

**COMPENSATING EMPLOYEES WHO SUFFER WORK-RELATED
PSYCHIATRIC HARM IN THE COURSE AND SCOPE OF THEIR
EMPLOYMENT**

A thesis submitted in fulfillment of the requirements for the degree of

MASTER OF LAWS

of

RHODES UNIVERSITY

by

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DEDICATION

This work is dedicated to my grandparents, Barney, Clara, Duif and Jan; and my parents, Franklin, Mercia and Alida. I am ever grateful that I am because of you.

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I would like to thank God for the strength and the ability to write this thesis, for being my best Friend and my constant Companion.

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ABSTRACT

This study aims to ascertain the legal redress available to employees who suffer psychological harm as a result of workplace stress. On a general level, it identifies and assesses some of the available policy options, particularly as they relate to the interaction of statutory workers' compensation schemes and the common law. On a more specific level, it examines and analyses various issues: the nature and extent of compensable psychiatric harm; the legal duty on employers to protect employees' health and well being; the role of negligence; requirements specific to the Compensation for Occupational Injuries and Diseases Act 130 of 1993 (COIDA); and the causal nexus necessary to sustain a claim. The conclusion is reached that employees should utilise the workers' compensation system as the primary vehicle to obtain redress if they suffer from occupational psychiatric harm. However, due to the law's generally conservative approach to psychiatric harm and intimations that the Department of Labour intends setting strict requirements for claims for psychiatric harm in terms of COIDA, the common law of delict might continue to play an important role in claims for occupational psychiatric harm. The writer recommends that a hybrid system for compensation for stress-related psychiatric harm suffered in the course and scope of employment be adopted, with the statutory compensation scheme providing relatively limited benefits and the common law providing general damages if the claimant can prove negligence on the part of the employer; that the requirement of a recognised psychiatric illness be maintained for both statutory compensation and compensation in terms of the common law; that all parties' interests are carefully balanced in delineating the employer's legal duty to employers and that undue weight not be accorded to the terms of the contract of employment; that more attention be paid to factual causation and the development of alternatives/complements to the traditional *conditio sine qua non* test; that the validity of the circular instruction on post-traumatic stress disorder (PTSD) be tested on administrative-law grounds; and that the stringent prescription requirements set by the circular instruction on PTSD be reviewed.

CHAPTER 1

GENERAL INTRODUCTION

1.1 DEFINITION OF WORKPLACE STRESS AND ITS CAUSES

Freud, in response to a question as to what he thought 'normal' people should be able to do well, is reported to have replied 'lieben und arbeiten', meaning 'love and work'.¹ Most people view work as the 'central and defining characteristic of life' – it is through work that they develop a sense of self-worth, identity and psychological health.² It is perhaps due to its importance that work can also become the source of extreme distress and anxiety in our lives.

The term 'stress' has acquired a commonsense meaning, but as two writers pithily observe, it is like sin in that it means different things to different people.³ Despite the debate surrounding the clinical definition of 'stress', it cannot be disputed that stress has become a problem in modern society.⁴ To place this study in context, the following broad definition proffered by the National Institute for Occupational Safety and Health (NIOSH) in the United States will suffice:⁵

'Job stress can be defined as the harmful physical and emotional responses that occur when the requirements of the job do not match the capabilities, resources, or needs of the worker. Job stress can lead to poor health and even injury.'

¹ JC Quick, LR Murphy and JJ Hurrell, Jr (eds) *Stress and Well-Being at Work: Assessments and Interventions for Occupational Mental Health* (1992) 3.

² Quick *et al* 4.

³ The controversy centers around the fact that people often use 'stress' to refer to both causes (stressors) and symptoms (strains) thereof, thereby casting doubt on the validity of research results. Also, while researchers are more accurate in their definition, they disagree with one another as to what the term connotes. See TA Beehr *Psychological Stress in the Workplace* (1995) 6, 11 and MF Dollard 'Introduction: Context, Theories and Intervention' in MF Dollard, AH Winefield and HR Winefield (eds) *Occupational Stress in the Service Professions* (2003) 5.

⁴ The United Nations in a 1992 report labeled it 'the 20th Century Disease' and in 1996 the World Health Organization stated that it has become a 'world wide epidemic'. See The American Institute of Stress official website available at <http://www.stress.org/job.htm> (accessed 8 June 2004).

⁵ The US National Institute of Occupational Safety and Health official website available at <http://www.cdc.gov/niosh/stresswk.html> (accessed 8 June 2004).

Stress is not inherently bad or negative: It can be an asset propelling people to achieve their best; and it is only when it turns into distress that it becomes destructive.⁶

More often than not stress can be attributed not only to occupational factors, but to a combination of work and non-work causes. It would be unrealistic to assume the independence of work and domestic life; they are undeniably intertwined.⁷ However, Scott cogently argues that the Industrial Revolution necessitated people leaving home to go to work, thereby 'bifurcating the individual's experience and identity'.⁸ Today, most individuals separate their occupational lives from their domestic lives; often we hear people warning others not to 'take their work home'.

Occupational stress⁹ may be caused by physical and psychosocial factors. The former include 'biological, biomechanical, chemical and radiological'¹⁰ causes, whereas the latter represent

'those aspects of work design and the organization and management of work, and their social and environmental contexts, which have the potential for causing psychological, social or physical harm'.¹¹

⁶ Preface to Quick *et al* ix. See also E Van Zyl 'The measurement of work stress within South African companies: a luxury or necessity?' (2002) 28(3) *SA Journal of Industrial Psychology* 26 who quotes Jacobs as follows: 'Stress is a reality of life, it is unavoidable, good and bad, constructive and destructive.'

⁷ BC Fletcher 'The Epidemiology of Occupational Stress' in C Cooper and R Payne (ed) *Causes, Coping and Consequences of Stress at Work* (1988) 9.

⁸ Quick *et al* 5. See for example, the situation in *Grobler v Naspers en 'n Ander* 2004 (4) SA 220 (C) where the plaintiff's unfortunate family circumstances (her husband had been in jail and their marriage was unstable) certainly played a role in her inability to cope with workplace pressures, but the Court (per Nel J) found that the employer should nonetheless be held liable for failing in its duty to provide a safe work environment.

⁹ The intermediary term 'stress' is used here to connote the consequence of stress (in industrial psychology literature the term 'strain' is used), whereas the term 'stressor' refers to the cause or antecedent of stress. See Dollard 5.

¹⁰ *Ibid.*

¹¹ *Ibid.*

This work is limited to the psychological effects of psychosocial stressors, although references to the costs of workplace stress include the impact thereof on people's social lives and their physiological health.

1.2 WORKPLACE STRESS IN CONTEXT

Fletcher writes that '[t]he work environment includes a constellation of psychological factors which are likely to interact in different ways in different jobs for different people'.¹² It is therefore surprising and unfortunate that research on occupational stress has tended to be non-specific, with the focus on industrial jobs rather than service professions.¹³ However, it is clear from the literature that workplace stress does not discriminate: It affects people of all races, cultures, income groups and occupations.¹⁴ Of course some jobs are inherently more stressful than others,¹⁵ but disparity in the degrees and manifestations of stress does not vitiate its presence in a broad spectrum of occupations.¹⁶

At the turn of the millennium various economic, political and socio-cultural factors impacted profoundly on modern working arrangements.¹⁷ Appelbaum, speaking on the transformation of work and employment and the new insecurities it brings, states that there are four broad influences that have generally been identified as affecting workers' security, viz 'the internationalization of production processes,

¹² Fletcher 3.

¹³ L Levi 'Foreword' in MF Dollard, AH Winefield and HR Winefield (eds) *Occupational Stress in the Service Professions* (2003) vii.

¹⁴ See, for example, Van Zyl 26 who concluded in 1993 'that 34,7% of Coloureds, 38,1% of whites and Asians and 35% of black South Africans suffer from high stress'. It is also insightful to note that Dollard *et al* devote specific chapters to stress suffered by people in different service professions, ranging from clergy to prostitutes. MY Tytherleigh 'What employers may learn from English higher education institutions: a fortigenic approach to occupational stress' (2003) 29(4) *Journal of Industrial Psychology* 101 states that despite the perception that life in academia is relatively stress-free, increasing levels of occupational stress are appearing in academics in the United Kingdom, Australia and New Zealand.

¹⁵ See the *dicta* by Colman J in *Walker v Northumberland County Council* [1995] All ER 737 (QBD) 749e-g to the effect that the circumstances of each case will often create extremely difficult evidential problems because occupations are inherently different and clinically normal people have a widely differing ability to cope with workplace pressures.

