

**A LEGAL COMPARISON BETWEEN SOUTH AFRICAN, CANADIAN  
AND AUSTRALIAN WORKMEN'S COMPENSATION LAW**

by

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**PROF AH DEKKER**

November 2013

I, JOHANNA PETRONELLA JANSEN VAN VUUREN, declare that

**A LEGAL COMPARISON BETWEEN SOUTH AFRICAN, CANADIAN AND  
AUSTRALIAN WORKMEN'S COMPENSATION LAW**

is my own work and that all the sources that I have used or quoted have  
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## AUTHOR'S NOTES

The following should be noted:

- The thesis represents the law as at 30 October 2013;
- Referral to male includes female and *vice versa*.

## **DEDICATIONS & ACKNOWLEDGEMENTS**

Dedicated to my Lord and saviour, Jesus Christ, for His everlasting love and grace.

I also dedicate this work to each and every worker who died on duty or sustained an occupational injury or contracted a dreaded occupational disease and in the humble trust that this work might assist in fair and just compensation for and the dignified treatment of these workers.

A number of people contributed towards the completion of this work and my sincere gratitude goes to each and everyone of them:

- I am greatly indebted to my husband, and dearest friend, Renier, for all his unconditional love, support and understanding in my years of study;
- Prof. Adriette Dekker, I am truly indebted to her and would like to express my sincerest gratitude for her excellent guidance and support;
- My employer and more specifically, Adv. Paul Mardon, who's support and comments were inspirational.

## **SUMMARY**

Workers' compensation originated internationally because of the need to address the plight of workers and communities left destitute due to occupationally sustained disabilities or death. This study examines how the right to no-fault compensation developed in South Africa in comparison to the comparable law in Canada and Australia. Specific limitations regarding the right to workers' compensation pursuant to the South African compensatory laws were identified. Limitations identified include the persons falling within the ambit of the law, circumstances creating a right to compensation, the right to claims for increased compensation uniquely provided for in South African compensatory law and founded in the negligent conduct of employers as well as common law redress for damages. The background of the administrative remedy in the form of the right to compensation for occupational injuries and diseases ought to be seen in the light of the Constitution of the Republic of South Africa 1996.

### **KEY TERMS**

Workers' compensation; COIDA; ODIMWA; COIDA section 56; Compensation for Occupational Injuries and Diseases Act (1993); Occupational Diseases in Mines and Works Act (1973); Social security law; History of workers' compensation; Workers' compensation for migrant employees; Administrative remedy; Who is an employee in terms of COIDA? Who is entitled to compensation? When is an employee entitled to compensation for an injury at work? Negligent employers; COIDA section 35; No-fault compensation; Common law claims for occupational injuries and diseases.

## **LIST OF ABBREVIATIONS AND ACRONYMS**

AJLL: Australian Journal of Labour Law.

Alta. L. Rev.: Alberta Law Review.

BCEA: Basic Conditions of Employment Act 75 of 1997.

Brit. J. Industr. Med.: British Journal of Industrial Medicine.

CC: Constitutional Court.

CLELJ: Canadian Labour and Employment Law Journal.

COIDA: Compensation for Occupational Injuries and Diseases Act 130 of 1993.

Fn: Footnote.

GDP: Gross Domestic Product.

HE: Her Excellency.

HSRC: Human Science Research Council.

IAVGO: Industrial Accident Victims Group Ontario.

Indus. L.J.: Industrial Law Journal.

Iowa Orthop J.: Iowa Orthopaedic Journal.

ISCR: Institute for Safety, Compensation and Recovery Research.

Ito: In terms of.

J Occup Health Safety Aust NZ: Journal of Occupational Health and Safety Australia and New Zealand.

La. L. Rev.: Louisiana Law Review.

LRA: Labour Relations Act 66 of 1995.

NWS: New South Wales.

ODIMWA: Occupational Diseases in Mines and Works Act 78 of 1973.

ODMWA: Occupational Diseases in Mines and Works Act 78 of 1973.

OH & S: Occupational Health and Safety.

OPSEU: Ontario Public Service Employees Union.

Osgoode Hall L J: Osgoode Hall Law Journal.

P: Page.

PAJA: Promotion of Administrative Justice Act 3 of 2000.

Para: Paragraph.

Paras: Paragraphs.

Pp: Pages.

Queensland U. Tech. L. & Just. J.: Queensland University of Technology, Law and Justice Journal.

RMA: Rand Mutual Assurance Company Limited.

S: Section.

SADC: South African Development Community.

SAMAT: Southern Africa Multidisciplinary Advisory Team

SCA: Supreme Court of Appeal.

Ss: Sections.

TEBA: The Employment Bureau of Africa.

Unif. Law Rev.: Uniform Law Review.

WC: Workers' compensation.

WCB: Workers' Compensation Board.

WHSCC: Workplace Health, Safety & Compensation Commission.

WSIB: Workplace Safety & Insurance Board.

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# CHAPTER 1

## MILEU

### 1. INTRODUCTION

Workers' compensation is a liability neither in tort nor in contract. It is a responsibility *postivi juris* and is annexed by law to a relationship, that of master and servant. The parties may choose whether they will enter into the relationship; but if they do the employer's liability for, and the worker's and his dependants' corresponding right to, compensation are legal consequences which are independent of and cannot be controlled by their agreement.<sup>1</sup>

These words of the honourable Justice Dixon<sup>2</sup> indicate the uniqueness of workers' compensatory law, a relatively new field of law resembling features of delict, contract, human rights and labour law. It forms part of social security law<sup>3</sup> and true to social security law, aims to provide a safety net in circumstances when the need arise. To determine if the current South African workers' compensatory scheme provides the necessary safety net, a comparison will be drawn between the workers' compensatory legislation of South Africa, Canada and Australia in the light of these countries' shared common law origins, the influence of the first British Workers' Compensation Law<sup>4</sup> and how compensatory legislation was developed in the three countries. Canadian workers' compensatory legislation is of particular importance to South Africa as the Workmen's Compensation Act 30 of 1941<sup>5</sup> was

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<sup>1</sup> *Mynott v Barnard* [1939] HCA 13; (1939) 62 CLR 68. Hereinafter: *Mynott*. Retrieved on 08/11/2012 from <http://www.austlii.edu.au/au/cases/cth/HCA/1939/13.html> as per Dixon J.

<sup>2</sup> *Ibid.*

<sup>3</sup> *Molefe v Compensation Commissioner and Another* (25579/05) [2007] ZAGPHC 365, Seriti J at [5] found in this unreported case that "The Compensation for Occupational Injuries and Diseases Act supra, is a social legislation and according to section 39(2) of the Constitution, it must be interpreted in such a manner that the said interpretation promotes the spirit, purport and objects of the social security right as enshrined in section 27(1)(c) of the Constitution." Hereinafter: *Molefe*.

<sup>4</sup> Frank, GS. 1940. *The South African law of workmen's compensation*. Durban: Butterworths. Frank at vii refers to the similarities between the Workmen's Compensation Act 25 of 1914, the Workmen's Compensation Act 59 of 1934 and the English Workmen's Compensation Act of 1925 and its antecedent acts.

<sup>5</sup> Hereinafter: 1941 Act.

greatly influenced by the then Ontario Workmen's Compensation Act<sup>6</sup> and the work done by Chief Justice WR Meredith.<sup>7</sup> Ison<sup>8</sup> reports that South Africa imitated the Ontario Workmen's Compensation Act which not only incorporated the same principles but in effect meant that Meredith was considered to be the founder of the South Africa workers' compensation system.<sup>9</sup> The differences in exercising the right to compensation between the three countries will be explored to specifically determine the position of South African employees who are faced with occupational injuries or diseases.

The purpose of this study is to determine if South African employees find themselves in a less favourable position and if so, the extent thereof when compared to other compensation systems in respect of the right to workers' compensation in the light of:

- the historical and current circumstances giving rise to this right;
- the administrative system that underpins the exercise of the right to workers' compensation;
- the purpose of this type of legislation;
- the requirements of a valid right;
- the scope of protection afforded to employees by workers' compensatory laws; and
- the scope of protection afforded to employers by workers' compensatory laws.

It is submitted that it is of the utmost importance that all employees who find

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<sup>6</sup> Ontario: An Act to provide for Compensation to Workmen for Injuries sustained and industrial Diseases contracted in the course of their Employment, S.O. 1914, c. 25. Hereinafter: Ontario Workmen's Compensation Act.

<sup>7</sup> Ison, TG. 1996. A historical perspective on contemporary challenges in workers' compensation. *Osgoode Hall L. J.* 34: 807-833. Hereinafter: Ison 1996. Retrieved on 07/03/2012 from <http://heinonline.org>.

<sup>8</sup> *Ibid.*

<sup>9</sup> Le Roux, PAK. 1977. *An administrative law enquiry into the nature and function of the powers of the Workmen's Compensation Commissioner*. LLM thesis, University of South Africa. At 31-33 Le Roux noted that the Departmental Committee on Workmen's Compensation appointed in 1930, had to investigate a State-run collective liability fund based "as far possible" on the Ontario system and although a proposed Bill was approved by a Select Committee, political reasons delayed promulgation until 1941 when the 1941 Act which in essence embodied the recommendations of the 1930 Committee, was reintroduced.



themselves in the unfavourable situation of being harmed by occupational injuries or diseases, are duly protected against financial distress and in applicable cases are compensated fairly, both in amount and manner in a just and speedy manner.

## 2. CONSTITUTIONAL IMPERATIVE

The Constitution of the Republic of South Africa 1996 is the supreme law of the Republic and forms the basis of all law in the country. It provides for the needs of its people in every aspect of life and all other legislation should give life to the rights and provisions of the Constitution.<sup>10</sup> The Constitution 1996 includes the Bill of Rights<sup>11</sup> which sets out and jealously protects the fundamental rights that protect life itself as well as human dignity and equality in various life situations. It determines how these rights should be promoted,<sup>12</sup> interpreted<sup>13</sup> and how it may be limited<sup>14</sup> in “an open and democratic society based on human dignity, equality and freedom.”<sup>15</sup>

Social security aims at social protection and forms an important, although at times a silent part of everyday life, as in the words of the International Labour Organisation (ILO) “social security or its absence touches nearly everyone on the planet”.<sup>16</sup> The nature of social security systems are described as financial instruments “fulfilling economic and social purposes” created and shaped by law.<sup>17</sup> From the viewpoint of an individual, social security is rights-based and entails legislated “prescribed entitlements, qualifying conditions and procedural guarantees”.<sup>18</sup> The concept of social security includes various forms e.g. social assistance, social welfare and social insurance such as workers’ compensation which is normally instituted and ruled by

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<sup>10</sup> Constitution of the Republic of South Africa, 1996 ss 1–2. Hereinafter: Constitution 1996.

<sup>11</sup> *Ibid* Chapter 2.

<sup>12</sup> *Ibid* s 7(2).

<sup>13</sup> *Ibid* s 39.

<sup>14</sup> *Ibid* s 36.

<sup>15</sup> *Ibid* s 36(1).

<sup>16</sup> International Labour Conference. 100th Session. 2011. *General survey concerning social security instruments in light of the 2008 Declaration on Social Justice for a Fair Globalization*. Hereinafter: ILO Conference (2011). Retrieved on 25/09/2012 from [http://www.ilo.org/wcmsp5/groups/public/@ed\\_norm/@relconf/documents/meetingdocument/wcms\\_152602.pdf](http://www.ilo.org/wcmsp5/groups/public/@ed_norm/@relconf/documents/meetingdocument/wcms_152602.pdf).

<sup>17</sup> Frank vii.

<sup>18</sup> *Molefe* [5].

legislation.<sup>19</sup> Section 27<sup>20</sup> of the Constitution 1996 determines the rights pertaining to social security. Section 27(1)(c) states that “everyone” has the right of access to social security in circumstances of inability to provide for themselves and their dependants. The justiciability of this right was challenged in the *Certification* case.<sup>21</sup> Subsequent interpretation by the Constitutional Court gave direction to the state’s responsibility on the “progressive realisation”<sup>22</sup> of this right.<sup>23</sup>

Section 9 of the Constitution deals with one of the core human rights values namely equality of all people while subsection (3) prohibits both direct as well as indirect unfair discrimination on a listed ground. Subsection (4) also prohibits direct and indirect unfair discrimination but on an unlisted ground and furthermore instructs the state to enact legislation to prevent or prohibit unfair discrimination. Discrimination on a listed ground will be unfair unless it can be proven to be fair. The listed grounds consist of race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.<sup>24</sup> Discrimination against people with disabilities will therefore be unfair unless it can be proven to be fair and may only be limited if

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<sup>19</sup> Harger L [Sa]. *Workers' Compensation, a brief history*. Retrieved on 17/03/2012 from <http://www.myfloridacfo.com/wc/history.html>. Harger distinguishes between “insurance” and social insurance as part of social security. Insurance relates to a contractual relationship where one party undertakes to indemnify the other against risk and workmen’s compensation is the oldest form of social security. Social security in this study refers to the social protection afforded to compensatory legislation which is a form of social insurance rather than social assistance.

<sup>20</sup> “27. Health care, food, water and social security.–

(1) Everyone has the right to have access to –

(a) health care services, including reproductive health care;

(b) sufficient food and water; and

(c) social security, including, if they are unable to support themselves and their dependants, appropriate social assistance.

(2) The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of each of these rights.”

<sup>21</sup> *Ex Parte Chairperson of the Constitutional Assembly: In Re Certification of the Constitution of the Republic of South Africa*, [1996] ZACC 26; 1996 (4) SA 744; 1996 (10) BCLR 1253 (CC) see [78]. Hereinafter: *Certification* case.

<sup>22</sup> ILO Conference (2011). At 66 the ILO Committee of Experts traced the concept of progressive realisation of social security rights to the United Nations Covenant on Economic, Social and Cultural Rights which expects from States to develop medium and long-term policies and programmes to realise the rights progressively. The right to social security is considered to be achieved progressively in accordance to the level of economic and social development of the particular State and the availability of resources. Progressive realisation entails “moving as expeditiously and effectively as possible towards that goal.”

<sup>23</sup> *Government of the Republic of South Africa and Others v Grootboom and Others* (CCT11/00) [2000] ZACC 19; 2001 (1) SA 46; 2000 (11) BCLR 1169.

<sup>24</sup> Constitution 1996 s 9(3).

limitations satisfy the conditions laid down in section 36.<sup>25</sup> Occupational injuries and diseases often result in disabilities of a temporary as well as a permanent nature.

Interpretation of the rights included in the Bill of Rights should be in accordance with section 39 which places an obligation upon a “court, tribunal or forum” to promote the values that underlie an open and democratic society based on human dignity, equality and freedom. It also requires from a court, tribunal or forum to consider international law and allows it to consider foreign law. When legislation is interpreted, every court, tribunal or forum “must promote the spirit, purport and objects of the Bill of Rights.”<sup>26</sup>

The Bill of Rights further provides for just administrative action in section 33 which specifies that everyone has the right to administrative action that is “lawful, reasonable and procedurally fair.”<sup>27</sup> Everyone also has the right to written reasons when administrative actions adversely affect them.<sup>28</sup> Workers’ compensatory legislation functions primarily in an administrative environment and decisions by the applicable bodies are generally of an administrative nature.

The Constitution furthermore determines how international law and soft law instruments find application in South African law in sections 39,<sup>29</sup> 231<sup>30</sup> and 233<sup>31</sup>.

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<sup>25</sup> “36. Limitation of rights.– (1) The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including–

- (a) the nature of the right;
- (b) the importance of the purpose of the limitation;
- (c) the nature and extent of the limitation;
- (d) the relation between the limitation and its purpose; and
- (e) less restrictive means to achieve the purpose.

(2) Except as provided in subsection (1) or in any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights.”

<sup>26</sup> Constitution 1996 s 39(2).

<sup>27</sup> *Ibid* s 33(1).

<sup>28</sup> *Ibid* s 33(2) “Everyone whose rights have been adversely affected by administrative action has the right to be given written reasons.”

<sup>29</sup> “39. Interpretation of Bill of Rights.– When interpreting the Bill of Rights, a court, tribunal or forum–

- (a) must promote the values that underlie an open and democratic society based on human dignity, equality and freedom;
- (b) must consider international law, and
- (c) may consider foreign law.”

In examining the South African compensation legislation, it will be compared to the Canadian and Australian legislations to determine if South Africa's legislation is on par with standards and trends in those two countries.

### 3. SADC INSTRUMENTS

Regional instruments are important as migrant labour<sup>32</sup> forms an integral part of the workforce in the region. The Southern African Development Community (SADC)<sup>33</sup> protects social security benefits at a regional level through specifically-designed policy documents, e.g.:

- the SADC's founding Treaty which forms the regional framework for regulation and development of social security in Southern Africa;<sup>34</sup>

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<sup>30</sup> "231(2) An international agreement binds the Republic only after it has been approved by resolution in both the National Assembly and the National Council of Provinces, unless it is an agreement referred to in subsection (3).

(3) An international agreement of a technical, administrative or executive nature, or an agreement which does not require either ratification or accession, entered into by the national executive, binds the Republic without approval by the National Assembly and the National Council of Provinces, but must be tabled in the Assembly and the Council within reasonable time.

(4) Any international agreement becomes law in the Republic when it is enacted by law into national legislation; but a self-executing provision of an agreement that has been approved by Parliament is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament."

<sup>31</sup> "233 Application of international law.- When interpreting any legislation, every court must prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law."

<sup>32</sup> The relevancy of migration labour in the South African labour market will be discussed in Chapter 5 under the definition of an "employee".

<sup>33</sup> Member states comprises of the People's Republic of Angola, the republics of Botswana, Madagascar, Malawi, Mauritius, Mozambique, Namibia, Seychelles, South Africa, Zambia, Zimbabwe, the Democratic Republic of Congo, the United Republic of Tanzania and the kingdoms of Lesotho and Swaziland.

<sup>34</sup> The SADC's founding Treaty provides for rights in respect of social security for workers and non-workers. Article 6 deals with equality of all people and forbids discrimination based on grounds similar to the RSA Constitution e.g. "ARTICLE 6 GENERAL UNDERTAKINGS. 2. SADC and Member States shall not discriminate against any person on grounds of gender, religion, political views, race, ethnic origin, culture or disability." Social development is addressed as an objective in article 5 as "ARTICLE 5 OBJECTIVES The objectives of SADC shall be to: promote sustainable and equitable economic growth and socio-economic development that will ensure poverty alleviation with the ultimate objective of its eradication, enhance the standard and quality of life of the people of Southern Africa and support the socially disadvantaged through regional integration." Article 21 deals with cooperation with regard to policies, strategies, as well as programmes and projects. Jordaan, B, Kalula, E & Strydom, E (eds). 2009. *Understanding social security law*. Cape Town: Juta Law. Hereinafter: Jordaan *et al.* At 26-57 the authors noted that the Treaty is continuously being expanded by additional instruments in the form of charters, protocols and codes for example the Charter on Fundamental Social Security Rights (also known as the Social Charter) in the SADC.

- the Charter of Fundamental Social Rights in the SADC which aims to provides for regional regulation of labour law protection;<sup>35</sup>
- the Code on Social Security (2007) acknowledges the right to social security and supports social dialogue to promote development of social security on national level through co-ordination, harmonization and involvement of communities in social security policies;<sup>36</sup>
- the Protocol on the Facilitation of Movement of Persons (2005) promotes free movement of people in the SADC region;<sup>37</sup>
- The Protocol on Health (1999) deals with sustainable human development and productivity dependant upon a healthy population through a process of close co-operation in the area of health.<sup>38</sup>

<sup>35</sup> The objectives contained in article 2 of the Social Charter provides for regional regulation of labour law protection with specific protection for certain vulnerable groups like children and young persons and people with disabilities, enabling environments for health, safety and environmental protection as well as ratification of ILO instruments by member states. Social security receives specific attention in article 2(1)(e) providing for a process of facilitation between the social partners to “(e) promote the establishment and harmonisation of social security schemes” inclusive of health and safety in the workplace in article 2(1)(f).

<sup>36</sup> Jordaan *et al* 50–51. The authors explain that the SADC Code on Social Security of 2007 to be of crucial importance in the development of the right to social security at national level and further supports social dialogue to promote development of social security on national level and the African nature of *ubuntu* shows from the importance given to co-ordination, harmonization and involvement of communities in social security policies. It acknowledges the fact that governments are not on its own able to fully provide in the social security needs of the region’s people. The position of marginalised groups like women, children and persons with disabilities, migrants and foreign workers are recognised. A reading of the Code on Social Security shows that it guides on the implementation of Article 5 of the Charter of Fundamental Social Rights and of specific importance for purposes of this study are: Article 4: The Right to Social Security; Article 5: Social Assistance, Social Services and Social Allowances; Article 6: Social Insurance; Article 9: Death and Survivors; Article 12: Occupational Injuries and Diseases as well as Article 17: Migrants, Foreign Workers and Refugees.

<sup>37</sup> Jordaan *et al* 53–54. Southern African Development Community. 2005. *Protocol on facilitation of the movement of persons*. This Protocol gives expression to the objectives of the SADC Treaty, which requires SADC to develop policies aimed at the progressive elimination of obstacles to the free movement of capital and labour, goods and services and of the people of the region generally amongst the member States. Retrieved on 26/05/2012 from [http://www.sadc.int/index.php/documents-publications/protocols?sortBy=34&pageSize=4&doc\\_q\\_0=&sortOrder=desc&filterByKey=&filterByVal=&page=2](http://www.sadc.int/index.php/documents-publications/protocols?sortBy=34&pageSize=4&doc_q_0=&sortOrder=desc&filterByKey=&filterByVal=&page=2).

<sup>38</sup> Southern African Development Community. 1999. *Protocol on health*. Retrieved on 26/05/2012 from <http://www.sadc.int/documents-publications/themes/health/>. This Protocol aims to achieve sustainable human development and productivity dependant upon a healthy population and SADC identified the need for close co-operation in the area of health to effectively control communicable and non-communicable diseases in dealing with common concerns in the region. The Protocol came into force in 2004 and coordinates regional preparedness on epidemics, prevention procedures, disease control and where feasible the eradication of communicable and non-communicable diseases. The Protocol deals with education, training, efficient laboratory services and universal strategies in addressing the health needs of women, children and vulnerable groups.

According to a study by Fultz and Pieris,<sup>39</sup> the relationship between a social security scheme and its milieu is dynamic and is influenced by economic factors of resources, distribution,<sup>40</sup> productivity, labour mobility and labour costs<sup>41</sup> and regional policy instruments should be seen in the context of economic limitations, high informal employment realities and the realities of limitations on the administrative capacity of governments.<sup>42</sup>

The role of social security in strengthening political and economic transition in the SADC region is important<sup>43</sup> as it *inter alia* provides protection to workers “who are displaced or lose employer-provided benefits as markets are opened to increased competition”.<sup>44</sup>

#### **4. STRUCTURE OF THE STUDY**

This study will follow a similar structure in each of the chapters starting with general background information, and then discuss the statutory provisions and case law of South Africa, Canada and Australia before concluding the chapter.

The right to workers’ compensation will be explored from different angles to determine the historical need for the right to workers’ compensatory legislation, the nature and purpose of workers’ compensatory laws and trends of interpretations flowing from it, circumstances under which the right will arise or will defeat such right and person’s entitled to the right as well as limitations the right to delictual remedies. In exploring the right, it will be prudent to give some attention to the systems of government and adjudicative structures applicable to each of the three countries. For purposes of this study, discussions will be limited to one act per jurisdiction per aspect unless appropriate to discuss more than one. The right to workers’ compensation by employees and the right to protection against delictual

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<sup>39</sup> Fultz, E & Pieris, B. 1999. *Social security schemes in Southern Africa: An overview and proposals for future development*. Harare: ILO. At 7. Hereinafter: *Fultz & Pieris*.

<sup>40</sup> *Ibid* 35.

<sup>41</sup> *Ibid* ix.

<sup>42</sup> *Ibid* 7.

<sup>43</sup> *Ibid* ix.

<sup>44</sup> *Ibid* ix.

actions afforded to employers will be discussed under the following headings, being:

- Chapter 2: Adjudicative structures and the historical development of compensatory law. In discussing these aspects, information will be given on the differences in adjudicative structures between the three countries and it will be demonstrated how compensatory legislation developed. Due to the *stare decisis* doctrine applicable in all three countries, it is important to have insight in the hierarchical court structure applicable to case law and as workers' compensation is in essence an administrative remedy, the limitation on the right of access to courts will receive attention.
- Chapter 3: The administrative nature, purpose and interpretation of compensatory legislation. This is closely related to the historical development of compensatory law and it will be shown that the courts often examine and consider the historical development in the process of interpretation of the purpose of the right to compensation and the barring of the right to delictual actions.
- Chapter 4: Causality and the relationship with employment. The right to compensation is limited to injuries and diseases arising within the boundaries of employment; and establishing whether an injury arose out of and in the course of employment may include gray areas clouded by the circumstances of the injury and the law that needs to be applied.
- Chapter 5: The scope of application of compensatory legislation. The statutory definitions of employee and employer will be explored. The right to workers' compensation and the right to protection against delictual action are limited rights and will only arise within an employment relationship. However, proving the existence of an employment relationship is not always an easy task in the absence of a contract of service.
- Chapter 6: The right to delictual remedies. Abrogation of this right forms an intimate part of the history and purpose of workers' compensatory legislation and is dealt with differently in the three countries.
- Chapter 7: Conclusion.

## CHAPTER 2

### ADJUDICATIVE STRUCTURES AND THE HISTORICAL DEVELOPMENT OF COMPENSATORY LAW

#### 1. INTRODUCTION

One of the aims of this study is to determine how and why a statutory right to workers' compensation was developed. In addition to exploring the historical development of compensatory law, the adjudicative structures of South Africa, Canada and Australia warrant attention as to provide an understanding of the background applicable to court cases due to the commonly shared *stare decisis* doctrine and as workers' compensation is in essence an administrative remedy. Limitations to the right of access to courts will also receive attention in this Chapter.

Legislation on occupational injuries and diseases regulates a tripartite relationship of social partners,<sup>1</sup> aiming to balance the interests of state, employer and employee.<sup>2</sup> The intention of this kind of social security legislation is to create a right

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<sup>1</sup> Olivier, MP, Smit, N & Kalula, ER (eds). 2003. *Social security: A legal analysis*. Durban: LexisNexis Butterworths. At 38. Hereinafter: Olivier *et al* (2003). Ison 1996: 807–833 argues that the Canadian workers compensation system is increasingly complex and open to pressure groups. See also Winder, C. 2009. The development of OHS legislation in Australia. *J Occup Health Safety Aust NZ* 25(4): 277–287. Retrieved on 17/03/2012 from <http://0-search.informit.com.au.oasis.unisa.ac.za/browseJournalTitle;res=APAFT;issn=0815-6409>.

<sup>2</sup> In *Jooste v Score Supermarket Trading (Pty) Ltd (Minister of Labour Intervening)* 1999 (2) SA 1 (CC). (Hereinafter: *Jooste*). At [9] the CC discussed the importance of this type of legislation and the “significant impact on the sensitive and intricate relationship amongst employers, employees and society at large.” The Court recognised the intervention by the State to create an appropriate balance. The balance struck “between the competing interests of employers and employees” was also a point of interest in the case of *Healy v Compensation Commissioner and Another* 2010 (2) SA 470 (E) at [11]. (Hereinafter: *Healy*). In Canada, courts often refer to this balance as the “historic trade-off” introduced to compensatory law by Chief Justice Meredith in Ontario as in *Puddicombe v Workers' Compensation Board (N.S.)*, 2005 NSCA 62 (CanLII) para [29]. Retrieved on 09/04/2011 from <http://canlii.ca/t/1k549>. (Hereinafter: *Puddicombe*). In Australia the Victorian Accident Compensation Act, Act No. 10191 of 1985 (retrieved on 12/06/2010 from [http://www.austlii.edu.au/au/legis/vic/consol\\_act/aca1985204/](http://www.austlii.edu.au/au/legis/vic/consol_act/aca1985204/)) s 20(1)(o) requires from the Compensation Authority to foster the relationship between the parties while the Queensland Act, Workers' Compensation and Rehabilitation Act 2003 in s 5(5) acknowledges the need for a balance by not placing too heavy a burden upon industry or society. Retrieved on 12/06/2010 [http://www.austlii.edu.au/au/legis/nt/consol\\_act/wraca400/](http://www.austlii.edu.au/au/legis/nt/consol_act/wraca400/).



to no-fault<sup>3</sup> compensation in the form of an administrative remedy<sup>4</sup> replacing common law litigation. The right to compensation is the main objective of compensatory legislation<sup>5</sup> but as no right is absolute, the right to workers' compensation will only arise under specific circumstances dependent upon the fulfilment of specific criteria. It is predominantly exercised through an administrative process.

In this chapter the need for legislation to provide for workers who sustained harm in the workplace will be viewed from its historical perspective and background information on the three countries' judicial structures will also be given because it is in court that practical meaning is attached to the words of an act through interpretation.<sup>6</sup>

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<sup>3</sup> The *MEC for Education, Western Cape Province v Strauss* 2008 (2) SA 366 (SCA) explains no-fault compensation at para [11]–[12] as: “COIDA came into operation on 1 March 1994 providing for a system of no-fault compensation for employees who are injured in accidents that arise out of and in the course of their employment or who contract occupational diseases. A compensation fund is established to which employers are required to contribute and from which compensation and other benefits are paid to employees. Employees meeting the requirements of the Act are entitled to the benefits provided for and prescribed by COIDA. COIDA ‘supplants the essentially individualistic common-law position, typically represented by civil claims of a plaintiff employee against a negligent defendant employer, by a system which is intended to and does enable employees to obtain limited compensation from a fund to which the employers are obliged to contribute.’

[12] At common law an employee has to show that his or her employer acted negligently thereby risking a finding that he or she was contributory negligent. The employee claiming damages from the employer would also bear the risk of the employer’s insolvency or his inability to meet a judgment debt. While the employee ran the risk of an adverse cost order if he or she was unsuccessful, a common-law action might lead to his or her recovering substantially more by way of damages than under the compensation provided by COIDA. Section 35 abolished an employee’s common-law right to claim damages.”

<sup>4</sup> Piron, J. 1978. *Workmen’s compensation law: The test for “arising out of and in the course of” employment*. Pretoria: Institute for Labour Relations UNISA. The author at 1, discussed the phrase “out of and in the course of” as contained in s 2(i) in the 1941 Act. But the third element in the word “resulting” was not included in the discussion.

<sup>5</sup> Ontario. Workmen’s Compensation Commission. 1913. *Final report relating to the liability of employers*. (Meredith, WR Chairperson). Toronto: Legislative Assembly of Ontario. Hereinafter: Meredith Report. Meredith states at 4: “... the true aim of a compensation law is to provide for the injured workman and his dependants ...” Retrieved on 09/05/2010 from [http://www.awcbc.org/common/assets/english%20pdf/meredith\\_report.pdf](http://www.awcbc.org/common/assets/english%20pdf/meredith_report.pdf).

<sup>6</sup> South Africa (Republic). Law Reform Commission. 2006. Discussion paper 112: Statutory revision: *Review of the Interpretation Act 33 of 1957*. Retrieved on 24/07/2013 from [http://www.justice.gov.za/salrc/dpapers/dp112\\_interpretation.pdf](http://www.justice.gov.za/salrc/dpapers/dp112_interpretation.pdf). At 2 the duty of the courts is described as “... to ascertain and give effect to the will of Parliament as expressed in its enactments. In the performance of this duty the Judges do not act as computers into which are fed the statutes and the rules for the construction of statutes and from which issue forth the mathematically correct answer. The interpretation of statutes is a craft as much as a science

## 2. INTERNATIONAL HISTORY

In general, legislation serves the society which it regulates.<sup>7</sup> The intention of an act determines the purpose and objectives<sup>8</sup> which is often based on the historical context that gave rise to the need for that particular legislative measure.<sup>9</sup>

Compensation for bodily injuries dates back to antiquity with Nippur Tablet No. 3191 from Sumeria on the law of Ur-Nammu, king of Ur approximately 2050 B.C. Monetary compensation were granted for certain injuries to workers' limbs, including fractures.<sup>10</sup> In the collection of laws and rules of the king of Babylon (1750 B.C.), the Code of Hammurabi, similar determinations were made to provide for widows, orphans and the permanent impairments of the injured.<sup>11</sup> The model was followed by ancient Greeks, Arabs, Chinese and Romans by enacting laws providing for fixed schedules determining exact compensation for the loss of specified body parts.<sup>12</sup>

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and the judges, as craftsmen, select and apply the appropriate rules as the tools of their trade. They are not legislators, but finishers, refiners and polishers of legislation which comes to them in a state requiring varying degrees of further processing."

<sup>7</sup> WorkSafe (British Columbia). Policy and Regulation Development Bureau. [Sa]. *Royal Commission briefing papers*. Richmond: WorkSafeBC. Retrieved on 09/08/2012 from [http://www.worksafebc.com/regulation\\_and\\_policy/archived\\_information/royal\\_commission\\_briefing\\_papers/assets/pdf/rc\\_introduction.pdf](http://www.worksafebc.com/regulation_and_policy/archived_information/royal_commission_briefing_papers/assets/pdf/rc_introduction.pdf). At 15 the purpose of an enquiry by a Royal Commission is stated, to: "examine the statutory framework, mandate, structure, organization, and governance and administration of the British Columbia workers' compensation system in order to meet the needs of the people of British Columbia for a high quality public system that is equitable, effective and efficient in the context of changing workplaces and consistent with the underlying principles of workers' compensation in British Columbia, namely:

- (a) accident prevention
- (b) no-fault compensation
- (c) collective employer liability
- (d) industry funding
- (e) universal coverage
- (f) administrative adjudication." (Own emphasis).

Hereinafter: *Royal Commission briefing papers*.

<sup>8</sup> Botha, C. 2005. *Wetsuitleg*. 4<sup>th</sup> edition. Cape Town: Juta Law. At 81.

<sup>9</sup> Burger, AJ. 2009. *A guide to legislative drafting in South Africa*. Cape Town: Juta law. At 25 Burger discusses the purposive method of interpretation and quote the very old case of *Heydon* [1584] 3 Co Rep 7a; where four principles were laid down: firstly, what the common law was before the enactment; secondly, what was the deficiency that the common law lacked; thirdly, what remedy was instituted by Parliament and fourthly, the proper motive for that remedy.

<sup>10</sup> Guyton, GP. 1999. A Brief History of Workers' Compensation. *Iowa Orthop J* 19: 111-121. Retrieved on 17/03/2012 from <http://www.ncbi.nlm.nih.gov/pmc/issues/144831/>.

<sup>11</sup> Winder 277-287.

<sup>12</sup> Guyton 111-121. Ancient Arab law assessed the loss of a joint of the thumb equal to one-half the value of a finger while loss of part of a penis was compensated proportionally to the length lost.

Feudalism became the structure of government during the Middle Ages causing compensation for workers to be dependent upon the honour, goodwill and generosity of feudal lords.<sup>13</sup>

The development of English common law which influenced the legal system in western countries and continued into the Industrial Revolution replaced the compensation schedules with common law rules.<sup>14</sup>

The Industrial Revolution changed the way in which work was done forever by introducing sources of inanimate power; the introduction of machines and production methods and in the process aggravated the risk to injury and disease proportionally.<sup>15</sup> If the ability to earn is lost through injuries or diseases, it usually is unexpected and it results in a cost transfer to the injured employee, his next of kin and society at large.<sup>16</sup>

In Britain, the incidence of fever amongst child labour in cotton mills led to the Health and Morals Apprentices Act of 1802 which marked the creation of legislation regulating working conditions, initially primarily pertinent to child labour.<sup>17</sup>

Social assistance was provided through the guild system of the Middle Ages, according to which artisans contributed to a fund administered by the guild and from which compensation could be claimed in instances of incapacity due to injuries or diseases.<sup>18</sup> But not all workers could afford this form of mutual insurance<sup>19</sup> which was also provided by trade unions.<sup>20</sup>

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<sup>13</sup> *Ibid.*

<sup>14</sup> Guyton 111–121. Winder 277–287.

<sup>15</sup> Winder 277–287. Derickson, A. 1988. *Workers' health, workers' democracy: the Western miners' struggle, 1891–1925*. New York: Cornell University Press. At 37 the death rate of hard rock miners in the metal and coal sectors in British Columbia (Canada) is tabled as 4.2 per 1,000 between 1898–1908 and 3.3 per 1,000 for the period 1909–1920. These sectors were notorious for the dangers associated therewith and the risk of being fatally injured due to an occupational injury was more than ten times as high as in the manufacturing industry during 1910.

<sup>16</sup> Meredith Report at 4 states: "... the true aim of a compensation law is to provide for the injured workman and his dependants and to prevent their becoming a charge upon their relatives or friends, or upon the community at large."

<sup>17</sup> Winder 277–287.

<sup>18</sup> Le Roux 3. Le Roux contended that "workmen's compensation legislation is a typical manifestation of the modern welfare state where the state plays an increasing role in many facets of society. The result is a corresponding increase in the power of the state to regulate and

Workers could sue employers for negligence under common law, known to be an expensive, onerous and protracted process and workers were subject to court decisions by judges firm on maintaining existing social conditions.<sup>21</sup> An employer, normally being in a stronger financial and influential position than the worker, could manipulate court processes to his own advantage and could afford the best legal representation.<sup>22</sup> Employees taking legal action against employers usually lost their work.<sup>23</sup> In cases where workers were fatally injured, the key source of evidence for litigation would be the post-mortem done by the coroner's jury but under influence of the employer, the process was open to prejudice often blaming the victim.<sup>24</sup>

Employers defended claims based on three key, relatively solid, common law (known as the "unholy trinity of defences")<sup>25</sup> defence principles:<sup>26</sup>

- *Volenti non fit injuria*: damage through consent produces no cause of action. Employees were considered to be familiar with hazards inherent to a particular job and voluntarily assumed that risk in taking up the job. Assumption of risk was formalised through both employment contracts excluding the right to sue contractually and through the interview process;

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organise the life of the citizen through granting discretionary powers to state officials." Le Roux at 5 confirmed the assistance through guilds, fraternities and social assistance organisations. Derickson examines the role of trade unions in social assistance and Workmen's Compensation Legislation in the western mining districts of the USA as well as in the Canadian province of British Columbia. At xi the conclusion is drawn that most unions provided social assistance and death assistance programmes to their members following the example set earlier by "railroad brotherhoods and other craft organizations..."

<sup>19</sup> Winder 277–287.

<sup>20</sup> Derickson at 63 relates the preamble to the Gold Hill constitution of 1866 which declared "Experience has taught us... that the dangers to which we are continually exposed are,... fully verified by the serious and often fatal accidents that occur in the Mines, and that Benefits in many of these cases are positively necessary." It is calculated that the main expense in time and money to unions in the western mining regions of the USA and the Canadian province of British Columbia was devoted to mutual aid. Loss of income caused a lack of subsistence and thus unions provided mutual insurance to provide a continuous flow of income for periods of temporary incapacity, Derickson 64. Costs incurred by occupational injuries and diseases were predominantly borne by the injured parties themselves, their relatives, unions, mutual benefit associations and society, Derickson 174.

<sup>21</sup> Winder 277–287. Guyton 111–121.

<sup>22</sup> Derickson 174–176.

<sup>23</sup> *Ibid* 177.

<sup>24</sup> Derickson 174–175. According to Derickson the coroner often was employed as the company's doctor.

<sup>25</sup> Mushai, I & Hutcheson, H. 2013. Injuries, compensations, myths and realities: Is increased compensation under the South African workmen's compensation system a myth or reality? *SHEQ Management Journal* March/April 2013: 10–12.

<sup>26</sup> Winder 277–287. Guyton 111–121. Derickson 175.

- Contributory negligence: if the worker was partly negligent, irrespective of the extent, the employer could not be held liable;<sup>27</sup>
- Fellow servant rule: an employer could not be held liable if the injury was affected through negligence of a co-worker of the injured employee.<sup>28</sup>

Compensation in successful cases was often meagre<sup>29</sup> but over time, more workers approached the courts and with legal assistance, the number of successful claims gradually increased.<sup>30</sup> The increase in successful court actions and a number of other factors forced legislative change e.g. respondent employers in successful civil litigation cases faced insolvency, social pressure by both organised labour and the socialist movement increased in combination with labour unrest due to a lack of compensation for occupational injuries and diseases.<sup>31</sup>

These pressures led to the first successful comprehensive legislated social insurance scheme as developed by Chancellor von Bismarck in 1884.<sup>32</sup> Other countries soon followed suit<sup>33</sup> with presently some form of cover in most countries of the world and still based on the Bismarckian model. It was preceded in 1838 by legislative protection of railroad workers in the event of an accident and in 1876 by a failed Voluntary Insurance Act.<sup>34</sup>

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<sup>27</sup> Contributory negligence still defeats a claim for increased compensation pursuant to s 56 of COIDA in South Africa currently as will be discussed in Chapter 6.

<sup>28</sup> The fellow servant rule is still partly applicable in claims pursuant to COIDA's s 56 because of the working of s 35(2) and s 56(1)–(e) which afforded identical protection to specific categories of employees and employers. The protection will be further discussed in Chapter 6.

<sup>29</sup> Derickson 177, as is evident from a report by the Montana Department of Labor and Industry (1913–14) revealing that “only a small percentage of the victims ... are receiving adequate and proportionate compensation for the loss sustained.”

<sup>30</sup> Guyton 111–121. Derickson 176.

<sup>31</sup> Guyton 111–121. Le Roux 18. Derickson 177.

<sup>32</sup> Olivier *et al* (2003) 29. According to Le Roux similar legislation followed worldwide i.e.: Germany (1884); Austria (1887); Norway (1894); Great Britain (1897); Denmark, Italy & France (1898); Spain, New Zealand & South Australia (1900); New South Wales, Netherlands, Greece & Sweden (1901); Western Australia, Luxembourg & British Columbia (1902); Russia & Belgium (1903); Cape of Good Hope (1905); Hungary & Transvaal (1907); Alberta (1908) & Quebec (1909). In America the “Employers’ Liability Act of 1880” excluded the defence by employers that employees voluntarily accepted the risk (*volenti non fit injuria*), Le Roux 11.

<sup>33</sup> Derickson 175–179, although some legislative reform was made to the common law defences raised by employers, no real difference was affected before the promulgation of no-fault legislation resulting in unions advocating it. Initially employers opposed social insurance measures but eventually had to accede to demands from trade union movements.

<sup>34</sup> Le Roux 25. Derickson 178 remarks that following the enactment of compensatory legislation the United Mine Workers (a trade union) of British Columbia assisted its members in obtaining the amount of \$70,000 in compensation by 1909.

The scheme was from its inception controlled by the social partners consisting of labour, business and the State.<sup>35</sup> Although a great improvement from the common law recourse previously available, a measure of tension remained. It is obvious from the words of Miller who lamented that employers initially did their best to prevent compensatory legislation and when sensed it to be unavoidable “they changed their tactics and got into it to make the law and make it as harmless to themselves as they could”.<sup>36</sup> It was perceived that the major western countries enacted laws characterised by inadequate benefits, tedious processes and unnecessarily restrictive in nature rather protecting employers against economic loss than compensating employees for their losses.<sup>37</sup>

It is submitted that the historical development of compensatory legislation shows that its main purpose is the benefit of society at large by removing the economical burden society historically had to endure due to occupational injuries and diseases.<sup>38</sup> In the words of Du Toit: “no society can prosper if large numbers of its citizens suffer insecurity or destitution”.<sup>39</sup> From the beginning, social security was characterised by a sense of solidarity between social groupings as is evident from the mutual insurance schemes organised by the guilds and unions since the Middle Ages discussed *supra*.<sup>40</sup>

The purpose of an act ought to be seen in the light of its historical development.<sup>41</sup> Compensatory legislation had its origins in the need for social security and the protection of employees and their dependents against losses due to occupational

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<sup>35</sup> Olivier *et al* (2003) 38. Ison 1996: 807–833. Winder 277–287.

<sup>36</sup> Derickson 179.

<sup>37</sup> Derickson 180.

<sup>38</sup> Derickson 179. Australia (Commonwealth). Productivity Commission. 2004. *National workers' compensation and occupational health and safety frameworks, Report no. 27*. Canberra: Productivity Commission. At 160–161. Hereinafter: Productivity Commission Report (2004). The Report identified the problems faced by the growing number of self-employed people in Australia who will be dependent upon the Government's social security system in instances of injuries sustained or diseases contracted, be it occupational or otherwise. Retrieved on 25/03/2012 from [http://www.pc.gov.au/\\_data/assets/pdf\\_file/0006/18546/workerscomp.pdf](http://www.pc.gov.au/_data/assets/pdf_file/0006/18546/workerscomp.pdf).

<sup>39</sup> Olivier, MP (ed.), Okpaluba, MC, Smit, N & Thompson, M. 1999. *Social security law – General principles*. Durban: Butterworths. At vii. Hereinafter: Olivier *et al* (1999).

<sup>40</sup> Olivier *et al* (2003) 38–39 & Chapter 2 fn 18.

<sup>41</sup> Botha at 1 cited Du Plessis LM, stating the purpose of statutory interpretation to be “about construing enacted law-texts with reference to and reliance on other law-texts, concretising the text to be construed so as to cater for the exigencies of an actual or hypothesised concrete situation.”

injuries, diseases and fatalities associated with it.<sup>42</sup> The Industrial Revolution increased the risk of injury and disease proportionally due to the augmented occupational exposure.<sup>43</sup>

### 3. SOUTH AFRICA

#### 3.1. Introduction

The Republic of South Africa has nine provinces with a central government enacting national legislation applicable to the entire country and of which the Compensation for Occupational Injuries and Diseases Act 130 of 1993 (hereinafter: COIDA) is an example. All legislation needs to conform to the Constitution 1996 and COIDA, as part of the social security rights provided for in section 27 of the Constitution, should aim to gradually “realise” these rights.<sup>44</sup> Interpretation of these rights should be in accordance with section 39 of the Constitution which places an obligation upon “a court, tribunal or forum” to promote the values that underlie an open and democratic society based on human dignity, equality and freedom.<sup>45</sup> According to Currie,<sup>46</sup> constitutional interpretation entails a two step enquiry: firstly determination of the meaning of a right and secondly it should be established whether the challenged provision conflicts with the Bill of Rights. Every court, tribunal or forum is obliged to “promote the spirit, purport and objects of the Bill of Rights”<sup>47</sup> when these rights, inclusive of social security rights, are interpreted. Currie contends that a purposive interpretation aims at carefully examining the essential values underpinning the “listed fundamental rights in an open and

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<sup>42</sup> According to Le Roux 22, the first no-fault compensatory act in a common law country was the British “Workmen’s Compensation Act, 1897”. Two clear characteristics distinguished it: i) the employee was entitled to compensation irrespective whether the injury was caused through the fault of any person, thus the very important no-fault principle, according to which an employee had a valid claim even if he was injured through a fault of his own, and ii) compensation was paid by the employer based on pre-determined amounts.

<sup>43</sup> Le Roux 6.

<sup>44</sup> Botha 67. In determining the purpose and intention of a statute it should in principle be interpreted in the light of the Bill of Rights (Chapter 2) in the Constitution of the RSA.

<sup>45</sup> These values are important to the injured or diseased.

<sup>46</sup> Currie, I & De Waal, J. 2005. *The Bill of Rights handbook*. 5<sup>th</sup> edition. Cape Town: Juta Law. At 145.

<sup>47</sup> Constitution 1996 s 39(2).

democratic society based on human dignity equality and freedom and then to prefer the interpretation of a provision that best supports and protects those values”.<sup>48</sup>

Social insurance as a form of social security is normally instituted and ruled by legislation.<sup>49</sup> It is financed through the payment of insurance premiums known in COIDA as assessments and paid by employers.<sup>50</sup> In a *quid pro quo* process, the employee loses his right to claim pursuant to common law against his employer<sup>51</sup> but is entitled to compensation benefits when the employee sustains an occupational injury or contracts an occupational disease.<sup>52</sup> Social security is protected in the Constitution’s Bill of Rights<sup>53</sup> and may only be limited under the strict and specific conditions prescribed by section 36<sup>54</sup> but because section 27 is already demarcated by the term “reasonable”, section 36 would hardly ever be applied.<sup>55</sup>

Effective social security in developing countries (like South Africa) is hampered because it is limited to people working in formal employment while in Africa less than ten percent of the active population is employed as such.<sup>56</sup> The scope of cover<sup>57</sup>

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<sup>48</sup> Currie 148.

<sup>49</sup> Harger L [Sa]. *Workers' compensation, a brief history*. Retrieved on 17/03/2012 from <http://www.myfloridacfo.com/wc/history.html>.

<sup>50</sup> COIDA s 83. Assessments are calculated based on the needs of the Compensation Fund, the risk category of the industry and the annual earnings of employees and is paid by the employer.

<sup>51</sup> COIDA s 35.

<sup>52</sup> COIDA s 22.

<sup>53</sup> South Africa (Republic). Department of Social Development. (Taylor, V. Chairperson). 2002. *Transforming the present – Protecting the future*, Report of the *Committee of Inquiry into a comprehensive system of social security for South Africa*. Pretoria: Department of Social Development. At 113–116. Hereinafter: Taylor Report. The Taylor Report at 36 indicates that social security rights enjoy equal status to political and civil rights in the Constitution 1996. Retrieved on 05/11/2008 from <http://www.sarpn.org/CountryPovertyPapers/SouthAfrica/taylor/index.php>.

<sup>54</sup> According to s 36 of the Constitution, a right in the Bill of Rights may only be limited pursuant to a law of general application and only to the extent that is “reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom.” Factors that further qualify the limitation relates to the nature of the right, importance and purpose of the limitation, relation between the limitation and its purpose and any less restrictive means to realise that purpose.

<sup>55</sup> Currie 186–188 & 594–595.

<sup>56</sup> The Taylor Report at 37, found that the high unemployment rate ( $\pm 50\%$ ) in developing countries leaves a huge number of people without social security protection as it is often limited to people in formal employment. Unemployment in South Africa by the end of 2011 was 23.9% and between 2000 and 2008 it averaged at 26.38% with an all-time high of 31.20% in 2003 according to <http://www.tradingeconomics.com/south-africa/unemployment-rate>.

<sup>57</sup> The definitions of employer and employee will be discussed in Chapter 5 of this study.



is limited to those within the definition of an employee excluding a vast number of atypical employed or unemployed people.<sup>58</sup> To make matters worse, the Taylor Committee opined that in developing countries large proportions of formally employed people are caught in poverty known as the “working poor”.<sup>59</sup> A comprehensive system with an integrated system covering the total population is recommended.<sup>60</sup>

### 3.2. South African court structure and compensatory legislation

It is prudent to have regard to each of the three countries’ court structure as case law is influenced by the doctrine of precedence, a characteristic of the common law legal system.<sup>61</sup> South Africa has a mixed system of common law and civil law.<sup>62</sup> The common law countries derive the system from the English legal system<sup>63</sup> and the civil law system was derived from the Roman-Dutch law.<sup>64</sup>

The South African Constitution Seventeenth Amendment Act of 2012 provides in section 166 for the judicial structure. In hierarchical order, from the most superior to the lowest the courts provided for are:

- (a) the Constitutional Court;
- (b) the Supreme Court of Appeal;
- (c) the High Court of South Africa, and any high court of appeal that may be established by an Act of Parliament to hear appeals from any court of a status similar to the High Court of South Africa; and
- (d) the Magistrates’ Courts; and
- (e) any other court established or recognised in terms of an Act of Parliament, including any court of a status similar to either the High Court or the Magistrates’ Courts.

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<sup>58</sup> Olivier *et al* (2003) 131–134 & 162.

<sup>59</sup> Taylor Report 38.

<sup>60</sup> Olivier *et al* (1999) 17. Taylor Report 41.

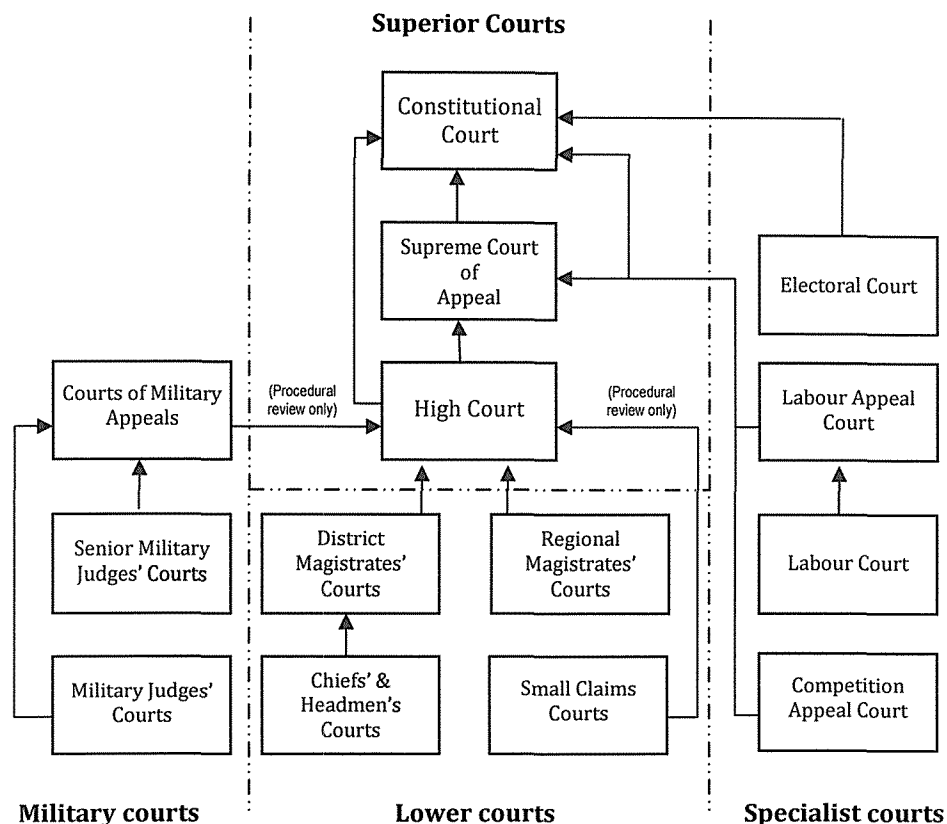
<sup>61</sup> Bassam, S & Gardiner, D (eds). 2012. *The Law Handbook, your practical guide to the law in New South Wales*. 12<sup>th</sup> edition. Sydney: Thomson Reuters. At 2. Retrieved on 09/02/2013 from [http://www.legalanswers.sl.nsw.gov.au/guides/law\\_handbook/legal\\_system.html](http://www.legalanswers.sl.nsw.gov.au/guides/law_handbook/legal_system.html).

<sup>62</sup> Tetley, W. 1999-2000. Mixed Jurisdictions: Common Law vs. Civil Law (Codified and Uncodified). *La. L. Rev.* 60: 677–738. Retrieved on 12/07/2013 from <http://0-heinonline.org.oasis.unisa.ac.za/HOL/Print?collection=journals&handle=hein.journals/louilr60&id=691>.

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

<sup>64</sup> *Ibid.*

The judicial structure of the South African court system has been depicted schematically as follows:<sup>65</sup>



In terms of section 167(3) of the Constitution, the Constitutional Court is the highest court in all matters<sup>66</sup>, is may adjudicate on constitutional and any other matters which raise an arguable point of law of general public importance<sup>67</sup> and has the final word on whether a matter is within its jurisdiction.<sup>68</sup>

The Supreme Court of Appeal<sup>69</sup> may judge all matters on appeal from the High Court other than labour or competition matters. The Constitution<sup>70</sup> provides that the SCA may hear appeals in respect of constitutional matters, and a further appeal, on constitutional issues only, may lie to the Constitutional Court. Although it has

<sup>65</sup> Courts of South Africa schematic. Retrieved on 24/07/2013 from [https://en.m.wikipedia.org/wiki/File:Courts\\_of\\_South\\_Africa\\_schematic.svg#file](https://en.m.wikipedia.org/wiki/File:Courts_of_South_Africa_schematic.svg#file).

<sup>66</sup> Constitution 1996 s 167(3)(a).

<sup>67</sup> *Ibid* s 167(3)(b)(i) & (ii).

<sup>68</sup> *Ibid* s 167(3)(c).

<sup>69</sup> Hereinafter: SCA.

<sup>70</sup> Constitution Seventeenth Amendment Act, s 168.

jurisdiction in the whole country, it has no original jurisdiction and all matters come to it out of necessity from the High Court on appeal or review.<sup>71</sup>

The High Court derives its jurisdiction from section 169 of the Constitution and pursuant to the Superior Courts Act 10 of 2013; the country has 7 divisions of the High Court with main seats situated in the bigger cities of the country as well as 6 local seats. The High Court has inherent jurisdiction and acts as a court of first instance, or it may act as a court of appeal for the Magistrate's Court within its area of jurisdiction. Furthermore, all the divisions of the High Court operate as courts of appeal regarding decisions made by a single judge of the High Court. Appeals against a decision made by a single High Court judge will either go to a full bench of the same division consisting of three members or to the SCA.<sup>72</sup>

All other courts are instituted under section 170 of the Constitution including Magistrates' Courts which do not have jurisdiction to decide on any constitutional matters. Magistrates' Courts are "creatures of statute" by nature and are created and operated within the ambit of the Magistrates' Courts Act 32 of 1944. Magistrates' Courts have no jurisdiction over compensatory legislation<sup>73</sup> and are therefore irrelevant for the purposes of this study.

Section 91 of the COIDA<sup>74</sup> provides for an appeal process to be heard by a tribunal

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<sup>71</sup> Law Society of the Northern Provinces. 2011. *Jurisdiction of South African courts and tribunals, a guide for the legal practitioner*. Pretoria. At 9. Retrieved on 24/07/2013 from [http://www.northernlaw.co.za/important\\_information\\_for\\_members/constitutional\\_court\\_judgment/Jurisdiction.LSSA.pdf](http://www.northernlaw.co.za/important_information_for_members/constitutional_court_judgment/Jurisdiction.LSSA.pdf).

<sup>72</sup> *Ibid* 12.

<sup>73</sup> Compensation for Occupational Injuries and Diseases Act 130 of 1993 section 91.

<sup>74</sup> "91(5)(a) Any person affected by a decision referred to in subsection (3)(a), may appeal to any provincial or local division of the Supreme Court having jurisdiction against a decision regarding-

- (i) the interpretation of this Act or any other law;
  - (ii) the question whether an accident or occupational disease causing the disablement or death of an employee was attributable to his or her serious and wilful misconduct;
  - (iii) the question whether the amount of any compensation awarded is so excessive or so inadequate that the award thereof could not reasonably have been made;
  - (iv) the right to increased compensation in terms of section 56.
- (b) Subject to the provisions of this subsection, such an appeal shall be noted and prosecuted as if it were an appeal against a judgment of a magistrate's court in a civil case, and all rules applicable to such an appeal shall mutatis mutandis apply to an appeal in terms of this subsection."

and for a limited right of appeal<sup>75</sup> from a decision by a tribunal to the High Court.<sup>76</sup> Tribunals are formed pursuant to an enabling statute that governs that particular tribunal<sup>77</sup> and its functions.<sup>78</sup> The Superior Courts Act provides in section 3(b) for the establishment of any tribunal as contemplated in section 34 of the Constitution after consultation with the Minister responsible for the administration of justice. No administrative review council is in place in spite of an increasing number of tribunals, as Armstrong points out: "... the tribunal landscape of South Africa continues to be made up of haphazard, unstructured and unsystematic appeal procedures which hinder rather than assist the advancement of access to administrative justice".<sup>79</sup> COIDA provides in section 2 for the appointment by the Minister, of the Director-General, the Compensation Commissioner and "such other officers and employees"<sup>80</sup> as will be needed in the performance of the Director-

<sup>75</sup> *Odayar v Compensation Commissioner* 2006 (6) SA 202 (N) at [7]–[11] the Court examined s 91(5)(a)(i) of COIDA as cited in Chapter 2 fn 74 *supra*. (Hereinafter: *Odayar*). The Court cited earlier case law [*Grobbelaar v Workmen's Compensation Commissioner* 1978 (3) SA 62 (T) and *Nicosia v Workmen's Compensation Commissioner* 1953 (4) SA 165 (T)] in which it was held that no appeal shall lie against a finding of fact but only on interpretation of the Act. The Court previously held that "...in certain cases, inferences drawn from proved facts may be questions of law".

<sup>76</sup> COIDA s 91(5).

<sup>77</sup> "91. Objections and appeal against decisions of Director-General

(1) Any person affected by a decision of the Director-General or a trade union or employers' organization of which that person was a member at the relevant time may, within 180 days after such decision, lodge an objection against that decision with the commissioner in the prescribed manner.

(2)(a) An objection lodged in terms of this section shall be considered and decided by the presiding officer assisted by two assessors designated by him, of whom one shall be an assessor representing employees and one an assessor representing employers.

(b) If the presiding officer considers it expedient, he may, notwithstanding paragraph (a), call in the assistance of a medical assessor.

(c) The provisions of sections 6, 7, 45 and 46 shall apply mutatis mutandis in respect of the consideration of an objection.

(3)(a) After considering an objection the presiding officer shall, provided that at least one of the assessors, excluding any medical assessor, agrees with him, confirm the decision in respect of which the objection was lodged or give such other decision as he may deem equitable.

(b) If neither of the assessors agrees with the view of the presiding officer, the presiding officer shall submit the dispute in terms of section 92 to the Supreme Court for decision.

(4) The presiding officer may in connection with proceedings in terms of this section make such order as to costs and the payment thereof as he may deem equitable."

<sup>78</sup> *Venter v Compensation Commissioner* 2001 (4) SA 753 (T) at 757A–D.

<sup>79</sup> Armstrong, GC. 2011. *Administrative justice and tribunals in South Africa: A Commonwealth comparison*. LL.M thesis, University of Stellenbosch. At 129. Retrieved on 02/08/2013 from [http://www.google.co.za/url?sa=t&rct=j&q=tribunals%20in%20south%20africa&source=web&cd=3&cad=rja&ved=0CDoQFjAC&url=http%3A%2F%2Fscholar.sun.ac.za%2Fbitstream%2Fhandle%2F10019.1%2F17997%2Farmstrong\\_administrative\\_2011.pdf%3Fsequence%3D1&ei=Ej39UYmgFqLe7AbPuYH4CA&usg=AFQjCNFPxCDEs386rEV-BXF9ujUMGwdxGg&bvm=bv.50165853,d.ZWU](http://www.google.co.za/url?sa=t&rct=j&q=tribunals%20in%20south%20africa&source=web&cd=3&cad=rja&ved=0CDoQFjAC&url=http%3A%2F%2Fscholar.sun.ac.za%2Fbitstream%2Fhandle%2F10019.1%2F17997%2Farmstrong_administrative_2011.pdf%3Fsequence%3D1&ei=Ej39UYmgFqLe7AbPuYH4CA&usg=AFQjCNFPxCDEs386rEV-BXF9ujUMGwdxGg&bvm=bv.50165853,d.ZWU).

<sup>80</sup> COIDA s 2(1)(b).

General's functions and a "presiding officer" who is an officer appointed and designated in terms of section 2(1)(a) or (b). Assessors are appointed in equal numbers to represent the interests of employers and employees after consultation with the Compensation Board to assist the presiding officer with hearings held in terms of section 91.<sup>81</sup> Section 91(3)(a) empowers the presiding officer after consideration of an objection to confirm a decision or substitute it for any other equitable decision on condition that at least one of the assessors besides the medical assessor, agrees with him. However, if "neither of the assessors agrees with the view of the presiding officer, the presiding officer shall submit the dispute in terms of section 92 to the Supreme Court for decision". The non-agreement with the presiding officer by the assessors, led to the still unreported High Court case of *Director-General Department of Labour & Another v Nazeem Mallie & Another*<sup>82</sup> in which the Director-General stated a case for the High Court to consider *inter alia* a question of *locus standi* in referring a case to the High Court in terms of section 92 of COIDA. The question arose because in "practice presiding officers enjoy appointments of limited tenure and cannot be expected to use their own resources to fund such proceedings".<sup>83</sup> The Court considered the Director-General to be better resourced than an individual presiding officer in referring a matter to the High Court<sup>84</sup> although the law clearly empowers the presiding officer to have standing to refer cases to the High Court.<sup>85</sup> The honourable Court refused to interpret the defined meaning of "presiding officer" as inclusive of "Director-General" as it is incapable of an interpretation beyond the ordinary meaning of the words.<sup>86</sup> Section 91(3)(b) does not empower the Director-General to refer a matter to the High Court<sup>87</sup> but section 4(1)(p) confers the power upon the First Applicant to "institute such inquiries and perform such other functions as may be prescribed, or as he may deem necessary for the administration of this Act" which functions may include a referral to the High Court provided it is necessary for the administration of the Act.<sup>88</sup>

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<sup>81</sup> COIDA s 8.

<sup>82</sup> *Director-General Department of Labour & Another v Nazeem Mallie & Another* (22684/09) [2013] ZAWCHC 124.

<sup>83</sup> *Ibid* [9].

<sup>84</sup> *Ibid* [9].

<sup>85</sup> *Ibid* [10].

<sup>86</sup> *Ibid* [10].

<sup>87</sup> *Ibid* [11].

<sup>88</sup> *Ibid* [12].

This case clearly shows the peculiarity applicable to the administrative tribunal adjudicative system in South Africa and applicable to COIDA.

### 3.3. A synopsis of the history of compensatory legislation in South Africa

The historical development of compensatory legislation in South Africa cannot be separated from the history of mining in South Africa or the consequences thereof. South Africans were not subjected to the dreadful consequences of the Industrial Revolution because farming was the general occupation. However, the discovery of minerals like gold, diamonds and coal and the mining operations<sup>89</sup> which consequently followed<sup>90</sup> exposed employees to newly-identified risks,<sup>91</sup> causing them to organise themselves into trade unions and enforce collective interests.<sup>92</sup> Workers compensatory legislation developed along two very distinguishable lines in the form of compensation for injuries and diseases other than lung diseases<sup>93</sup> contracted by mine workers and compensation for the latter.<sup>94</sup>

Compensation for occupational injuries commenced for mine workers when three gold mining companies founded the Rand Mutual Assurance Company Limited in 1894<sup>95</sup> and it rapidly expanded to include forty-two mines by 1900.<sup>96</sup> This

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<sup>89</sup> International Labour Office. *Silicosis records of the International Conference held at Johannesburg 13–27 August 1930*. London: PS King & Son. Retrieved on 01/08/2013 from <http://www.ugr.es/~amenende/investigacion/ILO-Silicosis-Conference-1930.pdf>. Hereinafter: *ILO Silicosis Conference Report*. At 589–590 & 494–495 the paper states that mine managers and officials were of American origin and miners came from England particularly from Cornwall and Northern England. Only a few South Africans were employed in mining. Due to their previous exposure to tuberculosis, the migrant workers from Europe and the USA had a measure of immunity to tuberculosis contrary to South Africans.

<sup>90</sup> Dekker, AH. 2005. *Informal social security: A legal analysis*. LLD thesis. University of South Africa. At 29.

<sup>91</sup> *ILO Silicosis Conference Report* 494–495.

<sup>92</sup> Dekker 31.

<sup>93</sup> Compensated under COIDA.

<sup>94</sup> Compensated under ODIMWA.

<sup>95</sup> *RMA History and nature of the business*. [Sa]. Retrieved on 18/03/2012 from <http://www.randmutual.co.za/AboutUs/HistoryandNatureoftheBusiness/tabid/152/Default.aspx>. Garzarelli, G, Keeton-Stolk, L & Schoer, V. 2008. *Report on workers' compensation in the Republic of South Africa*. Two licensed mutual associations function pursuant to COIDA i.e. the Rand Mutual Assurance in the mining industry and The Federated Mutual Employers Assurance in the building and construction industry at 3. Retrieved on 23/07/2013 from [http://ssreform.treasury.gov.za/Publications/Workers'%20Compensation%20in%20the%20Republic%20of%20South%20Africa%20\(USAID,%202008\).pdf](http://ssreform.treasury.gov.za/Publications/Workers'%20Compensation%20in%20the%20Republic%20of%20South%20Africa%20(USAID,%202008).pdf).

voluntary scheme preceded legislation in the Transvaal and the Cape Colony as well as Britain.<sup>97</sup>

Legislation commenced with the Employer's Liability Act 35 of 1886 in the Cape Colony and Natal followed in 1886.<sup>98</sup> The first real compensation act was the Workmen's Compensation Act 40 of 1905 (Cape of Good Hope) that replaced the Employer's Liability Act 35 of 1886. The Transvaal followed in 1907<sup>99</sup> with the Workmen's Compensation Act 36 of 1907 (hereinafter: 1907 Act). This Act applied only to white employees and it compensated loss of income at a rate of 50% of earnings during periods of disablement and compensated fatal injuries or permanent disablement in the form of lump sums. Calculations were based on the employee's earnings and were restricted to maximum amounts. The unification of South Africa in 1910, led to the applicability of the Transvaal's 1907 Act to the whole country. It was repealed by the Workmen's Compensation Act 25 of 1914.<sup>100</sup>

A voluntary compensation scheme for black workers was introduced in 1905 and followed up in 1911 with the Native Labour Regulation Act 15 of 1911.<sup>101</sup> Racial discrimination was thus embedded in legislation and people covered by the definition of a worker by virtue of this Act were precluded from claiming under Act 25 of 1914.<sup>102</sup> Over time, the Rand Mutual Assurance provided benefits to all races at higher rates considered more appropriate than the statutory prescribed rates.<sup>103</sup> Racial discriminative provisions pertaining to benefits were only removed by the Workmen's Compensation (Amendment) Act 28 of 1977.<sup>104</sup>

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<sup>96</sup> Lang, J. 1986. *Bullion Johannesburg: Men, mines and the challenge of conflict*. Johannesburg: Jonathan Ball. At 197. Garzarelli 3.

<sup>97</sup> Lang 51. The British Workmen's Compensation Act took effect in 1908.

<sup>98</sup> Strydom, EML (ed). 2006. *Essential social security law*. 2<sup>nd</sup> edition. Cape Town: Juta Law. At 3.2.1. Le Roux 28.

<sup>99</sup> Le Roux 29. Lang 197. The Act came into operation in April 1908. Garzarelli 2, the authors noted that the Anglo-Boer War interrupted passing of an intended Employers' Liability Act in the Transvaal.

<sup>100</sup> Lang 197.

<sup>101</sup> *Ibid*.

<sup>102</sup> Strydom *et al* 3.2.1. Le Roux 30. Lang 197.

<sup>103</sup> Lang 197. The Rand Mutual Assurance Company under the auspices of the Chamber of Mines established two mine hospitals to provide specialist treatment to injured employees, the first of which was the Cottesloe Hospital in 1936 and the second known as the Rand Mutual Hospital in 1979, Lang 358 & 459-460.

<sup>104</sup> *Ibid* 459.

One of the demands by organised labour contained in the Worker's Charter published near the end of the 1913 strike by mine workers on the Witwatersrand was the amendment of the 1907 Act.<sup>105</sup> The Workmen's Compensation Act of 1914 (hereinafter: 1914 Act), consolidated, revised and broadened benefits to employees paid by employers under specific conditions.<sup>106</sup> Certain industrial diseases were included by amendment in 1917 in the Workmen's Compensation (Industrial Diseases) Act 13 of 1917.<sup>107</sup>

The Statutes of 1914 and 1917 were repealed<sup>108</sup> by the Workmen's Compensation Act 59 of 1934<sup>109</sup> (hereinafter: 1934 Act), pursuant to which fault on the part of the employer as *sine qua non* for compensation was removed.<sup>110</sup> The office of the Compensation Commissioner was set up to mediate<sup>111</sup> on compensation settlements between employees and employers who were obliged to obtain insurance.<sup>112</sup>

The Workmen's Compensation Act 30 of 1941 (hereinafter: 1941 Act), introduced a whole new compensation dispensation by establishing a central fund from which employees were compensated subject to the fulfilment of certain conditions.<sup>113</sup> This Act did not cover all employees or incidents and categorised employees by race,<sup>114</sup> sex<sup>115</sup> and income.<sup>116</sup>

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<sup>105</sup> *Ibid* 223.

<sup>106</sup> Le Roux 29. *Mankayi v AngloGold Ashanti LTD* 2010 (5) SA 137 (SCA). [15]. Hereinafter: *Mankayi* (SCA).

<sup>107</sup> Le Roux 29. *Mankayi* (SCA) [15].

<sup>108</sup> Schedule 3 of the 1934 Act.

<sup>109</sup> Frank v; the then Minister of Labour wrote in the Foreword: "One of the first legislative attempts of the Union of South Africa in the industrial sphere was the Workmen's Compensation Act, No. 24 of 1914. It was a measure which played a useful part in its time, but by 1934, when the new Act, No. 59 of 1934, was passed, it was quite inadequate to meet the needs which had arisen in our post-war industrial world."

<sup>110</sup> *Mankayi* (SCA) [16].

<sup>111</sup> S 17. S 18 sets out the functions of the Commissioner i.e.

"(a) To investigate or cause investigation to be made into any claim or other matter referred to him in terms of this Act and to assist the parties in bringing about a settlement of the dispute by agreement;

(b) To examine the settlements transmitted to him in terms of section seventy-seven by any insurer and if he be not satisfied that the terms of any such settlements are equitable, to bring the claim into review before a magistrate..."

<sup>112</sup> S 74. Frank at v.

<sup>113</sup> *Mankayi* (SCA) [17].

<sup>114</sup> The 1941 Act defined "Black" in s 2 as: "'Black' ..... [Definition of 'Black' amended by s. 1 (g) of Act 51 of 1956, substituted by s. 1 (c) of Act 29 of 1984 and deleted by s. 1 (2) of Act 114 of 1991.]"

<sup>115</sup> Gender differentiation is evident from the title of the Act referring to men e.g. "Workmen's Compensation Act."

<sup>116</sup> The role of remuneration will be discussed in Chapter 5 as part of the definition of an "employee."



The 1941 Act was repealed by COIDA which came into operation on 1 March 1994 and broadened the definition of “an employee” by removing the restriction on income. Benefits that employees may be entitled to, in essence remained the same with strict limitations on the time period (maximum of 24 months) afforded for payment of income replacement benefits during periods of recovery; limitations on the duration allowed for payment of medical costs (maximum of 24 months) and the scheduled determination of the degree of permanent disability stayed unchanged from 1941<sup>117</sup> and calculation of the monetary value remained tied to the average accident earnings.<sup>118</sup> The time limits can be criticised for they do not take note of the type or seriousness of the injury and no provision being made for individual cases. No rights have been enacted pertaining to rehabilitation and return-to-work programmes<sup>119</sup> and no clear prohibition against dismissal<sup>120</sup> is entertained within the ambit of compensatory legislation in South Africa while travelling expenses have only been allowed for emergency transport associated with the accident.<sup>121</sup> No provision has been made for loss of retirement income or for expenses needed in respect of adjustments to homes, vehicles etc. to accommodate consequential disabilities.

Mine workers suffering from occupational diseases contracted through work on mines could be compensated on an *ex-gratia* basis within the discretion of the Board pursuant to the Miners' Phthisis Act 34 of 1911<sup>122</sup> (hereinafter: 1911 Act) in anticipation of the Miner's Phthisis Act 19 of 1912<sup>123</sup> (hereinafter: 1912 Act). The 1911 Act defined a “miner” as a person from European descent who worked underground on a “scheduled mine”<sup>124</sup> and a “native labourer” was considered to be of aboriginal or African tribal origin who worked underground on a scheduled

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<sup>117</sup> 1941 Act Schedule 1 and COIDA Schedule 2.

<sup>118</sup> 1941 Act ss 38 & 39 and COIDA Schedule 4.

<sup>119</sup> Oliphant, M. 2013. *Budget vote address*. The honourable Minister of Labour announced intended amendments to COIDA to include rehabilitation and early return-to-work provisions. Retrieved on 25/07/2013 from <http://www.labour.gov.za/media-desk/speeches/2013/budget-vote-address-by-the-hon-minister-of-labour-ms-mildred-n-oliphant-mp-national-assembly>.

<sup>120</sup> Dismissals fall within the ambit of the Labour Relations Act 66 of 1995. Hereinafter: LRA.

<sup>121</sup> COIDA s 72.

<sup>122</sup> *ILO Silicosis Conference Report* 650.

<sup>123</sup> *Mankayi v Anglogold Ashanti Ltd* 2011 32 ILJ 545 (CC) at 26–27. Hereinafter: *Mankayi* (CC).

<sup>124</sup> *ILO Silicosis Conference Report* at 592 indicated that the Transvaal mines were classified as “phthisis-producing of non-phthisis mines” with all of the gold producers schedules as phthisis-producing mines.

mine.<sup>125</sup> The 1912 Act introduced a system of compensation to be paid according to the degree of disease, first and advanced stages, which remained the basis until presently as section 44 of the Occupational Diseases in Mines and Works Act 78 of 1973 (hereinafter: ODIMWA) classifies as first and second degree.<sup>126</sup>

It is important to note that contrary to one of the principles of compensatory legislation i.e. funding of compensation by employers in exchange for protection against civil liability,<sup>127</sup> persons fulfilling the definition of a “miner” were expected to contribute 2½ percent of their earnings towards the compensation fund which constituted half of the levy with their employer the balance. The formula was changed on 1 August 1914 to a total levy of 7½ of the earnings of which the employer had to contribute 5 percent.<sup>128</sup> “Native labourers” were not expected to contribute in the same way but the monetary value of compensation was markedly less than the value of compensation paid to “miners”<sup>129</sup> under the 1912 Act and its amendments in 1914, 1916, 1917 and 1918 as well the Miners’ Phthisis Act 40 of 1919 (a new Principal Act) as amended in 1924<sup>130</sup> and the Miners’ Phthisis Act, Consolidation Act, No. 35 of 1925.<sup>131</sup> Payment of compensation was considered a burden that could ruin a marginally profitable mine.<sup>132</sup>

Ironically South Africa was considered to be a world leader in the field of occupational lung diseases.<sup>133</sup> South Africa *inter alia* enacted the first statutory

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<sup>125</sup> *Ibid* 650–651.

<sup>126</sup> *Ibid* 651–673.

<sup>127</sup> The protection of employers against common law liability will be discussed in the following chapters.

<sup>128</sup> *ILO Silicosis Conference Report* 653 & 672–673.

<sup>129</sup> *Ibid* 653.

<sup>130</sup> By the Miners’ Phthisis Act Amendment Act 35 of 1924.

<sup>131</sup> *ILO Silicosis Conference Report* 652–674.

<sup>132</sup> *Ibid* 595.

<sup>133</sup> South Africa (Republic). Department of Health. 2009. *The hidden epidemic amongst former miners: silicosis, tuberculosis and the Occupational Diseases in Mines and Works Act in the Eastern Cape, South Africa*. (Research report by Roberts, J). Durban: Health Systems Trust. Retrieved on 26/06/2012 from <http://www.hst.org.za/uploads/files/ODMWA.pdf>. At 17 the author cited the finding of Katz, E (1994), *The White Death. Silicosis on the Witwatersrand Gold Mines 1886 – 1910* at 5 that between the years 1902 and 1925, “silicosis was the subject of no fewer than nine legislative acts, six commissions, ten parliamentary select committees and four major state industry reports”.

compensation scheme<sup>134</sup> compensating silicosis and tuberculosis,<sup>135</sup> did extensive research within specialised research facilities<sup>136</sup> and accommodated the very first International Conference on Silicosis (1930)<sup>137</sup> under the auspices of the ILO.<sup>138</sup>

A very important feature of the South African compensatory legislation is the entrenched distinction and long-standing disparity<sup>139</sup> between compensation for lung diseases contracted on “controlled” mines and “controlled” works<sup>140</sup> and occupational injuries sustained on mines and works as well as occupational injuries and diseases flowing from work in other industries as is evident from the judgment by Khampepe J in the Constitutional Court ruling of *Mankayi v Anglo Gold Ashanti*<sup>141</sup> (hereinafter: *Mankayi* (CC)). The disparity led to three court actions culminating in a landmark Constitutional Court ruling confirming the right of an employee to sue his employer for negligence in forsaking his “duty of care” to an employee pursuant to ODIMWA. The Constitutional Court was faced with the question whether section 35 of COIDA precludes the right to sue an employer pursuant to ODIMWA.<sup>142</sup>

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<sup>134</sup> Mcculloch, J. 2009. Counting the cost: gold mining and occupational disease in contemporary South Africa. *African Affairs Journal* 108(431): 221-240. Retrieved on 26/06/2012 from <http://www.cwbpi.com/AIDS/reports/SouthAfricaGoldMining.pdf>.

<sup>135</sup> Meiklejohn, A. 1954. The development of compensation for occupational diseases of the lungs in Great Britain. *Brit. J. Industr. Med.* 11: 198-212. Retrieved on 25/07/2013 from <http://www.ncbi.nlm.nih.gov/pmc/articles/PMC1037557/pdf/brjindmed00231-0034.pdf>.

<sup>136</sup> *ILO Silicosis Conference Report* 98.

<sup>137</sup> *Ibid* 2.

<sup>138</sup> Butler, HB. 1928. Labour problems in Southern Africa. *International Labour Review* 17(4): 465-485. Butler, the then Deputy Director of the International Labour Office, reported at 469, after a visit to South Africa in 1927 that a conference to be held in Johannesburg and convened by the ILO has been proposed on the prevention of silicosis. Retrieved on 02/03/2013 from <http://heinonline.org>.

<sup>139</sup> Olivier *et al* (2003) 459. "There is also the Occupational Diseases in Mines and Works Act (ODMWA), which provides for mandatory reporting and the payment of certain benefits to mine workers who develop certain occupational lung diseases, as well as the payment of certain benefits for dependants of workers who die from such diseases."

<sup>140</sup> ODIMWA s 10 states: "**Declaration as controlled mine or controlled works**

(1) Whenever it comes to the notice of the Minister that any persons are performing risk work at a mine or works which is not a controlled mine or a controlled works in terms of section 9 or a notice under this subsection, he or she shall, subject to the provisions of subsection (3) of this section, by notice in the Gazette declare the mine or works in question to be a controlled mine or a controlled works as from a date to be specified in the notice, not being a date earlier than thirty days after the day on which the notice is published in the Gazette."

<sup>141</sup> 2011 32 ILJ 545 (CC). At 29-34.

<sup>142</sup> *Ibid* the whole ruling but particularly paras 13-14.

### **3.4. South African compensatory legislative framework**

The COIDA forms the central focus of this dissertation and repealed the Workmen's Compensation Act of 1941 which was preceded by the 1934 Act and its predecessors.<sup>143</sup>

COIDA will be examined as well as its counterpart in the mining industry, ODIMWA and compared to similar provisions and juridical developments in the Canadian and Australian compensatory legislation. Problems and deficiencies identified in the South African system will be compared to possible solution/s in the Canadian and Australian compensatory schemes. In the process of analysis it will be necessary to refer to the provisions of the following South African statutes: Occupational Health and Safety Act 85 of 1993, the Employment Equity Act 55 of 1998, the Labour Relations Act 66 of 1995 and the Mine Health and Safety Act 29 of 1996.

It is submitted that certain determinations in COIDA and ODIMWA are problematic and archaic and its application in the South African labour milieu deserves the attention of the legal fraternity. This study will examine some of the aspects that influence the right to compensation of an employee i.e. the limitations in the definition of what constitutes an "injury", the lack of inclusivity in the definition of an "employee" and the reasonableness of the protection afforded to employers in shielding employers against civil liability. In the process of analysis, attention will be given to the South African determination in comparison to the same determination in Canadian law as well as in Australian law.<sup>144</sup>

### **3.5. Problematic issues**

Legislation pertaining to occupational injuries and diseases in South Africa is characterised by a fragmented system regulated by at least four different statutes

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<sup>143</sup> Chapter 2 fn 113–121 *supra*.

<sup>144</sup> Chapter 6 in particular will discuss this aspect.

and spread over at least three different government departments,<sup>145</sup> causing dissimilar compensation and enforcement.<sup>146</sup> Two laws deal with prevention by promoting safe and healthy work places i.e. the Occupational Health and Safety Act<sup>147</sup> and the Mine Health and Safety Act.<sup>148</sup> The first named Act regulates all industries and sectors other than mining which is being regulated by the latter. The two Acts brought into existence two different inspectorates with individualised responsibilities and jurisdictions under the auspices of two different state departments i.e. the Department of Labour and the Department of Mineral Resources.<sup>149</sup>

The fragmentation is further enforced by two different compensatory acts being: the COIDA and the ODIMWA. Neither COIDA nor ODIMWA regulate preventative measures of occupational health and safety and consequently it does not form part of the purpose of either. However, the Director-General as part of his functions under COIDA,<sup>150</sup> may assist a scheme/s in preventing accidents and diseases and promoting the health and safety of employees. COIDA is administered by the Department of Labour while ODIMWA is being administered by the Department of Health. The fragmented system caused disparity in the nature, amount and type of compensation to which an employee may be entitled and as determined by the industry as well as prevention of unsafe conditions in the workplace. Although

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<sup>145</sup> Hatting, S & Acutt, J (eds). 2008. *Occupational health management and practice*. 3<sup>rd</sup> edition. Cape Town: Juta. At 9 the authors refer to the Erasmus Commission of Enquiry (1975) who identified this as problematic as early as 1975 as it caused confusion in the area of health and safety because of the replication of health and safety in various laws which in turn lead to duplication over different state departments. Retrieved on 24/07/2013 from <http://books.google.co.za/books?id=uptThLmdhxYC&pg=PA10&lpg=PA10&dq=history+of+south+african+workmen's+compensation+act+1941&source=bl&ots=bdD-rQmszm&sig=PSMYIxa5phVA5ljyvO5rYuIT9ac&hl=en&sa=X&ei=hNTwUYecFYaZhQfLvoHQDw&ved=0CFEQ6AEwBTgK#v=onepage&q=history%20of%20south%20african%20workmen's%20compensation%20act%201941&f=false>.

<sup>146</sup> South Africa (Republic). Department of Labour. 1997. *Report of the Committee of Inquiry into a National Health and Safety Council in South Africa*. (Committee members: Benjamin, P & Greef, J). [SI]. Electronic copy: Stanton, DW. 2003. At 1. Hereinafter: Benjamin Report. Retrieved on 12/03/2012 from <http://www.commerciallaw.uct.ac.za/staff/academic/pbenjamin/>. Taylor Report at 113–114. The Committee identified fragmentation as a problem that ought to be addressed through a process of equalising the different acts and to integrate it in a comprehensive occupational health and safety system within the social security framework.

<sup>147</sup> Occupational Health and Safety Act 85 of 1993.

<sup>148</sup> Mine Health and Safety Act 29 of 1996.

<sup>149</sup> South Africa (Republic). Department of Labour. *Occupational Health and Safety Act and Amendments: Application*. Retrieved on 18/07/2013 from <http://www.labour.gov.za/legislation/acts/occupational-health-and-safety/occupational-health-and-safety-act-and-amendments>.

<sup>150</sup> S 4(2).

integration is widely recommended, it remains problematic with little or no progress.<sup>151</sup>

The *Mankayi* rulings did not address the question of the constitutionality of the disparity in compensation<sup>152</sup> between COIDA and OIOWA.<sup>153</sup> The question remains open as to unfair discrimination and if so, if it can be saved by the “reasonableness” thereof or section 36 of the Constitution.<sup>154</sup> Dignity and equality is of particular importance for purposes of occupational injuries and diseases.

In 1996, the then Minister of Labour remarked:<sup>155</sup>

The provision of an efficient occupational health and safety service in South Africa, including compensation for injured and diseased workers, is severely hampered by the lack of an overall national policy and implementation strategy in this field. It is further hampered by the fragmentation of responsibility across various governmental departments.

Prevention includes three aspects i.e. pro-active accident prevention, risk assessment payments and sanctions against offenders. The lack of a coherent policy framework with strategically incorporated prevention measures is identified by both Taylor<sup>156</sup> and Benjamin<sup>157</sup> with a deficiency in rehabilitation and reintegration

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<sup>151</sup> Taylor Report 113–116.

<sup>152</sup> AngloGold Ashanti. 2006. *Annual Report 2006*. Retrieved on 14/05/2010 from <http://www.anglogold.co.za/subwebs/InformationForInvestors/ReportToSociety06/worker-compensation.htm>. The report announced “Worker compensation in South Africa under review” but unfortunately no formal process has been established by either the South African Department of Labour or the Department of Health yet.

<sup>153</sup> *Mankayi* (SCA) [61].

<sup>154</sup> *Harksen v Lane NO* 1998 SA 300 CC is the classic ruling on unfair discrimination in South Africa. The impact of the discrimination upon the plaintiff and others in the same position determines the fairness. If the discriminatory act is found to be unfair, it should be considered if it can be saved under s 36 of the Constitution. Only if it cannot be saved by s 36 will it be unfair discrimination.

<sup>155</sup> Rees, D & Davies, T. 1997. Occupational health, in *South African health review*, edited by J Reddy, Durban: Health Systems Trust: 171–222. Retrieved on 25/07/2013 from [ftp://apollo.hst.org.za/pubs/sahr/1997/ch19\\_25.pdf](ftp://apollo.hst.org.za/pubs/sahr/1997/ch19_25.pdf).

<sup>156</sup> Taylor Report 36–37 & 114.

<sup>157</sup> Benjamin Report at 1, 43–45, 57, 59–60, 64, 74 (the example of the Canadian province of British Columbia is given), 96–97 (the example of the Australian scheme), 130, 178, 180 & 201.

programmes for injured or diseased employees into the workplace<sup>158</sup> as part of COIDA.<sup>159</sup>

### 3.6. Summary

South African workers' compensatory legislation developed as a result of the hazards associated with mining<sup>160</sup> in a fragmented way that distinguishes between occupational injuries and diseases and lung diseases associated with mining.<sup>161</sup> Disparate compensation for different races was embedded from the inception of the first legislation and was only removed at a later stage.<sup>162</sup> The fragmentation is still very much alive in the form of two distinctive Acts with disparate compensation schemes.<sup>163</sup> Appeals against decisions pursuant to COIDA lie in the first instance to a tribunal and thereafter in limited circumstances to the High Court, the Supreme Court of Appeal and in the last instance to the Constitutional Court on constitutional issues.<sup>164</sup>

## 4. CANADA

### 4.1. Introduction

Canada is a federal dominion established by virtue of the British North America Act 1867 which was amended by the supreme law of Canada,<sup>165</sup> the Constitution Act 1982.<sup>166</sup> The Federation comprises of ten provinces (Alberta, British Columbia, Manitoba, New Brunswick, Newfoundland and Labrador, Nova Scotia, Ontario, Prince Edward Island, Quebec, and Saskatchewan) and three territories (Yukon and Northwest Territories from which Nunavut<sup>167</sup> was separated in 1999) each

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<sup>158</sup> Oliphant, the honourable Minister of Labour announced intended amendments to COIDA to include rehabilitation and early return-to-work provisions.

<sup>159</sup> Taylor Report Chapter 12. Benjamin Report Part 4.

<sup>160</sup> Chapter 2 para 3.3 *supra*.

<sup>161</sup> Chapter 2 para 3.5 *supra*.

<sup>162</sup> Chapter 2 para 3.3 *supra*.

<sup>163</sup> Chapter 2 para 3.5 *supra*.

<sup>164</sup> Chapter 2 para 3.2 *supra*.

<sup>165</sup> Canada Constitution Acts, 1867 to 1982 and specifically the Constitution Act 1982 s 52(1).

<sup>166</sup> Canadian Constitution Foundation. Retrieved on 27/07/2013 from <http://www.canadianconstitutionfoundation.ca/constitution.php>.

<sup>167</sup> Campbell Cohen Law Firm. [Sa]. *About Nunavut*. Retrieved on 25/07/2013 from <http://www.canadavisa.com/about-nunavut.html>.

governing independently with legislative authority to enact legislation binding upon that particular jurisdiction.<sup>168</sup> All legislation needs to conform to the Constitution Act 1982<sup>169</sup> which includes the Canadian Charter of Rights and Freedoms.<sup>170</sup> Each of the provinces enacted compensatory legislation<sup>171</sup> (some more than one act) constituting a vast number of statutes with generally similar determinations to the province of Ontario which based its legislation on research done and principles laid down by Chief Justice Meredith in 1913.<sup>172</sup>

<sup>168</sup> Pearson Education. [Sa]. Retrieved on 28/07/2013 from <http://www.infoplease.com/ipa/A0107386.html>.

<sup>169</sup> Constitution Act 1982 s 52(1) which provides as follows: "The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect."

<sup>170</sup> Canada (Federation). Department of Justice. 2013. *Rights and Freedoms in Canada: The role of the Canadian Charter of Rights and Freedoms*. Retrieved on 25/07/2013 from <http://www.justice.gc.ca/eng/csj-sjc/just/06.html>. It is explained that "The Charter takes precedence over other legislation because it is "entrenched" in the Constitution, the supreme law of Canada". See also *The Canadian Encyclopedia*. [Sa]. *Constitutional Law*. Retrieved on 25/07/2013 from <http://www.thecanadianencyclopedia.com/articles/constitutional-law>.

<sup>171</sup> Alberta: Workers' Compensation Act, RSA 2000, c W-15. Retrieved on 27/10/2010 from <http://canlii.ca/t/522s2>.

British Columbia: Workers Compensation Act, RSBC 1996, c 492. Retrieved on 30/10/2010 from <http://canlii.ca/t/5203j>.

Manitoba: The Workers Compensation Act, CCSM c W200. Retrieved on 10/10/2010 from <http://canlii.ca/t/lb79>.

New Brunswick: Workers' Compensation Act, RSNB 1973, c W-13. Retrieved on 30/10/2010 from <http://canlii.ca/t/51z17>.

Newfoundland and Labrador: Workplace Health, Safety and Compensation Act, RSNL 1990, c W-11. Retrieved on 30/10/2010 from <http://canlii.ca/t/51zk4>.

Northwest Territories & Nunavut: Workers' Compensation Act, SNWT 2007, c 21. Retrieved on 06/09/2010 from <http://canlii.ca/t/l406>.

Nova Scotia: Workers' Compensation Act, SNS 1994-95, c 10. Retrieved on 10/10/2010 from <http://canlii.ca/t/523hv>.

Ontario: Workplace Safety and Insurance Act, 1997, S.O. 1997, c. 16, Sch. A. Retrieved on 10/10/2010 from <http://canlii.ca/t/51xr9>.

Prince Edward Island: Workers Compensation Act, RSPEI 1988, c W-7.1. Retrieved on 09/06/2010 from <http://canlii.ca/t/51vw4>.

Quebec: An Act Respecting Industrial Accidents and Occupational Diseases, RSQ, c A-3.001. Retrieved on 03/01/2011 from <http://canlii.ca/t/lgb3>.

Saskatchewan: The Workers' Compensation Act, 1979, SS 1979, c W-17.1. Retrieved on 25/09/2010 from <http://canlii.ca/t/52377>.

Yukon: Workers' Compensation Act, SY 2008, c 12. Retrieved on 06/09/2010 from <http://canlii.ca/t/kkkf>.

Canada Federal Government: Government Employees Compensation Act, RSC 1985, c G-5. Retrieved on 01/05/2010 from <http://canlii.ca/t/hzmq>.