¹⁶ In this regard, a distinction must be drawn between 'chronic stressors' that are 'consistent, long-term states of the job or organization', and 'acute stressors' that are 'short-term events in the workplace that may be stressful'. See Beehr 13-14 and Dollard 8.

¹⁷ Dollard 1-2.

the decline of the standard employment relationship, the marginalization of care work, and the ubiquity of digital technology'.¹⁸

1.2.1 Globalisation and internationalisation of production processes

The broad effect of globalisation is succinctly captured as follows by Supiot:¹⁹

'Globalisation and localisation are the two inseparable faces of world economic strategies that are based on the exploitation of local competitive advantages. This dual trend towards internationalisation and localisation has paradoxical effects on the labour markets, subjecting them to quantitative pressures to reduce labour costs, which place labour at a lower value than capital, and at the same time to qualitative pressures to improve work skills as a result of the demand for innovation and greater quality on the products and services markets.'

He goes on to state that the international economic system turns a blind eye to the social problems created by these events.²⁰

At a more specific level, multinational companies have become stateless enterprises moving their production locations relentlessly to gain competitive advantages in terms of production costs and through escaping regulatory constraints.²¹ Employees know that capital is mobile, that employers can relocate plants, outsource some operations, purchase components from foreign producers.²² The sum total of this 'threat effect' is that the bargaining power of workers is reduced, wages are held down, overtime is imposed, work is sped up and unions are undermined.²³

¹⁸ E Appelbaum 'Transformation of Work and Employment and New Insecurities' (2002) *Paper presented at the conference on The Future of Work, Employment and Social Protection*, 18-19 January in Lyon, France at 2.

¹⁹ A Supiot 'Towards an international social order? Preliminary observations on the "new regulations" in work, employment and social protection' (2002) *Paper presented at the Conference on The Future of Work, Employment and Social Protection*, 18-19 January in Lyon, France at 6.

²⁰ *Ibid.*

²¹ Appelbaum 3.

²² Appelbaum 4.

²³ *Ibid.* See, also, N Rudra 'Globalization and the Decline of the Welfare State in Less-Developed Countries' (2002) 56(2) *International Organization* 411, who argues that labour in less developed countries are more marginalised because of large pools of low-skilled and surplus workers.

1.2.2 Decline of standard employment relationships

Globalisation has led to companies being able to shift the risks of the volatility in global markets from capital to labour, because they can shift their production processes to areas with cheap labour costs.²⁴ This has led to a weakened commitment to workers, willingness to invest in skills development or to share productivity gains with workers.²⁵ A common argument is that the employment relationship in all industrialised countries have been weakened, because employers opt for non-standard or atypical work arrangements that make it possible for them to avoid providing social protections to which workers with regular employment contracts are entitled.²⁶

The European Agency for Health and Safety at Work has stated that organizational structures are continually changing.²⁷ Some of the adverse consequences of recent trends are that workers perceive a lack of control over their work, workloads become complex without a commensurate increase in staff training and people start feeling isolated because of a decrease in human interaction.²⁸ Modern work demands are also squeezing out what has been regarded as 'relaxed' jobs²⁹ and workers are expected to perform multiple tasks, leading to role ambiguity and role conflict.³⁰

1.2.3 Marginalisation of care work

The dilemma with care work can briefly be described as follows:³¹ Traditionally, there had been a male breadwinner who went out to work and a female

²⁴ Appelbaum 6.

²⁵ *Ibid.*

²⁶ Appelbaum 7.

²⁷ European Agency for Health and Safety at Work available at http://agency.osha.eu.int/publications/forum/5/en/index_4.htm (accessed 2 June 2004).

²⁸ *Ibid.*

²⁹ For example, scientists compete for funding (Dollard 1-2) and academics are subjected to 'increasing accountability, value for money, efficiency and quality, and an increase in remote and autocratic management styles' (Tytherleigh 102).

³⁰ Dollard 1-2.

³¹ Appelbaum 11-17.

homemaker who took care of the needs of the family. That is no longer the case, with women entering the job market, very often because families depend on double income. However, the ideal worker is 'a worker who behaves in the workplace as if he or she has a wife at home full-time',³² performing all of the unpaid care work that families require. This normative system places a lot of stress on household members, a burden that is still disproportionately borne by women.

1.2.4 Economic and technological change

The world economy has shifted from one based on production to one based on knowledge. This shift has profound effects on everyone in the workforce, because knowledge is inescapably tied to human beings. Hamel and Prahalad describe the phenomenon thus:³³

'The machine age was a physical world. It consisted of things. ... In the machine age, people were ancillary, things were central. ... In the information age, things are ancillary, knowledge is central. ... A company's value derives not from things, but from knowledge, know-how, intellectual assets, competencies – all of it embodied in people.'

The psychological burdens on employees increase, with the result that many of the injuries they suffer will not be to their limbs, but to their psyches.

Technological change has 'outstripped efforts to develop socio-technical perspectives that integrate human needs and values into the management of jobs and organizations'.³⁴ Workers experience an overload of information and often there are psychological stress reactions to learning new skills.³⁵ Technological advances have also led to underemployment and poor quality

³² Appelbaum 14.

³³ G Hamel and CK Prahalad 'Competing in the New Economy: Managing Out of Bounds' (1996) 17(3) *Strategic Management Journal* 237 at 241.

³⁴ Dollard 1-2.

³⁵ European Agency for Health and Safety at Work 'The Everchanging World of Work' (2002) at http://agency.osha.eu.int/publications/forum/5/en/index_5.htm (accessed 2 June 2004).

work – ‘work not fit for a machine to do’ – that is unsatisfying, low-paying and offers little job security.³⁶

1.2.5 South Africa's historical inequalities

South Africa's history of inequality and exploitation creates peculiar problems in addition to those enumerated above. Van Zyl provides this succinct overview:³⁷

‘As a result of the shortage of high-level human resources, managers and professionals are under great pressure; similarly, the skills shortage is creating unique pressures for technicians and skilled workers. New legislation (for instance the Employment Equity Act), affirmative action and the quota systems are creating great and unique distress among workers from different racial/cultural groups. This is intensified and compounded by economic conditions that make life in South Africa an unusually distressful experience. The problems are also intense, extensive and complex enough to rob people of any hope that there will be significant relief even in a future generation.’

1.2.6 Costs of workplace stress

The complexity and multifaceted effects³⁸ of stress make it almost impossible to quantify the costs thereof.³⁹ These costs are suffered at an individual, organisational and societal level.⁴⁰ Occupational stress not only affects the employee, but impacts on other people with whom that person interacts, for example, his/her family.⁴¹ Research has shown that people suffering from stress are prone to errors, are involved in work accidents, are absent from work more often and are more involved in strikes and work slowdowns.⁴² Society also

³⁶ Dollard 1-2.

³⁷ Van Zy 30.

³⁸ See fn 12 above.

³⁹ Fletcher 9. Some estimates in the European Union suggest that the costs of work stress could amount to 5-10% of GDP. In the United States, one study has concluded that 54 % of sickness absenteeism is work related. The World Health Organisation in 2001 warned that ‘mental health problems and stress-related disorders are the biggest cause of premature death in Europe’. See Dollard 2-3.

⁴⁰ Dollard 5.

⁴¹ Van Zyl 26.

⁴² Van Zyl 27.

suffers in that stress impacts negatively on social cohesion and creates income disparities.⁴³

1.3 AIM OF THE STUDY

This study aims to ascertain the legal redress available to employees who suffer psychological harm as a result of workplace stress. On a general level, it identifies and assesses some of the available policy options, particularly as they relate to the interaction of statutory workers' compensation schemes and the common law. On a more specific level, it examines and analyses various issues: the nature and extent of compensable psychological harm; the legal duty on employers to protect employees' health and well being; the role of negligence; requirements specific to the Compensation for Occupational Injuries and Diseases Act;⁴⁴ and the causal nexus necessary to sustain a claim.

1.3.1 Specific limitations

This work does not contain extensive discussion of generally accepted delictual principles. Instead, the focus will be on specific issues relating to the compensation of individuals who suffer psychiatric harm in the course and scope of their employment.

Also, the legal provisions relating to occupational health and safety in mines are excluded from the ambit of this thesis. This is because such legislation is broadly similar to the provisions of the Occupational Health and Safety Act⁴⁵ (OHSA) and COIDA in terms of the basis of awarding compensation,⁴⁶ even though there are major differences in the benefit structures and the calculation of

⁴³ Dollard 4.