<sup>172</sup> Ison, TG. 1989. *Workers' compensation in Canada*. 2nd edition. Toronto: Butterworths. At Preface v. Hereinafter: Ison 1989. See also the Meredith Report. The report researched existing Canadian and international legislation and acknowledged the concerns of employees and employers who agreed "(1) That the law of Ontario is entirely inadequate in the conditions under which industries are now carried on to provide just compensation for those employed in them who meet with injuries, or suffer from industrial diseases contracted in the course of their employment; and (2) that under a just law the risks arising from these causes should be regarded as risks of the industries and that compensation for them should be paid by the industries."

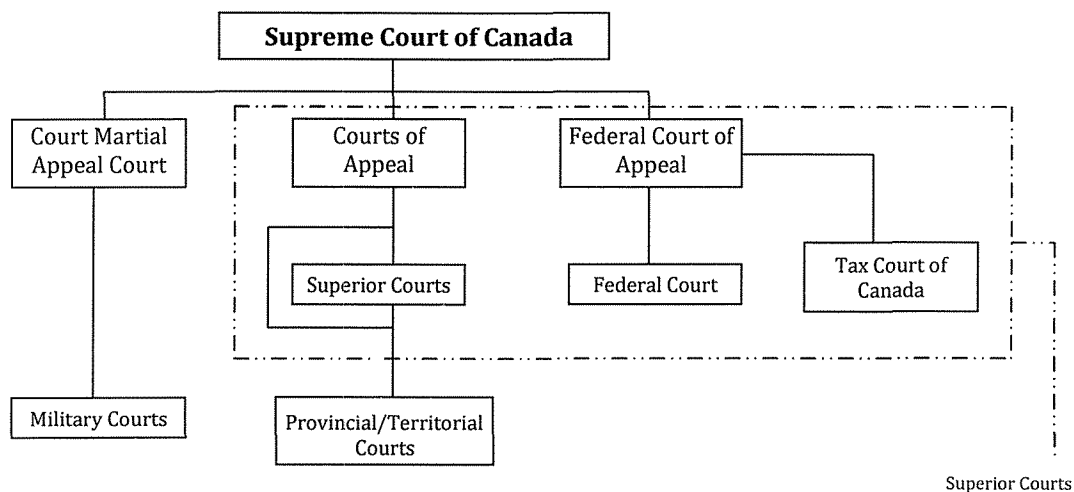


## 4.2. Canadian court structure and compensatory legislation

The federal system of governance in Canada empowers individual provinces to regulate their compensation systems on an individual basis.<sup>173</sup> Canada (except for the province of Quebec) follows the legal system of common law like South Africa.<sup>174</sup>

Four levels of court are operational in Canada with the Supreme Court of Canada as the highest court, followed by the Federal Court of Appeal and the provincial and territorial courts of appeal. The next level in lower ranking order is the provincial and territorial Superior Courts. These courts handle more serious crimes and appeals from provincial and territorial courts. On the same level, but responsible for different issues, is the Federal Court. The lowest level is the provincial and territorial courts which are responsible for the majority of cases.<sup>175</sup>

Schematically the court structure can be depicted as follows:<sup>176</sup>



The Supreme Court of Canada is the final court of appeal as it is the highest court in Canada and has jurisdiction in all areas of law, including constitutional matters.<sup>177</sup>

<sup>173</sup> Canada (Federation). Department of Justice. 2005. *Canada's court system*. Ottawa: Department of Justice Canada. Retrieved on 12/07/2013 from <http://www.justice.gc.ca/eng/csjs-jc/ccs-ajc/pdf/courten.pdf>. At 1. Hereinafter: *Canada's Court System*.

<sup>174</sup> Pearson Education. [Sa]. *Common law*. Retrieved on 12/07/2013 from <http://www.infoplease.com/encyclopedia/society/common-law.html>.

<sup>175</sup> *Canada's Court System* 3.

<sup>176</sup> Canadian Superior Courts Judges Association. [Sa]. *Structure of the Courts*. Retrieved on 12/07/2013 from [http://www.cscja-acjcs.ca/structure\\_of\\_courts-en.asp?l=4](http://www.cscja-acjcs.ca/structure_of_courts-en.asp?l=4).

<sup>177</sup> *Canada's Court System* 7.

Appeals in all other courts must have been exhausted before the Supreme Court may be approached with an application for leave to appeal.<sup>178</sup> Leave to appeal to the Supreme Court is permitted only if the case involves a question of public importance (which may include workers' compensatory matters); an important issue of law or mixed law and fact; or if the matter is considered to be important enough.<sup>179</sup> The Court also assists the Federal Government on matters of law or fact particularly regarding interpretation of the Canadian Constitution and other federal or provincial or territorial legislation.<sup>180</sup>

The Federal Court and Federal Court of Appeal are essentially superior courts with civil jurisdiction but limited to the corners of federal statutes only.<sup>181</sup> The Federal Court is a court of first instance and appeals from its decisions are heard by the Federal Court of Appeal.<sup>182</sup> It hears federal matters on interprovincial disputes, intellectual property proceedings, citizenship appeals and issues involving the Crown, corporations and government departments.<sup>183</sup> It is the only Court that has jurisdiction to hear applications for review of administrative decisions and orders by federal boards, commissions and tribunals (inclusive of jurisdiction over workers' compensation matters) and may be approached at any time during a proceeding on a question of law, jurisdiction or practice.<sup>184</sup> Provincial and territorial Superior Courts on the other hand, have jurisdiction in all matters except those specifically excluded by a statute.<sup>185</sup>

Each province/territory has a Court of Appeal or an appellate division hearing appeals from decisions by the Superior Courts and provincial and territorial courts.<sup>186</sup> Although the number of judges sitting as a Court of Appeal differs

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<sup>178</sup> *Ibid* 7.

<sup>179</sup> *Ibid* 7.

<sup>180</sup> *Ibid* 3.

<sup>181</sup> *Ibid* 4-5.

<sup>182</sup> *Ibid* 4-5.

<sup>183</sup> *Ibid* 4-5.

<sup>184</sup> *Ibid* 4-5.

<sup>185</sup> *Ibid* 4.

<sup>186</sup> *Ibid* 4.

between jurisdictions, the panel usually consists of three judges. These courts have jurisdiction to hear constitutional matters raised on appeal.<sup>187</sup>

Provincial and Territorial Superior Courts are known by different names in the individual provinces i.e. Superior Court of Justice, Supreme Court (different from the Supreme Court of Canada), and Court of Queen's Bench.<sup>188</sup> The court system is similar in all provinces except for Nunavut as the Nunavut Court of Justice deals with both territorial and superior court matters.<sup>189</sup>

The Superior Courts have inherent jurisdiction and may hear any matter except where specifically limited to another level of court.<sup>190</sup> The most serious criminal and civil matters are heard by the Superior Courts with some of the courts having specialised divisions dealing with family law.<sup>191</sup> The Superior Courts also operate as a court of first appeal for the lower ranking courts.<sup>192</sup>

Each province and territory, except Nunavut, has a provincial or territorial court, which hears cases involving either federal or provincial or territorial laws concerning criminal offences, family law matters (excluding divorce), young persons offenders, traffic violations, provincial and territorial regulatory offences, and claims involving money less than a predetermined threshold.<sup>193</sup>

Ancillary to the formal court system functions Administrative Tribunals and Boards under different enabling statutes similarly to South Africa.<sup>194</sup> Courts supervise the Administrative Tribunals and the Tribunals may refer questions to the courts.<sup>195</sup> The Courts recognised Administrative Tribunals as courts of first instance within

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<sup>187</sup> *Ibid* 4.

<sup>188</sup> *Ibid* 3–4.

<sup>189</sup> *Ibid* 3–4.

<sup>190</sup> *Ibid* 4.

<sup>191</sup> *Ibid* 4.

<sup>192</sup> *Ibid* 4.

<sup>193</sup> *Ibid* 2–3.

<sup>194</sup> *Ibid* 9.

<sup>195</sup> *Ibid* 9.

the specialised field of workers' compensation<sup>196</sup> and their expertise is protected in privative clauses included in the enabling act.<sup>197</sup> The Canadian system of Administrative Tribunals is known for its proliferation<sup>198</sup> and although its objective is easy access to flexible, informal and inexpensive hearings, it is more and more judicialised and influenced by procedural requirements and the involvement of lawyers.<sup>199</sup> Administrative tribunals aim at the implementation of government policy and "implementation of that policy may require from them to make quasi-judicial decisions".<sup>200</sup> The Supreme Court of British Columbia set out the review process in *Albert v British Columbia (Workers' Compensation Appeal Tribunal)*<sup>201</sup> of which the standard of review to be applied to the decision under review is applied as the first and foremost step.<sup>202</sup> The Court cited the four applicable contextual aspects to be applied in the "pragmatic and functional approach" as stated in *Speckling v British Columbia (Workers' Compensation Board)*,<sup>203</sup> to be:<sup>204</sup>

- (1) the presence or absence of a privative clause or statutory right of appeal;
- (2) the expertise of the tribunal relative to that of the reviewing court on the issue in question;
- (3) the purposes of the legislation and the provision in particular; and
- (4) the nature of the question -- law, fact, or mixed law and fact.

<sup>196</sup> See for instance *Pasiechnyk v Saskatchewan (Workers' Compensation Board)*, [1997] 2 S.C.R. 890 paras 29–31 & 69 of which para 69 states: .."the embrative wording of s. 180 indicates that the legislators intended to endow the Board with exclusive power to decide whether employee actions arising from workplace mishaps proceed, notwithstanding their legal characterization." *Pasiechnyk v Saskatchewan (Workers' Compensation Board)*, [1997] 2 S.C.R. 890. Hereinafter: *Pasiechnyk*. Retrieved on 09/04/2011 from <http://www.canlii.org/en/ca/scc/doc/1997/1997canlii316/1997canlii316.html>.

<sup>197</sup> Alberta s 13.1; British Columbia s 255; Manitoba s 60.8; Newfoundland s 26; Northwest Territories s 126; Nova Scotia s 10F; Ontario s 31; Prince Edward Island s 56.2; Quebec s 579 & Yukon s 59.

<sup>198</sup> MacNaughton, HM. 2009. Future directions for Administrative Tribunals: Canadian administrative justice – where do we go from here? In *Tribunals in the Common Law World*, edited by R Creyke. Annandale: Federation Press: 203–226. Retrieved on 26/07/2013 from <http://books.google.co.za/books?id=Opvn1CiM7zwC&pg=PR8&lpg=PR8&dq=tribunals+in+the+common+law+world+chapter+where+do+we+go+from+here&source=bl&ots=4FqHs2MGgB&sig=V3HC9aqiPCjufo00Welqb91LVfA&hl=en&sa=X&ei=yQBdUuWNNYXG0QW3mIGQCQ&ved=0CCkQ6AEwAA#v=onepage&q=tribunals%20in%20the%20common%20law%20world%20chapter%20where%20do%20we%20go%20from%20here&f=false>.

<sup>199</sup> *Ibid* 206.

<sup>200</sup> *Ocean Port Hotel Ltd. v British Columbia (General Manager, Liquor Control and Licensing Branch)*, [2001] 2 S.C.R. 781, 2001 SCC 52 at 24. Retrieved on 03/08/2013 from <http://www.canlii.org/en/ca/scc/doc/2001/2001scc52/2001scc52.pdf>.

<sup>201</sup> *Albert v British Columbia (Workers' Compensation Appeal Tribunal)*, 2006 BCSC 838. Hereinafter: *Albert*. Retrieved on 03/04/2011 from <http://www.canlii.org/en/bc/bcsc/doc/2006/2006bcsc838/2006bcsc838.html>.

<sup>202</sup> *Ibid* [3].

<sup>203</sup> [2005] B.C.J. No. 270.

<sup>204</sup> *Albert* [4].

The “patently reasonable standard of review” is determined by applying the following principles to the decision under review:<sup>205</sup>

- ‘Patently unreasonable’ means openly, clearly, evidently unreasonable;
- The review test must be applied to the result not to the reasons leading to the result;
- The privative clause set out in s. 96(1) of the Act requires the highest level of curial deference;
- A decision may only be set aside where the board commits jurisdiction error;
- A decision based on no evidence is patently unreasonable, but a decision based on insufficient evidence is not.

In British Columbia the rules applicable to administrative review has been codified in the Administrative Tribunals Act S.B.C 2004, c. 45 which in section 58 protects privative clauses in the enabling act by stipulating:

- (2) In a judicial review proceeding relating to expert tribunals under subsection (1)
  - (a) a finding of fact or law or an exercise of discretion by the tribunal in respect of a matter over which it has exclusive jurisdiction under a privative clause must not be interfered with unless it is patently unreasonable,
  - (b) questions about the application of common law rules of natural justice and procedural fairness must be decided having regard to whether, in all of the circumstances, the tribunal acted fairly, and
  - (c) for all matters other than those identified in paragraphs (a) and (b), the standard of review to be applied to the tribunal's decision is correctness.

“Discretionary decision” is defined in subsection (3) in an open-ended definition<sup>206</sup> as patently unreasonable for the purposes of subsection (2)(a) if the discretion:<sup>207</sup>

- (a) is exercised arbitrarily or in bad faith,
- (b) is exercised for an improper purpose,
- (c) is based entirely or predominantly on irrelevant factors, or
- (d) fails to take statutory requirements into account.

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<sup>205</sup> *Ibid* [9].

<sup>206</sup> In addition to the statutory definition, it is necessary to visit the common law definition of patently unreasonable because of the open-endedness of the first named as was found in *Albert* at [44]–[45].

<sup>207</sup> *Ibid* [43].

The codification shows the two different standards of review applied in Canadian administrative law comprising of the correctness standard [section 58(2)(c)] and the patently unreasonableness standard [section 58(2)(3)]. A finding of mixed “law and fact” will attract the standard of “patently unreasonableness” to direct the review process.<sup>208</sup>

### 4.3. A synopsis of the history of compensatory legislation in Canada

As discussed *supra*, the origin of workers’ compensation lies in Germany which spread to Britain and the rest of the world.<sup>209</sup> Ison indicated that the body of Canadian legislation was drawn from England and France but distinctly Canadian jurisprudence started with the work by Meredith on compensatory law.<sup>210</sup> The crucial language was derived from the British Law but preference was given to features from German and American legislation which resulted in legislation *sui generis* to Canada.<sup>211</sup> The work of Meredith culminated in the promulgation of the Workmen’s Compensation Act named: An Act to provide for Compensation to Workmen for Injuries sustained and industrial Diseases contracted in the course of their Employment, S.O. 1914, c. 25.<sup>212</sup>

Although some Canadian provinces promulgated compensatory laws as early as 1902,<sup>213</sup> the Canadian province of Ontario was the first to embark on comprehensive research on the subject before enactment of legislation with the appointment of Chief Justice Meredith to head a Royal Commission of Enquiry.<sup>214</sup> The *Ontario, Workmen’s Compensation Commission, Final Report on Laws Relating to the Liability of Employers* (1913) (hereinafter: Meredith Report) sets out principles that would influence not only Ontario but Canada as a whole and international law on compensatory law.<sup>215</sup> The South African Workmen’s Compensation Act of 1941

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<sup>208</sup> *Ibid* [36].

<sup>209</sup> Association of Workers’ Compensation Boards of Canada. [Sa]. *History of workers’ compensation*. Retrieved on 17/03/2012 from <http://www.awcbc.org/en/historyofworkerscompensation.asp>.

<sup>210</sup> Ison 1996: 807–833.

<sup>211</sup> Ison 1989: 1.

<sup>212</sup> Ison 1996: 807–833.

<sup>213</sup> Le Roux 11.

<sup>214</sup> See Chapter 2 fn 209 *supra*. See also Chapter 2 fn 216–218, 238 & 240 *infra*.

<sup>215</sup> Ison 1996: 807–833.

was based upon the principles laid down in the Meredith Report and as COIDA in essence is an amendment of the 1941 Act, it is the same principles still governing the current South African statute.<sup>216</sup>

Meredith<sup>217</sup> laid down the following principles<sup>218</sup> in his Report based on his international research into the compensatory laws of countries like Germany, France, Belgium, England and the USA:

- No-fault principle: the right to compensation to injured workers without regard to negligence and in return employers are shielded against law suits and claims for damages.
- Collective liability: all employers share collectively in the costs of benefits to injured employees inclusive of universal mandatory coverage. A system that creates security of payment by an independent organ of state with exclusive jurisdiction to determine compensation claims, collect and administer employer contributions, inquire into, hear and decide on relevant matters, where the employer's ability to pay is of no consequence any longer and payment to the worker is guaranteed from an accident fund.
- Security of payment: payment of compensation will not be defeated by the insolvency of the company or protracted appeals in court.
- Administration by an independent organization.<sup>219</sup>

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<sup>216</sup> Ison 1996: 807–833. Although the Commissioner at the time referred to the “first Workmen’s Compensation Act” it can safely be assumed reference was made to the 1941 Act as the 1934 Act was mostly copied from the British Workmen’s Compensation Act, 1925 as is clear from the Foreword, Preface and contents of Frank who quoted the relevant sections from the British Act and case law through his work in assistance for the purpose of interpretation.

<sup>217</sup> Ison 1996: 807–833. Over the following years, other Canadian provinces followed with commissions similar to the Meredith Commission e.g. the British Columbia Workmen’s Compensation Board Inquiry, Report of the Commissioner, the Hon. Gordon McG. Sloan of 1952 and the Commission to Inquire into and Investigate Every Aspect of the Workmen’s Compensation Act, Report of the Commissioner, W.F.A. Turgeon, the Workmen’s Compensation Act, Manitoba of 1958.

<sup>218</sup> Douglas, DG, Mastoras, J & Liversidge, LA. 1995. *A guide to workers’ compensation in Ontario*. Toronto: Canada Law Book. At 1 the authors remarked that “Despite the many changes that have been effected to the Act since 1914, the basic premise of the Act and its objectives remain largely unaltered.” See also Knight, J, Kontra, C & Channel, B. 2010. *Ontario Workplace Safety and Insurance Act: Quick reference*. Toronto: Carswell. At 1.

<sup>219</sup> Ontario Workplace Tribunals Library. 2009. *Workers’ compensation law: A documentary history in Ontario*. At 1–2. Retrieved on 10/08/2012 from <http://www.owtlibrary.on.ca/english/print/wcl.pdf>.

These principles known as the “historic trade-off”<sup>220</sup> influenced the development and interpretation of compensatory legislation until today and are still applied by the courts and taken into account in the consideration of legislative changes.<sup>221</sup>

Developments were introduced with time as the need arose generally based on reports e.g. Middleton Report: *The Report of the Commissioner in the matter of The Workmen’s Compensation Act 1932*;<sup>222</sup> the Roach Report (1950)<sup>223</sup> enquired and reported *inter alia* on compensation scales, payment of claims, occupational diseases, assessments, appeals, rehabilitation<sup>224</sup> and the composition of the Board;<sup>225</sup> the McGillivray Report (1967)<sup>226</sup> concentrated on the operation and structure of the Board; the Task Force (1973) again examined the administration of workers’ compensation.<sup>227</sup> Weiler<sup>228</sup> (1980),<sup>229</sup> was appointed under pressure from the Union of Injured Workers to do a comprehensive inquiry into all aspects pertaining to workers’ compensation<sup>230</sup> and it led to fundamental changes in the benefit scheme by introducing a dual system aiming to replace actual wage loss

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<sup>220</sup> See furthermore Chapter 3 paras 4.2.4 & 5.2; Chapter 4 para 3.2.2 (*Puddicombe*); also Chapter 5 & Chapter 6.

<sup>221</sup> IAVGO Community Legal Clinic. 2011. *WSIB Funding Review: Submissions of IAVGO Community Legal Clinic*. At 5–8. Retrieved on 24/07/2013 from <http://www.wsibfundingreview.ca/pdf/IAVGO%20submission.pdf>.

<sup>222</sup> Ontario Workplace Tribunals Library 2.

<sup>223</sup> Ontario (Lieutenant Governor). 1950. *Report on the Workmen’s Compensation Act*. Toronto: Baptist Johnston. The Honourable Mr. Justice Roach, Commissioner was appointed to inquire into and report upon, and to make recommendations regarding *The Workmen’s Compensation Act upon subjects other than detail administration*. Retrieved on 11/08/2013 from <http://www.ontla.on.ca/library/repository/mon/25007/15417.pdf>.

<sup>224</sup> *Ibid* 106 distinguished between medical rehabilitation and vocational rehabilitation which includes return-to-work. No formal programmes to the latter were in place at the time but employers were expected to provide suitable work placements for injured workers similar to the current regime under COIDA.

<sup>225</sup> Ontario Workplace Tribunals Library 3.

<sup>226</sup> *Ibid* 3.

<sup>227</sup> *Ibid* 3.

<sup>228</sup> Ontario (Provincial Government). Ministry of Labour. 1980. *Reshaping workers’ compensation for Ontario*. Toronto: Ministry of Labour. Hereinafter: Weiler Report. Weiler reasons that workers’ compensation is placed between tort liability and social welfare as a mechanism of compensation for loss of income at 13. Retrieved on 11/08/2013 from <http://archive.org/details/reshapingworkers00weil>.

<sup>229</sup> Ontario Workplace Tribunals Library 6–7. The first Weiler report explored the philosophical foundations of workers’ compensation and proposed changes to the benefits scheme and the second report dealt with occupational diseases and the third report (1981) revisited the proposed benefit scheme and introduced a dual system replacing the “actual wage loss” system with a system of “projected wage loss”.

<sup>230</sup> Ontario Workplace Tribunals Library 4–6.



basis with a projected wage loss system<sup>231</sup> taking into account factors such as the employee's vocational characteristics, prospects for rehabilitation<sup>232</sup> and the availability of suitable employment with regard to the employee's reduced capacity as well as compensation for pain and suffering.<sup>233</sup> It also introduced the creation of the Workers' Compensation Appeals Tribunal, a tripartite structure with representatives from employers and employees under the chairmanship of a neutral party; as well as, consultative and advisory services for employers and employees in the form of the Office of the Worker Advisor and Office of the Employer Advisor.<sup>234</sup>

#### **4.4. Canadian compensatory legislative framework**

Canada has various compensatory laws and not all of them will be discussed in this study. Each jurisdiction, including the Federal Government of Canada, has enacted at least one compensatory law but certain provinces enacted more than one statute, some of which provide for specific groups (e.g. Alberta has the Blind Workers Compensation Act RSA 2000 cB 4 as well as the Workers' Compensation Act, RSA 2000, c W-15).

The general trend in Canada is that all jurisdictions follow a similar structure and policy though not identical, with regard to compensatory legislation.<sup>235</sup> The Northwest Territories and Nunavut are regulated by the same compensation

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<sup>231</sup> *Ibid* 6–7.

<sup>232</sup> Weiler Report at 22, distinguished three forms of rehabilitation i.e. medical and physical, vocational and economic, and thirdly social and psychological. The rippling effect of the injured worker's trauma ought to be reduced by medical care, retraining and relocation to increase economic productive employment and create income security to combat the social problems associated with occupationally-injured people in the form of "frustrations, alcoholism, sexual difficulties, and family breakdowns".

<sup>233</sup> Derstine, D & Nathu, S. 1990. Workers' compensation in Ontario: A decade of reform. *University of Toronto Faculty of Law Review* 48, Winter: 22-47. Retrieved on 11/08/2013 from [http://utflr.law.utoronto.ca/utfl\\_file/count/media/UTLFR/utflr48/06\\_48UTorontoFacLRev22\(1990\).pdf](http://utflr.law.utoronto.ca/utfl_file/count/media/UTLFR/utflr48/06_48UTorontoFacLRev22(1990).pdf).

<sup>234</sup> Ontario Workplace Safety and Insurance Appeals Tribunal. 2010. *History of the Tribunal*. Retrieved on 11/08/2013 from <http://www.wsiat.on.ca/english/about/history.htm>.

<sup>235</sup> Canada (Federal Government). Auditor General of Canada. 2006. *Report on the Workers' Compensation Board of the Northwest Territories and Nunavut*. Auditor General of Canada: Ottawa: Ontario. At 3. Hereinafter: Auditor General's Report 2006. Retrieved on 25/07/2013 from <http://www.oag-bvg.gc.ca/internet/docs/200606wcbce.pdf>.

authority and share the same legislation.<sup>236</sup> The Territory of Nunavut was established in 1999 when it became independent from the Northwest Territories.<sup>237</sup> The two governments agreed to maintain the existing Workers' Compensation Board.<sup>238</sup> Where provinces share legislative measures, compensation authorities and industry characteristics, they will be grouped together for purposes of this study. For ease of reference the name of the province rather than the name of the specific act will be used in this study e.g. Ontario or Ontario Act rather than Ontario: Workplace Safety and Insurance Act, 1997, S.O. 1997, c. 16, Sch. A.

#### 4.5. Problematic issues

Ison argues that workers' compensation systems ought to be unambiguous while the Canadian system is increasingly complicated with the inclusion of pressure groups in the appointment of commissions of enquiry in contrast to single person commissions who ought to be independent but experienced as Meredith.<sup>239</sup> He contended that recent changes were made without thorough investigative processes, under pressure by interest groups, resulting in complicated social insurance systems since the practice of single person commissions fell in disuse.<sup>240</sup> Meredith's research showed workers insisted:<sup>241</sup>

- (1) That the law of Ontario is entirely inadequate in the conditions under which industries are now carried on to provide just compensation for those employed in them who meet with injuries, or suffer from industrial diseases contracted in the course of their employment; and
- (2) that under a just law the risks arising from these causes should be regarded as risks of the industries and that compensation for them should be paid by the industries.

Employers agreed to Meredith's proposals except for the inclusion of "industrial diseases". Although the Meredith Commission consisted of only one person, he consulted with all relevant stakeholders over the period from 1910 until 1913.

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<sup>236</sup> *Ibid* 3-4.

<sup>237</sup> Campbell Cohen Law Firm. [Sa]. About Nunavut. Retrieved on 25/07/2013 from <http://www.canadavisa.com/about-nunavut.html>.

<sup>238</sup> Auditor General's Report 2006: 3-4.

<sup>239</sup> Ison 1996: 807-833.

<sup>240</sup> *Ibid*.

<sup>241</sup> Meredith Report.

As with the *Jooste* and *Mankayi* court cases in South Africa, the principle underlying the historic trade-off<sup>242</sup> was also challenged in the Canadian courts, e.g. the Alberta Court of Queens' Bench reviewed it in *Wilson v City of Medicine Hat*<sup>243</sup> and in *Budge v Alberta (W.C.B.)*<sup>244</sup> with the Supreme Court of Newfoundland dealing with *Reference Re Sections 32 and 34 of the Workers' Compensation Act (Nfld)*<sup>245</sup> and the High Court of Justice in *Medwid v Ontario*.<sup>246</sup>

Mckenna<sup>247</sup> examined the relevancy of the historic trade-off in current circumstances which differs remarkably from circumstances at the time of the negotiated compromise in an article entitled: "*Workers' Compensation: The Historic Compromise Compromised?*" The application of the historic trade-off principle in modern compensatory legislation is criticised taking into account current workplace and economic conditions as well as health conditions like burnout and mental stress associated with the modern work environment. He suggests the "...historic compromise must be renegotiated. A key element of such renegotiation should be clear, fair, and functional criteria and processes for determining causation of workplace stress and burnout."<sup>248</sup>

For the purposes of this study, only one Canadian act (the particular act will be determined based on the topic under discussion), the principal workers' compensatory act as per province, will be compared to COIDA with regard to each particular subject matter.

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<sup>242</sup> Knight *et al* 1. The authors reason that despite attacks on the historic trade-off in courts, together with collective liability, it remains fundamental to compensatory legislation.

<sup>243</sup> *Wilson v Medicine Hat (City of)*, 2000 ABCA 247 (CanLII). An appeal to this decision was upheld by the Court of Appeal of Alberta. Hereinafter: *City of Medicine Hat* or *City of Medicine Hat* ruling. Retrieved on 23/03/2013 from <http://canlii.ca/t/5rq8>.

<sup>244</sup> *Budge v Alberta (Workers' Compensation Board)*, 1987 CanLII 3184 (AB Q.B.). Hereinafter: *Budge*. Retrieved on 23/03/2013 from <http://canlii.ca/t/27w0z>.

<sup>245</sup> *Reference re: Validity of Sections 32 and 34 of the Workers' Compensation Act*, 1983 44 DLR. Hereinafter: *Reference re*. Retrieved on 25/03/2013 from <http://canlii.ca/t/1nplb>.

<sup>246</sup> *Medwid v Ontario*, 1988 CanLII 193 (ON SC). Hereinafter: *Medwid*. Retrieved on 25/01/2011 from <http://canlii.ca/t/1p77z>.

<sup>247</sup> McKenna, I. 2000. Workers' compensation: The historic compromise compromised? *Alta. L. Rev.* 38(2): 578–589. Retrieved on 24/05/2012 from <http://0-heinonline.org.oasis.unisa.ac.za/HOL/Page?handle=hein.journals/alblr38&id=590&collection=journals&index=journals/alblr>.

<sup>248</sup> *Ibid*.

## 4.6. Summary

Canadian workers' compensatory legislation is based on principles laid down by Chief Justice Meredith and which led to the law in Ontario and influenced legislation in all Canadian jurisdictions as well as internationally including South Africa. It aims at creating a balance between the interests of employers and employees and encompasses the principle known as the "historic trade-off" according to which employees abrogated the right to sue at common law in exchange for no-fault compensation through an administrative means.<sup>249</sup>

## 5. AUSTRALIA

### 5.1. Introduction

The Australian Federation came into existence by virtue of the Commonwealth of Australia Constitution Act 1900<sup>250</sup> and currently comprises of six autonomous States (New South Wales, Queensland, South Australia, Tasmania, Victoria and Western Australia) and ten territories of which only three have limited self governing authority (Australian Capital Territory, The Northern Territory and Norfolk Island).<sup>251</sup> The Commonwealth of Australia Constitution Act 1900 does not include a Bill of Rights similar to South Africa or Canada but that does not mean that Human Rights do not form an integral part of Australian law.<sup>252</sup> The Australian Human Rights Commission stated that it can be found in the Australian Constitution,<sup>253</sup> in common law<sup>254</sup> and other legislation reflecting human rights

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<sup>249</sup> Chapter 2 fn 213–220 *supra*.

<sup>250</sup> Commonwealth of Australia Constitution Act 1900. Retrieved on 26/07/2013 from [http://www.aph.gov.au/About\\_Parliament/Senate/Powers\\_practice\\_n\\_procedures/Constitution/preamble](http://www.aph.gov.au/About_Parliament/Senate/Powers_practice_n_procedures/Constitution/preamble).

<sup>251</sup> Australian Government. [Sa]. *Australia's federation*. Retrieved on 30/07/2011 from <http://australia.gov.au/about-australia/our-government/australias-federation>.

<sup>252</sup> Australia (Commonwealth). [Sa]. Australian Human Rights Commission. *How are human rights protected in Australian law?* Retrieved on 27/07/2013 from <https://www.humanrights.gov.au/how-are-human-rights-protected-australian-law>.

<sup>253</sup> *Ibid*. The Australian Constitution provides for the right to vote (s 41); protection of property rights (s 51); the right to a trial by jury (s 80); freedom of religion (s 116) & prohibition of discrimination on the basis of State of residency (s 117).

<sup>254</sup> *Ibid*. The Australian common law is inherited from the United Kingdom specifically the *Magna Carta* (1215) which can be considered to be the first human rights treaty.

values.<sup>255</sup> The absence of a Bill of Rights creates a situation of the non-existence of constitutional remedies in Australia but the Human Rights Commission may make recommendations to the Parliament as was done on legislation discriminating against same sex couples.<sup>256</sup> The sources of human rights reflect a lack of socio-security rights. Although Victoria and the Australian Capital Territory enacted human rights laws, they do not have constitutional status; they remain ordinary laws of Parliament.<sup>257</sup> The Australian Federal Government does not have explicit constitutional jurisdiction on occupational health and safety or compensatory matters.<sup>258</sup>

All Australian jurisdictions enacted workers' compensatory legislation, and some jurisdictions enacted multiple laws to provide for different fields of work e.g. New South Wales enacted *inter alia* the following workers' compensatory laws: The Workers' Compensation (Dust Diseases) Act 14 of 1942; The Associated General Contractors Insurance Company Limited Act 38 of 1980; The Workers Compensation (Bush Fire, Emergency and Rescue Services) Act 83 of 1987; The Workers Compensation Act 70 of 1987; The Coal Industry Act 107 of 2001; The Workplace Injury Management and Workers Compensation Act 86 of 1998. For purposes of this study, discussions will be limited to one act, the principal act on workers' compensation, per aspect per State, unless it is prudent to discuss more than one.

## 5.2. Australian court structure and compensatory legislation

Australia and Canada<sup>259</sup> have similar federal systems of government which includes self governing states and territories with different degrees of legislative power in both<sup>260</sup> but in contrast to South Africa's<sup>261</sup> one national legislative government.

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<sup>255</sup> *Ibid.*

<sup>256</sup> *Ibid.*

<sup>257</sup> Saunders, C. 2010. The Australian Constitution and our rights, in *Future Justice*. At 117. Retrieved on 27/07/2013 from [http://www.futureleaders.com.au/book\\_chapters/pdf/Future\\_Justice/Cheryl\\_Saunders.pdf](http://www.futureleaders.com.au/book_chapters/pdf/Future_Justice/Cheryl_Saunders.pdf).

<sup>258</sup> Productivity Commission Report (2004): 112.

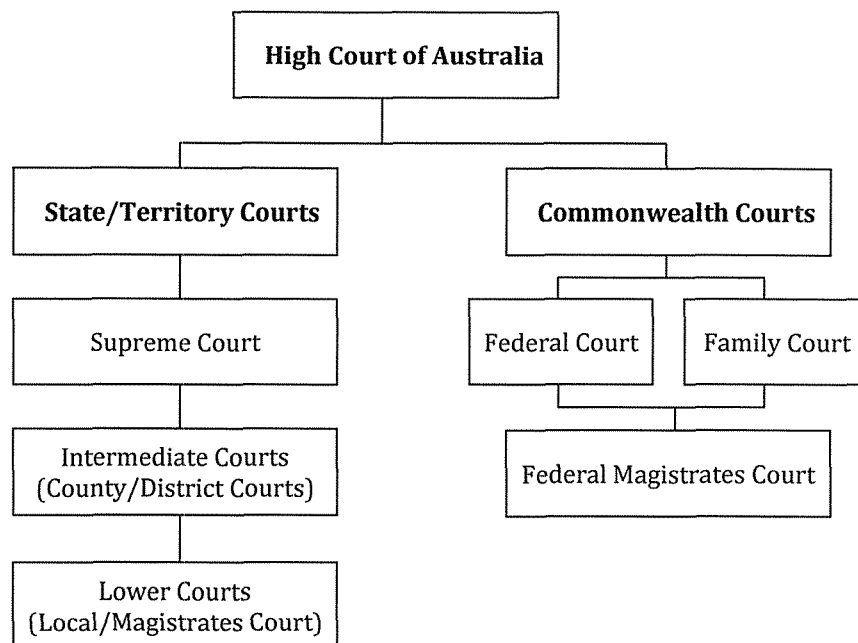
<sup>259</sup> See Chapter 2 paras 4.1 & 4.2 *supra*.

<sup>260</sup> Bassam 6.

<sup>261</sup> Chapter 2 para 3.1 *supra*.

Australian compensatory legislation shares certain characteristics to the South African labour milieu e.g. the mining industry. Similar to Canada and South Africa, Australia shares characteristics of the English mercantile law as it falls within the common law tradition.<sup>262</sup> Both Canada as well as Australia have specific provisions for Federal Government employees separate from the provincial legislative provisions pertaining to workers' compensatory legislation.<sup>263</sup>

The Australian Court system can be depicted schematically as follows:<sup>264</sup>



The Commonwealth Constitution established the High Court of Australia as the highest court<sup>265</sup> and final court of appeal<sup>266</sup> (dependent upon approval of leave to appeal following an application to the High Court) and it has jurisdiction over Federal, State and Territorial matters.<sup>267</sup> Its jurisdiction includes interpretation of

<sup>262</sup> Bassam 2.

<sup>263</sup> Government Employees Compensation Act, R.S.C. 1985 (Canada); Safety, Rehabilitation and Compensation Act 75 of 1988 (Australia).

<sup>264</sup> Harvey A. 2009. *Hierarchy of the Australian courts*. Retrieved on 12/07/2013 from <http://andrewharvey4.wordpress.com/2009/09/19/genl2021-introduction-to-the-australian-legal-system-my-lecture-notes/>.

<sup>265</sup> Australia Constitution s 71.

<sup>266</sup> Australia Constitution s 73.

<sup>267</sup> Australia Constitution s 73. Also: New South Wales Bar Association. 2013. *Court structure, judges' titles and order of seniority*. At 6-7. Retrieved on 12/07/2013 from [http://www.nswbar.asn.au/docs/resources/structure\\_2013.pdf](http://www.nswbar.asn.au/docs/resources/structure_2013.pdf).

the Commonwealth Constitution and legal disputes between Federal and State or Territory courts.<sup>268</sup> Appeals may be heard from matters heard in the High Court itself, Federal Courts or State Supreme Courts.<sup>269</sup>

The Federal Court considers civil matters derived from federal law and Constitutional issues, industrial cases, corporations, trade practices as well as judicial reviews and federal tax cases.<sup>270</sup> Appeals are heard from rulings by a single judge and rulings by the Federal Magistrates Court (non-family law matters) and decisions by the States' Supreme Courts on federal matters.<sup>271</sup> Some of the Federal Court's judges are the Presidents or Deputy Presidents of the Administrative Appeals Tribunal<sup>272</sup> that also hears appeals and reviews regarding workers compensation cases.<sup>273</sup>

The Federal Magistrates Court was established to provide uncomplicated and accessible judicial service and to decrease the workload of the Family Court of Australia and the Federal Court of Australia using conciliation, counselling and mediation where appropriate.<sup>274</sup> Although family law comprises of about 80% of the Federal Magistrates Court's work, jurisdiction includes also admiralty, insolvency, patent rights, migration, unlawful discrimination and workplace relations law.<sup>275</sup> Appeals on general federal matters from the Federal Magistrates Court lie to the Federal Court of Australia and on family matters to the Family Court of Australia.<sup>276</sup>

The different States and Territories have individualised judicial structures but in general it consists of a Supreme Court at the top of the hierarchy with jurisdiction over civil and criminal matters and appellate as well as original jurisdiction.<sup>277</sup>

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<sup>268</sup> Australia Constitution s 76. New South Wales Bar Association 4 & 6.

<sup>269</sup> New South Wales Bar Association 6.

<sup>270</sup> *Ibid* 8.

<sup>271</sup> *Ibid* 8.

<sup>272</sup> *Ibid* 9.

<sup>273</sup> *Ibid* 21.

<sup>274</sup> *Ibid* 9–10.

<sup>275</sup> *Ibid* 11.

<sup>276</sup> *Ibid* 12.

<sup>277</sup> Australian Post Graduate Network. [Sa]. Retrieved on 16/07/2013 from <http://www.alpn.edu.au/court-hierarchy>.

District and County Courts, presided over by a judge, are lower in hierarchical order to the Supreme Court followed by Magistrate and Local Courts as the lowest in ranking order of these four courts.<sup>278</sup> Each State also has specialised courts and tribunals which is important to workers' compensatory matters e.g. the Administrative Decisions Tribunal in New South Wales.<sup>279</sup>

Different from both South Africa and Canada, the Australian judicial system was supplemented by a comprehensive integrated administrative tribunal system<sup>280</sup> in 1976 (appreciated by South African and Canadian lawyers)<sup>281</sup> dealing with specific areas of law aimed at speedy resolutions<sup>282</sup> e.g. the Administrative Appeals Tribunal providing a means of review which is considered to be "fair, just economical, informal and quick"<sup>283</sup> as tribunals are viewed to be the first and most accessible mechanism of review of executive decisions.<sup>284</sup> The Administrative Appeals Tribunal<sup>285</sup> reviews administrative decisions on merit, made by Commonwealth Government officials, authorities, other Tribunals and bodies on the federal sphere of government<sup>286</sup> as a general jurisdictional tribunal regarding decisions pursuant to more than 400 enactments.<sup>287</sup> Decisions may be confirmed, varied or set aside in matters that are specifically regulated by statutes and legislative instruments conferring jurisdiction on the Appeals Tribunal. Subject matters range from taxation and social security to workers' compensation and immigration.<sup>288</sup> The Administrative Decisions (Judicial Review) Act 59 of 1977, codified the grounds for judicial review and compelled decision-makers to provide written reasons for decisions.<sup>289</sup>

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<sup>278</sup> *Ibid.*

<sup>279</sup> *Ibid.*

<sup>280</sup> Armstrong 76.

<sup>281</sup> Creyke 65.

<sup>282</sup> New South Wales Bar Association 4.

<sup>283</sup> *Ibid* 20.

<sup>284</sup> Groves, M & Lee, HP (eds). 2007. *Australian administrative law: Fundamentals, principles and doctrines*. Cambridge: Cambridge University Press) at vii.

<sup>285</sup> Robinson, MA. 2007. The explosion in administrative law at the State level. Paper delivered at Seminar of the Australian Institute of Administrative Law, NSW Chapter. At 1. The Administrative Appeals Tribunal is described as a super-tribunal. Retrieved on 04/05/2012 from <http://www.robinson.com.au/monoartpapers/articles/MAR%20Explosion%20in%20Administrative%20Law%20at%20the%20State%20Level%2021%20June%202007.pdf>.

<sup>286</sup> New South Wales Bar Association 21.

<sup>287</sup> Groves 80.

<sup>288</sup> New South Wales Bar Association 21.

<sup>289</sup> Armstrong 78.



Besides the Northern Territory and Queensland, all other States introduced similar Administrative Appeals Tribunals to the Commonwealth scheme but in South Australia and Tasmania, review forms part of the functions of a dedicated division of the District or Magistrates Court.<sup>290</sup> A tribunal's jurisdiction is limited to the corners of the enabling act<sup>291</sup> and can also be found in the nature of the decisions it may review.<sup>292</sup>

The South Australian Supreme Court considered the limitation set by the South Australian Workers Rehabilitation and Compensation Act 1986 in the case of *South Australian Fire and Emergency Services Commission v Workers Compensation Tribunal & Anor*<sup>293</sup> by limiting jurisdiction in appeals to questions of law<sup>294</sup> in section 86.<sup>295</sup> The right to appeal as well as the jurisdiction to consider an appeal by the Workers Compensation Tribunal is limited to the statutory provision which may only involve a question of law<sup>296</sup> irrespective of how the ground for appeal is framed.<sup>297</sup> The Full Bench of the Tribunal is not authorised to determine its own jurisdiction<sup>298</sup> because *inter alia*, the enabling Act does not constitute the Workers Compensation Tribunal as a court although its decision when made within its jurisdiction is "final and conclusive".<sup>299</sup> The Court held that it is the expressed intent of the Act to restrict litigation over determinations by the Tribunal and the Act in its totality provides for speedy conclusions and informal hearings of workers' compensation claims in the most efficient and cost effective manner possible.<sup>300</sup> It would contradict the legislative policy to allow "erroneous decisions of the Full Bench which expand its jurisdiction to include controversies over factual questions".<sup>301</sup> The Supreme Court found that a decision of the Tribunal will be final

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<sup>290</sup> Groves 83.

<sup>291</sup> *Ibid* 86.

<sup>292</sup> *Ibid* 87.

<sup>293</sup> [2009] SASC 213. Hereinafter: *South Australian Fire and Emergency Services Commission*. Retrieved on 08/12/2011 from <http://www.austlii.edu.au/au/cases/sa/SASC/2009/213.html>.

<sup>294</sup> COIDA similarly limits appeals to questions of interpretation in s 9(5).

<sup>295</sup> *South Australian Fire and Emergency Services Commission* [3] & [40].

<sup>296</sup> *Ibid* [43].

<sup>297</sup> *Ibid* [44].

<sup>298</sup> *Ibid* [45].

<sup>299</sup> *Ibid* [46] & [49].

<sup>300</sup> *Ibid* [48].

<sup>301</sup> *Ibid* [48].

if it limits itself to the boundaries of its jurisdiction and the task of the Supreme Court is to be the guardian as to such limitations.<sup>302</sup>

### 5.3. A synopsis of the history of compensatory legislation in Australia

The first attempt at compensatory legislation in Australia was in New South Wales (1882) after which South Australia (1884), Victoria and Queensland (1886), Western Australia (1894) and Tasmania (1895) followed.<sup>303</sup> These laws followed in the footsteps of the British Employers' Liability Act 1880 which had only restricted application to manual workers and injuries sustained in limited situations with meagre compensation.<sup>304</sup>

No-fault workers' compensatory legislation was only introduced into Australia by Western Australia in 1902, followed by the other States with Victoria to be the last in 1914. The first Commonwealth Seamen's Compensation Act 29 of 1909, was found to be invalid by the High Court of Australia. The Northern Territory and the Australian Capital Territory only enacted compensatory legislation in 1931.<sup>305</sup>

The history of compensatory legislation in Australia is characterised by periods of few legislative changes followed by periods of rapid and often broad legislative changes. Changes in increased rights to compensation were often enacted by Labour Governments while Conservative Governments were inclined to restrain the rights under pressure of the cost burden to businesses which suggests the socio-political undertones in workers' compensation that characterised it from inception in Germany.<sup>306</sup>

In 1926 the Labour Government in New South Wales widened the eligibility test by changing the conjunctive noun "and" to the disjunctive "or" in the test phrase "out of

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<sup>302</sup> *Ibid* [49].

<sup>303</sup> Winder 277-287.

<sup>304</sup> *Ibid*.

<sup>305</sup> Ballard, J & Sirca, H. 1991. *Annotated Commonwealth Employee's Rehabilitation and Compensation Act 1988*. Annandale: Federation Press. At: Introduction ix.

<sup>306</sup> Purse, K. 2005. The evolution of workers' compensation policy in Australia. *Health Sociology Review* 14(1): 8-20. Hereinafter: Purse 2005. Retrieved on 07/05/2012 from <http://0-search.informit.com.au.oasis.unisa.ac.za/fullText;dn=200509528;res=APAFT>.

and in the course of employment”.<sup>307</sup> This amendment was repealed in 1929 by the then Conservative Government. It was reintroduced later and by the end of World War II all the Australian States had changed the wording of their workers’ compensatory laws to the disjunctive form of the test.<sup>308</sup> The pattern repeated itself with the right to compensation for commuting injuries to and from work.<sup>309</sup> Queensland replaced the word “accident” by defining an “injury” to allow compensation to an employee who is not injured in an accident but suffering from a condition as a consequence of work. It also introduced full wages in respect of income replacement for the first 26 weeks of disability in 1972 while rehabilitation was particularly provided for the next year.<sup>310</sup> All the jurisdictions except Queensland (which embarked on a publicly-underwritten compensation system in 1916) had expensive systems of manifold private insurers,<sup>311</sup> meagre compensation and financial instability by 1970.<sup>312</sup> During the 1970’s changes involved an increase in the level of earnings replacement compensation while the 1980’s were marked by the introduction of rehabilitation and return-to-work programmes<sup>313</sup> aimed at reducing costs<sup>314</sup> as the financial liabilities reached a crisis level of being under-reserved by 31%.<sup>315</sup> An extension of the duration of income replacement payments was also enacted.<sup>316</sup>

The common law right to claim damages from employers was restricted to claims for non-economic loss.<sup>317</sup> (Although limited over time, the right to sue employers for

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<sup>307</sup> This test phrase and its application will be discussed in Chapter 4.

<sup>308</sup> Purse 2005: 12.

<sup>309</sup> *Ibid* 13.

<sup>310</sup> Queensland Parliament. Finance and Administration Committee. 2013. *Report No. 28, Inquiry into the operation of Queensland’s Workers’ Compensation Scheme*. Brisbane: Government Printer. At 5. Hereinafter: Queensland Workers’ Compensation Inquiry 2013. Retrieved on 12/08/2013 from

<http://www.parliament.qld.gov.au/Documents/TableOffice/TabledPapers/2013/5413T2695.pdf>.

<sup>311</sup> Monash University. Institute for Safety, Compensation and Recovery Research. 2011. *‘To strike a balance’ A history of Victoria’s Workers’ Compensation Scheme, 1985–2010 (Monash University Research report #: R1-011-018)*. Clayton: Monash University Publishing. At 25 it is reported that Victoria alone had 69 private insurers which was replaced in 1985 with one primary insurer and 9 others appointed after a tender process. Hereinafter: ISCRR. Retrieved on 14/08/2013 from <http://www.iscrr.com.au/reports-pubs/research-reports/worksafehistory.pdf>.

<sup>312</sup> ISCRR 6.

<sup>313</sup> *Ibid* 20.

<sup>314</sup> Purse 2005: 15.

<sup>315</sup> ISCRR 10.

<sup>316</sup> Purse 2005: 14–15.

<sup>317</sup> *Ibid* 15–16.

negligence remained part of the Australian compensatory legislation from the initial introduction of compensatory legislation<sup>318</sup> while in South Africa and in Canada<sup>319</sup> it was removed with the enactment of compensatory legislation as part of the historic trade-off).<sup>320</sup>

Amendments between 1990 and 1996 in Queensland included *inter alia* the inclusion of “significant contributing factor” into the requirements pertaining to the definition of “an injury”<sup>321</sup> as part of the prerequisites to establish causality and the irrevocable election whether to pursue<sup>322</sup> at common law.<sup>323</sup>

In Victoria the failed amendments of the 1980’s led to the biggest strike action in Victorian history since 1970 in late 1992 which was followed with the promulgation of a new Act soon after a new government was elected.<sup>324</sup> The new Act introduced *inter alia* the concept of a “serious injury” in section 134AB<sup>325</sup> (still presently applied) as prerequisite for the right to pursue at common law; and income replacement benefits ceased after 104 weeks unless the employee was seriously injured or permanently disabled.<sup>326</sup> These changes and risk rated premiums enhanced health and safety performance which in turn led to the financial turnaround of the compensation scheme in Victoria.<sup>327</sup> Although the announcement of the removal of the right to sue at common law in 1997 was followed by consecutive protests,<sup>328</sup> the Bill was passed and came into effect on 23 December 1997. Emotions ran high during debate in the Lower House of Victoria, with monopoly money thrown in the public gallery<sup>329</sup> and the shouting of “shame, shame”.<sup>330</sup> The right to institute common law proceedings was reintroduced in

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<sup>318</sup> *Ibid* 11.

<sup>319</sup> Barring of the right to pursue at common law will be discussed in Chapter 6.

<sup>320</sup> Purse 2005: 11.

<sup>321</sup> The definition of an injury will be dealt with in Chapter 4.

<sup>322</sup> The right to pursue at common law will be discussed in Chapter 6.

<sup>323</sup> Queensland Workers’ Compensation Inquiry 2013 at 5.

<sup>324</sup> ISCR 43–44.

<sup>325</sup> The concept of “serious injury” will be dealt with at Chapter 6 paras 4.1; 4.3.1; 4.3.2; 4.3.3 & 4.3.4.

<sup>326</sup> ISCR 45.

<sup>327</sup> *Ibid* 48.

<sup>328</sup> *Ibid* 52.

<sup>329</sup> The monopoly money was represented of the money that workers stand to lose with the removal of the right to pursue at common law. ISCR 53.

<sup>330</sup> ISCR 53.

2000 but access was restricted.<sup>331</sup> Financial stability followed<sup>332</sup> and Victoria took the bold step of voluntarily screening workers for preventable diseases since 2008.<sup>333</sup> In the recent past, Australia embarked on a programme of national harmonisation of both occupational health and safety and workers' compensation.<sup>334</sup>

#### 5.4. Australian compensatory legislative framework

Various compensatory laws are effective in the Australian Commonwealth because each jurisdiction has enacted at least one compensatory law of which eleven<sup>335</sup> of the workers' compensatory laws are considered to be the "principal" statutes with main objectives to provide satisfactory monetary compensation, appropriate rehabilitation and reintegration into the workplace, affordability of premiums and fully funded by employers.<sup>336</sup> The differences can be ascribed to differences in demographics and social, economic and cultural factors designing the particular scheme.<sup>337</sup> The multiplicity of compensatory laws is viewed as one of the reasons for burdening the economy, employees and employers with inadequacies and encumbers employers to comply with health and safety requirements and expenses.<sup>338</sup> Multi-state employers are faced with compliance and cost burdens as each of the workers' compensatory laws "reflects community norms, evolving workplace arrangements and the legal and medical practices of that particular jurisdiction".<sup>339</sup> In addressing these problems as well as the concerns of a growing mobile labour force, the Productivity Commission proposed an alternative national scheme operating in addition to the existing schemes to provide national coverage.<sup>340</sup> Furthermore, a formal review mechanism is proposed to increase the

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<sup>331</sup> *Ibid* 56.

<sup>332</sup> *Ibid* 62.

<sup>333</sup> *Ibid* 63.

<sup>334</sup> *Ibid* 70.

<sup>335</sup> Queensland Workers' Compensation Inquiry 2013 at 9.

<sup>336</sup> Productivity Commission Report (2004) at XXII indicates ten principal workers' compensatory laws in Australia.

<sup>337</sup> Purcal, S & Wong, A. 2007. *Australian workers' compensation: A review*. At 1. Retrieved on 14/08/2013 from [http://wwwdocs.fce.unsw.edu.au/actuarial/research/papers/2007/AustWorkComp\\_Purcal.pdf](http://wwwdocs.fce.unsw.edu.au/actuarial/research/papers/2007/AustWorkComp_Purcal.pdf).

<sup>338</sup> Productivity Commission Report (2004): XXII.

<sup>339</sup> *Ibid* XXIII.

<sup>340</sup> *Ibid* XXIII.

level of consistency and uniformity between jurisdictions with time to benefit all employees, employers and the economy.<sup>341</sup> However, it was not well received and during the inquiry phase the Queensland Law Society referred to it in lucid terms in its submission to the Productivity Commission. It warned that the presentations to the Commission opened a “debate upon irreconcilable differences in those schemes which have been identified by governments as properly within the sovereign decision-making powers of the respective States and Territories”.<sup>342</sup> The Law Society was very clear on its stance and submitted that:<sup>343</sup>

...it is unrealistic to contemplate legislating for “consistent workers’ compensation programs across Australia” or for a “consistent benefits structure”. The existing Australian schemes are simply not amenable to a “one size fits all” approach. Matters such as common definitions can, as has been mentioned above, be addressed by amendments agreed between all jurisdictions and enacted in their respective legislation and no special Commonwealth legislation is required to effect that accord.

Similar to Canada, some of the Australian States have more than one compensatory law specific to a particular group<sup>344</sup> e.g. New South Wales enacted the Workers Compensation (Bush Fire, Emergency and Rescue Services) Act 83 of 1987 as well as the Workers Compensation Act 70 of 1987. Similar to Canada, not all of the Australian laws will be perused for the purposes of this study but only one act per aspect under discussion and for ease of reference the name of the State will be utilised rather than the name of the specific act, e.g. New South Wales rather than New South Wales Workers Compensation Act 70 of 1987.<sup>345</sup>

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<sup>341</sup> *Ibid* XXIII.

<sup>342</sup> Queensland Law Society. 2003. *Accident compensation submission re Workers’ Compensation*. (Sullivan, T.: President). At 1. Hereinafter: Queensland Law Society Submission 2003. Retrieved on 14/08/2013 from [http://www.pc.gov.au/\\_data/assets/pdf\\_file/0006/19626/sub097.pdf](http://www.pc.gov.au/_data/assets/pdf_file/0006/19626/sub097.pdf).

<sup>343</sup> *Ibid* 3.

<sup>344</sup> Productivity Commission Report (2004): XXII, XXX–XXXII & 5.

<sup>345</sup> Commonwealth: Safety, Rehabilitation and Compensation Act 75 of 1988. Retrieved on 12/06/2010 from [http://www.austlii.edu.au/au/legis/cth/num\\_act/ceraca1988534/](http://www.austlii.edu.au/au/legis/cth/num_act/ceraca1988534/).  
Australian Capital Territory: Workers Compensation Act 1951. Retrieved on 12/06/2010 from [http://www.austlii.edu.au/au/legis/act/consol\\_act/wca1951255/](http://www.austlii.edu.au/au/legis/act/consol_act/wca1951255/).  
New South Wales: Workers Compensation Act No 70 of 1987. Retrieved on 12/06/2010 from [http://www.austlii.edu.au/au/legis/nsw/consol\\_act/wca1987255/](http://www.austlii.edu.au/au/legis/nsw/consol_act/wca1987255/).  
Northern Territory: Workers Rehabilitation and Compensation Act 13 of 2008. Retrieved on 25/09/2010 from [http://www.austlii.edu.au/au/legis/nt/consol\\_act/wraca400/](http://www.austlii.edu.au/au/legis/nt/consol_act/wraca400/).  
Queensland: Workers’ Compensation and Rehabilitation Act 2003. Retrieved on 12/06/2010 from [http://www.austlii.edu.au/au/legis/nt/consol\\_act/wraca400/](http://www.austlii.edu.au/au/legis/nt/consol_act/wraca400/).

## 5.5. Problematic issues

Fragmentation is rife in Australian compensatory legislation due to the constitutional government system of the country which empowers each jurisdiction to govern independently and promulgate its own statutes as needs.<sup>346</sup> This resulted in eleven<sup>347</sup> different principal workers' compensatory laws with another twenty-nine subject specific statutes.<sup>348</sup> Fragmentation was increased by disparate

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South Australia: Workers Rehabilitation and Compensation Act 124 of 1986. Retrieved on 12/06/2010 from [http://www.austlii.edu.au/au/legis/sa/consol\\_act/wraca1986400/](http://www.austlii.edu.au/au/legis/sa/consol_act/wraca1986400/).

Tasmania: Workers Rehabilitation and Compensation Act 4 of 1988. Retrieved on 06/05/2012 from [http://www.austlii.edu.au/au/legis/tas/consol\\_act/wraca1988400/](http://www.austlii.edu.au/au/legis/tas/consol_act/wraca1988400/).

Victoria: Accident Compensation Act No. 10191 of 1985. Retrieved on 12/06/2010 from [http://www.austlii.edu.au/au/legis/vic/consol\\_act/aca1985204/](http://www.austlii.edu.au/au/legis/vic/consol_act/aca1985204/).

Western Australia: Workers' Compensation and Injury Management Act 44 of 1981. Retrieved on 12/06/2010 from [http://www.austlii.edu.au/au/legis/wa/consol\\_act/wcaima1981445/](http://www.austlii.edu.au/au/legis/wa/consol_act/wcaima1981445/).

<sup>346</sup> Purse, K, Guthrie, R & Meredith, F. 2004. Faulty frameworks: The Productivity Commission and workers' compensation. *Australian Journal of Labour Law*, 17(3): 306–316. Hereinafter: Purse 2004. Retrieved on 03/05/2012 from [http://ura.unisa.edu.au/R/?func=dbin-jump-full&object\\_id=unisa26596](http://ura.unisa.edu.au/R/?func=dbin-jump-full&object_id=unisa26596).

<sup>347</sup> Queensland Workers' Compensation Inquiry 2013 at 9.

<sup>348</sup> New South Wales: Associated General Contractors Insurance Company Limited Act 38 of 1980. Retrieved on 30/06/2011 from [http://www.austlii.edu.au/au/legis/nsw/num\\_act/agcicla1980n38564](http://www.austlii.edu.au/au/legis/nsw/num_act/agcicla1980n38564).

New South Wales: Bishopsgate Insurance Australia Limited Act 81 of 1983. Retrieved on 30/06/2011 from [http://www.austlii.edu.au/au/legis/nsw/num\\_act/biala1983n81411.pdf](http://www.austlii.edu.au/au/legis/nsw/num_act/biala1983n81411.pdf).

New South Wales: The Standard Insurance Company Act 18 of 1963. Retrieved on 05/08/2011 from [http://www.austlii.edu.au/au/legis/nsw/num\\_act/tsiclaicoica1963n18712.pdf](http://www.austlii.edu.au/au/legis/nsw/num_act/tsiclaicoica1963n18712.pdf).

New South Wales: Workers' Compensation (Brucellosis) Act 1979 (repealed in 2004). Retrieved on 30/06/2011 from [http://www.austlii.edu.au/au/legis/nsw/repealed\\_act/wca1979379/s2.html](http://www.austlii.edu.au/au/legis/nsw/repealed_act/wca1979379/s2.html).

New South Wales: Workers Compensation (Bush Fire, Emergency and Rescue Services) Act 83 of 1987. Retrieved on 03/07/2011 from

[http://www.austlii.edu.au/au/legis/nsw/num\\_act/wcfearsa1987n83621.pdf](http://www.austlii.edu.au/au/legis/nsw/num_act/wcfearsa1987n83621.pdf).

New South Wales: Workers' Compensation (Dust Diseases) Act 14 of 1942. Retrieved on 05/08/2011 from [http://www.austlii.edu.au/cgi-bin/sinodisp/au/legis/nsw/consol\\_act/wcda1942388/longtitle.html?stem=0&synonyms=0&query=Workers%20Compensation%20Dust%20Diseases%20Act%201942](http://www.austlii.edu.au/cgi-bin/sinodisp/au/legis/nsw/consol_act/wcda1942388/longtitle.html?stem=0&synonyms=0&query=Workers%20Compensation%20Dust%20Diseases%20Act%201942).

New South Wales: Workmen's Compensation (Lead Poisoning – Broken Hill) Act 31 of 1922. Retrieved on 05/08/2011 from

[http://www.austlii.edu.au/au/legis/nsw/num\\_act/wcpha1922n31513.pdf](http://www.austlii.edu.au/au/legis/nsw/num_act/wcpha1922n31513.pdf).

New South Wales: Coal Industry Act 107 of 2001. Retrieved on 03/07/2011 from [http://www.austlii.edu.au/au/legis/nsw/num\\_act/cia2001n107197.pdf](http://www.austlii.edu.au/au/legis/nsw/num_act/cia2001n107197.pdf).

Victoria: Victoria State Emergency Services Act 1987. Retrieved on 05/08/2011 from [http://www.austlii.edu.au/au/legis/vic/hist\\_act/vsesa1987330/](http://www.austlii.edu.au/au/legis/vic/hist_act/vsesa1987330/).

Victoria: Juries Act 53 of 2000. Retrieved on 05/08/2011 from

[http://www.austlii.edu.au/au/legis/vic/consol\\_act/ja200097/](http://www.austlii.edu.au/au/legis/vic/consol_act/ja200097/).

Victoria: Emergency Management Act 75 of 1986. Retrieved on 05/08/2011 from [http://www.austlii.edu.au/au/legis/vic/hist\\_act/ema1986190/](http://www.austlii.edu.au/au/legis/vic/hist_act/ema1986190/).

Victoria: Police Assistance Compensation Act 1968. Retrieved on 05/08/2011 from [http://www.austlii.edu.au/au/legis/vic/hist\\_act/paca1968307/](http://www.austlii.edu.au/au/legis/vic/hist_act/paca1968307/).

Victoria: Country Fire Authority Act 1958. Retrieved on 05/08/2011 from [http://www.austlii.edu.au/au/legis/vic/hist\\_act/cfaa1958292/](http://www.austlii.edu.au/au/legis/vic/hist_act/cfaa1958292/).

augmentation of benefits through legislative amendments in the different jurisdictions and resulted in the system being described as “dysfunctional”.<sup>349</sup>

A proposal for a National Framework with a “national Authority” on workers compensation in 1994 by the Industry Commission was met by strong resistance in 1994 and again in 1997.<sup>350</sup> The persistent need to harmonise coverage and compensation benefits while remaining sustainable eventually led to the founding of the Agreement by the States and Territories on Harmonisation of Workers Compensation and Occupational Health and Safety Arrangements (2006)<sup>351</sup> and subsequently the Heads of Workers’ Compensation Authorities to issue an action plan to harmonise coverage and benefits between the different jurisdictions for the

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Western Australia: Workers’ Compensation and Injury Management (Acts of Terrorism) Act 40 of 2001. Retrieved on 30/06/2011 from

[http://www.austlii.edu.au/au/legis/wa/consol\\_act/wcaimota2001629/](http://www.austlii.edu.au/au/legis/wa/consol_act/wcaimota2001629/).

Western Australia: Employer’ Indemnity Policies (Premium Rates) Act 96 of 1990. Retrieved on 30/06/2011 from [http://www.austlii.edu.au/au/legis/wa/consol\\_act/toc-E.html](http://www.austlii.edu.au/au/legis/wa/consol_act/toc-E.html).

Western Australia: Employers’ Indemnity Supplementation Fund Act 80 of 1980. Retrieved on 30/06/2011 from [http://www.austlii.edu.au/au/legis/wa/consol\\_act/toc-E.html](http://www.austlii.edu.au/au/legis/wa/consol_act/toc-E.html).

Western Australia: Waterfront Workers (Compensation for Asbestos Related Diseases) Act 22 of 1986. Retrieved on 05/08/2011 from

[http://www.austlii.edu.au/au/legis/wa/consol\\_act/wwfarda1986644/](http://www.austlii.edu.au/au/legis/wa/consol_act/wwfarda1986644/).

Western Australia: Workers’ Compensation (Common Law Proceedings) Act 35 of 2004. Retrieved on 30/06/2011 [http://www.austlii.edu.au/au/legis/wa/consol\\_act/wclpa2004459/](http://www.austlii.edu.au/au/legis/wa/consol_act/wclpa2004459/).

South Australia: Workmen’s Compensation Act 36 of 1971. Retrieved on 23/07/2011 from [http://www.austlii.edu.au/au/legis/sa/num\\_act/1971/](http://www.austlii.edu.au/au/legis/sa/num_act/1971/).

Tasmania: Workers’ (Occupational Diseases) Relief Fund Act 45 of 1954. Retrieved on 23/07/2011 from [http://www.austlii.edu.au/au/legis/tas/consol\\_act/wdrfa1954404/](http://www.austlii.edu.au/au/legis/tas/consol_act/wdrfa1954404/).

Australian Capital Territory: Workers Compensation Act 1951. Retrieved on 23/07/2011 from [http://www.austlii.edu.au/au/legis/act/num\\_ord/wco1951316/](http://www.austlii.edu.au/au/legis/act/num_ord/wco1951316/).

Common Wealth: Asbestos Related Claims (Management of Commonwealth Liabilities) Act 122 of 2005. Retrieved on 23/07/2011 from

[http://www.austlii.edu.au/au/legis/cth/num\\_act/acocla2005550/](http://www.austlii.edu.au/au/legis/cth/num_act/acocla2005550/).

Common Wealth: Veterans’ Entitlements Act 27 of 1986. Retrieved on 23/07/2011 from [http://www.austlii.edu.au/au/legis/cth/num\\_act/vea1986261/](http://www.austlii.edu.au/au/legis/cth/num_act/vea1986261/).

<sup>349</sup> Purse, K. 2011. Winding back workers’ compensation entitlements in Australia. *Australian Journal of Labour Law*, 24(3): 238–259. Hereinafter: Purse 2011. Retrieved on 03/05/2012 from <http://0-www.lexisnexis.com.oasis.unisa.ac.za/hottopics/lnacademic/?verb=sr&csi=267868>.

<sup>350</sup> Queensland Law Society Submission 2003. At 2 the Law Society stated in their submission: “Any statutory framework which inhibits the flexibility of the States to fix policy is unnecessary, counterproductive and must be opposed.”

<sup>351</sup> Australian Capital Territory. 2006. Chief Minister and Treasury Directorate. *Agreement by the States and Territories on harmonisation of workers’ compensation and occupational health and safety arrangements*. Retrieved on 12/05/2012 from

[http://www.cmd.act.gov.au/\\_data/assets/pdf\\_file/0008/119483/caf-harmonisation-iga.pdf](http://www.cmd.act.gov.au/_data/assets/pdf_file/0008/119483/caf-harmonisation-iga.pdf).

See furthermore Chapter 4 paras 2.4; 3.4 & 4.4 and Chapter 5 paras 2.10; 3.7 & 4.7 on the effect of the inter-state arrangements in Canada and Australia and the lack thereof in South Africa.



years 2010-2013.<sup>352</sup> This is not accepted by all jurisdictions and implementation is varied with the Territories and three of the States on par with time limits, two States in progress and two States in resistance to harmonisation.<sup>353</sup>

The Constitution of Australia does not empower the Federal Government with respect to workers' compensation over the States but it may use specific powers e.g. the "corporations power" to enable the implementation of a new national insurance scheme.<sup>354</sup>

A particular characteristic of the Australian compensatory legislative history is the repeated cycle<sup>355</sup> of the development of seemingly too generous compensation benefits and access to compensation by means of too lenient measures causing problems of sustainability and affordability<sup>356</sup> which then needs to be constrained in a continuous process<sup>357</sup> of legislative changes<sup>358</sup> which process was influenced by the philosophy of the government of the day.<sup>359</sup>

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<sup>352</sup> Safe Work Australia. 2010. *The National Workers' Compensation Action Plan 2010–2012*. Canberra: Safe Work Australia. Hereinafter: *The National WC Plan 2010–2012*. Retrieved on 30/07/2011 from <http://safeworkaustralia.gov.au/AboutSafeWorkAustralia/WhatWeDo/Publications/Pages/WCPlan2010–2013.aspx>.

<sup>353</sup> Cairns, A. 2012. *Work health and safety harmonisation – after the deadline*. Electronic article retrieved on 05/05/2012 from <http://www.moray.com.au/publications/work-health-and-safety-harmonisation-after-the-deadline/>.

<sup>354</sup> Productivity Commission Report (2004): 112.

<sup>355</sup> Taylor, S. 2005. Workers' compensation amendments: for better or worse? *Proctor* 25(3):13-14. Retrieved on 05/05/2012 from <http://0-search.informit.com.au.oasis.unisa.ac.za/fullText;dn=20051806;res=AGISPT>. See further Fountain, J. 2009. Amendments to the weekly payments provisions of the Workers Rehabilitation and Compensation Act 124 of 1986. *Bulletin (Law Society of SA)*: 31(7): 16–17. Retrieved on 05/05/2012 from <http://0-search.informit.com.au.oasis.unisa.ac.za/fullText;dn=20093437;res=AGISPT>. Purse, K. 2003. Australian workers' compensation policy: Conflict, step-downs and weekly payments. *International Employment Relations Review*: 9(1): 23–44. Hereinafter: Purse 2003. Retrieved on 25/05/2012 from <http://0-search.informit.com.au.oasis.unisa.ac.za/documentSummary;dn=165031633647043;res=IELBUS>.

<sup>356</sup> Williamson, BC. 1991. Amendments to New South Wales Workers Compensation Legislation. *Australian Journal of Labour Law*: 4(1): 62–72. Retrieved on 03/05/2012 from <http://0-www.lexisnexis.com.oasis.unisa.ac.za/hottopics/lnacademic/?verb=sr&csi=267868>.

<sup>357</sup> Adams, KL. 2005. Here we go again: The Accident Compensation Act 1985 (Vic) and the amendment merry-go-round. *Australian Journal of Labour Law*: 18(2): 158–172. Retrieved on 03/05/2012 from <http://0-www.lexisnexis.com.oasis.unisa.ac.za/hottopics/lnacademic/?verb=sr&csi=267868>.

<sup>358</sup> Purse, K. 2009. From WorkCover to WorkCover Light in South Australia. *Australian Journal of Labour Law* 22(2): 188–206. Hereinafter: Purse 2009. Retrieved on 05/05/2012 from <http://0-www.lexisnexis.com.oasis.unisa.ac.za/hottopics/lnacademic/?verb=sr&csi=267868>.

<sup>359</sup> ISCR 2.

## 5.6. Summary

Legislative developments on workers' compensatory legislation in Australia are notorious for periods of rapid amplification of benefits in favour of employees followed by periods of a limitation of such rights. It is greatly influenced by the political philosophy of the government of the day with Labour Governments enhancing benefits to workers and Conservative Governments retracting them.<sup>360</sup> The workers' compensatory system in Australia is characterised by fragmentation which is being addressed by a process of harmonisation which is inclusive of the Commonwealth Government and all the different States.<sup>361</sup>

## 6. CONCLUSION

In this chapter the historical development of workers' compensatory legislation was explored to identify the need for this type of laws. It is clear that although legislative provisions were made since antiquity for monetary compensation, the Industrial Revolution intensified the need for redress other than what was available at common law. Workers who could afford it participated in social assistance schemes since the Middle Ages but because not everybody could afford it, it too was unsatisfactorily. Actions under common law were known to be expensive, onerous and protracted processes with often unsuccessful outcomes due to the relatively solid common law defence principles that favoured employers. This led to the Bismarckian model of workers' compensation which has been refined by Meredith in Canada to develop legislation *sui generis* to Canada.<sup>362</sup>

South Africa is a republic with a central government with a supreme Constitution including a Bill of Rights which protects the rights of its citizens and other people within its jurisdiction. COIDA and ODIMWA are the two workers' compensatory laws enacted to provide social security benefits in times of distress to people in formal employment, which leaves people in other forms of employment without

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<sup>360</sup> Chapter 2 fn 305–333 *supra*.

<sup>361</sup> Chapter 2 fn 333 & 355–353 *supra*.

<sup>362</sup> Chapter 2 fn 211 *supra*.

social security benefits.<sup>363</sup> Canada<sup>364</sup> and Australia<sup>365</sup> have federal systems of government and although both also have written constitutions, Australia does not have a Bill of Rights similar to South Africa and Canada. The federal systems of government allow for jurisdictional enactments which in both Canada and Australia lead to multiple workers' compensatory laws.<sup>366</sup> As the South African compensatory system is notorious for its fragmentation, it is equally true of Canada and Australia.<sup>367</sup>

All three countries fall within the common law legal tradition and all three countries have a judicial system that follows the *stare decisis* doctrine. Administrative review of decisions regarding workers' compensatory provisions is aimed at providing a review mechanism that is easy, accessible and cost effective. All three of the countries provide for a limited right of review often complicated by technicalities created by both statute and through interpretation.<sup>368</sup>

Although South Africa escaped the dreadful consequences of the Industrial Revolution, the equally dreadful consequences of the mining industry influenced and magnified the need for the enactment of workers' compensatory legislation.<sup>369</sup> South Africa took the lead with legislation pertaining at compensation for lung diseases due to mining but neither ODIMWA nor its antecedent acts were developed resulting in an outdated compensatory scheme in place at present.<sup>370</sup> South Africa absorbed the principles laid down by Meredith in the 1941 Act which Act did not cover all employees or incidents.<sup>371</sup> The definition of an employee was broadened over time with racial discrimination and fragmentation being some of the negative aspects characterising workers' compensatory legislation in South Africa from its inception.<sup>372</sup>

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<sup>363</sup> Chapter 2 fn 2-4, 58-60 and Chapter 2 para 3.3 *supra*.

<sup>364</sup> Chapter 2 fn 170 & Chapter 2 paras 4.1 & 4.2 *supra*.

<sup>365</sup> Chapter 2 para 5.1 *supra*.

<sup>366</sup> Chapter 2 paras 4.3; 4.3 & 5.1 *supra*.

<sup>367</sup> Chapter 2 paras 3.5; 4.4 & 5.5 *supra*.

<sup>368</sup> Chapter 2 paras 3.2; 4.2 & 5.2 *supra*.

<sup>369</sup> Chapter 2 para 3.3 *supra*.

<sup>370</sup> Chapter 2 fn 93, 94 & 122-142 *supra*.

<sup>371</sup> Chapter 2 fn 114-116 & 216 *supra*.

<sup>372</sup> Chapter 2 fn 117-121 *supra*.

Chief Justice Meredith laid down the principles that encompassed the historic trade-off and still form the basis of workers' compensatory legislation in all three countries at present (although Australia did not follow the principles *per se*, it is also applied in Australian compensatory laws). The historic trade-off principle came under constitutional attack in both South Africa<sup>373</sup> and Canada<sup>374</sup> but in Australia a limited right to sue at common law can be exercised.<sup>375</sup>

Developments in Australian workers' compensatory laws were influenced by the political philosophy of the day which reveals the socio-economic foundation of workers' compensatory legislation as part of the social security framework.<sup>376</sup> Fragmentation and complicated systems have been identified as obstacles in all three countries but with Australia implementing an integrated system.<sup>377</sup>

The importance of administrative law cannot be denied and its specific applicability in the field of workers' compensation is real as it sets the limits for official decision makers and provides the mechanisms and principles that facilitate people to query and challenge an official's decision.<sup>378</sup>

In this chapter it was demonstrated how and why the right to workers' compensation was developed and laid down in legislation. Furthermore the adjudicative structures of South Africa,<sup>379</sup> Canada<sup>380</sup> and Australia<sup>381</sup> were introduced to enable an understanding of the *stare decisis* doctrine and *ratio* applied in court cases in the three countries under discussion. This chapter also explored the right of access to courts for the purposes of review and appeal.

The role of the tripartite relationship of social partners as regulated by legislation on occupational injuries and diseases in order to balance the interests of state,

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<sup>373</sup> Chapter 2 fn 2 & 141 *supra*.

<sup>374</sup> Chapter 2 fn 242–246 *supra*.

<sup>375</sup> Chapter 2 para 3.3 *supra*.

<sup>376</sup> Chapter 2 fn 306–334 *supra*.

<sup>377</sup> Chapter 2 fn 335–354 *supra*.

<sup>378</sup> Chapter 2 fn 4; 280–289 and Chapter 2 paras 3.2; 4.2 & 5.2 *supra*.

<sup>379</sup> Chapter 2 para 3.2 *supra*.

<sup>380</sup> Chapter 2 para 4.2 *supra*.

<sup>381</sup> Chapter 2 para 5.2 *supra*.

employer and employee by the creation of a right to no-fault compensation in the form of an administrative remedy which is categorised as a form of social security, was pointed out.<sup>382</sup>

The right to workers' compensation as provided for in COIDA and ODIMWA will be examined in relation to similar legislative provisions and juridical developments in Canada and Australia in the next chapters.

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<sup>382</sup> Chapter 2 paras 1 & 2 *supra*.

## CHAPTER 3

### THE ADMINISTRATIVE NATURE, PURPOSE AND INTERPRETATION OF COMPENSATORY LEGISLATION

#### 1. INTRODUCTION

This chapter will specifically consider the administrative nature and purpose of workers' compensation from the viewpoint of the social stakeholders, statutory law and interpretation by the courts. In exploring the right to workers' compensation, the named aspects ought to be probed to have an insight in the circumstances that influence the right to compensation as represented in the effectiveness of the administrative remedy and how the courts are influenced by the purpose of the scheme when the right to compensation and the counter right to be protected against civil litigation is considered. It is significant to note the close relationship between the purpose of workers' compensatory laws, the administrative remedy and the protection afforded to employers against civil actions. This is clear from the *ratio* by the courts when faced with cases challenging the protective provisions. Case law discussed in this Chapter may therefore overlap with case law that will be dealt with elsewhere in this study, but in the current Chapter, only those parts of a ruling that relates to the purpose, administrative remedy and the bar against civil action will be explored.

#### 2. THE ADMINISTRATIVE NATURE OF COMPENSATORY LEGISLATION

The administrative nature of workers' compensatory legislation stems from the principle of speedy compensation, born from the need to provide continued financial support in times that the employee cannot provide for himself without any fault of his own.<sup>1</sup> Because the court system is a slow and adversarial process, the remedy is to be executed by an administrative system intended to avoid breaks in financial income and reach speedy outcomes. The effectiveness of these bodies has

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<sup>1</sup> As shown from the historical development of workers' compensatory law in Chapter 2.

the potential to greatly impact on the parties that have to exercise their rights through the administrative body. It will be shown that dissatisfaction with the administrative bodies providing this service is growing in all three countries amongst employers and employees who are reliant on the effectiveness of these administrative bodies as the route of first instance. It also follows that the administrative nature rules dispute resolution processes and procedures.<sup>2</sup>

## 2.1. The administrative nature of compensatory legislation in South Africa

In *Jooste*,<sup>3</sup> the South African Constitutional Court acknowledged the administrative nature of the statutory workers' compensatory remedy and contrasted it with the common law remedy available under the civil justice system.<sup>4</sup> Noting that an occupationally-injured employee has the right to claim pecuniary loss (COIDA sections 47-64) "through an administrative process" (COIDA sections 38-46) that calls for the Compensation Commissioner to adjudicate on the claim and decide the monetary value to which the employee may be entitled (COIDA section 4).<sup>5</sup>

The administrative body in South Africa is the Director-General of the Department of Labour who delegates his functions<sup>6</sup> to the Compensation Commissioner established in terms of section 2 of COIDA.<sup>7</sup> The administrative ineptitude of the Compensation Commissioner is evident from the Commissioner's Annual Reports which reveal qualified audits from the Auditor General for a number of years<sup>8</sup> for instance the Annual Report (2010/2011):<sup>9</sup>

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<sup>2</sup> Guthrie, R, Goldacre, L & Claydont, W. 2008. Workers' compensation dispute resolution procedures in Western Australia - The new regime. *Queensland U. Tech. L. & Just. J.* 8(1): 46-76. Retrieved on 26/05/2012 from [http://0-www.heinonline.org.oasis.unisa.ac.za/HOL/Page?handle=hein.journals/qutlj8&div=8&collection=journals&set\\_as\\_cursor=1&men\\_tab=srchresults&terms=Workers](http://0-www.heinonline.org.oasis.unisa.ac.za/HOL/Page?handle=hein.journals/qutlj8&div=8&collection=journals&set_as_cursor=1&men_tab=srchresults&terms=Workers).

<sup>3</sup> Par 3.2.1 *infra*.

<sup>4</sup> *Jooste* [12]-[13].

<sup>5</sup> *Ibid* [13].

<sup>6</sup> COIDA s 3.

<sup>7</sup> **"2. Compensation Director-General and staff**

(1) The Minister shall subject to such conditions as he or she may determine, in order to assist the Director-General in the performance of his or her functions in terms of or under this Act and subject to the laws governing the public service, appoint-

(a) an officer to be called the Compensation Commissioner; ..."

<sup>8</sup> South Africa (Republic). Department of Labour. 2010. *Compensation Fund Annual Report 2009/2010*. Pretoria: Government Printing Works. At 9, the report of the previous year's

### 2.3 Basis for accounting opinion

The Auditor-General noted various instance [sic] where it was not possible to express an opinion and which led to a disclaimer. With regard to revenue contributions and assessment debtors,

- a) Materially incorrect assessments recorded by the Fund;
- b) Inadequate monitoring of controls over overdue assessment debtors resulted in the accumulation of incorrect provisional assessments and materially incorrect debtors with credit balances; and
- c) Lack of a proper management framework for the continuous review of the ageing of assessment debtors which resulted in an unreliable ageing of assessment debtors being applied for purposes of determining the provision for credit losses.<sup>10</sup>

### Interest and Penalties on assessment employers

8. I was unable to verify the accuracy and completeness of interest and penalties for late submissions of return of earning's [sic] and late payment of assessment due to interest and penalties incorrectly charged to assessment debtors. .... Consequently, I did not obtain all the information and explanations I considered necessary to satisfy myself as to the accuracy and completeness of interest and penalties on assessment [sic] employers amounting to R404 million.<sup>11</sup>

### Medical claims

9. The Fund made a payment in the current year totaling [sic] R24 million to a medical claimant's service provider based on a court order. Of the R24 million, invoices totaling [sic] R18,3 million were not processed on the E-claims systems to validate the accuracy of the payment made. Therefore, I was unable to verify accuracy of the medical claims for the year and no alternative procedures could be performed.<sup>12</sup>

Payment for medical treatment by the compensation scheme forms an inherent part of the right to compensation for occupational injuries and diseases and non-

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qualified audit reads as follows: "Various materially incorrect assessments have been recorded by the Fund in the year under review and in previous years. Consequently, I am unable to express an opinion on: The completeness and accuracy of revenue contributions and valuation of assessment debtors."

South Africa (Republic). Department of Labour. 2012. *Compensation Fund Annual Report 2011/2012*. Pretoria: Government Printing Works. The 2011/2012 Annual Report at 71 reports on the disclaimed audit opinion received in the 2008/2009 financial year and the response of Parliament's Standing Committee on Public Account's to the qualified audit. Hereinafter: *Compensation Fund Annual Report (2011/2012)*. Both Reports retrieved on 12/08/2011 from <http://www.labour.gov.za/documents/annual-reports/annual-reports>.

<sup>9</sup> South Africa (Republic). Department of Labour. 2011. *Compensation Fund Annual Report 2010/2011*. Pretoria: Government Printing Works. Hereinafter: *Compensation Fund Annual Report (2010/2011)*. Retrieved on 12/08/2011 from <http://www.labour.gov.za/documents/annual-reports/annual-reports>.

<sup>10</sup> *Compensation Fund Annual Report (2010/2011)*: 11.

<sup>11</sup> *Ibid* 83.

<sup>12</sup> *Ibid*.



payment or belated payment for medical treatment severely impairs this right. In South Africa it caused medical practitioners to refuse or avoid treating patients who sustained occupational injuries or who contracted occupational diseases. In reaction to this stance by medical practitioners, the Director-General of the Department of Labour announced a turnaround strategy at the Compensation Fund to Parliament's Select Committee on Labour and Public Enterprises.<sup>13</sup> At a summit of the South African Society of Occupational Medicine, he acknowledged the negative effect of non-payments and late payments of medical bills on workers in a presentation entitled "We hear your cries";<sup>14</sup> claiming the lack of protection afforded to vulnerable employees "as a result of our problems in settling claims on time" to be a foremost source of frustration to the Compensation Fund and although the Fund "understand[s] their [medical practitioner's] frustration but equally, we have a duty for the care of injured workers". The overdue payments were due to *inter alia* an enormous backlog in the registration and adjudication of claims that was reported in December 2012 to the total of "an unprecedented ... 600 000".<sup>15</sup> In addition to the backlog the Fund had to establish interventions aimed at combating criminal activities associated with corruption.<sup>16</sup> The Compensation Fund incurred "fruitless and wasteful expenditure" of R1.5 million due to interest charged by suppliers on late payments for services rendered to the Fund and another R10.2 million charged by the service provider for the late implementation of an information technology system during the 2011/2012 financial reporting period.<sup>17</sup>

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<sup>13</sup> South Africa (Republic). Department of Labour. 28 February 2013. *Compensation Fund to undergo a turnaround strategy and an intensive forensic audit – Department of Labour*. Department of Labour: Media Desk. Retrieved on 25/08/2013 from <http://www.labour.gov.za/DOL/media-desk/media-statements/2013/compensation-fund-to-undergo-a-turnaround-strategy-and-an-intensive-forensic-audit-2013-department-of-labour>.

<sup>14</sup> South Africa (Republic). Department of Labour. 17 March 2013. *We hear your cries: Department of Labour DG Nhleko tells doctors over Compensation Fund*. Department of Labour: Media Desk. Retrieved on 25/08/2013 from <http://www.labour.gov.za/DOL/media-desk/media-statements/2013/we-hear-your-cries-department-of-labour-dg-nhleko-tells-doctors-over-compensation-fund>.

<sup>15</sup> South Africa (Republic). Department of Labour. 07 December 2012. *Department of Labour to prioritise elimination of claims backlog at Compensation Fund: Labour DG Nhleko*. Department of Labour: Media Desk. Retrieved on 25/08/2013 from <http://www.labour.gov.za/DOL/media-desk/media-statements/2012/department-of-labour-to-prioritise-elimination-of-claims-backlog-at-compensation-fund-labour-dg-nhleko>.

<sup>16</sup> South Africa (Republic). Department of Labour. 16 May 2013. *Compensation Fund takes huge strides to tackle fraud and corruption and aims to reduce claims backlog*. Department of Labour: Media Desk. Retrieved on 25/08/2013 from <http://www.labour.gov.za/DOL/media-desk/media-statements/2013/compensation-fund-takes-huge-strides-to-tackle-fraud-and-corruption-and-aims-to-reduce-claims-backlog>.

<sup>17</sup> *Compensation Fund Annual Report (2011/2012)*: 55.

In July 2013 the Compensation Commissioner informed Parliament's Portfolio Committee on Labour that the information technology system of the Rand Mutual Assurance Company would be tested for use by the Fund.<sup>18</sup> In addition to the administrative problems facing the Compensation Fund, a wave of fraud and corruption by employees and service providers hit the Fund. According to the Fund's Annual Report 2011/2012, a total number of 208 cases were investigated to an estimated amount of R 71,766,067 of which 137 investigations were completed regarding actual loss to the amount of R 26,072,606 and 45 cases were referred for police investigation.<sup>19</sup> During the previous year 3 cases of fraud against health care providers were prosecuted with 2 convictions and 4 health care providers under investigation while 6 ex-employees of the fund were on trial and 4 others under investigation.<sup>20</sup>

Poor service delivery by the Compensation Fund prompted an investigation by the Public Protector<sup>21</sup> who found *inter alia* the Fund "failed to give effect to the right to procedurally fair administrative action, when it failed to give ... properly formulated written decisions regarding their claims, incorporation [sic] the principles of just administrative action as set out in the Constitution and PAJA."<sup>22</sup>

## 2.2. The administrative nature of compensatory legislation in Canada

Canadian law also acknowledged the administrative nature of the workers' compensatory remedy in *Henry v Saskatchewan (Workers' Compensation Board)*<sup>23</sup> where the Court cited the words of Mitchell JA in the earlier decision of *Dowling v*

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<sup>18</sup> South Africa (Republic). Department of Labour. 17 March 2013. *Department of Labour's CF turning the corner to address claims backlog*. Department of Labour: Media Desk. Retrieved on 25/08/2013 from <http://www.labour.gov.za/DOL/media-desk/media-statements/2013/departement-of-labour-2019s-cf-turning-the-corner-to-address-claims-backlog>.

<sup>19</sup> *Compensation Fund Annual Report (2011/2012)*: 23.

<sup>20</sup> *Ibid* 24.

<sup>21</sup> South Africa (Republic). 2010. Public Protector. *Report on a systemic investigation into allegations of poor service delivery by the Compensation Fund* (Report 28 of 2009/10). Pretoria: Government Printing Works. Retrieved on 25/08/2013 from [http://www.pprotect.org/library/investigation\\_report/investigation\\_report.asp](http://www.pprotect.org/library/investigation_report/investigation_report.asp).

<sup>22</sup> *Ibid* 84.

<sup>23</sup> *Henry v Saskatchewan (Workers' Compensation Board)*, 1999 CanLII 12241 (SK CA). Hereinafter: *Henry*. Retrieved on 28/04/2012 from <http://canlii.ca/t/11777>.

*Prince Edward Island Workers' Compensation Board*, [1994] (P.E.I.J. No. 113) saying:<sup>24</sup>

Accordingly, the Workers' Compensation Act should be interpreted liberally so as to provide compensation for work-related injuries *to as many as can reasonably be seen to fall within its purview*. [italics added]

The Court interpreted the italicised phrase to “substrate that the Board is a public authority established to assist as many people as it can within the bounds of its constituent statute”<sup>25</sup> and achieving the purpose for the Board’s existence ought not to be measured in the number of claims repudiated.<sup>26</sup>

Dissatisfaction with the administrative management of workers’ compensation claims is not peculiar to South Africa but the Canadian scheme is also known for same. The Canadian Ombudsman for Ontario’s statistics on the number of complaints received indicates a high level of dissatisfaction with the Compensation Board. Out of 15 provincial government organizations complained about in 2012-2013 the Board rated at number 3;<sup>27</sup> in 2011/2012 at number 2;<sup>28</sup> in 2010/2011 the Board took number 3 position<sup>29</sup> and in 2009/2010 it rated again number 3.<sup>30</sup> In addition to formal complaints at ombudspersons, disgruntled workers publicised their experiences via social media for example Facebook,<sup>31</sup> Youtube<sup>32</sup> and newspapers.

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<sup>24</sup> *Ibid* [47].

<sup>25</sup> *Ibid* [48].

<sup>26</sup> *Ibid* [48].

<sup>27</sup> Ontario (Provincial Government). 2013. *Ontario Ombudsman: Annual Report 2012/2013*. Toronto: Ontario. At 78. Retrieved on 07/09/2013 from [www.ombudsman.on.ca/Resources/Annual-Reports.aspx](http://www.ombudsman.on.ca/Resources/Annual-Reports.aspx).

<sup>28</sup> Ontario (Provincial Government). 2012. *Ontario Ombudsman: Annual Report 2011/2012*. Toronto: Ontario. At 76. Retrieved on 07/09/2013 from <http://www.ombudsman.on.ca/Resources/Annual-Reports.aspx>.

<sup>29</sup> Ontario (Provincial Government). 2011. *Ontario Ombudsman: Annual Report 2010/2011*. Toronto: Ontario. At 79. Retrieved on 07/09/2013 from <http://www.ombudsman.on.ca/Resources/Annual-Reports.aspx>.

<sup>30</sup> Ontario (Provincial Government). 2010. *Ontario Ombudsman: Annual Report 2009/2010*. Toronto: Ontario. At 75. Retrieved on 07/09/2013 from <http://www.ombudsman.on.ca/Resources/Annual-Reports.aspx>.

<sup>31</sup> Facebook: Occupy W.S.I.B. *Justice for injured workers*. Retrieved on 07/09/2013 from <https://www.facebook.com/groups/11868327550/>.

<sup>32</sup> The truth about WSIB. Retrieved on 07/09/2013 from <http://www.youtube.com/watch?v=Y7kRkUr6eel> and also: Justice for injured workers & WSIB. Retrieved on 07/09/2013 from <http://www.youtube.com/watch?v=8cRxOuVMYiY>.

The Windsor Star reported on an employee who informed the Ontario Attorney General of his intention to pursue an action for \$2.7 million in damages for the manner in which he was treated by the Ontario Compensation Board, claiming the Board failed to afford him a “duty of care” and the staff “engaged in reckless behaviour” in a process that denied payment for certain treatment and proposed different treatment which left him worse off.<sup>33</sup>

Court action holding the Board liable for its decisions had been pursued by another employee earlier and in the first of no less than seven court rulings<sup>34</sup> involving one claimant between 2001 and 2012, Shuchuk (his psychological injury originated after a work related motor vehicle accident),<sup>35</sup> pursued a tort action against the Compensation Board and its officials. The Master in Chambers struck the Applicant’s claim as not disclosing a course of action<sup>36</sup> and remarked that only someone who has been “living in a sealed glass bubble on an ocean floor for the last 25 years” would be unaware of dissatisfaction with the Board.<sup>37</sup>

The Applicant successfully appealed<sup>38</sup> the ruling with the Court recognising his tort action known in Canadian law as an “abuse of public office or misfeasance in public office”<sup>39</sup> by pleading the conduct of the Defendants to be:<sup>40</sup>

vindictive, malicious, biased, made without any medical indication or basis, deliberately disregarded the Plaintiff’s rights and the express opinions of his treating physician and psychologists that the conduct was medically contraindicated, was a breach of the Defendants’ duty of good faith, and constituted an assault upon the Plaintiff as well as a defamation upon his character, all of which resulted in the worsening of his medical and psychological health.

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<sup>33</sup> Sacheli, S. 2013. *Injured worker fights 16-year battle with WSIB*. The Windsor Newspaper. Windsor: Ontario. Retrieved on 07/09/2013 from <http://blogs.windsorstar.com/2013/01/09/injured-worker-fights-16-year-battle-with-wsib/>.

<sup>34</sup> *Shuchuk v Wolfert*, 2001 ABQB 500; *Shuchuk v. Wolfert*, 2001 ABQB 937; *Wolfert v Shuchuk*, 2003 ABCA 109; *Shuchuk v Alberta (Workers' Compensation Board, Appeals Commission)*, 2005 ABQB 526; *Shuchuk v Alberta (Workers' Compensation Board)*, 2007 ABCA 213; *Shuchuk v Alberta (Appeals Commission for Workers' Compensation)*, 2010 ABQB 432 and *Shuchuk v Alberta (Workers' Compensation Board)*, 2012 ABCA 50.

<sup>35</sup> *Shuchuk v Alberta (Workers' Compensation Board, Appeals Commission)*, 2005 ABQB 526 (CanLII). [2]. Retrieved on 25/08/2013 from <http://canlii.ca/t/118f2>.

<sup>36</sup> *Shuchuk v Wolfert*, 2001 ABQB 500 (CanLII). [1]–[6]. Retrieved on 25/08/2013 from <http://canlii.ca/t/5m3b>.

<sup>37</sup> *Ibid* [1].

<sup>38</sup> *Shuchuk v Wolfert*, 2001 ABQB 937 (CanLII). Retrieved on 25/08/2013 from <http://canlii.ca/t/dwn>.

<sup>39</sup> *Ibid* [11].

<sup>40</sup> *Ibid* [7]–[10].

The Court held that neither the Board nor its officials will be protected out of necessity against an action for abuse of power or an intentional infliction of mental suffering<sup>41</sup> acting in bad faith by exercising a public power in a vindictive manner with an intention to injure and real injury to follow from such conduct.<sup>42</sup> The action by an ex-employee of the Board<sup>43</sup> against the Board and its officials originated due to insistence by the Defendants that the Applicant undergo an independent psychological assessment against the advice of his own and the Board's psychologists and after the Board had had the Applicant investigated by a private investigator.<sup>44</sup>

The Canadian workers' compensatory scheme is similarly to South Africa open to various forms of fraudulent claims (estimated at \$1 billion annually)<sup>45</sup> by employers,<sup>46</sup> employees, providers of medical care and equipment and corrupt officials in the service of the Boards.<sup>47</sup>

The long-term social outcomes of permanently disabled workers are distressing as found in a survey done amongst these workers by the Thunder Bay and District Injured Workers' Support Group, which shows of the participants: 71% living under the poverty line, 42% receiving welfare, 18% receiving workers' compensation benefits, only 15% working and 15% who have contemplated suicide.<sup>48</sup>

Dissatisfaction with the scheme increases the danger of stakeholders questioning the workers' compensation system as the ultimate solution posed by occupational

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<sup>41</sup> *Ibid* [22] & [33].

<sup>42</sup> *Ibid* [27] & [41].

<sup>43</sup> *Ibid* [8].

<sup>44</sup> *Ibid* [9] & [31].

<sup>45</sup> McCann, W. 1997. *New investigators to probe compensation fraud*. Canadian Press NewsWire. Toronto: Ontario. Retrieved on 28/08/2013 from <http://0-search.proquest.com.oasis.unisa.ac.za/docview/359533643/fulltext/140308574B82D1B37BE/1?accountid=14648>.

<sup>46</sup> Boyes, S. 1998. Fraud squad. *OH & S Canada*: 14(1): 28-33+. Reported of criminal investigations launched against bogus companies which were set up for the purpose of instituting false workers' compensation claims for non-existent employees. Retrieved on 27/05/2012 from <http://0-search.proquest.com.oasis.unisa.ac.za/docview/224625659/fulltextPDF/140308574B82D1B37BE/24?accountid=14648>.

<sup>47</sup> *Ibid*.

<sup>48</sup> Thunder Bay and District Injured Workers' Support Group. 2011. *Presentation to the WISB Funding Review*. (Arthurs, H.: Chair). At 3. Retrieved on 28/08/2013 from [http://www.injuredworkersonline.org/Documents/WSIBFR\\_Thunder\\_Bay\\_IWSG\\_Apr\\_2011.pdf](http://www.injuredworkersonline.org/Documents/WSIBFR_Thunder_Bay_IWSG_Apr_2011.pdf).

injuries and diseases to employees, employers and communities.<sup>49</sup> Especially labour organisations like unions are starting to question the historical compromise as one of the principles underlying the compensation scheme.<sup>50</sup>

### 2.3. The administrative nature of compensatory legislation in Australia

Preference of administrative settlements to litigation was acknowledged as the underlying philosophy of workers' compensatory legislation in Australian case law. This was confirmed in *Berowra Holdings Pty Ltd v Gordon*<sup>51</sup> by the reflection of the Court to the "procedural history and context of the litigation" in a case that turned on non-compliance of the stipulated six months period by a worker before commencing with civil action against the employer. The honourable Court consequently refused to "confer upon the statute a character which its words do not readily bear and which is quite removed from facilitating non-litigated settlements."<sup>52</sup>

The Australian scheme is equally dissatisfying to the community it is intended to serve with medical practitioners questioning recent policy changes in New South Wales pertaining to work capacity creating a system of administrative decision-making by non-medical administrative officials on medical opinions expressed by duly qualified medical practitioners.<sup>53</sup> Employers are equally dissatisfied as is clear from a survey done by an industry association,<sup>54</sup> indicating 28% of Queensland employers to be "very dissatisfied" and 31% to be "moderately dissatisfied" giving a

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<sup>49</sup> British Columbia Federation of Labour. 2008. *Insult to injury, changes to the BC Workers' Compensation system (2002 - 2008): The impact on injured workers*. 2. British Columbia. Retrieved on 07/09/2013 from

<http://www.bctf.ca/uploadedFiles/Public/HealthSafety/WCB/InsultToInjuryExecSummary.pdf>.

<sup>50</sup> *Ibid*.

<sup>51</sup> *Berowra Holdings Pty Ltd v Gordon* [2006] HCA 32; (2006) 225 CLR 364. [27]. Hereinafter: *Berowra Holdings Pty Ltd*. Retrieved on 24/08/2013 from

<http://www.austlii.edu.au/au/cases/cth/HCA/2006/32.html>.

<sup>52</sup> *Ibid* [27].

<sup>53</sup> Injured Workers Support Network. 2006. *Work capacity: Insurance company clerks, with no formal qualifications in health care, can now make decisions that render medical opinion invalid*. Retrieved on 31/08/2013 from <http://www.injuredworkerssupport.org.au/?p=3886>.

<sup>54</sup> Australian Industry Group. 2010. *Ensuring sustainability and fairness in the Queensland Workers' Compensation scheme* (Response to discussion paper). Retrieved on 31/08/2013 from [http://www.aigroup.com.au/portal/binary/com.epicentric.contentmanagement.servlet.ContentDeliveryServlet/LIVE\\_CONTENT/Policy%2520and%2520Representation/Submissions/OHS/2010/WorkCover\\_submission\\_March\\_2010.pdf](http://www.aigroup.com.au/portal/binary/com.epicentric.contentmanagement.servlet.ContentDeliveryServlet/LIVE_CONTENT/Policy%2520and%2520Representation/Submissions/OHS/2010/WorkCover_submission_March_2010.pdf).

total of 59% of employers to be dissatisfied with the Queensland workers' compensation scheme as administered by the Authority.<sup>55</sup> Employers strongly support limitations on access to common law redress because it undermines and compromises confidence in the scheme.<sup>56</sup>

After an annual increase of 27% in poor service delivery complaints<sup>57</sup> received by the Victorian Ombudsman, he investigated record keeping at the six agencies<sup>58</sup> appointed by the WorkCover Authority<sup>59</sup> to assist with performance of a number of its administrative functions.<sup>60</sup> Conclusions included a finding of poor record keeping that resulted in delayed payments in respect of medical services delivered;<sup>61</sup> and in poor or delayed decision making and breaches in the privacy of claimants as well as systemic inadequacies and outdated computer systems.<sup>62</sup>

Case studies done as part of the investigation showed administrative maladministration which strongly remind of the problems faced by the South African Compensation Fund as discussed *supra*. The Report noted the danger posed by delayed or non-payment for medical services as it may lead to refusal of treatment to occupationally-injured employees<sup>63</sup> (as happened in South Africa) which concern was triggered by manipulation of the incentive system put in place by the Authority to promote prompt payment of medical bills within set timeframes.<sup>64</sup> At one of the agencies, it was found that 10 000 medical bills were hidden in a locked cupboard to be filtered into the payment system over a period of

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<sup>55</sup> *Ibid* 2–3.

<sup>56</sup> *Ibid* 4 & 8.

<sup>57</sup> Victoria (State Government). 2011. Victorian Ombudsman. *Investigation into record keeping failures by WorkSafe agents*. Victorian Government Printer. Melbourne: Victoria. 10. Hereinafter: Victorian Ombudsman Report (2011). Retrieved on 31/08/2013 from [http://www.ombudsman.vic.gov.au/resources/documents/new\\_-\\_report\\_investigation\\_into\\_record\\_keeping\\_failures\\_by\\_worksafe\\_agents.pdf](http://www.ombudsman.vic.gov.au/resources/documents/new_-_report_investigation_into_record_keeping_failures_by_worksafe_agents.pdf).

<sup>58</sup> Allianz Australia Workers' Compensation (Victoria) Limited, CGU Workers Compensation (Victoria) Limited, GIO Australia (formerly known as the Government Insurance Office but since 1989 the name changed to GIO Australia), QBE Workers Compensation (Victoria) Limited, Gallagher Bassett Services Workers Compensation Victoria Pty Ltd, and Xchanging Integrated Services Australia Pty Ltd.

<sup>59</sup> As the Compensation Authority is known in Victoria.

<sup>60</sup> Victorian Ombudsman Report (2011): 10.

<sup>61</sup> *Ibid* 52.

<sup>62</sup> *Ibid* 53.

<sup>63</sup> *Ibid* 41.

<sup>64</sup> *Ibid* 34–38.

11 months.<sup>65</sup> Under the leadership of senior staff members, dated medical bills were not paid before or until duplicate accounts were received by the agency as it then could falsely be processed as newly-received bills<sup>66</sup> because delayed payment of accounts would prompt a penalty from the Authority.<sup>67</sup> In addition, both employers and employees complained about delayed reimbursements owed to them with smaller companies less able to await delayed payments and employees left destitute while waiting for income replacement benefit payments<sup>68</sup> usually made on a weekly basis to enable workers<sup>69</sup> to meet daily living expenses.<sup>70</sup> One such case study showed a delay of 17 months in respect of a back payment in respect of additional income replacement benefits.<sup>71</sup> The claim had in its initial stages been disputed by the agency but the dispute was settled by a Medical Panel advising the payment to be made. But as no administrative actions could be derived from the file notes and the case managers had been changed, it appears that nothing was done to give effect to the advice from the Medical Panel.<sup>72</sup> The Ombudsman considered poor and delayed decision making as a reason for ineffectiveness in dealing with an employee in need of adjustment to his place of residence who had to wait for more than a year for the application to be considered despite submitting two different supporting reports, the first of which was considered by the agency as inadequate.<sup>73</sup>

Similar findings were made by the South Australian WorkCover Ombudsman in his Annual Report for the year 2011/2012.<sup>74</sup> Of the 199 formal complaints received, about 35% related to delays in already-approved payments<sup>75</sup> and a significant number of complaints related to poor ineffective administrative actions from the Authority's case managers on aspects like: repeated failures to acknowledge

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<sup>65</sup> *Ibid* 36.

<sup>66</sup> *Ibid* 36.

<sup>67</sup> *Ibid* 34.

<sup>68</sup> Income replacement benefit payments are payments made as substitution for wages.

<sup>69</sup> During the investigation by the Ombudsman, a case manager opined that delayed payments to workers adds to a "feeling of helplessness because they're not at work, providing for their family and it all snowballs". Victorian Ombudsman Report (2011): 40.

<sup>70</sup> *Ibid* 39.

<sup>71</sup> *Ibid* 40.

<sup>72</sup> *Ibid* 40.

<sup>73</sup> *Ibid* 43-45.

<sup>74</sup> South Australia (State Government). WorkCover Ombudsman. 2012. *WorkCover Annual Report 2011/2012*. Adelaide: South Australia. At 4. Retrieved on 31/08/2013 from <http://www.wcombudsmansa.com.au/site/DefaultSite/filesystem/documents/Annual%20Report%202012.pdf>.

<sup>75</sup> *Ibid* 10.



correspondence, failure to refund medical and travel expenses, failure to respond to phone messages within one business day, failure to adequately provide information and failure to inform claimants of progress made on claims.<sup>76</sup>

#### **2.4. Summary**

It can be concluded from the above that in all three countries, the workers' compensation schemes are under pressure due to systemic administrative problems created by human error and a lack of administrative effectiveness; and in South Africa and Australia aged or inadequate information technology resources persistently influence service delivery in a negative way.<sup>77</sup>

In all three countries, employers and employees are increasingly dissatisfied with the manner in which the compensation schemes are run and a growing measure of distrust can be detected.<sup>78</sup>

It is submitted that the right to compensation and the inverse right to be protected against civil action will be defeated in the long run if the administrative system meant to give effect to these rights is unreliable, corrupt, incompetent or delays monetary compensation to stakeholders at crucially important times rather than to provide a speedy and non-adversarial remedy as intended by the historical authors of the system.

### **3. SOUTH AFRICA: PURPOSE AND INTERPRETATION**

As put forward in the previous chapter, legislation in general serves the community it rules and legislative measures are enacted in fulfilment of the needs of a specific community. As indicated in Chapter 2, workers' compensatory legislation in general was developed to fulfil a particular societal need, as was cited in the Australian case

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<sup>76</sup> *Ibid* 11-12 & 19.

<sup>77</sup> Chapter 3 paras 2.1; 2.2 & 2.3 *supra*.

<sup>78</sup> Chapter 3 paras 2.1; 2.2 & 2.3 *supra*.

of *Berowra Holdings Pty Ltd v Gordon*<sup>79</sup> that “all statutes give effect to some public policy.” It will now be prudent to consider the statutory provisions pertaining to the purpose section included in a specific workers’ compensation act and the interpretation the courts attach to it.

### 3.1. Purpose of COIDA

The Compensation for Occupational Injuries and Diseases Act 130 of 1993 (COIDA) came into operation on 1 March 1994 and repealed the 1941 Act in its totality.<sup>80</sup>

In South African law, the long title of an act may be consulted to establish the nature and scope of that act;<sup>81</sup> while the Preamble describes the conditions and objectives intended.<sup>82</sup> The purpose of COIDA as included in the long title of the Act is:

**To provide for compensation for disablement** caused by occupational injuries or diseases sustained or contracted by employees in the course of their employment, or for death resulting from such injuries or diseases; and to provide for matters connected therewith.<sup>83</sup>

The main object of the Act is encapsulated in the first six words which refer to the provision of compensation for disablement caused by injuries and diseases caused specifically by employment.

Although the long title does not create any rights or obligations, it is seen as a guiding principle in interpretation of an act and may be considered by the courts. In the case of *Kirtley v The Compensation Commissioner and Another*,<sup>84</sup> the honourable Court noted that the long title of the Act predicts the purpose of the Act to include amongst others, compensation for temporary partial and temporary total incapacity<sup>85</sup> and compensation for the permanent consequences of occupational

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<sup>79</sup> *Berowra Holdings Pty Ltd* [24].

<sup>80</sup> COIDA Schedule 1.

<sup>81</sup> Burger 44. Burger at 26, based his opinion that the Constitution favours a purposive method of interpretation on s 39(2).

<sup>82</sup> Burger 45.

<sup>83</sup> Own emphasis.

<sup>84</sup> (2005) 26 ILJ 1593 at [1].

<sup>85</sup> *Olivier et al* (2003): 460 "Incapacity for work is usually conceived as the loss of the ability to earn and is classified under social insurance."

injuries and diseases.<sup>86</sup> It is submitted that by dealing with the purpose contextually in the long title of the Act, light is shed on the intention and scope of COIDA. The purpose, to compensate, provides direction to each provision that follows and should be kept in mind whenever COIDA is interpreted.<sup>87</sup>

While the purpose of an act reveals the intentions of the legislature, it is in the interpretation and execution of a statute that the purpose becomes significant. COIDA ought to provide a system beneficial to the South African society and the burden of cost caused by occupational injuries and diseases should not be transferred to employees. In this regard, the SCA held in the *Mankayi* ruling: “Interpretation seeks to give effect to the object or purpose of legislation. It involves an inquiry into the intention of the legislature”.<sup>88</sup>

### **3.2. Interpretation through case law**

#### **3.2.1. *Jooste v Score Supermarket Trading (Pty) Ltd (Minister of Labour Intervening)***

In *Jooste v Score Supermarket Trading (Pty) Ltd (Minister of Labour Intervening)*,<sup>89</sup> the Court cited the purpose of COIDA as encapsulated in the long title of the Act and considered the position of an employee at common law before the enactment of compensatory legislation.

The Constitutional Court had to consider a challenge on the validity of COIDA’s section 35 which bars civil action against employers.<sup>90</sup> In considering the validity of section 35, the Court contrasted the administrative remedy provided by the Act to the common law situation. The legislated remedy available to an employee who suffered an occupational injury consists of a claim for pecuniary loss through an administrative system designed at speedy payment from a fund, is contrasted to a

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<sup>86</sup> *Ibid* 1.

<sup>87</sup> Wetsuitleg 81. The court confirmed that the long title may be consulted to determine the intention of an act in *Bhyat v Commissioner for Immigration* 1932 AD 125.

<sup>88</sup> *Mankayi* (SCA) [25].

<sup>89</sup> *Jooste* [13]–[14].

<sup>90</sup> *Ibid* [2].

common law action through a process of civil litigation against a defendant employer by which damages will only be awarded upon proof of negligence on the part of the employer.<sup>91</sup> Under common law, contributory negligence by the employee could result in a proportional reduction of damages without certainty of payment of the awarded damages by the defendant. Employees could also be held liable for legal costs if the case is unsuccessful. The legislated scheme's intention is to provide limited compensation from a fund which is funded by mandatory contributions from employers.<sup>92</sup> The Court held that the compensation scheme was rationally connected to a legitimate government purpose and the barring of the right is justified in the light of the purpose of compensatory legislation that was evident from historical context from which it developed.<sup>93</sup>

### **3.2.2. *Davis v Workmen's Compensation Commissioner***

In the well-known case of *Davis v Workmen's Compensation Commissioner*<sup>94</sup> Friedman JP when citing from *Williams v Workmen's Compensation Commissioner* 1952 (3) SA 105 (C), expressly gave preference to an interpretation most favourable to employees while renouncing any prejudice to employees.<sup>95</sup>

### **3.2.3. *Healy v Compensation Commissioner and Another***

In *Healy v Compensation Commissioner and Another*,<sup>96</sup> Plasket J explained the purpose of COIDA is to be achieved through "give and take: it creates a no-fault system of compensation, channelled through an administrative process." The court appreciated the removal of compensation for occupational injuries and diseases from common law; and, while an employer is relieved from the burden associated

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<sup>91</sup> *Ibid* [13]-[15].

<sup>92</sup> *Ibid* [16].

<sup>93</sup> *Ibid* [12].

<sup>94</sup> *Davis v Workmen's Compensation Commissioner* 1995 (3) SA 689 (C), at 694 E-G. Hereinafter: *Davis*.

<sup>95</sup> The honourable Judge stated at E-G: "The policy of the Act is to assist workmen as far as possible. See *Williams v Workmen's Compensation Commissioner* 1952 (3) SA 105 (C) at 109C. The Act should therefore not be interpreted restrictively so as to prejudice a workman if it is capable of being interpreted in a manner more favourable to him." This is supported by the rule that the legislature does not intend harsh, unjust or unreasonable legislative measures; Burger 33.

<sup>96</sup> *Healy* [11].

with delictual actions, an employee may claim compensation without being burdened to prove negligence on the part of his employer. By replacing the court process by an administrative process, the nature of compensation was changed from adversarial to non-adversarial. This is a system intended at benefiting society at large.<sup>97</sup>

### **3.3. Summary**

It is submitted that the protection of employers through the working of section 35 was never the main purpose of COIDA; and is not as such included in the long title of the Act but is the product of the principle of balancing the interests of employers and employees without regard to fault. The protection is extended to employers irrespective of failure to register and pay assessments to the Compensation Fund because an employee's right to claim remains unaffected by such failures<sup>98</sup> as will be discussed in Chapter 5 when the definitions of an employee and employer for the purposes of COIDA will be explored.

## **4. CANADA: PURPOSE AND INTERPRETATION**

### **4.1. Purpose of the Northwest Territories Workers' Compensation Act, 2007**

The majority of Canadian workers' compensatory statutes deal with the purpose similarly to COIDA.<sup>99</sup> With regard to the "purpose", the identical Acts of Nunavut<sup>100</sup> and the Northwest Territories<sup>101</sup> will be discussed as they differ both in textual and contextual approaches from COIDA.

Unlike COIDA, the Northwest Territories Act<sup>102</sup> does not contain a long title but the purpose is being dealt with in Part 1 which is devoted to "Interpretation, Purpose

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<sup>97</sup> *Ibid.*

<sup>98</sup> *Boer v Momo Development CC en 'n Ander* 2004 (5) SA 291 (T). At 294.

<sup>99</sup> The purpose section of the Worker's Compensation Act of Saskatchewan, 1979, is very similar to COIDA and reads: "An Act to provide for Compensation to Workers for Injuries sustained in the Course of their Employment."

<sup>100</sup> Nunavut: Consolidation of Worker's Compensation Act S. Nu. 2007, c.15.

<sup>101</sup> Northwest Territories: Worker's Compensation Act S.N.W.T. 2007, c. 21.

<sup>102</sup> All references to the Northwest Territories Act include the Nunavut Act.

and Application". The human rights values applicable to disability, dignity and respect<sup>103</sup> and the influence of the Meredith principles are evident from the balancing of the interests of the parties in the text:<sup>104</sup>

- 1.1. The purpose of this Act is to establish an open, fair, and comprehensive system of compulsory no-fault mutual insurance for workers and employers that
  - (a) provides for the **sustainable payment of compensation** to injured or diseased workers, the mitigation of the effects of workplace injuries and disease, and the eventual **return of these workers to the workplace** to perform work of which they are capable;
  - (b) ensures the **quick and secure payment of compensation**, without regard to fault and without court proceedings, to injured or diseased workers or, in the case of a fatality, to the dependents of the worker;
  - (c) provides for the independent administration of this compensation system and the adjudication of claims in a manner that **treats employers, workers and claimants fairly, compassionately and respectfully**;
  - (d) ensures the **compensation system is accountable**, through the Minister and the Legislative Assembly, to the public for its decisions and for the administration of this Act; and
  - (e) is dedicated to the continued improvement of this compensation system and the ultimate goal of eliminating workplace injuries and diseases.

The main noteworthy characteristics include *inter alia* no-fault compensation, challenges of sustainability, rehabilitation and re-integration into the workplace,<sup>105</sup> swift but just compensation,<sup>106</sup> fair, kind, considerate treatment and an administrative system that is both accountable and transparent.<sup>107</sup>

The contextual approach in dealing with the purpose as part of the definition section indicates it to define the rest of the Act and interpretation of all provisions to be disseminated from the stated purpose.<sup>108</sup>

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<sup>103</sup> S 1.1.(c).

<sup>104</sup> S 1.1. Own emphasis.

<sup>105</sup> S 1.1.(a).

<sup>106</sup> S 1.1.(c).

<sup>107</sup> S 1.1.(d).

<sup>108</sup> Botha 82. But Botha is of the opinion that care should be taken to avoid literalism.

## 4.2. Interpretation through case law

The purpose of compensatory legislation cannot be removed from the history thereof. It has been discussed in a number of Canadian court cases with the court often referring to the so-called “historic trade off” whereby employers are indemnified from action in exchange for an administrative recourse to employees.<sup>109</sup>

### 4.2.1. *Medwid v Ontario*

In *Medwid v Ontario*,<sup>110</sup> the history of compensatory law in the Canadian province of Ontario is discussed and the principles underlying it reiterated. Under the heading “The Act Today” at (b) the compensation scheme is examined based on the following four principles:<sup>111</sup>

- a) compensation paid to injured workers without regard to fault;
- b) injured workers should enjoy security of payment;
- c) administration of the compensation schemes and adjudication of claims handled by an independent commission, and
- d) compensation to injured workers provided quickly without court proceedings.

The four principles cited still form the backbone of Canadian compensatory legislation and are, to some extent, included in the purpose sections of all the acts.

### 4.2.2. *Henry v Saskatchewan (Workers' Compensation Board)*

The purpose of compensatory legislation was referred to by the Court in *Henry v Saskatchewan (Workers' Compensation Board)*<sup>112</sup> citing from *MacLeod v Workers'*

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<sup>109</sup> For example *Medwid*. Furthermore in *Michelin North America (Canada) Inc. v Workers' Compensation Board (N.S.)*, 2002 NSCA 166 the court refers to the “historic tradeoff” [sic] at 14 whereby employers are relieved from tort action by employees in exchange for a “legislated scheme providing accessible compensation for a range of broadly-defined workplace accidents without the necessity of proving the employer at fault.” The court cautions against losing sight of the adversarial origins of compensation law. Retrieved on 30/05/2011 from <http://canlii.ca/t/5f3p>.

<sup>110</sup> 1988 CanLII 193 (ON S.C.).

<sup>111</sup> The Meredith principles. The Yukon Act in its Preamble recognises these principles and maintains it as the underlying basis of the Act.

<sup>112</sup> 1999 CanLII 12241 (SK CA).

*Compensation Board of Prince Edward Island*(1983), 40 Nfld. & P.E.I.R. 138 (P.E.I.S.C. App. Div.)<sup>113</sup> where it was ruled that:<sup>114</sup>

The *Workers' Compensation Act* is obviously remedial legislation designed to protect workers and their dependents from the hardship of economic loss sustained through injuries suffered by the worker in the course of his employment.

The Court took into consideration the provisions of the Interpretation Act, S.P.E.I. 1981, c. 18 guiding interpretation of remedial legislation to be "given such fair, large and liberal construction and interpretation as best ensured the attainment of its objects."<sup>115</sup> It follows that compensatory legislation should be given a liberal meaning and in doing so extend compensation for "work-related injuries to as many as can reasonably be seen to fall within its purview."<sup>116</sup>

In his dissenting ruling, Wakeling JA took into consideration the long title of the Act:<sup>117</sup>

An Act to provide for Compensation to Workers for Injuries Sustained in the Course of their Employment. This title goes some distance in establishing the approach to be taken when engaging in a purposeful interpretation of the Act.

The overall object and intent of the Act is clear from the definition of an injury i.e. to compensate workplace injuries and diseases.<sup>118</sup> Taking into consideration the long title and the said definition, it can be deduced that the purpose is to compensate only those injuries and diseases that are work-related.<sup>119</sup> The honourable Judge held that the long title "goes some distance in establishing the approach to be taken when engaging in a purposeful interpretation of the Act."<sup>120</sup>

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<sup>113</sup> *Henry* [34].

<sup>114</sup> *Ibid.*

<sup>115</sup> S 9.

<sup>116</sup> *Henry* [34].

<sup>117</sup> *Ibid* [95].

<sup>118</sup> *Ibid* [94].

<sup>119</sup> *Ibid* [94]–[95].

<sup>120</sup> *Ibid* [95].



### 4.2.3. *Budge v Alberta (Workers' Compensation Board)*

In *Budge v Alberta (Workers' Compensation Board)*<sup>121</sup> the Court ruled that section 18<sup>122</sup> of the Workers' Compensation Act violates sections 7<sup>123</sup> and 15(1)<sup>124</sup> of the Canadian Charter of Rights and Freedoms.<sup>125</sup> According to the ruling the right to equality before the law and security of person was violated by the Workers' Compensation Act of Alberta because it protected "any employer" against civil claims for damages and not only the employer of a specific employee which means the limitation is not rationally connected to the purpose it seeks to serve.<sup>126</sup> Section 18 of the Act also violated the rights of the injured employee's wife as she was also affected by the bar against civil litigation.<sup>127</sup>

### 4.2.4. *Wilson v City of Medicine Hat*

In the decision of *Wilson v City of Medicine Hat*<sup>128</sup> specific attention was given to the situation where a claim by an employee was repudiated by the Compensation Authority and all legal avenues exhausted but he still has no recourse in civil litigation against the employer.<sup>129</sup> The Court cited the section that bars civil action against employers and noted that it ought to be construed remedially "given a fair, large and liberal interpretation" to achieve its objectives seen in the light of the

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<sup>121</sup> 1987 CanLII 3184 (AB Q.B.).

<sup>122</sup> "18(1) If an accident happens to a worker entitling him or his dependants to compensation under this Act, neither the worker, his legal personal representatives, his dependants nor his employer has any cause of action in respect of or arising out of the personal injury suffered by or the death of the worker as a result of the accident

(a) against any employer, or

(b) against any worker of an employer,

in an industry to which this Act applies when the conduct of that employer or worker that caused or contributed to the injury arose out of and in the course of employment in an industry to which this Act applies."

<sup>123</sup> S 7: "Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice" as per *Budge* [29].

<sup>124</sup> *Budge* at [46] indicates that s 15(1) of the Charter "declares that every individual is equal before and under the law and has the right to equal protection and equal benefit of the law without discrimination...."

<sup>125</sup> *Ibid* [28].

<sup>126</sup> *Ibid* [50]–[54] & [58].

<sup>127</sup> *Ibid* [52]–[54] & [58].

<sup>128</sup> *City of Medicine Hat* ruling.

<sup>129</sup> *Ibid* [67].

historic trade-off principle.<sup>130</sup> It was held that the bar on civil litigation against employers by employees remains intact irrespective of a decision by the Compensation Board that compensation will not be payable because a different interpretation would obliterate the operation of the compensation scheme and the working of the historic trade-off; and would encourage employees to pursue a negative outcome at the Board to enable them to seek redress via civil actions and in doing so, the object of workers' compensatory law will be defeated.<sup>131</sup>

### 4.3. Summary

Human rights are embedded in the Canadian legislative provisions and case law on compensation reveals the deep-seated human rights culture. Workers and employers are entitled to be treated fairly and with dignity with an intended outcome that speaks of efficiency and transparency. A noteworthy aspect in realising the rights to dignity and equality is the benefit of rehabilitation and return-to-work programmes which is absent from COIDA.<sup>132</sup>

A liberal interpretation has been found to be appropriate when workers' compensatory legislation is interpreted in both South Africa and Canada. Balancing the interests of employers and employees was identified by both countries' courts as to be closely related to the objects and purpose of this type of social legislation.<sup>133</sup>

## 5. AUSTRALIA: PURPOSE AND INTERPRETATION

### 5.1. The purpose of the South Australian Workers Rehabilitation and Compensation Act, 1986

Generally Australian compensatory statutes deal with the purpose in the long title of the act but in some laws an additional section dealing with the objectives of the act provides more clarity. Long titles generally are similar to COIDA with some titles

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<sup>130</sup> *Ibid* [20]–[21].

<sup>131</sup> *Ibid* [67]. The earlier decision of *Wallace v United Grain Growers Ltd.*, 1997 CanLII 332 (SCC), [1997] 3 SCR 701. Retrieved on 23/03/2012 from <http://canlii.ca/t/1fqxh> yielded similar results.

<sup>132</sup> Chapter 3 paras 4.1 & 4.2 *supra*.

<sup>133</sup> Chapter 3 paras 4.2, 4.2.1, 4.2.2, 4.2.3 & 4.2.4 *supra*.

shorter but wider in application.<sup>134</sup> Some of the compensatory laws only have a long title but four of the acts contain a section dealing with the objective of the compensation scheme. These sections are characterised by an extensive set of goals aimed at what the acts purport to achieve and the manner in which to achieve it. The South Australian Act, 1986 contains both a long title as well as an object section<sup>135</sup> similar but not identical to the Victorian Accident Compensation Act, 1985.<sup>136</sup> The object sections aim to balance the interests of the parties (the same principle known as the historic trade-off in Canada) in a fair and transparent way as stated in the South Australian Act:<sup>137</sup>

## 2—Objects of Act

(1) The objects of this Act are—

- (a) to establish a workers rehabilitation and compensation scheme—
  - (i) that **achieves a reasonable balance** between the interests of **employers and the interests of workers**; and
  - (ii) that provides for the effective rehabilitation of disabled workers and their early return to work; and
  - (iii) that provides **fair compensation for employment-related disabilities**; and
  - (iv) that **reduces the overall social and economic cost to the community** of employment-related disabilities; and
  - (v) that ensures that employers' costs are contained within reasonable limits so that the impact of employment-related disabilities on South Australian businesses is minimised; and
- (b) to provide for the **efficient and effective administration** of the scheme; and
- (c) to establish incentives to encourage efficiency and discourage abuses; and
- (d) to ensure that the scheme is fully funded on a fair basis; and
- (e) to reduce the incidence of employment-related accidents and disabilities; and
- (f) to **reduce litigation and adversarial contests** to the greatest possible extent.

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<sup>134</sup> The long title of the Northern Territories' Workers Rehabilitation and Compensation Act 13 of 2008 reads: "An Act about workers' rehabilitation and compensation" which creates an open-ended purpose. Similar purposes are to be found in the Tasmanian Workers Rehabilitation and Compensation Act 4 of 1988; the Western Australian Workers' Compensation and Injury Management Act 1981; the Australian Capital Territory's Workers Compensation Act 1951 and the Commonwealth's Seafarers Rehabilitation and Compensation Act 234 of 1992 and the Commonwealth's Safety, Rehabilitation and Compensation Act 75 of 1988.

<sup>135</sup> Workers Rehabilitation and Compensation Act, 1986 s 2.

<sup>136</sup> No 10191 of 1985.

<sup>137</sup> S 2. Own emphasis.

- (2) A person exercising judicial, quasi-judicial or administrative powers must interpret this Act in the light of its objects without bias towards the interests of employers on the one hand, or workers on the other.

The relationship between the purpose of the workers' compensatory scheme, an effective and efficient administrative remedy coupled with a reduction in litigation is clear from the instructions given regarding interpretation in section 2(2). Sub-section 2 instructs interpretation of the Act when exercising powers, to be in the "light of its objects" and favouring neither party but fairly balances the interests of employers and employees.

The objectives correspond to the Canadian Northwest Territories Act as discussed *supra* but with added appreciation for the negative impact of occupational injuries and diseases upon society in section 2(1)(a)(iv).

## 5.2. Interpretation through case law

Purposive interpretation in contrast to a meticulously literal interpretation of workers' compensatory law is a long-standing principle in Australia. An example of this approach can be seen from the case of *Melanie Gillian Jefferts and Comcare Australia*<sup>138</sup> heard by the Administrative Appeals Tribunal of Australia where the Deputy President of the Tribunal cited from the case of *McDermott v Owners of SS Tintoretto* [1911] AC 35. In the latter Lord Shaw at 45, indicated already in 1911 that interpretation of these types of remedial acts should not be "in the spirit of meticulous literalism."

The nature of compensatory legislation was described as "a liability neither in tort nor in contract. It is a responsibility *positivi juris* and is annexed by law to a relationship, that of master and servant" by Dixon J in the High Court of Australia in the case of *Mynott v Barnard* [1939] HCA 13; (1939) 62 CLR 68.<sup>139</sup>

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<sup>138</sup> *Melanie Gillian Jefferts and Comcare Australia* [1996] AATA 358 at 18. Retrieved on 09/12/2011 from <http://www.austlii.edu.au/au/cases/cth/AATA/1996/358.html>. Hereinafter: *Melanie Gillian Jefferts*.

<sup>139</sup> *Mynott* as per Dixon J.

### 5.2.1. *Johnston v Commonwealth*

In *Johnston v Commonwealth*<sup>140</sup> Murphy J (in his consenting judgment) cautioned the Tribunal against “hair-splitting, over technical interpretation” as it conflicts with the remedial nature of compensatory legislation when interpreting the Compensation (Commonwealth Employees) Act 48 of 1971.<sup>141</sup> The majority judgment held: “The object of the statute is to provide for the payment of compensation to employees who suffer injury or disease occurring in circumstances connected with their employment by the Commonwealth” with emphasis on the legislative provision for an “aggravation, acceleration or recurrence” pertaining to occupational diseases contracted through employment.<sup>142</sup>

### 5.2.2. *Cloncurry Shire Council v Workers’ Compensation Regulatory Authority & Anor*

The Supreme Court of Queensland considered the purpose of the Queensland Act in *Cloncurry Shire Council v Workers’ Compensation Regulatory Authority & Anor*,<sup>143</sup> a case dealing with the power of the Compensation Authority to extend time limits in applications for review of a decision by a self-insured employer. The Court specifically referred to section 4(2) of the Act which stipulates that the objects of the Act “are an aid to the interpretation of the Act.”<sup>144</sup>

The Court reminded the parties that the main aim of the Act as beneficial legislation is the establishment of a workers compensation scheme aiming “to provide benefits for workers who sustain injuries in their employment as well as their dependants and to encourage improved health and safety performance by employers.” Interpretation ought therefore not to be stricter than necessary.<sup>145</sup>

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<sup>140</sup> *Johnston v Commonwealth* [1982] HCA 54. Hereinafter: *Johnston*. Retrieved on 09/12/2011 from <http://www.austlii.edu.au/au/cases/cth/HCA/1982/54.html>.

<sup>141</sup> *Ibid* 24.

<sup>142</sup> *Ibid* 15.

<sup>143</sup> *Cloncurry Shire Council v Workers’ Compensation Regulatory Authority & Anor* [2006] QSC 362. Retrieved on 25/08/2010 from <http://www.austlii.edu.au/au/cases/qld/QSC/2006/362.html>. Hereinafter: *Cloncurry Shire Council*.

<sup>144</sup> *Ibid* [8].

<sup>145</sup> *Ibid* [24].

The Court applied the *dictum* of *Project Blue Sky Inc v Australian Broadcasting Authority*<sup>146</sup> regarding the interpretation of the Act<sup>147</sup>

'The primary object of statutory construction is to construe the relevant provision so that it is consistent with the language and purpose of all the provisions of the statute. The meaning of the provision must be determined "by reference to the language of the instrument viewed as a whole". In *Commissioner for Railways (NSW) v Agalinos*, Dixon CJ pointed out that the "context, the general purpose and policy of a provision and its consistency and fairness are surer guides to its meaning than the logic with which it is constructed". Thus, the process of construction must always begin by examining the context of the provision that is being construed.

A legislative instrument must be construed on the prima facie basis that its provisions are intended to give effect to harmonious goals.

The meanings of provisions with conflicting connotations need to be adjusted to accomplish that result which will best achieve the purpose and language of the provisions but simultaneously uphold the harmony between all the legislated provisions.<sup>148</sup> Courts often have to determine the hierarchy of provisions i.e. which provision is more important and which is the subordinate to determine how to best give effect to the purpose and language though maintaining the unity of the statutory scheme.<sup>149</sup>

The Court held that in the light of the main aim of the Act as stated *supra*, provisions relating to timeliness are less important than provisions giving rights to compensation.<sup>150</sup>

### **5.2.3. *Bird v Commonwealth ("Maralinga case")***

In their consenting ruling in the High Court case of *Bird v Commonwealth ("Maralinga case")*<sup>151</sup> Deane and Gaudron JJ cautioned against reading words into

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<sup>146</sup> *Project Blue Sky Inc v ABA* [1998] HCA 28 CLR 355. Retrieved on 25/08/2010 from <http://www.austlii.edu.au/au/cases/cth/HCA/1998/28.html>.

<sup>147</sup> *Ibid* [25].

<sup>148</sup> *Ibid* [25].

<sup>149</sup> *Ibid* [25].

<sup>150</sup> *Ibid* [27].

the text when interpreting the Compensation Act despite the remedial nature of the Act and beneficial interpretation to employees. They further cautioned that in cases where two possible competing interpretations are possible, the more beneficial interpretation ought to be construed in favour of the employee.<sup>152</sup> The Justices approved of Lord Shaw's remarks in the House of Lords in *McDermott v Owners of S.S. Tintoretto* (1911) AC 35, that he considered it "to be quite unsound, and to be productive of wrong and mischief" to interpret such a remedial statute meticulously literally.<sup>153</sup>

#### 5.2.4. *Melanie Gillian Jefferts and Comcare Australia*

In *Melanie Gillian Jefferts and Comcare Australia*<sup>154</sup> the Tribunal referred to the authority of the Australian Acts Interpretation Act No. 2 of 1901,<sup>155</sup> section 15AA which provides clear guidance on the interpretation of the purpose of an Act:

**Regard to be had to purpose or object of Act<sup>156</sup>**

(1) in the interpretation of a provision of an Act, a construction that would promote the purpose or object underlying the Act (whether that purpose or object is expressly stated in the Act or not) shall be preferred to a construction that would not promote that purpose or object.

It follows that the preferred interpretation of Australian courts ought to be as enabling as can be and be as least restrictive as possible. A purposive interpretation consistent with human rights values is preferred.<sup>157</sup>

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<sup>151</sup> *Bird v Commonwealth ("Maralinga case")* [1988] HCA 23; (1988) 165 CLR 1. Retrieved on 08/12/2011 from <http://www.austlii.edu.au/au/cases/cth/HCA/1988/23.html>.

<sup>152</sup> *Ibid* [5].

<sup>153</sup> *Ibid* [5].

<sup>154</sup> *Melanie Gillian Jefferts* 18.

<sup>155</sup> Acts Interpretation Act 1901, Act No. 2 of 1901 as amended. Retrieved on 12/12/2011 from [http://www.austlii.edu.au/au/legis/cth/consol\\_act/aia1901230/](http://www.austlii.edu.au/au/legis/cth/consol_act/aia1901230/).

<sup>156</sup> Acts Interpretation Act 1901, s 15AA. This section should be read together with s 15A which determines that "Every Act shall be read and construed subject to the Constitution."

<sup>157</sup> Although Australia does not have a Bill of Rights, a longstanding protective culture of fundamental rights is prevalent. See Byrnes, A, Charlesworth, H & McKinnon, G. 2009. Bills of Rights in Australia: History, Politics and Law. *Australian Journal of Human Rights* 15(1): 175–180. Book review by the Honourable Michael Kirby AC CMG (formerly of the High Court of Australia). Retrieved on 29/05/2012 from <http://www.austlii.edu.au/au/journals/AUJHRights/2009/14.html>.

### 5.3. Summary

Australian statutory interpretation is ruled by the Australian Acts Interpretation Act 1901 which directs an interpretation that favours the objects of an Act.<sup>158</sup> The main objective of workers' compensatory law "aim[s] to achieve a reasonable balance between the interests of employers and workers..." as stated in the Preamble to the *National Workers' Compensation Action Plan 2010-2012*. A purposive interpretation is favoured rather than a meticulously literal interpretation.

## 6. CONCLUSION

The purpose of compensatory legislation is represented by the four principles as expressed in the Canadian compensatory legal system; while the remedial nature found its expression in interpretation of the compensatory legislation. The principles underlying compensatory legislation surface in all three countries under discussion to a greater or lesser extent although it is not referred to in exactly the same terms. The four principles consist of:<sup>159</sup>

- A no-fault compensation system,
- Secure payment from a fund funded by employers,
- Administration of compensation schemes and adjudication of claims through an independent structure, and
- Compensation paid to employees, speedily and preferably without court litigation.

These principles form the basis of the compensation scheme and regulate the sensitive tripartite relationship of state, employer and employee by balancing the interests of employers and employees by an independent administrator. In the balancing of the parties' interests by replacement of the adversarial common law right of an employee with an administrative remedy, an employee should not be prejudiced by a narrow interpretation of compensatory legislation as ruled by all three countries' courts; but interpretation should be broad and beneficial to

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<sup>158</sup> Chapter 3 para 5.2.4 *supra*.

<sup>159</sup> Chapter 3 para 4.2.1 *supra*.



employees and society at large. Equal treatment of all social stakeholders through interpretation is important and the counter right of employers not to be held civilly liable requires an equally broad and remedial interpretation. But in instances where two competing interpretations are equally possible, the interpretation that most favoured the employee ought to be preferred in all three countries.<sup>160</sup>

Underlying the interpretation and execution of the compensatory statutes of the three countries are constitutional imperatives and it ought to speak of a human rights-based interpretation showing the different countries' human rights cultures. As discussed above, some jurisdictions expressly include such values in their compensation legislation but in others (e.g. COIDA) although the compensatory law is silent on human rights values, it is derived from other sources of law and remains an integral part of the compensation scheme.<sup>161</sup>

In all three countries, a purposive interpretation is favoured rather than a meticulous literalism.<sup>162</sup> COIDA compares favourably to the two other jurisdictions with regard to purpose and interpretation.

The administrative nature of the remedy in contrast to a litigious process is preferred in all three of the countries but the practical administrative procedures and processes in all three countries are under pressure and have become a major concern which is threatening the existence of the remedy as it limits access to courts in exchange for protracted ineffective administrative processes that deliver agony only.<sup>163</sup> It is submitted that only an effective and just administrative system will be able to deliver a suitable and fair remedy that does not defeat the right to compensation.

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<sup>160</sup> Chapter 3 paras 3.2.2; 4.1; 4.2.2; 4.2.4; 5.1; 5.2; 5.2.1; 5.2.2; 5.2.3 & 5.2.4 *supra*.

<sup>161</sup> Chapter 3 paras 3.2; 4.2 & 5.2 *supra*.

<sup>162</sup> Chapter 3 paras 3.1; 3.2, 4.1; 4.2 & 5.1 & 5.2 *supra*.

<sup>163</sup> Chapter 3 paras 2.1, 2.2 & 2.3 *supra*.

## CHAPTER 4

### CAUSALITY AND THE RELATIONSHIP WITH EMPLOYMENT

#### 1. INTRODUCTION

Occupational injuries received historically more attention than occupational diseases; and compensation for injuries often remains more favourable than for diseases.<sup>1</sup> Occupational diseases by their nature develop over time with some diseases which only present themselves after many years, which creates problems to workers to provide sufficient proof of workplace exposure. For the purposes of this study attention will now be turned to the concept of an “injury” (the concept “injury” may include “disease” except where it will obviously lead to absurdities), its definitions and application in workers’ compensatory law.

The definition of an injury lays down the criteria and elements in the form of a test to determine if a specific injury is occupational in nature and will create a right to compensation.<sup>2</sup> Not all injuries will fulfil the requirements as stated in the definition of an occupational injury, but only those that satisfy all the elements of the test. In the early years of workers’ compensation, all three countries under discussion followed the text of the definition in the English Workmen’s Compensation Act, 1906<sup>3</sup> and the subsequent interpretation through case law.<sup>4</sup> Consideration will be

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<sup>1</sup> Ison, TG. 1994. *Compensation systems for injury and disease: The policy choices*. Toronto: Butterworths. At 12–14 the distinction between injuries and diseases is portrayed as a moral issue which resulted in better compensation for injuries than for diseases rather than compensation for disablement irrespective of the cause thereof.

<sup>2</sup> The Supreme Court of Canada approved the process followed by the Compensation Board in *Pasiechnyk*. The Board asked itself the following questions at [44]: “(1) was the plaintiff a worker within the meaning of the Act; (2) if so, was the injury sustained in the course of employment; (3) is the defendant an employer within the meaning of the Act; and, (4) if so, does the claim arise out of actions or defaults by the employer or the employer’s employees while engaged in, about or in connection with the industry or employment in which the employer or worker of such employer causing the injury is engaged.”

<sup>3</sup> The English Workmen’s Compensation Act provided as follows: “1–(1) If in any employment personal injury by accident arising out of and in the course of employment is caused to a workman...” as retrieved on 01/07/2013 from <http://nrs.harvard.edu/urn-3:HMS.COUNT:1076392>.

<sup>4</sup> *Thom or Simpson v Sinclair*, 1917 A.C. 127 (also cited by courts as *Simpson v Sinclair*, 1917 A.C. 127) and *Hewitson v St Helen’s Colliery Co. Ltd.* (1923), 16 BWCC 230 are examples of case law of which the dicta were cited and applied in all three of the countries.

given to the historical differences in development and interpretation of the definition in all three countries under discussion.

This Chapter will explore the tests applicable to the right to compensation and more specifically the test phrase “out of and in the course of employment” in the context of the definition of an “accident”. Attention will be given to the development of the tests in the three countries following the basis laid down in the early English decisions. In exploring the tests, cognisance need to be taken of the limitations on the right to compensation as embodied in the test phrase and definitions as influenced by the purpose of compensatory laws within the context of the historic trade-off to determine whether South African employees are being treated equally to employees in the other two countries.

## 2. SOUTH AFRICA

It is submitted that Piron argued correctly, that although the courts have advanced different tests over time<sup>5</sup> i.e. time and duty;<sup>6</sup> control test<sup>7</sup> and the place test,<sup>8</sup> it can be concluded that all the tests can be categorised and included into the control test.

### 2.1. Statutory definition of an injury: the test

COIDA defines an occupational injury to “mean[s] a personal injury sustained as a result of an accident”<sup>9</sup> and an accident is defined as “an accident arising **out of and in the course of** an employee's employment **and resulting** in a personal injury, illness or the death of the employee”.<sup>10</sup> These two definitions are closely linked and form a multi-faceted test.

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<sup>5</sup> Piron 24.

<sup>6</sup> *Ibid* 24.

<sup>7</sup> *Ibid* 33.

<sup>8</sup> *Ibid* 34.

<sup>9</sup> S 1(xxx).

<sup>10</sup> S 1(i). Own emphasis.

The test consists of two conjunctive elements different in meaning in the short phrase “out of and in the course of an employees employment” that requires an injury to be both related to the work environment **and**<sup>11</sup> to arise as a result of work.<sup>12</sup> If only one element is satisfied, the injury will not meet the criteria as an **occupational** injury because the necessary *nexus* will not have been established.<sup>13</sup> Although both elements are cause-based, a different meaning is to be attached to each, with “arising out of” broader in connotation than “in the course of.”<sup>14</sup>

“Arising out of employment” relates to circumstances pertaining to the location where the accident happened. If it was his employment that necessitated the employee to be where the accident befell him, it can be said to have “arose out of his employment”.<sup>15</sup> The question to be asked is: was the employee obliged by discharging his contractual employment duties to be where the accident happened? If so, the accident “arose out of his employment”.<sup>16</sup>

“In the course of employment” relates to circumstances of discharging the duties under his contract of employment and that which is related to it, be it expressly or impliedly.<sup>17</sup> When determining if an accident arose “in the course of employment,” factors to be taken into consideration are: the time when employment commences, ends and the duration thereof.<sup>18</sup>

The criterion of “in the course of” employment has a limiting effect on the scope of accidents fulfilling the test phrase and therefore on the right to compensation. As an example consider the situation where an employee attends a corporate function in fulfilment of his employment duties, consumes alcohol provided by the employer and is injured in an accident on his way home after the function, whilst intoxicated.

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<sup>11</sup> Own emphasis.

<sup>12</sup> Piron 23.

<sup>13</sup> *Ibid* 23.

<sup>14</sup> *Ibid* 22–23.

<sup>15</sup> Schaeffer, M & Heyne, JF. 1972. *Workmen’s compensation in South Africa*. Pretoria: JL van Schaik. At 12.

<sup>16</sup> *Ibid* 12.

<sup>17</sup> *Ibid* 13–14. In the unreported case of *Etsebeth v Minister of Defence & Another* (23698/2002) [2009] ZAGPHC, Ledwaba J remarked that the word “employment” has a broader meaning than “duties” at [13].

<sup>18</sup> *Ibid* 13–14.

Although the accident would arise from his employment it will not fulfil the requirement of “in the course of employment” and although it has the potential to result in serious disablement, it will not give rise to a right to compensation.

A third element “resulting in a personal injury, illness or the death” requires that an accident without consequences will not satisfy the test of an occupational injury. The latter is usually the first test to be applied as it often is the most obvious and easily observed.

The text on the test phrase remained essentially the same since the enactment of workers’ compensatory law in South Africa in 1907. The 1907 Act provided for compensation if “any workman become permanently incapacitated by reason of a personal injury arising out of and in the course of his work caused by any accident...”<sup>19</sup> which was amended by the 1934 Act to state if “an accident to a workman arising out of and in the course of his employment happens ... and results in such workman’s disablement or death...”<sup>20</sup> The 1941 Act further amended the test phrase in defining an “accident” to mean “an accident arising out of and in the course of a workman’s employment and resulting in a personal injury”,<sup>21</sup> the text of which was left unaltered with the enactment of COIDA.

## **2.2. Interpretation through case law**

South African compensatory law lacks secondary legislation in the form of policy documentation which can provide guidance on interpretation of the statute and consequential, it is necessary to extensively consult case law to follow precedence.<sup>22</sup> In this regard, a distinction should be drawn between true policy documentation in the form of secondary legislative instruments and awareness documentation in the

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<sup>19</sup> S 1(1).

<sup>20</sup> S 2(1).

<sup>21</sup> S 2(i).

<sup>22</sup> Piron 70–71, criticised the lack of policies as the test phrase is rather vague.

form of pamphlets which are available but does not contribute to legal interpretation.<sup>23</sup>

### 2.2.1. Early English case law

The courts in all three countries drew heavily on decisions by the English courts which were based upon a very similar Act in the early years of court interpretation.<sup>24</sup> A number of English rulings on the interpretation of the word “accident” are of importance as both were cited and applied often in South Africa e.g. *Thom or Simpson v Sinclair*, 1917 A.C. 127<sup>25</sup> and *Hewitson v St Helen’s Colliery Co. Ltd.* (1923), 16 BWCC 230<sup>26</sup> and *Powell v Great Western Railway Co.* (1940) 1 All E.R. 87;<sup>27</sup> with *Thom or Simpson v Sinclair* also cited and applied often in Australia<sup>28</sup> and *Hewitson v St Helen’s Colliery Co. Ltd.*<sup>29</sup> similarly in Canada<sup>30</sup> and Australia.<sup>31</sup>

<sup>23</sup> See for instance the “Basic Guides” as retrieved on 09/05/2012 from <http://www.labour.gov.za/DOL/legislation/acts/basic-guides/index>.

<sup>24</sup> Larson, A. 1973. The positional-risk doctrine in workmen’s compensation. *Duke Law Journal*: 1973(4): 761–819. Professor Larson showed how the phrase “arising out of” was broadened through interpretation that culminated in the “positional-risk” doctrine laid down in *Thom or Simpson v Sinclair* and confirmed in *Powell v Great Western Railway Co.* according to which the but-for rule was applied e.g. “This man suffered this casualty... and it arose out of the employment, because he was at that place. It was by its very nature a place which was rendered dangerous by the shooting of the gun ....” as retrieved on 14/09/2013 from <http://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=2452&context=dlj>.

<sup>25</sup> For example *Minister of Justice v Khoza* 1966 (1) SA 410 (AD) at 420 (hereinafter: *Khoza*) and *Twalo v Minister of Safety and Security and Another* (2009) 30 ILJ 1578 (Ck) at [16]. Hereinafter: *Twalo*.

<sup>26</sup> For example *Leemhuis & Sons v Havenga* 1938 TPD 524 at 525–526; *Ongevallekommissaris v Santam Versekeringsmaatskappy Bpk* 1965 (2) SA 193 (T), (hereinafter: *Ongevallekommissaris v Santam*) and *Workmen’s Compensation Commissioner v Van Rooyen* 1974 (4) SA 816 (T), (hereinafter: *Van Rooyen*).

<sup>27</sup> For example *Khoza* 420, *Van Rooyen* 820 F–G and *Twalo* at [16]. *Powell v Great Western Railway Co.* applied the principles laid down in *Thom or Simpson v Sinclair*.

<sup>28</sup> *Smith v Australian Woollen Mills Ltd* [1933] HCA 60; (1933) 50 CLR 504 at [6]. Retrieved on 14/06/2012 from <http://www.austlii.edu.au/au/cases/cth/HCA/1933/60.html>. The judgments of Starke J, Evatt J and McTiernan J in *Whittingham v Commissioner of Railways (WA)* [1931] HCA 49; (1931) 46 CLR 22, (hereinafter: *Whittingham v Commissioner of Railways*). Retrieved on 16/05/2012 from <http://www.austlii.edu.au/au/cases/cth/HCA/1931/49.html>. The ruling of Windeyer J in *Kavanagh v Commonwealth* [1960] HCA 25; (1960) 103 CLR 547 (hereinafter: *Kavanagh*). Retrieved on 11/05/2012 from <http://www.austlii.edu.au/au/cases/cth/HCA/1960/25.html>. Also in the judgments of Barwick CJ and Mason J in *Favelle Mort Ltd v Murray* [1976] HCA 13; (1976) 133 CLR 580. Retrieved on 08/12/2011 from <http://www.austlii.edu.au/au/cases/cth/HCA/1976/13.html>. Furthermore, also in *Badawi v Nexon Asia Pacific Pty Limited trading as Commander Australia Pty Limited* [2009] NSWCA 324 at [31]. Retrieved on 14/05/2012 from <http://www.austlii.edu.au/au/cases/nsw/NSWCA/2009/324.html>.

<sup>29</sup> See further Chapter 4 paras 3.2.4 & 4.2.1 *infra*.

<sup>30</sup> *Betts and Gallant v The Workmen’s Compensation Board*, 1933 CanLII 46 (SCC), [1934] SCR 107 at 116–117. Retrieved on 11/09/2013 from <http://canlii.ca/t/fslmr>. *Gellately v Newfoundland (Workers’ Compensation Appeal Tribunal)*, 1995 CanLII 9896 (NL CA) at [9]. Retrieved on

In *Hewitson*, Lord Atkinson held that “arising out of” implies “cause and effect” with the injury the effect that was caused by employment in the execution of employment duties but also that which is incidental to the employment.<sup>32</sup> The phrase “in the course of” employment entails “doing something he was employed to do ... when he is doing something in discharge of a duty to his employer, directly or indirectly imposed upon him by his contract of service”. This dictum of Lord Atkinson was applied *inter alia* in *Leemhuis & Sons v Havenga*,<sup>33</sup> in *Human v Workmen's Compensation Commissioner*<sup>34</sup> and in *Ongevall Kommissaris v Santam Bpk*.<sup>35</sup> Williamson JA applied the dictum of Lord Shaw in *Simpson v Sinclair*<sup>36</sup> (page 142) in his minority judgment in the enquiry to determine whether the accident arose “out of employment” in the case of *Minister of Justice v Khoza*.<sup>37</sup> In *Khoza*, Rumpff JA noted the sometimes contradictory English decisions and he suggested they are not authoritative in interpreting the South African Act. In his judgment he did not rely on any authorities but in his concurring ruling, Williamson JA cited *inter alia*, *Armitage v Lancashire and Yorkshire Railway*, (1902) 2 K.B. 182,<sup>38</sup> *Thom or Simpson v Sinclair*<sup>39</sup> and *Powell v Great Western Railway Co.*<sup>40</sup>

Although the cases subsequent to *Khoza* refrained from citing or applying the English decisions in this regard, later cases again considered decisions like *Hewitson*<sup>41</sup> and *Sinclair*.<sup>42</sup>

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01/05/2012 from <http://canlii.ca/t/2f151>. (Hereinafter: *Gellately*). Argued in *Workmen's Compensation Board v C.P.R.*, 1952 CanLII 44 (SCC), [1952] 2 SCR 359 at 360, (hereinafter: *C.P.R.*). Retrieved on 13/05/2012 from <http://canlii.ca/t/22wr9>.

<sup>31</sup> See the decisions of Dixon CJ and Windeyer J in *Kavanagh* at [10] and the ruling of McTiernan J in *Whittingham v Commissioner of Railways*.

<sup>32</sup> *Leemhuis & Sons v Havenga* 1938 TPD 524 at 526.

<sup>33</sup> *Ibid* 526.

<sup>34</sup> *Human v Workmen's Compensation Commissioner* 1956 (2) SA 461 (T) at 468–470.

<sup>35</sup> *Ongevallkommissaris v Santam* 196.

<sup>36</sup> *Simpson v Sinclair* 1917 A.C. 127 at 142. Also referred to as *Thom or Simpson v Sinclair*.

<sup>37</sup> *Khoza* 419–420.

<sup>38</sup> *Ibid* 419.

<sup>39</sup> *Ibid* 420.

<sup>40</sup> *Ibid* 420.

<sup>41</sup> *Rauff v Standard Bank Properties (A Division of Standard Bank of SA LTD) and Another* 2002 (6) SA 693 (W), distinguished at [14.2]. Hereinafter: *Rauff*.

<sup>42</sup> *Ex Parte Workmen's Compensation Commissioner: In re Manthe* 1979(4) SA 812, at 816 A. Hereinafter: *Manthe*.

### 2.2.2. *Briesch v Geduld Propriety Mines, Ltd*

Interpretation of the test as presented in the definition yielded complications in interpretation from its inclusion in the earliest statute, The Workmen's Compensation Act 36 of 1907.<sup>43</sup> However, it remained mainly unchanged throughout the history of compensatory legislation in South Africa. In one of the early cases, *Briesch v Geduld Propriety Mines, Ltd*,<sup>44</sup> Smith J identified 3 requirements: "(1) A personal injury, (2) that this injury arose out of and in the course of his work, and (3) that it was caused by an accident".<sup>45</sup> The Court noted that the English decision of *Fenton v Thorley* 1903 A.C. 443<sup>46</sup> accepted the popular meaning of "accident" but it was not helpful as it was often used interchangeable to indicate cause and or effect.<sup>47</sup> The Court held that three determining factors need to be satisfied to constitute an "accident", namely: an untoward or unexpected event; an event explicit in "nature, time and place"; and that an external agency, like the bursting of a pipe, is not a pre-requisite.<sup>48</sup>

### 2.2.3. *Minister of Justice v Khoza*

In South African law, the classical Appeal Court case of *Minister of Justice v Khoza*<sup>49</sup> (hereinafter: *Khoza*) is the standard authoritative source on the test phrase "out of and in the course of" as it revolved around the interpretation of section 2(i) of the 1941 Act,<sup>50</sup> the predecessor of COIDA. The 1941 Act defined "accident" to mean "an accident arising out of and in the course of a workman's employment and resulting in a personal injury"; the text of which was left unaltered with the enactment of

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<sup>43</sup> The 1907 Act provided in s 17 as follows: "If any workman become permanently incapacitated by reason of a personal injury arising out of and in the course of his work caused by any accident..."

<sup>44</sup> *Briesch v Geduld Propriety Mines, Ltd*, 1911 T.P.D. 707. Hereinafter: *Briesch*.

<sup>45</sup> *Ibid* 712.

<sup>46</sup> *Fenton v Thorley* 1903 A.C. 443 was considered to be the leading authority on this aspect by the Supreme Court of Canada as per *Workmen's Compensation Board v Theed* 1940 CanLII 45 (SCC), [1940] SCR 553 at 558 retrieved on 15/09/2013 at <http://canlii.ca/t/fslvf>.

<sup>47</sup> *Briesch* 712.

<sup>48</sup> *Ibid* 715.

<sup>49</sup> 1966 (1) SA 410 (AD).

<sup>50</sup> "2. In this Act, unless inconsistent with the context –

(i) "accident" means an accident arising out of and in the course of a workman's employment and resulting in a personal injury."



COIDA and thus remains authoritative. In *Khoza*, the court clearly distinguished between the two elements of the test phrase and found:<sup>51</sup>

*Luidens Wet 30 van 1941 moet die ongeval uit die werksman se diens ontstaan en in die loop daarvan plaasvind. 'In die loop daarvan' beteken dat die ongeval moet plaasvind terwyl die werksman besig is met sy werksaamhede en dit ontstaan 'uit sy diens' as die ongeval in verband staan met sy werksaamhede. (See translation to English infra).*

Rumpff JA, held that the legislator did not define the relationship between duties and accident; and a broad relationship would suffice.<sup>52</sup> If the relationship between duties and accident is seen in the light of the purpose and far-reaching scope of the Act, the *nexus* between duties and accident will in general sufficiently be established if the accident occurs at the place where the employee was exercising his duties as required by his employment.<sup>53</sup> The *nexus* will, however, be destroyed if the nature of the accident is such that the employee would have sustained the injuries although he was present somewhere else than required by his employment or when the employee through an action of his own, severed the *nexus* between employment and accident, or when the employee is injured by someone else and the motive for the assault is unrelated to the employee's duties.<sup>54</sup>

Williamson JA in his separate judgment formulated the test as an enquiry into "whether it was the actual fact that he was in the course of his employment that brought the workman within the range or zone of the hazard giving rise to the accident causing injury";<sup>55</sup> which brings into play a consideration of the place where the accident took place.<sup>56</sup>

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<sup>51</sup> *Khoza* 417. Translated to English it means: According to Act 30 of 1941, the accident needs to arise out of the employee's employment and occur in the course thereof. "In the course of " means that the accident must occur while the employee is engaged in his employment activities and it arises "from his service" if the accident is connected with his employment.

<sup>52</sup> *Ibid* 417 D.

<sup>53</sup> *Ibid* 417 D-F.

<sup>54</sup> *Ibid* 417 G-H.

<sup>55</sup> *Ibid* 419 H-420 B.

<sup>56</sup> *Ibid* 419-420.

From the above, it can be deduced that the test phrase “out of and in the course of an employee’s employment” refers to an open-ended spectrum of factors that include duties performed in discharging contractual employment duties, the place where the duties are executed and time of execution. It is submitted that the enquiry as formulated by the honourable Justice Rumpff requires employment to be a *conditio sine qua non* (the but-for test) in the broad sense for the accident. The broadness is necessitated by the extremely broad spectrum of accidents that may befall an employee out of and in the course of the performance of his duties as is evident from the uniqueness of the set of facts particular to each case.

#### **2.2.4. *Workmen’s Compensation Commissioner v Van Rooyen***

It is contended that *Khoza* did not create clarity on the application of the test phrase and in particular a number of cases followed that turned on the exceptions referred to by Rumpff JA. The then Transvaal High Court<sup>57</sup> applied the test as formulated by Williamson JA in *Khoza* in the stated case of *Workmen’s Compensation Commissioner v Van Rooyen*.<sup>58</sup> The words of Rumpff JA cited *supra* in the *Khoza* decision were wrongly applied by the Applicant to repudiate the claim of a widow by reason that her husband destroyed the causal connection through his own doing.<sup>59</sup> The reasons put forward by the Applicant included that the deceased was busy doing something totally unrelated to his duties, the deceased “went to the accident and the accident did not come to him”; the deceased abandoned his employment to assist the co-worker; the deceased did not owe the co-worker a duty of care and if any duty of care existed at that moment, it was upon the railway track foreman not the deceased.<sup>60</sup> The deceased was killed whilst trying to save the life of a co-worker, not a colleague but an employee of the South African Railways (SAR). The deceased was tasked to maintain equipment sold by his employer to SAR.<sup>61</sup>

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<sup>57</sup> Currently known as the Gauteng Division of the High Court of South Africa.

<sup>58</sup> 1974 (4) SA 816 (T).

<sup>59</sup> *Van Rooyen* 819 A.

<sup>60</sup> *Ibid* 816 F–H.

<sup>61</sup> *Ibid* 818 C–819 A.

Counsel for the “objector”<sup>62</sup> argued that the test phrase was not defined in the Act but only a broad *nexus* in time and space needs to be established between employment and injury as was held in *Khoza*;<sup>63</sup> and that the Applicant failed to appreciate the full meaning of the phrase “arose in the course of employment”; and even if the deceased acted contrary to the instructions of his employer, his actions would still satisfy the test.<sup>64</sup>

It was common cause that the accident occurred “*in the course*” of the deceased’s employment but the court had to determine if it also “*arose out of*” the deceased’s employment.<sup>65</sup> Galgut J applied the *dicta* of both Rumpff JA and Williamson JA from the *Khoza* decision and found that the principles given by the honourable judges were applicable in this case.<sup>66</sup> *In casu* the circumstances of the case did not form part of the exceptions that Rumpff JA referred to when he indicated that an employee may destroy the causal relationship through his own doing. The Court found “the deceased was about his employment at the time of the accident and that the time and place brought him within the range of the peril he encountered” and thus it follows that the test had been satisfied.<sup>67</sup>

#### **2.2.5. *Kau v Fourie***

*Kau v Fourie*<sup>68</sup> turned on the last of the listed exclusions as per Rumpff AJ in *Khoza* referred to *supra*. In casu the Appellant (Claimant in the court of first instance)<sup>69</sup> sustained an injury when he was assaulted by the Defendant who was at all relevant times an employee of the Defendant.<sup>70</sup> The Claimant instituted a claim for damages against the Defendant despite the fact that he received compensation from the Compensation Fund for his work incapacity due to the injury.<sup>71</sup> The Defendant pleaded that the Claimant received statutory compensation for the incapacity and

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<sup>62</sup> *Ibid* 817 F.

<sup>63</sup> *Ibid* 817 F.

<sup>64</sup> *Ibid* 817 G–H.

<sup>65</sup> *Ibid* 819 G–H.

<sup>66</sup> *Ibid* 820.

<sup>67</sup> *Ibid* 820 G.

<sup>68</sup> *Kau v Fourie* 1971 (3) SA 623 (T). Hereinafter: *Kau v Fourie*.

<sup>69</sup> *Ibid* 624 E.

<sup>70</sup> *Ibid* 624 E–H.

<sup>71</sup> *Ibid* 624 E–H.

that the Defendant was precluded from instituting a claim for damages in terms of section 7(a) of the 1941 Act; and no liability arises on his part pertaining to the incapacity of the Claimant.<sup>72</sup> The Court cited the *dicta* of both Rumpff JA and Williamson JA in *Khoza*<sup>73</sup> and noted that it will be applied as far as it is relevant to the facts at hand.<sup>74</sup> The Court then rejected that for purposes of Rumpff JA's *dictum*,<sup>75</sup> the injury arose out of employment as it flowed from damage to the Defendant's truck of which the Claimant was the driver at the relevant time.<sup>76</sup> In applying the but-for test, the Court reasoned that was it not for his employment, the Claimant would not have been assaulted by his employer after damaging the truck in a road accident.<sup>77</sup> The Court avoided to give preference to a specific authority and held that the assault did not satisfy the test and did not arise out of the Claimant's employment relationship but was due to the employer's unlawful, deliberate and wrongful action.<sup>78</sup> The Defendant assaulted the Claimant because he was aggrieved for the damage to his truck; the assault could have happened at any place where the employer and employee met, even after hours and the fact that the assault happened at the workplace was purely coincidental and incapable of rendering the required *nexus*.<sup>79</sup> The Act protects an employer even if the employer negligently exposed the employee<sup>80</sup> but the Act is silent on instances when the employer acted deliberately, which convinced the Court that the Legislator did not intend protecting employers acting deliberately.<sup>81</sup>

#### **2.2.6. *Ex Parte Workmen's Compensation Commissioner: In re Manthe***

In the stated case of *Ex Parte Workmen's Compensation Commissioner: In re Manthe* 1979(4) SA 812, the court, lead by previous decisions said: "the Act, as remedial legislation, should be given an [sic] broad and commonsense interpretation on this

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<sup>72</sup> *Ibid* 624 H-625 A.

<sup>73</sup> *Ibid* 627-628.

<sup>74</sup> *Ibid* 628 D.

<sup>75</sup> *Ibid* 628 G.

<sup>76</sup> *Ibid* 628 D-E.

<sup>77</sup> *Ibid* 628 E-F.

<sup>78</sup> *Ibid* 628 H.

<sup>79</sup> *Ibid* 628 H-629 B.

<sup>80</sup> *Ibid* 629 H.

<sup>81</sup> *Ibid* 630 A.

issue”<sup>82</sup> taking into account factors such as “the time, place and circumstances of the accident”<sup>83</sup> which all should be given a weight to ascertain whether a reasonable *nexus* exists between duties and accident.<sup>84</sup> This case also flowed from the exclusions listed by Rumpff JA in *Khoza* and specifically the *obiter dictum*<sup>85</sup> indicating that the required *nexus* is severed when the employee sustained injuries through an assault by another person and the motive for the assault is unrelated to the employee’s duties.<sup>86</sup>

The basic enquiry remained “whether it was the actual fact that he was in the course of his employment that brought the workman within the range or zone of the hazard giving rise to the accident” according to the *dictum* of Williamson AJ in *Khoza*.<sup>87</sup> It was held that the risk of assault was incidental to the performance of the employee’s duties at the particular time and place; and it is irrelevant that the public is subject to the same danger at that time and place.<sup>88</sup>

It is clear that the decisions in the period following *Khoza*, were inconsistent in their approach and in application of especially the conditions blamed for severing the required *nexus* as noted by Rumpff JA in *Khoza*.

#### **2.2.7. *Rauff v Standard Bank Properties (A Division of Standard Bank of SA Ltd) and Another***

Since the inception of workers’ compensatory law, questions arose in deciding when employment starts, when it ends and what the influence would be of a break in working hours<sup>89</sup> as in the English case of *St. Helens Colliery Company v Hewitson* 1924 A.C. 59 as applied in *Leemhuis*<sup>90</sup> and *Ongevallekommissaris v Santam*

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<sup>82</sup> *Manthe* 816 E.

<sup>83</sup> *Ibid* 816 F.

<sup>84</sup> *Ibid* 816 F–G.

<sup>85</sup> *Ibid* 815 F, 816 G–H and 817 H.

<sup>86</sup> *Ibid* 815 E–F.

<sup>87</sup> *Ibid* 817 H.

<sup>88</sup> *Ibid* 818 A–B.

<sup>89</sup> Frank 15–20.

<sup>90</sup> *Ongevallekommissaris v Santam* 196 D–F.

*Versekeringsmaatskappy Bpk.*<sup>91</sup> The Court in the latter cited Lord Romer in *Weaver v Tredegar Iron Company* (1940) 3 All E.R. 157 saying:<sup>92</sup>

In all cases, therefore, where a workman, on going to, or on leaving, his work suffers an accident on the way, the first question to be determined is whether the workman was at the place where the accident occurred in virtue of his status as a workman or in virtue of his status as a member of the public.

This aspect was under consideration by the Court in *Rauff v Standard Bank Properties (A Division of Standard Bank of SA Ltd) and Another*.<sup>93</sup> The Court had to decide if the employee (Rauff/Plaintiff) was injured “out of and in the course of” her duties when she was injured in a falling lift in the building in which she worked when she left her place of work at the end of the working day.<sup>94</sup> The Plaintiff instituted a claim for damages against the Defendant, which claim would be defeated if she was injured “out of and in the course of employment”<sup>95</sup> because the employer would then be protected against delictual liability.<sup>96</sup> Flemming DJP crisply explained the application of the two legged test:<sup>97</sup>

[9.1] I focus on determining what **relationship there was between the accident and the activity which the employee would be expected to do or not to do as a matter of executing the contract of employment.** It is of necessity factually related to know whether the accident was indeed 'arising out of' the employment or was unrelated to what the tasks of the employee entailed. The second leg is whether the accident was adequately integrated with the 'course of . . . employment'.

[9.2] The Legislature provides a gauge; it does not itself apply the gauge.

Sound practical judgment will establish that once an employee left office, the control of the employer is disrupted.<sup>98</sup> The court applied *Jeffery v Santam Insurance Ltd and Another* 1992 (3) SA 835 (W) where it was held that in terms of the 1941 Act employment begins and ends “when an employee reaches his place of work and

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<sup>91</sup> 1965 (2) SA 193 (T). Hereinafter: *Santam*.

<sup>92</sup> *Ibid* 196 H.

<sup>93</sup> 2002 (6) 693 (W).

<sup>94</sup> *Rauff* [1].

<sup>95</sup> *Ibid* [4].

<sup>96</sup> *Ibid* [13.3].

<sup>97</sup> *Ibid* [9.1]–[9.2]. Own emphasis.

<sup>98</sup> *Ibid* [9.2]–[10.1].

ends when he leaves it.”<sup>99</sup> The Plaintiff left behind both her “place of employment and the course of execution of her duties” once she walked out through the doors of her employer’s office.<sup>100</sup>

As this constitutes a general test which needs further consideration to determine if Plaintiff remained within the “sphere of her employment while going home and not whether she was still on a site of which the employer is the owner”, the Court applied the *Santam* ruling.<sup>101</sup> Flemming DJP strongly dismissed the notion that “employment sticks to the employee like a giant toffee...” as that would negate considering the duty to discharge employment duties and consequently considering whether the “accident arose out of employment.”<sup>102</sup> The Court considered the Defendant’s *sine qua non* argument to be inadequate because it did not take cognisance of what is expected from her in her capacity as an employee.<sup>103</sup> That is despite that had the Plaintiff not been working in the specific building at the particular time, she could have escaped the accident.<sup>104</sup>

### 2.3. Extended right to compensation

The definition as discussed above is broadened by the provisions of COIDA’S sections 22 and 25 which introduce an extension to the test phrase, namely:

- employee behaviour that constitutes “serious and wilful misconduct”;<sup>105</sup>
- employee actions taken in the interest of, or in connection with the employer’s business but otherwise unlawful or contrary to instructions from the employer;<sup>106</sup>

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<sup>99</sup> *Ibid* [10.1].

<sup>100</sup> *Ibid* [10.1].

<sup>101</sup> *Ibid* [11]–[13.1].

<sup>102</sup> *Ibid* [13.3].

<sup>103</sup> *Ibid* [14.5].

<sup>104</sup> *Ibid* [14.5].

<sup>105</sup> S 22(3)(a) “If an accident is attributable to the serious and wilful misconduct of the employee, no compensation shall be payable in terms of this Act, unless-

(i) the accident results in serious disablement; or

(ii) the employee dies in consequence thereof leaving a dependant wholly financially dependent upon him.

(b) Notwithstanding paragraph (a) the Director-General may, and the employer individually liable or mutual association concerned, as the case may be, shall, if ordered thereto by the Director-General, pay the cost of medical aid or such portion thereof as the Director-General may determine.”

- transport provided free of charge by the employer to his employee to and from work, in a vehicle provided for that purpose by the employer and driven by a person so instructed by the employer or by the employer himself;<sup>107</sup>
- participation by employees in training for and providing of first aid and emergency services with the consent of the employer either on the employer's premises or at another place by the employee.<sup>108</sup>

In the first two instances the test will be considered to be satisfied if serious disablement or death follows from the injury as COIDA provides for injuries sustained under those circumstances to be **“deemed to have arisen out of and in the course of the employment.”**<sup>109</sup>

### 2.3.1. Serious and wilful misconduct

In terms of section 22(3), the right to compensation (except for payment of reasonable medical costs as under discretion of the Director-General) will be defeated if the injury was sustained in circumstances where the conduct of the employee constitutes “serious and wilful misconduct”, save for accidents with seriously disabling consequences or death leaving a dependant who was totally financially reliant upon the deceased at the time of the accident.

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<sup>106</sup> S 22(4) “For the purposes of this Act an accident shall be deemed to have arisen out of and in the course of the employment of an employee notwithstanding that the employee was at the time of the accident acting contrary to any law applicable to his employment or to any order by or on behalf of his employer, or that he was acting without any order of his employer, if the employee was, in the opinion of the Director-General, so acting for the purposes of or in the interests of or in connection with the business of his employer.”

<sup>107</sup> S 22(5). In the case of *Gunter v Compensation Commissioner* (2009) 30 ILJ 2341, the court examined the interpretation of s 22(5) and found that the injured employee acted in “the course and scope of his employment” (at 24) when he was injured in a motor vehicle accident. The vehicle was not provided by his employer and the employee did not claim on the basis of the provisions in s 22(5) but on the definition “out of and in the course of his employment” as he was fulfilling his duties whilst travelling to fetch parts needed for repairs. Hereinafter: *Gunter*.

<sup>108</sup> S 25.

<sup>109</sup> S 22(4). Own emphasis.



The meaning of the phrase “serious and wilful misconduct” is therefore crucially important and COIDA defines it in section 1 to mean:<sup>110</sup>

- (a) being under the influence of intoxicating liquor or a drug having a narcotic effect;
- (b) a contravention of any law for the protection or the health of employees or for the prevention of accidents, if such contravention was committed wilfully or with a reckless disregard of the provisions of such law; or
- (c) any other act or omission which the Director-General having regard to all the circumstances considers to be serious and wilful misconduct.

The Commissioner may condone transgressions by employees of labour legislation with the inclusion of occupational safety legislation or workplace rules and instructions by an employee as well as other acts or omissions in the light of the circumstances of the accident if the employee sustained serious disablement or dies as a result of the accident as it forms part of “serious and wilful misconduct.”<sup>111</sup>

### **2.3.2. Court interpretation of serious and wilful misconduct**

The onus to prove serious and wilful misconduct rests on the Commissioner and it does not imply merely moral misconduct but rather heedless violation of a legal duty to follow safety measures.<sup>112</sup> It has been held that it does not constitute a mere

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<sup>110</sup> The definition stayed in essence the same since the 1907 Act according to Frank 25 and the similarities to COIDA can be seen when comparing to the current definition. The 1934 Act provided as follows in s 2:

- “(1) ... provided that no compensation shall be recoverable –
- (b) If the accident is attributable to the serious and wilful misconduct of the workman, unless the accident results in serious disablement, or the workman has died in consequence of the accident leaving as a child or any person dependent upon him...”

The 1934 Act defined “serious and wilful misconduct” in section 84 to mean:

- “(a) drunkenness; or
- (b) a contravention of any law or statutory regulation made for the purpose of ensuring the safety or health of workmen or of preventing accidents to workmen, if the contravention was committed deliberately or with a reckless disregard of the terms of such law or regulation; or
- (c) any other act or omission which the magistrate or a court of law may, having regard to all the circumstances of an accident, declare to be serious and wilful misconduct”.

<sup>111</sup> S 1(xlii)(b) and (c) and s 22(3) and (4).

<sup>112</sup> Schaeffer 35.

impulsive transgression of such rules but both knowledge and deliberate transgression have to be present.<sup>113</sup>

According to the test laid down by the Appeal Court in *Vermeulen v Heyne* 1913 AD 542,<sup>114</sup> serious and wilful misconduct will be present if the employer would be entitled to summarily dismiss the employee for the conduct.<sup>115</sup> The Court set out the analytical process to be followed to determine if serious and wilful misconduct is present.<sup>116</sup> The first step is to ascertain if one or more of the elements specified in the Act are present i.e. intoxication or wilful contravention of a safety law or regulation or any other act or omission in the light of all the circumstances of the accident. If it is established that one of the elements is present, the next step is to establish whether misconduct is present and if so, if the misconduct is both serious and wilful.<sup>117</sup>

### 2.3.3. Commuting injuries

It is submitted that when measured against the multi-faceted test for “out of and in the course of”, it is clear that travelling to and from work cannot satisfy the test as it entails actions outside the work sphere and outside the contract of employment.<sup>118</sup> The Legislature, by virtue of the extension of the control of the employer over his employee,<sup>119</sup> broadened coverage by providing that commuting injuries sustained under specified circumstances, will be deemed to satisfy the test.<sup>120</sup> This will be in circumstances when the employer provides the transport costless to the employee and the vehicle is controlled by the employer or an employee in his service. In

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<sup>113</sup> *Luipaardsvlei Estates v Byng* 1911 TPD 515.

<sup>114</sup> *Vermeulen v Heyne* was decided on the 1907 Act but the text has in essence been retained in all subsequent amendments including COIDA.

<sup>115</sup> *Ibid* at 548 the Court followed the test in respect of the seriousness of the conduct as suggested in the earlier English decision of *Johnson v Marshall, Sons and Co. Ltd* 1906 8 WCC 10.

<sup>116</sup> *Ibid* 547.

<sup>117</sup> *Ibid* 549.

<sup>118</sup> *Gunter* contrasted accidents arising from travelling and accidents “arising out of and in the course of employment” by the performance of contractual duties.

<sup>119</sup> Control is extended by the requirement that the transport be “controlled” by the employer in the 1941 Act s 27(3).

<sup>120</sup> *Xakaxa v Santam Insurance Co Ltd* 1967 (4) SA 521 (E), at 522 H-523 B. The Court considered the meaning and extent of the control at 523 A-H.

*Western Platinum Ltd v Santam Insurance Ltd*<sup>121</sup> decided in terms of the 1941 Act, the Court found in favour of a right to compensation; although the employer who paid the costs, contracted the bus service out to a bus company. The vehicle involved in the accident was neither driven by the employer nor any of the employer's employees but it was not a requirement of the 1941 Act.<sup>122</sup> This requirement, however, was introduced into South African compensatory legislation with the enactment of COIDA.

The difference in the meaning of the two elements of the test phrase "arise out of employment" and "in the course of employment" was explained by the court in the case of *Sparg v Workmen's Compensation Commissioner*<sup>123</sup> by virtue of the *dictum* of Rumpff JA in the *Khoza* ruling.<sup>124</sup> Kannemeyer JP held the Act deems "conveyance of a workman as therein provided to have taken place 'in the course of such workman's employment' but does not deem it to 'arise out of' the employment...."<sup>125</sup> In order for the employee to satisfy the test, he needs to prove the *nexus* with his employment because "arise out of employment" is not assisted by a deeming proviso.<sup>126</sup> *In casu* the required *nexus* with the employee's employment could not be established although he was injured in an accident whilst using a vehicle provided by his employer.<sup>127</sup> The reason for his journey lacked the required *nexus* with his employment duties as it was for a private errand.<sup>128</sup> It ought to be noted that the Occupational Health and Safety Act section 1(1) defines "premises" to include "any

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<sup>121</sup> 1994 (1) SA 480 (W).

<sup>122</sup> The 1941 Act s 27(3) determines: "For the purposes of this Act the conveyance of a workman free of charge to or from his place of work by means of transport controlled and specially provided by his employer for the purpose of such conveyance, shall be deemed to take place in the course of such workman's employment" while COIDA s 22(5) increases the amount of control from the employer by requiring: "For the purposes of this Act the conveyance of an employee free of charge to or from his place of employment for the purposes of his employment by means of a **vehicle driven by the employer himself or one of his employees** and specially provided by his employer for the purpose of such conveyance, shall be deemed to take place in the course of such employee's employment." (Own emphasis).

<sup>123</sup> *Sparg v Workmen's Compensation Commissioner* 1990 (1) SA 169 (E), at 172 A. In this case the employee was injured in a car accident while driving a motor vehicle provided by his employer but the purpose of the journey was to run a private matter.

<sup>124</sup> *Ibid* 172 C-F.

<sup>125</sup> *Ibid* 172 A. S 27(3) of the 1941 Act provided as follows: "For the purposes of this Act the conveyance of a workman free of charge to or from his place of work by means of transport controlled and specially provided by his employer for the purpose of such conveyance, shall be deemed to take place in the course of such workman's employment."

<sup>126</sup> *Ibid* 172 A-C.

<sup>127</sup> *Ibid* 170 C-F.

<sup>128</sup> *Ibid* 172 E-F.

building, vehicle, vessel, train or aircraft” which brings transport within the control of the employer and connotes a broader requirement than COIDA.

#### **2.4. Migrant labour**

It is clear from the discussion supra that the place where the accident happens and the place where the employee is executing his services are important aspects in determining whether an accident “arose out of and in the course of employment.” Workers moving across state borders for work purposes deserve attention. For purposes of this study, attention will be given to two groups of people: those entering South Africa, particularly from the SADC countries to work in South Africa and South Africans that work abroad but whose families remain in South Africa and who will be returning to the Republic after a period of absence.

COIDA section 23 enables an employee to validly claim under COIDA if an accident happens to him whilst working in another country provided that working outside South Africa is of a temporary nature, the normal work environment is within South Africa and the employer’s main business is in South Africa “such employee shall, subject to paragraph (c), be entitled to compensation as if the accident had happened in the Republic”. However, if it is required from the migrating employee to work outside the South African borders for longer than twelve months continuously,<sup>129</sup> the provision will cease to apply. It is submitted that this approach is outdated considering current global employment trends and considering the position of employees who do not qualify as previously disadvantaged candidates; and whose career prospects are limited within South Africa due to the impact of employment equity in the South African labour market.<sup>130</sup> These employees often work outside the borders of South Africa. If such an employee sustains an occupational injury or contracts an occupational disease, the employee returns to South Africa and without appropriate compensation to enable a sustainable living

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<sup>129</sup> In instances where the right to compensation entails a pension, s 60 of COIDA determines that the pension may be commuted to a lump sum award if the pensioner is domiciled outside or is absent from the RSA for a period(s) totalling more than six months.

<sup>130</sup> Employment Equity Act No. 55 of 1998.

while recovering and compensation in cases of permanent disability, the burden of costs shifts to his family and the community.

The portability of compensation paid to employees injured in South Africa but leaving the Republic thereafter, is limited by the Act. Section 60 of COIDA provides for the suspension of a pension that was awarded for permanent disablement or death; and replacing it with a lump sum payment, if that employee leaves the Republic for a continuous period longer than six months or is resident outside the Republic. However, the Director-General is required to notify the recipient of the pension of his intention and request representations to be made.

A further consideration to be taken into account is the South African Government's policy to promote financial integration in the SADC region with free movement of migrant labour and the transport of goods across borders in the region.<sup>131</sup> It is submitted that sections 23 and 60 of COIDA are contradictory to the spirit of the founding Treaty of the SADC's objective to "support the socially disadvantaged through regional integration"; the social security protection afforded pursuant to the Charter of Fundamental Social Rights and the Code on Social Security in the SADC<sup>132</sup> as well as the Draft Protocol on the facilitation of Movement of Persons.<sup>133</sup> The Code on Social Security specifically provides for migrant workers in Article 17 which states as follows:

- 17.2 Member States should ensure that all lawfully employed immigrants are protected through the promotion of the following core principles. These principles should be contained in both the national laws of Member States and in bi- or multilateral arrangements between Member States:
- (a) Migrant workers should be able to participate in the social security schemes of the host country.
  - (b) Migrant workers should enjoy equal treatment alongside citizens within the social security system of the host country.

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<sup>131</sup> Mlambo-Ngcuka, P. 2008. Keynote address. *New Partnership for Africa's Development (Nepad) South African Development Community (SADC) Infrastructure Projects Conference*. Delivered on behalf of HE Ms Phumzile Mlambo-Ngcuka, Deputy President of the Republic of South Africa by Radebe, J. Retrieved on 01/05/2012 from <http://www.info.gov.za/speeches/2008/08081108451002.htm>.

<sup>132</sup> Olivier *et al* (2003): 635 refers to an agreement between South Africa and Mozambique permitting payment of compensation for occupational injuries and diseases to migrant employees from Mozambique injured while working in South Africa, in Mozambique. See also Chapter 2 paras 3.5 & 5.5 and Chapter 4 paras 3.4 & 4.4 and Chapter 5 paras 2.10; 3.7 & 4.7.

<sup>133</sup> Jordaan *et al* 47-51.

- (c) There should be an aggregation of insurance periods and the maintenance of acquired rights and benefits between similar schemes in different Member States.
- (d) Member States should ensure the facilitation of exportability of benefits, including the payment of benefits in the host country.
- (e) Member States should identify the applicable law for purposes of the implementation of the above principles.
- (f) Member States should ensure coverage of self-employed migrant workers on the same basis as employed migrants.

The high prevalence of tuberculosis amongst mine workers in the SADC region led to the acceptance of the Declaration on Tuberculosis in the Mining Sector on 18 August 2012.<sup>134</sup> It *inter alia* acknowledged that mineworkers in the Region contributed and continue to contribute to the wealth of the Region “at great personal cost to their health and welfare and that of their families and communities”; and the “positive contributions made by intra-regional migrant workers to the mining sector of the regional economy...” The positive contributions are, however, destroyed by the high burden of disease with its costs implications; and that mineworkers and ex-mineworkers face obstacles in accessing health care, the absence of proper cross-border systems to provide continued treatment regimes. The Preamble (at “Aware”), furthermore acknowledged problems facing these workers, such as:

- d) inadequate or no legal frameworks to protect the rights of mineworkers ex-mine workers including occupational disease compensation for TB, Silicosis and other occupational respiratory diseases;
- e) inadequate or no mechanisms for financial compensation for mineworkers and ex-mineworkers with TB, Silicosis and other occupational respiratory diseases;
- f) lack of or inadequate medical surveillance programmes and systems for post-employment follow-up;
- g) lack of information among mineworkers, ex-mineworkers, employers, trade unions and government about their roles, rights and responsibilities

In addressing the identified problems, the Declaration promotes *inter alia* the creation of a legislative framework to include mandatory reporting of the said

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<sup>134</sup> Southern African Development Community. 2012. *Declaration on Tuberculosis in the Mining Sector*. Retrieved on 30/09/2013 from <http://www.stoptb.org/assets/documents/news/Declaration%20on%20Tuberculosis%20in%20the%20Mining%20Sector2012English.pdf>.

diseases<sup>135</sup> and development of the legislative framework to improve compensation for the workers.<sup>136</sup>

No right to compensation will arise on the part of an employee usually working outside the borders of South Africa but temporarily working within the country for a period of less than twelve months unless the employer made arrangements with the Director-General.<sup>137</sup> It should be noted that covered employees returning in an unhealthy or injured state will become a burden upon their families and their respective communities as was the case before the enactment of workers' compensatory legislation, if the person has no entitlement to compensation or if compensation awarded, is terminated upon leaving the source country thereof. It is submitted that COIDA be amended to provide for optional coverage to South African workers working abroad in countries, SADC or otherwise, that do not provide adequately for social security benefits.

## 2.5. Summary

The definition and test phrase has a limiting effect upon the right to claim compensation but is broadly interpreted by the courts consistent with the purpose of the Act.<sup>138</sup>

The elements identified to be taken into consideration for fulfilling the requirements of the test are:<sup>139</sup>

- an injury due to an accident; **and**
- sustained in circumstances that need to be arising out of **and**
- in the course of employment.

Certain exclusions to the test that resulted in a broadened right to compensation have been enacted in the form of:

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<sup>135</sup> *Ibid* 3(b)(ii)-(iii).

<sup>136</sup> *Ibid* 3(b)(iv).

<sup>137</sup> S 23(3).

<sup>138</sup> Chapter 4 paras 3.1 & 3.2 *supra*.

<sup>139</sup> Chapter 4 paras 2.1 & 2.2 *supra*.

- commuting injuries if the vehicle is provided free of charge and controlled by the employer;<sup>140</sup>
- serious disablement sustained during acts of misconduct;<sup>141</sup>
- transgression of labour laws;<sup>142</sup>
- training in and provision for emergency services with the approval of the employer.<sup>143</sup>

A serious limiting factor for employees in the SADC region is COIDA's limitation on trans-border compensation despite different SADC instruments that guide otherwise.<sup>144</sup>

It is clear that the how,<sup>145</sup> when, where and what<sup>146</sup> surrounding the accident will determine whether the injury is considered to be an accident arising "out of and in the course of employment" and if the test cannot be satisfied, the employee's right to compensation is frustrated. It is put forward that the elements of time, place and duties inherent to the test culminate in the control an employer exercises over his employees.

### 3. CANADA

#### 3.1. Statutory definition of an injury: the test

The Canadian compensatory laws tend to deal with the definition in a similar way to COIDA but for small differences which include the conjunctive form of the test phrase. The test is a pre-requisite for compensation and in statutes where it is not included in the definition section; it is being dealt with in the section that recognises the right to compensation. Corresponding determinations can be found in nearly all the Canadian

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<sup>140</sup> Chapter 4 para 2.3.3 *supra*.

<sup>141</sup> Chapter 4 para 2.3.1 & Chapter 4 fn 140 *supra*.

<sup>142</sup> Chapter 4 para 2.3.2 & Chapter 4 fn 111 *supra*.

<sup>143</sup> Chapter 4 fn 108 *supra*.

<sup>144</sup> Chapter 4 para 2.4 *supra*.

<sup>145</sup> "How" relates to "arising out of" as it refers to the nature of the employment.

<sup>146</sup> "When," "where" and "what" relates to the "arising in the course of" as it refers to the circumstances of time, location and activity surrounding the accident.



compensatory acts<sup>147</sup> but for small differences regarding mental stress; while Yukon<sup>148</sup> specifically excludes ordinary diseases of life from the definition.