⁴⁴ Act 130 of 1993 Hereinafter referred to as COIDA.

⁴⁵ Act 85 of 1993.

⁴⁶ The Mine Health and Safety Act 29 of 1996 is the mining equivalent of the OHSA, while the Occupational Diseases in Mines and Works Act 78 of 1973 is the mining counterpart of COIDA.

the compensation due to employees.⁴⁷ Furthermore, it is arguable that the amalgamation of these two systems should be considered within a broad occupational health policy framework.⁴⁸

1.4 THE LEGAL ISSUES

The existence of an occupational stress problem in society does not automatically translate into a need for legal intervention. Whether the law should intervene depends upon the importance society places on the interest that has been infringed and the nature of the other interests involved, in particular the employer's rights, but also the interests of society at large.⁴⁹

1.4.1 Constitutional considerations

From a constitutional perspective, the employee's rights to access to social security,⁵⁰ dignity,⁵¹ fair labour practices⁵² and an environment that is not harmful to their health or well-being⁵³ have to be balanced against the employer's right to engage freely in economic activity.⁵⁴ One must also not lose sight of society's interest in ensuring that the economy is not unduly prejudiced by health and safety standards that are too stringent.⁵⁵

⁴⁷ Taylor Committee of Inquiry into a Comprehensive Social Security System for South Africa: Report (2001) (hereinafter referred to as 'Taylor Committee Report') at 457; N Smit 'Employment injuries and diseases' in MP Olivier, N Smit and E Kalula (eds) *Social Security: A Legal Analysis* (2003) 459 (hereinafter referred to as 'Smit Legal Analysis') at 496.

⁴⁸ *Ibid.*

⁴⁹ JR Midgley 'Intention remains the fault criterion under the *actio injuriarum*' (2001) 118 SALJ 433 (hereinafter referred to as 'Midgley Intention') at 435.

⁵⁰ Section 27 of the Constitution of the Republic of South Africa, 1996 (hereinafter referred to as the Constitution).

⁵¹ Section 10 of the Constitution. How this right is applied is best illustrated by the definition given to it in the Canadian case of *Law v Canada (Minister of Law and Immigration)* (1999) 170 DLR 4th 1 (SCC): 'Human dignity means that an individual or a group feels self-respect and self-worth. It is concerned with physical and psychological integrity and empowerment.'

⁵² Section 23 of the Constitution.

⁵³ Section 24(a) of the Constitution.

⁵⁴ Section 22 of the Constitution does provide that the practice of a trade, occupation or profession may be regulated by law, but regulation still has to be effected within constitutional parameters.

⁵⁵ See MD Kirby 'Comparativism, realism and the economic factor' in NJ Mullany and AM Linden (eds) *Torts Tomorrow: A Tribute to John Fleming* (1998) 3 at 14: 'Just as other lawmakers would

The workers' compensation system is the oldest form of social insurance⁵⁶ and fulfills an important function in providing social protection to those workers who are injured or become ill as a result of their work or their working environment. A system that unjustifiably favours employers over employees, unreasonably restricts claims and makes no attempt at prevention, rehabilitation and (re)integration may not pass constitutional muster. However, in providing a constitutionally acceptable level of social protection to employees, the statutory workers' compensation system is not the only means that must be considered. The common law of delict also has a role to play in this regard, more specifically in compensating employees who suffer psychiatric harm in the course and scope of their employment.

1.4.2 The common law and/or statutory regulation?

The South African law of delict has been heavily influenced by English tort law, which in the 19th century placed increasing emphasis on freedom of action.⁵⁷ The result is that generally no liability will ensue unless there is fault on the part of the defendant. This development was in part due to the Industrial Revolution, free market economic theory and Kant's moral philosophy of individualism.⁵⁸ It was thought to be in the better interests of the economy to sacrifice the safety and security of individuals. These common-law principles have been changed by the fact that occupational health and safety in South Africa, as in many other countries, is subject to extensive legislation that principally operates on a no-fault

not dream of now performing their functions in disregard of the economic factor, so courts in their function of declaring, clarifying and extending legal principle must take seriously the economic consequences of what they are doing.'

⁵⁶ The first modern workers' compensation system is thought to have been first developed by Otto Von Bismarck in Germany in 1884. See A Clayton 'Workers' Compensation: A Background for Social Security Professionals' (2003-2004) 65(4) *Social Security Bulletin* 7 at 8.

⁵⁷ PR Spiller 'The Making of the Law of Delict: A M lange of Sources' in DP Visser (ed) *Essays on the History of Law* (1989) 341.

⁵⁸ *Ibid.* See also, R Pound 'Interests of Personality' (1914-1915) 28 *Harvard Law Review* 343 at 349: 'Up to the end of the eighteenth century the whole course of development of the law had been to disentangle individual interests from group interests and to protect and secure these individual interests by legal rights.'

basis.⁵⁹ Also, the Constitution embodies a new normative value system in terms of which all laws must be interpreted and applied.⁶⁰

Despite the wholesale changes to occupational health and safety laws in 1994, it is not yet clear whether all, or some, occupational stress claims can be brought within their ambit. A Circular Instruction Regarding Compensation for Post-traumatic Stress Disorder (PTSD)⁶¹ published in terms of COIDA⁶² implies incorporation of these claims into the statutory framework. However, the instruction requires an 'accident' before compensation is awarded, leaving the impression that gradual stressors are not covered. Furthermore, the circular instruction on PTSD does not apply to cases in which other psychiatric harm is alleged.

In *Grobler v Naspers Bpk en 'n Ander*⁶³ it was held that COIDA applies only if there was a specific traumatic event that led to psychiatric injury. Nel J granted damages for PTSD caused by persistent sexual harassment in terms of the common law. On appeal, this issue was specifically left open, although the Supreme Court of Appeal intimated that PTSD may qualify as an 'occupational disease' in terms of COIDA.⁶⁴

Given the need for statutory intervention, it is clear that the common law has some serious shortcomings that make it unsuitable as a primary port of call for

⁵⁹ C Thompson and P Benjamin *South African Labour Law* Vol 2, Service No 33 (1995) at G1-3.

⁶⁰ *Carmichele v Minister of Safety and Security and Another (Centre for Applied Legal Studies Intervening)* 2001 (4) SA 938 (CC) para [54]; *Minister of Safety and Security v Van Duivenboden* 2002 (6) SA 431 (SCA) para [17]; *Van Eeden v Minister of Safety and Security (Women's Legal Centre Trust, as amicus curiae)* 2003 (1) SA 389 (SCA) para [12]; H Keep and JR Midgley 'The Emerging Role of Ubuntu-Botho in Developing a Consensual South African Legal Culture' (2007) *Paper presented at the Joint Meeting of the Law and Society Association and the Research Committee on the Sociology of Law of the International Sociological Association*, 28 July at Humboldt University, Berlin.

⁶¹ Hereinafter referred to as 'the circular instruction on PTSD'.

⁶² GN 936 in GG 25132 of 27 June 2003.

⁶³ At 128.

⁶⁴ *Media 24 Ltd and Another v Grobler* 2005 (6) SA 328 (SCA) para [77].

employees who suffer psychiatric harm that has an occupational cause(s).⁶⁵ However, the common law remains relevant for various reasons: the statutory framework excludes many workers; fault is not entirely excluded due to the provisions in COIDA on increased compensation in certain cases of managerial negligence; workers' compensation legislation must be interpreted, as far as possible, in consonance with the common law; and the common law informs the interpretation of statutory provisions.⁶⁶ Furthermore, the Taylor Committee of Inquiry into a system of Comprehensive Social Security for South Africa recognised that a policy alternative would be to allow tort-based civil claims to be brought in respect of damages not covered by the current compensation system.⁶⁷

For the above reasons, the common law of delict will be extensively discussed and examined in this work. Ultimately, one can regard the common law as the parent of the statutory regime. The history of the parent informs what the child becomes; and the child has to learn from the parent's mistakes, discarding the patently wrong, improving on weaknesses, but retaining the good. As the parent evolves, so too does the child; the relationship between the two 'entities' is ever changing as life and their circumstances mould them. As the economy grows from one focused on production to one focused on service provision and technology advances, the types of industrial accidents and diseases will change, with stress-related psychiatric injuries likely to increase.⁶⁸ The regulatory environment has to adapt to meet this need and will have to rely on the common law to aid its development.

⁶⁵ See 2.3 below.