Quebec,<sup>149</sup> Newfoundland and Labrador<sup>150</sup> extend the definition to include a “recurrence, relapse or aggravation” giving a wider scope of injury to fulfil the test; while Saskatchewan<sup>151</sup> also includes a “potentially disabling condition caused by an occupational disease.” Quebec’s test phrase differs by the use of the disjunctive noun “or” and by defining an “employment injury” to mean an employment injury caused by a “sudden and unforeseen event” irrespective of the cause thereof and “arising out of or in the course of his work.”<sup>152</sup> It follows then that the test is broadened with one less element that needs to be satisfied in Quebec.

The (Federal) Government Employees Compensation Act<sup>153</sup> defines an accident to include “a wilful and an intentional act, not being the act of the employee, and a fortuitous event occasioned by a physical or natural cause” but includes the test phrase “out of and in the course of” in section 4<sup>154</sup> where the Act deals with the right to compensation.<sup>155</sup>

All the other Canadian Acts<sup>156</sup> contain a presumption<sup>157</sup> with the working that if a person was injured or died **in the course of** his employment, it is presumed to arise

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<sup>147</sup> New Brunswick s 1; Ontario s 2(1); Manitoba s 4(1); British Columbia s 5(1); Nova Scotia s 2; Prince Edward Island s 1(1); Yukon s 3(1) & Nunavut s 10.

<sup>148</sup> S 3(1).

<sup>149</sup> Quebec s 2.

<sup>150</sup> Newfoundland and Labrador s 2(1)(O).

<sup>151</sup> Saskatchewan s 2(k).

<sup>152</sup> Quebec s 2. Own emphasis.

<sup>153</sup> RSC 1985, c G-5.

<sup>154</sup> “4. (1) Subject to this Act, compensation shall be paid to

(a) an employee who

(i) is caused personal injury by an accident arising out of and in the course of his employment”

<sup>155</sup> The complex nature of the phrase is recognised by the Nova Scotia Court of Appeal in *Puddicombe* at 25 when the court criticised the habit of courts to reduce the phrase to a “set of rules.” The court at 26 indicated that the phrase should be interpreted within the context of “workers’ compensation law.”

<sup>156</sup> Alberta s 24(4); British Columbia s 5(4); Manitoba s 4(5); New Brunswick s 7(2); Quebec s 28; New Foundland and Labrador s 61; Nunavut s 14(2)(3); Nova Scotia s 10(4); Ontario s 13(2); Prince Edward Island s 6(4); Saskatchewan s 29 & Yukon s 17.

<sup>157</sup> The Saskatchewan Act does not stipulate the presumption to be rebuttable.

**out of** employment and *vice versa* unless the contrary is proved.<sup>158</sup> This has led to a number of court decisions such as *Gellately v Newfoundland (Workers' Compensation Appeal Tribunal)*, 1995 CanLII 9896 (NL CA) to be discussed *infra*.<sup>159</sup>

Ison<sup>160</sup> criticises the manner in which claims are declined by the application of the rebuttable presumption by the compensation authorities with the consequence of an opposite application of the presumption in claims where deficient affirmative evidence on the causal relationship between the injury and the employment is available.<sup>161</sup> The misapplication of the presumption has the effect of rebutting the presumption which is meant to favour the required *nexus* between injury and employment; and effectively places the onus on the employee to prove the injury to be work-related although the onus to rebut the presumption rests on the compensation authority.<sup>162</sup>

The standard of proof needed to rebut the presumption is a balance of probabilities after weighing all relevant evidence.<sup>163</sup> If the evidence shows, on a balance of probabilities, both elements of the test phrase to be satisfied, the presumption is not applied. Where on a balance of probabilities, evidence is found to be equal in weight, the benefit of the doubt will decisively favour the right to compensation. Evidence to rebut the presumption should have sufficient weight to positively affirm “an alternative cause, and evidence that the employment was not contributory”; and not simply alludes to evidence of a non-causal relationship between the accident and the injury.<sup>164</sup>

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<sup>158</sup> Own emphasis.

<sup>159</sup> In *Michelin*, at 29, the Nova Scotia Court of Appeal discussed the implications of the presumption as contained in s 10(4) of the Act and says it “creates a rebuttable presumption that ‘arising out of employment’ is an equivalent term to ‘arising ... in the course of employment.’” The court held that although the consequences of shift work (mal-adaptation syndrome) caused symptoms of tiredness at work, the injury did not “arise out of and in the course of employment.”

<sup>160</sup> Ison 1989: 37–38.

<sup>161</sup> Ison 1989: 37–38. See also *Bouchard v Workers Compensation Board of Manitoba*, 1997 CanLII 11523 (MB CA), at 5 & 10. Retrieved on 27/04/2012 from <http://canlii.ca/t/1pfl0>.

<sup>162</sup> *Ibid.*

<sup>163</sup> *Bouchard v Workers Compensation Board of Manitoba*, 1997 CanLII 11523 (MB CA), at 10 & 12.

<sup>164</sup> *MacLaren v P.E.I. (Workers' Compensation Board)*, 1995 CanLII 2090 (PE SCAD). Retrieved on 27/04/2012 from <http://canlii.ca/t/1c21j>. At 2, the court considered *Dunham v Workmen's Compensation Board* (1967), 67 D.L.R. (2nd) 726 (N.B.C.A.) in this respect.

Although the phrase “out of and in the course of employment” remained the test, the word “accident” was replaced in some jurisdictions by “injury”.<sup>165</sup> “Injury” is broader in application than “accident” and includes more instances of disablement than “accident”.<sup>166</sup>

The test phrase remains vague<sup>167</sup> and inconclusive of the requirement of only a single criterion but some primary indicators that have been identified and applied include *inter alia*:<sup>168</sup>

- place where the injury happened (the work site);
- if the action taken was for the benefit of the employer;
- did it follow from the use of equipment or material provided by the employer?
- was the level of risk exposed to similar to the risk associated with normal production?
- was the worker paid for the period during which the injury was sustained?
- was the injury caused by actions of the employer or a colleague?

Only a broad *nexus* with employment is required and the injury need not necessarily result from a work-related action if it can be shown to have arose out of employment.<sup>169</sup>

### 3.2. Interpretation through case law

The Canadian Compensation Boards have the assistance of a number of policies published as part of compensatory legislation because the different workers’ compensatory laws enable the publication of policies. These policies deal extensively with interpretation of phrases and parts of the enabling act; and are

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<sup>165</sup> Nunavut; Saskatchewan; Yukon & Newfoundland and Labrador.

<sup>166</sup> *Henry* [35]–[36].

<sup>167</sup> *Puddicombe* [25]–[26].

<sup>168</sup> Ison 1989: 26–27.

<sup>169</sup> It was held that the test phrase “in the course of employment” refers to actions done in discharging of a contractual duty **and** to actions “reasonably incidental to performance of the contractual duty” at [27] and [50] of *Puddicombe*.

used on a daily basis by the different Boards to adjudicate and administrate claims, thus in the execution of the administrative remedy.<sup>170</sup>

It is submitted that the publication of policy documents creates certainty and clarity for the three stakeholders.

This is contrary to the situation in South Africa where no policies have been published to assist in interpretation of COIDA except for Regulations on

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<sup>170</sup> Alberta: *Policy No. 02-01: Chapter: Work-relatedness: Arises out of and occurs in the course of employment*. Stating the legal basis and setting out in detail the factors normally taken into account in consideration of a claim. Retrieved on 15/05/2011 from <http://www.wcb.ab.ca/public/policy/manual/claimant.asp>.  
Manitoba (Provincial Government). Workers Compensation Board. 2006. *Policy No. 44.05: Adjudication and compensation: Arising out of and in the course of employment*. Retrieved on 15/05/2011 from <http://www.wcb.mb.ca/policy-manual>.  
New Brunswick: *Policy No. 21-100: Conditions for entitlement – General principles*. Retrieved on 18/05/2011 from <http://www.worksafenb.ca/view-all-policies?alttemplate=Printable&>.  
Newfoundland and Labrador (Provincial Government). Workplace Health, Safety and Compensation Commission. 2001. *Policy No. EN-19: Arising out of and in the course of employment* and Newfoundland and Labrador (Provincial Government). Workplace Health, Safety and Compensation Commission. 2001. *Policy No. EN-20: Weighing evidence*. Retrieved on 18/05/2011 from <http://www.whscc.nf.ca/policiesandprocedures.whscc>.  
Northwest Territories and Nunavut (Provincial Government). Workers' Safety and Compensation Commission. 2008. *Operational Policy Manual: Policy No. 03.02: Entitlement* (defining the concept of "Balance of Probabilities" as "A degree of proof which is more likely than not."). Retrieved on 10/03/2013 from <http://www.wsib.on.ca/en/community/WSIB/230/PolicyHome/24345?vgnextoid=cc08b411be12e110VgnVCM1000000e18120aRCRD>.  
Nova Scotia (Provincial Government). Workers' Compensation Board. 2009. *Policy No. 1.3.7.: General entitlement – Arising out of and in the course of employment*. Retrieved on 18/05/2011 from [http://www.wcb.ns.ca/policy/index\\_e.aspx?DetailID=1069](http://www.wcb.ns.ca/policy/index_e.aspx?DetailID=1069).  
Ontario (Provincial Government). Workplace Safety and Insurance Board. 2004. *Operational Policy Manual: Decision Making: Policy No. 11-01-01: Adjudicative process*. Retrieved on 15/05/2011 from <http://www.wsib.on.ca/en/community/WSIB/230/PolicyHome/24345?vgnextoid=cc08b411be12e110VgnVCM1000000e18120aRCRD>.  
Prince Edward Island (Provincial Government). Workers' Compensation Board. 2009. *Policy No. POL-71: Arising out of and in the course of employment* and Prince Edward Island (Provincial Government). Workers' Compensation Board. 2006. *Policy No. POL-68: Weighing of evidence*. Retrieved on 23/08/2012 from <http://www.wcb.pe.ca/Information/Policies>.  
Saskatchewan (Provincial Government). Workers' Compensation Board. 2001. *Policy No. POL 13/2001: Arising out of and in the course of employment*. Retrieved on 19/05/2011 from <http://www.wcb.sask.com/WCBPortalWeb/ShowProperty?nodePath=/WCBRepository/pdfs/PolicyManual>.  
Yukon (Provincial Government). Workers' Health and Safety Board. 2009. *Policy Manual: Policy No. EN-01: Arising out of and in the course of employment*. Retrieved on 19/07/2012 from <http://www.wcb.yk.ca/ActsPoliciesAndRegulations/Policies/EN/Default.aspx>.  
The Canadian courts take cognisance of the existence and applications of these policies which is binding as in *Magoon v Alberta (Workers' Compensation Board)*, 1993 ABCA 9 (CanLII), at [12]. Retrieved on 27/04/2012 from <http://canlii.ca/t/2d9j8>.

adjudication of a number of occupational diseases. In *Odayar v Compensation Commissioner*<sup>171</sup> the Court held that COIDA:<sup>172</sup>

does not confer upon the Director-General of the Department of Labour the power to issue regulations. Despite being published in the Government Gazette, the circular is no more than an internal memorandum setting out guidelines on the manner in which compensation claims relating to post-traumatic stress disorder ought to be dealt with.

### 3.2.1. *Canada Post Corp. v Nova Scotia (Workers' Compensation Appeals Tribunal)*

In *Canada Post Corp. v Nova Scotia (Workers' Compensation Appeals Tribunal)*,<sup>173</sup> Cromwell JA discussed this phrase<sup>174</sup> and sets it out as follows:

The requirement that the accident arise 'in the course of employment' is concerned with the time, place and circumstances of the accident while the requirement that it arise 'out of employment' is concerned with the origin of the cause of the injury.<sup>175</sup>

The test phrase clearly consists of two interrelated but distinct elements. Only a broad causal relationship (similar to the South African ruling in *Khoza*) with employment is required as it needs to be established that the employment "made a significant contribution to the occurrence of the injury."<sup>176</sup>

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<sup>171</sup> 2006 (6) SA 202 (N).

<sup>172</sup> *Odayar* [16].

<sup>173</sup> *Canada Post Corp. v Nova Scotia (Workers' Compensation Appeals Tribunal)*, 2007 NSCA 129. Retrieved on 05/06/2011 from (CanLII), <http://canlii.ca/t/1vgv0>.

<sup>174</sup> *Ibid.*

<sup>175</sup> The Court in *Gellately* considered the application of the test phrase in the Canadian historical context and explained the position as: "[9] The words 'in course of employment' refer to the time, place and circumstances under which the accident takes place. The words 'arising out of employment' refer to the origin of the cause of the injury. There must be some causal connection between the conditions under which the employee worked and the injury which he received. (Blacks Law Dictionary) In *MacKenzie v. Grand Truck Pacific Railway Co.*, [1926] 1 D.L.R. 1 (S.C.C.), Mignault, J., cited with approval the statement of Lord Atkinson in *St. Helens Colliery Co. v. Hewitson*, [1924] A.C. 58, that the words 'arising out of suggest the idea of cause and effect, the injury by accident being the effect and the employment, i.e., the discharge of the duties of the workman's service, the cause of that effect...'. Today doing something incidental to his or her employment would be sufficient, the discharge of a duty having been rejected as too narrow a view."

<sup>176</sup> *Douglas et al* 17.

### 3.2.2. *Puddicombe v Workers' Compensation Board (N.S.)*

The ruling of *Puddicombe v Workers' Compensation Board (N.S.)* identified a two-folded test in a factual inquiry<sup>177</sup> to be applied: “the nature of the work and the link between the activity of the employee giving rise to the injury and the risk of the work.”<sup>178</sup> In citing *Gellately v Newfoundland (Workers' Compensation Appeal Tribunal)*,<sup>179</sup> (discussed *infra*), the Court explained that “in the course of employment” has reference to the time, place and circumstances of the accident; while “arising out of employment” refer to the source of the cause of the injury and there needs to be a *nexus* between the conditions of the work and the injury sustained.<sup>180</sup> In the process of the enquiry, the strength of the *nexus* between the injury and the risk brought about by the employment is taken into consideration with emphasis on the scope of the risk and the *nexus* between the risk and the injury.<sup>181</sup> This is the practical approach in establishing the “arising out of employment” element of the test-phrase.<sup>182</sup>

The Court described the statutory requirement as purposively very broadly phrased in general terms to be applicable to a virtually limitless array of situations, jobs and types of injuries.<sup>183</sup> Courts avoided reducing the phrase “out of and in the course of employment” to a set of rules or guidelines not to limit the generalisation and the array of situations covered.<sup>184</sup> The Court referred to earlier decisions that have produced “... a bewildering vagueness in interpretation and conflict in judicial application”<sup>185</sup> that may defeat the purpose of workers’ compensatory legislation as a means of providing compensation in a simple and speedy way.<sup>186</sup> Unless the test phrase is applied within the context of workers’ compensatory law, “in the course of employment” will be concerned with only the worker’s contractual duties and “arise out of employment” be seen as if it is the work that caused the injury which is

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<sup>177</sup> *Puddicombe* [34].

<sup>178</sup> *Ibid* [37].

<sup>179</sup> 1995 CanLII 9896 (NL CA).

<sup>180</sup> *Puddicombe* [37].

<sup>181</sup> *Ibid* [40].

<sup>182</sup> *Ibid* [40].

<sup>183</sup> *Ibid* [24].

<sup>184</sup> *Ibid* [25].

<sup>185</sup> *Ibid* [25].

<sup>186</sup> *Ibid* [25].

considered to be too limited and inappropriate in the context of this type of legislation.<sup>187</sup> “In the course of employment” also refers to “things reasonably incidental to the performance of the contractual duty”;<sup>188</sup> while the Supreme Court of Canada refused to purely transplant the common law causation principles to “arising out of employment” as it has different goals which may not be suitable in a no-fault scheme.<sup>189</sup>

The Court very importantly remarked on an aspect lying “at the root of the entire statutory scheme” in the test phrase forming not only the gateway to the right to compensation but being central to the applicability of the bar against common law proceedings as it lies at the centre of the historic trade-off according to which employees exchanged the right to sue for access to a no-fault scheme and employers are obliged to contribute to the fund and in turn are absolved from civil actions.<sup>190</sup>

### 3.2.3. *Gellately v Newfoundland (Workers' Compensation Appeal Tribunal)*

The interpretation and application of the presumption<sup>191</sup> in relation to the test phrase as well as the application of “serious and wilful misconduct” in the light of the no-fault principle has been under scrutiny by the Supreme Court of Newfoundland and Labrador in the case of *Gellately v Newfoundland (Workers' Compensation Appeal Tribunal)*.<sup>192</sup> The Court held that “serious and wilful misconduct” is to be distinguished from the test phrase out of and in the course of employment with firstly an enquiry to establish if the test phrase is satisfied; and if not, no consideration arise into the existence of “serious and wilful misconduct.”<sup>193</sup>

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<sup>187</sup> *Ibid* [26].

<sup>188</sup> *Ibid* [27].

<sup>189</sup> *Ibid* [28].

<sup>190</sup> *Ibid* [29].

<sup>191</sup> “61. Where the injury arose out of the employment, it shall be presumed, unless the contrary is shown, that it occurred in the course of the employment, and where the injury occurred in the course of employment, it shall be presumed, unless the contrary is shown, that it arose out of the employment.”

<sup>192</sup> 1995 CanLII 9896 (NL CA).

<sup>193</sup> *Gellately* [10].

The Court criticised the reasoning of the inferior Courts in this case and held<sup>194</sup> that the additional test applied by the Appeal Tribunal with regard to the degree of intoxication constituted an added peril to the *nexus* between injury and employment and derived from the early decision by Lord Sumner in *Lancashire & Yorkshire Railway Co. v Highley*, [1917] A.C. 352<sup>195</sup> is outdated.<sup>196</sup> The Court rejected the application of the section as an error in law and held that following a finding that the injury did occur in the course of employment and the presumption applied<sup>197</sup>

the question which should have been asked is whether it had been proven that the employment was not a significant causative factor in the injury. As noted above a finding that the applicant was the sole cause of the injury does not preclude a finding that the injury arose out of the employment.

The Court held that once it is an established fact that the injury arose out of employment or in the course of employment, the next part of the enquiry is to apply the presumptive section and not follow it with an enquiry into the fault of the employee in the form of “serious and wilful misconduct.”<sup>198</sup>

#### **3.2.4. *Workmen's Compensation Board v C.P.R.***

To determine if an injury arose out of and in the course of employment, cognisance needs to be taken of when employment starts, ends and the duration thereof. The Supreme Court of Canada had to interpret the test phrase in the case of *Workmen's Compensation Board v C.P.R.*<sup>199</sup> where an employee during a period of break in work hours sustained serious injuries when she went for a swim on the employer's premises.<sup>200</sup> In this case, the Appellant Board relied on the early leading English decisions *inter alia*, *St. Helen's Colliery v Hewitson* referred to *supra* at par 1.2.1.

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<sup>194</sup> *Ibid* [15].

<sup>195</sup> A case that was also cited in South African courts.

<sup>196</sup> *Gellately* [12].

<sup>197</sup> *Ibid* [15].

<sup>198</sup> *Ibid* [17]–[18].

<sup>199</sup> 1952 CanLII 44 (SCC), [1952] 2 SCR 359.

<sup>200</sup> *C.P.R.* 368.



Rand J cited the despair expressed in courts since the inception of workers compensatory legislation in interpretation of the test phrase and noted: "These words have produced a bewildering vagueness in interpretation and conflict in judicial application since they were first introduced into the Compensation Act of England."<sup>201</sup> It is especially difficult in cases where an employee is injured during activities not directly flowing from his contractual employment duties which then leave the task to the Courts to interpret the test phrase from the viewpoint of the "broad conceptions underlying the legislation."<sup>202</sup> Rand J quoted<sup>203</sup> Viscount Haldane when he said in *Davidson v M'Robb* [1918] A.C. 304 (at 316):<sup>204</sup>

My lords, the Workmen's Compensation Act, 1906, appears on the face of it intended to afford a simple and speedy method of claiming compensation in the cases to which it relates... [sic]. But around the principle which Parliament laid down in this language there is already spreading itself in Courts of Justice an atmosphere of legal subtlety which bids fair to defeat the obvious purpose of the Legislature... [sic] we are bound to follow our previous decisions when they form really binding precedents, we ought, in applying the statute to particular facts, to direct our efforts rather to giving effect to broad principles with freedom in applying them to individual circumstances...

Normally it is at his place of work that the employee is exposed to risk, "including means of approach and departure; but it may be elsewhere as in the case of a truck driver."<sup>205</sup> But while on his way to or from his place of work, the employee is obviously in his personal domain but when at his workplace and his actions are not furthering the interests of the employer, difficulties relating to interpretation arise.<sup>206</sup> Injuries sustained during activities incidental to employment, for instance injured through an explosion while eating lunch as permitted in a workshop, will be considered as "in the course of employment."<sup>207</sup> Privileges conferred by the employer upon employees need to be differentiated from actions incidental to discharging contractual employment duties as it is "*prima facie*, an act within the

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<sup>201</sup> *Ibid.*

<sup>202</sup> *Ibid.*

<sup>203</sup> *Ibid.*

<sup>204</sup> *Ibid.*

<sup>205</sup> *Ibid* 369.

<sup>206</sup> *Ibid.*

<sup>207</sup> *Ibid.*

range of her own responsibility.”<sup>208</sup> Rand J held that to fulfil the requirements of the test phrase “the employee must be where she is either in carrying out a duty or under the coercion of the contract or in an exercise of conduct that is intimately involved, as an incident, with action in those two spheres.”<sup>209</sup>

### 3.3. Extended right to compensation

#### 3.3.1. The presumption and death

In addition to the presumption discussed *supra*, some of the Canadian Acts presume the discovery of the body of an employee in the workplace, at a place where that employee had a right to be, the death to arise out of and in the course of employment.<sup>210</sup> This presumption formed the theme of a number of court decisions, some of which dealt with the possibility of suicide by the deceased.<sup>211</sup> The question whether it remained open to be rebutted was under scrutiny by the Saskatchewan Court of Appeal in *Henry v Saskatchewan (Workers' Compensation Board)*. Bayda CJS fully examined the amended Act where the wording was changed and the previous reference to a rebuttable presumption deleted. The Chief Justice ruled that in spite of the exclusive jurisdiction of the Compensation Board to enquire into and decide on matters relevant under the Act,<sup>212</sup> the presumption was intentionally changed from rebuttable to irrefutable and therefore even suicide could be covered.<sup>213</sup> A clear distinction is drawn between the words “injury” and “accident,” the first wider in meaning than the last.<sup>214</sup>

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<sup>208</sup> *Ibid* 370.

<sup>209</sup> *Ibid* 370–371.

<sup>210</sup> Alberta s 24(3); Nunavut s 14(4); Nova Scotia s 36; Quebec ss 95, 96, 97 & Saskatchewan s 30.

<sup>211</sup> See for example *Henry; Gagnon v Saskatchewan (Workers' Compensation Board)*, 2007 SKQB 250 (CanLII); retrieved on 27/04/2012 from <http://canlii.ca/t/1spkx>; *Goertzen v Saskatchewan (Workers' Compensation Board)*, 2000 SKQB 362 (CanLII), retrieved on 27/04/2012 from <http://canlii.ca/t/1l9dc>; *Goertzen v Saskatchewan (Workers' Compensation Board)*, 2002 SKCA 125 (CanLII), retrieved on 27/04/2012 from <http://canlii.ca/t/5g0s> & *Truitt v Saskatchewan Workers' Compensation Board*, 2003 SKQB 257 (CanLII), retrieved on 27/04/2012 from <http://canlii.ca/t/56zg>.

<sup>212</sup> *Henry* [15]–[26].

<sup>213</sup> *Ibid* [30]–[32] & [35].

<sup>214</sup> *Ibid* [33], [39]–[42], [50].

### 3.3.2. Other instances of extended coverage

Coverage for occupational injuries is extended to include attending of classes or courses required by the employee's employment;<sup>215</sup> occupational diseases include (unless the contrary is proven) specific types of cancer in fire fighters<sup>216</sup> and "myocardial infarction within 24 hours after attendance at an emergency response" by fire fighters;<sup>217</sup> the use of recreational facilities provided by the employer;<sup>218</sup> and attendance of social functions as part of employment responsibilities.<sup>219</sup>

### 3.3.3. Serious and wilful misconduct

Similar to South Africa, all the Canadian jurisdictions provide for workers to be eligible for compensation in circumstances of "serious and wilful misconduct" only if it results in serious disablement or death.<sup>220</sup> If serious disablement is established, the misconduct becomes immaterial. It is interpreted similar to South Africa and it is required to be an intentional act not merely carelessness or a lack of prudence; and as the act should be "wilful", it does not include acts done on impulse or spontaneously.<sup>221</sup> Horseplay, intoxication<sup>222</sup> and instigating a fight are categorised as actions of "serious and wilful misconduct."<sup>223</sup>

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<sup>215</sup> Alberta s 24(5).

<sup>216</sup> Alberta s 24.1(2); British Columbia s 6.1(1.1); Manitoba s 4(5.2); Nunavut s 14.1; Ontario s 15.1(3) & Saskatchewan s 29.1.

<sup>217</sup> Alberta s 24.1(7); Manitoba s 4(5.6); Nunavut s 14.1; Ontario s 15.1 & Saskatchewan s 29.1.

<sup>218</sup> Ison 1989: 32.

<sup>219</sup> Ison 1989: 34.

<sup>220</sup> Alberta s 24(1)(2); British Columbia s 5(3); Manitoba s 4(3) limits benefits by the non payment of medical costs and loss of earnings for the first three weeks from the date of the injury; New Brunswick s 7(1); Newfoundland and Labrador s 43(2); Nunavut s 12(c); Nova Scotia s 10(3); Ontario s 17; Prince Edward Island s 6(3); Quebec s 27; Saskatchewan s 31 & Yukon s 4, 17.

<sup>221</sup> *Decision No. 535/95*, 1996 CanLII 9302 (ON WSIAT), fully discussed "serious and wilful misconduct" with an addendum setting out previous decisions. Hereinafter: *Decision No. 535/95*. Retrieved on 30/04/2012 from <http://canlii.ca/t/200q6>.

<sup>222</sup> *Gellately* showed that intoxication may take the employee outside the employment relationship, something which will defeat his right to compensation at [5] and [6] where the reasoning of the court *a quo* was quoted: "The appellant's gross intoxication constituted an act that was not work-related and as a consequence broke the employment nexus and takes the appellant outside the scope of his employment. The appellant introduced an additional risk which was not employment-related and by such act, removed himself from an employer/employee relationship with his employer." But this reasoning was held by the Supreme Court of Newfoundland and Labrador to defeat the no-fault principle because it attached fault to the employee at [12].

<sup>223</sup> Ison 1989: 35 & 64-67.

### 3.3.4. Court interpretation of serious and wilful misconduct

The Supreme Court ruling in *Gellately*<sup>224</sup> critically looked at the proper application of the concept of “serious and wilful misconduct”. It held that it should be applied in a phased manner, firstly determining whether the accident arose in circumstances that fulfil the test laid down in the test phrase “out of and in the course of employment”; and, if so determined, the next phase would entail an enquiry into the conduct of the employee in relation to the role it played in his injury:<sup>225</sup>

However, one cannot interpret the words “arising out of employment” in isolation of the fact that the legislature clearly contemplated that one could suffer an injury arising out of employment which is caused solely by the serious and wilful misconduct of the applicant. In the one case under s. 43(1) of the Act the misconduct can be used to preclude recovery, in the other, under s. 43(2), it cannot. At the stage of considering whether the injury arose out of and in the course of employment one is not addressing fault. It is only if there need be a consideration of whether the injury is attributable solely to the serious and wilful misconduct of the worker that one considers fault. One must therefore guard against allowing a consideration of cause under the first stage becoming an assessment of fault, suitable only under the second stage.<sup>226</sup>

It is submitted that although compensatory legislation is in principle a no-fault compensation system, fault does play a part under certain circumstances of which “serious and wilful misconduct” is one such circumstance.

The Court concluded that the intoxication did not cause the Appellant’s injuries but it was caused by the motor vehicle as a “hazard of” his employment and as it contributed to a material degree to his injury, it did arise out of employment.<sup>227</sup> The

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<sup>224</sup> Discussed also *supra* at Chapter 4 para 3.2.3.

<sup>225</sup> *Gellately* [10], [16]–[17].

<sup>226</sup> The applicable sections of the Act provide as follows:

“43(1) Compensation under this Act is payable

- a) to a worker who suffers personal injury arising out of and in the course of employment, unless the injury is attributable solely to the serious and wilful misconduct of the worker; and
- b) to the dependents of a worker who dies as a result of such an injury.

(2) The commission shall pay compensation to a worker who is seriously and permanently disabled as a result of an injury arising out of and in the course of employment notwithstanding that the injury is attributable solely to the serious and wilful misconduct of the worker.”

<sup>227</sup> *Gellately* [17].

Court compared the circumstances of a person who might have been injured in an accident after falling gravely ill whilst driving and the present circumstance of driving whilst intoxicated and consequently held the *nexus* between the injury and employment to be identical save for the “element of fault.” The Court concluded that in cases where injuries resulted in serious permanent disablement, fault is extinguished and the right to compensation restored.<sup>228</sup>

### 3.3.5. Transgression of employment laws or rules

Deliberate transgression of labour law or rules, including an employer’s rules to protect the health and safety of employees, will be considered as serious and wilful misconduct which will be considered as fulfilling the requirements of the test if serious disablement or death results from it.<sup>229</sup>

### 3.3.6. Commuting injuries

Similar to South Africa, normally, employment begins when the employee arrives at his workplace and ends when he leaves.<sup>230</sup> Travelling to and from work will for obvious reasons not satisfy the test of out of and in the course of employment but if the employer provides the transport or the type of transport and the journey is controlled by the employer it will be considered to be in the course of employment.<sup>231</sup> If an employee is summoned to the workplace by his employer outside his normal working hours, it will satisfy the test;<sup>232</sup> as will payment of commuting costs bring the journey within the ambit of the test.<sup>233</sup> This is similar to COIDA.

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<sup>228</sup> *Ibid* [18]. See Chapter 4 para 2.3.3 *supra*.

<sup>229</sup> In *Decision No. 535/95*, the employee’s injury was considered to be “out of and in the course of employment” although she contravened a known rule of the employer in using the freight lift. Her actions resulted in her injury to be held not to constitute “serious and wilful misconduct.” At: “ISSUE 2: Did the worker engage in ‘serious and wilful misconduct?’”.

<sup>230</sup> *Puddicombe* [7] & [36].

<sup>231</sup> Ison 1989: 29–30.

<sup>232</sup> *Puddicombe* [5] & [8].

<sup>233</sup> Ison 1989: 29–30. *Harris v Saskatchewan (Workers’ Compensation Board)*, 1996 CanLII 6825 (SK QB), 18. Retrieved on 30/04/2012 from <http://canlii.ca/t/1ns8c>.

### 3.3.6.1. Court interpretation on commuting injuries

In *Puddicombe*, the Nova Scotia Court of Appeal extensively used the principles laid down in *C.P.R.* and *Gellately* as discussed *supra*. Due to the general language used in the test phrase, courts refuse to limit the test phrase to a “set of rules or even firm guidelines.”<sup>234</sup> The test phrase has to be applied in the particular context of workers’ compensation law and if not interpreted in that light could be “viewed as being concerned simply with the employee’s contractual duties.”<sup>235</sup> In the context of workers’ compensation law, interpretation will be too narrow and inappropriate if “arising out of employment” is purely seen as a question of whether the work was the cause of the injury.<sup>236</sup>

Generally, injuries sustained on the way to and from work fall in the employee’s personal domain and “do not arise out of or in the course of employment.”<sup>237</sup> This is so because working hours normally start upon reaching the workplace and the employee is not paid for travel time as it does not form part of his contractual duties. Furthermore, the risks involved in travelling to work are not causally connected to the employment.<sup>238</sup>

In citing *Gellately*, two aspects of the enquiry are identified: “the nature of the work and the link between the activity of the employee giving rise to the injury and the risk of the work.”<sup>239</sup> In addition, to consider whether the employee was discharging his duties under his employment contract, all factors incidental to it should be taken into account; and if applied to the facts of the case, it became clear that the employee was exposed to an additional risk when travelling to work on an emergency call out by his employer although he was neither paid for it nor did travelling from his residence form part of his contractual duties.<sup>240</sup>

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<sup>234</sup> *Puddicombe* [25].

<sup>235</sup> *Ibid* [26].

<sup>236</sup> *Ibid* [26].

<sup>237</sup> *Ibid* [36] and as cited from *C.P.R.*

<sup>238</sup> *Ibid* [36].

<sup>239</sup> *Ibid* [37].

<sup>240</sup> *Ibid* [38]–[41].

### 3.4. Migrant labour

Migrant labour in Canada includes not only inter-province migration within the Canadian federation but also immigrants from other countries working in Canada. Canada established the Seasonal Agricultural Worker Program in 1966 according to which agricultural workers<sup>241</sup> from Jamaica could work for a maximum of eight months at a time in Canada but could return each year.<sup>242</sup> By 1970 the program was extended to include Mexicans and currently the program (according to which all working conditions and benefits of employment should be equal to Canadian citizens and permanent residents) includes workers from Mexico and the Caribbean countries of: Anguilla, Antigua and Barbuda as well as Barbados, Dominica, Grenada, Jamaica, Montserrat, St. Kitts-Nevis, St. Lucia, St. Vincent and the Grenadines and Trinidad and Tobago.<sup>243</sup> In 2002 a pilot immigration project was introduced and currently immigrants from about 80 countries enter Canada to take up lower skilled job opportunities.<sup>244</sup> However, it is not limited to lower skilled staff as highly trained and skilled people in information technology in the banking sector as well as health care providers are hired under the Temporary Foreign Worker Program.<sup>245</sup> As the immigrants, temporary or other, may not be treated less favourably than Canadian citizens and permanent residents, it follows that equal treatment of occupational injuries and diseases and the benefits attached to it, have to be equally favourable and it will be adjudicated upon according to the applicable compensatory act with jurisdiction.

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<sup>241</sup> Dean, D. 2013. *Canada treats migrant workers horribly*. Vice website: Ontario: Canada. The website reports that although more than 50 agricultural immigrants died in workplace accidents since 1996, no coroner's inquests have been held in connection with the death of farm workers. Retrieved on 20/09/2013 from [http://www.vice.com/en\\_ca/read/canadas-migrant-workforce-has-very-few-rights](http://www.vice.com/en_ca/read/canadas-migrant-workforce-has-very-few-rights). See further Chapter 4 paras 2.4 & 4.4 and Chapter 5 paras 2.10; 3.7 & 4.7.

<sup>242</sup> CBC News. 2012. *Migrant workers: Who they are, where they're coming from*. Toronto: Ontario. Retrieved on 20/09/2013 from <http://www.cbc.ca/news/canada/migrant-workers-who-they-are-where-they-re-coming-from-1.1137930>.

<sup>243</sup> *Ibid.* See also Canada (Federation) website. Employment and Social Development. [Sa]. *Hiring seasonal agricultural workers*. Retrieved on 21/09/2013 from [http://www.esdc.gc.ca/eng/jobs/foreign\\_workers/agriculture/seasonal/index.shtml](http://www.esdc.gc.ca/eng/jobs/foreign_workers/agriculture/seasonal/index.shtml).

<sup>244</sup> *Ibid.*

<sup>245</sup> Valiani, S. 2013. *RBC only one of many Canadian employers misusing temporary migrant workers*. Toronto: Star Newspapers. Retrieved on 28/09/2013 from [http://www.thestar.com/opinion/commentary/2013/04/15/temporary\\_foreign\\_worker\\_problem\\_goes\\_well\\_beyond\\_rbc.html](http://www.thestar.com/opinion/commentary/2013/04/15/temporary_foreign_worker_problem_goes_well_beyond_rbc.html).

Immigrants from countries other than the Canadian Federation should be distinguished from citizens and people with permanent residency moving between jurisdictions within Canada. The federal governmental system of Canada could have had the unjust result of prohibiting employees from compensation when injured in the course of employment while moving or working in a different jurisdiction than the one in which they are usually employed or normally reside. To prevent such, provision has been made for a right to compensation to cover trans-border injuries by entering into the Interjurisdictional Agreement on Workers' Compensation by all the Workers' Compensation Boards. The Boards undertake to:<sup>246</sup>

ensure that through the provisions of this Agreement and mutual co-operation, no worker disabled as a result of injury or disease causally related to employment in Canada, is denied fair and equitable compensation..

Specific provision is made in the Government Employees Compensation Act<sup>247</sup> for federal government employees by providing their claims to be administered and adjudicated by the provincial compensation authority in which the employee is normally employed.<sup>248</sup> Government employees normally employed outside the borders of Canada e.g. diplomatic services are compensated by the Ontario compensation authority. People employed by the Canadian Federal Government in foreign countries who are citizens of the host country, will be covered by the compensatory scheme of the foreign country unless such country does not have a scheme, in which case, the foreign worker will be covered by the Government Employees Compensation Act section 7.<sup>249</sup> COIDA does not have similar provisions.

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<sup>246</sup> Association of Workers' Compensation Boards of Canada. 2008. *Interjurisdictional Agreement on Workers' Compensation*. 1.4.1. Retrieved on 25/05/2012 from [http://www.awcbc.org/common/assets/english%20pdf/ija\\_consolidated\\_agreement.pdf](http://www.awcbc.org/common/assets/english%20pdf/ija_consolidated_agreement.pdf).

<sup>247</sup> Government Employees Compensation Act, RSC 1985, c G-5.

<sup>248</sup> *Ibid*. The Act defines "compensation" to include "medical and hospital expenses and any other benefits, expenses or allowances that are authorized by the law of the province where the employee is usually employed respecting compensation for workmen and the dependants of deceased workmen."

<sup>249</sup> *Ibid* at s 6: "Where an employee, other than a person locally engaged outside Canada, is usually employed outside Canada, the employee shall for the purposes of this Act be deemed to be usually employed in the Province of Ontario." See also Canada (Federation). [Sa]. *Labour Program*. Retrieved on 25/05/2012 from [http://www.labour.gc.ca/eng/health\\_safety/compensation/local.shtml](http://www.labour.gc.ca/eng/health_safety/compensation/local.shtml).



Alberta specifies in section 52 that payment of compensation may be terminated by the Compensation Board if an employee to whom compensation was awarded resides outside Canada unless:

- (a) the worker provides medical evidence in a manner satisfactory to the Board confirming the continuation of the disablement and the Board is satisfied that the period of disablement is not prolonged by the worker leaving Alberta, or
- (b) the worker has been granted an award for permanent disability arising out of the accident.

This section differs thus to section 23 of COIDA in that it is not limited by time and that the pension may be continued upon the submission of prove of the continued permanent disability. However, section 53 of the Alberta Act, provides for the continuation of payment of compensation to persons residing outside Canada.

However, the Acts of Ontario, Prince Edward Island, Quebec and Yukon are silent on the portability of compensation should a worker leave the jurisdiction after compensation for permanent disablement has been awarded.

Manitoba provides extensively for workers who are injured outside their jurisdiction in section 5(3) which, similarly to COIDA, provides for accidents during temporary absence from Manitoba. Section 5(4) refutes compensation to workers injured during non-work-related activities whilst outside Manitoba and who are employed by employers whose main businesses are not within Manitoba. In contrast to this provision, section 6(4) specifically provides for the Board to pay compensation subject to its discretion if an injustice would otherwise result where an employee failed to make an election if entitled to claim compensation in another country or place. New Brunswick (section 9) specifically includes accidents that happen in the "United Kingdom of Great Britain and Northern Ireland". Newfoundland and Labrador covers the workers of employers who carry on business within their area of jurisdiction if injured at work outside the province (section 51) and, very importantly, according to section 50 provides that compensation will not cease if a worker leaves the jurisdiction.

The Northwest Territories' Act (section 21), on the other hand, requires a worker to return to its jurisdiction for purposes of medical examinations at the workers' own costs if the claim is lodged after leaving Canada and provides for compensation if the worker is injured in a foreign country in sections 22-23. Saskatchewan requires the worker to present himself periodically for continuation of compensatory benefits (section 37).

Similarly to COIDA, The Acts of Nova Scotia (section 19-25), Ontario (sections 18-20), Prince Edward Island (sections 7-8), Quebec (section 8) and Saskatchewan (section 35-36) require the worker to be domiciled within its jurisdiction or the employer to have his establishment within the area of their jurisdictions, while Ontario (section 19), Prince Edward Island (section 7) and Yukon (section 7) limit the right to a claim, similarly to COIDA, to temporary absence for work from their respective provinces.

It follows that although extensive provisions are in place for coverage of employees within the Canadian Federation, cognisance is being taken of the needs of immigrants from other foreign countries. This is so because Canada provides for similar treatment and benefits of employees entering Canada (irrespective of the province) to employees who are citizens or permanent residents of Canada for both temporary as well as permanent employment. The requirement of similar treatment and benefits includes the realm of compensation for occupational injuries and diseases.

Although a number of the provisions referred to *supra* are similar to COIDA, the general trend is a wider coverage than COIDA with specific provisions made for Government employees working abroad, foreigners working for the Canadian Government in foreign countries and the provisions made for the portability of compensation benefits.

### **3.5. Summary**

It is clear from the discussion above that Canadian compensatory legislation finds broad application with extended coverage.

Elements to be taken into account in fulfilling the requirements in the definition and test phrase are:<sup>250</sup>

- an injury; **and**
- sustained in circumstances that need to be arising out of **and**
- in the course of employment.

An important added feature is the inclusion of a rebuttable presumption with regard to the two elements of the test phrase that has the working of one element having been satisfied, the other will be presumed to be satisfied unless otherwise proven.<sup>251</sup>

Despite the limiting effects of the test phrase, Canadian Acts provide for a broadening of eligibility for claims in the form of:

- commuting injuries;<sup>252</sup>
- serious disablements sustained despite misconduct;<sup>253</sup>
- transgression of labour laws;<sup>254</sup>
- provision for emergency services;<sup>255</sup>
- an irrefutable presumption in respect of a dead body found at the workplace;<sup>256</sup>
- trans-border compensation.<sup>257</sup>

Canada and South Africa share a historical connection both in the applicable principles on compensatory legislation as well as certain early English rulings.<sup>258</sup> It has however been differently developed in each of the countries.

The definition of an injury and the test phrase in the Canadian compensatory legislation is nearly as limited as the South African equivalent but in Canada as in South Africa, the courts interpret it broad and generous<sup>259</sup> and the Canadian right to

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<sup>250</sup> Par 3.1 *supra*.

<sup>251</sup> Chapter 4 fn 156–164 *supra*.

<sup>252</sup> Chapter 4 para 3.3.6 *supra*.

<sup>253</sup> Chapter 4 paras 3.2.3; 3.3.3 & 3.3.4 *supra*.

<sup>254</sup> Chapter 4 para 3.3.5 *supra*.

<sup>255</sup> Chapter 4 fn 217 *supra*.

<sup>256</sup> Chapter 4 para 3.3.1 *supra*.

<sup>257</sup> Chapter 4 para 3.4 *supra*.

<sup>258</sup> Chapter 4 para 3.2.4 *supra*.

<sup>259</sup> Chapter 4 para 3.2 *supra*.

compensation is much broader than the South African right due to the working of presumptions<sup>260</sup> and the inter-jurisdictional agreement.<sup>261</sup>

## 4. AUSTRALIA

### 4.1. Statutory definition of an injury: the test

The Australian compensatory laws with its common law history initially used the test phrase similar to COIDA but it developed very broadly in legislation and case law to a point where the need was identified for amendments intending to narrow the test and limit the right to compensation to injuries sustained in circumstances where the *nexus* with employment can be proved.

The Australian compensatory laws (except South Australia which uses the term “disability”<sup>262</sup>) require the existence of an “injury” and not an “accident” and define it in the New South Wales Act as:<sup>263</sup>

In this Act: “injury”:

- (a) means personal injury arising out of **or** in the course of employment,
- (b) includes:
  - (i) a disease which is contracted by a worker in the course of employment and to which the **employment was a contributing factor**, and
  - (ii) the aggravation, acceleration, exacerbation or deterioration of any disease, where the **employment was a contributing factor** to the aggravation, acceleration, exacerbation or deterioration, and
- (c) does not include (except in the case of a worker employed in or about a mine) a dust disease, as defined by the Workers' Compensation (Dust Diseases) Act 1942, or the aggravation, acceleration, exacerbation or deterioration of a dust disease, as so defined.<sup>264</sup>

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<sup>260</sup> Chapter 4 fn 156–164 *supra*.

<sup>261</sup> Chapter 4 para 3.4 *supra*.

<sup>262</sup> South Australia s 30. Western Australia refers to “a personal injury by accident arising out of or in the course of employment...”

<sup>263</sup> New South Wales s 4.

<sup>264</sup> Own emphasis.

“Injury” bears its normal meaning, interpreted liberally but an additional requirement is introduced by the term “contributing factor”.<sup>265</sup> The *nexus* between employment and injury is a requirement of all the Acts to establish a right to compensation. However, all the jurisdictions in Australia changed<sup>266</sup> the text of their legislation from the conjunctive phrase “out of **and** in the course of” to the disjunctive form: “out of **or** in the course of”;<sup>267</sup> and in doing so broadened the test through reducing the two-folded test to a single test if an injury has been proved.

The test has recently been narrowed by the introduction<sup>268</sup> of a further requirement in the form of “a substantial employment relationship” the extent of which is clear from the New South Wales Act,<sup>269</sup> in section 9A:

**9A No compensation payable unless employment substantial contributing factor to injury**

- (1) No compensation is payable under this Act in respect of an injury unless the employment concerned was a substantial contributing factor to the injury.
- (2) The following are examples of matters to be taken into account for the purposes of determining whether a worker’s employment was a substantial contributing factor to an injury (but this subsection does not limit the kinds of matters that can be taken into account for the purposes of such a determination):
  - (a) the time and place of the injury,
  - (b) the nature of the work performed and the particular tasks of that work,

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<sup>265</sup> Own emphasis. Commonwealth s 5A; Australian Capital Territory s 31(1); New South Wales s 1; Victoria s 4(1); Queensland s 32; Western Australia s 5; South Australia s 30(2); Tasmania s 25; Northern Territory s 3(1) & New South Wales s 4(1).

<sup>266</sup> Safe Work Australia. 2011. *Comparison of workers’ compensation arrangements in Australia and New Zealand*. Canberra: Safe Work Australia. At 10 it is indicated that the wording was changed already in 1946 in Victoria. Hereinafter: *Comparison of WC arrangements 2011*. Retrieved on 30/07/2011 from <http://safeworkaustralia.gov.au/AboutSafeWorkAustralia/WhatWeDo/Publications/Pages/comparison2011.aspx>.

<sup>267</sup> Own emphasis. Commonwealth s 5A; Australian Capital Territory s 31(1); New South Wales s 1; Victoria s 4(1); Queensland s 32; Western Australia s 5; South Australia s 30(2); Tasmania s 25; Northern Territory s 3(1) & New South Wales s 4(1). Purse 2011 at 239 considers the change to the test phrase by replacing “and” by “or” as one of the two most important changes to Australian compensatory law post World War II; the other being coverage for journeys to and from work sites.

<sup>268</sup> This limiting requirement has been introduced by all the jurisdictions in various ways with wording such as : “substantial contributing factor” in New South Wales and the Australian Capitol Territory; “a significant contributing factor” in Victoria and Queensland; “a significant degree” in Western Australia and the Commonwealth; “on the balance of probabilities” in South Australia; “a substantial degree” in Tasmania and “a material degree” in the Northern Territory but all with the intention to require prove of the employment relationship in order to exclude diseases and injuries of ordinary origin of life.

<sup>269</sup> In following the Victorian example.

- (c) the duration of the employment,
  - (d) the probability that the injury or a similar injury would have happened anyway, at about the same time or at the same stage of the worker's life, if he or she had not been at work or had not worked in that employment,
  - (e) the worker's state of health before the injury and the existence of any hereditary risks,
  - (f) the worker's lifestyle and his or her activities outside the workplace.
- (3) A worker's employment is not to be regarded as a substantial contributing factor to a worker's injury merely because of either or both of the following:
- (a) the injury arose out of or in the course of, or arose both out of and in the course of, the worker's employment,
  - (b) the worker's incapacity for work, loss as referred to in Division 4 of Part 3, need for medical or related treatment, hospital treatment, ambulance service or workplace rehabilitation service as referred to in Division 3 of Part 3, or the worker's death, resulted from the injury.
- (4) This section does not apply in respect of an injury to which section 10, 11 or 12 applies.

In some jurisdictions, the requirement of employment to be a "substantial" or "significant" contributing factor applies to both injuries and diseases while in others only to diseases.<sup>270</sup>

#### 4.2. Interpretation through case law

Although other aspects have the benefit of more or less a hundred years of authorities, some aspects previously decided still need to be reconsidered by the courts as the aspect of injuries happening during an interlude between periods of work. The Australian Compensation Authorities have, similar to the Canadian Authorities, the benefit of policy manuals that fully explain the ordinary interpretation and application of the different compensatory Acts.<sup>271</sup>

<sup>270</sup> Western Australia s 5; South Australia s 30A(a); Tasmania s 3(2A); Northern Territories s 4(7); Australian Capitol Territory s 31(2) & Commonwealth s 5B.

<sup>271</sup> Australian Government (Commonwealth). Minister for Employment and Workplace Relations. 2002. *Safety, Rehabilitation and Compensation Directions 2002*. Retrieved on 24/08/2012 from <http://www.comlaw.gov.au/Details/F2008B00376>.  
Commonwealth of Australia: *Comcare Regulation Policy 2011*. Retrieved on 10/02/2012 from [http://www.comcare.gov.au/\\_data/assets/pdf\\_file/0008/127745/OHS50\\_00772\\_Aug10\\_v31FINAL.pdf](http://www.comcare.gov.au/_data/assets/pdf_file/0008/127745/OHS50_00772_Aug10_v31FINAL.pdf).

Interpretation by the courts is still to be settled on the recently-introduced requirement that the employment relationship needs to be a “substantial contributing factor”<sup>272</sup> to the injury.

#### 4.2.1. *Kavanagh v Commonwealth*

The High Court of Australia interpreted “injury by accident” and “in the course of his employment” in *Kavanagh v Commonwealth*<sup>273</sup> (hereinafter: *Kavanagh*) with Dixon CJ citing the Act providing that if an employee sustained an injury by accident arising out of or in the course of employment, liability will arise for the payment of compensation with the word “injury” to mean “any physical or mental injury” inclusive of an “aggravation, acceleration or recurrence” of a prior injury.<sup>274</sup> *Kavanagh* died in hospital as a result of bronchopneumonia and heart failure due to the rupture of his oesophagus caused by vomiting of which the cause could not be established, at his workplace.<sup>275</sup> The question to be determined was whether the

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Australian Capital Territory (State Government). Parliamentary Counsel. 2010. *Workers Compensation Regulation 2002* (with notes). Retrieved on 10/02/2012 from [http://www.austlii.edu.au/au/legis/act/consol\\_reg/wcr2002346/notes.html](http://www.austlii.edu.au/au/legis/act/consol_reg/wcr2002346/notes.html).

New South Wales (State Government). WorkCover Authority NSW. 2009. *Workcover guides for the evaluation of permanent impairment 2009*. Retrieved on 12/02/2012 from [http://www.workcover.nsw.gov.au/formspublications/publications/Pages/WC00970\\_EvaluationofPermanentImpairmentGuideline\\_.aspx](http://www.workcover.nsw.gov.au/formspublications/publications/Pages/WC00970_EvaluationofPermanentImpairmentGuideline_.aspx).

Northern Territories (State Government). Work Health Authority. 2012. *Bulletins: Eligibility for workers compensation*. Retrieved on 12/02/2012 from <http://www.worksafe.nt.gov.au/Bulletins/HealthAndSafetyTopics/Workers%20Compensation/Forms/AllItems.aspx>.

Queensland (State Government). Department of Justice and Attorney-General. 2007. *A guide to cross border workers' compensation arrangements*. Retrieved on 14/02/2012 from [http://www.deir.qld.gov.au/workplace/resources/pdfs/cross\\_border\\_workerscomp\\_guide\\_2006.pdf](http://www.deir.qld.gov.au/workplace/resources/pdfs/cross_border_workerscomp_guide_2006.pdf).

Queensland (State Government). Department of Industrial Relations. 2010. *A death in the workplace – a guide for families and friends*. Retrieved on 14/02/2012 from <http://www.deir.qld.gov.au/workplace/resources/pdfs/a-death-in-the-workplace.pdf>.

South Australia (State Government). WorkCover SA. 2012. *WorkCover SA Claims Operational Guidelines 2012*. Retrieved on 17/02/2012 from <http://www.workcover.com/worker/reference-library/claims-operational-guidelines>.

Tasmania (State Government). Department of Justice. 2010. *A guide to workers' compensation in Tasmania*. Retrieved on 17/02/2012 from [http://www.workcover.tas.gov.au/employers/what\\_to\\_do\\_about\\_workers\\_compensation/workers\\_compensation\\_explained](http://www.workcover.tas.gov.au/employers/what_to_do_about_workers_compensation/workers_compensation_explained).

Victoria (State Government). WorkCover Authority. 2008. *The Victorian WorkCover Authority Claims Manual*. Retrieved on 18/02/2012 from <http://www1.worksafe.vic.gov.au/vwa/claimsmanual/default.htm>.

<sup>272</sup> Western Australia s 5; South Australia s 30A(a); Tasmania s 3(2A); Northern Territories s 4(7); Australian Capitol Territory s 31(2) & Commonwealth s 5B.

<sup>273</sup> [1960] HCA 25; (1960) 103 CLR 547.

<sup>274</sup> *Kavanagh* 2.

<sup>275</sup> *Ibid* 3.

rupture of the oesophagus constituted a personal injury by accident arising in the course of employment.<sup>276</sup> Although it happened at his place of work the word “in” contained in the phrase “in the course of employment” requires a causal connection with employment.<sup>277</sup> The resemblance of the Commonwealth Employees’ Compensation Act 24 of 1930 with the English Workmen’s Compensation Act is acknowledged by the Court.<sup>278</sup> The honourable Chief Justice traced the history of the phrase “in the course of” to as early as 1687 in an old English ruling.<sup>279</sup> Dixon CJ in citing *St. Helen’s Colliery Co. v Hewitson* [1924] AC 59; 16 BWCC 230, noted that the amendment from the conjunctive to the disjunctive version of the test phrase might not have intended the consequences of the change “to compensate sufferers from injuries unconnected with industry if and only if the injuries occurred during working hours.”<sup>280</sup> In casu, the appeal succeeded and the death was accepted with Dixon CJ explaining that “... it seems to me that when the conjunctive was dropped for the disjunctive, the result was to entitle the worker to compensation if no more is shown than that the personal injury by accident arose while he was doing something that was part of or incidental to his service.”<sup>281</sup>

#### **4.2.2. *Dayton v Coles Supermarkets P/L***

One of the important rulings pertaining to “a substantial contributing factor” was handed down in the Supreme Court of New South Wales in the case of *Dayton v Coles Supermarkets P/L*<sup>282</sup> in which all three judges separately ruled on the interpretation thereof:

**MEAGHER JA:**

16. Many judges have spent a great deal of time and difficulty analysing and pondering the meaning of the word “substantial”. But this word is a plain English word which is understood by anyone who is not a judge. Nor have the endless judicial lucubrations on the word contributed to anyone’s understanding of it.

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<sup>276</sup> *Ibid* 3.

<sup>277</sup> *Ibid* 7.

<sup>278</sup> *Ibid* 9.

<sup>279</sup> *Ibid* 9.

<sup>280</sup> *Ibid* 10.

<sup>281</sup> *Ibid* 11–13.

<sup>282</sup> *Dayton v Coles Supermarkets P/L* [2001] NSWCA 153. Retrieved on 06/05/2012 from <http://www.austlii.edu.au/cgi-bin/sinodisp/au/cases/nsw/NWCA/2001/153.html>.



Giles JA in citing from *Mercer v ANZ Banking Group Ltd* [2000] NSWCA 138; (2000) 48 NSWLR 740 (hereinafter: *Mercer*) noted that the word “a” in “a substantial contributing factor” means there is not a limitation on the number of substantial contributing factors to be taken into account and:<sup>283</sup>

“substantial” qualifies “contributing factor”, indicating that it is the strength of the causal linkage that is in question; and it is “the employment concerned” which must be a substantial contributing factor, meaning not the fact of being employed but what the worker was doing in his employment.

Giles JA continued that it was further held in *Mercer* that the correct interpretation of “substantial” is “more than minimal, large or great”; which is consistent with the Attorney General’s second reading speech in which the intention of this phrase was presented to be:<sup>284</sup>

in line with the primary objective of compensating workers who suffer injuries that have a proper link with the workplace, rather than those whose injuries have only a remote or tenuous connection with work” (also at 747). And it was also said that “a substantial contributing factor” is not a concept as stringent as or more stringent than that of “arising out of” the employment, and it appeared to be accepted that a worker’s employment would be a significant contributing factor to his injury if he was struck by a bolt of lightning at his work place [sic] (at 747-8).

Davies AJA in his ruling approvingly drew attention to the listed factors to be taken into account in terms of s 9A(2) when consideration is given to the degree in which employment contributed to the injury in determining if it is “substantial.”<sup>285</sup> The intention is to:<sup>286</sup>

exclude those many instances where, as a result of legal theory and extension of thought, liability has been found in cases where, as a matter of practical reality, the contribution which employment has made to the injury has little substance.

It is submitted that the meaning and interpretation of this newly-introduced phrase will still be developed by the courts in future.

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<sup>283</sup> *Ibid* 22.

<sup>284</sup> *Ibid* 23.

<sup>285</sup> *Ibid* 37.

<sup>286</sup> *Ibid* 37.

### 4.2.3. *Hatzimanolis v A.N.I. Corporation Limited*

Injuries during interludes between periods of work may in certain circumstances qualify as injuries arising out of or in the course of duty. The High Court of Australia found in *Hatzimanolis v A.N.I. Corporation Limited*<sup>287</sup> a worker to be injured on duty in an accident that happened during a sightseeing journey in his leisure time and after examining section 4 of the Act, explained the development of tests applied by Australian courts over time. Already in 1918, the court recognised that the course of employment also included “natural incidents connected with the class of work.”<sup>288</sup>

The majority decision recognised the need to scrutinise how the tests developed through the years and to apply it to the situation of an employee working in a remote area and attending an excursion organised by the supervisor on a day off and injured on the way back from it.<sup>289</sup>

The ruling was made under the New South Wales Act sections 4<sup>290</sup> and 9.<sup>291</sup> In citing from early cases, the Court held that it was already in 1918 accepted that “in the course of employment” also includes what is called “the natural incidents connected with the class of work.”<sup>292</sup> The Court further cited from the 1931 ruling by Dixon J in *Whittingham v Commissioner of Railways (W.A) (2)* [1931] HCA 49; (1931) 46 CLR<sup>293</sup> that the action of the employee must be “something which is part of or is incidental to his service,” the connection of which can be established as a “degree in which time, place, practice and circumstances as well as the conditions of employment had to be considered.”<sup>294</sup> Dixon J in 1937 held that “incidental to his service” did not help the interpretation of the test phrase and proposed it to be

<sup>287</sup> *Hatzimanolis v A.N.I. Corporation Limited* (1992) 173 CLR 473. Hereinafter: *Hatzimanolis*. Retrieved on 25/08/2010 from <http://www.austlii.edu.au/au/cases/cth/HCA/1992/21.html>.

<sup>288</sup> *Ibid* 7. In his concurring minority judgment Toohey J cited from *Kavanagh*, indicating the expression “in the course of” to “be seen as early as 1687 in the headnote to *Turberville v Stampe* which reads (31)(1687) [1792] EngR 2684; 1 Ld Raym 264 (91 ER 1072): “A master is responsible for all acts done by his servant in the course of his employment, though without particular directions” at [7].

<sup>289</sup> *Ibid* [5].

<sup>290</sup> S 4 defines an injury to mean “personal injury arising out of or in the course of employment.”

<sup>291</sup> S 9 provides for the right to compensation in instances of injuries sustained on duty.

<sup>292</sup> *Hatzimanolis* at [7] in citing from *Company v M'Robb* (1918) AC 304 at 321.

<sup>293</sup> *Whittingham v Commissioner of Railways* at 29.

<sup>294</sup> *Hatzimanolis* [7].

determined by whether the employee's actions formed part of activities he was "reasonably required, expected or authorized to do in order to carry out his actual duties."<sup>295</sup> The change from the conjunctive "and" to the disjunctive "or" did not encourage a narrow interpretation and "arising out of" indicated a "causal relationship" and "in the course of" a temporal *nexus*.<sup>296</sup>

The Court referred with approval to the flexibility of this test in determining whether or not the *nexus* with employment was sufficient to satisfy the test phrase even in modern times.<sup>297</sup> It was, however, realised that it is not applicable to the modern concept of the course of employment and a reformulation was necessary regarding the principles ruling instances of injuries sustained during periods of interludes.<sup>298</sup>

A common characteristic is the role of the employer who has "authorised, encouraged or permitted the employee to spend his time during that interval at a particular place or in a particular way."<sup>299</sup> The Court considered the nature of the periods of interludes to be an important factor and held it to be more readily accepted to be in the course of employment if the employee is required by his employment to be in a remote area and he is injured although during a period or a series of periods of interludes.<sup>300</sup>

The Court accepted that if the employer "expressly or impliedly, has induced or encouraged the employee to spend" the period at a specific location or manner, it will be considered as fulfilment of the test phrase unless it is defeated by serious and wilful misconduct by the employee. Regard should also be had to the general "nature, terms and circumstances of the employment."<sup>301</sup>

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<sup>295</sup> *Ibid* [9] in citing from *Henderson v Commissioner of Railways* (W.A)(3) [1937] HCA 67; (1937) 58 CLR 281.

<sup>296</sup> *Ibid* [6].

<sup>297</sup> *Ibid* [10]-[12].

<sup>298</sup> *Ibid* [13].

<sup>299</sup> *Ibid* [14].

<sup>300</sup> *Ibid* [15]. The shorter the period, the more easy will it be considered to satisfy the test phrase.

<sup>301</sup> *Ibid* [16].

#### 4.2.4. *PVYW v Comcare*

The *Hatzimanolis* ruling has been applied by the Federal Court of Australia in the case of *PVYW v Comcare*,<sup>302</sup> which involved an employee sent by her employer to a distant work site requiring her to sleep over.<sup>303</sup> The employer arranged her accommodation at a motel where she engaged in sexual activities and during which a glass light fitting broke loose and injured her.<sup>304</sup> Her claim was denied and she appealed successfully to the Federal Court of Australia where Nicholas J ruled:

What is of critical importance under the organising principles developed in *Hatzimanolis* is the temporal relationship between the applicant's employment and the injuries suffered by her. Here the temporal relationship between the applicant's injuries and her employment is that they were suffered by her while she was at a particular place where her employer induced or encouraged her to be during an interval or interlude between an overall period or episode of work.<sup>305</sup>

...

In the absence of any misconduct, or an intentionally self-inflicted injury, the fact that the applicant was engaged in sexual activity rather than some other lawful recreational activity while in her motel room does not lead to any different result.<sup>306</sup>

The Court held that based on *Hatzimanolis*, in the context of the particular provisions of the Act and the absence of serious and wilful misconduct or any intentionally self-imposed injuries, when an employee is at a specific place due to his employer "during an interval or interlude in an overall period or episode of work will ordinarily be in the course of employment."<sup>307</sup> The Court, however, remarked that it is necessary to have regard to the general nature, terms and circumstances of employment during the process of determining if an injury arose in the course of employment.<sup>308</sup>

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<sup>302</sup> *PVYW v Comcare* (No 2) [2012] FCA 395, at [3]. Hereinafter: *PVYW*. Retrieved on 23/04/2012 from <http://www.austlii.edu.au/au/cases/cth/FCA/2012/395.html>.

<sup>303</sup> An appeal against *PVYW* has been dismissed as per *Comcare v PVYW* [2012] FCAFC 181. Retrieved on 19/09/2013 from <http://www.austlii.edu.au/au/cases/cth/FCAFC/2012/181.html>.

<sup>304</sup> *PVYW* 3–5.

<sup>305</sup> *Ibid* 53.

<sup>306</sup> *Ibid* 55.

<sup>307</sup> *Ibid* 54.

<sup>308</sup> *Ibid* 54.

It is submitted that this decision shows the need for the introduction of limiting measures in the Australian compensatory legislation to preserve the right to compensation for the purpose it was historically intended for as the sexual activities the applicant engaged in, clearly did not form part of fulfilment of duties connected to the employment relationship which forms the basis of entitlement to compensation benefits although she was present at a venue and at a specific time because of arrangements made by her employer. The activities she was engaged in has no employment relationship other than the place and time; and the irrationality of the Federal Court's decision becomes clear when one takes into consideration the number of diseases that may flow from a night of passion in similar circumstances as in this case. The phrase out of and in the course of employment is rationally connected to the purpose of compensatory legislation.

It is important to note that the High Court set aside the decision of the Federal Court in *Comcare v PVYW* [2013] HCA 41,<sup>309</sup> explaining the reasoning in *Hatzimanolis* to still require a connection with an employment related activity in [35]:

Because the employer's inducement or encouragement of an employee, to be present at a particular place or to engage in a particular activity, is effectively the source of the employer's liability, the circumstances of the injury must correspond with what the employer induced or encouraged the employee to do. It is to be inferred from the factual conditions stated in *Hatzimanolis* ... that for an injury to be in the course of employment, the employee must be doing the very thing that the employer encouraged the employee to do, when the injury occurs.

Based on *Hatzimanolis*, the High Court held the relevant question to be answered is whether the employer induced or encouraged the employee to be engaged in the specific activity<sup>310</sup> and not whether the employer "induced or encouraged the employee to be at a place."<sup>311</sup> It is submitted that the High Court restored the required causal connection with this ruling but the vagueness of the test is simultaneously evident from the two dissenting rulings of Bell J and Gageler J.<sup>312</sup>

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<sup>309</sup> *Comcare v PVYW* [2013] HCA 41. Date of decision: 30 October 2013. Retrieved on 30/10/2013 from <http://www.austlii.edu.au/au/cases/cth/HCA/2013/41.html>.

<sup>310</sup> *Ibid* [38].

<sup>311</sup> *Ibid* [39].

<sup>312</sup> *Ibid* [64] & [109].

### 4.3. Extended right to compensation

Most jurisdictions provide for an “aggravation” of a pre-existing injury,<sup>313</sup> giving clarity on the situation of a person injured pre-employment or in the personal domain but where employment aggravates the pre-existing condition. Specific circumstances that will satisfy the test in the Commonwealth Act are described in section 6 which specifies instances of “violence”,<sup>314</sup> periods of “recess”,<sup>315</sup> “travelling”,<sup>316</sup> “education”<sup>317</sup> and medical treatment.<sup>318</sup> In addition to the described circumstances, certain categories of people doing voluntary emergency services,<sup>319</sup> mine rescue,<sup>320</sup> fire fighting,<sup>321</sup> ambulance assistance<sup>322</sup> and police<sup>323</sup> services will be deemed as employees for the purposes of workers’ compensation.

#### 4.3.1. Serious and wilful misconduct

Generally, most Acts deal with “serious and wilful misconduct” similar to South Africa and Canada; and provide that the right to compensation will be frustrated if the injury is caused by the “serious and wilful misconduct” of the employee. However, if serious disablement or death results from the injury so sustained, the right to compensation will be revived.<sup>324</sup> In addition to the phrase “serious and wilful misconduct”, the Australian Acts exclude benefits to employees when injury or death is “caused by an intentionally self-inflicted injury.”<sup>325</sup> The Commonwealth Act is a good example:

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<sup>313</sup> Commonwealth s 5A(1)(c); Australian Capital Territory s 4(1); Victoria s 5; Queensland s 32(3); South Australia s 3; Tasmania s 3(1); Northern Territory s 3(1).

<sup>314</sup> Commonwealth s 6(1)(a).

<sup>315</sup> Commonwealth s 6(1)(b).

<sup>316</sup> Commonwealth s 6(1)(d).

<sup>317</sup> Commonwealth s 6(1)(e).

<sup>318</sup> Commonwealth s 6(1)(f).

<sup>319</sup> Northern Territory s 3(7).

<sup>320</sup> New South Wales Schedule 1.

<sup>321</sup> Tasmania s 5; Northern Territory s 3(8) & s 3(8A).

<sup>322</sup> Tasmania s 6;

<sup>323</sup> Tasmania s 6A;

<sup>324</sup> Commonwealth s 14(2)(3); Victoria s 82(4); Western Australia s 22; Australian Capital Territory s 82(3); New South Wales s 14; Northern Territory s 57(1); Queensland s 130(1); South Australia s 30B & Tasmania s 25(2).

<sup>325</sup> Commonwealth s 14(2); Queensland s 129; Victoria s 82(3); Northern Territory s 57(1); Australian Capital Territory s 82(2) & New South Wales s 14(3).

#### 14 Compensation for injuries

- (1) Subject to this Part, Comcare is liable to pay compensation in accordance with this Act in respect of an injury suffered by an employee if the injury results in death, incapacity for work, or impairment.
- (2) Compensation is not payable in respect of an injury that is intentionally self-inflicted.
- (3) Compensation is not payable in respect of an injury that is caused by the serious and wilful misconduct of the employee but is not intentionally self-inflicted, unless the injury results in death, or serious and permanent impairment.

#### 4.3.2. Court interpretation of serious and wilful misconduct

Similar to South Africa and Canada, the right to compensation is extended to include situations of “serious and wilful misconduct.”<sup>326</sup> In *Whittingham v Ascott Air Conditioning Pty Ltd*,<sup>327</sup> a number of previous rulings were considered dealing with the term. It was held the word “wilful”<sup>328</sup> contains an element of calculation in its meaning and although the worker was highly intoxicated and his conduct inappropriate, it did not constitute “misconduct” as the employer provided the alcohol free of charge and the manager was equally intoxicated.<sup>329</sup>

In *Workcover Authority of NSW v Walsh*,<sup>330</sup> the use of illicit drugs to vitalise the employee to work continuously for extremely long hours without rest<sup>331</sup> formed the subject matter of the case.<sup>332</sup> The employee used drugs regularly for a long time and the autopsy revealed toxic levels of “methamphetamine” as well as “cannabinoids” present in his body; with the first named known to cause cardiac arrhythmias which was the probable cause of the employee’s death.<sup>333</sup> The Supreme Court of New South Wales had to determine whether the employment contributed substantially

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<sup>326</sup> Commonwealth s 14(3); Australian Capital Territory s 82(3); Northern Territories s 57; Queensland s 130; South Australia s 30B; Tasmania s 25(20); Victoria s 82(2C) & Western Australia s 22.

<sup>327</sup> *Whittingham v Ascott Air Conditioning Pty Ltd* [2010] NSWCCPD 36. A Presidential decision of the Workers Compensation Commission. Retrieved on 22/01/2011 from <http://www.austlii.edu.au/au/cases/nsw/NSWCCPD/2010/>.

<sup>328</sup> *Ibid* 73.

<sup>329</sup> *Ibid* 72.

<sup>330</sup> *Workcover Authority of NSW v Walsh* [2004] NSWCA 186. Hereinafter: *Walsh*. Retrieved on 11/05/2012 from <http://www.austlii.edu.au/au/cases/nsw/NSWCA/2004/186.html>.

<sup>331</sup> *Ibid* 17.

<sup>332</sup> *Ibid* 12–15.

<sup>333</sup> *Ibid* 19.

to the injury,<sup>334</sup> whether the injury was intentionally “self-inflicted”<sup>335</sup> and if serious and wilful misconduct was present.<sup>336</sup> If any of these factors were present, the right to compensation would be defeated.

Tobias JA held that misconduct which will “take an employee outside the scope of their employment must in all the circumstances be foreign or repugnant to the employment.”<sup>337</sup> Hodgson JA in agreeing with Tobias JA ruled that the intentionally self-inflicted harm of section 14(3) will apply only if the harm is done with intent and “without advertence to, or wish for, its injurious effect.”<sup>338</sup>

#### 4.3.3. Transgression of employment laws or rules

Only one of the Australian jurisdictions, South Australia, has a similar section to COIDA pertaining to contravention of labour laws or conduct without instructions or contrary to the instructions given by employers in section 30B of the Act. This section provides for such conduct to be “presumed to be acting in the course of employment.” The presumption is rebuttable by conduct constituting serious and wilful misconduct or voluntary intoxication.<sup>339</sup>

#### 4.3.4. Commuting injuries

As discussed *supra*, commuting between residence and workplace is *pima facie* not out of or in the course of employment but rather falls in the personal domain of the employee and it does not pose a special risk other than what the general public is exposed to. However, journeys undertaken for work purposes will be considered to be out of or in the course of employment in all the Australian jurisdictions, with some providing for journeys between the place of residence and the workplace.<sup>340</sup>

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<sup>334</sup> As in New South Wales Act s 9A.

<sup>335</sup> As in New South Wales Act s 14(3).

<sup>336</sup> As in New South Wales Act s 14(2).

<sup>337</sup> *Walsh* 56.

<sup>338</sup> *Ibid* 3.

<sup>339</sup> S 30B(2).

<sup>340</sup> Commonwealth s 9(2)(e); Australian Capital Territory s 36; New South Wales s 10; Northern Territory s 4; Queensland s 35 & South Australia s 30(5)–(7).



#### 4.3.4.1. Court interpretation on commuting injuries

In the case *Taylor v State of Tasmania*,<sup>341</sup> the Supreme Court of Tasmania considered the developments in Tasmanian compensatory law regarding journeys to and from the worker's place of work. In 1948 the Act provided a right of compensation if an employee is injured whilst "travelling between his place of residence or place of employment and any trade, technical, or other school which he is required to attend by the terms of his employment..."<sup>342</sup> In 1955 an amendment, similar to the current provision in COIDA, widened the right to compensation by providing:<sup>343</sup>

While the worker is travelling between his place of residence and his place of employment on or in any vehicle –

(a) Belonging to or hired by his employer and used: or

(b) Used under contract with his employer,

for the conveyance of workers to and from their places of employment.

In 1964 a further broadening was enacted to include injuries sustained whilst "the worker is travelling to his place of employment from his place of residence" irrespective of the vehicle; and in 1966 the journey home was also included.<sup>344</sup> At paragraph 9 the Court noted that this provision has been limited by section 25 of The Workers Rehabilitation and Compensation Reform Act 16 of 1995 which removed the right to compensation for many categories of commuting injuries that were previously compensable. The section has been retained in the current Act and it denies compensation for injuries sustained during journeys between the employee's residence and his worksite unless the journey is undertaken:<sup>345</sup>

6(a) (i) at the request or direction of the employer; or

(ii) if the journey is work related, with the authority (expressed or implied) of the employer; or

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<sup>341</sup> *Taylor v State of Tasmania* [2002] TASC 118. Retrieved on 08/05/2011 from <http://www.austlii.edu.au/au/cases/tas/TASC/2002/118.html>.

<sup>342</sup> *Ibid* 6.

<sup>343</sup> *Ibid* 7.

<sup>344</sup> *Ibid* 7.

<sup>345</sup> Provisions with similar effect are contained the Acts of the Commonwealth s 6; Western Australia s 19; Victoria s 83; South Australia s 30; Tasmania s 25; while an injury sustained while travelling to or from the place of work will be deemed to arise out of or in the course of employment in the Acts of New South Wales s 10; Australian Capital Territory s 36; Northern Territories s 4 & Queensland s 35. See further Chapter 4 paras 2.4 & 3.4 and Chapter 5 paras 2.10; 3.7 & 4.7.

- (b) while the worker is travelling between places where the worker is employed by different employers; or
- (c) while the worker, on a working day, is temporarily absent from the worker's place of employment, except where that absence occurs at the request or direction, or, if it is work related, with the authority (expressed or implied), of the employer; or
- (d) during a social or sporting activity which takes place away from the worker's place of employment, except where the worker's involvement in that activity forms part of the worker's employment or is undertaken at the request or direction, or with the authority (expressed or implied), of the employer.

It is respectfully submitted that by the creation of a right to compensation benefits irrespective of the employment relationship for commuting injuries sustained in accidents between home and work, the Australian compensatory legislation created too broad a test. This situation had to be curbed by an amendment to narrow the test and limit commuting injuries to those sustained in circumstances where a clear relationship with employment exists.

#### **4.4. Migrant labour**

As indicated *supra*, it is necessary to distinguish between a country's citizens and permanent residents and migrant workers from other countries entering that country for employment. Australia and Canada are the two countries with the highest number of migrant workers from other countries seeking employment in either Canada or Australia, per capita worldwide.<sup>346</sup> These non-citizens of Canada and Australia include lower skilled workers as well as highly skilled professionals comprising about 27% of immigrants.<sup>347</sup> Employment trends in Western Australia, Queensland and New South Wales show that persons born outside Australia were appointed in more than half of new vacancies totalling to thousands (64,500 in Western Australia and New South Wales ±43 450).<sup>348</sup> The Australian migration

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<sup>346</sup> Clarkey, A, & Skuterudz, M. 2012. *Why do immigrant workers in Australia perform better than those in Canada? Is it the immigrants or their labour markets?* At 1. Retrieved on 10/10/2013 from [http://arts.uwaterloo.ca/~skuterud/Mikal\\_Skuterud/Research\\_files/clarke\\_skuterud\\_census.pdf](http://arts.uwaterloo.ca/~skuterud/Mikal_Skuterud/Research_files/clarke_skuterud_census.pdf).

<sup>347</sup> Hernandez, V. 2012. *Migrant workers benefit most from Australia's mining boom*. International Business Times global headquarters: New York City. Retrieved on 30/08/2013 from <http://au.ibtimes.com/articles/280563/20120112/migrant-workers-benefit-australia-s-mining-boom.htm>.

<sup>348</sup> *Ibid.*

pattern clearly is not only inter-state within the Commonwealth but also across international borders.

The fragmented system of workers' compensation in Australia affected migrant work, migrant workers and employers conducting business in multiple Australian states as the rules, coverage, benefits and assessments in each jurisdiction differs from the other although a process of harmonisation has been put in place.<sup>349</sup> It is a requirement of *all* Australian jurisdictions that a *nexus* to the jurisdiction where the claim is lodged be established, tested according to the following incremental enquiry:<sup>350</sup>

1. the jurisdiction where the employee usually works in that employment; or
2. the jurisdiction where the employee is usually based for employment purposes; or
3. the jurisdiction where the employer's principle place of business is located.

South Australia effected an amendment in 2007 requiring employers to register each worker with only one scheme but to ensure each worker is registered with a scheme to prevent non-insurance.<sup>351</sup>

In section 34, the Australian Capital Territory (Victoria has a similar provision in section 84) provides for injuries sustained "outside Australia" and not only outside the Territory, as follows:

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<sup>349</sup> National Council for Self Insurers. 2010. *Surveying the way forward: Commentary on future workers compensation policy in Australia*. At 5 the question is raised if workers' compensation in Australia ought to follow the example of what was done with regard to health and safety by enacting a national Model Work Health and Safety Bill which aims at the harmonisation of health and safety in all Australian jurisdictions. It is acknowledged that the agreement to cross-border arrangements is the only progress that was made with regard to harmonisation of workers' compensation arrangements in Australia. Retrieved on 12/05/2012 from <http://www1.lawcouncil.asn.au/LPS/images/pdfs/SurveyingtheWayForward.pdf>.

<sup>350</sup> Known as the "state connection test" according to *Comparison of WC arrangements 2011* at 171. Australian Capital Territory s 36B; New South Wales s 9AB; Northern Territory s 53AA; Queensland s 113; South Australia s 6; Tasmania s 31A; Victoria s 80 & Western Australia s 20.

<sup>351</sup> *Ibid* 17-18.

Compensation is payable in relation to an injury to a territory worker suffered while the worker is outside Australia only if compensation would be payable in relation to the injury if the worker suffered the injury in Australia.

Contrary to the last named provision, Queensland (section 115) has a similar provision to COIDA which refutes an entitlement to compensation if a worker is not working outside of Australia purely in a temporary capacity at the time that the injury is sustained.

Double compensation is precluded e.g. if compensation is payable pursuant to another compensatory law, no entitlement arises in terms of a claim in another jurisdiction irrespective whether within or outside Australia: Queensland (section 116-118), South Australia section 55; Tasmania section 31E; Victoria section 84B and Western Australia section 23.

Continuation of compensation benefits when the employee leaves Australia is reliant on proof of continued disability (Australian Capital Territory sections 44-45; New South Wales section 53 and Western Australia section 69). The Northern Territory (section 65B) requires the worker's rehabilitation to be concluded before leaving the Territory as a prerequisite for the continued payment of compensation. Queensland discontinues payment of compensation benefits if a worker decides to leave Australia but, similar to COIDA, the compensation is commuted into a lump sum (section 173).

It is clear that Australia strictly requires a connection with one of the Australian States before the entitlement to a claim will arise. It is submitted that the high number of immigrant workers in Australia required legislation to concentrate on providing compensatory benefits to people injured within the jurisdiction of Australia similar to South Africa. Although the portability of benefits is less restricted than in COIDA, it is not as broad as the provisions in the Canadian compensatory laws.

## 4.5. Summary

It is clear from the discussion *supra* that in attempting to extend the right to compensation to all situations of occupational injuries, Australia broadened the test phrase extensively and in doing so created a right to compensation too broadly and consequently included injuries sustained in non-work related activities.<sup>352</sup>

Australia requires the following elements to be taken into account in fulfilling the requirements in the test phrase:<sup>353</sup>

- an injury; **and**
- in circumstances that need to need to be arising out of **or**
- in the course of employment.

In addition to the effects of the test phrase, Australian workers' compensatory laws provide for a broadening of the right to compensation in the form of:

- commuting injuries;<sup>354</sup>
- serious disablements sustained despite misconduct;<sup>355</sup>
- transgression of labour laws;<sup>356</sup>
- provision of voluntary emergency services;<sup>357</sup>
- trans-border compensation.<sup>358</sup>

## 5. CONCLUSION

### 5.1. Statutory definition of an injury: the test phrase

All three countries share early English Court decisions on compensatory legislative interpretation and it was applied and developed to suit the requirements of each of the different countries.<sup>359</sup>

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<sup>352</sup> Par 4.1 *supra*.

<sup>353</sup> Chapter 4 para 4.1 *supra*.

<sup>354</sup> Chapter 4 paras 4.3.4 & 4.3.4.1 *supra*.

<sup>355</sup> Chapter 4 paras 4.2.3; 4.2.4; 4.3.1 & 4.3.2 *supra*.

<sup>356</sup> Chapter 4 para 4.3.3 *supra*.

<sup>357</sup> Chapter 4 para 4.3 *supra*.

<sup>358</sup> Chapter 4 para 4.4 *supra*.

<sup>359</sup> See Chapter 4 fn 28 & Chapter 4 paras 2.2.1; 2.2.2; 2.2.7; 3.2.4 & 4.2.1.

South Africa and Canada are using the conjunctive version of the test phrase “out of and in the course of employment” while Australia is using the disjunctive “or” which has the effect of a very broad test in Australia.<sup>360</sup>

The definition and test phrase in COIDA is the strictest and most limiting of the three countries because the definition requires an “accident” to cause an “injury” and the test phrase strictly requires a further dual test to be satisfied; but the Courts have through interpretation, in the light of remedial legislation, given it a “broad and commonsense”<sup>361</sup> application so as not to defeat the purpose of the legislation. Application of the COIDA definition and test phrase strictly requires employment to be the only cause of the accident.<sup>362</sup>

The Canadian compensatory laws broadened the right to compensation by amending the definition by the use of the word “injury” by some jurisdictions and not an “accident” as in COIDA; and the disqualifying working of the test phrase was limited irrespective of the conjunctive noun “and,” by the working of two presumptions, one rebuttable and the other irrefutable.<sup>363</sup> The Canadian Courts gave a broad interpretation to the definition, test phrase and the presumptions; and held that employment need not be the sole cause of the injury although it needs to be substantial.<sup>364</sup> Application of the presumption in cases of death at the workplace is particularly broad and lenient towards the right to compensation, as it is irrefutable if an employee is found in a deceased state at a workplace where he had the right to be.<sup>365</sup> The word “injury” is used in the Australian compensatory legislation, giving it a wider definition and application than the use of “accident” in COIDA.<sup>366</sup> The right to compensation was broadened by the introduction of the disjunctive noun “or” into the test phrase which had the effect of the dual test to be reduced to a single test to be satisfied.<sup>367</sup> An effort to limit the right to compensation to injuries sustained in the work environment was made by the introduction of the

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<sup>360</sup> Chapter 4 paras 2.1; 2.1 & 4.1 *supra*.

<sup>361</sup> Chapter 4 para 2.2.6: *Manthe supra*.

<sup>362</sup> Chapter 4 paras 2.1; 3.1 & 4.1 *supra*.

<sup>363</sup> Chapter 4 para 3.1 *supra*.

<sup>364</sup> Chapter 4 fn 164 (*MacLaren*) at 2 & Chapter 4 para 3.1 *supra*.

<sup>365</sup> Chapter 4 para 3.1.1 *supra*.

<sup>366</sup> Chapter 4 para 4.1 *supra*.

<sup>367</sup> Chapter 4 para 4.1 *supra*.

additional test in the form of “a substantial contributing factor.”<sup>368</sup> COIDA does not have a similar phrase as the definition and test phrase create a three-fold test.

The Australian Courts interpret the test very broadly to the benefit of employees as is evident from the ruling in *PVYW*.<sup>369</sup> Although the South African Courts interpret the Act broadly to assist employees as far as possible, common sense prevails as expressed by the Court in *Manthe*.<sup>370</sup>

## **5.2. Extended right to compensation**

All three countries extended the right to compensation to include instances of serious and wilful misconduct, transgression of employment law or rules and commuting injuries. All these constitute conduct performed *prima facie* not out of or in the course of employment. It is handled very similar and a right to compensation will be established if serious disablement or death follows.<sup>371</sup>

## **5.3. Migrant labour**

COIDA’s provisions pertaining to migrant workers limit the right to compensation in a way that is not supportive of current international or regional employment trends; and by termination of payment of compensation pensions if the employee leaves South Africa for a period or periods longer than six months. Employees sustaining injuries outside of South Africa will only have a right to compensation if the employer’s head office is situated within South Africa and the employee is only temporarily employed outside South Africa. No specific provision is being made for government employees employed outside the Republic.<sup>372</sup>

Canadian compensatory legislation provides for a right to compensation if employees are injured outside the borders of their jurisdiction and specific

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<sup>368</sup> Chapter 4 para 4.1 *supra*.

<sup>369</sup> Chapter 4 para 4.2.4 *supra*.

<sup>370</sup> Chapter 4 para 2.2.6 *supra*.

<sup>371</sup> Chapter 4 paras 2.3, 3.3 & 4.3 *supra*.

<sup>372</sup> Chapter 4 para 2.4 *supra*.

provision has been made for government employees working outside the borders of Canada to be considered as employees of Ontario and to be compensated in terms of the Ontario Act. Foreigners working in their home countries for the Canadian Government will be compensated according to the Government Employees Compensation Act if their local legislation does not provide for it. Measures are in place to prevent double compensation from more than one jurisdiction.<sup>373</sup> It is submitted that this approach is preferable to the approach of COIDA.

Australian compensatory legislation provides for a right to compensation if an employee sustains injuries outside the borders of the jurisdiction where he is domiciled. Measures are in place to prevent double compensation in the form of compensation from more than one jurisdiction.<sup>374</sup> The right to compensation in both Canada and Australia is more reasonable and less restrictive pertaining to compensation in respect of migrant workers than the South African system; and it is submitted that COIDA needs to be amended to provide for a right to compensation for injuries sustained in migrant work.

It is submitted that the inter-jurisdictional agreements in Canada and Australia serve as examples of regional cooperation and can be used to inform agreements between the members of the SADC. As the SADC region not only provides a structure and forum for the negotiation and entering into of regional agreements but requires its members to “adequately” provide for social security to migrant workers, it is comparable to the inter-state situation prevailing within the federations of Canada and Australia. The inter-jurisdictional arrangements in Canada and Australia can thus be used as an example to South Africa and the SADC region. Bi-lateral and multi-lateral agreements between SADC members will have to provide for *inter alia* similar workers’ compensatory schemes with similar benefit structures, the recognition of claims across borders, systems providing for the portability and continuation of benefits and compensation payments etc. to ensure “equal treatment” as required by the Code on Social Security Article 17.2. It follows that an agreement between SADC states on cross-border compensation for work-

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<sup>373</sup> Chapter 4 para 3.4 *supra*.

<sup>374</sup> Chapter 4 para 3.4 *supra*.



related injuries and diseases will benefit the region as it will reduce poverty. One existing example is the current agreement between South Africa and Mozambique. However, the terms and conditions also need to include a right to compensation of South Africans working in a neighbouring state to prevent disabled people from falling into poverty upon return to the Republic.<sup>375</sup> It should be noted that agreements between SADC members are international agreements and as such soft law instruments which are not enforceable in a court with similar jurisdiction as the Federal Court of Canada and the High Court of Australia discussed *supra* in Chapter 2. Over time, agreements ought to be extended to include the members of the African Union but in the interim a system of optional coverage to South Africans working abroad in countries without appropriate compensatory schemes ought to be put in place.

#### **5.4. Policy documents**

The lack of secondary legislation in the form of published Regulations and Policies to COIDA is a serious limiting factor for South African employees who are often uninformed and ignorant of their rights and more specifically the right to compensation for occupational injuries and diseases. It is noteworthy that all the Canadian and Australian Compensation Authorities, employers and employees have the assistance of secondary legislation to fully inform and explain all rights and responsibilities in terms of the different Acts. It is submitted that COIDA needs to be amended to enable the promulgation of such secondary legislation.<sup>376</sup>

It is submitted that the phrase out of and in the course of employment and the definition of either “accident” or “injury” need to be rationally connected to the purpose of compensatory legislation by requiring a *nexus* between the injury and employment.

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<sup>375</sup> Chapter 1 para 3 and Chapter 4 para 2.4 *supra* and also Chapter 4 fn 129 & 132.

<sup>376</sup> Chapter 4 paras 2.2 & 3.2 & 4.2 *supra*.

## CHAPTER 5

### THE SCOPE OF APPLICATION OF COMPENSATORY LEGISLATION

#### 1. INTRODUCTION

Compensatory legislation can only protect persons falling within the ambit of the law. The importance of the legal nature of the employment relationship for the purposes of compensatory legislation becomes evident when the consequential rights and obligations arising from fulfilling the definitions of employer and employee are taken into consideration. Only a person who is able to satisfy the definition of an employee will have a right to compensation; and only an employer fulfilling the applicable definition will be immune against common law claims for damages and will be liable for registration with the administrative compensation body and the payment of levies, pursuant to compensatory law. These two definitions form the gist of the principle of balancing-of-interests (the historic trade-off).<sup>1</sup>

When the definition of one of the parties is amended, it automatically affects the other party as the definitions share a corresponding meaning, i.e. if more employees or categories of employees are included within the ambit of the definition, it effects the assessment rates of employers or it may include employers not previously included, for example, private households that are currently excluded from the ambit of COIDA. The State as a party is also affected as an increase in employees and employers covered has a consequence on the administration and administrative costs of the statutory body responsible for the administration. The contrary is also true, if one party is excluded, the other will be affected accordingly.

This Chapter will explore the nature of the employment relationship with reference to the common law contract of service, legislative provisions, case law and the different tests applied by the courts to determine the true nature of the relationship. It will furthermore be shown that the definition of an employee for the purposes of

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<sup>1</sup> Discussed in Chapter 2 & also Chapter 6.

compensatory legislation is closely related to the employment status of a person and that it defines the scope of persons who will have a right to compensation benefits and it influences which employers will be immune against civil liability.

## 2. SOUTH AFRICA

### 2.1. Statutory definition of an “employee”

The South African Constitution provides for the right of access to social security in section 27(1)<sup>2</sup> to “everyone..” and places the State under an obligation to “take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of each of these rights”<sup>3</sup> as well as the SADC instruments referred to in Chapter 4 paragraph 2.4. *supra*.

The word “everyone” has certain implications for compensatory legislation as it is directly related to the definition of an employee if that employee is “unable to support themselves and their dependants...”<sup>4</sup> while access to compensation should be extended progressively to more people. “Everyone” has been interpreted in *Khosa & Others v Minister of Social Development & Others; Mahlaule & Others v Minister of Social Development & Others*<sup>5</sup> to include South African citizens and people who acquired permanent residence status in South Africa<sup>6</sup> (migrant workers and non-South African citizens). In *Khosa*, the constitutionality of the provisions of the Welfare Laws Amendment Act 106 of 1997 was challenged, which limited payment of social welfare grants (e.g. pensions for the aged and child-support grants), to South African citizens only. At [40]-[44] the Constitutional Court

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<sup>2</sup> “27. Health care, food, water and social security.–(1) Everyone has the right to have access to–  
(a) healthcare services, including reproductive healthcare;  
(b) sufficient food and water; and  
(c) social security, including, if they are unable to support themselves and their dependants, appropriate social assistance.”

(2) The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of each of these rights.”

<sup>3</sup> Constitution 1996 s 27(2).

<sup>4</sup> *Ibid* s 27(1)(c).

<sup>5</sup> *Khosa & Others v Minister of Social Development & Others; Mahlaule & Others v Minister of Social Development & Others* 2004 6 BCLR 569 (CC). Hereinafter: *Khosa*.

<sup>6</sup> *Ibid* [95].

acknowledged the inter-relatedness of socio-economic rights and the “founding values of human dignity, equality and freedom” in the light of the influence of the rights to life, dignity and equality implied in socio-economic rights. The Court said that the right to equality is directly implicated by the exclusion of “permanent residents” because the Constitution confers the right to social security on “everyone” at [49]. The exclusion of permanent residents was at [85] held to be inconsistent with section 27 of the Constitution as it materially affected their rights to dignity and equality.

Based on the reasoning of the Court in *Khosa*, it is submitted that for purposes of compensatory law, “everyone” includes or ought to include, every legitimate worker in South Africa, although compensatory law falls within the realm of social insurance within the bigger milieu of social security and not as in *Khosa* within the realm of State-provided social assistance. In this sense, “everyone” comprises of an even wider group because some migrant workers may not acquire the status of permanent residency but may be exposed to occupational risks. It is submitted that employees currently excluded should over time be included within the ambit of the Act in a process of “progressive realisation” of the right to conform to the constitutional standard.

COIDA defines an employee to include workers in formal employment, irrespective of the form of the contract of service or how remuneration is quantified. This also includes casual employees, directors working under a contract of service, a curator acting on behalf of a disabled employee and dependants of deceased employees in cases of fatalities. However, it excludes employees in the South African Defence Force and the South African Police Services if they are doing service in defence of the country and further excludes persons working under a contract for service [section 1(xix)(d)(iv)] and domestic workers working in private households [section 1(xix)(d)(v)].<sup>7</sup>

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<sup>7</sup> COIDA s 1(xix). The differences between a contract for service and a contract of service will be discussed in more detail below.

## Definitions

In this Act, unless the context indicates otherwise-

(xix) "employee" means a person who has **entered into or works under a contract of service** or of apprenticeship or learnership, with an employer, whether the contract is express or implied, oral or in writing, and whether the remuneration is calculated by time or by work done, or is in cash or in kind, and includes-

- (a) a **casual** employee employed for the purpose of the employer's business;
- (b) a **director** or member of a body corporate who has entered into a contract of service or of apprenticeship or learnership with the body corporate, in so far as he acts within the scope of his employment in terms of such contract;
- (c) a person provided by a labour broker against payment to a client for the rendering of a service or the performance of work, and for which service or work such person is paid by the labour broker;
- (d) in the case of a deceased employee, his **dependants**, and in the case of an employee who is a person under disability, a **curator** acting on behalf of that employee; but **does not include**-
  - (i) a person, including a person in the employ of the State, performing military service or undergoing training referred to in the Defence Act, 1957 (Act No. 44 of 1957), and who is not a member of the Permanent Force of the South African Defence Force;
  - (ii) a member of the Permanent Force of the South African Defence Force while on "service in defence of the Republic" as defined in section 1 of the Defence Act, 1957;<sup>8</sup>
  - (iii) a member of the South African Police Force while employed in terms of section 7 of the Police Act, 1958 (Act No. 7 of 1958), on "service in defence of the Republic" as defined in section 1 of the Defence Act, 1957;
  - (iv) a person who **contracts for the carrying out of work** and himself engages other persons to perform such work;
  - (v) a domestic employee employed as such in a private household;<sup>9</sup>

A separate definition defines "dependant of an employee" to mean:<sup>10</sup>

- (a) a widow or widower who at the time of the employee's death was married to the employee according to civil law;
- (b) a widow or widower who at the time of the employee's death was a party to a marriage to the employee according to indigenous law and custom, if neither the husband nor the wife was a party to a subsisting civil marriage;

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<sup>8</sup> The Defence Act No. 44 of 1957 has been repealed by the Defence Act No. 42 of 2002. The 1996 Constitution provides in s 201(2)(b) for employment of the defence force "in defence of the Republic" while the Defence Act, 2002, in s 18 provides for humanitarian relief operations, the provision of essential services, social-economic upliftment and border control.

<sup>9</sup> Own emphasis.

<sup>10</sup> S 1(xv).

- (c) if there is no widow or widower referred to in paragraph (a) or (b), a person with whom the employee was in the at the time of the employee's death living as husband and wife;
- (d) a child under the age of 18 years of the employee or of his or her spouse, and includes a posthumous child, a step-child, an adopted child and a child born out of "wedlock";
- (e) a child over the age of 18 years of the employee or of his or her spouse, and a parent or any person who in the opinion of the Director-General was acting in the place of the parent, a brother, a sister, a half-brother or half-sister, a grandparent or a grandchild of the employee;
- (f) a parent of the employee or any person who in the opinion of the commissioner was acting in the place of the parent, and who was in the opinion of the Director-General at the time of the employee's death wholly or partly financially dependent upon the employee;

It is thus evident that certain categories of dependants will not be considered to be a dependent of an employee and will be excluded from the right to compensation, for instance children over the age of 18 years. In South Africa, not all children at age 18 years have completed their school education and although provision has been made in section 54 for the continuation of compensation after the age of 18 years depending upon continued education, no right to compensation arises if the child is already 18 years at the date of death of the parent (employee). This may leave the child destitute with incomplete school education and without the prospect of further education or training. It is submitted that the section 1(xv)(e) of the definition is unclear regarding the rights of a child older than 18 years at the time of the death of his parent as he does not have a right to statutory compensation if the paragraphs (d) and (e) are read together. However, if (e) is read alone it might hold the meaning that a child older than 18 years who stand in *loco parentis* to a younger (under the age of 18 years) child does have a statutory right to compensation by reading the subsection as: "a child over the age of 18 years of the employee or of his or her spouse ... who in the opinion of the Director-General was acting in the place of the parent, ...." The definition is furthermore complicated by paragraph (f) referring to "any person" who was financially dependent upon the deceased employee, may have a right to statutory compensation pursuant to the Act. In this regard, note should be taken of the provisions of section 54 and Schedule 4 of COIDA which limit compensation to a spouse and a maximum of three children. It is submitted that a child over the age of 18 years who does not have any right to statutory compensation

does not fall within the ambit of the Act and may retain his common law right to a civil claim. Section 54(1)(c)(iv) and (v) determines that a pension payable to a child shall lapse at the end of the month in which the child turns 18 except if the child suffers from a disability in which case it will continue until such time as it could reasonably be expected that the parent would have supported the child.

## 2.2. Statutory definition of an “employer”

The definition of an “employer” corresponds with the definition of an “employee. Employers have certain rights and obligations in terms of COIDA e.g. registration with the Compensation Fund,<sup>11</sup> record keeping,<sup>12</sup> submission of “returns of earnings”<sup>13</sup> and payment of assessments (levies).<sup>14</sup> Contravention of these provisions may lead to criminal liability and penalties imposed upon such an employer.<sup>15</sup> True to the principle of balancing-of-interest, employers are absolved from common law claims for damages against them in terms of section 35 and the only legal remedies available to defined employees are those provided for in COIDA.<sup>16</sup> Section 36<sup>17</sup> provides for civil claims against third parties by the employee and the Director-General.<sup>18</sup>

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<sup>11</sup> S 80.

<sup>12</sup> S 81.

<sup>13</sup> S 82.

<sup>14</sup> S 83–86.

<sup>15</sup> Ss 39(6), 80(6), 82(5) & 87. See also *Jooste* [16].

<sup>16</sup> “35. Substitution of compensation for other legal remedies

(1) No action shall lie by an employee or any dependant of an employee for the recovery of damages in respect of any occupational injury or disease resulting in the disablement or death of such employee against such employee's employer, and no liability for compensation on the part of such employer shall arise save under the provisions of this Act in respect of such disablement or death.

(2) For the purposes of subsection (1) a person referred to in section 56(1)(b), (c), (d) and (e) shall be deemed to be an employer.”

<sup>17</sup> “36. Recovery of damages and compensation paid from third parties

(1) If an occupational injury or disease in respect of which compensation is payable, was caused in circumstances resulting in some person other than the employer of the employee concerned (in this section referred to as the “third party”) being liable for damages in respect of such injury or disease–

(a) the employee may claim compensation in terms of this Act and may also institute action for damages in a court of law against the third party; and

(b) the Director-General or the employer by whom compensation is payable may institute action in a court of law against the third party for the recovery of compensation that he is obliged to pay in terms of this Act.

(2) In awarding damages in an action referred to in subsection (1)(a) the court shall have regard to the compensation paid in terms of this Act.

(xx) "**employer**" means any person, including the State, who employs an employee, and includes-

- (a) any person controlling the business of an employer;
- (b) if the services of an employee are lent or let or temporarily made available to some other person by his **employer, such employer** for such period as the employee works for that other person;
- (c) a labour broker who against payment provides a person to a client for the rendering of a service or the performance of work, and for which service or work such person is paid by the labour broker.<sup>19</sup>

Balancing the interests of employers and employees, lies at the centre of the definitions of "employer" and "employee" as the Act regulates the relationship between these two parties in instances of occupational injuries and diseases by removing the adversarial process and replacing it with an administrative remedy.<sup>20</sup>

Interpretation of the definitions of "employer" and "employee" ought to be seen in the light of the historical development of the contract of service and the historical development of the definitions in compensatory legislation itself.<sup>21</sup> "Contract of service" has not been defined in COIDA except for providing that the form thereof is

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(3) In an action referred to in subsection (1)(b) the amount recoverable shall not exceed the amount of damages, if any, which in the opinion of the court would have been awarded to the employee but for this Act.

(4) For the purposes of this section compensation includes the cost of medical aid already incurred and any amount paid or payable in terms of section 28, 54(2) or 72(2) and, in the case of a pension, the capitalised value as determined by the Director-General of the pension, irrespective of whether a lump sum is at any time paid in lieu of the whole or a portion of such pension in terms of section 52 or 60, and periodical payments or allowances, as the case may be.

<sup>18</sup> The SCA ruled in favour of the appellant in *Rand Mutual Assurance Co LTD v Road Accident Fund* 2008 (6) SA 511 (SCA) in interpreting s 36 to allow a mutual association to litigate in its own name against third parties although s 36 (1)(a) specifies that "the employee" and s 36(1)(b) "the Director-General or the employer by whom compensation is payable" are allowed to institute legal action to recover compensation paid by virtue of COIDA. The Court at [24]-[25], allowed the mutual association to litigate in its own name as it will not cause prejudice to the respondent. The Court considered the three rules of the *lex mercatoria* i.e. "that the wrongdoer is not entitled to benefit from the fact that the person wronged was insured; that the insured may not be enriched at the expense of the insurer by receiving both the insurance indemnity and damages from the wrongdoer; and that the insurer replaces the insured" in applying at [17] the *dictum* of *Commercial Union Insurance Co of SA Ltd v Lotter* 1999 (2) SA 147 (SCA).

<sup>19</sup> Own emphasis.

<sup>20</sup> See also Chapter 3 para 2.

<sup>21</sup> The Court in *Smit v Workmen's Compensation Commissioner* 1979 (1) SA 51 (A) gave an extensive overview of the development of the common law contract of service to determine whether Smit was an employee for the purposes of the 1941 Act. Hereinafter: *Smit*.



irrelevant for the purposes of the Act.<sup>22</sup> In establishing the existence and nature of the contract of service, regard needs to be taken of labour legislation, the common law and case law.

### 2.3. Requirements regarding the contract of service

It is suggested that the contract of service as presented in the COIDA definition<sup>23</sup> of an “employee” is applicable to all the categories of employees or deemed employees for the purposes of COIDA. Both dependents<sup>24</sup> and a curator<sup>25</sup> will be bound by the nature of the employment relationship between the injured or deceased employee and the employer; and requirements of the definition need to be satisfied before his curator or dependents will be deemed an “employee” and a right to compensation arises.

The common law contract of service forms the basis of the employment relationship.<sup>26</sup> The foundation of the contract of service lies in the Roman Law view of an agreement between two parties in terms of which one party renders personal services to the other party in exchange for remuneration, as a form of contract of letting and hiring (*locatio-conductio*).<sup>27</sup> The Romans distinguished between three types of hire contracts:<sup>28</sup>

- *locatio conductio rei* meaning the hire or letting of a thing;
- *locatio conductio operarum* meaning the hire or letting of personal services (the modern contract of employment);
- *locatio conductio operis* meaning the hire or letting of a specific piece of work (the current independent contractor or agency).

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<sup>22</sup> “‘employee’ means a person who has entered into or works under a contract of service or of apprenticeship or learnership, with an employer, whether the contract is express or implied, oral or in writing, and whether the remuneration is calculated by time or by work done, or is in cash or in kind, and ...”

<sup>23</sup> S 1(xix)(a)–(d) & Chapter 5 para 2.2 *supra*.

<sup>24</sup> S 1(xv) & Chapter 5 para 2.2 *supra*.

<sup>25</sup> S 1(xix)(d) & Chapter 5 para 2.2 *supra*.

<sup>26</sup> Mischke, C, Christianson, M and Strydom, EML (eds). 2005. *Essential labour law*. 4<sup>th</sup> edition. Pretoria: Mace Labour Law Publications. At 19. Hereinafter: Mischke *et al*.

<sup>27</sup> Du Plessis, JV & Fouché, MA. 2008. *’n Praktiese handleiding tot die Arbeidsreg*. Durban: Lexis Nexis. At 9. Hereinafter: Du Plessis *et al*.

<sup>28</sup> Mischke *et al* 20.

A contract of service (employment) should be differentiated from a contract for service<sup>29</sup> as represented in the definition by section 1(xix)(d)(iv) in the words “a person who contracts for the carrying out of work”<sup>30</sup> which is excluded from the definition of an “employee”.

From very early on in the history of compensatory legislation the courts had to determine whether the employment relationship fulfilled the requirements of a contract of service.<sup>31</sup> The nature of the employment relationship is characterised as that of master and servant. Therefore the measure of control exercised by the employer over the employee was considered from the inception of compensatory legislation to be a very important feature of a contract of service.<sup>32</sup>

### 2.3.1. *Smit v Workmen's Compensation Commissioner*

In *Smit v Workmen's Compensation Commissioner*,<sup>33</sup> Joubert JA detailed the history of the contract of service in the light of its Roman origins as:<sup>34</sup>

two species of *locatio conductio*, viz *locatio conductio operarum* and *locatio conductio operis (faciendi)*. Since a slave was a mere thing (*res*) he himself was incapable of letting his labour or services but if his owner did so then such a contract was construed as a letting of the slave as a thing (*res*), i.e. *locatio conductio rei*.

The Court carefully examined the development of the different contracts in Roman as well the Roman Dutch legal history in determining the nature of the contract entered into by the employee (Smit) and the employer, an insurance company, to

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<sup>29</sup> According to Du Plessis *et al* at 9–10, the contract for service is an agreement between an employer and an independent contractor in terms of which the contractor undertakes to do a specified piece of work within a specified period of time and the employer in turn undertakes to remunerate the contractor for the work.

<sup>30</sup> Own emphasis.

<sup>31</sup> Frank 39 & 156.

<sup>32</sup> Frank at 39 & 156 refers to the English decision *Simmons v Heath Laundry Company* (1910) 3 BWCC 200 where Fletcher-Mouton LJ explained: “The greater the amount of control exercised over the person rendering the services by the person contracting for them, the stronger the grounds for holding it to be a contract of service, and similarly the greater the degree of independence of such control, the greater the probability that the services rendered are of the nature of professional services and that the contract is not one of service.”

<sup>33</sup> 1979 (1) SA 51 (A).

<sup>34</sup> *Smit* 56 D.

determine if it was a contract *of* service or a contract *for* service.<sup>35</sup> The Court found that the legal relationship between Smit and the company was one of a contract for service as the company was only interested in the outcome of Smit's work without being prescriptive on the manner in which it has to be achieved.<sup>36</sup> The Court declined the argument by the Appellant to apply the control test and made the following decision in the light of the true nature of the work:<sup>37</sup>

The aforesaid features of the contract concerning its object, the lack of supervision and control over an agent, the non-requirement of personal performance of his duties by an agent, the remuneration by commission and the position of independence of an agent in the performance of his contractual duties are strong indicia in the present matter that the contract is one of work (*locatio conductio operis*) and not one of service (*locatio conductio operarum*).

This was despite the presence of *indicia* directing at benefits in kind afforded to Smit e.g. the use of a company vehicle, office, telephone and typing facilities; and the requirement by the company that leave had to be arranged with the company in advance.<sup>38</sup>

#### **2.4. Labour legislation and the definition of an employee**

In an effort to provide clarity of the interpretation of an "employee" in labour legislation, the Code of Good Practice: Who is an Employee<sup>39</sup> codified the dominant (multiple) impression test favoured by the courts.<sup>40</sup> The Code explains in Item 4 its applicability to COIDA<sup>41</sup> Part 6 of the Code identifies the main question to be answered in an enquiry involving the COIDA definition as "whether a person is employed in terms of a contract *of* service and has not been specifically excluded in

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<sup>35</sup> *Ibid* 56–62.

<sup>36</sup> *Ibid* 67 A–H.

<sup>37</sup> *Ibid* 68 A–C.

<sup>38</sup> *Ibid* 68 G–H.

<sup>39</sup> The Code of Good Practice: Who is an Employee, Notice No. 1774 of 2006 issued in terms of the LRA s 200A and the BCEA s 83A.

<sup>40</sup> Mischke *et al* 25.

<sup>41</sup> The Code relies on statutory provisions and case law and Item 11 instructs "... every person applying or interpreting one of these statutes must take the Code into account, the Code is not a substitute for applying binding decisions of the courts."

terms of the definition.”<sup>42</sup> The interpretation of the said definition requires consideration of the rebuttable presumption provided in the LRA<sup>43</sup> and BCEA favouring the worker as an employee<sup>44</sup> and lists seven *indicia* as advised in the ILO Recommendation 198, *The Employment Relationship Recommendation*, 2006. Only one of the factors needs to be present for the presumption to take effect.<sup>45</sup>

Part 3 of the Code, give preference to the “dominant impression test”<sup>46</sup> to determine whether a person is an independent contractor or an employee by a process of weighing of all relevant factors (regard should be had of all *indicia* that could indicate the true nature of the relationship)<sup>47</sup> without viewing the absence or presence of a single factor to be indicative of the nature of the relationship and without allocating an equal weight to every factor.<sup>48</sup> The South African courts give preference in the determination of the legal nature of the employment relationship to the dominant (multiple) impression test.<sup>49</sup> The test requires the weighing of all the relevant factors (*indicia*) in each individual case to decide if the dominant impression is that of an independent contractor or an employee.<sup>50</sup> Factors to consider may include:<sup>51</sup>

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<sup>42</sup> The Code of Good Practice: Who is an Employee, Notice No. 1774 of 2006, at Item 69–70.

<sup>43</sup> **“200A. Presumption as to who is employee**

(1) Until the contrary is proved, a person, who works for or renders services to any other person, is presumed, regardless of the form of the contract, to be an employee, if any one or more of the following factors are present:

- (a) the manner in which the person works is subject to the control or direction of another person;
- (b) the person’s hours of work are subject to the control or direction of another person;
- (c) in the case of a person who works for an organisation, the person forms part of that organisation;
- (d) the person has worked for that other person for an average of at least 40 hours per month over the last three months;
- (e) the person is economically dependent on the other person for whom he or she works or renders services;
- (f) the person is provided with tools of trade or work equipment by the other person; or
- (g) the person only works for or renders services to one person.”

<sup>44</sup> The presumptions are applicable only to employees who earn less than the prescribed threshold as announced periodically by the Minister of Labour in terms of s 6(3) of the BCEA.

<sup>45</sup> The Code of Good Practice: Who is an Employee, Notice No. 1774 of 2006, at Items 12–20.

<sup>46</sup> *Mischke et al* at 25 indicates the dominant impression test as the standard test applied by the courts.

<sup>47</sup> *Mischke et al* 25.

<sup>48</sup> The Code of Good Practice: Who is an Employee Items 27–52.

<sup>49</sup> *Mischke et al* 25.

<sup>50</sup> *Ibid* 26.

<sup>51</sup> The Code of Good Practice: Who is an Employee Items 27–52 and *Mischke et al* 25.

- the right of the employer to supervise the worker;
- the independence of the employee in the performance of his duties;
- if the employee is permitted to work for another employer;
- the manner in which remuneration is paid e.g. salary, commission or other;
- whether the employee is expected to provide his own equipment or tools;
- whether the employee is obliged to fulfil his duties personally;
- working hours and if such is prescribed by the employer.

These factors referred to in the Code represent the interpretation of the statutory provisions by the courts.<sup>52</sup>

## 2.5. Validity of the contract of service

This aspect provides a good example of the broadening of the definition of an employee for the purposes of compensatory legislation in South Africa.

The pre-1941 compensatory laws had as pre-requisite the requirement that the contract of service in all aspects be valid and, if defective, the right to compensation would have been defeated as in *Havenga v Rabie* 1916 TPD 466. In this case the employee was not in possession of a valid driver's license although he was engaged as a driver of the employer's vehicle.

The 1941 Act broadened the definition of a "workman" by replacing this requirement with the discretion of the Compensation Commissioner according to which the Commissioner is empowered to sanction a defective contract so as to be considered valid in all respects.<sup>53</sup> COIDA retained the essence of the 1941-provision but moved it from the definition of a "workman" to Chapter IV, section 27 headed as "Special circumstances in which Director-General may make award."<sup>54</sup>

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<sup>52</sup> *Ibid.*

<sup>53</sup> "3(1) ..... Provided that if in any claim for compensation under this Act it appears to the commissioner that the contract of service or apprenticeship or learnership under which the injured workman was working at the time when the accident causing the injury happened was invalid for any reason whatever, the commissioner may in his discretion deal with the matter as if such contract had at the time aforesaid been valid."

<sup>54</sup> "27. If in a claim for compensation in terms of this Act it appears to the Director-General that the contract of service or apprenticeship or learnership of the employee concerned is invalid, he may deal with such claim as if the contract was valid at the time of the accident."

### 2.5.1. *Van Wyk obo Van Wyk v Daytona Stud Farms & Others*

It is submitted that the amendment did not result in the provision of the right to compensation in all instances and it is doubtful that a strict interpretation by the Court is always in the best interest of workers.

The special plea raised by virtue of section 35 of COIDA against the plaintiff's claim for damages in *Van Wyk obo Van Wyk v Daytona Stud Farms & Others* [2007](C)<sup>55</sup> was dismissed. The Court had to decide if a valid contract of service existed in a case involving an eleven year old girl who lost a leg while working during a school holiday as a fruit picker on a farm at her parent's employer. The Court considered the purposes of both the BCEA<sup>56</sup> and of COIDA and relied on the ruling of *Swart v Smuts* 1971 2 All SA 153 (A)<sup>57</sup> which held that the Court in reaching its decision needs to have regard to the intention of the Legislature. The Court reasoned that the purpose of eradicating child labour as intended by the BCEA, will be defeated if the contract of service was not held to be *ab initio* void. The Court considered the purpose of eradication of child labour of more importance than the interests and social security benefits an individual child could gain from holding the contract to be valid.<sup>58</sup>

It is submitted that cognisance should be taken of children working as waiters, delivering newspapers and magazines, acting, singing etc. who are engaged in the informal sectors and exposed to risks without the safety net of social security benefits in the form of compensation for occupational injuries and diseases.

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<sup>55</sup> Case no. 20730 (unreported). Case discussed by Smit, N. 2010. Towards social justice: an elusive and a challenging endeavour. *Journal of South African Law* 1: 1-36. Hereinafter: *Daytona*. Retrieved on 26/05/2012 from <http://heinonline.org>.

<sup>56</sup> Act 75 of 1997.

<sup>57</sup> *Swart v Smuts* at 32-33.

<sup>58</sup> The BCEA s 43 prohibits employment of children younger than 15 years of age while the child (Van Wyk) was 11 years when injured when employed of the farm. Section 43 reads:

**"43. (1)** No person may employ a child—

(a) who is under 15 years of age; or

(b) who is under the minimum school-leaving age in terms of any law, if this is 15 or older."

## 2.6. The role of remuneration

Remuneration plays an important role in compensatory legislation as it is closely associated with the contract of service and definition of an employee. It furthermore forms the basis of the calculation of the monetary value of compensation, it forms part of the financial risk and consequently employer's levies are influenced by the earnings of their employees. Injuries and diseases affect the ability to earn and it is the loss of the ability to earn that needs to be made good by the awarding of compensation.<sup>59</sup> The form remuneration takes does not influence the requirement as it may be in cash or in kind, for work done or periodically received by the worker but it needs to be regular in nature.<sup>60</sup>

The definition of a "workman"<sup>61</sup> in terms of the 1941 Act was dependent upon the quantum of earnings of an employee; and if it exceeded the threshold promulgated periodically by law, the employee did not fulfil the requirements set to be considered as a "workman" and no valid claim arose.<sup>62</sup> Such a person still had the recourse of civil litigation and had to prove negligence on the part of his employer with the negative consequences related to such claims in order to effect compensation and address his losses.

Calculation of remuneration also proved difficult as the 1941 Act defined "earnings" to have the meaning of "the average remuneration of the workman at the time of the accident, calculated in the manner provided in section forty-one" and section 41 required the inclusion of all regular income to determine the monthly rate of earnings of the employee.<sup>63</sup>

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<sup>59</sup> S 47 of COIDA provides for compensation for temporary disablement be it partial or a total disability.

<sup>60</sup> COIDA s 63.

<sup>61</sup> It is submitted that the term "employee" in COIDA which replaced the term "workman" in the 1941 Act, more correctly represents the employment status of the person than "workman" who might not have a person in an employment relationship.

<sup>62</sup> S 3(2) contains certain categories of people excluded from the ambit of the Act including:  
"(b) persons whose annual earnings calculated in the manner set forth in section 41 exceed R24 000 or, from a date 1 determined by the Minister by notice in the Gazette, such higher amount 2 as he may so determine."

<sup>63</sup> "41 Method of calculating earnings  
(1) For the purpose of determining the compensation payable, the commissioner shall compute the earnings of the workman in such manner as, in his opinion, is best calculated

It is submitted that a significant number of employees were excluded from the ambit of the Act in this way as the inclusion of overtime earnings and other allowances often resulted in the employee not to be considered as a “workman” in terms of the Act. As a huge shortage of artisans existed, it was normal practice at the time for artisans to work overtime on a regular basis which often resulted in their earnings to exceed the maximum quantum to be considered as “workmen.”<sup>64</sup>

### 2.6.1. *Workmen's Compensation Commissioner v Crawford And Another*

In *Workmen's Compensation Commissioner v Crawford And Another*<sup>65</sup> the Court construed “the words 'of a constant character' as a qualification of the words 'any overtime payments’” as well as “other special remuneration” preceding it in section 41(1)(b)<sup>66</sup> that reads as: “any overtime payments or other special remuneration of a constant character or for work habitually performed” meaning that only remuneration of a regular nature qualified for inclusion as earnings pursuant to the 1941 Act.<sup>67</sup> COIDA relies on the calculation of earnings in a similarly phrased section 63 which determines for the inclusion of overtime and bonuses of a regular nature.

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to give the monthly rate at which the workman was being remunerated by his employer at the time of the accident including-

(a) the value of any food or quarters supplied by the employer save for the purpose of determining the amount of any periodical payment payable in respect of any period of temporary disablement during which the workman receives both food and quarters to the satisfaction of the commissioner from his employer, or as part of the medical aid to which he is entitled;

(b) any overtime payments or other special remuneration of a constant character or for work habitually performed,

but excluding remuneration for intermittent overtime and casual payments of a nonrecurrent [sic] nature, sums paid by an employer to a workman to cover any special expense entailed on the workman by the nature of the work, or any ex gratia payment to the workman, whether given by the employer or any other person.”

<sup>64</sup> South Africa (Republic). Department of Labour. 2008. *Scarce and critical skills research project*. At 43-47. Retrieved on 22/09/2012 from [http://www.labour.gov.za/DOL/downloads/documents/research-documents/Artisans%20trades\\_DoL\\_Report.pdf](http://www.labour.gov.za/DOL/downloads/documents/research-documents/Artisans%20trades_DoL_Report.pdf).

<sup>65</sup> *Workmen's Compensation Commissioner v Crawford And Another* 1987 (1) SA 296 (A). Hereinafter: *Crawford*.

<sup>66</sup> The 1941 Act.

<sup>67</sup> *Crawford* 309 A-C.



## 2.6.2. *Davis v Workmen's Compensation Commissioner*

In *Davis v Workmen's Compensation Commissioner*<sup>68</sup> the Court emphasised the wide discretion conferred upon the Compensation Commissioner in section 41(3)*ter*, to calculate the earnings of the employee.<sup>69</sup> The Commissioner needs to derive guidance from the “principles laid down in the preceding provisions. 'Practicable' means 'capable of being effected or accomplished'”.<sup>70</sup> The Court warned against calculation of the employee's earnings by merely having regard to what he earned at the time of the accident. “To do so gives a false and unrealistic picture of what applicant's annual earnings in fact were.”<sup>71</sup>

The Court then emphasised the importance to assist to an employee “as far as possible” and the Act not to be:<sup>72</sup>

interpreted restrictively so as to prejudice a workman if it is capable of being interpreted in a manner more favourable to him. In my judgment the Act does not lend itself merely to the restricted interpretation placed upon it by respondent. It is equally capable of being interpreted as affording respondent, on facts such as those in the present case, a discretion to look beyond the amount applicant happened to be earning at the time of the accident.

In COIDA the definition of an employee was broadened by omitting the threshold,<sup>73</sup> although remuneration still fulfils an important role and restricts the quantum of compensation to a maximum and minimum amount promulgated annually by the Minister of Labour and forms the basis of the calculation levies.<sup>74</sup>

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<sup>68</sup> *Davis*.

<sup>69</sup> *Ibid* 694 A–E.

<sup>70</sup> *Ibid* 694 A–E.

<sup>71</sup> *Ibid* 694 A–E.

<sup>72</sup> *Ibid* 694 E–G.

<sup>73</sup> Although the requirement relating to a maximum earnings level was removed by COIDA with its commencement date on 1 March 1994, the legacy of this exclusion from benefits are still felt by employees and their next of kin who were excluded from the ambit of the Act, irrespective of the seriousness of their injuries or even death. The inclusion of all employees irrespective of earnings was not retrospectively done. Personal knowledge by the author hereof shows an employee who lost both his hands at the end of 1993 and is still in dire need of compensation in the form of pension, prosthetic devices and a care allowance to enable him to hire assistance twenty years later, at the time of this work.

<sup>74</sup> COIDA ss 55, 83 & Schedule 4.

## **2.7. Employer registration and payment of levies**

### **2.7.1. *Boer v Momo Development CC en 'n Ander***

The High Court ruled in *Boer v Momo Development CC en 'n Ander*<sup>75</sup> that the definitions of employer and employee do not require an employee to be in the employment of a registered and paid up employer for the employee to have a rightful claim.<sup>76</sup> The definition “employer” does not refer to a “registered employer” but rather the employment relationship with an employee. According to the Court, “employer” and “employee” has its respective plain language meaning because the purpose of the Act as revealed in the long title, is to compensate employees for occupational injuries and diseases.<sup>77</sup>

As an employee has the right to compensation conferred by section 22(1), his right to claim damages under common law from his employer has been removed in terms of section 35.<sup>78</sup>

## **2.8. Third party employers**

### **2.8.1. *Rieck v Crown Chickens (Pty) Ltd t/a Rocklands Poultry***

The High Court as well as the SCA analysed the definitions of “employee” and “employer” as defined in COIDA in the two Rieck rulings. The worker (Rieck), employed by a labour broker, instituted legal action to claim damages against the employer where she was sent to work, in terms of section 36 of COIDA.

The High Court held in *Rieck v Crown Chickens (Pty) Ltd t/a Rocklands Poultry*<sup>79</sup> that the legislator specifically defined certain categories of employees e.g. civil servants, employees lent or let to another employer and employees in the service of a labour

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<sup>75</sup> *Boer v Momo Development CC en 'n Ander* 2004 (5) SA 291 (T). Hereinafter: *Boer v Momo*.

<sup>76</sup> *Ibid* 294 F-I.

<sup>77</sup> *Ibid* 294 F-I.

<sup>78</sup> *Ibid* 294 I-J & 295 A-B.

<sup>79</sup> *Rieck v Crown Chickens (Pty) Ltd t/a Rocklands Poultry* (2005) 26 ILJ 1240 (SE).

broker as referred to in the COIDA definition of an “employer.”<sup>80</sup> The Court held that in the circumstances of an employee’s services being lent or let to another, “the ‘permanent’ employer, rather than the person to whom the employee’s services are let or lent, remains the employers for purposes of the Act”.<sup>81</sup>

The Court further scrutinised section 1(xx)(c) and concluded that the labour broker remained the employer for the purposes of COIDA because the contract of service was entered into between the labour broker and the employee and no contractual agreement came into existence between the employer where the employee was sent to work, although the latter had more control over the employee than the labour broker; and secondly the labour broker registered with the Compensation fund and paid the levies into the Fund.<sup>82</sup> The Court held that this will be the case, irrespective where the services of the employee are rendered and irrespective who “controls the employee’s day-to-day conduct in the workplace.”<sup>83</sup>

The company, against whom the claim for damages was instituted, appealed the decision to the SCA where the Full Bench upheld the ruling.

### **2.8.2. *Crown Chickens (Pty) Ltd t/a Rocklands Poultry v Rieck***

The SCA considered the historical development of the two definitions in compensatory law in South Africa in *Crown Chickens (Pty) Ltd t/a Rocklands Poultry v Rieck*.<sup>84</sup> Nugent JA held that the 1914 Act, which consolidated the pre-union compensatory legislation, recognised only one employer for each employee at any specific time and that is the employer with whom a contract of employment has been entered into.<sup>85</sup> This will be the situation irrespective whether services are rendered for that employer or someone else.<sup>86</sup>

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<sup>80</sup> *Ibid* [20]. See also Chapter 5 para 2.2 *supra* for the definition.

<sup>81</sup> *Ibid* [20].

<sup>82</sup> *Ibid* [20].

<sup>83</sup> *Ibid* [20].

<sup>84</sup> *Crown Chickens (Pty) Ltd t/a Rocklands Poultry v Rieck* 2007 (2) SA 118 (SCA).

<sup>85</sup> *Ibid* [20]–[21].

<sup>86</sup> *Ibid* [20]–[21].

The definitions of the 1914 Act were retained in the 1934 Act.<sup>87</sup> The 1941 Act preserved the material part of the 1934-definition of an employee, but the definition of an employer was amended, although the essence of the definition was retained.<sup>88</sup> Any uncertainties were removed by the additional specification applicable to when the services of an employee is “temporarily lent or let on hire to another person then the employer would 'be deemed to continue to be the employer of such workman whilst [the workman] is working for that other person’”.<sup>89</sup> The Court concluded that all the Statutes preceding COIDA recognised only one employer as the employer of an employee at a specific moment and that is the employer with whom a contractual *nexus* exist.<sup>90</sup>

Nugent JA proceeded to examine the definitions in terms of COIDA.<sup>91</sup> The applicant argued that the work relationship that existed at the relevant time consisted of three parties and is best represented by subsection (b) of the definition of an “employer” with the relevant parties as the employer (labour broker), employee and the client as “some other person”.<sup>92</sup> It was contended on behalf of the applicant that the employee was an employee (for the purposes of COIDA) of the client of the labour broker at the relevant time of rendering services to the client.<sup>93</sup> The SCA rejected this interpretation<sup>94</sup> as favoured in South African Labour Law.<sup>95</sup> The Court held the words “such employer” in subsection (b) refers to the word “employer” immediately preceding it and “not the phrase ‘some other person’”.<sup>96</sup> It is held that the interpretation submitted by the applicant is inconsistent with the plain language meaning of the subsection and would change the historical construction which existed for more that hundred years, without good reason and it would furthermore

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<sup>87</sup> *Ibid* [22].

<sup>88</sup> *Ibid* [22].

<sup>89</sup> *Ibid* [22].

<sup>90</sup> *Ibid* [23].

<sup>91</sup> *Ibid* [23]–[26].

<sup>92</sup> *Ibid* [26].

<sup>93</sup> *Ibid* [26].

<sup>94</sup> *Ibid* [26].

<sup>95</sup> Volume 2 H1–N15, para 12 by Thomson, C & Benjamin, P.

<sup>96</sup> *Ibid* [26].

be inconsistent with the Act.<sup>97</sup> The proper meaning of the definition in COIDA supports the historical position that:<sup>98</sup>

... an employee generally has only one employer at any time, which is the person with whom he is in a contractual relationship of employment, even when he performs his contractual obligations for some other person.

### 2.8.3. Some practical implications: *Rieck* rulings

The scenario as discussed *supra* is also applicable to union representatives when engaging in union activities.

The LRA protects employees' rights in the workplace and prohibits hinderance of, disadvantaging of and discrimination against employees exercising their rights in terms of the LRA<sup>99</sup> inclusive of the right of representation by unions. Union representatives are authorised to exercise union functions whilst in

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<sup>97</sup> *Ibid* [26].

<sup>98</sup> *Ibid* [28].

<sup>99</sup> S 5 provides: "**Protection of employees and persons seeking employment.**—

- (1) No person may discriminate against an employee for exercising any right conferred by this Act.
- (2) Without limiting the general protection conferred by subsection (1), no person may do, or threaten to do, any of the following—
  - (a) require an employee or a person seeking employment—
    - (i) not to be a member of a trade union or workplace forum;
    - (ii) not to become a member of a trade union or workplace forum; or
    - (iii) to give up membership of a trade union or workplace forum;
  - (b) prevent an employee or a person seeking employment from exercising any right conferred by this Act or from participating in any proceedings in terms of this Act; or
  - (c) prejudice an employee or a person seeking employment because of past, present or anticipated—
    - (i) membership of a trade union or workplace forum;
    - (ii) participation in forming a trade union or federation of trade unions or establishing a workplace forum;
    - (iii) participation in the lawful activities of a trade union, federation of trade unions or workplace forum;
    - (iv) failure or refusal to do something that an employer may not lawfully permit or require an employee to do;
    - (v) disclosure of information that the employee is lawfully entitled or required to give to another person;
    - (vi) exercise of any right conferred by this Act; or
    - (vii) participation in any proceedings in terms of this Act.
- (4) A provision in any contract, whether entered into before or after the commencement of this Act, that directly or indirectly contradicts or limits any provision of section 4, or this section, is invalid, unless the contractual provision is permitted by this Act."

employment<sup>100</sup> and provision is made in section 15 for time to attend to union activities by providing for leave.<sup>101</sup>

It is submitted that application of the principles laid down in the *Rieck* rulings implies that the employer with whom the union representative has entered into a contract of service will be indemnified against common law claims for damages should the representative be injured while the representative is engaging in union activities. However, the union which is represented, might be exposed to actions for damages taken against it in such circumstances as a third party. The inference can also be drawn from the facts that election as a union representative is only possible when employed at a specific employer and exercising union rights and functions pertaining to that employer.

## 2.9. Atypical employment arrangements

COIDA excludes “a person who contracts for the carrying out of work and himself engages other persons to perform such work”,<sup>102</sup> which then effectively excludes a

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<sup>100</sup> S 14, with subsections 4 & 5 providing for:

- (4) A trade union representative has the right to perform the following functions—
- (a) at the request of an employee in the workplace, to assist and represent the employee in grievance and disciplinary proceedings;
  - (b) to monitor the employer's compliance with the workplace-related provisions of this Act, any law regulating terms and conditions of employment and any collective agreement binding on the employer;
  - (c) to report any alleged contravention of the workplace-related provisions of this Act, any law regulating terms and conditions of employment and any collective agreement binding on the employer to—
    - (i) the employer;
    - (ii) the representative trade union; and
    - (iii) any responsible authority or agency; and
  - (d) to perform any other function agreed to between the representative trade union and the employer.
- (5) Subject to reasonable conditions, a trade union representative is entitled to take reasonable time off with pay during working hours—
- (a) to perform the functions of a trade union representative; and
  - (b) to be trained in any subject relevant to the performance of the functions of a trade union representative.”

<sup>101</sup> “15 **Leave for trade union activities.**—

- (1) An employee who is an office-bearer of a representative trade union, or of a federation of trade unions to which the representative trade union is affiliated, is entitled to take reasonable leave during working hours for the purpose of performing the functions of that office.
- (2) The representative trade union and the employer may agree to the number of days of leave, the number of days of paid leave and the conditions attached to any leave.”

<sup>102</sup> S 1(xix)(d)(iv).

self-employed person and contractors from the scope of the Act. It is submitted that COIDA does not provide for the changing circumstances in the world of work and may become irrelevant if amendments do not correspond to the needs of the community it is intended to serve.

In appreciating the changing world of work globally which is marked by a growing number of atypically<sup>103</sup> employed people, the ILO adopted Recommendation 198, The Employment Relationship Recommendation, 2006<sup>104</sup> to address the issue of determining who an employee and who an employer is, in situations where the respective rights and obligations of the relevant parties are uncertain; where an attempt has been made to mask an employment relationship; and to address inadequacies or limitations in an existing legal framework or regarding interpretation or application thereof.<sup>105</sup> Member States are advised to effectively address the plight of female workers, the most vulnerable workers, young, old and migrating workers as well as disabled workers in national policies, to prevent abuses and protect the rights of workers.<sup>106</sup>

In determining whether an employment relationship exists, cognisance needs to be taken of the facts pertaining to the performance of work and remuneration of the worker irrespective of the cloak the relationship was draped in by the parties;<sup>107</sup> with attention to an open-ended list of *indicia* suggesting the existence of an employment relationship, inclusive of whether:<sup>108</sup>

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<sup>103</sup> Smit, N & Fourie, E. 2009. Perspectives on extending protection to atypical workers, including workers in the informal economy, in developing countries. *Journal of South African Law* 3: 516–547. Hereinafter: Smit *et al.* Retrieved on 26/05/2012 from <http://heinonline.org>. The authors contrast “employees” as protected by labour legislation to the term “atypical” employees which refers to “new forms of non-standard employment” also referred to as “non-standard”, or even “marginal” workers.

<sup>104</sup> International Labour Organisation. 2006. *R198 Employment Relationship Recommendation*. Hereinafter: *Employment Relationship Recommendation*. Retrieved on 21/09/2012 from [http://www.ilo.org/ifpdial/areas-of-work/industrial-and-employment-relations/WCMS\\_172417/lang-en/index.htm](http://www.ilo.org/ifpdial/areas-of-work/industrial-and-employment-relations/WCMS_172417/lang-en/index.htm). This Recommendation was included in the LRA’s s 200A and the BCEA’s s 83A but not in COIDA but the Code of Good Practice: Who is an Employee Notice No. 1774 of 2006, addresses it.

<sup>105</sup> *Employment Relationship Recommendation*, at the Introduction.

<sup>106</sup> *Ibid* Articles 5–8.

<sup>107</sup> *Ibid* Article 9.

<sup>108</sup> *Ibid* Article 13.

- (a) the fact that the work: is carried out according to the instructions and under the control of another party; involves the integration of the worker in the organization of the enterprise; is performed solely or mainly for the benefit of another person; must be carried out personally by the worker; is carried out within specific working hours or at a workplace specified or agreed by the party requesting the work; is of a particular duration and has a certain continuity; requires the worker's availability; or involves the provision of tools, materials and machinery by the party requesting the work;
- (b) periodic payment of remuneration to the worker; the fact that such remuneration constitutes the worker's sole or principal source of income; provision of payment in kind, such as food, lodging or transport; recognition of entitlements such as weekly rest and annual holidays; payment by the party requesting the work for travel undertaken by the worker in order to carry out the work; or absence of financial risk for the worker.

It is submitted that for labour legislation to remain relevant and purposive, it needs to provide for current labour trends.<sup>109</sup> According to Smit and Fourie,<sup>110</sup> atypical employment is the norm in developing countries within a growing informal economy that functions parallel to the formal economic system, with the atypically employed persons in growing need for social security protection.<sup>111</sup> Fultz and Pieris contend that the SADC region has lost a large number of jobs in the formal employment sector to the extent that the informal economy bigger than the formal economy is.<sup>112</sup> Informal employment is characterised by low earnings and little or no social security provisions.<sup>113</sup> The informal economic sector in sub-Saharan Africa increased from 30% (1990) to 39% (2003) of the total GDP;<sup>114</sup> while in 2005 total employment in the South African informal economic sector constituted 29.8%, of

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<sup>109</sup> Smit concluded that labour law is in danger of becoming outdated and irrelevant in the changing world of work; and that protection afforded to employees under labour law are threatened by new forms of working arrangements expressly aimed at extinguishing such rights. Smit *et al* 516.

<sup>110</sup> Smit *et al* 516.

<sup>111</sup> Smit *et al* at 516–617 argue that it is of particular importance for developing countries that labour legislation continues to protect vulnerable workers in the rapidly changing international market. It will furthermore comply with the ILO's policy of "decent work" which encompasses four objectives namely: "employment opportunities, workers' rights, social protection and representation".

<sup>112</sup> Fultz *et al* ix.

<sup>113</sup> *Ibid.*

<sup>114</sup> Smit *et al* 519.



which 7% represents domestic workers.<sup>115</sup> The Taylor Committee expressed concern for the high unemployment rate and rise in informally-employed persons that increased between 1996 and 2001 from 1 million to 2,7 million people.<sup>116</sup>

The scope of persons employed in atypical employment becomes clear if consideration is taken of the different sectors of the economy for example, building and construction with skilled and semi-skilled persons working in brick laying, plastering, tiling and painting. According to the Labour Force Survey, employment in the construction industry in 2003 totalled 626 000, of which 259 000 were informally employed.<sup>117</sup>

Women<sup>118</sup> are particularly vulnerable as a huge number of domestic workers and self-employed persons working in the cosmetic, fashion and hair industry are mostly females.

Mpedi recommends the gradual inclusion of currently excluded categories of people for example the self-employed and people in the informal sector.<sup>119</sup> It is submitted that, ironically, although atypically employed workers are the most vulnerable and in need of protection, this category is the least unionised without protection by labour legislation (inclusive of compensatory laws); however, in most developing countries, social security remains limited to persons in formal employment although a comprehensive system is needed to cover the whole population.<sup>120</sup> Atypical employment is characterised by a higher level of employment insecurity and precarious working conditions with unskilled females, forming the major part of this group.<sup>121</sup> The SADC Code on Social Security requires in Article 6 that:

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<sup>115</sup> Benjamin, P. 2008. Informal work and labour rights in South Africa. *Indus. L.J.* 29: 1579–1604. Retrieved on 26/05/2012 from <http://0-heinonline.org.oasis.unisa.ac.za/HOL/Page?handle=hein.journals/iljuta29&id=1635&collection=journals&index=journals/iljuta>.

<sup>116</sup> Taylor Report 20.

<sup>117</sup> South Africa (Republic). Department of Labour. 2004. *Report: Non-standard employment and its policy implications*. At 43. Retrieved on 27/09/2012 from [http://www.wits.ac.za/files/6lj0m\\_267499001348046308.pdf](http://www.wits.ac.za/files/6lj0m_267499001348046308.pdf).

<sup>118</sup> Smit *et al* 516.

<sup>119</sup> Mpedi, LG. 2008. *Pertinent social security issues in South Africa*. At 28–29 & 32–33. Community Law Centre (University Western Cape). Retrieved on 26/05/2012 from <http://www.communitylawcentre.org.za/projects/socio-economic-rights/Research%20and%20Publications/Research%20Series/Pertinent%20social%20security%20issues%20in%20South%20Africa.pdf/view>.

<sup>120</sup> Smit *et al* 516 & Olivier *et al* (1999) 49.

<sup>121</sup> Smit *et al* 518.

- 6.4 Member States should extend social insurance coverage to the entire working population.
- 6.5 Member States should provide and regulate social insurance mechanisms for the informal sector.
- 6.6 Member States should encourage and regulate private and public sector participation, with regard to both the provision and management of social insurance, as well as the payment of social insurance benefits. Private sector participation can be either occupational-based or of an individual or group nature.

COIDA provides for the inclusion of a person “who has **entered into ... apprenticeship or learnership, with an employer**”<sup>122</sup> but the system according to which employers provided apprenticeships has to a great extent fallen into disuse;<sup>123</sup> and no provision has subsequently been made to protect artisans-in-training at the training institutions who provide some form of practical training that may be as dangerous as an employer’s workplace.

## 2.10. Migrant labour

The previous discussion on migrant labour in Chapter 4 is equally relevant in determining the scope of compensatory law. Employees usually residing and working within South Africa but injured during a period of absence from the Republic shall “be entitled to compensation”, providing that the period of continuous absence from the Republic does not exceed 12 months unless an agreement to that regard was entered into between the Director-General, the employee and employer.<sup>124</sup> COIDA does not provide for a system of optional coverage except for the provision in section 23; and of importance is the acknowledgement of the three parties in the “agreement between the Director-General, the employee and the employer concerned” albeit conditions may be laid down by the Director-General.<sup>125</sup> It is submitted that particularly South Africans working abroad ought to have the option of self-coverage with a reputable independent workers compensation structure to prevent employees disabled as a

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<sup>122</sup> S 1(xix). Own emphasis.

<sup>123</sup> Van Rensburg, D. 2012. *Reinventing the apprenticeship system in South Africa*. Retrieved on 10/09/2013 from <http://www.leader.co.za/article.aspx?s=2&f=1&a=4115>.

<sup>124</sup> S 23(1). See also Chapter 4 paras 2.4; 3.4 & 4.4 *supra* and Chapter 5 paras 3.7 & 4.7 *infra*.

<sup>125</sup> S 23(1)(c).

result of work exposure, to return to the Republic and burdened their communities and the health care system due to a lack of relevant compensation. African countries e.g. the compensatory law of Sierra Leone only covers persons within a prescribed income bracket.

COIDA's sections 23(1), (2) and (3)<sup>126</sup> differ on the following points: section 23(1) applies to employers whose business entities are mainly carried out in the Republic and employees normally employed within the Republic but injured while temporarily outside the country; section 23(2) applies to employees who reside in the Republic and sustain an injury while working "in, on or above the continental shelf"<sup>127</sup> and section 23(3) restricts the right to compensation to employees of employers in agreement with the Director-General and payment of the applicable levies,<sup>128</sup> in an inverse situation to section 23(1)(a) where the employer's business are mainly outside the Republic and the employee usually works outside the

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<sup>126</sup> **"23. Accidents outside Republic**

- (1)(a) If an employer carries on business chiefly in the Republic and an employee of his ordinarily employed in the Republic, meets with an accident while temporarily employed outside the Republic, such employee shall, subject to paragraph (c), be entitled to compensation as if the accident had happened in the Republic.
- (b) The amount of compensation contemplated in paragraph (a) shall be determined on the basis of the earnings which the employee, in the opinion of the Director-General, would have received if he had remained in the Republic.
- (c) This subsection shall cease to apply to an employee after he has been employed outside the Republic for a continuous period of 12 months, save by agreement between the Director-General, the employee and the employer concerned, and subject to such conditions as the Director-General may determine.
- (2) If an employee resident in the Republic meets with an accident while employed in, on or above the continental shelf, such employee shall be entitled to compensation as if the accident had happened in the Republic.
- (3)(a) If an employer carries on business chiefly outside the Republic and an employee of his ordinarily employed outside the Republic, meets with an accident while temporarily employed in the Republic, such employee shall not be entitled to compensation unless the employer has previously agreed with the Director-General that such employee shall be entitled to compensation and, where applicable, has paid the necessary assessments in respect of him.
- (b) An employee referred to in paragraph (a) who is so temporarily employed in the Republic for a continuous period of more than 12 months, shall be deemed to be ordinarily employed by such employer in the Republic.
- (4) If, in terms of the law of the state in which an accident happens, an employee, in the circumstances referred to in subsection (1), is entitled to compensation or if an employee meets with an accident in the circumstances referred to in subsection (2) or in the Republic and he would be entitled to compensation in terms of the law of any other state as well as in terms of this Act, he shall by written notice to the Director-General elect to claim compensation either in terms of this Act or in terms of the law of the other state."

<sup>127</sup> S 23(2).

<sup>128</sup> The Court in *Boer v Momo* held that the Act does not require registration by an employer and payment of assessments as a precondition for the right to compensation at 294 G-I.

country but is injured while working within the Republic. Subsection (b) deems an employee working for a continuous period of longer than 12 months in the Republic to be usually employed in the Republic.

Section 23(4) provides for an elective process in a situation where an employee might be entitled to compensation in more than one country in terms of either section 23(1) or (2), in which case he is obliged to exercise his choice of country in writing to the Director-General. No time frame is set in the Act for the exercise of the elective process; and it is submitted that the choice will have to be exercised within a reasonable period of time from the date of the accident or diagnosis of the occupational disease.<sup>129</sup>

The Taylor Committee reported that migrant workers need to be treated equally based on ILO standards.<sup>130</sup> Millard argues the protection of migrating workers to be “one of the most pressing social security issues” facing Southern Africa<sup>131</sup> in current times involving a significant number of people.<sup>132</sup> Migrants include a broad spectrum of people, ranging from unskilled labour to highly-trained and skilled professionals; and globalisation is characterised by *inter alia* mobility.<sup>133</sup> Immigrant labourers from surrounding countries like Mozambique and Lesotho working on South African mines and injured are compensated through the Rand Mutual Assurance Ltd; and receive compensation benefits via an arrangement with TEBA Ltd.<sup>134</sup>

The author submits that current economic trends, with new emerging forms of the employment relationship, require a broadening of the definitions to fulfil the historical objectives of compensatory legislation; and more particular COIDA because the current provisions applicable to migrant workers do not take into

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<sup>129</sup> COIDA s 23 and Mpedi 28.

<sup>130</sup> Taylor Report at 114.

<sup>131</sup> The SADC Instruments discussed in Chapter 1 of this study ought to guide on how to deal with migrant employees who sustain occupational injuries or contract occupational diseases while working in one of the SADC countries.

<sup>132</sup> Millard, D. 2008. Migration and the portability of social security benefits: The position of non-citizens in the Southern African Development Community. *African Human Rights Law Journal* 8(1): 37-59. Retrieved on 24/05/2012 from <http://heinonline.org>.

<sup>133</sup> *Ibid* 39.

<sup>134</sup> TEBA (The Employment Bureau of Africa). 2008. Retrieved on 08/08/2011 from [http://en.wikipedia.org/wiki/TEBA\\_\(Southern\\_African\\_Company\)](http://en.wikipedia.org/wiki/TEBA_(Southern_African_Company)).

account the reality of a growing mobile workforce. It is especially true for South African professionals in industries like mining and medicine and who work for international companies with operations in multiple countries.<sup>135</sup>

In a report commissioned by the Department of Labour<sup>136</sup> on the shortage of critical skills in South Africa, it is reported that more than 23 000 South African healthcare professionals are working in Australia, Canada, the USA and the United Kingdom.<sup>137</sup> It is submitted that a growing number of employees normally work outside the borders of the Republic and are exposed to various risks; and if injured or diseased through employment exposures, are sent home with the resulting negative consequences for the South African society as referred to *supra* in this study.<sup>138</sup>

Mpedi argues the current bilateral agreements between South Africa and Mozambique to be unsatisfactory.<sup>139</sup> Millard concluded that migration should not be prevented because freedom of movement is an internationally-recognised human right but the limitation on the portability of social security benefits has the consequence that people may be left destitute irrespective of a lifetime of hard labour.<sup>140</sup>

It is clear that these limitations in the portability of compensatory benefits ought to be addressed. It may be done through economic and regional clusters like the SADC to enhance movement of people and money through legally-binding multilateral agreements but taking into account the region's particular needs.<sup>141</sup>

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<sup>135</sup> Erasmus, J & Breier, M (eds). 2009. *Skills shortages in South Africa: Case studies of key professions*. 2. Cape Town: HSRC Press. Retrieved on 23/09/2012 from <http://www.hsrcpress.ac.za/product.php?productid=2257>

<sup>136</sup> *Ibid* 120 & 145.

<sup>137</sup> *Ibid*.

<sup>138</sup> Mpedi 34 recognised the problematic situation and proposed addressing this aspect as a "pressing matter." He proposed social security provisions to be extended to include risks of illness, maternity benefits, invalidity, old age and occupational injuries and diseases to South Africans working outside the borders of the country irrespective if it be temporary or permanent and specifically in the African countries.

<sup>139</sup> Mpedi 34. COIDA s 94 provides agreements with foreign states to deal with compensatory matters and claims in terms of either COIDA or the foreign state.

<sup>140</sup> Millard 58.

<sup>141</sup> *Ibid* 58–59.

## 2.11. Domestic workers

The definitions of “employee”<sup>142</sup> and “employer” have been broadened over time but the current definition in COIDA still excludes domestic workers. However, 648 807<sup>143</sup> domestic workers were registered with the Department of Labour for purposes of the Unemployment Fund in December 2011.<sup>144</sup> The 1934 Act emphasised the nature and role of the contract of service in determining the status of “employee” and “employer” in section 6 that stated:

Persons who are regarded as Workmen and Employers for the purposes of this Act.

(1) A person shall be regarded for the purposes of this Act as a workman if he has entered into, or works under, a contract of employment or of apprenticeship with an employer, whether the contract is expressed or implied, is oral or in writing, and whether the remuneration is calculated by time or by work done. For the said purposes “workman” shall include any person whose occupation is conveying for gain, persons or goods by means of any vehicle, vessel or aircraft, the use of which he has obtained from the owner thereof under any contract other than a purchase or hire-purchase agreement, whether or not the remuneration of such person under such contract be partly an agreed sum and partly a share in takings, but shall not include any such person whose remuneration is fixed solely by a share in takings:

Section 84 of the same Act defined “employment” as:

‘Employment’ means work of any kind whatsoever in the Union, but does not include domestic service unless in connection with hotels or boarding houses in respect of which a licence referred to ..., is required nor employment in agriculture unless such employment be in connection with any engine driven or machine worked by mechanical power.

An employer is furthermore defined to “mean[s] any person who gives, or has given employment to any person.”<sup>145</sup>

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<sup>142</sup> Previously referred to as “workman”.

<sup>143</sup> Not all domestic workers need to register with the Unemployment Fund thus the figure is not all inclusive.

<sup>144</sup> South Africa (Republic). Department of Labour. 2012. *Job opportunities and unemployment in the South African Labour Market 2011-2012*. Pretoria: Government Printing Works. At 8. Retrieved on 12/08/2013 from <http://www.labour.gov.za/DOL/downloads/documents/annual-reports/job-opportunities-and-unemployment-in-the-south-african-labour-market/2012/jobopporeport201112.pdf>.

<sup>145</sup> Section 84 (the definition section) of the 1934 Act.

### 2.11.1. *Van Vuuren v Pienaar*

In the case of *Van Vuuren v Pienaar*,<sup>146</sup> the High Court of the Transvaal<sup>147</sup> examined the meaning of the definition “employment” and had to decide if “domestic service” included the services of an assistant matron working at a boarding school.<sup>148</sup> Although the assistant matron was seriously injured out of and in the course of her duties during an explosion in the kitchen, she had no valid claim in terms of the 1934 Act, as she was found to be employed in “domestic service” but the term “domestic service” was not defined in the 1934 Act.<sup>149</sup> Barry J and Millin J (concurring in a separate ruling)<sup>150</sup> applied the interpretation of “domestic servant” by Roche J in old English decisions with regard to the English Unemployment Insurance Act. Roche J is cited from *In re Junior Carlton Club* (1922, 1 KB 166) describing the nature of domestic service to be:<sup>151</sup>

...servants whose main or general function it is to be about the employers' persons or establishments, residential or quasi-residential, for the purpose of ministering to their employers' needs or wants, or to the needs or wants of those who are members of such establishments, or of those resorting to such establishments, including guests.

Rambottom J, although concurring with the outcome of his colleagues' decisions, differentiated between “domestic service” and a “domestic servant.”<sup>152</sup> The honourable Judge explained that the construction of the Act by which the Legislature did not deal with the exclusion in the definition of a “workman” but dealt with it in the definition of “employment,” indicated certain risks to be excluded from the ambit of the Act.<sup>153</sup> By excluding domestic service from the categories of employment, the “Court is concerned only with the nature of the work which the employee has been contracted to perform and not with the question whether he would, in the popular sense, be called a servant...”<sup>154</sup>

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<sup>146</sup> *Van Vuuren v Pienaar* 1941 TPD 122. Hereinafter: *Van Vuuren*.

<sup>147</sup> As it was then known.

<sup>148</sup> *Ibid* 124.

<sup>149</sup> *Ibid* 123–124.

<sup>150</sup> *Ibid* 127.

<sup>151</sup> *Ibid* 125 & 127.

<sup>152</sup> *Ibid* 129–130.

<sup>153</sup> *Ibid* 130.

<sup>154</sup> *Ibid* 130.

Although the definition was broadened by the 1941 Act, it continued to exclude domestic workers by stipulating:

- 3(2) The following persons shall not be regarded for the purposes of this Act as workmen-
- (f) domestic servants employed as such-
    - (i) in a private household; or
    - (ii) in a boarding house or institution in which are ordinarily employed not more than five such servants;

COIDA does not exclude the risk of domestic work but differentiate on the basis of the place of employment by exclusion of domestic workers in “private households” which include persons working as cleaners, care-givers, gardeners etc.<sup>155</sup> The Minister of Labour announced in her Budget Vote Address (2013) intended amendments to COIDA that may include domestic workers within the ambit of the Act.<sup>156</sup>

## 2.12. Summary

The Constitution of the Republic of South Africa calls for the provision of social security to “everyone” and places an obligation on the State to expand the provision of such benefits in a progressive manner.<sup>157</sup>

Although the definition of an employee has historically been broadened over time, the following workers remain excluded from the definition of an employee and are thus excluded from the right to compensation:

- independent contractors;<sup>158</sup>
- members of the Defence Force and Police in defence actions;<sup>159</sup>
- children older than 18 years at the death of his parent;<sup>160</sup>
- voluntary workers (inclusive of voluntary emergency workers);<sup>161</sup>
- workers in informal employment;<sup>162</sup>

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<sup>155</sup> S 1(xix)(d)(v).

<sup>156</sup> Oliphant.

<sup>157</sup> Chapter 5 para 2.1 *supra*.

<sup>158</sup> Chapter 5 paras 2.3, 2.4 *supra*.

<sup>159</sup> Chapter 5 para 2.1 *supra*.

<sup>160</sup> Chapter 5 para 2.1 *supra*.

<sup>161</sup> Chapter 5 para 2.1 *supra*.



- workers in atypical employment;<sup>163</sup>
- domestic workers in private households;<sup>164</sup>
- migrant workers;<sup>165</sup>
- child labourers (the *Daytona* ruling).<sup>166</sup>

No provision is being made for voluntary inclusion within the ambit of COIDA and directors of companies are included within the definition of an employee.<sup>167</sup>

The historical principle of balancing-of-interests is central to the definitions of employer and employee but:

- the employee's right of compensation is not dependent upon the registration and payment of levies by the employer;<sup>168</sup>
- third party employers will not be protected against common law claims for damages when utilising the services of labour brokers or borrowed employees from other employers as COIDA only recognises one employer per employee at any given time.<sup>169</sup>

The basis of the definition remains the common law contract of service which must be tested according to the applicable *indicia* as contained in the Code of Good Practice: Who is an Employee, with special attention to the dominant impression test which requires a weighing of all relevant factors.<sup>170</sup>

### 3. CANADA

The federal Canadian jurisdictions vary in their definitions of a "worker" and an "employer" for the purposes of compensatory legislation. However, similar to South Africa, the common law contract of service forms the basis of the employment

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<sup>162</sup> Chapter 5 para 2.5.1; 2.9 *supra*.

<sup>163</sup> Chapter 5 para 2.9 *supra*.

<sup>164</sup> Chapter 5 para 2.9; 2.11 & 2.11.1 *supra*.

<sup>165</sup> Chapter 5 para 2.10 *supra*.

<sup>166</sup> Chapter 5 para 2.5.1 *supra*.

<sup>167</sup> Chapter 5 para 2.1 *supra*.

<sup>168</sup> Chapter 5 para 2.1 & 2.7.1 *supra*.

<sup>169</sup> Chapter 5 para 2.8; 2.8.1; 2.8.2 *supra*.

<sup>170</sup> Chapter 5 para 2.4 *supra*.

relationship which is the ultimate requirement for satisfying the said definitions.<sup>171</sup> Different tests have been applied by the courts with the Ontario Appeals Tribunal showing preference for the “business reality” test that takes cognisance of an open-ended list of factors.<sup>172</sup>

### 3.1. Statutory definition of an “employee”

The Government Employees Compensation Act<sup>173</sup> expressly provides for workers of the Canadian Government as the only employees entitled to rights in terms of that Act.<sup>174</sup> However, similar to COIDA, it excludes members of the Canadian Forces and the Royal Canadian Mounted Police in the application section.<sup>175</sup>

All the other Canadian compensatory laws correspond to the text of Alberta<sup>176</sup> by stating:

- 1(1)(z) “worker” means a person who enters into or works under a contract of service or apprenticeship, written or oral, express or implied, whether by way of manual labour or otherwise, and includes
- (i) a learner, ...

Although all the other Acts contain almost identical definitions, every Act also provides for the particular needs of its own province which is supplemented by policy documents.<sup>177</sup> A common characteristic is voluntary coverage through an

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<sup>171</sup> Fudge, J, Tucker, E & Vosko, L. 2003. Employee or independent contractor? Charting the legal significance of the distinction in Canada. *CLELJ*: 10(2): 193–230. Retrieved on 10/09/2013 from [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1888625](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1888625).

<sup>172</sup> *Ibid* 217.

<sup>173</sup> R.S.C. 1985, c. G-5.

<sup>174</sup> *Ibid* s 2.

<sup>175</sup> S 3(1).

<sup>176</sup> Workers' Compensation Act, RSA 2000, c W-15.

<sup>177</sup> Alberta (Provincial Government). Workers Compensation Board. 2008. *Policy No. 06-01 Part II - Application 3: Student coverage*. Retrieved on 28/07/2012 from <http://www.wcb.ab.ca/public/policy/manual/0601p2a3.asp>.

See also Alberta (Provincial Government). Workers Compensation Board. 2008. *Worker fact sheet: Student coverage*. Retrieved on 28/07/2012 from

[http://www.wcb.ab.ca/workers/workers\\_facts.asp](http://www.wcb.ab.ca/workers/workers_facts.asp).

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application process whereby approved workers are deemed to be employees<sup>178</sup> for the purposes of the Act. Persons who are eligible to apply for optional coverage in terms of the Act include voluntary emergency workers,<sup>179</sup> fire fighters,<sup>180</sup> a partner in a partnership,<sup>181</sup> a proprietor,<sup>182</sup> a director,<sup>183</sup> independent contractors,<sup>184</sup> non-

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<sup>178</sup> Alberta s 1(1)(z)(ii), (iii); Saskatchewan ss 6(1)–(2); Manitoba s 1(1)(k) & (l); Ontario s 12; Quebec ss 9–19; British Columbia s 3; New Brunswick s 4, 5; Nova Scotia ss 4–8; Prince Edward Island ss 2–4; Newfoundland and Labrador ss 38(3) & 41; Nunavut s 6 & Yukon s 5(1).

<sup>179</sup> Alberta s 14(3) & Newfoundland and Labrador s 40(1)(g).

<sup>180</sup> Alberta s 14(3); Saskatchewan s 2; Manitoba s 1; Ontario s 2; Quebec s 12; British Columbia s 1; New Brunswick s 1, 5; Nova Scotia s 2, 5; Prince Edward Island s 1; Newfoundland and Labrador s 39; Yukon s 3(b) & Nunavut s 4.

<sup>181</sup> Alberta s 15(1), 16(1) & Ontario s 12(1).

<sup>182</sup> Alberta s 15(1), 16(1) & Yukon s 3(1)(f), 3(2)(d).

<sup>183</sup> Alberta s 15(1), 16(1); Manitoba s 1, 74; Ontario s 12; Quebec s 18; Prince Edward Island s 1, 3; Newfoundland and Labrador s 2(z)(iv) & Yukon s 3(1)(d), 3(2)(b).

<sup>184</sup> Manitoba s 1, 75(3); Ontario s 12(1); Nova Scotia s 4 & Prince Edward Island s 1(z)(vi), 4.

profit organisations,<sup>185</sup> an association of independent operators<sup>186</sup> and domestic workers.<sup>187</sup> Failure to follow the application procedure will exclude a person from benefits irrespective of the existence of a contract of service.<sup>188</sup> COIDA specifically excludes independent contractors but does not distinguish between employees and directors or proprietors. It includes these categories of persons into the definition of an employee provided these categories entered into a contract of service with the business entity which in practice means a person may simultaneously be considered to be both an employer and employee.<sup>189</sup>

In some of the workers' compensatory laws, certain designated categories of people are defined as workers; giving certainty to especially voluntary emergency workers<sup>190</sup> and domestic workers.<sup>191</sup> Although domestic workers are expressly excluded from the working of the Act in two jurisdictions,<sup>192</sup> they are included in the other jurisdictions e.g. under the pre-condition of minimum working hours in Manitoba.<sup>193</sup>

It is significant that all Canadian statutes include "learners" or "students" exposed to the hazards of occupation,<sup>194</sup> as workers, contrary to COIDA which only includes employees employed under apprenticeship or learnership contracts.<sup>195</sup>

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<sup>185</sup> Saskatchewan s 6; Manitoba s 75 & British Columbia s 3.

<sup>186</sup> Quebec s 19.

<sup>187</sup> Quebec ss 18, 19 & New Brunswick ss 2, 4 & 6.

<sup>188</sup> See discussion at Chapter 5 para 2.10.1: *Homes by Avi v Alberta (Workers' Compensation Board, Appeals Commission)*, 2007 ABQB 203 (CanLII).

<sup>189</sup> Chapter 5 paras 2.1 & 2.3 *supra*.

<sup>190</sup> British Columbia s 1; Manitoba s 1, s 4(5.1); New Brunswick s 1; Nova Scotia s 2(ae)(v); Ontario s 2(1); Prince Edward Island s 1(1)(z)(iii) & Saskatchewan s 2(t)(ii).

<sup>191</sup> Manitoba s 1; Ontario s 2 where an industry is defined to include a household if domestic staff is employed & Yukon s 3(1) defines an employer to be an employer for the purposes of the Act if he hires a domestic worker on a full time basis.

<sup>192</sup> New Brunswick s 2(3)(d) & Quebec s 2.

<sup>193</sup> Manitoba s 1(j).

<sup>194</sup> Alberta s 1(1)(o)(z); British Columbia s 1; Manitoba s 1(1) definitions of "learner" and "worker"; New Brunswick s 1 definitions of "learner" and "worker"; Newfoundland and Labrador s 2(z)(ii); Nunavut s 1(1), 4(1)(b)(i); Nova Scotia s 2(q), 2(ae)(iii); Ontario s 2 definitions of "learner" and "worker"; Prince Edward Island s 1(1)(p), (z)(ii); Quebec s 10; Saskatchewan s 2(m)(t)(i) & Yukon s 3(1) definitions of "learner" and "worker".

<sup>195</sup> In *Booyens N.O. v O.F.S. Provincial Administration* 1924 OPD 120, the Court clearly differentiated between a student at a trade school and an apprentice employed under a contract of apprenticeship.

Certain benefits are extended to special categories of persons, deemed to be workers for the purposes of compensatory legislation irrespective of remuneration. These include persons doing compulsory community service under a penal code,<sup>196</sup> confined persons,<sup>197</sup> children executing tasks,<sup>198</sup> students at a variety of educational institutions<sup>199</sup> e.g. technical institutions and vocational training institutions and a patient while participating in a work training programme.<sup>200</sup> These categories of persons are not entitled to all benefits; and specifically excluded is the right to return-to-work which for logical reasons does not form part of the applicable benefits.<sup>201</sup>

Canadian compensatory legislation has very similar provisions<sup>202</sup> with regard to dependents of deceased employees. They differ, however, from COIDA in that they do not have an age limitation pertaining to minors.<sup>203</sup> An example is the Act of Manitoba<sup>204</sup> which defines dependents as:

... those members of the family of a worker who were wholly or partly dependent upon his earnings at the time of his death or who, but for the incapacity due to the accident of the worker would have been so dependent, but a person shall be deemed not to be partially dependent upon the earnings of another person unless he was dependent partially on contributions from that other person for the provision of the ordinary necessities of life;

### 3.2. Statutory definition of an “employer”

The definition of an employer in Canadian compensatory law is closely related to the economic sector in which the employer conducts his business. If the sector in which the employer functions forms part of the compensation system, he will fall

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<sup>196</sup> Quebec s 11.

<sup>197</sup> Quebec s 12 & Nunavut s 4(1)(e).

<sup>198</sup> Quebec s 11.

<sup>199</sup> Nova Scotia s 6; Newfoundland and Labrador s 42 & Nunavut s 4(1)(b)(c).

<sup>200</sup> Nunavut s 4(1)(d).

<sup>201</sup> Quebec s 12.

<sup>202</sup> Alberta s 1(1)(h), British Columbia s 1, New Brunswick s 1, Newfoundland and Labrador s 2(1)(f), Nunavut s 1(2), Nova Scotia s 2(l), Ontario s 2(1), Prince Edward Island s 1(1)(h), Quebec s 2 which defines a “spouse” but not the other family members, Saskatchewan s 2(e) & Yukon s 3(1).

<sup>203</sup> S 1(xv)(c), the definition of “dependent of an employee”.

<sup>204</sup> S 1(1).

within the ambit of the rights and obligations applicable to an employer i.e. to be protected from claims for damages and liable for payment of assessments. Employers, who work as employees in the same industry, have the option to be included in the definition of an “employee” for the purposes of compensatory legislation.<sup>205</sup>

The fishing industry is a particularly difficult industry for the purposes of defining employers and employees as it mainly consists of independent contractors (fishermen) and buyers of fish in an industry vulnerable to economic and environmental fluctuations.<sup>206</sup> For the purpose of the British Columbian Act, “each buyer, recipient or payor is deemed to be the employer of all commercial fishers who contributed in any manner to the catching or landing of the fish bought, obtained or paid for by or through that person.”<sup>207</sup> This is despite the fact that the distinctive characteristics of an employer-employee relationship are not present between the fisherman and the buyer who is deemed to be the employer.<sup>208</sup>

### **3.3. Requirements regarding contract of service**

Ison<sup>209</sup> sheds light on the fact that although it is a requirement of the definition of an employee to be engaged under a contract of service, the commencement of the right to compensation and the corresponding right to protection against claims for damages are not dependent upon the “common law concepts of offer and acceptance.”

In a number of Tribunal Decisions it was held that a worker fulfils the definition in situations where a prospective employee was engaged in an activity related to the employer notwithstanding that the common law contract of service had not yet

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<sup>205</sup> Ison 1989: 14.

<sup>206</sup> British Columbia (Province). Workers’ Compensation Board. 1997. *Fishing industry and Workers Compensation: A briefing paper*. At 1 & 5. WorkSafeBC: Richmond. Hereinafter: *British Columbia Fishing Industry Briefing Paper*. Retrieved on 09/08/2012 from [http://www.worksafebc.com/regulation\\_and\\_policy/archived\\_information/policy\\_discussion\\_papers/default.asp](http://www.worksafebc.com/regulation_and_policy/archived_information/policy_discussion_papers/default.asp).

<sup>207</sup> British Columbia s 4(1)(c).

<sup>208</sup> *British Columbia Fishing Industry Briefing Paper* at 2.

<sup>209</sup> Ison 1989: 11.

commenced. In *Decision No. 775/92* of 1993,<sup>210</sup> it was explained that it is not the existence of the contract of service as such that is the determinant of the designation of “an employee” but the material question to the existence of an employment relationship.<sup>211</sup> The Court in citing the earlier *Decision No. 26* of 1974 (British Columbia), reasoned that the Act specifically refers to “a contract of service” to clearly differentiate it from the concept of “a contract for service” applicable to an independent contractor.<sup>212</sup> The contract of service does not constitute the commencement date of the right to compensation and therefore also not the commencement date for fulfilment of the definition of an employee. The Court considered the commencement of the employment relationship as<sup>213</sup>

... the employment relationship for compensation purposes had begun at the point of dispatch. It was there that the deceased allocated his time to the service of this employer rather than another, and began to act pursuant to arrangements made with the employer. Thus, the deceased was a worker of the employer within the meaning of the relevant legislation.

It is proposed that the ratio of the Court relates to a silent agreement between the worker and the employer and that a silent contract of service was entered into at the time of agreement.

The Appeals Tribunal applied in *Decision 192/89*<sup>214</sup> the “business reality” test which corresponds with the South African dominant impression test.<sup>215</sup> Eleven *indicia* are listed as part of the business reality test to be taken into consideration when determining the status of a worker:<sup>216</sup>

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<sup>210</sup> *Decision No. 775/92*, 1993 CanLII 5984 (ON WSIAT). Hereinafter: *Decision No. 775/92*. Retrieved on 10/08/2012 from <http://canlii.ca/t/206fv>.

<sup>211</sup> *Ibid* at (i)(b).

<sup>212</sup> As explained *supra* at Chapter 5 para 3.3 when dealing with the development of the contract of service.

<sup>213</sup> *Decision No. 775/92* at (i)(b).

<sup>214</sup> *Decision No. 921/89*, 1990 CanLII 5261 (ON WSIAT). Hereinafter: *Decision No. 921/89*. Retrieved on 30/09/2012 from <http://canlii.ca/t/20fjx>.

<sup>215</sup> Chapter 5 para 2.4 *supra*.

<sup>216</sup> *Decision No. 921/89* at (d) "Worker" versus "independent operator" - evolution of Tribunal test".

1. Ownership of equipment needed for the work;
2. The form of remuneration paid to the worker or contractor e.g. is it a fixed rate or dependent upon profit or loss;
3. The business structure (partnership etc.), advertising, business cards etc.;
4. Control over “where” and “when” work is to be performed;
5. The intention of the parties as may be derived from agreements, contract for service or contract of service, fixed term contracts etc.;
6. Business and government records e.g. tax records;
7. The economic market e.g. a highly skilled person is highly marketable and may be indicative of an independent contractor but a long-standing arrangement may be indicative of an employer-employee relationship.
8. Other persons categorised as “workers” in terms of the Act who provides similar services to an “employer”;
9. If it is allowed to delegate the services, it is indicative of a contractor;
10. The size of remuneration: large payments over a pre-determine period of time may indicate the person to be a contractor;
11. The degree of integration of the service into the overall business.

The named eleven *indicia* are not an exhaustive list but rather form part of an open-ended list of factors to be determined by the circumstances of each individual case.

### **3.3.1. *Joey’s Delivery Service v New Brunswick (Workplace Health and Safety Compensation Commission)***

The Court of Appeal of New Brunswick had to consider in *Joey’s Delivery Service v New Brunswick (Workplace Health and Safety Compensation Commission)*<sup>217</sup> whether drivers delivering fast food on behalf of Joey’s Delivery Service, worked under a contract of service or a contract for service; and if the last named is true, the drivers would fall within the category of independent contractors.<sup>218</sup>

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<sup>217</sup> *Joey’s Delivery Service v New Brunswick (Workplace Health and Safety Compensation Commission)* 2001 NBCA 17 (CanLII). Retrieved on 30/09/2012 from <http://canlii.ca/t/4vjb>. Hereinafter: *Joey’s Delivery Service*.

<sup>218</sup> *Ibid* [1].



All of the drivers worked only part-time, were entitled to make use of substitute drivers without prior authorisation, were responsible for their own vehicles, fuel, maintenance and insurance and also had to rent a radio from Joey's Delivery Services and were not subject to discipline by Joey's Delivery Service.<sup>219</sup> Drivers were restricted from making deliveries besides deliveries for Joey's during the same shift and no deductions were made for tax, pension or employment insurance and workers considered themselves as independent contractors for tax purposes.<sup>220</sup> The company arranged with fast food restaurants for the provision of a delivery service and dispatched the drivers upon an order by a restaurant.<sup>221</sup> The driver picked up the food from the restaurant, delivered it to the customer and returned to the restaurant with payment for the order minus the delivery fee. Upon completion of the shift, the driver pays a percentage of the delivery fees over to Joey's Delivery Services who kept a log of the orders delivered during that shift.<sup>222</sup>

The Appeals Tribunal (the court *a quo*) held that enough control was exercised over the drivers to be considered as employees of Joey's Delivery Services.<sup>223</sup>

The Court of Appeal *inter alia* considered the definition of "industry" and held it to be "disturbingly vague as to how one goes about determining what constitutes an "industry".<sup>224</sup> The Court further examined the definitions of "employer" and "employee" and held that the difference between having a worker under a "contract of hire" and working under a "contract of service" to be insignificant as a "contract of hire is a contract of employment".<sup>225</sup> Both definitions require the application of the common law principles,<sup>226</sup> with the point of departure, the four-folded test laid down in *Montreal v Montreal Locomotive Works Ltd. et al.*, [1947] 1 D.L.R. 161 (P.C.) on the following aspects: "(1) control; (2) ownership of tools; (3) chance of profit; and (4) risk of loss."<sup>227</sup> The last aspect relates to the true nature of the relationship

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<sup>219</sup> *Ibid* [7]–[9].

<sup>220</sup> *Ibid* [10]–[11].

<sup>221</sup> *Ibid* [5] & [9].

<sup>222</sup> *Ibid* [9]–[10].

<sup>223</sup> *Ibid* [13].

<sup>224</sup> *Ibid* [17]–[18].

<sup>225</sup> *Ibid* [31].

<sup>226</sup> *Ibid* [32].

<sup>227</sup> *Ibid* [33] & [44].

i.e. is the person an entrepreneur carrying on business for his own account in which case it constitutes a contract for service.<sup>228</sup>

### 3.3.2. *University of Lethbridge v Alberta (Workers' Compensation Board, Appeals Commission)*

The Court of Queen's Bench of Alberta had to decide whether a student (Larreynaga) of the University of Lethbridge, injured when a light fixture fell on her while she was in the University's library, could be deemed a "worker" as defined in the Act in *University of Lethbridge v Alberta (Workers' Compensation Board, Appeals Commission)*.<sup>229</sup>

The Appeals Commission interpreted the Act based on a plain reading that the student was "not a worker, the University was not her employer, and the injury did not occur in the course of her employment with the University"<sup>230</sup> as an employment or quasi-employment relationship is a precondition for fulfilment of the statutory definition of a "worker." Besides the conventional employment relationships, three additional types of persons are included into the definition i.e. learners, persons applying in terms of section 10 and "any other person" so deemed by the Board.<sup>231</sup> The Appeals Commissioner reasoned that as the first two types are based on an employment relationship it followed that the third (any other person) also needs an employment or quasi-employment relationship to be deemed a worker by the Board.<sup>232</sup> This led to a finding that Larreynaga could not be deemed a worker and even if she was deemed to be a worker, the accident did not arise "out of and occur in the course of employment" because no employment relationship existed between her and the University and therefore she could not be considered to be a "worker" in terms of the Act.<sup>233</sup>

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<sup>228</sup> *Ibid* [43]-[44].

<sup>229</sup> *University of Lethbridge v Alberta (Workers' Compensation Board, Appeals Commission)*, 2007 ABQB 551 (CanLII). At [2]. Hereinafter: *University of Lethbridge*. Retrieved on 11/08/2012 from <http://canlii.ca/t/1svtp>.

<sup>230</sup> *Ibid* [18].

<sup>231</sup> *Ibid* [19] & [96]-[98].

<sup>232</sup> *Ibid* [20] & [99].

<sup>233</sup> *Ibid* [20] & [99].

The Court of Queen’s Bench, in referring to the purpose of the Act,<sup>234</sup> examined the policy to include university students in the definition of a “worker” and described it as “a policy decision involving classes of persons and the balancing of public and private interests and is properly described as ‘polycentric’.”<sup>235</sup> The reasoning of the Court *a quo* was held to be untenable and an interpretative error of the word “worker” and furthermore the finding that the accident did not arise “out of and occur in the course of employment” was incorrect.<sup>236</sup>

The finding by the Court *a quo* in respect of the pre-condition of an employment relationship “simply does not accord with a plain reading of the Act” as the deemed provision is specifically directed at persons who would not otherwise be considered as “workers” in terms of the Act due to an existing employment relationship.<sup>237</sup> The Court of Queen’s Bench repudiated the reasoning and held “that the super-added requirement of an express employment relationship misapprehends the nature and purpose of a deeming provision and renders redundant the deeming provisions contained in s. 1(1)(y)(iii) of the Act.”<sup>238</sup> A legal fiction is being created by the inclusion of students within the definition but the only requirement for a student to satisfy the definition of a “worker” in terms of the Act is to be registered with and attend a university as defined in the Universities Act RSA 2000, c U-3.<sup>239</sup>

In terms of section 147(3), deemed workers are considered to be employees of the Government of Alberta and therefore the accident arose out of and occurred in the course of employment as she was engaged in studies at the library.<sup>240</sup> It followed that the University is immune to a tort action against it by the student.<sup>241</sup>

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<sup>234</sup> *Ibid* [58].

<sup>235</sup> *Ibid* [61].

<sup>236</sup> *Ibid* [95].

<sup>237</sup> *Ibid* [99].

<sup>238</sup> *Ibid* [100].

<sup>239</sup> *Ibid* [101].

<sup>240</sup> *Ibid* [109]–[110].

<sup>241</sup> *Ibid* [114].

### 3.4. Validity of contract of service

An unlawful employment contract will not destroy the right to compensation even in cases of employment of under age children, except in Nova Scotia<sup>242</sup> and Prince Edward Island<sup>243</sup> where the claim of a parent in respect of the death of a child whilst unlawfully employed, will be void.

#### 3.4.1. *Decision 20053860 (Re)*, 2005 CanLII 63196 (NB WHSCC)

The background of this decision<sup>244</sup> strongly reminds of the circumstances of the South African *Daytona* case, with the appellant a fourteen year old child whose arm was amputated subsequent to an injury while working on a potato farm.<sup>245</sup>

In the case heard by the New Brunswick Appeals Tribunal, the employee argued that the employer contravened the Employment Standards Act, SNB 1982, c E-7.2. by employing an under aged child which in turn rendered the employment contract invalid and he therefore ought to be allowed to proceed with a common law claim for damages against the employer.<sup>246</sup>

It was common cause that the employer did not comply with the applicable provisions of the Employment Standards Act but the Tribunal could not find any provisions in the same Act or the Occupational Health and Safety Act, SNB 1983, c O-0.2 that renders the contract of employment of a person younger than 16 years of age void.<sup>247</sup>

The Tribunal cited the case of *Still v M.N.R.*, 1997 CanLII 6379 (FCA), [1998] 1 FC 549 and applied the principle as follows:<sup>248</sup>

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<sup>242</sup> Nova Scotia s 80.

<sup>243</sup> Prince Edward Island s 54.

<sup>244</sup> *Decision No. 20053860 (Re)*, 2005 CanLII 63196 (NB WHSCC). Retrieved on 30/09/2012 from <http://canlii.ca/t/21lwj>. Hereinafter: *Decision No. 20053860*.

<sup>245</sup> *Ibid* 2.

<sup>246</sup> *Ibid* 3.

<sup>247</sup> *Ibid* 6.

<sup>248</sup> *Ibid* 6.

The following principle reflects both the modern approach and its public law milieu: where a contract is expressly or impliedly prohibited by statute, a court may refuse to grant relief to a party, when in all of the circumstances of the case, including regard to the objects and purposes of the statutory prohibition, it would be contrary to public policy, reflected in the relief claimed, to do so.

The Tribunal viewed the purpose of the compensation scheme and the specific provisions of the Employment Standards Act as providing protection to young workers and in holding the contract invalid would be contrary to public policy and would defeat the protection rendered by compensatory legislation.<sup>249</sup> As the Employment Standards Act does not render such a contract invalid and the Appellant relied on the employment relationship to establish the existence of a duty of care by the employer, it constitutes an avoidance of the immunity extended by the compensatory Act to the employer which is closely related to the purpose of compensatory law. Consequently, the contract of employment was found not to be invalid and the employee was barred from instituting a common law claim for damages against his employer.<sup>250</sup>

The reasoning in this case is clearly in contrast to the *Daytona* case<sup>251</sup> decided in South Africa although both are based upon the weighing of interests.

### **3.5. The role of remuneration**

Contrary to COIDA, the Canadian compensatory laws do not refer to earnings as part of the definition of either employee or employer. Only the two identical Acts of Nunavut and the Northwest Territories refer to remuneration in respect of a designated employee by empowering the Commission to exercise its discretion with regard to determining the work, period, remuneration, assessments payable and who will be considered as the employer of that person.<sup>252</sup>

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<sup>249</sup> *Ibid* 7 & 9.

<sup>250</sup> *Ibid* 7, 9 & 10.

<sup>251</sup> Chapter 5 para 2.5.1 *supra*.

<sup>252</sup> Nunavut s 6(2).

Remuneration forms the basis of the calculation of compensation and is either based on the earnings of the employee at the date of the accident or the loss of future earnings potential. It plays a role in the determination of the assessment as it constitutes the potential financial risk to the compensation fund from which benefits are to be paid.<sup>253</sup> It is for this reason that the rate of remuneration of “deemed workers” might be problematic.

The general rule is the determination of the quantum that best constitutes the “average earnings” or “net average earnings” of the employee in the pre-injury time period.<sup>254</sup> With regard to designated employees, the Compensation Authority is vested with the discretion<sup>255</sup> to determine the amount considered to be the employee’s “average earnings” led by information such as the amount for which coverage is paid and or in a manner considered appropriate.<sup>256</sup>

### 3.5.1. *Decision: 2010-385-AD (Re), 2010 CanLII 69811 (NS WCAT)*

It is submitted that the form which remuneration takes, may be an indication of the legal status of the employment relationship but it is not the sole indicator as can be derived from the ruling by the Nova Scotia Workers’ Compensation Appeals Tribunal in *Decision: 2010-385-AD (Re)*,<sup>257</sup> where the worker was indebted to the employer and tendered his time and work to pay off his dept.

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<sup>253</sup> Alberta s 97; British Columbia s 39; Manitoba s 80; New Brunswick s 53; Newfoundland and Labrador s 97; Nunavut s 70; Nova Scotia s 124; Ontario s 81; Prince Edward Island s 63(1); Quebec s 292; Saskatchewan ss 136, 137 & Yukon s 66.

<sup>254</sup> Ison 1989: 82.

<sup>255</sup> In New Brunswick s 34(1) the discretion is exclusive in nature and not open to review in any court.

<sup>256</sup> Manitoba ss 1(8) and 75.1(3); New Brunswick s 34; Newfoundland and Labrador s 101; Nunavut s 72 & Nova Scotia s 130. See the British Columbian Act which reads as follows:

**“Exception to section 33.1 — person with coverage under section 2 (2)**

33.6 If an independent operator or employer, to whom the Board directs that this Part applies under section 2 (2), has purchased coverage under this Act, the Board must determine the amount of average earnings under section 33.1 from the date of injury based on the gross earnings for which coverage is purchased.

**Exception to section 33.1 — person without earnings**

33.7 If a worker had no earnings at the time of the injury, the Board must determine the amount of average earnings of a worker under section 33.1 from the date of injury in a manner that the Board considers appropriate.”

<sup>257</sup> *Decision No. 2010-385-AD (Re)*, 2010 CanLII 69811 (NS WCAT). Retrieved on 11/08/2012 from <http://canlii.ca/t/2dmq7>. Hereinafter: *Decision No. 2010-385-AD*.

The Appeals Commissioner had to determine whether the worker was an independent contractor or an employee working under a contract of service.<sup>258</sup> The worker normally worked as a subcontractor installing roofs and he was paid on a per job basis and had completed more or less seven roofs in a period of approximately 12 weeks.<sup>259</sup> The worker was injured whilst working as such and counsel for the employer raised the question whether an employment relationship existed in the given circumstances.<sup>260</sup>

Although the worker was instructed by the employer not to climb onto the roof before the arrival of the employer, he proceeded to do so irrespective of a snow covered roof. While on the roof, the worker answered an incoming cell phone call and he fell from the roof.<sup>261</sup> It was argued on behalf of the employer that no employment relationship existed between the worker and the employer and the reason for the presence of the worker at the worksite was to do an assessment and determine the type of work that could be done to pay off the debt.<sup>262</sup>

The Commissioner ruled that on a balance of probabilities there can be no other reason for the presence of the worker at the work site besides the performance of labour; and ruled that the true legal relationship that existed constituted an oral contract of service whereby the definition of a “worker” for the purposes of the Act is satisfied.<sup>263</sup>

The climbing onto the roof against instructions, lack of protective wear and answering of the cell phone did not constitute “misconduct”<sup>264</sup> in terms of section 10(3) of the Act.<sup>265</sup>

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<sup>258</sup> *Ibid* at “ISSUES AND OUTCOMES: Is the definition of “worker” satisfied?”

<sup>259</sup> *Ibid* at: “Analysis: Is the definition of “worker” satisfied?”

<sup>260</sup> *Ibid.*

<sup>261</sup> *Ibid.*

<sup>262</sup> *Ibid.*

<sup>263</sup> *Ibid.*

<sup>264</sup> Discussed in Chapter 4.

<sup>265</sup> *Decision No. 2010-385-AD* at: “Analysis: Is the Worker’s claim barred by subsection 10(3) of the Workers’ Compensation Act?”

### 3.6. Employer registration and payment of levies

#### 3.6.1. *Isaac v British Columbia (Workers' Compensation Board)*

The Court of Appeal for British Columbia<sup>266</sup> had to decide if an Indian widow and her children were entitled to compensation when her husband (a member of the Necoslie Indian Band) died whilst working for Necoslie Band in a logging operation on the reserve.<sup>267</sup> The widow's claim was based upon section 5(1) of the Act as in force at the time of the fatal accident in 1984 and which provision stated:<sup>268</sup>

5.(1) Where, in an industry within the scope of this Part, personal injury or death arising out of and in the course of the employment is caused to a worker, compensation as provided by this Part shall be paid by the board out of the accident fund.

The employee was engaged in "an industry within the scope of this Part" being Part 1.<sup>269</sup> The Board had a policy which denied coverage to bands that have not applied for coverage and did not pay levies to the compensation fund. It was common cause that the Band did not apply.<sup>270</sup> The Board refused the claim based on the grounds that the deceased was not a "worker" and the Band not an "employer" within the definitions in section 2 of the Act; and argued that the payment of compensation from the compensation fund and payment of levies by employers are closely linked and acts as "counterparts of a social contract" by which a right to sue an employer or colleague has been removed in exchange for "the right to no-fault compensation."<sup>271</sup> The Court held that on a "literal reading" of the Act, the widow is entitled to compensation as a dependant of the deceased whom worked under a contract of service; and the employer engaged the deceased "under a contract of hiring a person engaged in work in or about an industry" and in doing so, fulfilled the requirements of the definitions.<sup>272</sup>

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<sup>266</sup> *Isaac v British Columbia (Workers' Compensation Board)*, 1994 CanLII 1444 (BC CA). Hereinafter: *Isaac*. Retrieved on 19/08/2012 from <http://canlii.ca/t/1dcxg>.

<sup>267</sup> *Ibid* 1-2.

<sup>268</sup> *Ibid* 4.

<sup>269</sup> *Ibid* 5.

<sup>270</sup> *Ibid* 6.

<sup>271</sup> *Ibid* 16 & 26.

<sup>272</sup> *Ibid* 28-43.



In this ruling which resembles the South African *Boer v Momo* ruling, the Court held that the Compensation Board was neither endowed with the discretionary power to refuse compensation based on the grounds that the employer failed to pay levies to the fund nor when uncertainty prevails whether levies can be collected from the employer.<sup>273</sup> In distinguishing between the different Parts of the Act, the Court considered the historical development of the legislation and held that the 1916 Act demonstrated the same principles as the Act at the time of the accident pertaining to the right to compensation and the liabilities of employers.<sup>274</sup> The Court held that on the plain reading of the Act, the right to compensation is independent of the payment of levies seen in the light of the remedial purpose of the Act.<sup>275</sup>

### 3.7. Migrant labour

Contrary to COIDA, the Canadian jurisdictions provide for compensation for migrant workers. Migration does not in itself disqualify an employee from fulfilling the requirements of the definition and it therefore does not form an exclusion to the definition. The Interjurisdictional Agreement on Workers' Compensation came into effect in all jurisdictions on 1 October 1993 except for Quebec where it became effective on 1 January 1995 and Nunavut, 1 April 1999.<sup>276</sup> The Agreement aims:<sup>277</sup>

- a) To promote and ensure the effective, efficient and timely administration and resolution of interjurisdictional issues that are the subject matter of this Agreement;
- b) To facilitate the acceptance of all compensable claims so that no injured worker will be denied compensation benefits except in accordance with the applicable Statutory Authority and Board policy; and
- c) To ensure that employers are not responsible for the payment of assessments to more than one Board in respect of the earnings or some portion thereof of their employees who are employed in more than one jurisdiction.

The main purpose is the achievement of equity for workers and employers pertaining to workers who need to perform their duties in more than one

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<sup>273</sup> *Ibid* 44.

<sup>274</sup> *Ibid* 53–62.

<sup>275</sup> *Ibid* 68.

<sup>276</sup> *Interjurisdictional Agreement on Workers' Compensation*.

<sup>277</sup> *Ibid* Part 1 Section 1.2.

jurisdiction and who are exposed to occupational hazards in more than one jurisdiction; and to achieve equity of payment of assessments by employers conducting business in multiple jurisdictions.<sup>278</sup> The previous discussion on this aspect in Chapter 4 is also of importance in the current Chapter.