⁶⁶ See 2.4 below.

⁶⁷ Taylor Committee Report 461.

⁶⁸ The American Psychological Association has predicted that stress-related injuries 'will be the most pervasive occupational disease of the 21st century': see AV Matsumoto 'Reforming the Reform: Mental Stress Claims under California's Workers' Compensation System' (1994) 27 *Loyola Los Angeles Law Review* 1327 at 1335.

1.4.3 Employer's legal duty

The employer's duty to create a reasonably safe working environment has its common-law origins in delict.⁶⁹ Some employment law writers assume that the duty is a consequence of an implied or residual term of the employment contract. Wallis submits that this view is erroneous.⁷⁰ However, it is arguable that the law leaves scope for concurrent duties;⁷¹ thus it may be possible that a duty can be derived from both sources. Moreover, in the area of occupational health and safety many statutory duties are created and breaches of these duties may be regarded as wrongful conduct for purposes of delict⁷² and may also carry statutory sanctions.

1.4.4 Role of negligence

As mentioned above,⁷³ the statutory compensation scheme does not require the employee to prove that the employer was at fault when the employee sustained the occupational injury or contracted the occupational disease. However, COIDA does provide for increased compensation in certain cases of (mostly) managerial negligence.⁷⁴ This provision has not been extensively utilised by employees and there is still much room for broadening its scope.⁷⁵ If the Taylor Committee of Inquiry's suggestion that common-law damages be allowed where the compensation system does not provide redress⁷⁶ is considered, negligence may also play a role in that context.

⁶⁹ MJD Wallis *Labour and Employment Law Service* Issue 5 (1995) 3-16.

⁷⁰ *Ibid.* See, also, *Paterson v South African Railways and Harbours* 1931 CPD 289 at 294 and *McDonald v General Motors South Africa (Pty) Ltd* 1973 (1) SA 232 (E) 234.

⁷¹ See *Lillicrap, Wassenaar and Partners v Pilkington Brothers (SA)(Pty) Ltd* 1985 (1) SA 475 (A) 496C-H and 502B-F; Van der Walt and Midgley 57-58.

⁷² J Neethling, JM Potgieter and PJ Visser *Law of Delict* 5 ed (2006) at 58.

⁷³ See fn 59 above.

⁷⁴ Section 56(1).

⁷⁵ P Myburgh 'Models to Provide and Sustain Adequate Long-Term Employment Injury Benefits' in MP Olivier, E Kalula, J van Steenberge, Y Jorens and W van Eeckhoutte (eds) *The Extension of Social Security Protection in South Africa* (2001) 210 at 232.

⁷⁶ See fn 67 above.

1.4.5 Causation

The causal nexus between the employee's work and/or working environment on the one hand, and his/her psychiatric illness on the other, assumes particular importance in workers' compensation due to the latter's compromise nature. The element of causation is an important limitation device that ultimately reflects the policy choices made by government in the area of workers' compensation, more specifically compensation for psychiatric diseases with an occupational cause(s).

1.4.6 Requirements specific to COIDA

Any workers' compensation system inherently contains an element of compromise between employers', employees' and society's interests. It will therefore never provide full cover against industrial accidents or diseases.⁷⁷ The best it can hope to achieve is to compensate as many deserving workers as possible, whilst maintaining economic and administrative efficacy.⁷⁸

The limitations that will be placed on the compensation of occupational psychiatric illnesses include the nature and type of psychiatric illnesses that are compensable. This will be discussed in the general chapter on the compensable harm.⁷⁹ There are, however, harm-related issues that are peculiar to statutory compensation. These issues, together with the requirement that the injury or disease must have originated in the course and scope of employment, will be addressed in a separate chapter dealing with COIDA-specific issues.

⁷⁷ L Joseph 'Causation in Workers' Compensation Mental Disability Cases: The Michigan Experience' (1981) 27(3) *Wayne Law Review* 1079 at 1087 (hereinafter referred to as 'Joseph Michigan Experience'); S Adler and R Schochet 'Workers' Compensation and Psychiatric Injury Definition' (1999) 22 *International Journal of Law and Psychiatry* 603 at 610.

⁷⁸ Adler and Schochet 610.

⁷⁹ Chapter 3.

1.5 CONCLUSION

It was only as recently as 1973⁸⁰ that the then Appellate Division definitively pronounced on the law governing claims for damages for psychiatric harm other than that 'sustained through the medium of the eye or the ear without direct contact'.⁸¹ The peculiar nature of psychiatric injury and the possibility of indeterminate liability dictate that a cautious approach must be adopted.⁸² Brazier writes that the reasons for caution include the difficulty of 'putting a monetary value' on psychiatric injury; the risk of false claims and unwarranted litigation; and proving a causal nexus between the plaintiff's injury and the defendant's conduct.⁸³

In the context of occupational stress, an English judge has stated that the circumstances in which it is likely to arise will more often than not cause 'difficult evidential problems of foreseeability and causation', especially in a professional environment where work is intrinsically demanding and stressful.⁸⁴ Furthermore, 'people do not live on the same emotional plane all the time'.⁸⁵ We invariably experience mental highs and lows.

The employment relationship is an unequal one.⁸⁶ The employer wields power over his/her employee. In an economy that has only recently entered the international economic community and whose industries are under immense pressure to compete in the global market, it is easy to lose sight of workers' needs. Economic history shows appalling abuse of workers' rights in the early

⁸⁰ *Bester v Commercial Union Versekeringsmaatskappy van SA Bpk* 1973 (1) SA 769 (A).

⁸¹ per Lord MacMillan in *Bourhill v Young* [1942] All ER 396.

⁸² Van der Walt and Midgley 92.

⁸³ M Brazier *Street on Torts* 9 ed (1993) 197.

⁸⁴ Colman J in *Walker v Northumberland County Council* [1995] 1 All ER 737 (QBD) 749e-g.

⁸⁵ Scottish Law Commission Discussion Paper 120 on Damages for Psychiatric Injury, August 2002 (hereinafter referred to as 'Scottish Law Commission Discussion Paper') available at <http://www.worldlii.org/cgi-worldlii/displ/scot/other/SLC/DP/2002/120.html> (accessed 22 January 2005).

⁸⁶ Wallis 5-27 fn 15. See, also, O Kahn-Freund *Labour and the Law* 3 ed (1983) 18 who writes: 'The relation between an employer and an isolated employee or worker is typically a relation between a bearer of power and one who is not a bearer of power. In its inception it is an act of submission, in its operation it is a condition of subordination'

stages of industrialisation.⁸⁷ To borrow a phrase from Rudyard Kipling,⁸⁸ in the struggle for economic growth, the law has the responsibility to keep its head while everyone around it loses theirs.

This work will canvass how occupational health and safety legislation deals with workplace stress claims and the policy gaps and institutional gaps in the current regulatory framework. It recognises that the statutory framework should be employees' first port of call, but that the common law still has an important role to play. Moreover, employment injuries and disease law certainly should not be the only solution to workplace stress. It must work in tandem with other legal and non-legal mechanisms.

The workplace stress problem is far too complicated and important to attempt to resolve by employing only reactive measures such as claims for compensation. The ideal situation would be for all role players to be aware of and to take preventative measures against occupational stress, because they realise that it is in everybody's best interests. However, our imperfections necessitate a compensation system that is financially and administratively feasible; respects, protects and promotes the constitutional rights of all relevant persons; respects, protects and promotes the constitutional values upon which our community is built; and complies with international, as well as regional, standards and benchmarks.

⁸⁷ See D Landes *The Wealth and Poverty of Nations* (1999) 360-372.

⁸⁸ From his poem "If" available at <http://www.emule.com/poetry/?page=poem&poem=2937> (accessed 25 June 2004).

CHAPTER 2

COMMON LAW OR WORKERS' COMPENSATION?

2.1 INTRODUCTION

In the introductory chapter, reference was made to the uncertainty that exists as to whether compensation for psychiatric injury caused by workplace stress could be accommodated in workers' compensation legislation as it stands, or whether damages can and should be sought in terms of the common law. This chapter expands upon this issue. It provides a brief overview of the context of occupational psychiatric harm and in light thereof assesses the statutory compensation system and its capacity to incorporate occupational psychiatric injuries; the state of the common law of torts and its suitability as a mechanism through which employees can claim compensation; and the relationship between the common law and statutory regulation. Some alternative solutions are also identified.