### **3.8. Fishers**

#### **3.8.1. *Mime’j Seafoods Ltd. v Nova Scotia (Workers’ Compensation Appeals Tribunal)***

The definition of “employer” was considered by the Nova Scotia Court of Appeal in *Mime’j Seafoods Ltd. v Nova Scotia (Workers’ Compensation Appeals Tribunal)*,<sup>279</sup> a case where a tribal band formed an Aboriginal community organisation known as Mime’j, to fulfil requirements by the Canadian law on fishing licenses. Mime’j held interests in fishing licences, vessels and equipment on behalf of the Aboriginal community who made use of the assets through a number of joint venture agreements.<sup>280</sup>

On behalf of Mime’j it was conceded that the captains and crew members satisfied the definition of a “worker” but Mime’j argued that this dispensation does not inevitably make Mime’j an employer. Mime’j insisted that it’s “type of leasing arrangement allows it to engage *workers* (as defined in the Act) without necessarily becoming their *employers*.”<sup>281</sup>

Arguments on behalf of Mime’j contended to correctly interpret the definition of “employer”; every word in the statute needs to bear meaning and the particular definition is not aimed at “workers” as defined in the Act but is rather aimed at the type of “worker” i.e. a worker in the fishing industry.<sup>282</sup> If so interpreted, it will have the emphasis to be placed as follows:<sup>283</sup>

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<sup>278</sup> *Ibid* Part 1 Section 1.3.

<sup>279</sup> *Mime’j Seafoods Ltd. v Nova Scotia (Workers’ Compensation Appeals Tribunal)*, 2007 NSCA 115 (CanLII). Retrieved on 11/08/2012 from <http://canlii.ca/t/1vgtt>.

<sup>280</sup> *Ibid* [3] & [13].

<sup>281</sup> *Ibid* [35].

<sup>282</sup> *Ibid* [36]–[41].

<sup>283</sup> *Ibid* [36].

2(n) "employer" means an employer within the scope of Part I and includes

...

- (ix) any person operating a boat, vessel, ship, dredge, tug, scow or other craft usually employed or intended to be employed in an industry to which Part I applies and, with respect to the industry of fishing, the owner or operator of a boat or vessel rented, chartered or otherwise provided to a worker employed in the fishing industry and used in or in connection with an industry carried on by the employer to which Part I applies,

A further argument on behalf of Mime'j was raised, contending that a common law analysis of the situation shows that no master and servant relationship existed between Mime'j and the captains and deckhands; and because the crew could thus not be seen as "employees," it follows that Mime'j could not be viewed as an "employer."<sup>284</sup> The captain and crew operated independently from Mime'j and the catch did not constitute an asset nor did it belong to Mime'j.<sup>285</sup>

The Court concluded that the presumption against tautology remains applicable,<sup>286</sup> it "is a presumption that can in appropriate circumstances be rebutted"<sup>287</sup> depending upon the circumstances of each case and the "words *employed in the fishing industry* cannot be seen, as Mime'j suggests, to have the concept of worker restricted to someone employed in the common law master-servant sense."<sup>288</sup> The Court held that as the definition of a "worker" is broad and comprehensive and reaches beyond the fishing industry, the Legislator found it necessary to "clarify their target" by identifying the employers "i.e. owners who provide vessels to workers engaged or involved in the fishing industry."<sup>289</sup> The verb "employed" ought to be interpreted as synonymous with "engaged or involved" as the words have in Canadian jurisprudence been used interchangeably.<sup>290</sup> The Court concluded that the:<sup>291</sup>

clear legislative intent, the text, and the entire context, the phrase [*worker*] *employed in the fishing industry* cannot reasonably be seen to exclude Mime'j as an *employer*. The result is inescapable. Mime'j is an employer under the Act.

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<sup>284</sup> *Ibid* [39].

<sup>285</sup> *Ibid* [39].

<sup>286</sup> *Ibid* [41].

<sup>287</sup> *Ibid* [42].

<sup>288</sup> *Ibid* [43].

<sup>289</sup> *Ibid* [43].

<sup>290</sup> *Ibid* [44].

<sup>291</sup> *Ibid* [47].

### 3.9. Domestic workers

Contrary to COIDA, most Canadian compensatory laws define the terms “worker” and “employer” to include persons working as domestic workers in private households.<sup>292</sup> Manitoba defines an “employer” to include:<sup>293</sup>

- (a) a person
  - (i) who has in service under a contract for hiring or apprenticeship, written or oral, expressed or implied, a person engaged in work in or about an industry, or
  - (ii) who employs a person for more than 24 hours a week
    - (A) in domestic service,
    - (B) as a sitter or companion to attend primarily to the needs of a child who is a member of the household, or
    - (C) as a companion to attend primarily to the needs of an aged, infirm or ill member of the household;

and “worker” includes:<sup>294</sup>

- (j) a person who is employed for more than 24 hours a week by the same employer
  - (i) in domestic service,
  - (ii) as a sitter or companion to attend primarily to the needs of a child who is a member of the household, or
  - (iii) as a companion to attend primarily to the needs of an aged, infirm or ill member of the household,...

The definition of an “employer” in Ontario requires the existence of a contract of service by a person engaged in an “industry” to which the Act applies with the definition of an “industry” inclusive of a household if a domestic worker is employed

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<sup>292</sup> Alberta: Employers of domestic workers may voluntarily register to include their employees as per <https://my.wcb.ab.ca/rm/wcb.ratemannual.webserver/ExemptIndustries.aspx> (retrieved on 30/03/2013). British Columbia: an employer hiring a domestic worker for more than 8 hours per week as per [http://www.worksafebc.com/insurance/need\\_coverage/emp\\_05.asp](http://www.worksafebc.com/insurance/need_coverage/emp_05.asp) (retrieved on 20/10/2012). New Brunswick excludes domestic workers in s 2(3). Manitoba s 1(1)(a) & (j) includes domestic workers. Nova Scotia: Workers' Compensation General Regulations 9(1) excludes domestic workers from the ambit of the Act. Ontario includes domestic workers in s 2(1). Quebec s 2 excludes domestic workers unless a successful application for inclusion has been lodged. Saskatchewan also has optional coverage in terms of ss 2 & 3 and Yukon includes domestic workers in the definition of an “employer” s 3(1)(c). Newfoundland and Labrador: WHSCC provides for optional coverage upon application as per [http://www.whsc.nf.ca/employers/Emp\\_RegisteringYourBusiness.whsc](http://www.whsc.nf.ca/employers/Emp_RegisteringYourBusiness.whsc) (retrieved on 20/10/2012).

<sup>293</sup> Manitoba s 1(1)(a) & (j).

<sup>294</sup> Manitoba s 1(1)(j).

by that household.<sup>295</sup> According to the Ontario Operational Policy Manual, the term domestic worker may refer to “babysitters, nannies, and nursemaids, bodyguards, butlers, chauffeurs, cleaning persons, companions, cooks, gardeners, handy persons, housekeepers” and “maids”. It may even include a family member if he/she is employed in “their own home for more than 24 hours per week...” depending on whether the family member receives a stated wage, the normal statutory deductions are made and employment records are duly kept by the employer. Where the employee works for more than one employer and the combined working hours exceed 24 hours per week, the domestic worker will be deemed a “worker” for the purposes of the Act.<sup>296</sup>

In New Brunswick the contrary position is true with domestic workers expressly excluded from the ambit of the Act.<sup>297</sup>

### **3.10. Third party employers**

The text of the New Brunswick Act with regard to the lending out or hiring out of an employee to a third party, is unambiguous and clear (contrary to COIDA)<sup>298</sup> by stating in section 2.1:

If an employer temporarily lends or hires out the services of a worker to another employer, the first employer shall be deemed to be the employer of the worker while he or she is working for the other employer.

The same cannot be said about the text of the Act of Alberta which was considered by the Court of Queen’s Bench in *Homes by Avi Ltd. v Alberta (Workers’ Compensation Board, Appeals Commission)*.<sup>299</sup>

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<sup>295</sup> Ontario s 2(1).

<sup>296</sup> Ontario (Provincial Government). Workplace Safety and Insurance Board. 2003. *Operational Policy Manual: Coverage: Policy No. 12-04-14: Domestic Workers*. Retrieved on 14/05/2011 from <http://www.wsib.on.ca/en/community/WSIB/230/OPMDetail/24347?vnextoid=d3f3fcea9bfc7210VgnVCM100000449c710aRCRD>.

<sup>297</sup> New Brunswick s 2(3) dealing with the application of the Act which reads ... “this Part does not apply to the following: ...(d) persons employed as domestic servants.”

<sup>298</sup> Chapter 5 para 2.8 supra.

<sup>299</sup> *Homes by Avi Ltd. v Alberta (Workers’ Compensation Board, Appeals Commission)*, 2007 ABQB 203 (CanLII). Retrieved on 11/08/2012 from <http://canlii.ca/t/1r044>.

### 3.10.1. *Homes by Avi Ltd. v Alberta (Workers' Compensation Board, Appeals Commission)*

The Court of Queen's Bench of Alberta gave a combined ruling regarding the appeal on three different cases,<sup>300</sup> [*Quattro Oilfield Construction Ltd. and Lucky Lee Stotz v Appeals Commission and the Workers' Compensation Board and Sharon Lee Pederson, Personal Representative of the Estate of Kenneth Paul Pederson, Deceased*;<sup>301</sup> *Homes by Avi Ltd. v Appeals Commission and the Workers' Compensation Board and James Donald Miller*;<sup>302</sup> and *Michael Joseph Labby and Maiko's Trucking (1990) Ltd. v Appeals Commission and Calvin Philip Speakman*<sup>303</sup>]. The cases were combined into one by reason of the similarity regarding the question of law and the case is reported as: *Homes by Avi Ltd. v Alberta (Workers' Compensation Board, Appeals Commission)* in respect of inclusion as employees into the ambit of the Workers' Compensation Act, RSA 2000, c W-15.<sup>304</sup>

All the persons who formed the subject of the applications were involved in unrelated occupational accidents while executing duties for companies of which they were also appointed as directors. In each instance the Board determined and the Appeals Commission confirmed the decisions that the provisions of the Compensatory law is not applicable in each individual's case because they were directors who did not apply for the optional coverage. The cases were heard together with the consent of the parties but had only the subject matter in common.<sup>305</sup>

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<sup>300</sup> *Quattro Oilfield Construction Ltd., and Lucky Lee Stotz v Appeals Commission and the Workers' Compensation Board and Sharon Lee Pederson, Personal Representative of the Estate of Kenneth Paul Pederson, Deceased; Homes by Avi Ltd. v Appeals Commission and the Workers' Compensation Board and James Donald Miller; and Michael Joseph Labby and Maiko's Trucking (1990) Ltd. v Appeals Commission and Calvin Philip Speakman* reported as *Homes by Avi Ltd. v Alberta (Workers' Compensation Board, Appeals Commission)*, 2007 ABQB 203 (CanLII).

<sup>301</sup> Hereinafter: *Quattro*.

<sup>302</sup> Hereinafter: *Homes by Avi Ltd.*

<sup>303</sup> Hereinafter: *Labby*.

<sup>304</sup> *Homes by Avi Ltd.* [1].

<sup>305</sup> *Ibid* [2].

In addition to the definition, the Act provided for three alternative ways to acquire the status of a worker in sections 15(1) and 16(1); with section 15(1)<sup>306</sup> upon application to the Board and section 16(1)<sup>307</sup> “in situations where a contract of service is not clearly established on the evidence.”<sup>308</sup> The Act provides for a fourth way whereby worker status can be gained in section 16(2)<sup>309</sup> determining that the Board may order a worker to be deemed a worker in terms of the Act.<sup>310</sup>

The reasons for judgment appears from the *Labby* appeal, which involved M. Labby, a director of Maiko’s Trucking (1990) Ltd., driving a tractor and trailer which was struck by a vehicle operated by Speakman. Labby failed to apply for inclusion as a worker in terms of the Act<sup>311</sup> and Speakman instituted tort action against Labby and Maiko’s Trucking (1990) Ltd.<sup>312</sup> The Commissioner ruled that even if a person works under a contract of service, section 15(1) excludes a director if he did not apply to be included into the ambit of the Act; while section 16(1)(c) exempts directors from being deemed to be workers irrespective of the task they perform, be it manual labour or not.<sup>313</sup>

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<sup>306</sup> **“Application to have Act apply**

15(1) Subject to section 16, an employer, a partner in a partnership, a proprietor and a director of a corporation are not workers for the purposes of this Act unless they apply to the Board in accordance with the regulations to have the Act apply to them as workers and the Board approves the application.”

<sup>307</sup> **“Persons deemed workers**

16(1) Where an individual performs any work for any other person in an industry to which this Act applies, that individual is deemed to be a worker of the other person, except when the individual

- (a) is performing the work as the worker of another employer,
- (b) is an employer and is performing the work as part of the business of the employer, whether by way of manual labour or otherwise,
- (c) is a director of a corporation and is performing the work as part of the business of the corporation, whether by way of manual labour or otherwise,
- (d) is a partner in a partnership who is a worker under section 15(1) and is performing the work as part of the business of the partnership, whether by way of manual labour or otherwise, in the industry for which coverage has been approved, or
- (e) is a proprietor who is a worker under section 15(1) and is performing the work as part of the business of the proprietorship, whether by way of manual labour or otherwise, in the industry for which coverage has been approved.”

<sup>308</sup> *Homes by Avi Ltd.* [11].

<sup>309</sup> “(2) Notwithstanding anything in this Act, the Board may, in its discretion or on the application of any interested party, by order deem any person or class of persons who have performed or are performing work for or for the benefit of another person to be workers of that other person for the purposes of this Act for the period or periods of time that the work was or is performed.”

<sup>310</sup> *Homes by Avi Ltd.* [11].

<sup>311</sup> *Ibid* [30].

<sup>312</sup> *Ibid* [32].

<sup>313</sup> *Ibid* [38].

The Court of Queen's Bench identified the questions to be answered as:<sup>314</sup>

whether a director of a corporation who has no personal coverage can fall within the definition of worker under s.1(1)(z) when performing work as part of the business of the corporation of which he or she is a director; and, if so, (2) whether the individual who is the subject of the appeal was a worker under the s. 1(1)(z) definition, which requires a determination of whether he was working under a contract of service.

The Court then proceeded to answer the questions in the light of the purpose of the Act.<sup>315</sup> Under the heading of "General principles of interpretation of the WCA" the Court in applying *Pasiechnyk* said that when interpreting the Act, the historic trade-off must be taken into consideration as employees retained no action against their employers in exchange for an efficient claims adjudication system, handled by an independent organ with compensation paid irrespective of the financial ability to pay by the employer and very importantly, without regard to fault.<sup>316</sup> A broad and liberal interpretation favouring the claimant should be preferred.<sup>317</sup>

The Applicants argued that the enquiry to determine whether a worker satisfies the test is concluded once the definition in section 1(1)(z) is satisfied and no need arises to include section 15 and 16 in the enquiry once the requirements of section 1(1)(z) are satisfied.<sup>318</sup> The Court rejected the argument and held that on a proper interpretation, the Act ought to be read as a whole and sections within their context.<sup>319</sup> The Court held that the section 1 definition should not be read in isolation and the scope of the term "worker" is limited by the working of section 14(1).<sup>320</sup> Section 14(1) determines that the Act applies to "all employers and workers in all industries in Alberta except the employers and workers in the industries designated by the regulations as being exempt."<sup>321</sup> Similar to the limitation placed by section 14(1) on the section 1(1)(z) definition, sections 15(1)

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<sup>314</sup> *Ibid* [47].

<sup>315</sup> *Ibid* [70]–[76].

<sup>316</sup> *Ibid* [91].

<sup>317</sup> *Ibid* [92]–[95].

<sup>318</sup> *Ibid* [96].

<sup>319</sup> *Ibid* [97].

<sup>320</sup> *Ibid* [98].

<sup>321</sup> *Ibid* [98].



and 16 limit the working of the definition [section 1(1)(z)] to directors who applied to the Board to be included within the ambit of the Act.<sup>322</sup>

The Court confirmed the previous findings that there is no ambiguity pertaining to the word “includes” between sections 1(1)(z) and 15(1); that the Act does not distinguish on the basis of the duties performed by directors taking into account the “benefits-conferring” nature of the legislation.<sup>323</sup>

The Applicant’s argument that ignoring the type of work done by a director at the relevant time, removes a benefit and denies protection while they are equally exposed to the hazards of the applicable industry as other workers, was declined by the Court of Queen’s Bench.<sup>324</sup> Contextual interpretation of sections 1(1)(z), 15(1) and 16(1)(c) means section 15(1) limits section 1(1)(z) and section 16(1)(c) excludes a director from being deemed a worker of the company of which he is a director, save for a successful application in terms of section 15(1).<sup>325</sup>

The exclusion of company directors is *contra* the South African law which views directors and chief executive officers as well as owners of corporations to be the employer **and** employee of a company if they work under a contract of service for that company.

### 3.11. Atypical employment arrangements

Canada did not escape the international trend of growing atypical employment, generally referred to as “precarious employment” which is described by Vosko<sup>326</sup> as:

In Canada, precarious employment normally involves those forms of work involving atypical employment contracts, limited social benefits and statutory entitlements, job insecurity, low job tenure, low wages and high risks of ill health. Precarious employment is shaped by tendencies in late capitalism whereby employers use subcontracting and other strategies to minimise labour costs and thereby lower the bottom of the labour market.

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<sup>322</sup> *Ibid* [99].

<sup>323</sup> *Ibid* [100]–[104].

<sup>324</sup> *Ibid* [120].

<sup>325</sup> *Ibid* [123].

<sup>326</sup> Vosko, LF. 2003. Precarious employment in Canada: Taking stock, taking action. *Just Labour* 3: 1–5. Retrieved on 07/09/2012 from [http://www.justlabour.yorku.ca/volume3/vosko\\_justlabour.PDF](http://www.justlabour.yorku.ca/volume3/vosko_justlabour.PDF).

The tendency is not limited to people at career entrance level (young people) or people at the end of their working life times, but increasingly mid-career workers are finding themselves in atypical employment relationships, usually engaged in sectors that are less unionised and less protected.<sup>327</sup>

The scope of atypical work is clear from the Economic Council of Canada's study entitled "Good Jobs, Bad Jobs" in 1990 which found that 50% of newly created jobs between 1980 and 1988 was not in the form of standard employment.<sup>328</sup>

It is argued by Quinlan and Mayhew that the trend by companies of contracting out leaves workers without the intended safety net of a right to compensation and the company liable while shifting costs to public health care and society.<sup>329</sup> Sub-contracting and leasing or agency workers (also known as labour hire workers), creates ambiguity with the result that difficulties arise to determine who the principal employer is.<sup>330</sup> Additional complications arise when illegal immigrants are the workers.<sup>331</sup> The authors share the opinion expressed *supra* that workers in atypical employment usually are engaged in sectors that are less unionised and for this reason are even more exposed to exploitation.<sup>332</sup> The right to workers' compensation means nothing if it is not exercised and some American studies indicated that the right is neither exercised in cases of fatalities nor serious injuries, with the possible number of unreported fatalities as high as between 30% and 60%.<sup>333</sup> A South African study in the Salt River mortuary showed that about 20% of fatal work-related accidents are not reported and the right to compensation is not exercised.<sup>334</sup> Reasons for the silence include fear of victimisation or reprisal in some

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<sup>327</sup> Clarke, M, Lewchuk, W, de Wolff, A, & King, A. 2007. 'This just isn't sustainable': Precarious employment, stress and workers' health. *International Journal of Law and Psychiatry* 30: 311-326. Retrieved on 26/05/2012 from [www.sciencedirect.com](http://www.sciencedirect.com).

<sup>328</sup> Cranford, C, Vosko, LF, & Zukewich, N. 2003. Precarious employment in the Canadian labour market: A statistical portrait. *Just Labour*: 3: 6-22. Retrieved on 07/09/2012 from <http://amillionreasons.ca/Statisticalportrait.pdf>.

<sup>329</sup> Quinlan, M, Mayhew, C. 1999. Precarious employment and workers' compensation. *International Journal of Law and Psychiatry*: 22: (5-6): 491-520. Retrieved on 26/05/2012 from [http://0-www.sciencedirect.com.oasis.unisa.ac.za/science?\\_ob=ArticleListURL&\\_method=list&\\_ArticleListID=2010854194&\\_sort=r&\\_st=13&view=c&\\_acct=C000030438&\\_version=1&\\_urlVersion=0&\\_userid=593394&md5=7d1a18905986af18b69cbddf72500a75&searchtype=a](http://0-www.sciencedirect.com.oasis.unisa.ac.za/science?_ob=ArticleListURL&_method=list&_ArticleListID=2010854194&_sort=r&_st=13&view=c&_acct=C000030438&_version=1&_urlVersion=0&_userid=593394&md5=7d1a18905986af18b69cbddf72500a75&searchtype=a).

<sup>330</sup> *Ibid.*

<sup>331</sup> *Ibid.*

<sup>332</sup> Quinlan: 505-506 & 515.

<sup>333</sup> *Ibid.*

<sup>334</sup> Rees: 176.

form.<sup>335</sup> In an effort to combat this trend, British Columbia amended its compensatory law to extend coverage to independent contractors and other groupings of contingency workers e.g. labour hire and domestic employment.<sup>336</sup>

Currently 97.6% of the workforce in British Columbia is included in the definition of an employee for the purposes of compensation.<sup>337</sup> In 1959, industrial workers previously excluded were included into the ambit of the Act<sup>338</sup> with voluntary employees included in 1968.<sup>339</sup>

This is contrary to the situation in Ontario where despite the pioneering work of Chief Justice Meredith, certain categories of employees are still excluded e.g. employees in the banking and financial sectors.<sup>340</sup> It is estimated that one third of employees in Ontario is excluded from the ambit of the Act.<sup>341</sup>

The Office of the Chief Actuary reported the following percentages of the workforce to be included within the definition in 2007: Alberta (89.7%); British Columbia (93.1%); Manitoba (69.5%); New Brunswick (93.9%); Newfoundland and Labrador (97.0%); Northwest Territories and Nunavut (100.0%); Nova Scotia (72.6%); Ontario (72.6%); Prince Edward Island (96.2%); Québec (93.4%); Saskatchewan (74.1%); Yukon (99.9%) and the average for Canada as 89.6%.<sup>342</sup> These percentages increased minimally according to statistics derived from the different jurisdictions' financial reports by 2009.<sup>343</sup>

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<sup>335</sup> Quinlan: 494–495.

<sup>336</sup> *Ibid.*

<sup>337</sup> *Royal Commission briefing papers* 21.

<sup>338</sup> British Columbia (Province). 1999. *Royal Commission on Workers' Compensation in British Columbia: Final Report*. Victoria: British Columbia Queen's Printer. At 18. Retrieved on 24/05/2012 from [http://www.qp.gov.bc.ca/rcwc/Vol\\_I/v1-ch01a.pdf](http://www.qp.gov.bc.ca/rcwc/Vol_I/v1-ch01a.pdf).

<sup>339</sup> *Ibid* 20.

<sup>340</sup> In South Africa, the economic sector does not form part of the criteria in the definitions.

<sup>341</sup> McKinnon, J. 2010. *Workers' Compensation finances – Crisis or smokescreen?* Ontario Network of Injured Workers' Groups (ONIWG). Retrieved on 10/08/2012 from [http://www.injuredworkersonline.org/Documents/WSIB\\_Funding\\_Backgrounder\\_Nov2010.pdf](http://www.injuredworkersonline.org/Documents/WSIB_Funding_Backgrounder_Nov2010.pdf).

<sup>342</sup> Canada (Federal Government). Office of the Chief Actuary. 2010. *Brief summary of Canadian Workers' Compensation System*. 2. Ottawa: Ontario. Retrieved on 28/09/2012 from [http://www.actuaries.org/CTTEES\\_SOCSEC/Documents/Canada\\_Workers\\_Comp.pdf](http://www.actuaries.org/CTTEES_SOCSEC/Documents/Canada_Workers_Comp.pdf).

<sup>343</sup> Institute for Work & Health. 2009. *Fact sheets: 2009*. Retrieved on 28/09/2012 from <http://www.iwh.on.ca/compensation-fact-sheets>.

### 3.12. Summary

The Canadian workers' compensatory laws do not extend protection against tort claims to directors, chief executive officers or owners of companies unless they applied successfully for inclusion to the applicable Compensation Authority with jurisdiction.<sup>344</sup>

Similarly to the South African definition in COIDA, the following workers do not satisfy the definition of an employee:<sup>345</sup>

- members of the Canadian Forces and the Royal Canadian Mounted Police;
- workers in informal employment;
- workers in atypical employment;

Contrary to the South African exclusions, the following categories are included within the definition of an employee:

- voluntary workers upon application;<sup>346</sup>
- independent contractors upon application;<sup>347</sup>
- students when registered with a recognised learning institution;<sup>348</sup>
- financially dependent children at the death of his employed parent;<sup>349</sup>
- domestic workers in private households;<sup>350</sup>
- migrant workers;<sup>351</sup>
- child labourers;<sup>352</sup>
- directors dependent upon application.<sup>353</sup>

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<sup>344</sup> Chapter 5 paras 3.1 & 3.10.1 *supra*.

<sup>345</sup> Chapter 5 para 3.1 *supra*.

<sup>346</sup> Chapter 5 para 3.1 *supra*.

<sup>347</sup> Chapter 5 paras 3.1; 3.2; 3.3; 3.3.1; 3.5.1 & 3.11 *supra*.

<sup>348</sup> Chapter 5 paras 3.1 & 3.3.2 *supra*.

<sup>349</sup> Chapter 5 para 3.1 & Chapter 5 fn 203 *supra*.

<sup>350</sup> Chapter 5 paras 3.1 & 3.9 *supra*.

<sup>351</sup> Chapter 5 paras 3.1 & 3.7 *supra*.

<sup>352</sup> Chapter 5 paras 3.4.1 & 3.9 *supra*.

<sup>353</sup> Chapter 5 paras 3.1; 3.8 & 3.10.1 *supra*.

The historic trade-off principle is central to the definitions of employer and employee but similar to South Africa:

- the employee's right of compensation is not dependent upon the registration and payment of levies by the employer;<sup>354</sup>
- third party employers will not be protected against common law claims for damages when utilising the services of particularly directors who did not follow the prescribed procedure to apply for inclusion within the ambit of the Act.<sup>355</sup>

The basis of the definition remains the common law contract of service which may be tested according to the applicable *indicia* as included in the *Joey's Delivery Services* ruling; and with the point of departure, the four-folded test laid down in *Montreal v Montreal Locomotive Works Ltd. et al.*, which requires a weighing of all relevant factors similarly to South Africa.<sup>356</sup>

#### 4. AUSTRALIA

Like South Africa<sup>357</sup> and Canada,<sup>358</sup> the basis of the Australian definition of an employee is the common law definition of a worker.<sup>359</sup> The Heads of Workers' Compensation Authorities included in their Final Report to the Labour Ministers' Council, recommendations pertaining to the definition of a "worker" and identified the common law definition of an employee as the basis of the definition in Australia.<sup>360</sup> Although the definition is based in common law, every jurisdiction extends or limits the definition to suit its own needs.<sup>361</sup>

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<sup>354</sup> Chapter 5 paras 3.6 & 3.6.1 *supra*.

<sup>355</sup> Chapter 5 paras 3.10; 3.10.1 *supra*.

<sup>356</sup> Chapter 5 para 3.3.1 *supra*.

<sup>357</sup> Chapter 5 para 2.3 *supra*.

<sup>358</sup> Chapter 5 para 3.3 *supra*.

<sup>359</sup> Productivity Commission Report (2004): XLII & 155–162.

<sup>360</sup> *Ibid* 154.

<sup>361</sup> *Ibid*.

#### 4.1. Statutory definition of an “employee”

All government employees in Australia are covered by the Safety, Rehabilitation and Compensation Act 75 of 1988 which includes Federal Police and Defence Force employees<sup>362</sup> as well as employees of “a licensed corporation.”<sup>363</sup>

The workers’ compensatory laws of the different jurisdictions in Australia define a worker similarly to the Act of Tasmania<sup>364</sup> which states:

**3(1) “worker” means –**

- (a) any person who has entered into, or works under, a contract of service or training agreement with an employer, whether by way of manual labour, clerical work or otherwise, and whether the contract is express or implied, or is oral or in writing; and...

In Australia as in South Africa and Canada, interpretation of the meaning of “worker” for the purposes of compensatory laws gave rise to a number of court cases as in *Protective Security Pty Ltd v Bedelph*<sup>365</sup> heard in the Supreme Court of Tasmania. The Appellant (employer) contended that the worker who died, was an independent contractor and not a “worker” as defined in the Act. The Supreme Court examined *inter alia* the nature of the employer’s business, the workers’ work history, the written agreement between the employer and the deceased. It noted the fact that the employer described the deceased on occasion as “an employee” and by applying the “control test” as well as other relevant *indicia* e.g. the written agreement, and found the deceased to be a “worker” for the purposes of the Act.<sup>366</sup>

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<sup>362</sup> S 2.

<sup>363</sup> S 5(1A)(b).

<sup>364</sup> Workers Rehabilitation and Compensation Act 4 of 1988.

<sup>365</sup> *Protective Security Pty Ltd v Bedelph* [2004] TASSC 128. Hereinafter: *Bedelph*. Retrieved on 16/03/2011 from <http://www.austlii.edu.au/au/cases/tas/TASSC/2004/128.html>.

<sup>366</sup> Similar facts were previously considered in *Brock Plaster Pty Ltd v Jenkins* [2003] TASSC 96 by the Supreme Court of Tasmania and the Court weighed the factors in favour of a finding of a contract of service (employer-employee relationship) against the factors indicating a finding of a contract for service. Hereinafter: *Brock Plaster Pty Ltd*. Retrieved on 16/09/2010 from <http://www.austlii.edu.au/au/cases/tas/TASSC/2003/96.html>. The control test was also applied as one of a number of criteria used by the Court in determining if a person is a “worker” in terms of the Act in *Cox Logging v Rigby* [2003] TASSC 26. At 14. Retrieved on 18/09/2010 from <http://www.austlii.edu.au/au/cases/tas/TASSC/2003/26.html>.

Similar to Canada,<sup>367</sup> the different Australian jurisdictions provide for persons considered to be workers who would not otherwise have been so considered, inclusive of timber contractors,<sup>368</sup> family day care workers,<sup>369</sup> workers for religious organisations,<sup>370</sup> commercial voluntary workers,<sup>371</sup> public interest voluntary workers and voluntary ambulance workers,<sup>372</sup> voluntary emergency workers,<sup>373</sup> voluntary fire fighters,<sup>374</sup> community service order under the Youth Justice Act or a penal code,<sup>375</sup> house workers earning above a certain amount,<sup>376</sup> students<sup>377</sup> and jockeys.<sup>378</sup>

South Australia defined the term “self-employed worker” to mean “a person to whom the Corporation has extended the protection of this Act pursuant to section 103”.<sup>379</sup> In South Africa a self-employed person will not be considered to be an employee for the purposes of COIDA because he is considered to be an independent “contractor”<sup>380</sup> although the director of a company is included in the definition of an employee if he works under a contract of service for the company.<sup>381</sup>

Similar to the RSA<sup>382</sup> and Canada,<sup>383</sup> the definition of a “worker” for the purposes of compensatory laws is inclusive of dependents of a deceased worker<sup>384</sup> and may also include the “legal personal representative of a deceased worker”<sup>385</sup> in some of the jurisdictions. Western Australia determines in this regard:<sup>386</sup>

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<sup>367</sup> Chapter 5 paras 3.1 & 3.2 *supra*.

<sup>368</sup> Australian Capital Territory s 16.

<sup>369</sup> Australian Capital Territory s 16A.

<sup>370</sup> Australian Capital Territory s 17; Queensland s 18 & Western Australia ss 8, 9 & 10.

<sup>371</sup> Australian Capital Territory s 18.

<sup>372</sup> Australian Capital Territory s 19; Queensland s 18, 19; South Australia s 103A & Tasmania s 6.

<sup>373</sup> Northern Territory s 3(7) & Queensland s 17.

<sup>374</sup> Northern Territory s 3(8)(8A); Queensland s 15 & Tasmania s 5.

<sup>375</sup> Northern Territory s 3(4) & Queensland s 21.

<sup>376</sup> Northern Territory s 3(5).

<sup>377</sup> Queensland s 22.

<sup>378</sup> Tasmania s 4DC & Western Australia s 11A.

<sup>379</sup> South Australia s 3(1).

<sup>380</sup> COIDA s 1(xix)(d)(iv).

<sup>381</sup> COIDA s 1(xix)(b).

<sup>382</sup> Chapter 5 para 2.1 *supra*.

<sup>383</sup> Chapter 5 para 3.1 *supra*.

<sup>384</sup> Commonwealth s 4(1); New South Wales s 3(1A) & Western Australia s 5(1).

<sup>385</sup> New South Wales s 3(1A); South Australia s 3(1); Victoria s 5(1C)(4) & Western Australia s 5(1).

<sup>386</sup> Western Australia s 5(1).

dependants means such members of the worker's family as were wholly or in part dependent upon the earnings of the worker at the time of his death, or would, but for the injury, have been so dependent;

To give clarity to the definitions of a worker and employer, Queensland added Schedules to the Queensland Act. Schedule 2 is entitled "Who is a worker in particular circumstances" which Schedule is divided into two parts with Part 1 dealing with inclusions into the definition and Part 2 dealing with exclusions from the definition and Schedule 3 dealing with "Who is an employer in particular circumstances".<sup>387</sup> The provisions of the Schedules codified the common law contract of service.<sup>388</sup> COIDA does not have similar schedules but has the use of the Code of Practice<sup>389</sup> and the Canadian jurisdictions make use of published policies<sup>390</sup> to clarify the concepts of "employee" and "employer."

In *Brock Plaster Pty Ltd v Jenkins*,<sup>391</sup> the Supreme Court of Tasmania ruled that a liberal interpretation on the status of a person is to be applied when interpreting protective legislation.<sup>392</sup> This indicates a purposive interpretation ought to be given

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<sup>387</sup> Queensland Schedules 2 & 3.

<sup>388</sup> Queensland Schedule 2 **"Part 2 Persons who are not workers"**

- 1 A person is not a worker if the person performs work under a contract of service with—
  - (a) a corporation of which the person is a director; or
  - (b) a trust of which the person is a trustee; or
  - (c) a partnership of which the person is a member; or
  - (d) the Commonwealth or a Commonwealth authority.
- 2 A person who performs work under a contract of service as a professional sportsperson is not a worker while the person is—
  - (a) participating in a sporting or athletic activity as a contestant; or
  - (b) training or preparing for participation in a sporting or athletic activity as a contestant; or
  - (c) performing promotional activities offered to the person because of the person's standing as a sportsperson; or
  - (d) engaging on any daily or other periodic journey in connection with the participation, training, preparation or performance.
- 3 A member of the crew of a fishing ship is not a worker if—
  - (a) the member's entitlement to remuneration is contingent upon the working of the ship producing gross earnings or profits; and
  - (b) the remuneration is wholly or mainly a share of the gross earnings or profits.
- 4 A person who, in performing work under a contract, other than a contract of service, supplies and uses a motor vehicle for driving tuition is not a worker.
- 5 A person participating in an approved program or work for unemployment payment under the *Social Security Act 1991* (Cwlth), section 601 or 606 is not a worker."

<sup>389</sup> Chapter 5 paras 2.4 & 2.5 *supra*.

<sup>390</sup> Chapter 5 paras 3.1; 3.3.2; 3.6.1; 3.7 & 3.9 *supra*.

<sup>391</sup> [2003] TASSC 96.

<sup>392</sup> *Brock Plaster Pty Ltd* 17.



when the definition is interpreted,<sup>393</sup> similar to the South African case of *Davis*<sup>394</sup> and the Canadian case of *University of Lethbridge*.<sup>395</sup>

#### 4.2. Statutory definition of an “employer”

The Supreme Court of Queensland explained the two definitions in *Appo v Stanley & Anor* [2010]<sup>396</sup> as:

[81] Those definitions show that to be an “employer” within the meaning of the WCRA one must employ a “worker” as defined and, to be a “worker” as defined, one must either work under a contract of service or be included, and not excluded, by the extended definition.

A number of Australian jurisdictions included into the term “employer” a person by whom a worker is employed under a contract of service,<sup>397</sup> a deemed employer<sup>398</sup> and the “legal personal representative of a deceased employer”<sup>399</sup> as in the definition of the Victorian Act in section 5(1):

**employer** includes—

- (a) the legal personal representative of a deceased employer;
- (b) the Crown in right of the State;
- (c) any person deemed to be an employer by this Act;
- (d) any public, local or municipal body or authority; and
- (e) where the services of a worker are temporarily lent or let on hire to another person by the person with whom the worker has entered into a contract of service or apprenticeship or otherwise, that last-mentioned person while the worker is working for that other person;

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<sup>393</sup> A liberal interpretation has also been confirmed by the South African (Chapter 5 para 2.6.2 *supra*) and Canadian (Chapter 5 para 3.10.1 *supra*) Courts.

<sup>394</sup> *Davis* discussed *supra* at Chapter 5 para 2.6.2.

<sup>395</sup> *University of Lethbridge* discussed *supra* at Chapter 5 para 3.3.2.

<sup>396</sup> *Appo v Stanley & Anor* [2010] QSC 383. At [81]. Retrieved on 02/02/2013 from <http://www.austlii.edu.au/au/cases/qld/QSC/2010/383.html>.

<sup>397</sup> Queensland s 30(1)(a); South Australia s 3(1)(a); Tasmania s 3(1) & Western Australia s 5(1).

<sup>398</sup> Australian Capital Territory s 5(c); Queensland s 30(2) read together with Schedule 3; South Australia s 3(1)(b)(c); Tasmania s 3(1)(b); Victoria s 5(1)(c) & Western Australia s 5(1).

<sup>399</sup> Australian Capital Territory s 5(b); Queensland s 30(4)(b); South Australia s 3(1)(c); Tasmania s 3(1)(c); Victoria s 5(1)(a) & Western Australia s 5(1).

### 4.3. Requirements regarding contract of service

The common law contract of service forms the basis of the employment relationship in Australia similar to the RSA<sup>400</sup> and Canada.<sup>401</sup> In Australia, as in the other two countries, determining the legal nature of the employment relationship created similar difficulties. Efforts have been made to provide clarity by enacting the requirements pertaining to a contract of service by some of the jurisdictions.<sup>402</sup>

Different tests<sup>403</sup> were applied over time with the control test as one of the first to be applied by the Courts. Early case law emphasised the assertion of control as conclusive to determine the legal nature of the relationship between the worker and presumed employer.<sup>404</sup> This was later expanded by recognising the **right** to control rather than effective control exercised by an employer over a worker.<sup>405</sup>

The organisation test is less applied with no consensus on its place in workers compensation law but it refers to a question of whether the activities of the worker form an integral part of the activities of the presumed employer.<sup>406</sup>

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<sup>400</sup> Chapter 5 paras 2.1; 2.2 & 2.3 *supra*.

<sup>401</sup> Chapter 5 paras 3.1; 3.2 & 3.3 *supra*.

<sup>402</sup> Australian Capital Territory: Notes to Chapter 3 of the Workers Compensation Act (although s 3 determines the legal status of Notes to be explanatory and does not form part of the Act). Queensland Schedules 2 & 3. South Australia s 3(1).

New South Wales (State Government). WorkCover Authority NSW. [Sa]. Policies: *Who to insure*. Retrieved on 20/08/2012 from <http://www.workcover.nsw.gov.au/insurancepremiums/Policies/Whotoinsure/Pages/default.aspx>.

Northern Territory (State Government). Work Health Authority. 2011. *Workers compensation best practice guidelines*. Retrieved on 23/08/2012 from [http://www.worksafe.nt.gov.au/Publications/Documents/best\\_practice\\_guidelines\\_approved\\_insurers.pdf](http://www.worksafe.nt.gov.au/Publications/Documents/best_practice_guidelines_approved_insurers.pdf).

Tasmania s 4E read together with *A guide to workers rehabilitation and compensation in Tasmania*. (See Chapter 4 para 3.2 *supra*).

Victoria (State Government). WorkCover Authority. *Worker rights & responsibilities*. Retrieved on 20/08/2012 from <http://www.worksafe.vic.gov.au/laws-and-regulations/worker-rights-and-responsibilities>.

Western Australia (State Government). WorkCover WA. 2012. *Workers' compensation & injury management: A guide for workers*. Retrieved on 18/01/2013 from [http://hr.curtin.edu.au/local/docs/WCIM\\_a\\_guide\\_for\\_workers\\_sept\\_LR.pdf](http://hr.curtin.edu.au/local/docs/WCIM_a_guide_for_workers_sept_LR.pdf).

<sup>403</sup> These tests included *inter alia* the results test, control test and organisational test.

<sup>404</sup> *Apostolidis v Victorian WorkCover Authority* [2012] VCC 1529. At 99. Hereinafter: *Apostolidis*. Retrieved on 04/02/2013 from <http://www.austlii.edu.au/au/cases/vic/VCC/2012/1529.html>.

<sup>405</sup> *Zuijs v Wirth Bros Pty Ltd* [1955] HCA 73. At 2. Hereinafter: *Zuijs*. Retrieved on 31/01/2013 from <http://www.austlii.edu.au/au/cases/cth/HCA/1955/73.html>.

<sup>406</sup> *Stevens v Brodribb Sawmilling Company Pty Ltd* [1986] HCA 1. At 15. Hereinafter: *Stevens*. Retrieved on 02/09/2012 from <http://www.austlii.edu.au/au/cases/cth/HCA/1986/1.html>.

The results test is a broadened control test in which control or the right to control is only one of an open-ended list of *indicia*, the application of which will be determined by the specific circumstance of the case.<sup>407</sup> The test is based upon concepts utilised by the Australian Taxation Office and excludes persons who satisfy all three of the following conditions from the definition of a worker:<sup>408</sup>

- a. the person is paid to achieve a specified result or outcome; and
- b. the person is expected to provide the tools, plant and equipment needed in performance of the work; and
- c. the person is liable to remedy defects in the work or for resulting damages.

#### 4.3.1. *Humberstone v Northern Timber Mills*

The driver of a truck, Humberstone, carried timber for one company for a period of close to fourteen years before he died in an accident at work.<sup>409</sup> His wife claimed compensation and contended that he was a worker within the definition of the Act and an employee of the timber company.<sup>410</sup>

The full Bench of the High Court of Australia in applying the “control test” found that he was an independent contractor.<sup>411</sup> This was in spite of Humberstone’s regular working and lunch hours ruled by the firm and he worked only on rare occasions for other persons.<sup>412</sup> Factors indicating that he was an independent contractor were, he owned his truck, paid for fuel, maintenance and insurance for the truck and obtained the necessary license to carry on the business.<sup>413</sup>

The Court applied the control test and found Humberstone to be an independent contractor:<sup>414</sup>

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<sup>407</sup> *Apostolidis* 99–100.

<sup>408</sup> Queensland Act, Schedule 2, Part 1, Items 2 & 3.

<sup>409</sup> *Humberstone v Northern Timber Mills* [1949] HCA 49; (1949) 79 CLR 389. Hereinafter: *Humberstone*. Retrieved on 02/09/2012 from <http://www.austlii.edu.au/au/cases/cth/HCA/1949/49.html>.

<sup>410</sup> *Ibid* 2.

<sup>411</sup> *Ibid* 4.

<sup>412</sup> *Ibid* 2.

<sup>413</sup> *Ibid* 3.

<sup>414</sup> *Ibid* 4.

If the work done by one person for another is done subject to the control and direction of the latter person as to the manner in which it is to be done the worker is a servant and not an independent contractor. If, however, the person doing the work agrees only to produce a given result but is not subject to control in the actual execution of the work he is an independent contractor.

#### 4.3.2. *Stevens v Brodribb Sawmilling Company Pty Ltd*

In the now classic ruling, *Stevens v Brodribb Sawmilling Company Pty Ltd*, the High Court of Australia guided in an appeal from a Full Bench of the Supreme Court of Victoria on the *indicia* to be used in determining whether the legal nature of an employment relationship is one of a contract *of* service or one of a contract *for* service.<sup>415</sup>

The ruling of the Compensation Court (sitting as Court of first instance) which determined that both the applicant as well as the co-worker whose negligent acts caused Stevens' injuries, were employees for the purposes of the compensation law, was set aside by the Supreme Court of Victoria.<sup>416</sup>

The High Court considered first of all, the degree of and the right to exercise control by the company over the co-worker.<sup>417</sup> The Court applied the words of Dixon J from the ruling in *Humberstone*:<sup>418</sup>

The question is not whether in practice the work was in fact done subject to a direction and control exercised by an actual supervision or whether an actual supervision was possible but whether ultimate authority over the man in the performance of his work resided in the employer so that he was subject to the latter's order and directions.

The Court did not rely on the degree of control exercised by the company over the workers but used it as but one of a number of *indicia* including the method of remuneration, provision and maintenance of equipment, obligation to work, working hours, provision for leave, deduction of income tax and the delegation of

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<sup>415</sup> *Stevens* 1.

<sup>416</sup> *Ibid* 1 & 7–8.

<sup>417</sup> *Ibid* 9.

<sup>418</sup> *Ibid* 9.

work by the deemed employee.<sup>419</sup> It is submitted that this approach corresponds with the South African application of the “dominant impression” test and the Canadian “business reality test”.<sup>420</sup>

Both workers provided their own equipment and maintained it at own costs, set their own working hours, received payment every fortnight based on the volume of timber they delivered, no income tax was deducted and Stevens’ was able to provide profits and loss accounts for the financial years of 1977 and 1978.<sup>421</sup> Work was not guaranteed and workers were free to engage in other work or contracts and to employ helpers. The sawmill company co-ordinated activities and was responsible for organising a steady flow of timber delivered to the mill but could not stipulate the manner in which workers had to perform tasks and it was left to the exercise of their skilfulness and judgment.<sup>422</sup> The High Court confirmed the Supreme Court’s finding that neither the co-worker nor the Applicant was employees of the company. No inference could be drawn by the Court that the company could lawfully exercise authority over either of the two workers.<sup>423</sup> The power to delegate by employing others to do the work was a factor of considerable importance to the Court in reaching its decision.<sup>424</sup>

The Court dismissed the “organization test” as the sole criterion in deciding whether a worker is an employee or independent contractor or whether the worker is “part and parcel” of the company.<sup>425</sup> It was submitted that the organisation test is relevant to the measure of control but the Court considered the other *indicia* as of more importance.<sup>426</sup>

The High Court, while recognising the difficulties with the control test, defended the common law test as one that is flexible and adaptable to changing social

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<sup>419</sup> *Ibid* 9–12.

<sup>420</sup> Chapter 5 paras 2.4 & 3.3. *supra*.

<sup>421</sup> *Stevens* 10–13.

<sup>422</sup> *Ibid* 11.

<sup>423</sup> *Ibid* 12.

<sup>424</sup> *Ibid* 13.

<sup>425</sup> *Ibid* 14–15.

<sup>426</sup> *Ibid* 15.

circumstances; referring to the changes made from actual control to the right to control.<sup>427</sup> The Court added:<sup>428</sup>

Furthermore, control is not now regarded as the only relevant factor. Rather it is the totality of the relationship between the parties which must be considered.

#### 4.3.3. *Hollis v Vabu Pty Ltd* [2001] HCA 44

The majority of the High Court of Australia overturned a decision by the Supreme Court of New South Wales and found the workers of Vabu (a courier company) to be employees of Vabu and not independent contractors in *Hollis v Vabu Pty Ltd*.<sup>429</sup> According to the honourable Court, terminology such as “employee” and “independent contractor” refer to a broad range of possible legal relationships embodied in the terminology which does “not necessarily display their legal content purely by virtue of their semantic meaning.”<sup>430</sup>

The Court dealt with the development of the relationship from medieval times where it had its basis in the feudal relationship of master and servant which was applied to hold a master vicariously liable for the negligent actions of his servant.<sup>431</sup> The control test in case law started with *Humberstone*,<sup>432</sup> continued in *Zuijs v Wirth Brothers Pty Ltd* [1955] HCA 73<sup>433</sup> and was further broadened in *Stevens*.<sup>434</sup> The control test originated from a predominantly agricultural society and had to be adjusted to the modern employment milieu which is characterised by vagueness between employees and other categories of workers engaged in professions and services which do not attract supervision.<sup>435</sup> The test has been broadened in *Stevens* with the right to exercise control; and in *Zuijs v Wirth Brothers Pty Ltd*, the Court

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<sup>427</sup> *Ibid* 19.

<sup>428</sup> *Ibid* 20.

<sup>429</sup> *Hollis v Vabu Pty Ltd* [2001] HCA 44. Hereinafter: *Hollis*. Retrieved on 05/02/2013 from <http://www.austlii.edu.au/au/cases/cth/HCA/2001/44.html>.

<sup>430</sup> *Ibid* 36.

<sup>431</sup> *Hollis* 33.

<sup>432</sup> *Humberstone*. See Chapter 5 para 4.3.1 *supra*.

<sup>433</sup> *Zuijs*. See Chapter 5 para 4.3.1 & Chapter 5 fn 405 *supra*.

<sup>434</sup> *Stevens*. See Chapter 5 para 4.3.2 *supra*.

<sup>435</sup> *Hollis* 43.

broadened the test further by adding “so far as there is scope for it’, even if it be only in incidental or collateral matters”.<sup>436</sup> The totality of the employment relationship needs to be scrutinised of which control in all its shades, represents but one of the *indicia*.<sup>437</sup>

The New South Wales Compensation Court applied the *Hollis* ruling in the case of *Cartner v Barclay*<sup>438</sup> and took “a broad overview of both the nature and operation of the putative employers business and the totality of the relationship between the parties within that business operation.”<sup>439</sup>

#### **4.3.4. *Abraham Abdalla re Abraham Abdalla v Viewdaze Pty Ltd t/as Malta Travel PR927971***

The Australian Industrial Relations Commission gave clear guidance on the *indicia* to be considered in a case<sup>440</sup> that did not specifically turn on compensation but in which the Court acknowledged that it had to follow *Stevens*.<sup>441</sup> The importance of the control test was duly considered by the Honourable Court.<sup>442</sup>

The Court utilised the *indicia* as applied in the cases of *Stevens*, *Hollis* and *Sammartino v Mayne Nickless Express t/a Wards Skyroad*<sup>443</sup> and advised the following approach and principles to distinguish between independent contractors and employees with due regard to the general character<sup>444</sup> of the relationship:<sup>445</sup>

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<sup>436</sup> *Ibid* 44.

<sup>437</sup> *Ibid* 44.

<sup>438</sup> *Cartner v Barclay* [2002] NSWCC 9. Retrieved on 05/02/2013 from <http://www.austlii.edu.au/au/cases/nsw/NSWCC/2002/9.html>.

<sup>439</sup> *Ibid* 38.

<sup>440</sup> *Abraham Abdalla re Abraham Abdalla v Viewdaze Pty Ltd t/as Malta Travel PR927971* [2003] AIRC 504. Hereinafter: *Abraham Abdalla*. Retrieved on 04/09/2012 from <http://www.austlii.edu.au/au/cases/cth/AIRC/2003/504.html>.

<sup>441</sup> *Ibid* [17]–[18].

<sup>442</sup> *Ibid* [18]–[19].

<sup>443</sup> *Sammartino v Mayne Nickless Express t/a Wards Skyroad* 904/98 M Print Q3706 [1998] AIRC 1009. Retrieved on 08/09/2012 from [www.austlii.edu.au/au/cases/cth/AIRC/1998/1009.html](http://www.austlii.edu.au/au/cases/cth/AIRC/1998/1009.html).

<sup>444</sup> *Abraham Abdalla* [18].

<sup>445</sup> *Ibid* [34].

1. The ultimate question to determine whether the person is an independent contractor or an employee turns on whether the legal character of the relationship between the parties is one of a contract of service or a contract for service;
2. Secondly the nature of the work performed and the way in which it is performed as to identify the relevant *indicia* and the weight assigned to the relevant factors;
3. Thirdly the terms and terminology used in the contract should be considered but with due regard to the true nature of the relationship and the real intention of the parties.
4. The fourth step will be to consider the open-ended list of *indicia* in a process of weighing up of all the relevant aspects with due regard to the following factors of which none is conclusive on its own:<sup>446</sup>
  - a. Control: the presence, extent of or absence of control;
  - b. Whether the worker performs work for other or has the right to do so;
  - c. Is the worker's place of work separate to the employer's and/or the manner of advertising their services to the outside world;
  - d. Does the worker provide significant tools and equipment and does it constitute a substantial investment, skills or training;
  - e. Is the worker obliged to supply the services personally;
  - f. Is the worker subject to discipline or dismissal by the presumed employer?
  - g. Whether the presumed employer presents the worker to the world as part of the business by for instance require the worker to wear the company's corporate clothing;
  - h. If income tax is deducted from the worker's remuneration;
  - i. The manner of calculation of remuneration e.g. periodic wages, salary or per completed task;
  - j. Whether the worker is entitled to paid sick and or annual leave;
  - k. Does the work involve a profession, trade or distinct calling by the worker;
  - l. Does the worker create goodwill or commercial assets through his work;

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<sup>446</sup> Chapter 5 paras 2.3. & 3.3. *supra* discuss the *indicia* as per South Africa and Canada.



- m. Does the worker spend a significant portion of his income on business expenses;
5. If, after consideration of the *indicia* uncertainty still persists, then it is a practical matter of whether the worker was running their own independent business rather than as a representative of another business with little or no independence in their conduct;
6. Lastly, if clarity could still not be reached, the decision should be guided by "matters which are expressive of the fundamental concerns underlying the doctrine of vicarious liability" as per *Hollis*.<sup>447</sup>

#### 4.3.5. *Yu Cang Zhao v Monlea Pty Ltd trading as Nordex Interiors*

The Court discussed a variety of *indicia* (of which none is conclusive on its own) and the provisions in law to determine whether the legal nature of the relationship between the parties could be described as one of an employer-employee or an independent contractor relationship<sup>448</sup> in *Yu Cang Zhao v Monlea Pty Ltd trading as Nordex Interiors*.<sup>449</sup>

The concept of a worker in terms of the Act was considered with reference to the definition of a "worker,"<sup>450</sup> and a "deemed worker,"<sup>451</sup> as provided for in section 2 of the Act and categorised under "outworkers and other contractors."<sup>452</sup> The Court in citing from the *Stevens* ruling, examined the nature of the relationship between the parties and in referring to the control test relied on the words of Dixon J in *Humberstone* which indicated that the control test does not constitute the sole criterion, the relevance of which is rather to be found in the right to exercise control, "whether ultimate authority over the man in the performance of his work resided in the employer so that he was subject to the latter's order and

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<sup>447</sup> *Hollis* [41]–[42].

<sup>448</sup> *Ibid* 37 & 41.

<sup>449</sup> *Yu Cang Zhao v Monlea Pty Ltd trading as Nordex Interiors* [2003] NSWCCPD 11. Hereinafter: *Yu Cang Zhao*. Retrieved on 09/12/2011 from <http://www.austlii.edu.au/au/cases/nsw/NSWCCPD/2003/11.html>.

<sup>450</sup> *Ibid* 38.

<sup>451</sup> *Ibid* 39.

<sup>452</sup> New South Wales: Workplace Injury Management and Workers Compensation Act 86 of 1998.

directions.”<sup>453</sup> According to Dixon J other factors to be taken into consideration include the method of remuneration, supply and maintenance of equipment, duty to work, working hours, provision of leave, deduction of income tax and assignment of work by the presumed employee.<sup>454</sup>

The Court considered three categories of *indicia* i.e. control,<sup>455</sup> skills<sup>456</sup> and financial arrangements<sup>457</sup> to conclude the legal nature of the employment relationship.

#### 4.4. Validity of contract of service

The Acts of New South Wales<sup>458</sup> and Western Australia<sup>459</sup> deal with a tainted contract of employment similar to the South African<sup>460</sup> and Canadian<sup>461</sup> compensatory laws by providing for discretion to condone the invalidity of a contract of service:<sup>462</sup>

##### **24. *Illegal employment***

If, in any proceedings for the recovery of compensation under this Act, it appears that the contract of service or training contract under which the injured person was engaged at the time when the **injury** happened was illegal, the matter may be dealt with as if the injured person had at that time been a worker under a valid contract of service or training contract.

None of the other jurisdictions have enacted a discretionary provision and the effect of an invalid contract of service on eligibility to compensation has been referred to the Courts in a number of cases, some with conflicting outcomes specifically in the cases of illegal immigrants.

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<sup>453</sup> *Yu Cang Zhao* 40.

<sup>454</sup> *Ibid* 44.

<sup>455</sup> *Ibid* 54–57.

<sup>456</sup> *Ibid* 59.

<sup>457</sup> *Ibid* 40 & 60–61.

<sup>458</sup> New South Wales s 24.

<sup>459</sup> Western Australia s 192.

<sup>460</sup> Chapter 5 para 2.5 *supra*.

<sup>461</sup> Chapter 5 para 3.4 *supra*.

<sup>462</sup> New South Wales s 24.

#### 4.4.1. *Workcover Corporation (San Remo Macaroni Co Pty Ltd) v Liang Da Ping*

The basis of the contract of employment founded in the common law requires it to be for a legal purpose and be performed in compliance with the law.<sup>463</sup> Illegality may arise from statutory provisions, where it is established that a breach of a statutory provision has occurred, or at common law where the courts consider that public interest is hurt by the terms of the contract.<sup>464</sup> Australian immigration is ruled by the Commonwealth Migration Act No. 62 of 1958 and a number of cases revolved around the application of the Migration Act upon claims for compensation.<sup>465</sup>

In *Liang Da Ping*, heard by the Supreme Court of South Australia, the respondent entered Australia on a temporary student visa and worked for San Remo Macaroni Co Pty Ltd for longer hours of employment than permitted by his visa conditions.<sup>466</sup> After expiration of the visa, he stayed on in the employment although his status was then that of an illegal immigrant in terms of the Migration Act section 14(2).<sup>467</sup> More or less two years later, on 12 June 1992, he injured his hand whilst performing duties for his employer.<sup>468</sup> The Migration Act provides in section 83(2):<sup>469</sup>

Where a person who is an illegal entrant performs any work in Australia without permission, in writing, of the Secretary of the Department of Immigration the person commits an offence.

The Court ruled this section to render any contract entered into by an illegal immigrant unenforceable, unlawful and therefore *ab initio* void.<sup>470</sup> Due to the fact that the contract of employment is void, the essential requirement of being a

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<sup>463</sup> *Workcover Corporation (San Remo Macaroni Co Pty Ltd) v Liang Da Ping* [1994] SASC 4466. At [5] & [10]. Hereinafter: *Liang Da Ping*. Retrieved on 06/02/2013 from <http://www.austlii.edu.au/au/cases/sa/SASC/1994/4466.html>.

<sup>464</sup> Guthrie, R. 2004. Tourists overstaying their welcome: When the visa runs out and the workers stay on. *Legal Issues in Business: The Tourism Industry*: 6: 1–17. Hereinafter: Guthrie (2004). Retrieved on 06/02/2013 from [http://business.curtin.edu.au/research/publications/journals/lib/table\\_of\\_contents.cfm](http://business.curtin.edu.au/research/publications/journals/lib/table_of_contents.cfm).

<sup>465</sup> *Ibid* 1.

<sup>466</sup> *Liang Da Ping* [2].

<sup>467</sup> *Ibid* [2].

<sup>468</sup> *Ibid* [2].

<sup>469</sup> *Ibid* [3].

<sup>470</sup> *Ibid* [5] & [10].

“worker” pursuant to the definition required in terms of the South Australian Workers Rehabilitation and Compensation Act cannot be satisfied and the right to compensation is defeated.<sup>471</sup> By mouth of King J it was held at [10]:<sup>472</sup>

The purported contract of service between the respondent and Sian Remo could not be lawfully performed by the respondent. He was not obliged to perform it, because performance would have been an illegal act, and San Remo could not insist on performance for the same reason. The statute discloses an intention of the legislature to prohibit such performance in the public interest. That being so the implication that the contract itself is prohibited and void seems plain.

Contrary to the ruling in *Liang Da Ping*, the New South Wales Court of Appeal upheld the applicants’ right to compensation in similar circumstances in *Non-Ferral (NSW) Pty Ltd v Taufia*<sup>473</sup> although he was illegally employed in Australia on a tourist visa that had expired.<sup>474</sup> In interpreting section 83(2) of the Migration Act, the Court held that the purpose of the section is not to render an employment contract void but to penalise non-compliance of the Migration Act.<sup>475</sup> The objectives of the Migration Act will not be served by rendering the employment contract illegal and will be disproportional to the gravity of the unlawful activity.<sup>476</sup> Guthrie argues that *Taufia* follows the principles laid down by the High Court in *Fitzgerald v F.J. Leonhardt Pty Ltd* (1997) 71 ALJR 653 and *Yango Pastoral Co Pty Ltd v First Chicago Australia Ltd & Ors.* (1978) 139 CLR 410 in respect of a contract tainted by an aspect of illegality due to a statutory provision.<sup>477</sup> The Compensation Tribunal of South Australia declined to follow *Liang Da Ping* in the matter of *Riley v Workcover/Allianz Australia (Robinvale Transport Group (SA) Pty Ltd)*.<sup>478</sup>

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<sup>471</sup> *Ibid* [11].

<sup>472</sup> Quoted in South Australia (State Government). WorkCover SA. 2013. *Claims Operational Guidelines*, Chapter 3: *Entitlement to compensation* at 7. Retrieved on 06/02/2013 from <http://www.workcover.com/worker/reference-library/claims/operational-guidelines>.

<sup>473</sup> *Non-Ferral (NSW) Pty Ltd v Taufia Matter* [1998] NSWLR 43. Hereinafter: *Taufia*. Retrieved on 16/02/2013 from <http://www.austlii.edu.au/au/cases/nsw/NSWSC/1998/49.html>.

<sup>474</sup> Guthrie (2004) 4.

<sup>475</sup> *Ibid* 5.

<sup>476</sup> *Ibid* 5.

<sup>477</sup> *Ibid* 4–5.

<sup>478</sup> *Riley v Workcover/Allianz Australia (Robinvale Transport Group (SA) Pty Ltd)* [2002] SAWCT 79. Retrieved on 04/09/2012 from <http://www.austlii.edu.au/au/cases/sa/SAWCT/2002/79.html>. Hereinafter: *Riley*.

#### 4.4.2. *Riley v Workcover/Allianz Australia (Robinvale Transport Group (SA) Pty Ltd)*

The South Australian Workers' Compensation Tribunal ruled in a dispute, *Riley v Workcover/Allianz Australia (Robinvale Transport Group (SA) Pty Ltd)*, against a decision by Allianz Australia Workers Compensation (SA) Ltd rejecting a claim for compensation<sup>479</sup> by a truck driver by reason of an illegal contract of service as the worker's driving license was suspended due to unpaid fines.<sup>480</sup> Allianz argued that in Australian compensatory law, the right to compensation is dependent upon a valid contract of service, which means the contract must both be valid and enforceable; and contracts entered into for an illegal purpose or contracts prohibited by law will bar a right to compensation.<sup>481</sup> Allianz in relying on the *Liang Da Ping* ruling argued that the contract of service was *ab initio* void, because of the suspension of the employee's driver's license, the employee was incompetent to perform the duties he was contracted to perform and he was therefore not in employment on the date of the accident and could not be considered to fulfil the requirements of the definition of a "worker" for the purposes as envisaged in section 3 the Act.<sup>482</sup>

The Tribunal took notice of the ruling in *Non-Ferral (NSW) Pty Ltd v Taufia*<sup>483</sup> but in considering the validity of the contract, applied the High Court decision in *Fitzgerald v FJ Leonhardt Pty Limited* [1997] HCA 17 in distinguishing between situations where the parties deliberately and knowingly enter into agreements with the purpose to breach statutory provisions and situations of incidentally committing an illegality in the course of performing the terms of an otherwise lawful contract.<sup>484</sup> Four categories in which the enforceability of a contract may be affected by a statutory provision which cause specific conduct to be illegal, have been identified by the Court i.e.:<sup>485</sup>

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<sup>479</sup> *Riley* [1].

<sup>480</sup> *Ibid* [23]-[26].

<sup>481</sup> *Ibid* [54].

<sup>482</sup> *Ibid* [54]-[59].

<sup>483</sup> *Ibid* [60]-[62].

<sup>484</sup> *Ibid* [63]-[67].

<sup>485</sup> *Ibid* [68].

- (1) The contract may be to do something which the statute forbids;
- (2) It may be one which the statute expressly or impliedly prohibits;
- (3) Though lawful on its face, it may be made in order to effect a purpose which the statute renders unlawful; or
- (4) Though lawful according to its own terms, it may be performed in a manner which the statute prohibits.

The Tribunal held that this case is concerned with the fourth category<sup>486</sup> which means that the contract will not be rendered illegal due to an unlawful act in the course of its performance and the penalty will be coming from the relevant statute.<sup>487</sup> While a person intentionally in breach of the law will not be assisted by the Court, unwitting acts in contravention of the law are dissimilar.<sup>488</sup>

The Tribunal dealt with the different exceptions to the rule with regard to relief by the Courts and remarked that it “would be doubly absurd if the courts closed their doors to a party seeking to enforce its contractual rights without regard to the degree of that party’s transgression, the deliberateness or otherwise of its breach of the law and its state of mind generally relevant to the illegality.”<sup>489</sup> The Tribunal found that the entry into the contract of service was not contaminated with any unlawfulness at the applicable date for the suspension had not yet commenced, but even if it had commenced it would not render the contract *ab initio* unlawful.<sup>490</sup> The worker could have the suspension lifted by merely paying the fines or arrange for it to be paid.<sup>491</sup> It is not the purpose of the Criminal Law (Sentencing) Act in terms of which the fines and suspension have been issued to prohibit the creation of employment relationships or to render workers’ compensation rights unenforceable and if so, it would be wholly disproportionate in relation to the severity of the worker’s actions.<sup>492</sup> Furthermore, there is no public policy which requires a denial of the right to compensation or alternatively to refuse the worker to rely on the existence of a contract of service in fulfilment of the requirements of the definition of a “worker” by reason of the suspension of his driver’s licence.<sup>493</sup>

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<sup>486</sup> *Ibid* [69].

<sup>487</sup> *Ibid* [70].

<sup>488</sup> *Ibid* [72].

<sup>489</sup> *Ibid* [76]–[77].

<sup>490</sup> *Ibid* [80]–[81].

<sup>491</sup> *Ibid* [80]–[81].

<sup>492</sup> *Ibid* [83].

<sup>493</sup> *Ibid* [86].

The Tribunal held the rejection of the claim based on “the alleged illegality of the contract of employment or the mode of its performance” as inappropriate.<sup>494</sup>

#### 4.4.3. *Singh v TAJ (Sydney) Pty Limited*

The New South Wales Court of Appeal also followed a more lenient approach in the case of *Singh v TAJ (Sydney) Pty Limited*<sup>495</sup> by setting aside the decision of the Workers Compensation Commission of New South Wales. The Court of first instance denied the Appellant continuation of compensation because the Appellant’s visa status changed subsequent to an occupational accident disallowing the appellant employment.<sup>496</sup> The Appellant did not breach the provisions of his visa at the time of the accident but because he was not allowed to enter into employment, the respondent argued continuing compensation in respect of loss of earnings would mean compensating the ex-worker for unlawful conduct because an employment contract entered into will be illegal.<sup>497</sup>

The Court viewed the approach of *Nonferral v Taufia* as appropriate<sup>498</sup> and resubmitted the case back to the Court below for a rehearing taking into consideration the questions of illegality of the Appellant’s employment, if any and the severity and relevance of it.<sup>499</sup>

#### 4.5. **The role of remuneration**

The Productivity Commission of Inquiry identified the differences in compensatory legislation between the Australian jurisdictions as problematic.<sup>500</sup> The different definitions of “employee” and “employer” and the manner of calculation of earnings and levies were identified as some of the impediments in harmonising occupational health and safety legislation in Australia which includes compensatory

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<sup>494</sup> *Ibid* [88].

<sup>495</sup> *Singh v TAJ (Sydney) Pty Limited* [2006] NSWCA 330. Retrieved on 09/02/2013 from <http://www.austlii.edu.au/au/cases/nsw/NSWCA/2006/330.html>.

<sup>496</sup> *Ibid* 1.

<sup>497</sup> *Ibid* 39–41.

<sup>498</sup> *Ibid* 46.

<sup>499</sup> *Ibid* 48.

<sup>500</sup> Productivity Commission Report (2004): 14–15.

legislation.<sup>501</sup> It further creates uncertainties with regard to who is considered an employee or employer and who might be entitled to compensation as well as whether an employer will be protected against common law suits.<sup>502</sup> It is thus a hindrance pertaining to the principle of the balancing of interests of the parties.

The Australian compensatory laws do not refer to remuneration as part of the definition of “worker” or “employer”; and it does not form part of the requirements set in law. Similar to Canada, it informs the calculation of compensation benefits and the rate of assessments to be paid by employers;<sup>503</sup> and similar to Canada, calculating the remuneration of deemed “workers” may be problematic.<sup>504</sup> Uncertainties are prevented by legislated provisions to that regard.<sup>505</sup> The earnings of a contractor will be calculated at a rate which he would have earned had he been working as an employee and consideration will be given to industrial agreements if any.<sup>506</sup>

#### **4.6. Employer registration and payment of levies**

Employers are obliged to obtain workers’ compensation insurance to cover their workers,<sup>507</sup> but the Australian workers’ compensation system expressly provides for a “nominal insurer” to ensure coverage should an employer omit to register and insure.<sup>508</sup> The Productivity Commission is of the view that it poses a threat in the form of an unsustainable cost burden to fund the Workers Compensation Nominal Insurer.<sup>509</sup> Workers lodge a claim with the Compensation Authority and the Nominal Insurer may institute a claim against the employer to recover the costs incurred on behalf of the employer.<sup>510</sup>

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<sup>501</sup> *Ibid* 14–15.

<sup>502</sup> Productivity Commission Report (2004): 14–15.

<sup>503</sup> Australian Capital Territory ss 176–177 & 179; New South Wales s 155(1B)(2); Queensland s 54(6); South Australia s 4(8); Tasmania s 97(1C)(6) & Victoria s 9(1)(f).

<sup>504</sup> Commonwealth s 8(3); Australian Capital Territory ss 21–24; New South Wales s 20; Northern Territory s 49(1); Queensland s 106; South Australia s 4; Tasmania s 4DC; Victoria ss 5(1) & 5A & Western Australia s 10A.

<sup>505</sup> Australian Capital Territory s 22; New South Wales s 43; Northern Territories s 127; South Australia s 4(7); Tasmania ss 4DC(2); 5(2); 6(2) & 6A(2); Victoria s 5A(9)–(12) & Western Australia s 7.

<sup>506</sup> South Australia s 4(7).

<sup>507</sup> Australian Capital Territory s 147; New South Wales s 155; Northern Territory s 126; Queensland s 48; South Australia s 59; Tasmania s 97; Victoria s 19 & Western Australia s 160.

<sup>508</sup> Productivity Commission Report (2004): 335–337.

<sup>509</sup> *Ibid* 335.

<sup>510</sup> Australian Capital Territory s 30; New South Wales ss 142; 142A & 145; Northern Territory s 150; Queensland ss 57–62; Tasmania s 121; Victoria s 20 & Western Australia s 57B.



#### 4.7. Migrant labour

The definition of “an employee” moving between the different jurisdictions in Australia will not constitute a bar to compensation because all the jurisdictions provide for eligibility to compensation if the worker can establish a link to a particular State. Therefore it does not exclude workers or employers from fulfilling the requirements of the definitions. Movement between jurisdictions is governed by principles laid down by the Heads of Workers Compensation Authorities in the National Cross-Border Model and agreed upon by all the jurisdictions, inclusive of:<sup>511</sup>

- elimination of the need for an employer to obtain coverage for a worker in more than one State;
- a worker is only entitled to compensation in the worker’s “home” jurisdiction;
- certainty for workers pertaining to workers compensation rights;
- the elimination of forum shopping;
- ensure that each worker is connected to one State.

Criteria laid down to determine the “home” jurisdiction are to be tested in a hierarchical manner:<sup>512</sup>

- (a) the State in which the worker usually works in that employment
- (b) if no State or no one State is identified by (a), the State in which the worker is usually based for the purposes of that employment
- (c) if no State or no one State is identified by (a) or (b), the State in which the employer’s principal place of business in Australia is located
- (d) if no State or no one State is identified by (a), (b) or (c), the State in which the worker was injured, provided that they are not entitled to compensation for the same injury under the laws of another country.

All the jurisdictions entered into the Agreement by legislative amendments<sup>513</sup> to achieve the objectives with Queensland in July 2003, the Australian Capital

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<sup>511</sup> South Australia (State Government). WorkCover SA. 2012. *Cross-border Workers Compensation Provisions Guidelines*. At 11. Retrieved on 30/01/2013 from <http://www.workcover.com/workcover/documents-a-z?filter=C>.

<sup>512</sup> *Ibid* 4–5.

<sup>513</sup> Queensland s 113; Australian Capital Territory s 36B; Victoria s 80; Tasmania s 31A; Western Australia s 20 (Part III, Division I); New South Wales s 9AA; South Australia s 6 & Northern Territory s 53AA.

Territory in June 2004, Victoria in September 2004, Tasmania in December 2004, Western Australia in December 2004, New South Wales in January 2006, South Australia in January 2007 and the Northern Territory in April 2007.<sup>514</sup>

The current position of non-citizens working within the RSA or South African citizens working abroad can be compared to the situation in both Canada and Australia before the inter-jurisdictional arrangements were made. Canada has a similar system of inter-jurisdictional arrangements to Australia<sup>515</sup> but in seeking solutions, it should be kept in mind that South Africa and the SADC countries are independent states while Canada and Australia are federal constituencies.

#### **4.7.1. *Mynott v Barnard***

The need for the National Cross-Border Model is clear from the facts of this case where the employer and employee both lived in Victoria at all material times, entered into the employment agreement in Victoria but the employee was fatally injured in an accident that arose out of and in the course of his duties at the work site in New South Wales.<sup>516</sup> His dependents claimed compensation under the Victorian Workers' Compensation Act (1928).<sup>517</sup>

The claim failed in both the County Court as well as the Supreme Court because the test applied by the Courts was the applicability of the Act to the place of the accident. The question to be answered on appeal was whether application of the Victorian Act was limited to accidents within the borders of Victoria and what territorial limitation should be applied as the Act cannot be applicable to "all employers, all workers and all accidents everywhere."<sup>518</sup> The Court observed that the question essentially addresses a question of construction of a statute.

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<sup>514</sup> QBE Insurance (Australia) Limited. [Sa]. *Connect Fact Sheet: QM3288-0413 Cross Border Provisions*. Retrieved on 30/01/2013 from [www.qbe.com.au/Australia/Useful-Resources/Fact-Sheets/Insurance.html](http://www.qbe.com.au/Australia/Useful-Resources/Fact-Sheets/Insurance.html).

<sup>515</sup> See Chapter 4 paras 2.4; 3.4 & 4.4 and Chapter 5 paras 2.10 & 3.7.

<sup>516</sup> *Mynott* 1.

<sup>517</sup> *Ibid* 1.

<sup>518</sup> *Ibid* 3-4.

Although each of the five honourable Justices of the High Court of Australia gave a separate ruling, they were unified in dismissing the appeal by the dependents and found that the right to compensation does not attach to the contract of employment because the right is not founded in the contract but in the accident itself.<sup>519</sup>

The Court cited and followed the English case of *Tomalin v S Pearson & Son Ltd* (1909) 2 K.B. 61 in which it was held that a United Kingdom employer would not be held liable pursuant to the British Workmen's Compensation Act if a worker suffers an injury out of and in the course of his duties in a foreign country.<sup>520</sup> Dixon J, in his ruling, turned to the American judgment of *Cameron v Ellis Construction Co.* (1930) 252 N.Y. and applied the then internationally-accepted test of the place where the employment is located in all cases.<sup>521</sup>

COIDA does not explicitly require the contract of employment to be entered into within South Africa but it is implied in the requirement that the employer's chief business unit be within the South African border and an employee will be covered if the accident happens outside the borders if the employer duly registered and the employee did not work for a period exceeding 12 months outside South Africa.<sup>522</sup> COIDA is thus dissimilar on this point.

#### **4.8. Fishers**

In South Australia, crew members of fishing vessels are excluded from the ambit of the Act if the worker is remunerated by way of a share in the profits or gross receipts earned by fishing.<sup>523</sup> However, if a contract of service exists, the worker will be deemed an employee. In addition to the definitions of employer and worker, the South Australian Act also defines "contract of service" to mean:<sup>524</sup>

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<sup>519</sup> *Ibid* 34.

<sup>520</sup> *Ibid* 40.

<sup>521</sup> *Ibid* 47.

<sup>522</sup> Chapter 5 paras 2.1 & 2.10 *supra*.

<sup>523</sup> South Australia s 3(3).

<sup>524</sup> South Australia s 3(1).

- (a) a contract under which one person (the worker) is employed by another (the employer);
- (b) a contract, arrangement or understanding under which one person (the worker) works for another in prescribed work or work of a prescribed class;
- (c) a contract of apprenticeship;
- (d) a contract, arrangement or understanding under which a person (the worker)—
  - (i) receives on-the-job training in a trade or vocation from another (the employer); and
  - (ii) is during the period of that training remunerated by the employer;

The Supreme Court of South Australia interpreted the words “contract, arrangement or understanding” as they appear in the definition of “contract of service” with emphasis on the need for interpretation of the expression in the context of the whole Act<sup>525</sup> in *Warrior v Workcover Corporation*.<sup>526</sup>

The words are capable of including the full spectrum of possibilities, from formal contracts of service to “circumstances as informal as a mere understanding.”<sup>527</sup> As the definition of a contract of employment is defined in paragraph (a), the contract referred to in paragraph (b) must intend something else than a contract of employment.<sup>528</sup> Paragraph (b) includes an “arrangement which falls short of a contract or an agreement whereby a worker works for another person”<sup>529</sup> and an “understanding” is more informal than a contract or an arrangement and might include situations where the parties have not officially agreed for the worker to work for the other individual.<sup>530</sup> The nature of an “understanding” is even less formal than that of an “arrangement” and might flow from customary conduct without addressing the conditions that gave rise to the relationship.<sup>531</sup>

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<sup>525</sup> *Ibid* 39.

<sup>526</sup> *Warrior v Workcover Corporation* No. Scgrg-98-279 Judgment No. S6893 [1998] SASC 6893. At 38–40. Retrieved on 07/09/2012 from <http://www.austlii.edu.au/au/cases/sa/SASC/1998/6893.html>.

<sup>527</sup> *Ibid* 39.

<sup>528</sup> *Ibid* 39.

<sup>529</sup> *Ibid* 39.

<sup>530</sup> *Ibid* 40.

<sup>531</sup> *Ibid* 40.

The purpose of the Act<sup>532</sup> pertaining to the people who stand to benefit from it is explained as:

...to ensure the widest coverage of persons who work for others so that if they suffer injury and consequent disability they will be entitled to economic protection during the period of the disability.

The purpose of compensatory law stands thus in relation to the people it is meant to benefit and therefore the more people falling within its ambit the greater the fulfilment of its purpose.

#### 4.9. Domestic workers

Domestic workers are included in the definition of a “worker”.<sup>533</sup> However, in terms of the South Australian Regulations, it is optional for employers of domestic workers to register with the Compensation Authority if the domestic worker earns less than a prescribed threshold and is not employed for business purposes.<sup>534</sup>

#### 4.10. Third party employers

A number of Australian jurisdictions have an equivalent provision to COIDA<sup>535</sup> pertaining to lending, letting or hiring the services of an employee to another employer and the meaning of “employer” is defined in the Australian Capital Territory to include:<sup>536</sup>

- (c) if the services of the worker are temporarily lent or let on hire to someone else (the **temporary employer**) by the person (the **original employer**) with whom the worker has entered into a contract of service or apprenticeship—the original employer is, for this Act, taken to continue to be the employer of the worker while the worker is working for the temporary employer.

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<sup>532</sup> *Ibid* 41.

<sup>533</sup> Australian Capital Territory s 11; Northern Territory s 3(5); Queensland s 3; South Australia Regulations s 5; Tasmania s 4(5); Victoria s 5(1) & Western Australia s 5(1).

<sup>534</sup> South Australia, Regulation 9 of the Regulations 2010.

<sup>535</sup> See Australian Capital Territory s 5; Queensland Schedule 3(1); Tasmania s 4A; Victoria s 5 & Western Australia s 5.

<sup>536</sup> Australian Capital Territory s 5.

The New South Wales Act in section 12 specifically provides for situations in which representatives of trade unions are injured when on official union duties to be covered that will prevent situations as discussed under the *Rieck* rulings in South Africa:

**12 Claims by trade union representatives**

If:

- (a) a worker is an accredited representative of a trade union of employees, or other organisation of employees, of which any person employed by the worker's employer is a member,
- (b) with the consent of or at the request of that employer or pursuant to an industrial award or agreement, the worker is carrying out his or her duties as such a representative (whether at the worker's place of employment or elsewhere) or is on an associated journey, and
- (c) the worker receives a personal **injury** while carrying out those duties or on that journey,

the **injury** is, for the purposes of this Act, an **injury** arising out of or in the course of employment, and compensation is payable accordingly.

**4.10.1. Workcover Corporation & Ors v Fogliano**

The Supreme Court of South Australia ruled on this stated case<sup>537</sup> in answering three of the seven questions formulated by the full bench of the Workers Compensation Appeal Tribunal.<sup>538</sup> All the questions turned on the type of training that would entitle a person to be deemed a worker,<sup>539</sup> working under a contract of service<sup>540</sup> for the purposes of the Act and specifically the meaning of the words "on-the-job training" in section 3(d).<sup>541</sup> The specific definition is cited *supra* at paragraph 4.8.

The Supreme Court criticised the formulation of the stated questions as they constituted questions of a general nature and some of the questions is answerable

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<sup>537</sup> *Workcover Corporation & Ors v Fogliano* No. SCGRG-99-1168 [2000] SASC 28. Retrieved on 16/04/2011 from <http://www.austlii.edu.au/au/cases/sa/SASC/2000/28.html>. Hereinafter: *Fogliano*.

<sup>538</sup> *Ibid* 13–17.

<sup>539</sup> South Australia (State Government). *WorkCover SA. 2008. Changes to the WorkCover Scheme*. Retrieved on 08/05/2012 from <https://www.workcover.com/workcover/documents-a-z?filter=C>. From 2008 the South Australian Act exempts employers who employ trainees and apprentices from paying assessments in respect of apprentices and trainees in their employ.

<sup>540</sup> South Australia: Workers Rehabilitation and Compensation Act 124 of 1986 s 3.

<sup>541</sup> *Fogliano* 8.

by applying the law to the facts.<sup>542</sup> The Court therefore considered it appropriate to only answer three of the questions as it entails the limitations set by the statute rather than the meaning of specific words.<sup>543</sup>

The worker was a trainee participating in a skills development training programme by Quality Training Company which did it on behalf of the Commonwealth Government. Fogliano (trainee) and Quality Training entered into a “contract of participation” and he was subsequently sent to do practical training experience at a hotel where he was injured.<sup>544</sup>

The Court held that “on-the-job training” as in section 3(d) *supra*, extends the common law principles characterising a master and servant relationship; and it does not define the type of work to be productive in nature or the place of work but only requires training to be instructive or educational in nature irrespective of the place where it occurs.<sup>545</sup> The employer was identified as the legal entity with which the contractual arrangement was made for the on-the-job training in a trade or vocation and who was responsible for remunerating the trainee, although the trainee was injured whilst doing practical work assignments at a third party, the hotel.<sup>546</sup> The legal entity viewed as the employer was subsidised by the Commonwealth Government to train or educate trainees,<sup>547</sup> but that did not change the fact that the trainee was working under a contract of service for Quality Training.<sup>548</sup>

#### **4.11. Atypical employment arrangements**

According to available data, a slightly lower number of employees are included within the definition of an employee which is partly attributed to the decline in the traditional employer-employee system of full-time work in the service of one

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<sup>542</sup> *Ibid* 9.

<sup>543</sup> *Ibid* 9–13.

<sup>544</sup> *Ibid* 2.

<sup>545</sup> *Ibid* 14.

<sup>546</sup> *Ibid* 17.

<sup>547</sup> *Ibid* 16–17.

<sup>548</sup> *Ibid* 18.

employer, in recent times.<sup>549</sup> The category of non-traditional work in Australia includes temporary labour, part-time labour, self-employed persons, fixed-term contract labour, labour hire workers, outworkers, seasonal labour and unrecorded labour.<sup>550</sup>

According to the findings of the Commission of Inquiry, this group is more likely to be unaware of their rights with regard to a claim and to be afraid of negative consequences to their positions if a claim is reported on their behalf.<sup>551</sup> Specifically young and atypically-employed people hesitate to institute claims.<sup>552</sup>

Data confirming a decrease in the number of employees covered by compensatory legislation is scarce. However, according to findings of the Australian Bureau of Statistics, the proportion of incorporated enterprises managed by their owners increased from 1.8% to 5.6% between 1978 and 1996; while the Productivity Commission's own analysis shows an increase of 15% of people defining themselves as self-employed contractors over the two decades prior to the Final Report.<sup>553</sup>

Although certain categories (horse racing jockeys, boxers, wrestlers and referees) of professional sportsmen and women may be deemed as workers for the purpose of compensatory laws, in general professional sportspersons are excluded from the definition.<sup>554</sup> Uniquely to Australia, some Ministers of religion are excluded determined upon the denomination but others who are working under a contract of service are included.<sup>555</sup>

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<sup>549</sup> Productivity Commission Report (2004): 158–160.

<sup>550</sup> Australian Capital Territory ss 9 & 10; Northern Territory s 3(1); Queensland Schedule 2 Part 2; South Australia Regulations Part 2 Item 5; Tasmania s 4(5); Victoria ss 9, 11 & 12 & Western Australia s 14.

<sup>551</sup> Productivity Commission Report (2004): 158–161. See also Quinlan: 494–501.

<sup>552</sup> *Ibid.*

<sup>553</sup> Productivity Commission Report (2004): 158–160.

<sup>554</sup> Australian Capital Territory s 84 (excluding the activity); Northern Territory s 6A(10); Queensland Schedule 2 Part 2; South Australia s 58(1); Tasmania s 7; Victoria s 16 & Western Australia ss 11 & 11A.

<sup>555</sup> Queensland s 18; Tasmania s 3(4); Western Australia ss 8–10 & South Australia Regulation 6(1) of the Workers Rehabilitation and Compensation Regulations 2010 (in terms of the Workers Rehabilitation and Compensation Act 124 of 1986). Retrieved on 07/09/2012 from <http://www.legislation.sa.gov.au/LZ/C/R/WORKERS%20REHABILITATION%20AND%20COMPENSATION%20REGULATIONS%202010/CURRENT/2010.154.UN.PDF>.



## 4.12. Summary

The Australian compensatory laws generally exclude directors, trustees and partners of companies from the definition of a worker; but in certain jurisdictions they may apply for inclusion to the applicable Compensation Authority with jurisdiction.<sup>556</sup>

Similarly to the South African definition in COIDA, the following workers do not satisfy the definition of an employee:

- workers in informal employment;<sup>557</sup>
- workers in atypical employment;<sup>558</sup>
- independent contractors;<sup>559</sup>
- child labourers under the legal age as it will be against public policy (similar to illegal immigrants);<sup>560</sup>

Contrary to the South African exclusions, the following categories are included within the definition of an employee:

- members of the Federal Police and Defence Force;<sup>561</sup>
- voluntary workers;<sup>562</sup>
- students when registered with a recognised learning institution;<sup>563</sup>
- financially-dependent child(ren) at the death of that employed parent;<sup>564</sup>
- domestic workers in private households;<sup>565</sup>
- migrant workers.<sup>566</sup>

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<sup>556</sup> Chapter 5 para 4.1 *supra*.

<sup>557</sup> Chapter 5 paras 4.1; 4.2 4.3 & 4.8 *supra*.

<sup>558</sup> Chapter 5 paras 4.8 & 4.11 *supra*.

<sup>559</sup> Chapter 5 paras 4.1; 4.2; 4.3; 4.3.1; 4.3.2; 4.3.3; 4.3.4; 4.3.5; 4.5 & 4.11.

<sup>560</sup> Chapter 5 para 4.11 *supra*.

<sup>561</sup> Chapter 5 para 4.1 *supra*.

<sup>562</sup> Chapter 5 para 4.1 *supra*.

<sup>563</sup> Chapter 5 para 4.1 & 4.10.1 *supra*.

<sup>564</sup> Chapter 5 para 4.1 *supra*.

<sup>565</sup> Chapter 5 paras 4.1; 4.2 & 4.9 *supra*.

<sup>566</sup> Chapter 5 paras 4.1; 4.2 & 4.7 *supra*.

The historical principle of balancing-of-interests is central to the definitions of employer and employee but similar to South Africa and Canada:

- the employee's right of compensation is not dependent upon the registration and payment of levies by the employer;<sup>567</sup>
- third party employers will not be protected against common law claims for damages when utilising the services of directors who did not follow the prescribed procedure to apply for inclusion within the ambit of the Act.<sup>568</sup>

The basis of the definition remains the common law contract of service which may be tested according to the applicable *indicia* as included in the *Abraham Abdalla re Abraham Abdalla v Viewdaze Pty Ltd t/as Malta Travel* ruling; and with the point of departure, the control test laid as developed which requires a weighing of all relevant factors similarly to South Africa.<sup>569</sup>

## 5. CONCLUSION

In all three countries the definitions of employee and employer correspond to each other in ruling the historic trade-off. They define the scope of compensatory legislation as only workers satisfying the definition will have a right to compensation and only employers satisfying the applicable definition will be immune against civil liability.<sup>570</sup>

In all three countries, the basis of the employment relationship is founded in the common law contract of employment and it is embedded in the statutory definitions of all three countries' workers' compensatory legislation.<sup>571</sup> In all three countries, the courts preferred a liberal interpretation of the definitions so as to include as many persons as possible within the protective provisions of the legislation.<sup>572</sup> The courts in all three countries have laid down *indicia* which are to be applied in a

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<sup>567</sup> Chapter 5 para 4.6 *supra*.

<sup>568</sup> Chapter 5 paras 4.1; 4.2 & 4.10 *supra*.

<sup>569</sup> Chapter 5 paras 4.1; 4.3; 4.3.2; 4.3.3; 4.3.4 & 4.3.5 *supra*.

<sup>570</sup> Chapter 5 paras 2.1; 2.2; 3.1; 3.2; 4.1 & 4.2 *supra*.

<sup>571</sup> Chapter 5 paras 2.1; 2.2; 2.3; 3.1; 3.2; 3.3; 4.1; 4.2 & 4.3 *supra*.

<sup>572</sup> Chapter 5 paras 2.3; 2.6.1; 2.6.2; 2.7.1; 3.3; 3.3.1; 3.3.2; 3.4.1; 3.6.1; 3.8.1; 4.3; 4.3.2; 4.3.3; 4.3.4; 4.3.5; 4.4.2 & 4.10.1 *supra*.

process of weighing of the different factors and of which only one factor will not be conclusive on its own. It is submitted that preference is given in all three countries to what is known in South African labour law as the “dominant impression” test to determine the true relationship between the parties.<sup>573</sup>

In South Africa<sup>574</sup> and Canada,<sup>575</sup> provision has been made for discretionary condonation pertaining to the validity of the contract of service but not in Australia<sup>576</sup> where the courts made contradictory rulings. It appears that matters of public policy will be important decisive aspects as was shown in South Africa<sup>577</sup> and Canada<sup>578</sup> regarding child labour; and in Australia<sup>579</sup> regarding illegal immigrants.

Remuneration in all three countries forms the basis of the monetary assessment for which the employer is liable and the compensation to which an injured employee may be rightfully entitled.<sup>580</sup> Failure by an employer to register with a compensation authority and to pay levies or premiums will not bar a right to compensation in any of the three countries as provision has been made for compensation in these circumstances.<sup>581</sup> The financial contribution of all employers is an important aspect of the continued financial viability of compensation schemes in all three countries. Although this Chapter only noted the concern on the Nominal Insurer in Australia; reference was made in Chapter 4 about the concerns raised about fraud and maladministration.

In all three countries, the legal nature of the employment relationship changed over time with vagueness and gray areas as a result.<sup>582</sup> This is mainly due to a growing number of atypical forms of employment and a reduction in the number of workers in traditional employment relationships.<sup>583</sup> The plight of workers in informal

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<sup>573</sup> Chapter 5 paras 4.1; 4.3; 4.3.2; 4.3.3; 4.3.4 & 4.3.5 *supra*.

<sup>574</sup> Chapter 5 para 2.5 *supra*.

<sup>575</sup> Chapter 5 para 3.4 *supra*.

<sup>576</sup> Chapter 5 para 4.4 *supra*.

<sup>577</sup> Chapter 5 para 2.5.1 *supra*.

<sup>578</sup> Chapter 5 para 3.4.1 *supra*.

<sup>579</sup> Chapter 5 paras 4.4.1; 4.4.2 & 4.4.3 *supra*.

<sup>580</sup> Chapter 5 paras 2.6; 3.5 & 4.5 *supra*.

<sup>581</sup> Chapter 5 paras 2.7; 3.6 & 4.6 *supra*.

<sup>582</sup> Chapter 5 paras 2.3; 3.3 & 4.3 *supra*.

<sup>583</sup> Chapter 5 paras 2.9; 3.11 & 4.11 *supra*.

employment is of growing concern due to the lack of legislative protection available to this group.<sup>584</sup> Migrating workers in South Africa and South Africans working abroad are not statutorily protected similar to employees in Canada and Australia.<sup>585</sup> It is submitted that South Africa should follow the example of optional coverage for categories of workers currently not covered like trainees in training institutions, voluntary emergency workers and self-employed persons and South Africans working abroad.

Domestic workers in private households as a particularly vulnerable group is excluded from the ambit of the Act in South Africa but is to a great extent covered under Canadian and Australian compensatory legislation as an optional coverage.<sup>586</sup> It is submitted that inclusion of domestic workers in private households in South Africa ought to be prioritised to conform to the constitutional imperative.

Situations where third-party employers are involved create complications in all three countries, but the right to institute common law claims for damages against third parties who negligently exposed persons to hazards in the workplace is open to employees in all three countries.

It is a trait of the workers' compensatory acts in Canada and Australia that provision is being made for students, domestic workers, fire fighters and persons doing community service to be included in the definition of an employee for the purposes of compensatory law. It is submitted that recognition of these categories of persons encourages responsible citizenship because people voluntarily providing services in emergencies will not incur medical costs in cases of injuries. None of these categories are covered under COIDA and since acceptance of the RSA Constitution in 1996, no amendments were made to COIDA to give life to the "progressive realisation" of these rights and extend it to those excluded from the working thereof.

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<sup>584</sup> Chapter 5 paras 2.9; 3.11 & 4.11 *supra*.

<sup>585</sup> Chapter 5 paras 2.10; 3.7 & 4.7 *supra*.

<sup>586</sup> Chapter 5 paras 2.11; 3.9 & 4.9 *supra*.

## CHAPTER 6

### THE RIGHT TO DELICTUAL REMEDIES

#### 1. INTRODUCTION

In compensatory legislation, the common law has been amended by a *quid pro quid* system according to which employers are indemnified against delictual claims in exchange for participation in an insurance scheme administered by an independent institution. In exchange for a common law claim, workers received an administrative recourse to obtain speedy compensation while relieved from the burden of proof required by court actions. The crux of this principle is underpinned by what is known as the “historic trade-off” principle.<sup>1</sup>

It is trite law that an employer owes his employees a common law duty of care to take reasonable care for their health and safety. The duty of care is not absolute and is limited by the standard of reasonableness<sup>2</sup> flowing from the legal relationship between a master and his servant.<sup>3</sup> Reasonableness depends upon a factual examination of the circumstances of each case.<sup>4</sup>

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<sup>1</sup> Meredith Report at 17.