2.1.1 Societal, organisational and individual context of occupational psychiatric harm

As mentioned before, the detrimental effects of workplace stress can be felt at an individual, organisational and societal level.¹ It is not with stress as such that this analysis is concerned, but with the recognisable mental disorders that may result from stress and may cause workers to become temporarily or permanently disabled. A perusal of the symptoms of, for example, PTSD indicates that sufferers' quality of life is significantly impaired and it may have dire consequences for their family life and how they interact with and function in the broader community.²

¹ Dollard 5.

² A rather extreme illustration of the dire consequences of workplace stress can be found in the high incidence of police officers who commit suicide, kill family members or colleagues and/or harm strangers. See, *inter alia*, 'Multiple killing: Stress blamed' (2005) available at www.news24.com/News24/South_Africa/News/0,,2-7-1442_1707085,00.html (accessed 5 April

Implicit in the comprehensive coverage envisaged when workers' compensation laws are drafted, is the realisation that workers are ill-suited to bear the costs of occupationally-acquired diseases. Just as the disease reduces their ability to earn a living, medical and other expenses escalate.³ Few workers will sufficiently insure against the risk of disease, because of, *inter alia*, lack of information, improper evaluation of risks and workers' tendency to discount information about workplace hazards.⁴ Insurance companies may not underwrite such policies or workers may be unable to afford premiums.⁵

The world of work is in a continuous state of flux. Erwin, writing in the American context, states that jurisdictions 'allowing compensation for stress-induced injuries are responding to the shift from an industrial labor force, traditionally plagued by physical accidents and injuries, to the computer-age work force, plagued by stress-related injury and illness.'⁶ If South Africa does not adapt in the same way, it runs the risk of excluding from cover a substantial proportion of people injured as a result of or in the course and scope of their employment.

Thompson and Benjamin write that 'public awareness of occupational health and safety as an issue is erratic'; and it is stimulated by major disasters such as mining disasters and major health scares such as asbestos-related illnesses.⁷ Often it is only when industrial hazards start posing a threat to the broader community that these issues receive attention.⁸ Given the insidious nature of gradual stressors and public ignorance of mental health in general, mental health in the workplace is not accorded the attention it deserves.

2006); E Claassen "'Stressed" cop on shooting rap' (2005) available at http://www.news24.com/News24/South_Africa/News/0,,2-7-1442_1666931,00.html (accessed 5 April 2006).

³ Note 'Compensating Victims of Occupational Disease' (1979-1980) 93 *Harvard Law Review* 916 (hereinafter referred to as 'Compensating Disease') at 936.

⁴ *Compensating Disease* 937.

⁵ *Ibid.*

⁶ JP Erwin 'Workers' Compensation Law: Stress Related Injury in the Workplace' (1994-1995) 17 *Workers' Compensation Law Review* 307 at 317. Also, see 1.2.4 above.

⁷ Thompson and Benjamin G1-5.

⁸ *Ibid.*

2.2 THE STATUTORY COMPENSATION SYSTEM

Occupational health and safety legislation aims to strike a balance between protecting employees on the one hand, and not unduly inhibiting the economic endeavours of employers. Its primary purpose is to establish mechanisms that are 'more efficient and equitable than civil law remedies based on negligence'.⁹ Employees are exempted from proving fault on the part of the defendant.¹⁰ Employers (and certain fellow employees) are protected by the fact that COIDA divests employees of their common-law right of action in delict,¹¹ although it still allows for increased compensation to claimants injured due to managerial negligence.¹² The system also ameliorates the economic consequences of huge damages claims against employers in that it establishes a compensation fund¹³ to which employers have to pay assessments¹⁴ and out of which such damages will usually be paid.¹⁵

⁹ *Jooste v Score Supermarket Trading (Pty) Ltd (Minister of Labour Intervening)* 1999 (2) SA 1 (CC) para [15]. Thompson and Benjamin G1-3.

¹⁰ Thompson and Benjamin G1-4.

¹¹ Section 35(1) of COIDA reads: '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.' See also, *Skinner v Minister of Public Works and Others* 1998 JOL 4223 (SE); *Mphosi v Central Board for Co-operative Insurance Ltd* 1974 (4) SA 633 (A) 644A-E; *Minister of Justice v Khoza* 1966 (1) SA 410 (A); *Patterson v Irvin and Johnson Ltd* 1963 (3) SA 255 (C) and *Bhoer v Union Government and Another* 1956 (3) SA 582 (C) 589.

¹² Section 56(1) provides:

'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 he employer;
- (d) ...
- (e) ...,

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.

¹³ Section 15.

¹⁴ Section 86.

¹⁵ See s 29, which provides that the Director-General of Labour, an employer individually liable in terms of s 84, or a mutual association established in terms of s 30 will be liable for the payment of compensation under the Act.

2.2.1 Limitation of common-law right to sue

Section 35 of COIDA limits the employee's common-law right to sue in terms of any law other than COIDA. This limitation shields the employer from being personally liable for damages. The employer may choose to waive the protection afforded by s 35, but it must then be shown that the employer or the employer's duly authorised representative was aware of the provisions of the section at the time of undertaking to waive those rights, that s/he was authorised to waive those rights and that s/he did waive those rights.¹⁶

The bar on common-law claims does not apply where the employee is harmed as a result of deliberate wrongdoing by the employer or a person for whose delicts the employer is vicariously liable.¹⁷ In *Crown Chickens (Pty) Ltd t/a Rocklands Poultry v Rieck*¹⁸ it was also held that where a labour broker provided an employee to a client, s 35 of COIDA did not preclude the plaintiff from suing the client for the negligent conduct of the latter's security guards during a shooting incident in which the plaintiff was injured. The Court found that even though the plaintiff was under the day-to-day instruction of the client, the plaintiff had an employment relationship with the labour broker and not the client.¹⁹

In *Jooste v Score Supermarket*²⁰ the Constitutional Court held that s 35 of COIDA does not violate the right to equal protection and benefit of the law as enshrined in s 9 of the Constitution. The Court was of the view that the issue of whether an employee ought to have the right to claim damages from the employer, either over and above COIDA damages, or as an alternative thereto, is controversial, complex and highly debatable.²¹ It declined to make what it termed

¹⁶ *Kadiega v North West Housing Corporation* (2006) 27 ILJ 89 (B).

¹⁷ *Kau v Fourie* 1971 (3) SA 623 (T) 620-630; *Mphosi v Central Board for Co-operative Insurance Ltd* at 22A.

¹⁸ [2007] 1 BLLR 1 (SCA); Judgment in the Court *a quo* reported at [2005] 6 BLLR 622 (SE).

¹⁹ At paras [19]-[28]. See also, the judgment in the Court *a quo* at paras [18]-[21].

²⁰ [1999] BCLR 139 (CC).

²¹ At para [17].

‘a policy choice under the guise of rationality review’, stating that such a choice was one that had to be made by the legislature.²²

2.2.2 The condition of the compensation system

The recognition of mental illnesses as ‘diseases’ for purposes of COIDA²³ is not a solution free from difficulty. Difficulties stem in large part from the shortcomings of the current legislative and regulatory frameworks, as well as the administrative difficulties that the Compensation Fund is currently experiencing.

The Taylor Committee Report raised various concerns relating to coverage for employment injuries and diseases, the most important of which are the exclusionary nature of the coverage,²⁴ the absence of preventative, reintegrative and rehabilitative measures in the compensation system²⁵ and the lack of linkage with other social security schemes. The last-mentioned concern leads to duplication of payments that undermines the financial stability of the various funds and provides a disincentive for injured workers to return to the labour market.²⁶

2.2.2.1 Benefits under COIDA²⁷

The Taylor Committee further commented on the basis upon which benefits are paid under COIDA. It expressed the view that the so-called “meat chart” creates the impression that compensation is for loss of a limb, as opposed to income replacement.²⁸ The “meat chart” refers to Schedule 2 of COIDA, in terms of

²² *Ibid.*

²³ This issue is extensively discussed in Chapter 7.

²⁴ Taylor Committee Report 461.

²⁵ Taylor Committee Report 455-456.

²⁶ Taylor Committee Report 460.

²⁷ A very useful document setting out the calculation of compensation to all employees injured on or after 1 April 2005 is available at <http://www.labour.gov.za/download/7960/Useful%20Document%20-%20COID%20-%20Calculation%20of%20compensation%20for%20workers%20injured%20on%20or%20after%201%20April%202005.doc> (accessed 12 April 2007).