<sup>2</sup> Mischke *et al* 359.

<sup>3</sup> Kelly, G. 2000. *Post Traumatic Stress Disorder and the Law*. 45. Dublin: Round Hall Sweet & Maxwell. *Van Deventer v Workmen's Compensation Commissioner* 1962 (4) SA 28. 31 B–D.

<sup>4</sup> The Mine Health and Safety Act places the “owner” of a mine under an obligation to: 2(b) “ensure, as far as reasonably practicable, that the mine is commissioned, operated, maintained and decommissioned in such a way that employees can perform their work without endangering the health and safety, of themselves or of any other person” and defines “reasonable practicable” in s 102 as meaning “practicable having regard to –

(a) the severity and scope of the hazard or risk concerned;

(b) the state of knowledge reasonably available concerning that hazard or risk and of any means of removing or mitigating that hazard or risk;

(c) the availability and suitability of means to remove or mitigate that hazard or risk; and

(d) the costs and the benefits of removing or mitigating that hazard or risk”.

The Occupational Health and Safety Act has a nearly identical definition of same in s 1(1) and requires in s 8(1) from an employer to “provide and maintain, as far as is reasonably practicable, a working environment that is safe and without risk to the health of his employees.”

## 2. SOUTH AFRICA

Spoor argued that administrative sanctions are the only mechanisms available to South African employees, whereby an employer who breaches the duty of care owed to his employees can be held accountable.<sup>5</sup> Spoor contends that the bar on common law litigation has a number of consequences including the lack of development of case law to determine the content and meaning of the employer's duty of care, infrequent prosecutions for contravention of the employer's general duty of care with no precedents and no developed law on what such duties entail. COIDA excludes the civil justice system, by virtue of the provisions of section 35 of the Act, from playing its rightful role in ensuring accountability.<sup>6</sup>

Although compensation for diseases in mines had been part of the compensatory legislation for roughly one century, delictual claims for lung diseases were not pursued prior to the significant judgment by the Constitutional Court in *Mankayi* (CC) concerning occupational diseases compensated under the Occupational Diseases in Mines and Works Act 78 of 1973 (ODIMWA).

### 2.1. Statutory provisions absolving an employer from liability

No right to institute a common law claim for damages against an employee's employer for negligently causing harm in cases of injuries and/or diseases in respect of which eligibility for statutory compensation prevails will arise by virtue of COIDA because of the working of section 35 which reads as follows:

#### **35. Substitution of compensation for other legal remedies**

- (1) No action shall lie by an employee or any dependant of an employee for the recovery of damages in respect of any occupational injury or disease resulting in the disablement or death of such employee against such employee's employer, and no liability for compensation on the part of such employer shall arise save under the provisions of this Act in respect of such disablement or death.
- (2) For the purposes of subsection (1) a person referred to in section 56(1)(b), (c), (d) and (e) shall be deemed to be an employer.

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<sup>5</sup> Spoor, R. 2009. *22<sup>nd</sup> Annual Labour Law Conference*. The Employers Duty of Care: Responsibility without accountability is not responsibility at all. Retrieved on 20/02/2013 from [http://www.lexisnexis.co.za/pdf/3.0\\_THE%20EMPLOYERS%20DUTY%20OF%20CARE.pdf](http://www.lexisnexis.co.za/pdf/3.0_THE%20EMPLOYERS%20DUTY%20OF%20CARE.pdf).

<sup>6</sup> *Ibid* 5.

The deeming provision of section 35(2) extends the protection afforded to employers to the following categories of employees in terms of section 56(1):

- (1). If an employee meets with an accident or contracts an occupational disease which is due to the negligence-
  - (a) of his employer;
  - (b) of an employee charged by the employer with the management or control of the business or of any branch or department thereof;
  - (c) of an employee who has the right to engage or discharge employees on behalf of the employer;
  - (d) of an engineer appointed to be in general charge of machinery, or of a person appointed to assist such engineer in terms of any regulation made under the Minerals Act, 1991 (Act No. 50 of 1991); or
  - (e) of a person appointed to be in charge of machinery in terms of any regulation made under the Occupational Health and Safety Act, 1993 (Act No. 85 of 1993),

the employee may, notwithstanding any provision to the contrary contained in this Act, apply to the commissioner for increased compensation in addition to the compensation normally payable in terms of this Act.

These two sections effectively abrogated the right to institute a civil claim in a court of law and replaced it with an administrative process except for third parties and persons not included in the definitions of an employee or employer.<sup>7</sup> COIDA determines that compensation does not form part of the estate of an employee;<sup>8</sup> and the Act does not specifically bar a claim by an employees' estate against his employer which leaves open the question as to the right in respect of a delictual claim for damages by a deceased employees' estate against the employer.

The definition of dependants of a deceased employee, discussed in the previous Chapter, has not been interpreted by the courts. However, it is clear the child of a deceased employee, who is older than 18 years at the time of the fatal accident killing his parent, does not have a claim for statutory compensation; and it is submitted that it is unclear whether a delictual claim for damages is open to him.<sup>9</sup> If the correct interpretation of the definition in section 1(xv)(e) of COIDA holds that

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<sup>7</sup> Chapter 5 *supra*.

<sup>8</sup> "34. Compensation in terms of this Act owing to the death of an employee shall not form part of his estate."

<sup>9</sup> Chapter 5 para 2.1 *supra*.

such a child is included as a dependent of the deceased at all times, it may result in an inequality that is unfair and discriminatory because the basis of workers' compensation is a *quid pro quid* scheme according to which the employee and his dependents give up the right to common law redress in exchange for an administrative no-fault remedy, which remedy is not open to persons not included within the definition.

Claims against third parties are expressly preserved by virtue of section 36:

**36. Recovery of damages and compensation paid from third parties**

- (1) If an occupational injury or disease in respect of which compensation is payable, was caused in circumstances resulting in some person other than the employer of the employee concerned (in this section referred to as the "third party") being liable for damages in respect of such injury or disease-
- (a) the employee may claim compensation in terms of this Act and may also institute action for damages in a court of law against the third party; and
  - (b) the Director-General or the employer by whom compensation is payable may institute action in a court of law against the third party for the recovery of compensation that he is obliged to pay in terms of this Act..

In cases of negligent and wrongful conduct by an employer or if the employer knowingly fails to correct patent defects present in premises, works, plants or machinery, the harmed employee has an option to institute a claim for increased compensation by virtue of section 56 but the standard of proof is the historical requirements applicable to common law claims that so very often resulted in failed claims before the enactment of workers' compensatory legislation. Negligence by an employer should be distinguished from deliberate conduct by the employer harming an employee which will not save the employer from liability as was shown in the case of *Kau v Fourie* discussed *supra*.<sup>10</sup>

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<sup>10</sup> *Kau v Fourie* discussed *supra* at Chapter 4 para 2.2.5.



## 2.2. Interpretation through case law: Constitutional challenges

### 2.2.1. *Jooste v Score Supermarket Trading (Pty) Ltd (Minister of Labour Intervening)*

The Constitutional Court ruled on the constitutional validity of section 35 in an equality challenge in *Jooste v Score Supermarket Trading (Pty) Ltd (Minister of Labour Intervening)*<sup>11</sup> pursuant to the Interim Constitution.<sup>12</sup> The Applicant argued that section 35(1) of COIDA needs to be viewed independently from the rest of the Act as it does not form an essential part of the Act; and no reason exists as to why a negligent employer need not pay assessments in terms of the Act and compensate delictual damages.<sup>13</sup>

The equality challenge (which was not based on a listed ground)<sup>14</sup> was answered by deciding whether section 35 of COIDA is rationally connected to a legitimate government purpose; and if not, whether it constitutes unfair discrimination against employees as section 35(1) undoubtedly differentiates between employees and non-employees.<sup>15</sup> The Court considered the context in which the right to a delictual recourse is barred in the light of the historical development of compensatory law taking into account the purpose of COIDA;<sup>16</sup> and compared the position of a person exercising his right to a civil justice claim to that of an employee who exercises an administrative remedy available under COIDA.<sup>17</sup> Counsel for the Applicant admitted that an employee will have “the best of both worlds” if the right to COIDA compensation is extended by a further right to common law damages.<sup>18</sup> The Full Bench of the Constitutional Court refused to be drawn into what it considered to be a policy decision which rests with Parliament and not courts.<sup>19</sup> The Court

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<sup>11</sup> This case was also discussed with reference to the purpose of workers' compensatory legislation in Chapter 3 para 3.2.1 of this study.

<sup>12</sup> *Jooste* [5] & [9].

<sup>13</sup> *Ibid* [15].

<sup>14</sup> S 8(2) of the Interim Constitution.

<sup>15</sup> *Jooste* [11].

<sup>16</sup> *Ibid* [12].

<sup>17</sup> *Ibid* [13].

<sup>18</sup> *Ibid* [15].

<sup>19</sup> *Ibid* [16].

considered American, Canadian<sup>20</sup> and German case law and held the differentiation not to be arbitrary, irrational or discriminatory in nature as:<sup>21</sup>

The legislature clearly considered that it was appropriate to grant to employees certain benefits not available at common law. The scheme is financed through contributions from employers. No doubt for these reasons the employee's common law right against an employer is excluded. Section 35(1) of the Compensation Act is therefore logically and rationally connected to the legitimate purpose of the Compensation Act, namely, a comprehensive regulation of compensation for disablement caused by occupational injuries or diseases sustained or contracted by employees in the course of their employment.<sup>22</sup>

The question whether section 35 infringes the Applicant's right of access to the courts was left unanswered due to the approach taken by the Applicant *in casu*.<sup>23</sup>

The *Report of the Committee of Inquiry into a Comprehensive System of Social Security for South Africa: Transforming the Present – Protecting the Future*<sup>24</sup> took note of the *Jooste* ruling; and raised the possibility of a combined model of a no-fault workmen's compensation scheme coupled with a fault-based common law system of employer's liability in which double compensation is prevented but provision be made for full coverage like pain and suffering currently excluded from statutory compensation.<sup>25</sup>

### 2.2.2. *Mlomzale v Mizpah Boerdery (Pty) Ltd*

The constitutional validity of section 35 was also attacked in *Mlomzale v Mizpah Boerdery (Pty) Ltd*,<sup>26</sup> a case in which the earlier decision of *Pettersen v Irvin and Johnson Ltd* 1963 (3) SA 255 (C) was both approved and applied.<sup>27</sup> The Plaintiff contended that the statutory compensation comprises only of pecuniary loss and

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<sup>20</sup> Reference re.

<sup>21</sup> *Jooste* [16]-[18].

<sup>22</sup> *Ibid* [16].

<sup>23</sup> *Ibid* [21].

<sup>24</sup> Taylor Report 115.

<sup>25</sup> *Ibid* 115-116.

<sup>26</sup> *Mlomzale v Mizpah Boerdery (Pty) Ltd* 1997 (1) SA 790 (C). Hereinafter: *Mlomzale*.

<sup>27</sup> *Ibid* 794 E-I.

therefore general damages ought to be still available.<sup>28</sup> Mitchell AJ interpreted section 7 of the 1941 Act which essentially mirrored section 35 of COIDA, and held that “compensation” refers to statutory compensation while “damages” designates a wider notion inclusive of general damages rendering the *Pettersen* ruling convincing.<sup>29</sup>

The Court was unconvinced that section 7 of the 1941 Act constituted an “unjustifiable infringement of the plaintiff’s rights.”<sup>30</sup> Compensation is protected against attachment and proportional reduction due to contributory negligence by the employee.<sup>31</sup> Furthermore, compensation is protected against the inability of an employer to recompense because compensation is paid from a fund in the form of insurance benefits funded by the employer’s monetary contributions.<sup>32</sup> The Court refrained from a finding of unconstitutionality *inter alia* because the Constitution does not have retrospective effect and the claim pre-dated the Constitution.<sup>33</sup> The employer was not held liable for damages irrespective he omitted to register with the Commissioner and failed to duly report the claim to the Commissioner; but a different ruling was possible had the employee showed that the employer’s omissions frustrated the employee’s claim for COIDA compensation.<sup>34</sup>

### 2.2.3. *Mankayi v Anglogold Ashanti Ltd*

The Full Bench of the Constitutional Court overturned the SCA’s judgment in a legal paradigm-shifting judgment in *Mankayi* (CC), challenging the applicability of COIDA’s section 35 to ODIMWA claimants although they are not entitled to claim pursuant to COIDA.<sup>35</sup>

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<sup>28</sup> *Ibid* 794 C–D.

<sup>29</sup> *Ibid* 794 I.

<sup>30</sup> *Ibid* 794 C–D.

<sup>31</sup> *Ibid* 794 D.

<sup>32</sup> *Ibid* 794 E.

<sup>33</sup> *Ibid* 794 G–H.

<sup>34</sup> *Ibid* 795 D–E.

<sup>35</sup> *Ibid* [1]. The SCA noted in *Mankayi* (SCA), the history as: The Transvaal Workmen’s Compensation Act 36 of 1907 explicitly preserved an employee’s common law right to claim damages from his employer arising from personal injury and dependent upon an irreversible selection by the worker whether to proceed at common law or claim statutory compensation. The Workmen’s Compensation Act 25 of 1914 provided for a similar irrevocable elective process. The 1934 Act removed the right of an employee to institute a common law claim for

The Constitutional Court isolated two main aspects for decision in respect of Mankayi's contentions, being<sup>36</sup> whether:

- [6.1] the word "employee" in section 35(1) of COIDA includes employees covered by ODIMWA, notwithstanding that they are barred from claiming benefits under COIDA; and
- [6.2] the abrogation of the common law right of action envisaged by section 35(1) of COIDA applies to Mr Mankayi.

The Court proceeded by considering the history of compensatory legislation in South Africa regarding the two sets of legislation which respectively provide for compensation pertaining to certain occupational diseases under ODIMWA,<sup>37</sup> as well as compensation pertaining to occupational injuries and diseases under COIDA<sup>38</sup> similarly to the SCA.<sup>39</sup>

The Appellant argued that although he indeed fulfils the definition of an employee pursuant to COIDA,<sup>40</sup> section 35(1) only affects him regarding claims under COIDA. The Respondent argued that a plain reading of section 35(1) extinguishes an employee's common law right to sue his employer in respect of "any" disabling occupational disease.<sup>41</sup> The Court dismissed this argument and interpretation that was accepted by the courts *a quo* as untenable.<sup>42</sup>

The Court accepted that a plain reading of the definition of an "employee" in COIDA applies to persons like the Appellant working on controlled mines and works<sup>43</sup> and that under certain circumstances the definitions "employee" and "employer" in

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damages against his employer in exchange for a no-fault administrative remedy. Section 5 introduced a claim for increased compensation, open to an employee if the accident was "*due to*" the employer's negligence. The compensation system was reformed with the founding of a central fund to which employers contributed and from which employees were compensated by virtue of the 1941 Act with section 7 extinguishing the employee's right to a common law remedy. *Mankayi* (SCA) at [14]–[17].

<sup>36</sup> *Mankayi* (CC) [3]–[5].

<sup>37</sup> Chapter 2 paras 3.3; 3.4; 3.5 & 6 *supra*.

<sup>38</sup> Chapter 2 paras 3.3 & 3.4 *supra*.

<sup>39</sup> *Mankayi* (CC) [25]–[59].

<sup>40</sup> Solely because if he sustained an injury or contracted a disease for which ODIMWA does not provide, he will have a claim in terms of COIDA. *Mankayi* (CC) at [69].

<sup>41</sup> *Mankayi* (CC) [69].

<sup>42</sup> *Ibid.*

<sup>43</sup> ODIMWA is only applicable to "controlled mines and works".

COIDA may include their counterparts in ODIMWA.<sup>44</sup> The diseases contracted by Mankayi are compensable diseases under both ODIMWA and COIDA but by virtue of section 100(2)<sup>45</sup> of ODIMWA, Mankayi is constrained to a claim under ODIMWA.<sup>46</sup> Although the Constitutional Court accepted this interpretation of the definition of “employee”, the Court held it “cannot refer to employees who cannot benefit under that legislation”<sup>47</sup> or to an “employee” in section 35(1).<sup>48</sup>

The Court held that sections 100(1) and (2) separate rightful claimants under ODIMWA from rightful claimants under COIDA; and while section 100(2) removes the right to compensation pursuant to COIDA, it is unable to simultaneously render section 35(1) applicable to an ODIMWA claimant. The purpose of section 100(2) is to prevent double compensation to one claimant for the same disease under both ODIMWA and COIDA.<sup>49</sup> The honourable Court criticised the reasoning of the SCA by finding:<sup>50</sup>

COIDA is the principal Act, which sets out the generally applicable provisions, while ODIMWA deals with special circumstances without diminishing those principles, and that the limitation contained in section 35(1) is of general application.

Three reasons are given *in casu* by the Court:<sup>51</sup>

- a general principle cannot be applicable to a person who has been removed from its ambit;
- COIDA and ODIMWA deal differently with compensation; and
- the clear wording of section 35(1) of COIDA.

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<sup>44</sup> *Mankayi* (CC) [72].

<sup>45</sup> “100(2) Notwithstanding anything in any other law contained, no person who has a claim to benefits under this Act in respect of a compensable disease as defined in this Act, on the ground that such person is or was employed at a controlled mine or a controlled works, shall be entitled, in respect of such disease, to benefits under the Workmen’s Compensation Act, 1941 (Act 30 of 1941) or any other law.”

<sup>46</sup> *Mankayi* (CC) [73].

<sup>47</sup> *Ibid* [76].

<sup>48</sup> *Ibid*.

<sup>49</sup> *Ibid* [77].

<sup>50</sup> *Ibid* [77]–[78].

<sup>51</sup> *Ibid* [78].

The Court then compared benefits and compensatory regimes in the two Acts and found an employee compensated under COIDA to be in a much better position than his counterpart who is compensated in terms of ODIMWA.<sup>52</sup> An ODIMWA claimant benefits less than a claimant under COIDA and consequently lower levies are raised from employers by the ODIMWA fund.<sup>53</sup> It did not surprise then, that ODIMWA is silent on the right to a delictual claim because the “drastic reduction in his compensation is obligatory.”<sup>54</sup>

Khampepe J noted that on a plain reading of section 35(1) of COIDA the significant absence of any reference to ODIMWA, although ODIMWA was enacted more than twenty years prior to COIDA.<sup>55</sup> Section 35(1) creates two interconnected outcomes; firstly it extinguishes the right of an employee to claim damages against his employer, and secondly it confines the employer’s liability to payment of compensation pursuant to COIDA.<sup>56</sup> The two parts of the sentence cannot be disengaged by holding that the first part only applies to extinguish the employee’s right to claim damages (in terms of both COIDA and ODIMWA) while the second part only applies to an employer’s liability pursuant to COIDA.<sup>57</sup>

Although the Constitutional Court agreed with the interpretation of the SCA regarding section 4 of the 1934 Act and section 7 of the 1941 Act,<sup>58</sup> it considered the *Petterson* ruling<sup>59</sup> as of limited value, as it did not deal with the claim of an employee who had no right to claim compensation under the 1941 Act as in *Mankayi’s* case.<sup>60</sup> The Court refused to accept that section 35(1) of COIDA could by implication quench the right to a delictual claim under ODIMWA as it would be “extraneous and cumbersome, but constitutes an unjustified imposition on the wording.”<sup>61</sup> Furthermore, contextually section 35(1) is placed within Chapter IV which explicitly regulates the way in which COIDA compensation should be

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52 *Ibid* [79]–[87].

53 *Ibid* [88].

54 *Ibid*.

55 *Ibid* [91].

56 *Ibid* [92].

57 *Ibid* [93].

58 *Ibid* [95].

59 Applied by the SCA.

60 *Mankayi* (CC) [96]–[98].

61 *Ibid* [102].

handled<sup>62</sup> while no reference is made to ODIMWA, the diseases it compensates or is open to the inclusion of ODIMWA employees.<sup>63</sup> While ODIMWA similarly directs how compensation is to be dealt with, it does not have any provision mirroring section 35(1).<sup>64</sup> The dissimilarity is even more noticeable considering that COIDA provides for increased compensation due to an employer's negligence but ODIMWA does not, which leaves the ODIMWA claimant in a lesser position and the two Acts distinctive.<sup>65</sup>

The judgment acknowledged the enormous contribution made by mining to the economy of the Republic on account of mine workers' health and the consequential impact upon families and communities in general.<sup>66</sup>

It is respectfully submitted that the Constitutional Court correctly ruled in this matter taking into consideration the requirement of monetary contributions expected from mine workers at the inception of compensation for lung diseases in mining referred to in Chapter 2 of this study.<sup>67</sup> It is furthermore respectfully proposed that the judgment renders the argument of the Defendant correct<sup>68</sup> in that it places mine workers in a different and possibly better position in respect of the right to institute delictual claim(s) against their employer in comparison to employees in other industries who are exclusively dependant on COIDA; with section 35(1) of COIDA previously held by the Constitutional Court to validly preclude the right to claim delictually.<sup>69</sup>

It is suggested that the financial and legal impact flowing from this case will be felt in years to come as class action litigation has already commenced in a format that has not been seen in South Africa before. The proverbial floodgates have been opened if initial indications prove to be true, with at least three law firms representing an estimated 25 000 employees and dependents of deceased workers

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<sup>62</sup> *Ibid* [103].

<sup>63</sup> *Ibid* [103]–[105] & [113].

<sup>64</sup> *Ibid* [106].

<sup>65</sup> *Ibid* [107]–[108].

<sup>66</sup> *Ibid* [23] & [109]–[110].

<sup>67</sup> Chapter 2 para 3.3 & Chapter 2 fn 127–129 *supra*.

<sup>68</sup> *Mankayi* (CC) [74].

<sup>69</sup> *Jooste supra*.

who died as a result of silicosis.<sup>70</sup> The financial impact of the claims becomes evident considering potentially 200 000 claimants from the SADC region with an estimated monetary value of R1 000 000 each in actions against 78 gold mines for the period of 1965 until present.<sup>71</sup> Judgment against the mining companies might render the companies financially vulnerable; but as discussed *supra* in this study, due to the difficulties in proving negligence and claiming damages from employers, claimants may not be able to recover damages.

### 2.3. Interpretation through case law: Applicability of statutory provisions

#### 2.3.1. *Van De Venter v MEC of Education: Free State Province*

The question arises as to whether unique factual circumstances surrounding an accident and/or injury may squash the applicability of section 35 and/or may create a right to a civil justice claim.

The Free State High Court (as it was known then) answered the question in the negative in the still unreported case of *Van De Venter v MEC of Education: Free State Province*.<sup>72</sup> The Court considered the definitions of an “occupational injury” and “an accident arising out of and in the course of an employee’s employment..” and held:<sup>73</sup>

...There is no magic in any of the two definitions. The crux of both definitions is to be found in the words personal injury. The injury which the applicant sustained during the course of the robbery was and remains an occupational injury. ... The provisions of the particular legislation have to be generously construed in favour of employees. Whether doing so is good or bad remains a debate for another day.

[41] It follows, therefore, that any personal injury sustained by an employee caused by any criminal act arising out of and during the course of an employee’s employment amounts to an accident as defined in section 1.

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<sup>70</sup> Bloomberg. 2013. *Lawyers in talks to merge mine silicosis lawsuits*. Retrieved on 07/03/2013 from <http://www.moneyweb.co.za/moneyweb-mining/lawyers-in-talks-to-merge-south-african-mine-silic>. See also Kolver, L. 2012. *Anglo case should strongly influence future silicosis claims – lawyer*. Retrieved on 07/03/2013 from <http://www.miningweekly.com/article/anglo-case-should-strongly-influence-future-silicosis-claims-lawyer-2012-12-07-1>.

<sup>71</sup> *Ibid*.

<sup>72</sup> *Van De Venter v MEC of Education: Free State Province* (3545/2010) [2012] ZAFSHC 185 at [40]–[44]. Hereinafter: *Van De Venter*.

<sup>73</sup> *Ibid* [40]–[41].



Section 35(1) precludes a delictual claim irrespective whether the employer “wrongfully neglected to ensure that the applicant was employed in a reasonably safe environment”;<sup>74</sup> and the constitutional validity of section 35 has been confirmed by the Constitutional Court in *Jooste*.<sup>75</sup> Safe working conditions do not create an absolute duty of care and is measured against community policy<sup>76</sup> and the conduct of the employee<sup>77</sup> who breached some of the protective measures instituted by the employer.<sup>78</sup>

### **2.3.2. Free State Consolidated Gold Mines Bpk h/a Western Holdings Goudmyn v Labuschagne**

The Labour Appeal Court ruled in *Free State Consolidated Gold Mines Bpk h/a Western Holdings Goudmyn v Labuschagne*,<sup>79</sup> an appeal from a decision by the Industrial Court, in which Labuschagne<sup>80</sup> contended that the employer committed an unfair labour practice when the employer redeployed him irrespective of his back condition of which the employer was aware, on a crane which was difficult for him to handle. The employee expressed his disapproval to the redeployment.<sup>81</sup> Remedies in the form of damages tailored as an application for unfair dismissal and unfair labour practice were pleaded in the Court below *verbatim*:

7.1.2 *Dat die agbare hof sal vind dat die respondent direk verantwoordelik was vir die mediese toestand en agteruitgang van die applikant en skadevergoeding sal toestaan om die applikant se finansiële posisie te herstel in terme van skade wat gelei [sic] is ondermeer finansiële skade, vermoenskade en toekomstige skade, soos wat in die hof voorgelê sal word.*

7.1.3 *Dat die hof enige mediese hulp wat aan die applikant verleen kan word sal toestaan en ook enige hulp [wat] alreeds verleen is sal hersien en ook verdere hulp sal toestaan en bepaal.*

7.1.4 *Dat die respondent die applikant se finansiële posisie in oënskou neem en herstel tot op die vlak van wat dit was voor die beëindiging van diens.*

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<sup>74</sup> *Ibid* [45].

<sup>75</sup> *Ibid* [45].

<sup>76</sup> *Ibid* [48] & [50].

<sup>77</sup> *The Applicant in casu*.

<sup>78</sup> *Van De Venter* [51].

<sup>79</sup> *Free State Consolidated Gold Mines Bpk h/a Western Holdings Goudmyn v Labuschagne* (1999) 20 ILJ 2823 (LAC). Hereinafter: *Labuschagne*. Retrieved on 26/05/2012 from <http://heionline.org>.

<sup>80</sup> The employee.

<sup>81</sup> *Labuschagne* [1], [11]–[12].

7.1.5 *Dat die applikant vergoed word vir verliese gely tydens die beëindiging van sy diens en ook daarna, asook wat in die toekoms mag volg.*

7.1.6 *Enige ander kompensasie wat die hof in ag sou neem.*

7.1.7 *Enige alternatiewe verligting wat die hof as geskik sou aanvaar.*<sup>82</sup>

(See footnote 82 for English translation).

The Court held that the employer is indemnified from **all** liabilities<sup>83</sup> by virtue of section 35 of COIDA even if the employer acted blameworthy, the provisions of COIDA's section 35 cannot be avoided by masking it as an unfair labour practice.<sup>84</sup>

#### 2.4. Fault-based claims: Delictual claims

It does not fall within the scope of this study to fully examine the law relating to claims for delictual damages but it will be prudent to give attention to some aspects that are of importance in the consideration of these types of claims; and more importantly to note that it is fault-based while workers' compensatory schemes are distinguishable by the no-fault principle.

According to Neethling,<sup>85</sup> a delict may be defined as "the act of a person that in a wrongful and culpable way causes harm to another". All of five elements<sup>86</sup> have to be satisfied before a claimant will have a valid claim which comprises of:

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<sup>82</sup> *Ibid* [2]. Translated into English it means: 7.1.2 That the honourable court will find that the respondent was directly responsible for the medical condition and deterioration of the applicant and will grant damages to restore the applicant's financial position in order to recover damages suffered, including financial damages, pecuniary loss and future loss, as will be presented to the court.

7.1.3 That the court will grant any medical assistance to the applicant that may be granted as well as review of any assistance already given and will determine and grant further assistance.

7.1.4 That the respondent will consider the applicant's financial position and restore to the level prior to the termination of employment.

7.1.5 That the applicant be compensated for losses suffered at the termination of employment and thereafter, as well as future losses.

7.1.6 Any other compensation that the court would take into consideration.

7.1.7 Any alternative relief that the court would accept as appropriate.

<sup>83</sup> The Court held in *Labuschagne* at [14] that s 35 specifically relieves the employer of all delictual liabilities and not only damage items specified in the Act.

<sup>84</sup> *Labuschagne* [13]–[14].

<sup>85</sup> Neethling, J, Potgieter, JM, Visser, PJ. 2006. *Law of Delict*. 5<sup>th</sup> edition. Durban: Lexisnexis Butterworths. At 4.

<sup>86</sup> The five elements: conduct, wrongfulness, fault, causation and damage. See Neethling *et al* 4.

- **Conduct:** a voluntary *commissio* or an *omissio* but liability for an omission will arise only where a positive duty to act exists.<sup>87</sup>
- **Wrongfulness:** the conduct complained of must be legally reprehensible and is tested according to the legal convictions (*boni mores*) of society.<sup>88</sup>
- **Fault:** once the wrongfulness of the conduct is proven,<sup>89</sup> it is essential to establish whether the defendant acted intentionally (with *dolus*)<sup>90</sup> or negligently (*culpa*),<sup>91</sup> either of which is adequate for liability to attach.<sup>92</sup>
- **Causation:** a *nexus* needs to be established between the conduct and the harm caused; in this regard both factual causation<sup>93</sup> and legal causation are considered.<sup>94</sup> The purpose of legal causation is to limit the scope of factual causation.<sup>95</sup> If the consequence of the action is “too remote” to have been foreseen by an objective, reasonable person, the defendant will be saved from liability.<sup>96</sup>
- **Damage:** the action must have resulted in loss or harm to the claimant in a form considered to be worthy of legal protection.<sup>97</sup> Damages may take the form of patrimonial loss<sup>98</sup> or non-patrimonial damages.<sup>99</sup>

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<sup>87</sup> Neethling *et al* 25–26.

<sup>88</sup> *Ibid* 33–36.

<sup>89</sup> Except for in limited cases of strict liability which requires neither intention nor negligence as a prerequisite for liability.

<sup>90</sup> Wilfulness is satisfied when a person acts with the desire to bring about harmful consequences and is substantially certain that such consequences will follow. Accountability is a prerequisite for fault: to be at fault, the defendant must be *culpa capax*, having the ability to know the difference between right and wrong and to act accordingly. Neethling *et al* 118–120.

<sup>91</sup> The “reasonable person” sets an objective standard for negligence according to Neethling *et al* 127–130.

<sup>92</sup> Neethling *et al* 117.

<sup>93</sup> Factual causation is determined by considering the available facts and relevant probabilities by applying a variety of theories according to Neethling *et al* 165–177.

<sup>94</sup> Neethling *et al* 165.

<sup>95</sup> Neethling *et al* 178. Applying legal causality it is determined which of different harmful consequences following a harmful event, ought to be attached to the “tortfeasor.”

<sup>96</sup> Neethling *et al* 178–180. The SCA expressly applied in *S v Mokgethi* 1990 1 SA (A) [40]–[41] preference for a flexible text based on reasonableness, fairness and justice, or policy and normative considerations in determining legal causality. The High Court at [55] and the SCA at [17] found the conduct of the co-workers (by shooting at the vehicle in which Rieck was held hostage) in the two *Rieck* rulings (discussed *supra*) as contradicting the reasonable person’s conduct in similar circumstances.

<sup>97</sup> Neethling *et al* 204.

<sup>98</sup> Actual and prospective monetary loss, i.e. where the claimant incurred medical expenses and loss of earning capacity.

<sup>99</sup> Damages that do not form part of a person’s financial estate, but inclusive *inter alia* of compensation (solace or satisfaction for pain and suffering). See Neethling *et al* 204–207.

Furthermore, it will be necessary to consider the influence of the Apportionment of Damages Act No. 34 of 1956<sup>100</sup> and the Prescription Act No. 68 of 1969. Pursuant to section 12(1) of the Prescription Act, prescription will start running<sup>101</sup> as soon as the debt is due except when the creditor is being held in the dark as to the existence of the debt in which case prescription will only commence when the claimant becomes aware or reasonably ought to have known of the existence of the debt.<sup>102</sup> A debt only becomes due when a complete cause of action is established and all evidentiary facts have been established.<sup>103</sup>

It is submitted that irrespective of the outcome of the silicosis delictual claims, the mining industry will have to improve current preventative measures to protect the health and safety of mine employees. It has been known for more than a century that dusty atmospheric conditions may lead to fibrotic changes in the lungs which with time lead to silicosis; and a person suffering from silicosis to be more susceptible of contracting tuberculosis known already then as the dual condition of “silico-tuberculosis” or “tuberculo-silicosis”.<sup>104</sup>

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<sup>100</sup> S1(1)(a) provides as that “Where any person suffers damage which is caused partly by his own fault and partly by the fault of any other person, a claim in respect of that damage shall not be defeated by reason of the fault of the claimant, but the damages recoverable in respect thereof shall be reduced by the court to such extent as the court may deem just and equitable having regard to the degree in which the claimant was at fault in relation to the damage” and s 2: “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.”

<sup>101</sup> **“12. When prescription begins to run**

(1) Subject to the provisions of subsections (2) and (3), prescription shall commence to run as soon as the debt is due.

(2) If the debtor wilfully prevents the creditor from coming to know of the existence of the debt, prescription shall not commence to run until the creditor becomes aware of the existence of the debt.

(3) A debt shall not be deemed to be due until the creditor has knowledge of the identity of the debtor and of the facts from which the debt arises: Provided that a creditor shall be deemed to have such knowledge if he could have acquired it by exercising reasonable care.”

<sup>102</sup> S 12(2). Also Visser, PJ, Potgieter, JM, Steynberg, L, Floyd, TB. 2008. *Skadevergoedingsreg*. 2<sup>nd</sup> edition. Cape Town: Juta and Company Ltd. At 141. Hereinafter: Visser *et al*.

<sup>103</sup> Visser *et al* at 1.3.1 in the case of *Coetzee v SA Railways & Harbours* 1933 CPD 565 where the Court cited from *Abrahamse & Sons (Pty.) Limited v S.A. Railways and Harbours* (1933 C.P.D. 626): “The proper legal meaning of the expression “cause of action” is the entire set of facts which gives rise to an enforceable claim, and includes every fact which is material to be proved to entitle a plaintiff to succeed in his claim. It includes all that a plaintiff must set out in his declaration in order to disclose a cause of action.”

<sup>104</sup> See Chapter 2 para 3.3. and *ILO Silicosis Conference Report* 216.

The South African Minister of Mines in the Union Government appointed a committee in 1912 to explore:<sup>105</sup>

the elaboration, introduction, and operation of a uniform and systematic standard of the practical methods which should be applied to every form of mining work in detail, both in regard to general and local ventilation and to dust prevention, in order to combat at every point the conditions which produce miners' phthisis.

The Committee reported back in 1916 on the conditions and specifically mining activities that were found to be the most hazardous in creating conditions leading to silico-tuberculosis. In particular rock-drill operators were frequently exposed to conditions described as "nothing less than appalling."<sup>106</sup> Some of the preventative measures identified by the Committee e.g. ventilation, the use of water to wet down and containment of dust and infection control are still applied presently *albeit* methods have been refined and modernised.<sup>107</sup>

The standard of care owed by an employer to his employees is reasonableness; and it is submitted that mining companies have clearly been aware of the duty of care owed to their employees for a very long time and had the knowledge and means to prevent dreaded diseases in relatively easy and inexpensive ways rendering prevention reasonable in the circumstances.

## **2.5. Interpretation through case law: Claims for increased compensation**

Section 56 of COIDA<sup>108</sup> provides for increased compensation due to the negligence of the harmed employee's employer or certain categories of employees in the same enterprise who are included in the definition.<sup>109</sup> It has been a concern for a long

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<sup>105</sup> United States of America. Bureau of Labor Statistics. 1917. Miner's Phthisis on the Witwatersrand, Transvaal. *Monthly Review of the Bureau of Labor Statistics* 4: 102–105. Retrieved on 02/03/2013 from <http://heionline.org>.

<sup>106</sup> *Ibid.*

<sup>107</sup> *Ibid.*

<sup>108</sup> See also s 43 of the 1941 Act.

<sup>109</sup> COIDA s 56(1) cited *supra* in this Chapter at 1.1. and 1941 Act s 43(1).

time that this provision is not utilised by employees. Benjamin<sup>110</sup> described the number of claims instituted for increased compensation as “few and far between” and of a “miniscule proportion of cases handled by the commissioner”, referring to the ten years preceding February 1985 seeing only 156 claims instituted of which only 30 succeeded.<sup>111</sup> 1985 saw 24 891 injuries reported (2 334 mortalities and 1 081 categorised as seriously disabling) but only 27 claims lodged for increased compensation and only 4 were successful.<sup>112</sup> Benjamin attributed it to relative ignorance and a lack of access to investigation records held by the two inspectorates, which consequently do not lead to improved safety and health at workplaces.<sup>113</sup>

Similar sentiments were aired in a recent article asking whether this provision is “serving its intended purpose?” if only a few claims succeed.<sup>114</sup> The authors see the answer in the negligence-based rules that pre-dated compensatory legislation and necessitated enactment of compensatory laws, as it has historically “been proven that many injured workers tend to go uncompensated under negligence-based compensation rules.”<sup>115</sup>

The last Annual Report of the Compensation Fund reporting on the outcome of section 56 claims was the 2004/2005 Annual Report and the first available Report is the 2001/2002. The period 2001 to 2005 is therefore used for the purposes of analysing the trends in dealing with these claims.<sup>116</sup>

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<sup>110</sup> Benjamin, P. 1987. Additional Compensation for Accidents at Work: An Underutilized Remedy. *Indus. L.J.* 8: 15–20. Retrieved on 15/04/2012 from <http://heinonline.org>.

<sup>111</sup> *Ibid.*

<sup>112</sup> *Ibid.*

<sup>113</sup> *Ibid.*

<sup>114</sup> Mushai 10–12. (Chapter 2 fn 25).

<sup>115</sup> *Ibid.* 12.

<sup>116</sup> South Africa (Republic). Department of Labour. 2002. *Compensation Fund Annual Report 2001/2002*. Pretoria: Government Printing Works. At 11 & 16.

South Africa (Republic). Department of Labour. 2003. *Compensation Fund Annual Report 2002/2003*. Pretoria: Government Printing Works. At 14 & 22.

South Africa (Republic). Department of Labour. 2004. *Compensation Fund Annual Report 2003/2004*. Pretoria: Government Printing Works. At 15 & 30.

South Africa (Republic). Department of Labour. 2005. *Compensation Fund Annual Report 2004/2005*. Pretoria: Government Printing Works. At 18 & 36.

All retrieved on 12/08/2011 from <http://www.labour.gov.za/documents/annual-reports/annual-reports>.

**SECTION 56 CLAIMS**

Period :	2001/2002	2002/2003	2003/2004	2004/2005	TOTAL	AVERAGE
Total:	126	128	130	133	517	129.3
Withdrawn/ Abandoned:	18	7	5	28	58	14.5
Not lodged in pre- scribed manner:	7	11	6	30	54	13.5
Heard: Successful:	0	3	2	15	20	5
Heard: Dismissed:	5	7	2	0	14	3.5
Heard: Judgment Reserved:	2	0	0	1	3	0.75
Carried over from the previous year:	99	94	100	115	408	102
New applications received:	27	34	30	18	109	27.25
All Claims: Number of compensation awards:	45 236	42 693	53 781	42 668	184 378	46 095

It is submitted that an analysis of the numbers contained in the Annual Reports shows that on average 46 095 awards are made annually by the Fund in respect of permanent disablement which could indicate a serious injury or disease and an entitlement to institute a claim for increased compensation in cases of negligent exposure to harm but only a small fraction of claims for increased compensation are lodged annually (27.25). An even smaller number of the section 56 claims lodged are heard and a trifling number succeeds i.e. 5. The vast majority are either dismissed or repudiated for procedural reasons and even more are abandoned, possibly due to the extremely slow process prescribed by the Rules of the Commissioner that mimics the rules of civil procedure;<sup>117</sup> and tardy management of these matters resulting in lost evidence and loss of contact with claimants as is clear from the huge number carried over from year to year without being finalised.<sup>118</sup>

The Compensation Fund acknowledged the need for speedy finalisation of claims for increased compensation in the protection of vulnerable groups in its Strategic Plan 2013/4-2018/9 by aiming to finalise claims where the facts are undisputed within 60 days from receipt.<sup>119</sup>

<sup>117</sup> COIDA: GN 983 (Government Gazette 15785 of 27 May 1994): Rules, Forms and Particulars. Rule 1 of the Rules prescribes the procedure to be followed in exchanging pleadings by the parties.

<sup>118</sup> In this regard see also the administrative problems at the Compensation Fund discussed in Chapter 3 para 1.1.

<sup>119</sup> South Africa (Republic). Department of Labour. 2013. *Compensation Fund Strategic Plan 2013/4-2018/9*. Pretoria: Government Printing Works. At 18. Retrieved on 26/06/2013 from <http://www.labour.gov.za/documents/annual-reports/compensation-fund-strategic-plan-2012-2017/2013-2019/compensation-fund-strategic-plan-2013-2019>.

The low success rate is indicative of the high burden of proof on employees to prove the complete blameworthiness of the employer as any contributory negligence (pure contributory negligence)<sup>120</sup> by the employee renders a complete defence to the employer whereas comparative negligence only renders a partial defence.<sup>121</sup>

In the event of a successful claim, compensation is limited, with the maximum no-fault compensation limited to 75% of an injured worker's earnings at the time of the accident;<sup>122</sup> and section 56(4) limits the amount of increased compensation to:<sup>123</sup>

4 (a) If the Director-General is satisfied that the accident or occupational disease was due to negligence as referred to in subsection (1), he shall award the applicant such additional compensation as **he may deem equitable**.

(b) The amount of such additional compensation together with any other compensation awarded in terms of this Act **shall not exceed the amount of the pecuniary loss** which the applicant has in the opinion of the Director-General suffered or can reasonably be expected to suffer as a direct result of the said accident or occupational disease.

It is submitted that the remedial nature and purpose of compensatory legislation (as the Court said: "The policy of the Act is to assist workmen as far as possible")<sup>124</sup> is not consistent with the limiting effects of sections 35 and 56 of COIDA.

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<sup>120</sup> McKinnon, RC. 2013. *Changing the Workplace Safety Culture*. 17. Bosa Roca (USA): Taylor & Francis Inc. Retrieved on 24/07/2013 from [http://books.google.co.za/books?id=wlwDgL\\_I5hwC&pg=PA16&lpg=PA16&dq=history+of+south+african+workmen's+compensation+act+1941&source=bl&ots=gFAMrx9iXD&sig=UlkaveljMLA-s0IAVrkS2Egmuw&hl=en&sa=X&ei=ldzwUenOF9CDhQfd2IC4Ag&ved=0CDsQ6AEwAzgU#v=onepage&q=history%20of%20south%20african%20workmen's%20compensation%20act%201941&f=false](http://books.google.co.za/books?id=wlwDgL_I5hwC&pg=PA16&lpg=PA16&dq=history+of+south+african+workmen's+compensation+act+1941&source=bl&ots=gFAMrx9iXD&sig=UlkaveljMLA-s0IAVrkS2Egmuw&hl=en&sa=X&ei=ldzwUenOF9CDhQfd2IC4Ag&ved=0CDsQ6AEwAzgU#v=onepage&q=history%20of%20south%20african%20workmen's%20compensation%20act%201941&f=false).

<sup>121</sup> In *Fred Saber (Pty) Ltd v Franks* 1949 (1) SA 388 (A) the words "due to" in s 43(1) was construed to mean "caused by" and consequently the accident was "caused by the respondent's own negligence or if it was caused by the combined negligence of the appellant and the respondent, the respondent is not entitled to recover increased compensation..." as at 403.

<sup>122</sup> COIDA Schedule 4.

<sup>123</sup> COIDA s 56(4). Own emphasis. As COIDA is lacking policy documents, no published guidance is available in respect of the calculation of the monetary value in successful cases and it is distinguishable from delictual claims for damages which are accompanied by actuarial statements of claims.

<sup>124</sup> *Davis supra* at Chapter 3 para 3.2.2 *supra*.



### 2.5.1. *Looyen v Simmer and Jack Mines Ltd. and Another*

Interpretation of the right to claim increased compensation due to the negligence of the employer<sup>125</sup> led to a number of court cases after the promulgation of the 1941 Act seeking clarity on the categories of employees that would satisfy the provision e.g. in *Looyen v Simmer and Jack Mines Ltd. and Another*<sup>126</sup> in which a shift boss was held to be “in charge of ... any branch or department” of the employer’s business.<sup>127</sup> The relationship between the section removing the right to civil action and the right to increased compensation is stated as follows:<sup>128</sup>

There is no doubt that sec. 7 deprives the workmen ... of the right they otherwise would have to sue their employer for personal injury caused by his negligence or that of his servants acting in the course of their employment. There is equally, no doubt that sec. 43 applies to relieve the workmen ... of some of the disabling effect of sec. 7 ...

The Court noted that Parliament did not intend to restore common law liability entirely by covering accidents caused by co-workers who are not in authoritative positions but rather the intention is to hold the employer liable for increased compensation in cases where a person appointed to be in charge of a part of the business was negligent.<sup>129</sup>

### 2.5.2. *Grace v Workmen's Compensation Commissioner and Another*

The Court below found that a patent defect existed in the machine which the employer failed to rectify and caused Grace’s<sup>130</sup> hand to be severed, but it also held that contributory negligent conduct of the part of Grace was a direct or proximate cause of the accident.<sup>131</sup> The appeal turned around the question whether the Court below ought to have applied section 1(1) of the Apportionment of Damages Act in

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<sup>125</sup> S 43 of the 1941 Act and COIDA s 56.

<sup>126</sup> *Looyen v Simmer and Jack Mines Ltd. and Another* 1952 (4) SA 547 (A.D.). Hereinafter: *Looyen*.

<sup>127</sup> *Ibid* 557 B.

<sup>128</sup> *Ibid* 554 H–555 A.

<sup>129</sup> *Ibid* 557 A.

<sup>130</sup> The appealing employee.

<sup>131</sup> *Grace v Workmen's Compensation Commissioner and Another* 1967 (4) SA 137 (T) at 138 A–C. Hereinafter: *Grace*.

*Grace v Workmen's Compensation Commissioner and Another*<sup>132</sup> which provides as follows:<sup>133</sup>

- (a) Where any person suffers damage which is caused partly by his own fault and partly by the fault of any other person, a claim in respect of that damage shall not be defeated by reason of the fault of the claimant but the damages recoverable in respect thereof shall be reduced by the court to such extent as the court may deem just and equitable having regard to the degree in which the claimant was at fault in relation to the damage.
- (b) Damage shall for the purpose of paragraph (a) be regarded as having been caused by a person's fault notwithstanding that another person had an opportunity of avoiding the consequences thereof and negligently failed to do so.

The Transvaal High Court<sup>134</sup> contrasted the word "damages" as in the Apportionment of Damages Act to the word "compensation" in the 1941 Workmen's Compensation Act.<sup>135</sup> The Court followed the interpretation of section 43 by the Appeal Court in *Fred Saber (Pty) Ltd v Franks* 1949 (1) SA 388 (A)<sup>136</sup> as the decision is binding save it be shown that section 1(1) of the Apportionment of Damages Act (which had been promulgated since the *Fred Saber* ruling) effectively amended section 43 of the 1941 Act which would render the *Fred Saber* decision no longer applicable.<sup>137</sup> As a matter of general rule in interpretation of law, an earlier provision is amended by the later one if two provisions are inconsistent and irreconcilable.<sup>138</sup> Nicholas J held that the two provisions are not inconsistent because section 1(1) of the Apportionment of Damages Act only relates to claims for *damages* while section 43 of the 1941 Act only relates to claims for increased *compensation* which is "compensation" and not "damages", a distinction drawn by the Act itself as section 7 saves employers from claims for "damages".<sup>139</sup> The High

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<sup>132</sup> *Ibid* 138 C-E.

<sup>133</sup> The Apportionment of Damages Act s 1(1)(a) abolished the common law doctrine of contributory negligence whereby any portion of negligence by the claimant constitutes a complete defence and s 1(1)(b) abolished the so-called "last opportunity" rule whereby the person who has the last opportunity to avoid the damage was held solely blameworthy.

<sup>134</sup> As it was called then.

<sup>135</sup> *Grace* 139 B-C.

<sup>136</sup> Hereinafter: *Fred Saber*.

<sup>137</sup> *Grace* 139 G-H.

<sup>138</sup> *Ibid* 139 H.

<sup>139</sup> *Ibid* 140 A-C.

Court also relied on Hoexter JA in *Table Bay Stevedores (Pty) Ltd v South African Railways and Harbours* 1959 (1) SA 386 holding that:<sup>140</sup>

It is clear that sec. 7 of the Act deprives a workman of his common law right of suing his employer for damages in respect of patrimonial loss caused by the employer's negligence. The workman is entitled to compensation only from his employer; it is true that, in terms of sec. 43 of the Act, the compensation may be increased if the accident of the workman is due to the employer's negligence, but what the workman recovers from his employer under the Act remains compensation and nothing but compensation.

Nicholas J consequently held that the Apportionment of Damages Act did not apply to claims for increased compensation.<sup>141</sup>

COIDA retained the words "damages" in section 35 of the Act and "increased compensation" in section 56 which renders *Grace* still authoritative.

### **2.5.3. *Young v Workmen's Compensation Commissioner and Another***

The Transvaal Division of the High Court<sup>142</sup> applied *Fred Saber* and *Grace* in *Young v Workmen's Compensation Commissioner and Another*<sup>143</sup> by mouth of Le Roux J<sup>144</sup> who encapsulated the principles applied in previous rulings as follows:<sup>145</sup>

As a prerequisite for a claim for additional or increased compensation, the Act requires proof by a workman that the accident in which he/she was injured was 'due to' the negligence of his employer or a person entrusted with the management of the business or any branch thereof of the employer, or due to a patent defect in the condition of the premises, works, plant, material or machinery used in such business of which the employer was aware but negligently failed to remedy. Once the workman surmounts this hurdle, it is open to the employer to show that the workman was also negligent and that his negligence contributed to the accident and therefore to his damage. It is now trite law that the words 'due to' mean 'caused solely by', as was decided in *Fred Saber (Pty) Ltd v Franks*...

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<sup>140</sup> *Grace* 140 E & *Table Bay Stevedores (Pty) Ltd v South African Railways and Harbours* 1959 (1) SA 386 at 390.

<sup>141</sup> *Grace* 140 F-G.

<sup>142</sup> As it was known then although the province of Transvaal was dissolved in 1994.

<sup>143</sup> *Young v Workmen's Compensation Commissioner and Another* 1998 (3) SA 1085 (T). Hereinafter: *Young*.

<sup>144</sup> Maritz AJ concurring.

<sup>145</sup> *Young* 1091 A-E.

It has also been held authoritatively that 'compensation' in terms of the Act is not 'damage' as contemplated in the Apportionment of Damages Act 34 of 1956, and that upon proof of contributory negligence on the part of the workman he cannot succeed with an application for increased compensation in terms of s 43.

Although the case was judged in 1998, it was determined by virtue of the 1941 Act, as the claimant was very seriously injured on 9 December 1989 during the recital of the musical play "Camelot" and was subsequently awarded 100% permanent disablement by the Compensation Commissioner.<sup>146</sup> The accident happened in a situation of urgency to move from one scene to another and Young was made aware of the dangers and the urgency involved during rehearsals.<sup>147</sup> During the performance in darkness, she got confused, turned to the wrong side and fell into the void. No warning signs or appropriate precautionary measures were put in place to prevent harm to the actors and thus the employer was found negligent.<sup>148</sup> Consequently the next question to be answered was whether Young was contributory negligent because she had the last opportunity to avoid the accident and harm to herself.<sup>149</sup> The Court *a quo* found contributory negligence on the part of Young as it "can only be attributed to her own negligence in losing concentration at that stage."<sup>150</sup> The High Court took a different approach to the Tribunal by holding that "once it is conceded that the employer was negligent in creating a dangerous situation without proper safeguards, the onus is on it to prove negligence on the part of the workman."<sup>151</sup> *In casu* the Court held that due to the urgency, inexperience and lack of preparation in dark conditions, Young panicked and under stress took the wrong option which was not unreasonable in the circumstances.<sup>152</sup>

According to the doctrine of non-culpable error of judgment a person finding himself in "an emergency created by someone else is not negligent if he makes an error of judgment and takes the wrong option under stress, provided the option

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<sup>146</sup> *Ibid* 1092 D-F.

<sup>147</sup> *Ibid* 1093 B-F & 1094 H-J.

<sup>148</sup> *Ibid* 1093 F-1094 G.

<sup>149</sup> *Ibid* 1094 H.

<sup>150</sup> *Ibid* 1094 I.

<sup>151</sup> *Ibid* 1095 A-C.

<sup>152</sup> *Ibid* 1095 C-G.

which he takes is not an unreasonable one under the circumstances.”<sup>153</sup> The onus rests on the employer to prove contributory negligence which they were unsuccessful to do.<sup>154</sup>

## 2.6. Summary

The South African situation may be summarised as follows:

- The general rule is that civil actions by employees against their employers is prohibited in respect of occupationally-acquired injuries and diseases;<sup>155</sup>
- An exception to the rule has been identified, being action that is open to claimants pursuant to ODIMWA;<sup>156</sup>
- Claims by virtue of section 56 of COIDA remain statutory-based but have the characteristic of quasi-civil actions;<sup>157</sup>
- Immunity against civil action by virtue of COIDA is extended to employers and certain categories of employees in authoritative positions;<sup>158</sup>
- The definitions of an “occupational injury” and an “occupational disease”;<sup>159</sup> an “employee” and an “employer”<sup>160</sup> determine whether an action will be barred and an employer be saved from same.
- The right of action against third parties is retained.<sup>161</sup>

## 3. CANADA

Chief Justice Meredith introduced subrogation of the right to a common law action for damages for compensation to be obtained via an administrative process based

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<sup>153</sup> *Ibid* 1095 F–G.

<sup>154</sup> *Ibid* 1096 E–F.

<sup>155</sup> Chapter 6 paras 2.1; 2.2 & 2.3 *supra*.

<sup>156</sup> Chapter 6 para 2.2.3 *supra*.

<sup>157</sup> Chapter 6 para 2.5 *supra*.

<sup>158</sup> Chapter 6 paras 2.1 & 2.5 *supra*.

<sup>159</sup> Chapter 4 *supra*.

<sup>160</sup> Chapter 5 *supra*.

<sup>161</sup> Chapter 5 para 2.8 *supra*.

on a no-fault principle.<sup>162</sup> Ison<sup>163</sup> points out that the general rule determines that:<sup>164</sup>

No claim in respect of a compensable disability lies by court action against the employer of the injured worker, any worker of that employer, any other employer covered by the Act, or any worker of such other employer.

Differences exist between the provisions in the different jurisdictions but in all jurisdictions the statutory bar relates to the status of the parties i.e. employer<sup>165</sup> and

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<sup>162</sup> Meredith Report at 9 & 17 that reads: "The bill would, in my opinion, fail to do justice to a large body of employees who will not be entitled to compensation under Part I, if it did not provide for a substantial modification of the common law as to the liability of the employer to answer in damages to an employee who is injured owing to the negligence of the employer or his servants.

According to the common law it is a term of the contract of service that the servant takes upon himself the risks incidental to his employment (popularly called the assumption of risk rule), and that this risk includes that of injury at the hands of fellow-servants, (popularly called the doctrine of common employment). The doctrine of common employment is an exception to the general rule that the master is responsible for the acts of his servants when engaged in his work, and has rightly, I think, often been declared unfair and inequitable...

The unfairness of this doctrine has been recognized by the Imperial Parliament and by the Legislature of this Province in the enactment of employers' liability acts which have modified it but to a very limited extent...

In my opinion there is no reason why this objectionable doctrine should not, as one of the provisions of Part II of the draft bill provides, be entirely abrogated.

The draft bill also provides for the abrogation of the assumption of risk rule.

The rule is based upon the assumption that the wages which a workman receives include compensation for the risks incidental to his employment which he has to run. That is, in my judgment, a fallacy resting upon the erroneous assumption that the workman is free to work or not to work as he pleases and therefore to fix the wages for which he will work, and that in fixing them he will take into account the risk of being killed or injured which is incidental to the employment in which he engages.

Another rule of the common law is unfair to the workman. Although the employer has been guilty of negligence, if the workman has been guilty of what is called contributory negligence and his injury was occasioned by their joint negligence the employer is not liable. The injustice of this rule consists in this, that though the employer may have been guilty of the grossest negligence, if the workman has been guilty of contributory negligence, however slight it may have been, and his injury was occasioned by the joint negligence, the employer is not liable.

It is proposed by the draft bill to substitute for this rule that of comparative negligence as it is called, and provide that contributory negligence shall not be a bar to recovery by the workman or his dependants but shall be taken into account in the assessment of damages."

And "It must also be borne in mind that the workman is required, as the price of the compensation he is to receive, to surrender his right to damages under the common law, if his injury happens under circumstances entitling him by the common law to recover or, if he would be entitled to recover only under the Workmen's Compensation for Injuries Act, his right to the like damages as he would be entitled to at common law limited, however, to an amount not exceeding three years' wages or \$1,500, whichever is the larger sum."

<sup>163</sup> Ison 1989: 163.

<sup>164</sup> *Ibid.*

<sup>165</sup> Chapter 5 para 3.2 *supra*.

employee<sup>166</sup> pursuant to the relevant Act.<sup>167</sup> In some jurisdictions, the employee may opt for a civil justice claim or to claim workmen's compensation.<sup>168</sup> If the employee claims compensation, the right to a civil claim for damages is subrogated to the Board and if the Board exercises its right, a civil claim by the employee will be disallowed.<sup>169</sup> In addition to the statutory subrogation where applicable, whether an employee has a valid statutory workers' compensation claim will determine if the right to common law tort action is open to him.<sup>170</sup>

### 3.1. Statutory provisions absolving an employer from liability

An example of the particular provisions can be found in the Act of Newfoundland (the antecedent provisions formed the subject matter of a constitutional challenge)<sup>171</sup> that provides:<sup>172</sup>

#### **Compensation instead of action**

- 44.(1) The right to compensation provided by this Act is instead of rights and rights of action, statutory or otherwise, to which a worker or his or her dependents are entitled against an employer or a worker because of an injury in respect of which compensation is payable or which arises in the course of the worker's employment.
- (2) A worker, his or her personal representative, his or her dependents or the employer of the worker has no right of action in respect of an injury against an employer or against a worker of that employer unless the injury occurred otherwise than in the conduct of the operations usual in or incidental to the industry carried on by the employer.
- (3) An action does not lie for the recovery of compensation under this Act and claims for compensation shall be determined by the commission.<sup>173</sup>

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<sup>166</sup> Chapter 5 para 3.1 *supra*.

<sup>167</sup> Ison 1989: 163-165.

<sup>168</sup> Alberta s 22; British Columbia s 10; Manitoba s 195; New Brunswick ss 10, 11 & 12; Yukon s 51; Newfoundland ss 44, 44.1, 45 & 46; Nova Scotia ss 30, 31 & 105(2); Nunavut s 64; Ontario s 30; Prince Edward Island s 11; Quebec ss 446 & Saskatchewan s 40.

<sup>169</sup> Ison 1989: 171.

<sup>170</sup> See Chapter 3 para 4.2.4 (the *City of Medicine Hat* ruling).

<sup>171</sup> The current provisions in force have not been changed materially from the previous enactment.

<sup>172</sup> Similar provisions can be found in the Acts of Alberta ss 21, 22, 22.1 & 23; British Columbia s 10; Manitoba ss 9, 9.1, 10, 12, 13, 60.8(1)(b), 68(4) & 112; New Brunswick ss 9, 10, 11 & 12; Newfoundland and Labrador ss 44, 44.1, 45 & 46; Nunavut ss 64, 65 & 66; Nova Scotia ss 28, 29, 30, 31, 32 & 33; Ontario ss 26, 27, 28, 29, 30 & 31; Prince Edward Island ss 11, 12, 13 & 88; Quebec ss 438-453; Saskatchewan ss 39-44 & 166-168; Yukon ss 50 & 51 & Government Employee's Compensation Act ss 9, 10, 11 & 12.

<sup>173</sup> S 44(1) replaced the repealed s 32 with minimal changes. It formed part of *Reference re*.

### **No compensation**

44.1 (1) Section 44 shall not apply where the worker is injured or killed

- (a) while being transported in the course of the worker's employment by a mode of transportation in respect of which public liability insurance is required to be carried; or
- (b) as a result of an accident involving the use of a motor vehicle by the worker or another person, in the course of the worker's employment.

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### **Where action allowed**

45.(1) Where a worker sustains an injury in the course of his or her employment in circumstances which entitle him or her or his or her dependents to an action

- (a) against some person other than an employer or worker;
  - (b) against an employer or against a worker of that employer where the injury occurred otherwise than in the conduct of the operations usual in or incidental to the industry carried on by the employer; or
  - (c) where section 44.1 applies, the worker or his or her dependents, where they are entitled to compensation, may claim compensation or may bring an action.
- (2) The worker or his or her dependents shall make an election under subsection (1) within 3 months of the injury and an application for compensation is a valid election for the purpose of this section.
- (3) Where the worker or his or her dependents elect to bring an action, he or she or they shall immediately serve notice in writing of the election on the commission.

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### **Commission decides if action prohibited**

46. Where an action in respect of an injury is brought against an employer or a worker by a worker or his or her dependent, the commission has jurisdiction upon the application of a party to the action to adjudicate and determine whether the action is prohibited by this Act.<sup>174</sup>

The Canadian compensatory schemes categorise employers into divisions; and indemnity is generally provided to all employers within the scope of the Act and not only the injured employee's own employer and/or colleagues while the right to recover from third parties is preserved<sup>175</sup> as was shown in the case of *Budge*.<sup>176</sup>

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<sup>174</sup> S 46 replaced the repealed s 32 with minimal changes and was under consideration in *Reference re*.

<sup>175</sup> Alberta ss 21 & 23; British Columbia ss 10, 96, 113; Manitoba ss 9, 9.1, 10, 12, 13, 60.8(1)(b), 68(4) & 112; New Brunswick ss 10, 11 & 12; Newfoundland ss 44, 44.1, 45 & 46; Nova Scotia ss 28 & 29; Nunavut s 62; Ontario ss 26-31; Prince Edward Island ss 11-13; Quebec ss 438-445; Saskatchewan ss 39-44, 166-168 & Yukon ss 50-51.

<sup>176</sup> Chapter 3 para 4.2.3 *supra*.



### 3.2. Interpretation through case law: Constitutional rulings

Ison<sup>177</sup> opined that the bar on tort actions could be legislated inconsistently by the different Legislators before the Canadian Charter of Rights came into operation which rendered decisions vulnerable to constitutional challenges. Tort actions could previously have been barred irrespective whether the condition the worker suffered from was covered by workers' compensation or not. Ison gives the example of a worker suffering from occupationally-induced stress, who would have been barred from pursuing a court action for damages, irrespective of the fact that it was considered as a non-compensable condition.<sup>178</sup>

#### 3.2.1. Reference re: Workers' Compensation Act

The Constitutional validity of the subrogation of the worker's common law right to sue for damages against his employer was considered in *Reference re: Workers' Compensation Act*, 1983 (Nfld.), ss. 32, 34, 1987 CanLII 118 (NL CA) by the Supreme Court of Newfoundland sitting as an appeal court.<sup>179</sup> This ruling was also considered by the South African Constitutional Court when the constitutional validity of section 35 of COIDA was judged in the *Jooste* ruling.<sup>180</sup>

The Supreme Court of Newfoundland had to answer four questions<sup>181</sup> pursuant to the Canadian Charter of Rights and Freedoms.<sup>182</sup> The Canadian Constitution<sup>183</sup> is the supreme law of Canada and any law inconsistent with it will be unenforceable to the

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<sup>177</sup> Ison 1996: 807-833.

<sup>178</sup> *Ibid.*

<sup>179</sup> *Ibid.* Ison considers this case as the leading authority on this point.

<sup>180</sup> *Jooste* discussed *supra* at Chapter 6 para 2.2.1.

<sup>181</sup> "1. Does section 15(1) of the Charter of Rights and Freedoms (the "Charter") apply to causes of action arising prior to April 17, 1985?  
2. Are sections 32 and 34 of The Workers' Compensation Act, 1983, S.N. 1983, Chapter 48 (the "Act") inconsistent with section 15(1) of the Charter?  
3. If sections 32 and 34 of the Act are inconsistent with section 15(1) of the Charter, are sections 32 and 34 of the Act saved by section 15(2) of the Charter?  
4. If sections 32 and 34 of the Act are inconsistent with section 15(1) of the Charter and are not saved by section 15(2) of the Charter, to what extent, if any, can such limits on the rights protected by section 15(1) of the Charter be justified under section 1 of the Charter and thereby rendered not inconsistent with The Constitution Act, 1982?"

<sup>182</sup> *Reference re* 1-2.

<sup>183</sup> Similar to the South African Constitution.

extent of the inconsistency.<sup>184</sup> The Canadian Charter of Rights and Freedoms<sup>185</sup> guarantees particular rights and freedoms which (similar to South Africa) may be limited only to the extent that is justified in a “free and democratic society.”<sup>186</sup> Equality before the law, equal protection and equal benefit of the law coupled with protection against discrimination are some of the guaranteed rights and freedoms.<sup>187</sup>

The majority judgment by word of Goodridge CJN<sup>188</sup> ruled the exclusionary provisions of the Workers' Compensation Act, 1983 (Newfoundland.), c. 48, consistent with the Canadian Constitution.<sup>189</sup> Two legal questions were argued i.e. a widow (Mrs. Piercey) contended that sections 32 and 34 of the Workers' Compensation Act in place at the time, were “of no force and effect under s. 52(1) of the Constitution Act, 1982” because it conflicted with section 15 of the Charter. The second argument was offered by the employer that any inconsistencies were irrelevant, as section 15 of the Charter came into effect after the death of Mr. Piercey.<sup>190</sup> It was conceded by the Counsel for Mrs. Piercey that section 15 did not apply retrospectively;<sup>191</sup> but it was argued that sections 32 and 34 were nevertheless inconsistent with section 15(1) of the Charter and could not be saved by section 15(2) or section 1 of the Charter. Compensatory legislation as such was not attacked but it was argued that workers' compensation and the common law right of action could be entertained in a parallel situation.<sup>192</sup>

The Court considered the historical development of workers' compensation in Canada with particular attention to the Meredith principles and identified workers' compensation as a new, separate system of law distinguishable from tort law and of which Chief Justice Meredith:<sup>193</sup>

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<sup>184</sup> *Reference re 3.*

<sup>185</sup> Similar to the South African Bill of Rights.

<sup>186</sup> *Reference re 3.*

<sup>187</sup> *Ibid.*

<sup>188</sup> Gushue, Mahoney and O'Neill JJA concurred with Goodridge with Morgan JA consenting in a minority judgment but with different reasons.

<sup>189</sup> *Reference re 39.*

<sup>190</sup> *Ibid 4.*

<sup>191</sup> Which answered question 1 in the negative.

<sup>192</sup> *Reference re 6.*

<sup>193</sup> *Ibid 7.*

recommended the abolition of the common law defences of *volens*, common employment and contributory negligence. For this new system to succeed he recommended, among other things, that workers give up their common law rights of action against their own employers in exchange for specific guaranteed benefits as a trade-off<sup>194</sup> for employers shouldering the expense of this new system.

Very importantly, Meredith intended a system by which all workers would benefit by guaranteed compensation irrespective of fault and without costly litigation.<sup>195</sup> The Court considered the benefits of statutory compensation to an injured worker;<sup>196</sup> but in acknowledging the difficulties in comparing the monetary value of statutory benefits to that which may be otherwise acquired, limited itself to some general remarks.<sup>197</sup> Statutory benefits include medical costs inclusive of future costs (that might not be available by virtue of common law actions), compensation in respect of loss of earnings and earning capacity (which is considered higher under the Act) and general damages relating to raised living costs and non-economic loss that are only partly covered by a rating schedule determined by the Act.<sup>198</sup> Raised living costs demonstrated the biggest gap between statutory benefits and damages recoverable under common law because through common law, the raise in living costs may be recovered in full while non-economic loss will also be higher under common law than by virtue of statutory compensatory law.<sup>199</sup> Fatalities may attract higher statutory compensation than at common law.<sup>200</sup> Rehabilitation and reintegration into the workplace of an injured worker benefit employees and compensation is paid immediately which excludes the extremely tardy processes that are characteristic of common law claims for damages.<sup>201</sup> Contrary to civil litigation, compensation can be claimed without legal costs and the solvency of the employer does not influence the viability of compensation; and liability to compensate does not endanger the continued existence of a company.<sup>202</sup> Very

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<sup>194</sup> The so-called "historical trade-off."

<sup>195</sup> *Reference re 8*.

<sup>196</sup> *Ibid* 9–11.

<sup>197</sup> *Ibid* 11.

<sup>198</sup> *Ibid*.

<sup>199</sup> *Ibid*.

<sup>200</sup> *Ibid*. This is contrary to COIDA where a spouse is limited to compensation that equals 40% of 75% of the earnings of the deceased at the time of death and subject to an annual maximum amount that is currently R7 812 per month as per Government Gazette No. 36273.

<sup>201</sup> *Ibid* 12.

<sup>202</sup> *Ibid*.

importantly, other workers are also saved from liability while contributory negligence by the injured worker causes no reduction in compensation.<sup>203</sup> Other advantages of statutory compensation include periodic payments *versus* lump sum payments which are vulnerable to spending and compensation is periodically reviewed and tax-free.<sup>204</sup>

The only disadvantage to employees identified by the Court is that a higher amount of damages can be recovered through common law actions than through statutory compensation and the Court could not find any disadvantage to employers caused by the system.<sup>205</sup>

The fundamental issue before the Court related to whether the removal of the right to common law actions constituted “an inequality that is discriminatory.”<sup>206</sup> The limitation on bringing a tortfeasor before the Court is viewed as acceptable in the light of the workability of the compensation scheme and the relatively immaterial consequences thereof.<sup>207</sup> The Court held that in founding a compensation scheme more favourably to employees than would be possible at common law, the consequence of section 32 is: “some individuals in certain circumstances have been adversely affected.”<sup>208</sup> Such inequality could not be said to be “discriminatory in the invidious sense” but the question to be answered remained, could the extent of the adverse consequences of section 32 be such as to render it discriminatory?<sup>209</sup>

Two questions are central to any Charter challenge:<sup>210</sup>

The first question is what is the test to be applied to the impugned legislation under, in this reference, s. 15. The second question is what is the test to be applied under s. 1 if the legislation fails the first test.

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<sup>203</sup> *Ibid.*

<sup>204</sup> *Ibid.*

<sup>205</sup> *Ibid* 13.

<sup>206</sup> *Ibid.*

<sup>207</sup> *Ibid.*

<sup>208</sup> *Ibid* 14.

<sup>209</sup> *Ibid.*

<sup>210</sup> *Ibid* 16.

In answering the first question, the provision's historical and philosophical context should be contemplated.<sup>211</sup> In considering a discrimination challenge, the applicable test will be "reasonableness and fairness".<sup>212</sup> A challenger by virtue of section 15(1) of the Charter has to establish that his rights have been infringed; and only after the breach has been proven on a preponderance of probabilities will sections (1), 15(2) or 24 be considered.<sup>213</sup> The challenger first has to prove differential treatment pursuant to the applicable breach and thereafter, needs to prove whether:<sup>214</sup>

having regard to the purposes and aims of the legislation, there is an adverse effect upon the person which, on an objective basis, can properly be said to be unfair or unreasonable when compared to the treatment given to persons similarly situated, and when considered in the light of the circumstances in which the distinction is made, if the distinction is a reasonable and rational one, a finding of discrimination is less likely.

The applicable group being treated differently pursuant to the Workers' Compensation Act is identified as "victims of tort" whom were owed a duty, which duty was breached and damages consequently suffered.<sup>215</sup> The differential treatment is shown by comparing victims of tort to victims of tort who suffered occupational injuries or diseases. The first named group will have a cause of action at common law but not the second group who will have a right to compensation which might be materially less.<sup>216</sup> Identifying an inequality does not render the specific law unenforceable; and once a *prima facie* case has been made out favouring the challenger of the law, the onus shifts to the defender of the law to show that the "articulated purpose justifies the law."<sup>217</sup>

In answering question two i.e. whether sections 32 and 34 of the Workers' Compensation Act is inconsistent with section 15(10) of the Charter, the Court reasoned that the Workers' Compensation Act must be seen in the light of its social

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<sup>211</sup> *Ibid.*

<sup>212</sup> *Ibid* 20.

<sup>213</sup> *Ibid* 23.

<sup>214</sup> *Ibid.*

<sup>215</sup> *Ibid* 23-24.

<sup>216</sup> *Ibid* 24.

<sup>217</sup> *Ibid.*

shown that the differential treatment creates an inequality that is unjustifiable or unreasonable.<sup>241</sup>

In considering whether section 15(1) of the Charter infringes the “right of action”<sup>242</sup> against an employer or co-worker<sup>243</sup> as substituted by the right to compensation determined by an administrative tribunal determined according to the Act,<sup>244</sup> the honourable Justice weighed the benefits and disadvantages of both a claim under common law against a claim under compensatory law taking into consideration the extent of the burden of proof in both instances.<sup>245</sup> His Honour accepted categorising of workers for purposes of the Act to be valid, which then raises the question whether section 32 constitutes an inequality by removing the “right of action”.<sup>246</sup> He answered the last question in the negative because all “workers are entitled to the benefits provided by the Act and regulations.”<sup>247</sup> He ruled that no inequality and therefore no discrimination is established. The honourable Justice held:<sup>248</sup>

To find an inequality by comparing those covered by the Act with those not so covered and therefore free to take an action in tort one must ignore the underlying purpose of the Act and the myriad of benefits enjoyed by those covered by the Act and not available to those others. In my view any economic loss that may be sustained by the taking away of the "right of action" for work-related injuries is more than off-set by the overall benefit of the Act and is a necessary incident to the implementation of a valid legislative scheme.

It follows then that the equality rights as protected under section 15 of the Charter are not violated and the other questions need not be answered.<sup>249</sup>

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<sup>241</sup> *Reference re 33-34.*

<sup>242</sup> An action at common law and which the courts have to consider taking into account the various defences an employer may raise.

<sup>243</sup> By either the injured worker or his dependents based on the negligence of the employer or a co-worker.

<sup>244</sup> *Reference re 37.*

<sup>245</sup> *Ibid* 38.

<sup>246</sup> *Ibid.*

<sup>247</sup> *Ibid.*

<sup>248</sup> *Ibid.*

<sup>249</sup> *Ibid* 38-39.

The similarities in the reasoning of the Supreme Court of Newfoundland and the South African Constitutional Court is evident from the inferences drawn from the history, purpose and development of compensatory laws.<sup>250</sup>

### 3.2.2. *Pasiechnyk v Saskatchewan (Workers' Compensation Board)*

The Federal Supreme Court of Canada emphasised the purpose of compensatory legislation in *Pasiechnyk v Saskatchewan (Workers' Compensation Board)*, a case that centred on the right to institute a civil claim against an employer, the government of Saskatchewan. The Claimants argued that the government did not act in its capacity as an employer but in its capacity as a regulator; which duties under the Occupational Health and Safety Act, R.S.S. 1978, c. O-1, were neglected as the government failed to adequately inspect the crane that fell on the workers killing two and seriously injuring six others.<sup>251</sup> The injured employees and the dependents of the deceased were compensated by the applicable Compensation Board.<sup>252</sup>

The Saskatchewan government requested the Compensation Board to determine whether the action was barred by the Saskatchewan Compensation Act, which application was opposed by the Claimants by applying for an order to prevent the Board from making the determination. The Claimants' arguments that the Board lacked jurisdiction to make the determination was rejected by both the Saskatchewan Court of Queen's Bench and the Saskatchewan Court of Appeal.<sup>253</sup> The Board's interpretation indicated that the government was an "employer" within the meaning of the Act and therefore the actions were barred.<sup>254</sup>

*In casu*, the Court considered the definitions of "employer"; "employment"; "industry"; "injury" and "worker" pursuant to the Act.<sup>255</sup> The Court also cited

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<sup>250</sup> See also *Jooste* discussed at Chapter 6 para 2.2.1.

<sup>251</sup> *Ibid* [1]–[3].

<sup>252</sup> *Ibid*.

<sup>253</sup> *Ibid* [3].

<sup>254</sup> The actions were instituted against the government of Saskatchewan, ProCrane and SaskPower. The Court of Queen's Bench dismissed the application for a judicial review but the Saskatchewan Court of Appeal allowed the application for a review against the government but disallowed the application for a review against ProCrane and SaskPower. *Pasiechnyk* [4].

<sup>255</sup> *Pasiechnyk* [5].

sections 3(1)<sup>256</sup>; 22(1)<sup>257</sup>; 44<sup>258</sup>; 167<sup>259</sup>; 168<sup>260</sup> and 180<sup>261</sup> of The Workers' Compensation Act, 1979, S.S. 1979, c. W-17.1<sup>262</sup>

The Workers' Compensation Board as the court of first instance held the actions to be barred although protection by the Act was not designed to protect employers purely because of their position as an "employer" but because of its engagement in an "industry" which in the case of the government is "regulating".<sup>263</sup> The Court of Queen's Bench in its judgment held that the government was an employer engaged in an industry and categorised the government's activities as an undertaking in the exercise of its regulatory duties pertaining to health and safety.<sup>264</sup> The Saskatchewan Court of Appeal overturned the previous ruling. The Court held that the decision whether the government is an employer within the meaning of the Act, was *ultra vires* the jurisdiction of the Board because the relevant law to determine the question of "whether the government can be sued in tort in its capacity as regulator, despite the statutory bar, was the Occupational Health and Safety Act and the common law" and not compensatory law.<sup>265</sup> This judgment recognised the "dual capacity" doctrine, which means that an action against the government in its capacity as regulator is not barred but an action against the government in its capacity as an employer is precluded.<sup>266</sup>

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<sup>256</sup> "3.(1) This Act applies to all employers and workers engaged in, about or in connection with any industry in Saskatchewan except those industries excluded by a regulation or order of the Lieutenant Governor in Council or by section 10."

<sup>257</sup> "22.(1) The board shall have exclusive jurisdiction to examine, hear and determine all matters and questions arising under this Act and any other matter in respect of which a power, authority or discretion is conferred upon the board and, without limiting the generality of the foregoing, the board shall have exclusive jurisdiction to determine:..."

<sup>258</sup> "44. No employer and no worker or any dependent of a worker has a right of action against an employer or a worker with respect to an injury sustained by a worker in the course of his employment."

<sup>259</sup> "167. The right to compensation provided by this Act is in lieu of all rights of action, statutory or otherwise, to which a worker or his dependants are or may be entitled against the employer of the worker for or by reason of any injury sustained by him while in the employment of the employer."

<sup>260</sup> "168. Any party to any action may apply to the board for adjudication and determination of the question of the plaintiff's right to compensation under this Act or as to whether the action is one barred by this Act, and that adjudication and determination is final and conclusive."

<sup>261</sup> "180. Except as otherwise provided in this Act, all rights of action against the employers for injuries to workers, either at common law or under The Workmen's Compensation Act, are abolished."

<sup>262</sup> *Pasiechnyk* [5].

<sup>263</sup> *Ibid* [6].

<sup>264</sup> *Ibid* [8].

<sup>265</sup> *Ibid* [10].

<sup>266</sup> *Ibid* [11].



The Federal Supreme Court of Canada examined *in casu* the history and purpose of compensatory legislation, which advanced the premise that the Board has exclusive jurisdiction to decide whether the statutory bar applies because “this question is intimately related to one side of the historic trade-off.”<sup>267</sup> The history of compensatory laws in Canada starting with the Meredith Report was considered by the Court,<sup>268</sup> with specific attention to the “historic trade-off” that led to workers losing their cause of action against an employer but obtained compensation irrespective of fault or the employer’s financial ability to pay from a fund to which compulsory contributions had to be made by employers. One year after its promulgation, the Act was amended to extinguish the right to a cause of action by a Schedule 1 worker against a Schedule 1 employer.<sup>269</sup>

The Federal Court took note of case law that acknowledged the significance of the historic trade-off in relation to the purpose of compensatory laws e.g. *Reference re*<sup>270</sup> and *Medwid v Ontario*.<sup>271</sup> The statutory bar protects the integrity of the compensation system by providing the benefit of protection against suit to employers who might have sought to be exempted from paying premiums if no benefit could be derived from it.<sup>272</sup>

The Court reasoned that the Board is at the centre of the workers compensation system characterised by three aspects i.e. i) compensation and rehabilitation of injured employees; ii) prohibition of civil actions and iii) the compensation fund. As the Board has exclusive jurisdiction over the compensation fund, it follows that the Board has exclusive jurisdiction to decide *inter alia* if an industry falls within the reach of the Act.<sup>273</sup>

Three of the Act’s provisions preclude tort actions: section 44 removes the right of an employer and employee against and employer or employee for an injury

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<sup>267</sup> *Ibid* [23].

<sup>268</sup> *Ibid* [24].

<sup>269</sup> *Ibid* [25].

<sup>270</sup> *Pasiechnyk* [26]. See discussion of *Reference re supra* at Chapter 6 para 3.2.1.

<sup>271</sup> Discussed at Chapter 3 para 4.2.1 *supra*.

<sup>272</sup> *Pasiechnyk* [27].

<sup>273</sup> *Ibid* [32]–[33].

sustained on duty; section 167 clearly indicates that the right of action is replaced by the right to compensation and section 180 extinguishes all rights of actions against employers pertaining to injuries on duty by employees. These sections use words with specific meaning as defined in the Act like employer, worker and injury.<sup>274</sup>

Entitlement to compensation is closely related to the removal of the right to a civil action, but entitlement to compensation will not necessarily mean that every potential defendant is saved from liability because some rights of action will be retained but the Board will be subrogated<sup>275</sup> to the claim.<sup>276</sup> In terms of section 168, the vital questions to be answered by the Board are whether the plaintiff is entitled to compensation and whether the defendant is protected against suit as a contributor to the workers' compensation system. Both aspects are intimately related "to the purposes and structure of the workers' compensation system" and within the Board's exclusive jurisdiction.<sup>277</sup>

The Federal Court approved the reasoning of the Board that immunity against suit does not extend to all actions against employers but the "object, purpose and scope of the Act" requires the scope of immunity to be limited to the industry the employer was engaged in at the time of the accident; and therefore the Board followed four questions:<sup>278</sup>

1. Was the plaintiff a worker within the meaning of the Act?<sup>279</sup>
2. If so, was the injury sustained in the course of his or her employment?<sup>280</sup>
3. Is the defendant an employer within the meaning of the Act?<sup>281</sup>
4. If the defendant is an employer within the meaning of the Act, does the claim arise out of acts or defaults of the employer or the employer's employees while engaged in, about or in connection with the industry or employment in which the employer or worker of such employer causing the injury is engaged?

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<sup>274</sup> *Ibid* [39].

<sup>275</sup> Ss 39 and 40 of the Saskatchewan Act.

<sup>276</sup> *Pasiechnyk* [40].

<sup>277</sup> *Ibid* [41]–[42].

<sup>278</sup> *Ibid* [44]–[45].

<sup>279</sup> The definition of an "employee" was discussed in Chapter 5 *supra*.

<sup>280</sup> For a discussion of causality see Chapter 4 *supra*.

<sup>281</sup> See Chapter 5 *supra* for a discussion of the definition of an "employer".

types of claims, inclusive of claims for harassment and psychological trauma.<sup>298</sup> The true nature of the claim is identified by the Court as a typical common law claim purporting to cover its true identity to avoid recognition of immunity afforded to the Crown against civil liability actions.<sup>299</sup> The Court held that “the respondent’s action is in reality an action by an employee against his employer seeking damages for harm allegedly suffered in the course of his employment”.<sup>300</sup> The Court ruled that the action is a masked common law action that arose out of the course of employment and thus barred by section 12 of the Government Employees Compensation Act.<sup>301</sup> The Court furthermore held that before bringing a civil liability action against the Crown for damages, a claimant first needs to utilise all administrative law remedies available to him before the remedies afforded by the Charter may be exercised.<sup>302</sup>

### 3.3. Interpretation through case law: Applicability of statutory provisions

#### 3.3.1. *Kovach v Singh*

The majority ruling in *Kovach v Singh*<sup>303</sup> by the Court of Appeal for British Columbia, extended immunity afforded to employers to include medical practitioners by giving a broadened interpretation to the phrase “personal injury arising out of the course of employment”.<sup>304</sup> *In casu* the effect of the immunity is to protect the Defendant, a medical doctor, against professional liability arising from medical malpractice founded in the doctor-patient relationship and not the employer-employee relationship.<sup>305</sup> Kovach’s injury, sustained in the course of her employment, was aggravated by the negligent medical treatment she received at the hands of Dr. Singh.<sup>306</sup>

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<sup>298</sup> *Ibid* [48].

<sup>299</sup> *Ibid* [69]–[76].

<sup>300</sup> *Ibid* [69].

<sup>301</sup> *Ibid* [71].

<sup>302</sup> *Ibid* [76].

<sup>303</sup> *Kovach v Singh*, 1998 CanLII 6423 (BC CA). Hereinafter: *Kovach*. Retrieved on 12/05/2013 from <http://canlii.ca/t/1dxzp>.

<sup>304</sup> *Ibid* [2].

<sup>305</sup> *Ibid* [9].

<sup>306</sup> *Ibid* [12] & [14].

The honourable Madam Justice Newbury criticised the reasoning of the Court below as there is no evidence that the historic trade-off was intended to be applied to cases of medical malpractice.<sup>307</sup> The possible insolvency of an employer referred to in *Pasiechnyk* is not applicable in this case as medical practitioners normally are covered by professional insurance schemes and barring an action under these circumstances “seems, with respect, a distortion of the purposes of the workers’ compensation scheme.”<sup>308</sup> The Court was however bound by the Supreme Court’s decision in *Pasiechnyk* pertaining to the jurisdiction of workers’ compensation boards and the final decision whether Kovach was injured “out of and in the course of her employment” through the treatment of Singh, rested with the Board and was not open to review unless it was patently unreasonable.<sup>309</sup> The Court then held that the decision was indeed patently unreasonable because the reasoning of the Appeal Board was flawed as the Board considered that any injury sustained during negligent treatment “must be a direct result of and must have arisen out of her employment.” This is contrary to a common sense view on causation and authorities.<sup>310</sup>

The Court found that an injury can only be sustained by a statutory-defined “worker” acting in the course of employment.<sup>311</sup> The Appeal Board considered an irrelevant aspect i.e. whether Singh was a worker pursuant to the Act and whether he acted in the course of his employment and consequently the Board “made the leap to the conclusion that an action for negligence against him must be barred.”<sup>312</sup> The statutory bar is, however, applicable when both the injured worker and the “tortfeasor” acted in the course of their respective employment.<sup>313</sup> The compensable injury needs to be the same injury that gives rise to the statutory bar and the breach of duty refers to the action that gave rise to that same injury;<sup>314</sup> and by extending protection to Singh, the historic trade-off was frustrated.<sup>315</sup> The Court accordingly

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<sup>307</sup> *Ibid* [12].

<sup>308</sup> *Ibid*.

<sup>309</sup> *Ibid* [13].

<sup>310</sup> *Ibid* [14].

<sup>311</sup> *Ibid* [15].

<sup>312</sup> *Ibid* [17].

<sup>313</sup> *Ibid* [18].

<sup>314</sup> *Ibid* [19].

<sup>315</sup> *Ibid* [20].

set aside the determination by the Board and resubmitted it back to the Board for reconsideration.<sup>316</sup>

It is submitted that the very broad collective liability principle underpinned the misjudgement of the Board in *casu* because if immunity was not available to all employers within a category, the doctor would not have been considered for protection. South Africa indemnifies only the employer as defined.<sup>317</sup>

### 3.3.2. *OPSEU v Ontario et al*

The Ontario Superior Court of Justice (Divisional Court)<sup>318</sup> was approached by the Ontario Public Service Employees Union in an application to review the decision of the Vice-Chair of the Grievance Settlement Board in the case of *OPSEU v Ontario et al*.<sup>319</sup> The ruling concluded that the said Board could not award damages “for or by reason of an accident happening to the worker or an occupational disease contracted by the worker while in the employment of the employer” if the alleged accident or disease is/was compensable under workmen’s compensatory laws.<sup>320</sup>

The Appellant claimed damages based on a collective agreement which incorporated provisions from the Occupational Health and Safety Act R.S.O. 1990, c. O. 1<sup>321</sup> and required from the Crown as employer to provide reasonably for the health and safety of employees on duty;<sup>322</sup> and which clauses were breached by exposure in correctional institutions to second-hand smoke that adversely affected the health of the union’s members.<sup>323</sup>

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<sup>316</sup> *Ibid* [21]–[22].

<sup>317</sup> Chapter 5 para 2.2 *supra*.

<sup>318</sup> On 11/09/2012.

<sup>319</sup> *OPSEU v Ontario et al*, 2012 ONSC 2348 (CanLII). Hereinafter: *OPSEU*. Retrieved on 23/03/2013 from <http://canlii.ca/t/fsqz9>.

<sup>320</sup> *Ibid* [1].

<sup>321</sup> *Ibid* [4] & [28].

<sup>322</sup> *Ibid* [2].

<sup>323</sup> *Ibid* [3].

The Respondent questioned the Board's jurisdiction ruled by Articles 9.1 and 18.1 of the collective agreements<sup>324</sup> as the Board had no jurisdiction to consider fault-based claims pursuant to the Workplace Safety and Insurance Act, 1997, S.O. 1997, c.16 irrespective of the right to provide for enhanced no-fault benefits in collective agreements.<sup>325</sup> The Applicant in turn, argued *inter alia* that the historic trade-off limited no-fault insurance regarding claims based in tort and had no effect on a claim based in contract which means the worker has a right to "enforce a provision of an employment contract"<sup>326</sup> which in the current instance was embodied in the collective agreement.<sup>327</sup>

The Board in its ruling rejected OPSEU's argument that the Workplace Safety and Insurance Act only applies to tort and not to contractual damages. The historical trade-off entails that the employer's funding of the compensation fund shields it from liability for compensable occupational injuries, as "pleaded in tort or in contract, the substance was the same."<sup>328</sup> The Board refused to award damages pursuant to the collective agreement,<sup>329</sup> although it remains open to the parties to negotiate for supplementary benefits in clear and unambiguous language.<sup>330</sup>

On appeal the Union insisted that the remedy of damages was open to it and such a remedy does not constitute a "right of action" under the Ontario compensatory law and could thus not be seen as part of the historic trade-off. OPSEU based its arguments in case law and the right to pursue grievances through labour relations principles, particularly a previous decision by the Workers Compensation Appeals Tribunal determining that although the right to a civil claim is extinguished, it does not affect the right to pursue a grievance under a collective agreement.<sup>331</sup> The Respondent argued that the Board correctly ruled that the right to civil actions was precluded and supported its argument with case law supporting that "grievance

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<sup>324</sup> As the Occupational Health and Safety Act R.S.O. 1990, c. O. 1 incorporated into the collective agreement does not provide for the award of damages.

<sup>325</sup> *OPSEU* [4].

<sup>326</sup> *Ibid* [5].

<sup>327</sup> *Ibid*.

<sup>328</sup> *Ibid* [12].

<sup>329</sup> *Ibid* [13].

<sup>330</sup> *Ibid* [14].

<sup>331</sup> *Ibid* [28].

arbitration constituted a form of action or right of action” and damages could then not be awarded for compensable injuries.<sup>332</sup> The Respondent also raised the important argument that if the honourable Court accepted OPSEU’s contentions, it would lead to different regimes for unionised and non-unionised workers pertaining to identical injuries.<sup>333</sup>

The Superior Court of Justice held that the Board’s interpretation was prudent, reasonable and correct.<sup>334</sup> *In casu*, the Court found that a labour arbitrator would not have the jurisdiction to award monetary damages to compensate occupational injuries.<sup>335</sup> It was held that awarding monetary damages based on breach of a collective agreement where a valid compensatory claim exists will lead to an artificial distinction between claims instituted by the employee himself and claims instituted on behalf of the worker.<sup>336</sup> The Court furthermore could not find any justification to allow for different regimes for unionised and non-unionised workers in respect of identical injuries and declined the submission made by OPSEU.<sup>337</sup>

### **3.3.3. Decision No. 622/89I**

The Ontario Workplace Safety and Insurance Appeals Tribunal ruled on the influence of serious and wilful misconduct by the party accused of negligent conduct in *Decision No. 622/89I*.<sup>338</sup> *In casu*, the Defendant was criminally charged and convicted of dangerous driving with regard to a motor vehicle accident that injured the Applicant.<sup>339</sup> It was common cause that the Applicant was injured in the course of his duties and the Panel had to decide:

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<sup>332</sup> *Ibid* [29].

<sup>333</sup> *Ibid*.

<sup>334</sup> *Ibid* [30] & [40]–[41].

<sup>335</sup> *Ibid* [36].

<sup>336</sup> *Ibid* [39].

<sup>337</sup> *Ibid*.

<sup>338</sup> *Decision No. 622/89I*, 1990 CanLII 5168 (ON WSIAT). Retrieved on 30/04/2012 from <http://www.canlii.org/en/on/onwsiat/doc/1990/1990canlii5168/1990canlii5168.pdf>. Hereinafter: *Decision No. 622/89I*.

<sup>339</sup> *Ibid* 5.

- Whether the Defendant was in the course of his duties at the time of the accident;
- If so, did the Defendant act with serious and wilful misconduct that would nullify the statutory protection?
- Will the action be barred if the answer to the first question is yes and to the second is no?<sup>340</sup>

The first question was answered in the affirmative<sup>341</sup> and then the enquiry turned to whether his reckless driving constituted serious and wilful misconduct. Serious and wilful misconduct [section 3(7)] on the part of an employee will refute all statutory benefits unless the consequences are serious.<sup>342</sup> The Panel held that the section will only be applicable if the injured worker (beneficiary) and the person guilty of the serious and wilful misconduct is the same person.<sup>343</sup> Section 3(7) does not contemplate the presence of negligence but the no-fault system requires the conduct to be “wilful, not negligent, in order to trigger the denial of benefits.”<sup>344</sup> It was held that both the Applicant and the Defendant were in the course of their employment following which the Applicant’s right of action has been barred.<sup>345</sup>

### **3.3.4. Decision No. 324000**

*In casu*, a hospital applied for a declaration that the Plaintiff in a court action’s right of action in respect of tort was extinguished.<sup>346</sup> The hospital was categorised as a Schedule 1 employer and the worker was employed by another schedule 1 employer, which was contracted by the hospital to remove non-medical waste from the hospital’s property. The worker sustained a needle-stick injury while removing waste.<sup>347</sup>

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<sup>340</sup> *Ibid* 3.

<sup>341</sup> *Ibid* 8.

<sup>342</sup> *Ibid* 9.

<sup>343</sup> *Ibid*.

<sup>344</sup> *Ibid* 9–10.

<sup>345</sup> *Ibid* 10.