²⁸ Taylor Committee Report 456.

which the compensation received by an employee is calculated on the basis of the employee's earnings at the time of the accident or disease,²⁹ as well as the severity of the disablement. If the injury is not listed in Schedule 2, the Commissioner has to determine a degree of disablement consistent therewith.³⁰

This basis and calculation of benefits are particularly relevant for psychiatric injury cases, because an appropriate measure for calculating benefits has to be determined. The circular instruction on PTSD provides guidelines on the benefits to be paid in such cases. Payments for temporary, total or partial disablement shall be made for a period not exceeding 24 months 'from the date of the accident'. One hundred per cent impairment due to PTSD shall be deemed equivalent to 65% permanent disablement, while impairment less than 20% will not be awarded permanent disablement.³¹

These provisions raise two issues. Firstly, an accident is not necessary for compensation for an occupational disease, so it is arguable that if PTSD is to be regarded as an occupational disease, the circular instruction on PTSD is *ultra vires* insofar as it requires an accident.³² Secondly, it is unclear on what basis the 65% permanent disablement is determined. In terms of Schedule 2, the loss of two limbs is regarded as 100% permanent disablement, as is loss of both hands, or of all fingers and both thumbs. PTSD is equivalent to loss of an arm at the shoulder and loss of an arm between the elbow and the shoulder. This may not be an issue specific to PTSD, but it is indicative of the arbitrary nature of the

²⁹ Section 53 of COIDA prescribes rules as to how the Commissioner is to calculate compensation. However, s 63(5) provides that if the Commissioner is of the view that is not practicable to use this prescribed method, s/he may calculate earnings in any manner that s/he considers just and equitable.

³⁰ Section 49(2)(b).

³¹ Compensation for permanent disablement shall be made in appropriate cases when a final medical report is received from a panel that is constituted by the Compensation Commissioner and consists of psychiatrists, clinical psychologists, and if necessary, occupational therapists (Clause 3 of the circular instruction on PTSD).

³² Theron J in *Odayar v Compensation Commissioner* [2005] JOL 16306 (N) raised an additional concern that the Director-General of Labour does not have the authority to issue such a circular instruction that purports to change the requirements of COIDA. See 7.2.4.1 below.

determination of disablement.³³ Disablement is not linked to the real effect a loss may have on an employee's specific occupation, i.e. inadequate provision is made for the functional consequences of an injury or disease.³⁴

Other problems relating to the payment of benefits under COIDA include the following: The maximum limit set on benefits are prejudicial to blue-collar workers in particular, who are left with insufficient means to survive;³⁵ the fact that benefits are not linked to inflation, the fact that temporary disablement of less than 30% results in a lump sum payment without any consideration of the effect on, future needs and earning capacity of the particular employee; the absence of minimum benefits for temporary disablement leaves employees in this situation without any means of income; medical care is paid for without due regard to whether it is necessary in the circumstances of a particular case, leading to unnecessary wastage; and additional compensation is not claimed for because of lack of knowledge and lack of publication of these provisions.³⁶

2.2.2.2 *Administrative problems in the compensation system*

The Pretoria Legal Resources Centre has a dedicated Workers' Compensation Project that aims to engage the system.³⁷ The accounts by those involved include descriptions of the compensation system as 'inert' and riddled with a 'lack of delivery' and disorganisation.³⁸ Most cases the Project took on in 2001–2002

³³ Myburgh 240 cites the example of loss of an eye being set at only 30% of permanent disablement.

³⁴ *Ibid.*

³⁵ It is generally problematic that compensation is earnings-related, because no account is taken of the employee's loss of employment or earning capacity. See MP Olivier and E Klinck 'Coverage against Employment Injuries and Diseases' (2001) *Paper prepared for the Ministerial Committee of Inquiry into a Comprehensive Social Security System* 18. See also R U'Ren and M U'Ren 'Workers' Compensation, Mental Health Claims and Political Economy' (1999) 22 *International Journal of Law and Psychiatry* 451 at 460 who write: 'In terms of health, individuals in lower social status groups have the highest rates of morbidity and mortality for almost every medical and psychiatric disorder.'

³⁶ Myburgh 236-239. See also, Olivier and Klinck 18-19.

³⁷ Legal Resources Centre Annual Report 2002 'Tenacious Twosome: Engaging the Workers Compensation System' available at http://www.lrc.org.za/AnnualReports2002/Tenacious_Twosome.asp (accessed 6 March 2006).

³⁸ *Ibid.*

were more than three years old.³⁹ In 2000 the Compensation Fund had the rather dubious honour of being the first statutory body in this country to be ordered to pay interest after the Court found that there had been an unreasonable delay in the processing of claims.⁴⁰

It is not just the claims process that lacks efficacy. Dr Sophia Kisting from the Industrial Health Research Group at the University of Cape Town has been quoted as stating that there is no point in just blaming the Compensation Commissioner and her⁴¹ staff; the problem is bigger than one person or an administrative entity.⁴² The Benjamin and Greef Committee of Inquiry raised concerns about the entire system, some of the important factors being:⁴³

- prevention policies to promote and enforce compliance with OHS legislation are inadequately developed;
- with the exception of the mining industry, a dwindling level of resources are devoted to the prevention of occupational accidents and work related ill-health;
- there is a critical shortage of personnel to develop OHS policy and to enforce OHS legislation while, at the same time, existing human resources are inefficiently utilised;

³⁹ *Ibid.* In April 2000 a submission was made to the Public Protector, requesting a formal inquiry into the Office of the Compensation Commissioner. The signatories to this submission were: The Workers' Health Clinic, University of Cape Town; National Union of Metal Workers, South Africa; Respiratory Clinic, Groote Schuur Hospital; South African Society of Occupational Medicine, Western Cape; Industrial Health Research Group, UCT; AIDS Law Project, University of Witwatersrand; Occupational and Environmental Health Research Unit, UCT; South African Society of Occupational Health Nurses, Western Cape Branch. See J Stein 'Workers' compensation system adds insult to injury' (2001) (hereinafter referred to as 'Stein Insult') available at http://www.health-e.org.za/news/easy_print.php?uid=20000306 (accessed 30 March 2006). The submission stated that in the experience of signatories thereto, workers may wait for more than five years to be paid out, even when their claim had been accepted by the Commissioner. See J Stein 'Patience with the worker's compensation commission has run out' (2000) (hereinafter referred to as 'Stein Patience') available at <http://www.health-e.org.za/news/article.php?uid=20000501> (accessed 6 March 2006).

⁴⁰ Stein Patience *loc cit.*

⁴¹ This statement was made when the Compensation Commissioner was female, but at present that post is occupied by Mr Shadrack Mkhonto.

⁴² Stein Insult *loc cit.*

⁴³ Klass Looch Associates (Occupational Health and Safety Legislation Consultants) 'Benjamin and Greef Committee of Inquiry into a National Occupational Health and Safety Council in South Africa (Report 1997)' available at http://www.klasslooch.com/ohs_commissions_of_inquiry.htm (accessed 30 March 2006).

- the programmes of prevention and compensation agencies are insufficiently coordinated. Compensation agencies do not adequately promote the prevention of occupational accidents and work-related ill-health;
- there is generally a low level of employer compliance with obligations in terms of compensation legislation and a low level of employee awareness of rights in terms of compensation legislation;⁴⁴
- there is inadequate reporting of occupational accidents and, to a greater extent, work-related ill-health. This prevents the determination of the full extent of these problems, the effective development of preventative strategies and deprives employees of compensation benefits;
- there is insufficient research on OHS and no coordinated research programme;
- there is a severe shortage of skilled OHS personnel and no coordinated skills training strategy to address this shortage;
- there is no coordinated communication strategy to raise public awareness of OHS and to promote active approaches among employers and employees.'

Some of these aspects have improved since the submission of the report, but it is clear that a lot of issues are systemic. Employers are not keen on reporting accidents because the assessments they pay to the Compensation Fund is risk-based, meaning that more accidents lead to higher assessments for the employer concerned.⁴⁵ Also, the employer's liability to compensate a victim of an accident is an immediate safety incentive.⁴⁶ There is no such incentive with work-related diseases, which may only manifest years later.⁴⁷ This is so either because of a natural propensity to discount future costs or because employers think that they may not be around when the liabilities become due.⁴⁸

⁴⁴ The Compensation Fund Annual Report 2006 Chapter 5 available at <http://www.labour.gov.za/download/10925/Annual%20Report%20-%20Compensation%20Fund%202006%20-%20Chpt%205%20.pdf> (accessed 16 April 2007) 17 indicates that the average number of days' delay in reporting an accident or the onset of an occupational disease has decreased from 123 days in 2004-2005 to 112 days in 2005-2006, but that this state of affairs is still highly unsatisfactory.

⁴⁵ Stein Insult *loc cit*.

⁴⁶ Compensating Disease 934.

⁴⁷ Stein Insult *loc cit* cites the example of a nurse at the Carltonville Hospital who had contracted HIV after pricking herself with a needle in the course of her employment. Five years after the incident, the nurse's claim had not been processed because the employer had yet to provide the Compensation Commission with the required documentation.

⁴⁸ *Ibid*.

Paula Howell, an attorney working on the Workers' Compensation Project at the Pretoria Legal Resources Centre, has gone on record as stating that the Compensation Commission has sufficient powers of investigation to resolve cases regardless of whether or not employers comply with the Act.⁴⁹ Indeed, COIDA empowers the Director-General to subpoena witnesses who are able to provide information on any inquiry in terms of the Act.⁵⁰ It also confers extensive powers of search and seizure on certain authorised persons.⁵¹ The signatories to the abovementioned submission to the Public Protector on the poor service delivered by the Compensation Commission, averred that to their knowledge no labour inspectors had been appointed to police employers' compliance, or otherwise, with the provisions of COIDA.⁵²

The occupational health system must also be viewed within the broader context of a country's health care system. Walter Cronkite once said of America's health care system: '[It] is neither healthy, caring, nor a system.'⁵³ At the moment, the same charge can be leveled against the South African health care system. Working conditions for medical professionals are poor and the government's focus in recent years, one may argue, rightly so, has been on the provision of primary health care services.⁵⁴ Psychiatric/psychological disorders are not

⁴⁹ J Stein 'Workers' compensation – too little, too late' (hereinafter referred to as 'Stein Too Little') (2000) available at <http://www.health-e.org.za/news/article.php?uid=20000738> (accessed 6 March 2006).

⁵⁰ Section 6.

⁵¹ Section 7.

⁵² Stein Too Little *loc cit*.

⁵³ Available at <http://www.brainyquote.com/quotes/quotes/w/waltercron169605.html> (accessed 3 April 2006).

⁵⁴ See 'Health Care in South Africa' at http://www.southafrica.info/ess_info/sa_glance/health/health.htm (accessed 3 April 2006). See also, IJ Fourie 'The Megatrends of Health Care Reform in South Africa' (1999) available at <http://general.rau.ac.za/aambeeld/junie1999/megatrends.HTM> (accessed 3 April 2006), who writes the following: 'In its World Development Report for 1993, "Investing in Health", the World Bank contended that vast improvements in the health of the developing world can be achieved by redirecting health care resources from the traditional doctor-centred, hospital-based health care systems to a far more cost-effective primary health care approach involving universal access to "a defined package of public health measures and essential clinical services". It is the policy of the Department of Health to develop an affordable and sustainable system of universal access to quality primary health care for all South Africans regardless of race, gender and place of residence. The unenviable challenge facing the Department of Health is how to achieve this while

regarded as a priority, especially in the public health care system. Even with 'physical' injuries, doctors often do not indicate that the cause may be occupational, or they neglect to complete the necessary forms.⁵⁵ These issues feed into decision-making on compensation, for, as a government expert at the ILO Meeting of Experts on the List of Occupational Diseases mentioned, where there are no clear guidelines for diagnosis and training of doctors and other medical staff, agreement on compensation becomes difficult.⁵⁶

The claims process also lends itself to delays. In stark contrast to the stringent prescription requirements for the submission of claims, the Commissioner is not compelled to act within a certain period of time.⁵⁷ The following factors have been identified by a health management service that aims to assist medical practitioners in dealing with claims brought in terms of COIDA:⁵⁸ incomplete claims often reach the Compensation Commission;⁵⁹ there is a duplication of paperwork, since each and every medical practitioner treating a patient must essentially fill out the same forms; and thirdly, medical practitioners are uncertain

at the same time maintaining the range and quality of the traditional hospital-based secondary and tertiary care within a limited budget that is currently almost exclusively financed from general tax revenues.'

⁵⁵ Stein Insult *loc cit* relates the story of a worker who had lost three of her fingers while operating a defective hydraulic press machine. Three years after the incident her claim had not been settled because the surgeon, who had thrice operated on her hand, had failed to indicate that her injury was work-related.

⁵⁶ ILO official website 'Report on Meeting of Experts on Updating the List of Occupational Diseases' at Geneva, 13-20 December 2005 (hereinafter referred to as 'ILO Report') available at <http://www.ilo.org/public/english/standard/reln/gb/docs/gb295/pdf/meulod.pdf> (accessed 31 March 2006) 4.

⁵⁷ Myburgh 237.

⁵⁸ Available at <http://www.iod-net.co.za> (accessed 31 March 2006). The joint venture between Pracmed Management and Praximed Management Services is called IOD-Net and its mission is explained thus: 'The business of IOD-Net is to provide a value added service to Medical Practitioners across South Africa by sending fully compliant COID claim batches comprising all relevant documentation and all accounts pertaining to a particular claim to the correct Compensation Commissioner. We feel we could assist the Compensation Commissioners by significantly speeding up the processing of claims and thus assist the Service Providers by their claims being paid faster.'

⁵⁹ In the Compensation Fund Annual Report for the year ending March 2005, the manager for Exempted Employers and Unreported Accidents stated that 6 741 follow-up letters were written to employees to submit information. 'During this process claims from 1999 to 2002 were reviewed for outstanding information but unfortunately there were minimal responses forthcoming.'

which claims to submit to which of the relevant Compensation Commissioners, a situation that often leads to claims going astray.

The Benjamin and Greef Committee's conclusion indicates a problem, the extent of which requires a major response from government.⁶⁰

'The Committee is of the view that existing legislation and administrative structures are unable to meet the challenges of technology, the expectations of employees, the requirements for enhanced productivity and competitiveness and the obligations of the state. Failure to do so will result in occupational accidents and work-related ill-health continuing to take an immense toll on human and economic resources. A new perspective and a fresh impetus is (*sic*) necessary to, at a national level, initiate a coordinated approach to occupational health, safety and compensation.'

2.3 THE COMMON LAW⁶¹

The delictual remedies available to workers who suffer from occupationally related psychiatric illnesses are extensively discussed in the following chapter.⁶² For present purposes suffice it to note that the *actio iniuriarum* provides redress for only intentionally-caused infringements. The damages payable will be in the form of a *solatium*, thus no patrimonial loss will be made good. For a claim under the Aquilian action or the action for pain and suffering to succeed, the claimant has to prove injury to his/her nervous system and that the defendant's conduct had been intentional or negligent.

Various debates on the efficacy or otherwise of the Anglo-American tort system have raged for many decades. The broad import of some of the arguments will

⁶⁰ Klass Looch Associates (Occupational Health and Safety Legislation Consultants) 'Benjamin and Greef Committee of Inquiry into a National Occupational Health and Safety Council in South Africa (Report 1997)' available at http://www.klasslooch.com/ohs_commissions_of_inquiry.htm (accessed 30 March 2006).

⁶¹ In this context the term 'common law' refers to the Anglo-American law of torts.

⁶² See 3.4.3.1 below.

be discussed here, because such arguments are also relevant for the South African law of delict.

Proponents of the common law system of torts refer to various positive aspects thereof. They include economic scholars who focus on deterrence; those who emphasise its justice goal on the basis of moral philosophy; and enterprise liability scholars who emphasise its compensation function.⁶³ In an erudite article on the empowerment functions of the tort system, a Canadian judge argues that full and swift compensation is not tort law's *only* function.⁶⁴ It does breed financial empowerment, but it also creates compliance, psychological, didactic, economic and political empowerment.⁶⁵

The crux of the argument relating to the deterrent function of tort law is that employers observe their statutory duties not because they may incur substantial fines, but because they want to prevent heavy claims for damages.⁶⁶ On a psychological level, a day or more in court may be part of the healing process for victims. It is a manifestation of 'fellow feelings' in society.⁶⁷ It can also create awareness of a problem in society, a function that is particularly important in relation to occupational stress claims.⁶⁸

A further argument is that, economically, the market will acknowledge that workplace stress is prejudicial and there will thus be an incentive to address the problem.⁶⁹ Courts are more independent and not under pressure from specific

⁶³ SD Sugarman 'Doing Away with Tort Law' (1985) 73 *California Law Review* 555 at 559.