<sup>346</sup> *Decision No. 324000*, 2001 ONWSIAT 3137 (CanLII). At [1]. Retrieved on 29/04/2012 from <http://www.canlii.org/en/on/onwsiat/doc/2001/2001onwsiat3137/2001onwsiat3137.html>. Hereinafter: *Decision No. 324000*.

<sup>347</sup> *Ibid* [11]–[13], [17]–[18] & [34].



The worker relied on an exception [section 28(4)] whereby an exception to the rule is created and an employer will not be protected if another employer who is not the worker's employer, supplies a motor vehicle without an operator to operate same.<sup>348</sup> *In casu*, the truck was leased from another company.<sup>349</sup> Section 28<sup>350</sup> reads as follows:

28(1) A worker employed by a Schedule 1 employer, the worker's survivors and a Schedule 1 employer are not entitled to commence an action against the following persons in respect of the worker's injury or disease:

1. Any Schedule 1 employer.
2. A director, executive officer or worker employed by any Schedule 1 employer.

...

(4) Subsections (1) and (2) do not apply if any employer other than the worker's employer supplied a motor vehicle, machinery or equipment on a purchase or rental basis without also supplying workers to operate the motor vehicle, machinery or equipment.

The Defendant secondly put the Plaintiff to the proof that it was indeed an employee of the hospital who put the needle in the bin.<sup>351</sup>

The action was founded in the Canadian Charter of Rights and Freedoms and based upon four specific rights: "Equality under the law; Equality before the law; Equal benefit of the law; and Equal protection of the law."<sup>352</sup> *In casu*, the Defendant relied specifically upon "Equal benefit of the law" as he sought damages for pain and suffering which was not available pursuant to compensatory law.<sup>353</sup>

The Tribunal held that the leased truck did not form part of the sequence of events that resulted in the injury; although section 28(4) preserves the right of action only in respect of the supplier of a vehicle who fails to also supply an operator, it is not applicable to the hospital.<sup>354</sup> The Tribunal accepted that the needle was put in the

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<sup>348</sup> *Ibid* [8].

<sup>349</sup> *Ibid* [8], [11]–[13], [29] & [36].

<sup>350</sup> Ontario Act.

<sup>351</sup> *Decision No. 324000* [29].

<sup>352</sup> *Ibid* [30].

<sup>353</sup> *Ibid* [31].

<sup>354</sup> *Ibid* [37]–[38].

bin by a hospital employee or was in the bin due to negligence in the control of the garbage system but in both instances, the hospital worker will be indemnified because of the status of the hospital as a Schedule 1 employer.<sup>355</sup>

### 3.4. Summary

The Canadian system of compensatory laws pertaining to the right of access to the civil justice system to obtain redress for occupationally acquired injuries and diseases can be summarised as follows:

- The general rule is similar to South Africa, civil action by employees against employers within the same category is statutory barred;<sup>356</sup>
- An exception to the rule is civil action which is subrogated to the Compensation Authority;<sup>357</sup>
- Immunity against civil action by virtue of compensatory legislation is extended to all employers and all employees operating within the same statutory-determined category;<sup>358</sup>
- The definitions of an “occupational injury”; “occupational disease”;<sup>359</sup> an “employee”; an “employer”<sup>360</sup> and the statutory-determined category of work is determinative of whether an action will be barred and an employer be saved from same;<sup>361</sup>
- The historic trade-off principle is viewed as an essential part of the success of the workers’ compensation scheme;<sup>362</sup>
- The right of action against third parties is retained.<sup>363</sup>

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<sup>355</sup> *Ibid* [41]-[42].

<sup>356</sup> See Chapter 6 paras 2.1 & 3.1 *supra*.

<sup>357</sup> Chapter 6 paras 3 & 3.2.2 *supra*.

<sup>358</sup> Chapter 6 paras 3.3.1 & 3.3.4 *supra*.

<sup>359</sup> Chapter 4 paras 3.1; 3.3 & 3.4 *supra*.

<sup>360</sup> Chapter 5 paras 3.1 & 3.2 *supra*.

<sup>361</sup> Chapter 6 para 3.2.2 *supra*.

<sup>362</sup> Chapter 6 paras 3.2.1 & 3.2.2 *supra*.

<sup>363</sup> Chapter 6 para 3.1 *supra* & Chapter 3 para 4.2.3 *supra*.

#### 4. AUSTRALIA

The Australian federal system of government empowers the Federal Government and States to determine their own laws and thus the right to common law claims for damages differs between jurisdictions. Contrary to the situation in South Africa and Canada, Australia did not include a Bill of Rights in the Federal Constitution and only Victoria and the Australian Capitol Territory included human rights provisions into their individual Constitutions.<sup>364</sup>

The Productivity Commission<sup>365</sup> reported on the implications to preserve, limit or bar access to common law damages for occupational injuries, diseases and fatal accidents<sup>366</sup> in Australia in the process to harmonise the right to common law claims for damages between jurisdictions.<sup>367</sup> The Commission found that compensation schemes barring common law claims or with limited access to such claims tend to provide long-term statutory compensation benefits but in contrast, schemes with unlimited access to common law remedies tend to provide short term statutory benefits supplemented by common law damages for the seriously injured.<sup>368</sup> The object of recovery under common law is to “restore the worker, as far as money can, to the position they were in, before the accident. In an unrestricted system, it meets the full loss of earning capacity and explicitly compensates non-economic loss.”<sup>369</sup>

It is trite law in Australia that employers owe their employees a general duty of care,<sup>370</sup> which duty *inter alia* includes a duty to employ reasonably competent staff,

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<sup>364</sup> Bassam 4.

<sup>365</sup> The Commission considered common law actions as “an inappropriate mechanism for providing workers’ compensation in most circumstances” as per Productivity Commission Report (2004): 246.

<sup>366</sup> Productivity Commission Report (2004): 215.

<sup>367</sup> *Ibid* 215–249.

<sup>368</sup> *Ibid* 215.

<sup>369</sup> *Ibid* 230.

<sup>370</sup> The FindLaw Team. [Sa]. *What duty of care do Australia employers owe employees?* Find Law Australia website, retrieved on 07/06/2013 from <http://www.findlaw.com.au/articles/5090/what-duty-of-care-do-australia-employers-owe-emplo.aspx>, indicates that the High Court in *O’Connor v Commissioner for Government Transport* (1959) 100 CLR 225, at 229, placed all employers under obligation to take reasonable care for the safety for every employee by the provision of: “proper and adequate means of carrying out his work without unnecessary risk, by warning him of unusual or unexpected risks, and by instructing him in the performance of his work where instructions might reasonably be thought to secure him from danger of injury...The standard of care for an employee’s safety is not a low one.”

to prudently ensure a safe work place and to “provide, inspect and maintain safe plant and equipment”.<sup>371</sup> Failure of the duty of care resulting in loss to the worker, may entitle the worker to recover damages through common law.<sup>372</sup>

The different jurisdictions switched between periods of permitting the right to civil action,<sup>373</sup> with limitations applicable in some of the jurisdictions<sup>374</sup> and barring such right.<sup>375</sup> Reasons for limitations on the right to common law actions include that it is “fundamentally contrary to the concept of ‘no-fault’; undermines scheme affordability and, is inimical to early intervention, rehabilitation and return to work”<sup>376</sup> as well as the tardiness, costs, uncertainty and adversarial nature of civil litigation.<sup>377</sup> Opposing views argue that the right to common law actions is a fundamental right, it incentivises safer work conditions, prevents cost shifting by employers, augments statutory benefits and barring the right constitutes discrimination against the injured.<sup>378</sup> Purse contends that unlike Canada,<sup>379</sup> the right to sue employers for negligence remained part of the Australian compensatory legislation<sup>380</sup>

A common characteristic between all the jurisdictions is that damages do not supplement no-fault compensation but rather provide an alternative to compensation i.e. both statutory compensation **and** recovery under common law is not permitted although in general the right to no-fault statutory compensation is preserved until the defendant’s negligence is proved.<sup>381</sup> The Commission recommended that if the right to common law actions is preserved, it ought to be confined to the most severely injured, compensating for non-economic loss, pain,

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<sup>371</sup> Productivity Commission Report (2004): 216. See also Bassam 109.

<sup>372</sup> Productivity Commission Report (2004): 216.

<sup>373</sup> The right was abolished in the Northern Territory in 1987 and in South Australia in 1992 as per the Productivity Commission Report (2004): 218.

<sup>374</sup> Comcare prohibited claims for economic loss while New South Wales, Victoria and Western Australia confined the right to common law claims to employees who were severely injured; and Queensland and Tasmania have a minimum injury threshold as per Productivity Commission Report (2004): 218.

<sup>375</sup> Productivity Commission Report (2004): 218 & 221.

<sup>376</sup> *Ibid* 221.

<sup>377</sup> *Ibid* 221–222 & 236–239 & 242–245.

<sup>378</sup> *Ibid* 222–223 & 245–246.

<sup>379</sup> For the South African history in this regard see Chapter 2 para 3.3 *supra*.

<sup>380</sup> Purse 2005: 11.

<sup>381</sup> Productivity Commission Report (2004): 218.

suffering and disfigurement with statutory compensation for economic loss. The Commission rejected a fault-based only system.<sup>382</sup>

Successful claims for damages are paid from the compensation scheme although cases are heard and determined in the formal court system.<sup>383</sup>

#### 4.1. Statutory provisions absolving an employer from liability

Employees of the Commonwealth,<sup>384</sup> New South Wales,<sup>385</sup> Queensland,<sup>386</sup> Tasmania,<sup>387</sup> Victoria<sup>388</sup> and Western Australia<sup>389</sup> may opt<sup>390</sup> to exercise a limited right of action for damages. Prerequisites include a successful statutory compensation claim<sup>391</sup> and a minimum degree of permanent impairment.<sup>392</sup>

Contributory negligence by the worker may lead to the apportionment of damages<sup>393</sup> and steps taken or failed to be taken by the employee in mitigation of

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<sup>382</sup> *Ibid* 247.

<sup>383</sup> New South Wales (State Government). WorkCover Authority NSW. 2012. *New South Wales Workers Compensation Scheme issues paper*. Gosford: WorkCover NSW. At 12. Retrieved on 12/05/2012 from <http://www.workcover.nsw.gov.au/injuriesclaims/changes-to-workers-compensation/Pages/workers-compensation-scheme-issues-paper.aspx>. See also, Shine Lawyers': *Who pays compensation if I take legal action?* Retrieved on 07/06/2013 from <http://www.shine.com.au/service/personal-injury-victoria/workers-compensation-victoria/>. WorkCover Queensland: *Common law entitlements and payments*. Retrieved on 07/06/2013 from <http://www.workcoverqld.com.au/rehab-and-claims/support-and-benefits/common-law-payments>. Tate, P. 2007. What is State Insurance? Commentary on David Bennett QC's Paper. *Adelaide Law Review* 28: 95–102. Retrieved on 07/03/2012 from <http://0-www.heinonline.org.oasis.unisa.ac.za/HOL/LuceneSearch?terms=what+AND+is+AND+state+AND+insurance%3F+Commentary+on+David+Bennett+&base=js&all=true&searchtype=advanced&collection=journals&submit=Go&sections=any&x=0&y=0>.

<sup>384</sup> The Commonwealth Act limits claims to damages for non-economic loss but dependants of deceased workers may claim both economic and non-economic loss.

<sup>385</sup> New South Wales ss 149–151AD.

<sup>386</sup> Queensland s 189(2) & 250 if the permanent impairment is assessed at 20% or less whole body impairment.

<sup>387</sup> Tasmania s 138AB.

<sup>388</sup> Victoria s 134AB.

<sup>389</sup> Western Australia s 92 & 93E.

<sup>390</sup> Commonwealth ss 45(2)(3) & 52; Queensland s 189(2) creates an irrevocable choice. See also Productivity Commission Report (2004): 218.

<sup>391</sup> Commonwealth s 45 & Queensland s 250.

<sup>392</sup> New South Wales s 151H [15% permanent impairment]; Queensland ss 237(1) & 239 [20% whole person impairment]; Tasmania s 138AB(2) [30% whole person impairment]; Victoria s 134AB(15)(16) [30% impairment or a "serious injury"] & Western Australia s 93E(3)(4) [degree of disability not less than 30% or a significant injury resulting a permanent disability of at least 16%].

<sup>393</sup> New South Wales s 151N & 151S; Queensland s 307 & Western Australia s 93(2).

his damages have to be taken into consideration.<sup>394</sup> Research showed contributory negligence on the part of workers in only a small number of cases.<sup>395</sup>

If the employee received compensation before the recovery of damages for permanent impairment and pain and suffering,<sup>396</sup> the compensation or the damages, whichever is the lesser, should be repaid to the applicable compensation authority.<sup>397</sup>

The right of claims against third parties are retained<sup>398</sup> and if so decided by the compensation authority, it may be taken over and proceeds with action against such third party<sup>399</sup> but the rule against double compensation is applicable.<sup>400</sup>

Both economic<sup>401</sup> and non-economic loss<sup>402</sup> and redress for death<sup>403</sup> can be claimed under Australian common law which is usually paid as a lump sum.<sup>404</sup> Some of the defences previously raised by employers e.g. *volenti non fit injuria*<sup>405</sup> and common employment<sup>406</sup> are removed and may not be raised by employers.

Contrary to an absolute bar (similar in nature to the bar in COIDA)<sup>407</sup> that is applicable in the Northern Territories<sup>408</sup> and South Australia,<sup>409</sup> employees in the

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<sup>394</sup> New South Wales s 151L & Queensland s 267.

<sup>395</sup> Out of 261 claims in New South Wales, contributory negligence was found in only 13 with 50% contribution in 3 cases and less than 20% in the other 10 cases. Productivity Commission Report (2004): 229.

<sup>396</sup> New South Wales s 151A(2).

<sup>397</sup> Commonwealth ss 48(3) & 49; New South Wales s 151A; Queensland ss 119, 128C, 178A; Tasmania s 133 & Western Australia s 92.

<sup>398</sup> Commonwealth s 46; New South Wales ss 151 & 151Z; South Australia s 54(5); Victoria s 138 & Western Australia s 93. See also Productivity Commission Report (2004): 216.

<sup>399</sup> Commonwealth s 50; Tasmania s 347; Victoria s 134AB(12) requires the consent of the Compensation Authority before the employee may institute proceedings against the employer.

<sup>400</sup> Commonwealth ss 48(3), 49 & 51; New South Wales s 151A; Queensland s 270; South Australia s 54(7) & Western Australia s 91.

<sup>401</sup> New South Wales ss 151I–151J.

<sup>402</sup> Commonwealth s 52A & Victoria s 134AB.

<sup>403</sup> Commonwealth s 46; Tasmania s 138AH & Western Australia s 93AD.

<sup>404</sup> Productivity Commission Report (2004): 217.

<sup>405</sup> New South Wales s 151O. *Volenti non fit injuria* (voluntary assumption of risk) was one of the dreaded defences raised historically that led to the enactment of compensatory legislation as discussed in chapter 2 which discussed the purpose of compensatory laws.

<sup>406</sup> New South Wales s 151AA.

<sup>407</sup> Chapter 6 paras 2.1 & 2.2 *supra*.

<sup>408</sup> Northern Territories s 52.

<sup>409</sup> South Australia s 54, the wording of which strongly reminds of COIDA s 35(1).

Australian Capital Territory have an unlimited right to sue for damages except for measures to prevent double compensation.<sup>410</sup>

The Victorian Act provides as follows:<sup>411</sup>

**134AB Actions for damages**

- (3) Subject to subsection (4A), a worker may not bring proceedings in accordance with this section unless—
- (a) determinations of the degree of impairment of the worker have been made under section 104B and the worker has made an application under subsection (4); or
  - (b) subject to any directions issued under section 134AF, the worker elects to make an application under subsection (4) on the ground that the worker has a serious injury within the meaning of this section.

....

- (16) If the assessment under section 104B of the degree of impairment of the worker as a result of the injury is less than 30 per centum, the person may not bring proceedings for the recovery of damages in respect of the injury unless—
- (a) the Authority or self-insurer—
    - (i) is satisfied that the injury is a serious injury; and
    - (ii) issues to the worker a certificate in writing consenting to the bringing of the proceedings; or
  - (b) a court, other than the Magistrates' Court, on the application of the worker made within 30 days after the worker received advice under subsection (7) or, with the consent of the Authority under subsection (20), after that period, gives leave to bring the proceedings.

...

- (19) For the purposes of subsection (16)(b)—
- (a) a court, other than the Magistrates' Court, must not give leave unless it is satisfied on the balance of probabilities that the injury is a serious injury;

...

- (38) For the purposes of the assessment of *serious injury* in accordance with subsections (16) and (19)—
- (a) ...
  - (b) the terms *serious* and *severe* are to be satisfied by reference to the consequences to the worker of any impairment or loss of a body function, disfigurement, or mental or behavioural disturbance or disorder, as the case may be, with respect to—
    - (i) pain and suffering; or

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<sup>410</sup> Australian Capital Territory ss 36F, 182A–186.

<sup>411</sup> The subsections that will be applicable to the discussion of case law hereafter, are cited here.

- (ii) loss of earning capacity—
  - when judged by comparison with other cases in the range of possible impairments or losses of a body function, ...
- (c) an impairment or loss of a body function or a disfigurement shall not be held to be serious for the purposes of subsection (16) unless the pain and suffering consequence or the loss of earning capacity consequence is, when judged by comparison with other cases in the range of possible impairments or losses of a body function, or disfigurements, as the case may be, fairly described as being more than significant or marked, and as being at least very considerable;
- (d) .....
- (e) where a worker relies upon paragraph (a), (b) or (c) of the definition of serious injury in subsection (37), the Authority or self-insurer shall not grant a certificate under subsection (16)(a) and a court shall not grant leave under subsection (16)(b) on the basis that the worker has established the loss of earning capacity required by paragraph (b) unless the worker establishes in addition to the requirements of paragraph (c) or (d), as the case may be, that—
  - (i) at the date of a decision under subsection (16)(a) or at the date of the hearing of an application under subsection (16)(b), the worker has a loss of earning capacity of 40 per centum or more, ...

The definition of an “employer” is generally broadly defined in Australian compensatory laws and may include “any person deemed to be an employer by this Act”,<sup>412</sup> with none of the laws categorising employers similar to COIDA<sup>413</sup> or Canada.<sup>414</sup>

#### 4.2. Interpretation through case law: Constitutional rulings

The Federal Constitution of Australia lacks a Bill of Human Rights and consequently court cases challenging human rights breaches in compensatory legislation or practise are not to be found.

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<sup>412</sup> Victorian Act s 5(1)(c).

<sup>413</sup> See Chapter 5 para 2.2 *supra* for the COIDA definition.

<sup>414</sup> See Chapter 5 para 3.2 *supra* for the Canadian definition.



### 4.3. Interpretation through case law: Applicability of statutory provisions

#### 4.3.1. *Ninkovic v Pajvancek*

Marks J laid down principles in the Supreme Court of Victoria in the case of *Ninkovic v Pajvancek*<sup>415</sup> on the interpretation of the definition of a “serious injury” as the test for a right of access to common law remedies. The case turned on a similarly-worded provision enacted<sup>416</sup> in the Transport Accident Act No. 111 of 1986 which Act created a no-fault compensation system for victims of motor vehicle accidents. The interpretation was subsequently confirmed by the Full Bench in *Humphries and Another v Poljak* [1992] VicRp 58; [1992] 2 VR 129<sup>417</sup> and is still applied by the Victorian courts when faced by the need to interpret the provision in the Victorian Accident Compensation Act.<sup>418</sup>

Access to common law remedies is limited by the defined expression “serious injury” and consequently courts need to be satisfied that the victim has suffered a “serious injury” due to a specific accident, before a court may approve leave to proceed at common law.<sup>419</sup> This provision creates an “exception to the general rule which prevents or, rather, prohibits common law proceedings...”<sup>420</sup> and if a “serious injury” is sustained, the injured person may apply to the Commission for a certificate allowing to sue under common law; but if such is denied, the plaintiff has recourse to the court and may apply for leave to proceed at common law.<sup>421</sup>

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<sup>415</sup> *Ninkovic v Pajvancek* [1991] VicRp 81; [1991] 2 VR 427. Hereinafter: *Ninkovic*. Retrieved on 14/06/2013 from <http://www.austlii.edu.au/au/cases/vic/VicRp/1991/81.html>.

<sup>416</sup> *Ninkovic* [8]:

" 'Serious injury' means:

(a) serious long-term impairment or loss of a body function; or

(b) permanent serious disfigurement; or

(c) severe long-term mental or severe long-term behavioural disturbance or disorder; or

(d) loss of a foetus."

<sup>417</sup> *Humphries and Another v Poljak* [1992] VicRp 58; [1992] 2 VR 129. Retrieved on 14/06/2013 from <http://www.austlii.edu.au/au/cases/vic/VicRp/1992/58.html>. Hereinafter *Poljak*.

<sup>418</sup> In this regard, see *Poljak* as well as *Kelso v Tatiara Meat Co Pty Ltd* [2007] VSCA 267. Retrieved on 13/06/2013 from <http://www.austlii.edu.au/au/cases/vic/VSCA/2007/267.html>. *Sabo v George Weston Foods* [2009] VSCA 242. Retrieved on 13/06/2013 from <http://www.austlii.edu.au/au/cases/vic/VSCA/2009/242.html>. *Bachos v Storden Pty Ltd & Anor* [2012] VCC 1745. Retrieved on 14/06/2013 from <http://www.austlii.edu.au/au/cases/vic/VCC/2012/1745.html>.

<sup>419</sup> *Ninkovic* [5].

<sup>420</sup> *Ibid* [6]–[7].

<sup>421</sup> *Ninkovic* [7] and Victorian Act s 134AB(3)(a) & 134AB(16).

A court is bound not to give permission to pursuit at common law unless it is satisfied that “the injury is a serious injury”, the onus of which rests upon the plaintiff to convince the court that the “injury suffered by the plaintiff was serious.”<sup>422</sup> The Court has to be satisfied that the Plaintiff could bring himself within the corners of the definition which is characterised by its all-inclusivity by the word “means” in “serious injury means”.<sup>423</sup> The honourable Justice interpreted “serious long-term impairment or loss of a body function” to mean there “must be an impairment which is serious, and it must be long-term, or there must be a serious loss of a body function.”<sup>424</sup> The word “serious” indicates serious consequences for the plaintiff which in the context of the statute means consequences in the form of disablement from work or impedes enjoyment of life.<sup>425</sup>

#### **4.3.2. *To Ha Lu v Mediterranean Shoes Pty Ltd & Ors***

Supreme Court of Victoria sitting as an Appeal Court ruled on *To Ha Lu v Mediterranean Shoes Pty Ltd & Ors*<sup>426</sup> to determine whether different injuries may be combined to satisfy the requirement of a “serious injury” as meant by section 135A(19)(a)<sup>427</sup> of the Victorian Accident Compensation Act.<sup>428</sup>

According to his minority reasons, Buchanan JA interpreted a “serious injury” to mean that the Act only requires the existence of impairment or loss of physical function without confining the bodily function to the body part directly affected by the injury.<sup>429</sup> Combining two injuries will necessitate it to flow from one incident.<sup>430</sup> The definition of “serious injury” does not explicitly require a “relationship between

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<sup>422</sup> *Ninkovic* [8] and Victorian Act s 134AB(38)(e)(i).

<sup>423</sup> *Ninkovic* [10].

<sup>424</sup> *Ibid* [11].

<sup>425</sup> *Ibid*.

<sup>426</sup> *To Ha Lu v Mediterranean Shoes Pty Ltd & Ors* [2000] VSCA 65. Hereinafter: *To Ha Lu*. Retrieved on 14/06/2013 from <http://www.austlii.edu.au/au/cases/vic/VSCA/2000/65.html>.

<sup>427</sup> “(19) In this section—  
determination date, in relation to an injury, means the date on which—  
(a) the injury is determined, or deemed, in accordance with this section, or  
declared by a court, to be a serious injury; or ...”

<sup>428</sup> *To Ha Lu* [6].

<sup>429</sup> *Ibid* [3].

<sup>430</sup> *Ibid* [4].

an injury and impairment or loss of a body function"<sup>431</sup> but the definition should be interpreted within the context of the Act and the limited right of access to common law redress. Impairments or loss of bodily functions flowing from separate incidents, each giving rise to a cause of action for damages, should be considered separately when deciding whether the test has been met with the "only relevant impairment or loss of a body function is that resulting from the defendant's wrongful act or omission the subject matter of the plaintiff's cause of action."<sup>432</sup>

Leave was sought from the Supreme Court to sue under common law for injuries sustained in the employ of the first Respondent after the Compensation Authority assessed the Plaintiff's degree of impairment at less than 30 percent and the County Court dismissed the Plaintiff's application.<sup>433</sup>

The Plaintiff sustained an injury by repeatedly straining his right elbow and to a lesser extent his left elbow when pulling shoes from a mould in a shoe factory. A second injury followed later when a mould fell on his right shoulder, close to his neck but neither the shoulder nor the neck injury were mentioned to his doctor or reported to the Authority although impairment to the neck and "right upper limb" was accepted and compensated.<sup>434</sup> Medical evidence supported the elbow condition (which was accepted as minor)<sup>435</sup> and a rotator cuff tear in the shoulder but the relationship between the shoulder injury and the incident when the mould hit the Plaintiff was unclear.<sup>436</sup> It was also held in the Court below that the injuries to the elbow and the neck could not be relevantly aggregated to be considered as "serious" in combination.<sup>437</sup> It was contended on behalf of the Plaintiff that the two injuries ought to be aggregated and the combined degree of impairment caused a serious and long-term impairment of one bodily function, the right arm; and it gave rise to one cause of action or in the alternative the shoulder injury ought to be considered as a "serious injury".<sup>438</sup>

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<sup>431</sup> *Ibid* [5].

<sup>432</sup> *Ibid*.

<sup>433</sup> *Ibid* [6].

<sup>434</sup> *Ibid* [7].

<sup>435</sup> *Ibid* [11].

<sup>436</sup> *Ibid* [9].

<sup>437</sup> *Ibid* [11]-[12].

<sup>438</sup> *Ibid* [13].

The Supreme Court of Victoria's majority ruling, held that for an injury to be considered as "serious", it necessitates serious consequences for the Plaintiff as judged on an objective basis; and if compared to similar cases, it must fit a fair description of at least "'very considerable' and certainly more than 'significant' or 'marked'".<sup>439</sup> On a balance of probabilities, it needs to be established that the injury caused serious long-term impairment of a bodily function decided on "elements of fact, degree and value judgement".<sup>440</sup>

In relying on *Humphries v Poljak*, [1992] VicRp 58; [1992] 2 V.R. 129 it was argued on behalf of the Plaintiff that the two injuries need to be "relevantly aggregated" for the purposes of fulfilling the test on seriousness because it resulted in the impairment of one body function, the right arm.<sup>441</sup> According to *Humphries*, multiple impairments may not be aggregated for the purpose of establishing whether it constitutes a "serious injury"; but injuries<sup>442</sup> may relevantly be combined for that purpose.<sup>443</sup> It was also contended that both injuries formed part of one cause of action, the negligent failure of the first Respondent to provide a safe work system.<sup>444</sup> The Court declined the arguments and held that it cannot be relevantly aggregated as it "impaired two separate body functions"<sup>445</sup> viz the shoulder and arm; and *Humphries* was distinguishable as that ruling was made in the context of one incident that resulted in more than one injury.<sup>446</sup> Chernov JA explained that an injury to the big toe of one foot and subsequently an injury to the knee of the same leg may negatively affect the use of that leg, but it would be inaccurate to describe it as one impaired bodily function, the leg, but if this is wrong, his Honour continued to analyse the relevant provisions of Act.<sup>447</sup>

The Act defines "injury" to mean "any physical or mental injury" which includes the "aggravation ... of any pre-existing injury" and "serious injury" is defined to mean "a

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<sup>439</sup> *Ibid.*

<sup>440</sup> *Ibid* [15].

<sup>441</sup> *Ibid* [22].

<sup>442</sup> It is important to note the difference in meaning of impairments and injuries.

<sup>443</sup> *To Ha Lu* [22].

<sup>444</sup> *Ibid.*

<sup>445</sup> *Ibid* [22]-[23].

<sup>446</sup> *Ibid* [29].

<sup>447</sup> *Ibid* [23].

long-term impairment or loss of body function”.<sup>448</sup> It is not the injury *per se* which is indicative of its seriousness but rather the degree of impairment or loss of bodily function consequential to the injury.<sup>449</sup> The Act aims to forbid common law actions by occupationally-injured employees who are entitled to statutory compensation and the limited access creates an exception to the prohibition.<sup>450</sup> To come within the exception, the Plaintiff needs to show that the relevant injury indeed constitutes a “serious injury”.<sup>451</sup> It is not open for the Court to grant leave unless it is satisfied that the injury is a “serious injury”.<sup>452</sup>

Multiple injuries require each individual injury to be shown as a “serious injury”.<sup>453</sup> Aggregation of multiple injuries depends on whether the same body function is affected and whether they arose from the same relevant accident failing which they remain distinct.<sup>454</sup> The Statute prohibits relevant aggregation of separately sustained occupational injuries which do not individually constitute a “serious injury” despite impairing one bodily function.<sup>455</sup> In cases of a pre-existing injury, it is permissible to combine injuries to determine if the second injury aggravated the first and if so, whether the additional impairment satisfies the “serious injury” test.<sup>456</sup> The process includes a comparison between the impairment immediately before and after the second injury; and if shown that the impairment flowing from the second injury can be fairly described as “serious”, the second injury will satisfy the test.<sup>457</sup>

The Court held that the injuries could not be relevantly aggregated because each injury gave rise to one cause of action which means that proceedings would involve two claims founded in two distinct incidents that resulted from two separate allegedly-negligent acts or omissions and will necessitate separate rulings.<sup>458</sup>

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<sup>448</sup> *Ibid* [24].

<sup>449</sup> *Ibid.*

<sup>450</sup> *Ibid.*

<sup>451</sup> *Ibid.*

<sup>452</sup> *Ibid.*

<sup>453</sup> *Ibid* [26].

<sup>454</sup> *Ibid.*

<sup>455</sup> *Ibid* [28].

<sup>456</sup> *Ibid.*

<sup>457</sup> *Ibid.*

<sup>458</sup> *Ibid* [31].

### 4.3.3. *Haden Engineering Pty Ltd v McKinnon*

The impact of pain and suffering on the seriousness of the injury was considered by the Supreme Court of Victoria in an application for leave to pursue at common law based on section 134AB(38)(c)<sup>459</sup> in the case of *Haden Engineering Pty Ltd v McKinnon*.<sup>460</sup> The Court acknowledged the numerous disputes relating to the statutory test for a “serious injury” in its function as gatekeeper regarding “common law proceedings for damages attributable to the injury.”<sup>461</sup> For purposes of clarity, the specific subsection states that none of impairment, loss of bodily function or disfigurement shall be held as “serious”:

... unless the pain and suffering consequence or the loss of earning capacity consequence is, when judged by comparison with other cases in the range of possible impairments or losses of a body function, or disfigurements, as the case may be, fairly described as being more than significant or marked, and as being at least very considerable...

The test criteria is criticised by the Court to be unfortunately vague, “imprecise, impressionistic, adjectival”;<sup>462</sup> and putting the courts to task to apply the test consistently and follow the rule of law by treating similar cases alike irrespective of the difficulties posed by imprecise criteria such as “unquantifiable as pain.”<sup>463</sup>

Interpretation of the “pain and suffering consequence” includes a two-folded test with the first element the applicant’s experience of pain and the second element the disabling effect thereof on the applicant’s physical capabilities (e.g. incapacity for work) and amenities of life.<sup>464</sup>

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<sup>459</sup> “134AB(38)(c) an impairment or loss of a body function or a disfigurement shall not be held to be serious for the purposes of subsection (16) unless the pain and suffering consequence or the loss of earning capacity consequence is, when judged by comparison with other cases in the range of possible impairments or losses of a body function, or disfigurements, as the case may be, fairly described as being more than significant or marked, and as being at least very considerable;”

<sup>460</sup> *Haden Engineering Pty Ltd v McKinnon* [2010] VSCA 69. Hereinafter: *Haden Engineering Pty Ltd*. Retrieved on 25/08/2010 from <http://www.austlii.edu.au/au/cases/vic/VSCA/2010/69.html>.

<sup>461</sup> *Ibid* [1]–[2].

<sup>462</sup> *Ibid* [3].

<sup>463</sup> *Ibid* [4].

<sup>464</sup> *Ibid* [9].

To assess the experience of pain, the Court has to consider the intensity, frequency and duration of the pain and episodes of pain<sup>465</sup> with the evidentiary basis comprising of:<sup>466</sup>

- (a) what the plaintiff says about the pain (both in court and to doctors);
- (b) what the plaintiff does about the pain (e.g. medication, rest, seeking medical treatment);
- (c) what the doctors say about the extent and intensity of the plaintiff's pain; and
- (d) what the objective evidence shows about the disabling effect of the pain.

The Plaintiff's credibility will determine the weight attached to his version of the pain experienced,<sup>467</sup> with cognisance taken of an individual's preparedness to endure pain to facilitate a desired level of function in which case objective evidence of the disabling effect may be of less importance.<sup>468</sup>

In assessing the second element, the disabling effect of pain, the extent of the limiting effect on the Plaintiff's physical functioning and interferences with the Plaintiff's amenities of life, ought to be considered.<sup>469</sup> The disabling effect of the pain on work capacity entails a consideration of whether the Plaintiff is able to and the extent to which the Plaintiff can perform his pre-injury employment.<sup>470</sup> The ability to return to full-time employment does not exclude a finding of "serious injury" as it is but one of the factors to be considered.<sup>471</sup>

Assessment of the impact upon everyday activities of life will depend upon the circumstances of each case but may include considering the impact of pain on the Plaintiff's sleep, mobility, cognitive function,<sup>472</sup> ability to self-care, execution of household duties, recreational and social activities, sexual life and enjoyment of life.<sup>473</sup> The statutory test requires the consequences for the Plaintiff be compared

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<sup>465</sup> *Ibid* [10].

<sup>466</sup> *Ibid* [11].

<sup>467</sup> *Ibid* [12].

<sup>468</sup> *Ibid* [13].

<sup>469</sup> *Ibid* [14].

<sup>470</sup> *Ibid* [15].

<sup>471</sup> *Ibid*.

<sup>472</sup> Which may be impaired due to the use of medication.

<sup>473</sup> *Haden Engineering Pty Ltd* [16].





“very considerable” pain, suffering and loss of earning capacity.<sup>484</sup> To establish a “serious injury”, Guppy relied on the consequences of impairment in respect of loss of earning capacity and not the subsequent pain and suffering.<sup>485</sup> Section 134AB(37) defines “serious injury” as a “permanent impairment or loss of a body function”<sup>486</sup> with the process to establish the seriousness of an injury to be determined according to subsection (38) and specifically the second injury shall not be held as “serious” by the Court unless:<sup>487</sup>

- Consideration is given to the consequences to Guppy of the impairment regarding the loss of earning capacity compared to similarly impaired cases;
- the loss of earning capacity when compared to similar cases can be “fairly described as being more than significant or marked, and as being at least very considerable”;
- even if paragraphs (b) and (c) have been satisfied, Guppy further needs to show that he has a permanent loss of earning capacity of at least 40% in financial means measured in accordance with paragraph (f)
- loss of earning capacity is to be measured by comparing Guppy’s gross annual income which he earns, or is capable of earning in suitable employment at the date of the hearing by the County Court, with the gross annual income which he earns, or is capable of earning during the 3 years preceding and the 3 years following the injury that “most fairly reflects his earning capacity had the injury not occurred”.

The influence of the test is that Guppy has to show a loss of 40% earning capacity due to the second injury which can fairly be described “as more than significant or marked, and as being at least very considerable” if compared to similar cases.<sup>488</sup> In following earlier authorities, the Court held that the second injury must in itself satisfy the requirements of a “serious injury” as “the additional impairment caused by the aggravation must bear consequences of sufficient magnitude (more than

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<sup>484</sup> *Ibid* [8]–[9].

<sup>485</sup> *Ibid* [11]–[12].

<sup>486</sup> *Ibid* [13].

<sup>487</sup> *Guppy* [14] and the Victorian Act s 134AB(37)(b)(c) & (f).

<sup>488</sup> *Ibid* [17].

significant or marked, and at least very considerable) for the second injury to qualify as a 'serious' injury."<sup>489</sup>

Before the first injury, Guppy was fit and healthy; he sought medical treatment and tried to return to work on light duties after the injury but was found to be incapacitated after about 6 months in September 2001.<sup>490</sup> About four years later he commenced work with an employer who specialises in the placement of people with disabilities <sup>491</sup> where his hours of work fluctuated<sup>492</sup> but by the mid of 2005 he could only manage 11 hours of work per week.<sup>493</sup> The second injury was sustained in August of 2005<sup>494</sup> and upon returning to work thereafter, he worked 10 hours per week.<sup>495</sup> The Court accepted Guppy's pre-injury earning capacity as an average of 20-22 hours per week<sup>496</sup> and after the injury he could only work 10-12 hours per week<sup>497</sup> which meant a reduction of close to 50% which satisfies the requirement of at least 40% reduction in income.<sup>498</sup> Once the 40% threshold has been met, the next test to apply is whether the second injury resulted in consequences that can be described as "more than significant or marked and must be at least very considerable" in comparison to similar cases.<sup>499</sup> The Court held that in most cases, satisfying the 40% threshold will also mean "at least very considerable" consequences pertaining to earning capacity. It was argued by the Defendant that because Guppy's earnings was low, satisfying the 40% test will not take much to satisfy for example, a person working 4 hours per week, reduced to two hours, losing 50% could "hardly be described as 'very considerable'"<sup>500</sup> The Court firmly declined this argument and held that for "an already impoverished person to lose 40 per cent of his already reduced work capacity is a consequence that must on any measure be viewed as 'very considerable'."<sup>501</sup> Accordingly, leave was granted to

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<sup>489</sup> *Ibid* [18]-[19].

<sup>490</sup> *Ibid* [20].

<sup>491</sup> *Ibid* [22].

<sup>492</sup> *Ibid* [23].

<sup>493</sup> *Ibid* [26]-[27].

<sup>494</sup> *Ibid* [28].

<sup>495</sup> *Ibid* [29].

<sup>496</sup> *Ibid* [40].

<sup>497</sup> *Ibid* [41].

<sup>498</sup> *Ibid* [47]-[48].

<sup>499</sup> *Ibid* [49].

<sup>500</sup> *Ibid* [50].

<sup>501</sup> *Ibid* [51].

bring common law actions in respect of the aggravation due to the second injury based on a reduced earning capacity.<sup>502</sup>

#### 4.3.5. *Parry v Masterpet Australia Pty Ltd*

The District Court of New South Wales determined a case that turned on the limitation period allowed to commence proceedings in *Parry v Masterpet Australia Pty Ltd*,<sup>503</sup> a case that was decided on section 151D of the New South Wales Compensation Act.<sup>504</sup> The Plaintiff sought an order *nunc pro tunc* for leave to bring an action for damages outside the three year limitation period<sup>505</sup> after sustaining an occupational injury on 29 March 2004.<sup>506</sup>

The Plaintiff notified her employer at the time of the accident and consulted a lawyer who advised that it is “premature” to pursue compensation and failed to inform her on a right to civil action.<sup>507</sup> After three operations she was informed in March 2006 by the Compensation Authority that she may be entitled to compensation for whole person impairment and needed to see a lawyer.<sup>508</sup> She saw another lawyer and upon an enquiry as to an action for damages, she was informed that it wasn’t applicable to her.<sup>509</sup> She received compensation on 24 November 2006 based on an assessment of 17% whole person impairment and a further amount pertaining to pain and suffering. She was informed that she was not entitled to any further compensation by the end of 2007;<sup>510</sup> but after a new claims manager was appointed to her case, she was informed that her “compensation rights remained open for all time.”<sup>511</sup> She consulted another lawyer on 24 May 2009 and was informed that she might be entitled to further compensation due to deterioration in her condition and about the possibility to pursue at common law

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<sup>502</sup> *Ibid* [52].

<sup>503</sup> *Parry v Masterpet Australia Pty Ltd* [2013] NSWDC 71. Hereinafter: *Parry*. Retrieved on 16/06/2013 from <http://www.austlii.edu.au/au/cases/nsw/NSWDC/2013/71.html>.

<sup>504</sup> *Ibid* [1].

<sup>505</sup> *Ibid* [1], [27]–[28] & [40]–[41].

<sup>506</sup> *Ibid* [2].

<sup>507</sup> *Ibid* [4]–[5].

<sup>508</sup> *Ibid* [6].

<sup>509</sup> *Ibid* [7].

<sup>510</sup> *Ibid* [11].

<sup>511</sup> *Ibid* [12].

for damages.<sup>512</sup> She was advised to apply for reinstatement of compensation for loss of earnings which may influence the employer's insurer to resolve to payment of a lump sum on a once-and-for-all basis rather than compensation for loss of earnings which she may be entitled to until the age of 67.<sup>513</sup> Notice of the intended claim for damages was given by her lawyers to the employer on 24 October 2011<sup>514</sup> which is outside the limitation period as provided in section 151D(2):<sup>515</sup>

A person to whom compensation is payable under this Act is not entitled to commence court proceedings for damages in respect of the injury concerned against the employer liable to pay that compensation more than 3 years after the date on which the injury was received, except with the leave of the court in which the proceedings are to be taken.

Prejudice to a defendant might compel a Court to refuse extension of the limitation period but the absence of prejudice does not necessarily mean a favourable outcome to the Plaintiff.<sup>516</sup>

The first question to be considered is specifically the date on which the limitation period begins to run;<sup>517</sup> which was agreed by the parties to be the "date of the finding, in a valid medical certificate" that the Plaintiff's injuries surpassed the threshold of 15%.<sup>518</sup> The Court found authority for this reasoning in the decision of *Opoku v P & M Quality Smallgoods P/ L* [2012] NSWSC 478 where it was accepted that *Opoku* could not institute proceedings until he met the required threshold.<sup>519</sup> This is contrary to previous decisions in which the New South Wales Court of Appeal held that the three year limitation period starts from the date of the injury and not from the date of the finding that the threshold has been reached.<sup>520</sup>

In considering prejudice to the defendant, the Honourable Justice applied the test framed in *Itex Graphix Pty Limited v Elliott* [2002] NSWCA 104 at [87] on the

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<sup>512</sup> *Ibid* [13].

<sup>513</sup> *Ibid* [14].

<sup>514</sup> *Ibid* [15].

<sup>515</sup> *Ibid* [21].

<sup>516</sup> *Ibid* [22].

<sup>517</sup> *Ibid* [23]–[24].

<sup>518</sup> *Ibid* [25] & [40].

<sup>519</sup> *Ibid* [26].

<sup>520</sup> *Ibid* [27]–[40].

discretion by the Court in deciding applications for leave to sue after the limitation period stating that “the general question that has to be asked is what is fair and just (per Gleeson CJ in *Salido*). Or what does the justice of the case require”.<sup>521</sup> The Court held that the Defendant was aware from the date of the injury of the Plaintiff’s injury and causal relationship between her injuries, disabilities and employment duties.<sup>522</sup> The Plaintiff tried to ascertain her legal rights and accepted the advice of lawyers in a case where negligence is not obvious, while the limitation period expired during a time which she was under the impression that a claim for damages was not open to her.<sup>523</sup> The Court held it to be “fair and just” in the light of all the circumstances to grant the relief sought.<sup>524</sup>

#### 4.4. Summary

The Australian situation regarding the right to action at common law by an employee against his employer may be summarised as follows:

- The general rule is that civil actions by employees against their employers is prohibited in respect of occupational injuries and diseases;<sup>525</sup>
- An exception to the rule has been created by a number of Australian jurisdictions;<sup>526</sup>
- Civil claims by virtue of the applicable compensatory law are barred until a minimum threshold of permanent impairment is established;<sup>527</sup>
- Immunity against civil action by virtue of Australian compensatory laws is extended to the company as employer and certain categories of employees in an enterprise that are not specifically specified;<sup>528</sup>
- The right of action against third parties is retained;<sup>529</sup>

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<sup>521</sup> *Ibid* [49].

<sup>522</sup> *Ibid* [50].

<sup>523</sup> *Ibid* [50].

<sup>524</sup> *Ibid* [51]–[53].

<sup>525</sup> Chapter 6 paras 4.1 & 4.3.1 *supra*.

<sup>526</sup> Chapter 6 paras 4.1 & 4.3.1 *supra*.

<sup>527</sup> Chapter 6 paras 4.1 & 4.3.4 *supra*.

<sup>528</sup> Chapter 6 para 4.1 *supra*.

<sup>529</sup> Chapter 6 para 4.1 *supra*.

- The definitions of an “occupational injury”; “occupational disease”;<sup>530</sup> an “employee” and an “employer”<sup>531</sup> determine whether an action will be barred and an employer be saved from same.

## 5. CONCLUSION

The general rule in all three countries is that the employee’s right to common law redress is removed.<sup>532</sup> Limited access has been allowed in all three countries. In South Africa, the right is limited to mine employees who are entitled to compensation for lung diseases under ODIMWA.<sup>533</sup> In Canada, a limited right has been subrogated to the Compensation Authority (who has the final decision whether to proceed with civil action) and differs between jurisdictions, some of which have abrogated the right.<sup>534</sup> In Australia, a limited right exists in some jurisdictions based on statutory determined thresholds.<sup>535</sup> The right in Australia is the broadest of the three countries in following a hybrid system whereby the right arises once a minimum threshold of impairment has been reached.<sup>536</sup>

Reasons for the removal or limitation of the rights are closely related to the purpose and development of compensatory laws in all three countries; founded on an argument that is essential to the existence of compensatory legislation and without it, the social contract between employers and employees may be breached.<sup>537</sup>

Common law actions for damages are fault-based in contrast to workers compensation schemes which are by their very nature no-fault systems of social security.<sup>538</sup> COIDA is unique amongst the three countries in providing for a fault-based claim for increased compensation within the statutory compensation

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<sup>530</sup> See Chapter 4 paras 4.1; 4.3 & 4.4 *supra*.

<sup>531</sup> See Chapter 5 paras 4.1 & 4.2 *supra*.

<sup>532</sup> Chapter 6 paras 2.1; 2.2; 3.1; 3.2; 4.1 & 4.2 *supra*.

<sup>533</sup> Chapter 6 para 2.2.3 *supra*.

<sup>534</sup> Chapter 6 para 3.1 *supra*.

<sup>535</sup> Chapter 6 para 4.1 *supra*.

<sup>536</sup> Chapter 6 paras 4.1 & 4.3 *supra*.

<sup>537</sup> Chapter 6 paras 2.2; 2.2.1; 2.2.2; 2.2.3; 3.1; 3.2; 3.2.1; 3.2.2; 3.2.3; 4.1; 4.2 & 4.3 *supra*.

<sup>538</sup> Chapter 6 para 2.4 *supra*.

scheme.<sup>539</sup> The rules that govern recovery are however archaic in nature and pre-dates current common law rules pertaining to non-statutory claims for damages.<sup>540</sup> Successful claims are limited to compensation for pecuniary loss only disadvantaging employees who have a higher burden of proof than at common law for lower redress.<sup>541</sup> It is submitted that such disadvantages to employees are not consistent with the remedial nature of compensatory legislation. A further disadvantage is that the employer is not held responsible according to his statutory and common law duties of care as a claim for increased compensation is a claim against the Compensation Fund and not against the employer.<sup>542</sup>

Categories of employees included in the ambit of protection against civil action, and for the purposes of increased compensation and wrongful conduct include senior employees in charge of the employer's business which leaves colleagues of equal hierarchical status and lower ranking employees open to common law claims for damages if they do not fulfil the definition of "in charge of a branch or department" under COIDA.<sup>543</sup> Immunity to employers in the Canadian compensatory schemes is very broad because contrary to COIDA, a system of collective liability is followed according to which all employers in the same category are indemnified against civil claims by all employees in the same category.<sup>544</sup> Immunity in Canada has been extended to include even professional medical negligence, which is contrary to the philosophy of the compensation system which is based on the employment relationship.<sup>545</sup> In Australian compensatory law immunity is generally broad and may include a deemed employer, with none of the laws categorising employers similar to COIDA or Canada.<sup>546</sup>

The right of action against third parties is retained in all three countries.<sup>547</sup>

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<sup>539</sup> Chapter 6 paras 2.5; 2.5.1; 2.5.2; 2.5.3 *supra*.

<sup>540</sup> Chapter 6 paras 2.5.1; 2.5.2; 2.5.3 *supra*.

<sup>541</sup> Chapter 6 para 2.5 *supra*.

<sup>542</sup> Chapter 6 para 2.5 *supra*.

<sup>543</sup> Chapter 6 para 2.5 *supra*.

<sup>544</sup> Chapter 6 paras 3.1; 3.3 & 3.3.1 *supra*.

<sup>545</sup> Chapter 6 para 3.3.1 *supra*.

<sup>546</sup> Chapter 6 para 4.1 *supra*.

<sup>547</sup> Chapter 6 paras 2.1; 3.1 & 4.1 *supra*.

The fragmentation in the South African compensation scheme has markedly been enlarged and deepened as an unintended consequence of the *Mankayi* ruling widening the disparity between the rights and redress of employees pursuant to COIDA and ODIMWA respectively.<sup>548</sup> Fragmentation in the Canadian compensatory scheme is real in the form of provincial jurisdictional determinations, but has been overcome by the Interjurisdictional Agreement.<sup>549</sup> It is thus not considered as problematic in contrast to Australia with a similar federal system of government but which has expressed the need for harmonising the schemes across the country and has commenced the process with a system of benchmarking health and safety laws across jurisdictions.<sup>550</sup>

Irrespective of how a common law claim for damages is framed, be it a breach of human rights or human rights remedies, labour relations disputes or remedies or in breach of contract, the courts in all three countries will not allow a masked claim if the applicable compensatory law prohibits actions for damages against the employer. In deciding the true nature of the action, the courts have regard to the employment relationship and the applicable definitions.<sup>551</sup>

In South Africa and Canada, court actions by employees generally challenge the immunity afforded to employers,<sup>552</sup> but in Australia court actions by employees are characterised by appeals turning on technical requirements to obtain a declaration of the right to pursue at common law.<sup>553</sup> Interpretation of unclear provisions in Australia poses difficulties to the Courts in determining the seriousness of an injury through evidence and testimony *inter alia* on pain and suffering, loss of earning capacity in addition to procedural aspects like the date when prescription starts to run. The very technical nature of the Australian compensation system has seen the need for greater involvement from lawyers; and workers are advised to seek legal advice once the required threshold has been met and the right to pursue at common

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<sup>548</sup> Chapter 6 para 2.2.3 *supra*.

<sup>549</sup> Chapter 6 para 3 *supra*.

<sup>550</sup> Chapter 6 para 4 *supra*.

<sup>551</sup> Chapter 6 paras 2.3.1; 2.3.2; 3.2.3; 3.3.2; 3.3.3; 3.3.4 & 4.1 *supra*.

<sup>552</sup> Chapter 6 paras 2.2; 2.3; 3.2 & 3.3 *supra*.

<sup>553</sup> Chapter 6 paras 4.3; 4.3.1; 4.3.2; 4.3.3; 4.3.4 & 4.3.5 *supra*.



law is established.<sup>554</sup> It is proposed that an overly-complicated compensatory system is contrary to the principle of equal access and equal benefit of the law and contrary to the Meredith principles.

It is submitted that employers will be indemnified irrespective of the circumstances surrounding the accident unless the employer removes himself from the ambit of the protection by deliberately wrongful actions.<sup>555</sup>

Human rights challenges in South Africa and Canada have shown that courts are of the view that the compensation scheme is advantageous to workers, with the only disadvantage to employees that a higher amount of damages can be recovered through common law actions than through statutory compensation. However, it is important to note that no disadvantages to employers due to the system could be identified.<sup>556</sup> Australia does not have a Bill of Rights in its Constitution and accordingly no such challenges were reported.

No statutory compensation is provided for pertaining to non-pecuniary loss like pain and suffering, loss of enjoyment of life etc. under COIDA or in Canada but it is compensated under Australian compensatory laws.<sup>557</sup> It is also the reason why recovery under common law is normally higher than at statutory compensation; and it is submitted that employees have a need for their harm to be redressed in a manner that vindicates harm done, which is not the case in very limited compensation regimes. It is submitted that employees will challenge the provisions that exclude employers from liability for negligently exposing employees until either adequate no-fault compensation is being paid or the right to pursue at common law is re-instated.

None of the three compensatory systems allow of double compensation. If a worker recovers at common law, statutory compensation will be deducted from it and *vice versa* which ever is the lesser.<sup>558</sup>

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<sup>554</sup> Chapter 6 para 4.3.5 *supra*.

<sup>555</sup> Chapter 6 fn 10 *supra*.

<sup>556</sup> Chapter 6 paras 2.2.1 & 3.2.1 *supra*.

<sup>557</sup> Chapter 6 fn 25; 353 & 396 & Chapter 6 paras 4.3.1; 4.3.2 & 4.3.3 *supra*.

<sup>558</sup> Chapter 6 paras 2.2.1; 2.2.3; 3.1 & 4.1 *supra*.

The common law has been developed and amended in Australia to assist employees specifically through the removal of certain defences often utilised by employers in the past. Neither South Africa nor Canada has similar provisions.<sup>559</sup>

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<sup>559</sup> Chapter 6 para 4.1 & Chapter 6 fn 405 & 406 *supra*.

## CHAPTER 7

### CONCLUSION

#### 1. INTRODUCTION

The purpose of this study was stated as an exploration whether South African employees find themselves in a less favourable position regarding the right to compensation for occupational injuries and diseases and if so, the extent thereof in comparison to Canadian and Australian employees.

In answering the question, four areas have been identified that revealed problematic aspects:

1. the scope of workers' compensation in South Africa;
2. the administrative remedy and access to courts;
3. common law liability; and
4. fragmentation.

Protection against financial distress with fair and just compensation through an effective administrative system for occupational injuries and diseases is of the utmost importance.<sup>1</sup> This study tried to establish if some of the provisions in the South African workers' compensatory scheme are outdated; and to establish whether the South African workers' compensation scheme is adequate for current employment needs. The aim of the study was not to concentrate on the contents of the right to compensation in the form of the benefits although reference was made to it but rather to examine the right itself and its scope of application.<sup>2</sup>

South Africa has a supreme Constitution which includes a Bill of Rights and the right to workers' compensation is implicated in the right of access to social security in section 27 of the Constitution. The Government of South Africa is obliged by virtue of the Bill of Rights to gradually broaden social security rights but the only

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<sup>1</sup> Chapter 1 para 1.

<sup>2</sup> Chapter 2 para 3.4.

amendments to COIDA related to the list of scheduled occupational diseases in 2004. It did not extend the right to no-fault compensation to excluded persons and has not been broadened since the promulgation of the Constitution.<sup>3</sup> Similar social security sentiments to the South African Bill of Rights are expressed in the SADC Instruments which is of particular importance for South Africa as an important role player and leader in the region with an increase in the movement of people and goods across the borders of the SADC region and ultimately globally.<sup>4</sup> Canada has a similar constitutional framework with a Charter of Rights representing a human rights culture.<sup>5</sup> Australia does not have a Bill of Rights as part of its Constitution and social security rights are thus a silent part of the Australian law.<sup>6</sup>

It is submitted that the purpose section in COIDA be amended to include human rights values in the form of human dignity (inclusive of bodily integrity), respect and fairness similar to those included in the Northwest Territories Act<sup>7</sup> and to acknowledge people suffering from occupational injuries and diseases' disabilities.

The lack of inclusivity in COIDA is a major stumbling block in accessing benefits and in achieving social justice.<sup>8</sup> As the role of the tripartite relationship of social partners is to balance the interests of state, employer and employee,<sup>9</sup> it is important that all members of the stakeholder groups are included in all forms of decision-making to effectively balance the interests of the parties;<sup>10</sup> as with the example of Meredith who consulted widely to find a solution acceptable to all groupings.<sup>11</sup> It remains true and in South Africa inclusivity may act as a method to creatively relieve specific social security problems. As there is a bulk of research available e.g. the Taylor Report, the Benjamin Report, Reports by the Department of Labour etc. what is lacking is clear policy documentation.<sup>12</sup>

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<sup>3</sup> Chapter 1 para 2 & Chapter 2 para 3.1.

<sup>4</sup> Chapter 1 para 3.

<sup>5</sup> Chapter 2 para 4.1.

<sup>6</sup> Chapter 6 para 4.

<sup>7</sup> Chapter 3 para 4.1.

<sup>8</sup> Chapter 2 para 3.4.

<sup>9</sup> Chapter 2 para 6.

<sup>10</sup> Chapter 3 para 5.3.

<sup>11</sup> Chapter 2 paras 4.3 & 4.5.

<sup>12</sup> Chapter 2 para 3.5.

## 2. THE SCOPE OF WORKERS' COMPENSATION IN SOUTH AFRICA

In South Africa,<sup>13</sup> Canada<sup>14</sup> and Australia,<sup>15</sup> the scope of cover by virtue of the statutory provisions is limited to compensation for occupational injuries and diseases for persons fulfilling the statutory definitions of an employee, a dependant of a deceased employee and an occupational injury or disease.

The scope of workers' compensatory law should be viewed in the light of the purpose of this type of social security provisions which has been identified as limited to compensation for occupational injuries and diseases. If the object and intent are read together with the applicable definitions, it is clear that this type of statutory compensation is intended to be exclusively compensating work-related injuries and diseases and not any injuries or diseases irrespective of where and when they are sustained or contracted.<sup>16</sup> It has been held in all three countries that compensatory laws as part of beneficial legislation should be interpreted in a manner that favours employees. Particularly in cases where two possible competing interpretations are possible, the more beneficial interpretation ought to be construed in favour of the employee and consistent with human rights values.<sup>17</sup>

South Africa and Canada share the Meredith principles laid down in Ontario, of which the principle of collective liability forms part. The collective liability, known as the historic trade-off or compromise, holds that all employers participate in the scheme which then covers all the participating employers' workers.<sup>18</sup> The history of compensatory legislation in Australia is characterised by periods of few legislative changes followed by periods of rapid and often broad legislative changes under influence of the political philosophy of the day.<sup>19</sup> This creates a situation where

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<sup>13</sup> Chapter 2 para 3.

<sup>14</sup> Chapter 2 para 4.3.

<sup>15</sup> Chapter 2 para 5.3.

<sup>16</sup> Chapter 3 paras 4.2; 4.2.1 (*Medwid*); 4.2.2. (*Henry*); 4.2.3. (*Budge*) & 4.2.4. (*City of Medicine Hat*) & Chapter 3 para 5.1.

<sup>17</sup> Chapter 3 paras 3.1; 4.2; 5.1 & Chapter 5 para 4.1.

<sup>18</sup> Chapter 2 para 4.3.

<sup>19</sup> Chapter 2 para 5.5.

social legislation is misused by the political fraternity for its own purposes and ought to be avoided in South Africa.<sup>20</sup>

The scope of workers' compensation is determined by the fulfilment of the definitions of what constitutes an occupational injury or disease; and also who will be entitled to institute a claim for compensation as well as who will be protected against civil action for damages.<sup>21</sup>

Secondary legislation in the form of regulations and policy documents is lacking in the South African compensatory scheme, which are extensively used in Canada<sup>22</sup> and Australia<sup>23</sup> to guide the three social partners on the interpretation of definitions and help to create clarity in law. As the Court in *Odayar v Compensation Commissioner* held that the Commissioner is not empowered to issue regulations, it will be necessary for COIDA to be amended to empower the Commissioner to issue regulations or alternatively and in the interim the publication of guideline documentation that clearly states the requirements, rights and duties in plain language for the benefit of particularly less sophisticated employees.<sup>24</sup> Care should, however, be taken not to reduce guidelines into set rules so as to avoid limiting the general nature of the test phrases.<sup>25</sup> Queensland in Australia also made use of a schedule annexed to the act to assist with clarity on the interpretation of the definitions.<sup>26</sup>

Although the courts have advanced different tests over time to determine whether an injury arose out of and in the course of employment, it can be concluded that all the tests can be categorised and included into the control test in the form of control by the employer over the employee.<sup>27</sup> The test is a pre-requisite for compensation in all three of the countries but has the narrowest application in South Africa with

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<sup>20</sup> Chapter 2 para 5.3.

<sup>21</sup> Chapter 2 para 3.3 & Chapter 4 para 3.2.

<sup>22</sup> Chapter 4 para 3.2.

<sup>23</sup> Chapter 4 para 4.2.

<sup>24</sup> Chapter 4 para 3.2.

<sup>25</sup> Chapter 4 para 3.2 (*Puddicombe*).

<sup>26</sup> Chapter 5 para 4.1.

<sup>27</sup> Chapter 4 para 2.

the requirement that an injury arise “out of and in the course of employment.”<sup>28</sup> Australia exchanged the conjunctive “and” in the test phrase “out of and in the course of” to the disjunctive form “or”. However, without other limitations requiring a *nexus* with employment, it resulted in a situation where injuries flowing from non-work related activities, satisfied the test.<sup>29</sup> The requirement of employment in some jurisdictions, to be a “substantial” or “significant” contributing factor requires a stronger *nexus* with employment but is not settled in law yet.<sup>30</sup> Australia has the broadest and least restrictive definition of the three countries but it has unintentional consequences that resulted in compensation for non-work related injuries. Canada<sup>31</sup> and Australia<sup>32</sup> specifically provide for an aggravation of a pre-existing condition which is lacking in COIDA. Canada has a similar definition to South Africa but has broadened the definition with the inclusion of conditions in the form of a “recurrence, relapse or aggravation” and a presumption favouring an employee that softened the conjunctive “and” in the test phrase by presuming that if one element has been satisfied, the other is true and putting the compensation authority to the task to rebut the presumption.<sup>33</sup>

It is submitted that the Canadian approach is preferable as the current COIDA definitions do not accommodate an employee with a pre-existing condition although the Constitution precludes discrimination against persons with disabilities. It is also contrary to the well-known doctrine of “take your victim as you find him” or the so-called *talem qualem* rule in the law of delict.<sup>34</sup>

The COIDA test is a combination of two definitions, an occupational injury defined as “a personal injury sustained as a result of an accident”<sup>35</sup> and an accident as “an accident arising *out of and in the course of* an employee's employment *and resulting*

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<sup>28</sup> Chapter 4 para 3.1.

<sup>29</sup> Chapter 2 para 5.3; Chapter 4 para 4.1 & the case *PVYW v Comcare* (Chapter 4 para 4.2.4) & commuting injuries to and from work (Chapter 4 para 4.3.4).

<sup>30</sup> Chapter 4 para 4.1.

<sup>31</sup> Chapter 4 para 3.1.

<sup>32</sup> Chapter 4 paras 4.1; 4.2.1 (*Kavanagh*) & 4.3. & Chapter 3 para 5.2.1 (*Johnston*).

<sup>33</sup> Chapter 4 para 3.1.

<sup>34</sup> Neetling *et al* (2005) 199.

<sup>35</sup> S 1(xxx).

in a personal injury, illness or the death of the employee”.<sup>36</sup> The latter phrase comprises of two tests due to the working of the conjunctive noun “and” which means that both parts of the test phrase need to be satisfied.<sup>37</sup> Arising out of employment indicates the location of the accident and whether it is the employee’s employment that necessitated his presence at the location of the accident by virtue of his contract of employment;<sup>38</sup> while in the course of employment relates to circumstances of discharging the duties under his contract of employment and that which is related to it, be it expressly or impliedly with factors to be taken into consideration the time when employment commences, ends and the duration thereof.<sup>39</sup> The element of “in the course of” limits the scope of accidents that will attract compensation to be work-related. It is clear that the test phrase consists of two interrelated but distinct elements.<sup>40</sup>

The early English case law extensively interpreted the test phrase; and the approach by Rumpff JA in *Khoza* by declining to be guided by English case law is regrettable as South Africa has limited authorities on the subject in comparison to countries like England. The approach of Williamson JA in *Khoza*, by which he concurred with Rumpff JA but also relied on English authorities, is preferred as it opens up a South African approach but with the added benefit of settled English law and the nuances previously determined on by the courts.<sup>41</sup>

In *Khoza*, which is considered still to be the leading case on the subject, Rumpff JA held that the legislator did not define the relationship between duties and accident and a broad relationship would suffice.<sup>42</sup> This holds that only a broad relationship with employment is required which may include an open-ended spectrum of factors that maybe taken into consideration during the enquiry of the test phrase, even broad enough to include assaults on the employee if the reason is causally connected to the employment.<sup>43</sup>

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<sup>36</sup> Chapter 4 para 2.1.

<sup>37</sup> Chapter 4 para 2.1.

<sup>38</sup> Chapter 4 para 2.1.

<sup>39</sup> Chapter 4 paras 2.1 & 3.2.

<sup>40</sup> Chapter 4 paras 2.1 & 3.2.

<sup>41</sup> Chapter 4 para 2.2.

<sup>42</sup> Chapter 4 para 2.2.

<sup>43</sup> Chapter 4 paras 2.2 & 3.1.



On the opposite side of the spectrum it is possible for the deliberate conduct on the part of the employer to take him outside the immunity afforded by the legislation to employers against delictual claims for damages.<sup>44</sup>

All three countries extended the right to compensation by a deeming provision to provide for circumstances related to employment but which do not comprise of the discharging of contractual duties. Under the deeming provisions, COIDA includes transport provided by the employer free of charge and under the control of the employer;<sup>45</sup> circumstances of “serious and wilful misconduct” if it results in a serious disablement; actions taken by an employee in the interest of the employer irrespective it be contrary to the employer’s instructions or otherwise unlawful; and emergency work by a mine worker with the consent of his employer.<sup>46</sup> In the spirit of an interpretation most favourable to the employee, the courts have held that the onus rests on the Commissioner to prove the presence of serious and wilful misconduct.<sup>47</sup> In the Canadian legislation, the right has also been broadened with a presumptive provision regarding the death of a person in that the death will be deemed to fulfil the test if a person is found dead at his place of work.<sup>48</sup> It is submitted that this should seriously be considered to be included into South African law, seen in the light of South Africa’s dangerous mining industry.

The definition of an employee was broadened with the promulgation of COIDA but it remains exclusive in nature.<sup>49</sup> The definition of an employee is determined by the statutory definition which is based on the common law contract of service<sup>50</sup> in all three of the countries;<sup>51</sup> with the test applied by the courts to be the dominant impression test<sup>52</sup> and the power afforded to the applicable administrative body to condone invalid employment contracts.<sup>53</sup> In this regard, the courts ought to carefully weigh up the long-term interests of the parties so as not to defeat social

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<sup>44</sup> Chapter 4 para 2.2.

<sup>45</sup> Chapter 4 paras 2.3; 3.3.6 & 4.3.

<sup>46</sup> Chapter 4 paras 2.3; 3.2; 3.3; 3.3.5 & 4.3.

<sup>47</sup> Chapter 4 para 2.3.

<sup>48</sup> Chapter 4 para 3.3.

<sup>49</sup> Chapter 2 para 3.3.

<sup>50</sup> Chapter 5 paras 2.3; 3.3; 4 & 4.3;

<sup>51</sup> Chapter 5 paras 2.1; 3.1 & 4.

<sup>52</sup> Chapter 5 paras 2.3.2; 3.3; 4.3.2 (*Stevens*) & 4.3.4 (*Abraham Abdalla*).

<sup>53</sup> Chapter 5 paras 2.5; 3.4 & 4.4.

justice as was done in *Daytona*.<sup>54</sup> It is of utmost importance that young workers are protected equally to their adult counterparts when embarking on some forms of employment like waiting, delivering newspapers and magazines, acting, singing etc.<sup>55</sup>

Dependants as defined in COIDA exclude children that are older than 18 years at the time of the death of the parent from benefits irrespective whether they have concluded their education and training.<sup>56</sup> As it is unclear what the exact status is of this category of children, it is uncertain whether these children's right to pursue at common law is removed by virtue of section 35 of COIDA. Canada<sup>57</sup> and Australia<sup>58</sup> define a dependent to be a family member who was wholly or partially financially dependent upon the employee and no reference is made with regard to age. It is submitted that the age restriction on dependents be substituted by a provision that allows all family members that are financially dependent upon the employee to be rightful claimants.

COIDA<sup>59</sup> excludes a self-employed person (independent contractor) by the determination as represented in the definition by the words "a person who contracts for the carrying out of work and himself engages other persons to perform such work" which does not favour entrepreneurial enterprises which often consist of one person businesses or other forms of self-employment.<sup>60</sup> Furthermore, this phrase does not take cognisance of the changing world of work, with a worldwide increase in atypical forms of employment and does not conform to the provisions of the SADC Code on Social Security.<sup>61</sup> It is submitted that for legislation to remain relevant and purposive, it needs to provide for current labour trends; and it is proposed that a process should be followed according to which gradual inclusion into the definition is executed starting with optional cover for self-employed

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<sup>54</sup> Chapter 5 paras 2.5.1; 3.4.1 (*Decision No. 20053860*) & 4.4.2 (*Riley*) in connection with the influence of a suspended driver's licence.

<sup>55</sup> Chapter 5 para 2.4.1.

<sup>56</sup> Chapter 5 para 2.1.

<sup>57</sup> Chapter 5 para 3.1.

<sup>58</sup> Chapter 5 para 4.1.

<sup>59</sup> S 1(xix)(d)(iv).

<sup>60</sup> Chapter 5 paras 2.3 & 2.9.

<sup>61</sup> Chapter 5 paras 2.9; 3.11 & 4.11.

persons as this will give effect to the constitutional imperative. The exclusion of domestic workers in private households should be addressed similarly as this group is considered to be extremely vulnerable and in need of protection as could be seen in the *Van Vuuren* case<sup>62</sup> where the assistant matron in a hostel was excluded from the ambit of the Act but was seriously injured in a work-related accident.<sup>63</sup> The Canadian<sup>64</sup> and Australian<sup>65</sup> compensatory laws in general include domestic workers in private households. In all these categories optional coverage ought to be changed to compulsory coverage over time.

Attention should be given to persons in training as the previous dispensation of apprentices is not currently followed in South African industries; and young persons in training at training institutions are not considered to be “employees” for the purposes of the Act although they are exposed to employment hazards in practical training sessions.<sup>66</sup> The example of Canada<sup>67</sup> and Australia<sup>68</sup> ought to be followed and in the public interest trainees ought to be included.

Inclusion of the categories of self-employed persons, students and trainees could be done similar to Canada and Australia by way of deeming them to be employees of the government for the purposes of the act. It will be necessary to remove the current subsection excluding persons working under a “contract for service” and insert a deeming provision.

The plight of migrant workers deserves to be addressed. Migrant workers from SADC countries working at South African mines are in particular need of protection. South Africa should not be perceived as a country spreading poverty and ill-health but rather the opposite. It is important that migrant workers should be treated equally to South Africans even when returning to their countries of origin and if they are entitled to compensation, it must not be terminated upon leaving South

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<sup>62</sup> Chapter 5 para 2.11.1.

<sup>63</sup> See Chapter 5 para 3.9 for the Canadian situation.

<sup>64</sup> Chapter 5 para 3.9.

<sup>65</sup> Chapter 5 para 4.9.

<sup>66</sup> Chapter 5 para 2.9.

<sup>67</sup> Chapter 5 paras 3.1 & 3.3.2 (*University of Lethbridge*).

<sup>68</sup> Chapter 5 paras 4.1 & 4.10.1 (*Fogliano*).

Africa permanently. The inter-jurisdictional agreements in Canada and Australia need to be studied more thoroughly to determine precisely how it can be used as examples of agreements on an international level in the SADC region. South African workers working in the SADC countries are also in need of protection, and agreements, albeit international, need to address this aspect too. These issues are contained in the SADC Code on Social Security which requires from the SADC countries to provide adequate social security benefits to the people of the region in a harmonised manner. International agreements are soft law instruments and will only be binding when negotiated and agreed upon and cannot be enforced by law. It is submitted that the ideal situation will be the extension of such agreements to include all the members of the African Union.<sup>69</sup> Serious consideration ought to be given to include provisions for optional coverage to South Africans working abroad in countries that do not adequately provide for compensation for work-related injuries and diseases.

The definition of an employer corresponds to that of an employee<sup>70</sup> and is essential in balancing the interests of the parties as only the employer able to satisfy the definition will be immune against delictual claims for damages.<sup>71</sup> Although participation by all employers are an important part of the continued existence of a compensatory scheme, an anomaly is set in law by which omitting to register by an employer will neither defeat the right to benefits nor an employer's counter right to protection.<sup>72</sup> Australia uniquely provides for specific insurance for uninsured employers in the form of the "Nominal Insurer" but concerns were raised by the Productivity Commission (2004) regarding the financial impact it might have on the financial health of the compensation scheme.<sup>73</sup> It is submitted that the South African administrative body administering the Compensation Fund, the Compensation Commissioner, ought to put processes and procedures in place to expose employers who are not registered and who are not in good standing with the Fund. Awareness should be raised by way of compulsory posters in workplaces informing employees and employers of their rights and obligations. Furthermore, employers who are not

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<sup>69</sup> Chapter 4 paras 2.4; 3.4; 4.4 & 5.3 and Chapter 5 paras 2.9; 2.10; 3.7 & 4.7.

<sup>70</sup> Chapter 5 paras 2.2; 3.2 & 4.2.

<sup>71</sup> Chapter 5 para 2.2.

<sup>72</sup> Chapter 5 paras 2.7; 2.7.1 (*Boer v Momo*) & 3.6.1 (*Isaac*).

<sup>73</sup> Chapter 5 para 4.6.

compliant ought to be penalised openly to enhance compliance through example. It however requires a reliable financial system with clean audits confirming that employers are treated fairly and that correct assessments and penalties are charged which is clearly not currently the situation according to the Compensation Fund's Annual Reports.<sup>74</sup>

### **3. THE ADMINISTRATIVE REMEDY AND ACCESS TO COURTS**

The purpose of workers' compensatory laws, the administrative remedy and the protection afforded to employers against civil actions are very closely related.<sup>75</sup>

The administrative nature of workers' compensatory legislation stems from the principle of speedy compensation born from the need to provide continued financial support in times that the employee cannot provide for himself without any fault of his own.<sup>76</sup> Because the court system is a slow and adversarial process, the remedy is to be executed by an administrative system intended to avoid breaks in financial income and reach speedy outcomes. The effectiveness of these bodies has the potential to greatly impact on the parties that have to exercise their rights through the administrative body. The tardiness of the common law system was one of the reasons for removing workers' compensation from the court system to enable rapid processes with quick decision-making and compensation at a time when it is most needed.<sup>77</sup> However, if the administrative system is not an effective system, this object is defeated. It was shown that dissatisfaction with the administrative bodies providing this service is growing in all three countries amongst employers and employees who are reliant on the effectiveness of these administrative bodies as the route of first instance.<sup>78</sup> In South Africa, Canada and Australia it was acknowledged by the courts that the monetary value of statutory compensation provided for pursuant to workers' compensation is less than what is recoverable under common

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<sup>74</sup> Chapter 3 para 2.1.

<sup>75</sup> Chapter 3 para 2.

<sup>76</sup> As shown from the historical development of workers' compensatory law in Chapter 2.

<sup>77</sup> Chapter 6 para 3.2.1 (*Reference re*).

<sup>78</sup> Chapter 3 paras 2.1; 2.2 & 2.3.

law.<sup>79</sup> In all three of the countries the exclusive jurisdiction of the administrative bodies tasked with execution of the scheme was recognised by the courts.<sup>80</sup> It also follows that the administrative nature rules dispute resolution processes and procedures.<sup>81</sup>

Removal of workers' compensation from the ambit of the court system was one of the very first steps to address the plight of workers who could not afford to pursue actions in courts of law.<sup>82</sup> Rights to appeal and to review administrative decisions are limited in all three countries so as to restrict a worker and an employer from the repeated use of courts instead of the administrative system that in itself forms part of the remedy created as part of the solution to have justice for both parties.<sup>83</sup>

COIDA provides for an appeal process, with the court of first instance a tribunal and a limited right of appeal to the High Court but only regarding interpretation without any right of appeal against findings of fact.<sup>84</sup>

COIDA is outdated in terms of section 92, which instructs the presiding officer of the tribunal (who previously was a permanently-appointed officer of the Compensation Fund) to refer a case to the High Court if his view is not supported by at least one of the assessors. In practice, the presiding officer has a limited tenure without resources to refer a case to the High Court. This led to the case of *Nazeem Mallie* in which the Court indicated the Director-General to be the applicable person that should refer a case in the applicable circumstances to the High Court.<sup>85</sup> It is submitted that the Act be amended to provide for either the referral by the Director-General or alternatively for a permanently-appointed administrative appeals tribunal. It does not fall within the scope of this study to further explore the administrative tribunal system but it suffices to submit that the South African

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<sup>79</sup> Chapter 6 paras 2.2.1 (*Jooste*); 3.2.1 (*Reference re*) & para 4 (Productivity Commission Report).

<sup>80</sup> Chapter 6 para 3.2.2 (*Pasiechnyk*).

<sup>81</sup> Chapter 3 para 2.

<sup>82</sup> Chapter 2 para 5.2.

<sup>83</sup> Chapter 2 para 3.2.

<sup>84</sup> Chapter 2 para 3.2.

<sup>85</sup> Chapter 2 para 3.2.

judicial system in general and workers' compensation specifically would greatly benefit by a similar comprehensive administrative tribunal system as Australia.<sup>86</sup>

The Constitutional Court refused access to a common law claim for damages in favour of the statutory administrative remedy in *Jooste*.<sup>87</sup> The administrative remedy as provided by the Compensation Commissioner through the Compensation Fund is unfortunately failing its objective of speedy compensation that is just and fair as is clear from the need for the implementation of a turnaround strategy and medical practitioners' refusal to treat injured employees.<sup>88</sup> Similar dissatisfaction was expressed in Canada<sup>89</sup> and Australia;<sup>90</sup> and it does not seem that any of the three countries have an answer except for the approach embarked on by the South African Compensation Commissioner by identifying the problems and interacting with the relevant affected parties and real actions aimed at addressing the problems.<sup>91</sup> If the administrative problems are not addressed effectively to the satisfaction of the stakeholders, the compensation scheme is in itself endangered by one of the parties of the tripartite stakeholder group, the State. Pressure by the dissatisfied groups might cause the end of the scheme if the scheme cannot fulfil the purpose of its existence.<sup>92</sup>

The right to appeal in Canada is similar to South Africa, limited to questions of law and factual questions for as far as it concerns the law. An administrative tribunal system is in place of which the expertise in workers' compensatory law is recognised and appreciated by the higher courts.<sup>93</sup> Unfortunately, although the intention was to provide easy access to informal and inexpensive hearings, it became more judicialised, influenced by procedural requirements and involvement in hearings.<sup>94</sup> Approaching the higher courts with an application for review appears to be complicated with the standard of review to receive attention first of all in all

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<sup>86</sup> Chapter 3 paras 2.1 & 2.3.

<sup>87</sup> Chapter 3 para 2.1.

<sup>88</sup> Chapter 3 para 2.1.

<sup>89</sup> Chapter 3 para 2.2.

<sup>90</sup> Chapter 3 para 2.3

<sup>91</sup> Chapter 3 para 2.1

<sup>92</sup> Chapter 3 para 3.1.

<sup>93</sup> Chapter 2 para 4.2.

<sup>94</sup> Chapter 2 para 4.2.

cases. The rules governing review were codified in British Columbia to create certainty in law.<sup>95</sup>

The Australian judicial system comprises of a comprehensive Administrative Appeals Tribunal system which includes jurisdiction over workers' compensation matters.<sup>96</sup> The aim of the system is to provide just, fair, economical and speedy resolutions to disputes. Appeals to higher courts are, similar to South Africa and Canada, limited to questions of law.<sup>97</sup>

#### 4. COMMON LAW CLAIMS

The roots of compensation lie in ancient times where the right to be compensated for bodily harm was from very early on influenced by statutory involvement.<sup>98</sup> Any right will only be as effective as the results flowing from it as is clear from the historical need for the development of workers' compensatory legislation; which was shown to lie in the failure of the common law system of redress to provide a fair and just retribution system for employees suffering from occupational injuries and diseases.<sup>99</sup> In addressing the said failure of the adversarial system and the deficiencies in informal social assistance schemes which was not viable to all workers, a new branch of law was developed in the form of compensation without regard to fault in the form of an administrative remedy intended to provide speedy relief by replacing litigation.<sup>100</sup> This was necessary to address, *inter alia*, the so-called unholy trinity of defences raised by employers in the court system which successfully relieved them from liability.<sup>101</sup> From its inception, the workers' compensation scheme was under the control of the three social partners namely State, business and labour; aiming to benefit society at large by removing the economical burden society historically had to endure due to occupational injuries

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<sup>95</sup> Chapter 2 para 4.2.

<sup>96</sup> Chapter 2 para 5.2.

<sup>97</sup> Chapter 2 para 5.2.

<sup>98</sup> Chapter 2 para 1.

<sup>99</sup> Chapter 2 para 1.

<sup>100</sup> Chapter 2 para 1.

<sup>101</sup> Chapter 2 para 1.



and diseases.<sup>102</sup> Any current scheme needs to address the needs historically identified as well as newly-identified needs associated with current circumstances.

In South Africa, the 1941 Act to a great extent incorporated the Meredith principles into South African workers' compensatory law which is a no-fault based workers' compensation system.<sup>103</sup> Compensation for occupational lung diseases in declared mines and works is compensated through a no-fault compensation system but the right to common law action was retained and acknowledged by the Constitutional Court in the *Mankayi* case.<sup>104</sup> The consequences of the decision is the acknowledgement of the right to common law action against employers but it is limited to the specific occupational diseases covered in terms of ODIMWA and applicable only to declared mines and works; although COIDA compensates for the same occupational diseases but to employees working in all other workplaces.<sup>105</sup> It ought to be noted that Mankayi was unsuccessful in his application in both the High Court and the Supreme Court of Appeal before the Constitutional Court changed the ruling in his favour but both the SCA and the Constitutional Court alluded to the "meagre" compensation paid pursuant to ODIMWA.<sup>106</sup>

Both in South Africa<sup>107</sup> and Canada,<sup>108</sup> the exclusion from common law access was constitutionally challenged in different cases and the exclusion in section 35 of COIDA was declared valid seen in the light of the purpose of the Act.<sup>109</sup> Although the protection afforded to the class of employers in Canada was acknowledged by the Court in *Budge* as discriminatory in nature, the Court considered the protection of the statutory compensatory scheme as of more importance than the employees' right to common law redress.<sup>110</sup> The Court reasoned that allowing access to common law for the widow would undermine the compensatory system.<sup>111</sup> The purpose includes the historic compromise but in Australia, although the general

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<sup>102</sup> Chapter 2 para 2.

<sup>103</sup> Chapter 2 para 3.3.

<sup>104</sup> Chapter 2 para 3.3; Chapter 6 para 2.2.3 (*Mankayi*).

<sup>105</sup> Chapter 6 para 2.2.3.

<sup>106</sup> Chapter 6 para 2.2.3.

<sup>107</sup> Chapter 6 para 2.2.1 (*Jooste*); Chapter 6 para 2.2.2 (*Mlomzale*).

<sup>108</sup> Chapter 6 paras 3.2 & 3.2.1 (*Reference re*).

<sup>109</sup> Chapter 3 paras 3.1; 3.2 & 4.2; Chapter 6 paras 3.1 & 3.2.

<sup>110</sup> Chapter 3 para 4.2.3 (*Budge*).

<sup>111</sup> Chapter 6 para 3.2.1 (*Reference re*).

rule is also the exclusion of the right to common law claims for damages, limited access to common law actions is allowed.<sup>112</sup>

Flowing from the historic need to remove compensation for occupational injuries and diseases from the adversarial court system, the common law has been amended by a *quid pro quid* system according to which employers are indemnified against delictual claims in exchange for participation in an insurance scheme administered by an independent body; and in exchange for a common law claim, workers received an administrative remedy intended at speedy compensation while relieved from the burden of proof required by court actions, often referred to as the historic trade-off principle.<sup>113</sup>

The law is settled that an employer owes his employees a common law and a statutory duty of care to take reasonable care for their health and safety flowing from the legal relationship between a master and his servant, which duty is limited by the standard of reasonableness.<sup>114</sup> In recognising the need for redress in cases of negligent conduct on the part of the employer, COIDA uniquely provides for an additional claim in terms of section 56 in respect of increased compensation.<sup>115</sup> The definition of an employer is broadened for the purposes of sections 35 and 56 to include *inter alia* persons in charge of a branch or department of the employer's business.<sup>116</sup> Section 35 read together with section 56 abrogates the right to common law claims for damages by employees against their employers.<sup>117</sup> The position of a child over the age of 18 years is not clear as he does not have a right to compensation and the text of the definition is vague and might need court interpretation or rephrasing in an amendment. However, it is submitted that if a person does not have a statutory right to compensation, he ought to have the avenue of civil law because he is not caught in the *quid pro quid* principle.

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<sup>112</sup> Chapter 2 para 5.3; Chapter 3 para 5.1 & Chapter 6 para 4.

<sup>113</sup> Chapter 6.

<sup>114</sup> Chapter 6.

<sup>115</sup> Chapter 6 para 1.1.

<sup>116</sup> Chapter 6 paras 2.1 & 2.5.1 (*Looyen*).

<sup>117</sup> Chapter 6 para 2.1.

Although COIDA has the unique option whereby employees may claim based on the negligence of the employer, it is hardly ever used by employees for various reasons, some of which include ignorance, inadequate proof of the employer's negligence and the complicated procedural process that mimics civil procedure in delictual claims for damages.<sup>118</sup> Of the few claims duly lodged, more is abandoned than what is heard and of those heard a miniscule number succeeds due to the high burden of proof required from the employee.<sup>119</sup> A similar burden of proof faces an employee in pursuit of a section 56 claim than a worker more than a century ago in common law as he needs to prove pure negligence on the employer's part as any percentage of negligence on his own side will defeat his claim because no proportional apportionment of damages<sup>120</sup> is possible due to the text of the Act that refers to the monetary payment as compensation and not as damages.<sup>121</sup>

Older doctrines of defences like the last opportunity rule are still applied to the detriment of employees' claims for increased compensation.<sup>122</sup> It is submitted that COIDA be amended in this regard to allow for limited access to common law actions which will then render the Apportionment of Damages Act applicable. This will mean that the pure negligence rule will not defeat a claim in its totality or alternatively that section 56 be amended to have the Apportionment of Damages Act applicable to it. A further possible solution may include the inclusion of presumptive or deeming provisions to assist employees coupled with the removal of the words "due to" which has been held to mean "solely to"; and it is proposed that the example of Australia be followed irrespective whether the section is retained in COIDA or the right to common law reintroduced, the common law defences of employers ought to be removed.<sup>123</sup>

The bar against delictual claims remains in force irrespective of the fact that statutory compensation only compensates for pecuniary loss and not for general

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<sup>118</sup> Chapter 6 para 2.1 & 2.5.

<sup>119</sup> Chapter 6 para 2.5.

<sup>120</sup> Chapter 6 para 2.5.2 (*Grace*).

<sup>121</sup> Chapter 6 para 2.5.

<sup>122</sup> Chapter 6 para 2.5.3 (*Young*).

<sup>123</sup> Chapter 6 para 4.1.

damages like *contumelia*, loss of amenities, etc.<sup>124</sup> and irrespective of specific circumstances surrounding the incident.<sup>125</sup> The bar remains effective irrespective of how it is masked by a plaintiff,<sup>126</sup> as the bar is rationally connected to the purpose of the workers' compensatory scheme.<sup>127</sup> It is submitted that access to common law be allowed to enable employees to recover damages in excess of pecuniary loss.

An employer will, however, be exposed to civil action if he takes himself out of the protection by deliberate conduct like an assault on the employee for a non-work related reason as was held in *Kau v Fourie*.<sup>128</sup> The protective immunity of the employer should not be extended to classes or categories of employers as it will lead to the unsatisfactory situation as in Canada whereby it was even extended to protect medical practitioners against professional liability.<sup>129</sup> The case of *Kovach*<sup>130</sup> shows the importance of a purposive interpretation in the light of the historical development of a statute, because it was never the intention to protect an employer against mistakes he might make in professional conduct unrelated to the employment relationship. This case also demonstrates the consequence of extending collective contributions (assessments) to include collective liability in a spirit of "an injury to one is an injury to all."<sup>131</sup> The notion of collective contributions should not force collective liability to such an extreme and it is submitted that the South African approach is preferable as it conforms to the purpose of the scheme and has not been and ought not to be broadened.

Claims against third parties are retained in all three of the countries,<sup>132</sup> which will be ruled by the civil procedure rules applicable to delictual claims in South Africa inclusive of prescription and proportional reduction of damages due to contributory negligence on the part of the claimant.<sup>133</sup>

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<sup>124</sup> Chapter 3 para 3.1; Chapter 6 paras 2.2.1 (*Jooste*) & 2.2.2 (*Mlomzale*).

<sup>125</sup> Chapter 6 para 2.3.1 (*Van De Venter*).

<sup>126</sup> Chapter 6 paras 2.3.2 (*Labuschagne*); 3.2.2 (*Pasiechnyk*); 3.2.3 (*Prentice*) & 3.3.2 (*OPSEU*).

<sup>127</sup> Chapter 6 paras 2.2.1 (*Jooste*) & 3.2.2 (*Pasiechnyk*).

<sup>128</sup> Chapter 4 para 2.2.5 (*Kau v Fourie*) & Chapter 6 para 2.1.

<sup>129</sup> Chapter 6 para 3.3.1 (*Kovach*).

<sup>130</sup> Chapter 6 para 3.3.1 (*Kovach*).

<sup>131</sup> Regarding the notion of collective liability see also: Chapter 6 para 3.3.4 (*Decision No. 324000*).

<sup>132</sup> Chapter 6 paras 2.1; 3.1 & 4.1.

<sup>133</sup> Chapter 6 para 2.4.

In Australia a limited right to common law redress is allowed<sup>134</sup> and the limitation is contained by threshold per centum impairment under the exclusive jurisdiction by the Compensation Authority which needs to issue a certificate<sup>135</sup> to allow common law access. However, provision has also been made for courts to allow an action if the certificate is refused based on set limitations that are highly technical in nature. The limitations require an employee to prove that his injury qualifies the test as a “serious injury” taking into consideration factors such as consequences of seriousness nature inclusive of disfigurement, loss of bodily functions, mental or behavioural disturbances or disorders, pain and suffering and loss of earning capacity<sup>136</sup> which have been described by the courts as vague.<sup>137</sup> It is submitted that should South Africa follow the Australian example and allow limited access to common law actions, the limitations be stipulated in clear and unambiguous language and the example of Australia be followed of a staggered process which requires the issue of a certificate by the administrative body and if declined a right of appeal to the High Court with jurisdiction.

## 5. FRAGMENTATION

The South African compensatory system is characterised by fragmentation with the compensation system developed along two very distinctive lines with disparate and meagre compensation for lung diseases in mine workers and limited compensation for all other occupational diseases and occupational injuries ruled by a separate Act under different State departments with different enforcement structures.<sup>138</sup>

ODIMWA is the applicable statute regulating occupational lung diseases in mine workers and it developed from a scheme which does not reflect a true workers' compensatory scheme funded by only employer contributions in exchange for

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<sup>134</sup> Chapter 6 para 4; Chapter 6 para 4.3.1 (*Ninkovic*);

<sup>135</sup> Chapter 6 para 4.1 & Chapter 6 para 4.3.1 (*Ninkovic*).

<sup>136</sup> Chapter 6 paras 4.3.1 (*Ninkovic*); 4.3.2 (*To Ha Lu*); 4.3.3 (*Haden Engineering Pty Ltd*); 4.3.4 (*Guppy*) & 4.3.5 (*Parry*).

<sup>137</sup> Chapter 6 para 4.3.3 (*Haden Engineering Pty Ltd*).

<sup>138</sup> Chapter 2 paras 3.3 & 3.5.

immunity against common law liability which proves the landmark decision of the Constitutional Court in *Mankayi* as correct.<sup>139</sup>

The *Mankayi* ruling did not address the question of the constitutionality of the disparity in compensation between COIDA and ODMWA. The question remains open as to unfair discrimination and if so, if it can be saved by the “reasonableness” thereof or section 36 of the Constitution. Dignity and equality are of particular importance for purposes of occupational injuries and diseases.<sup>140</sup> It is submitted that the two acts need to be merged into one act, starting by placing both under the auspices of one State department and one administrative body with a process of equalisation of benefits. The deepened fragmentation between the two compensatory schemes by the *Mankayi* ruling, which allowed one group the right to common law actions which the other group is disallowed, will place a higher burden upon the Legislator to merge the two acts. As removal of the right to common law redress has only recently been acknowledged, removal of the right will create enormous dissatisfaction, confusion and probably litigation and it is submitted that the right rather be extended to all claimants inclusive of COIDA claimants albeit a limited right so as to preserve the purpose of the historic compromise.

The lack of inclusivity in COIDA is a major stumbling block in accessing benefits and in achieving social justice as it creates confusion amongst employees who are unaware of the two compensation systems and cannot always differentiate between the different bodies similarly named and with similar purposes (to compensate) but compensation is for different reasons (e.g. lung diseases in mine workers in terms of ODMWA and all occupational diseases and injuries in terms of COIDA).<sup>141</sup>

Prevention of accidents is not addressed in the South African compensatory schemes, with the only factor dealing with it the assessments that may be adjusted to penalise an employer who does not provide a safe and healthy workplace irrespective of his common law and statutory duty to do so. Unless the

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<sup>139</sup> Chapter 2 para 3.3 & Chapter 6 para 2.2.3 (*Mankayi* rulings).

<sup>140</sup> Chapter 2 para 3.5.

<sup>141</sup> Chapter 2 para 3.4.

fragmentation is addressed in this regard, it is doubtful that South African employees will be on par with their counterparts in Canada and Australia. Benjamin's argument that South Africa is lacking a coherent policy framework inclusive of strategically-incorporated prevention measures is supported.<sup>142</sup>

Multiplicity of compensatory and health and safety laws in Australia lead to a strategic framework according to which a gradual system of harmonisation is developed. A model bill has been provided and the different jurisdictions are adopting it on an individual basis in a process whereby it is adjusted in each jurisdiction to address the specific needs of that jurisdiction. COIDA lacks the provision for cross-border mobility of compensation benefits and the cross-border entitlements to the right of compensation, although it is an ILO standard.<sup>143</sup> This has been addressed by Interjurisdictional agreements by Canada<sup>144</sup> and Australia.<sup>145</sup> It is submitted that South Africa ought to develop a comprehensive policy framework after consultation and negotiations with relevant role players to extend coverage and the portability of compensation to the countries of the SADC region. This will facilitate the movement of people across borders but simultaneously ensure the continued provision of social security benefits.<sup>146</sup>

Ultimately the workers' compensatory scheme is aimed at reducing hardship. As the Court concluded in *Henry*:

The *Workers' Compensation Act* is obviously remedial legislation designed to protect workers and their dependents from the hardship of economic loss sustained through injuries suffered by the worker in the course of his employment.

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<sup>142</sup> Chapter 2 para 3.5.

<sup>143</sup> Chapter 5 paras 2.10 & 4.7.

<sup>144</sup> Chapter 4 para 3.4 & Chapter 5 para 3.7.

<sup>145</sup> Chapter 4 paras 2.4; 3.4 & 4.4 & Chapter 5 para 3.7.

<sup>146</sup> Chapter 1 para 3 & Chapter 2 paras 3.4 & 3.5.

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