⁶⁴ AM Linden 'Torts Tomorrow – Empowering the Injured' in NJ Mullany and AM Linden (eds) *Torts Tomorrow: A Tribute to John Fleming* (1998) 321 at 323.

⁶⁵ Linden 322.

⁶⁶ Per Goddard LJ in *Hutchinson v London and North Eastern Railway Co* [1942] 1 KB 481 at 488.

⁶⁷ Linden 327.

⁶⁸ Linden 329.

⁶⁹ Linden 332. The deterrence lies not only in the threat of having to pay damages, but in the threat of an official determination of liability, fear of undesirable publicity and fear of incurring huge administrative costs in defending one's position, whether in court or during out-of-court settlements (Sugarman 560-561).

interest groups; they look at individual cases; and are not as tempted to sacrifice the individual's rights on the altar of economic expedience.⁷⁰

These arguments do not find favour with all academic commentators. Sugarman argues that the deterrent function of tort law overemphasises both the amount of overly dangerous activity that would take place without tort liability, and the extent of the injury reduction it achieves.⁷¹ Its deterrent potential is undermined by various factors: ignorance of the law and the facts, individual and organisational incompetence, people discounting threats, the high returns involved in dangerous behaviour, small penalty for wrongdoers who have liability insurance, wrongdoers not being financially able to pay damages claims, inadequacy of damages and the fact that defendants, because of market imperfections, will shift the costs to consumers.⁷²

Tort law may also have socially negative impacts, such as overdeterrence, which causes people not to engage in socially desirable activities; the taking of perverse action to avoid liability; discouraging safety improvements in the face of pending liability; strong financial incentives for defendants to fight even meritorious claims; and the fact that defendants often perceive litigation as unjustified, thereby having a negative impact on their motivation to improve standards or ensure reasonable health and safety measures.⁷³

Fleming avers that the tort system's high transaction costs are inherent in the system itself:

'Primary is the adversary relationship between claimant and the compensation source. Liability to compensate is dependent on issues of causation and fault, which require investigation and are frequently contested. The assessment of damages, tailored to each case, invites

⁷⁰ Linden 334

⁷¹ Sugarman 561

⁷² Sugarman 564-581

⁷³ Sugarman 581-585

additional controversy. In sum, the system is geared to individualized processing and does not favour economies of scale.⁷⁴

If one uses the example of *Grobler v Naspers Bpk en 'n Ander*⁷⁵ and the subsequent appeal in *Media 24 Ltd and Another v Grobler*,⁷⁶ it is clear that the case took a long time to reach finality. The first hearing in the Cape Provincial Division was on 29 October 2002 and the last day of the appeal was 9 May 2005. Judgment was eventually delivered on 1 June 2005. This litigation process must have required considerable resources. Some would argue that time and money could be saved if the workers' compensation system is utilised for these types of cases.

2.4 RELATIONSHIP BETWEEN STATUTORY LAW AND THE COMMON LAW

Even if the conclusion is reached that the statutory scheme is the avenue through which workers must vindicate their rights, it does not mean that the common law becomes irrelevant. The statutory regime does not cover all workers; in fact large numbers of workers fall outside the ambit of COIDA,⁷⁷ e.g. those who have not entered into a contract of service, learnership or apprenticeship and those involved in non-standard forms of work – such as the informally employed and the self-employed.⁷⁸ Furthermore, the provisions in COIDA do not exclude fault entirely when it comes to increased compensation.⁷⁹

⁷⁴ JG Fleming 'Drug Injury Compensation Plans' (1982) 30 *The American Journal of Comparative Law* 297 (hereinafter referred to as 'Fleming Drug Injury Compensation') at 315.

⁷⁵ 2004 (4) SA 220 (C).

⁷⁶ 2005 (6) SA 328 (SCA).

⁷⁷ Act 130 of 1993.

⁷⁸ Taylor Committee Report 457. See, also, Myburgh 235. Section 1(d) of the Act also contains persons specifically excluded, viz those who are performing military service or undergoing training in terms of the Defence Act 44 of 1957 and who is not a member of the Permanent Force of the South African Defence Force; members of the Permanent Defence Force or members of the South African Police Service who are injured or contract a disease while "on service in defence of the Republic" as defined in the Defence Act; persons who contract for the carrying out of work and then engages other persons to perform such work; and domestic workers in private households. The exclusion of non-standard workers is particularly troublesome given the rise of non-standard forms of employment: see, for example, GS Lowe 'Employment Relationships as the Centrepiece of a New Labour Policy Paradigm' (2002) XXVIII(1) *Canada Public*

Also, in *Van Zyl v Workmen's Compensation Commissioner*⁸⁰ Thirion J stated the following about the basis on which compensation for occupational diseases is paid:

'[T]he Act⁸¹ in certain respects restricts the workman's common-law remedy in respect of injuries suffered in the course of his employment. In certain respects it substitutes for the workman's common-law right to proceed against his employer a new right, i e the right to claim compensation from the Commissioner. However, save to the extent that the workman's common-law rights have been restricted by express provisions or by necessary implication from the provisions of the Act, there would be no warrant for restricting his common-law rights. The Act should be interpreted, where possible, in consonance with the common law.'

In addition, the common law may inform the interpretation of statutory provisions.⁸² So, for example, in *Urquhart v The Compensation Commissioner*⁸³ the Court noted that the law has long considered psychiatric injury to be a personal injury and that nothing in the definitions of 'accident' or 'occupational injury' in COIDA indicates a contrary intention. The interplay between the two systems is also illustrated by the fact that Scottish Law Commission has stated that although it is in favour of replacing the common law of reparations for mental harm with a statutory system, the statutory obligation 'should be closely related to the principles which govern delictual liability for physical harm'.⁸⁴

Policy/Analyse de Politiques 93; E Appelbaum 'Transformation of Work and Employment and New Insecurities' (2002) *Paper presented at the conference on The Future of Work, Employment and Social Protection in Lyon, France, 18-19 January*.

⁷⁹ Section 56; Thompson and Benjamin H1-3.

⁸⁰ 1995 (1) SA 708 (N) 714D-E.

⁸¹ Although stated in relation to the Workmen's Compensation Act 30 of 1941, the dictum may also be applied to the provisions of COIDA.

⁸² J Keeler 'The Uneasy Relationship between Social Security and Workers' Compensation' (1996) *Social Security Journal* 50 at 58.

⁸³ *Urquhart v The Compensation Commissioner* 2006 (1) SA 75 (E) para [14]. Another possibility may be that the statute is a mere codification of the common law (see *S v M* 2003 (1) SA 341 (SCA) para [14]).

⁸⁴ Scottish Law Commission 'Report on Damages for Psychiatric Injury No. 196' (2004) 1 (hereinafter referred to as 'Scottish Law Commission Report') at 21 available at <http://www.scotlawcom.gov.uk/downloads/rep196.pdf> (accessed 12 April 2005).

2.5 STATUTORY REGULATION OR THE COMMON LAW?

Both the common law and statutory workers' compensation schemes have advantages and disadvantages. The former is arguably more thorough and has a deterrent effect, but it is laborious and expensive.⁸⁵ The latter is more cost-effective, but there are systemic difficulties within the present system and the complicated nature of psychiatric injury may make it difficult for administrators to properly administer the system.⁸⁶

It is against this backdrop that one must consider whether the common law relating to psychiatric injury should be utilised to provide compensation to workers, or whether these claims should be dealt with in terms of a struggling occupational health system. It is obvious that a common law approach has glaring deficiencies: only a small proportion of workers will receive compensation, the system itself is slow, costly and wasteful and the adversarial nature of litigation breeds antagonism between employer and employee.⁸⁷

It is arguable that the statutory compensation theoretically offers a more holistic approach to the problem of workplace stress, because it is generally accepted that prevention and rehabilitation, together with compensation, are integral to a first-rate social security system.⁸⁸ The common law, on the other hand, is more reactive and lacks the systems and processes to effectively realise the goals of prevention and rehabilitation.

⁸⁵ See 2.3 above.

⁸⁶ See 2.2.2 above.

⁸⁷ Troost 152 fn 23; Fleming Drug Injury Compensation 315 states: 'The high transaction costs of the tort system are inherent in the system itself. Primary is the adversary relationship between claimant and the compensation source. Liability to compensate is dependent on issues of causation and fault, which require investigation and are frequently contested. The assessment of damages, tailored to each case, invites additional controversy. In sum, the system is geared to individualized processing and does not favor economies of scale.'

⁸⁸ N Smit 'Employment injuries and diseases and disability in the workplace' in MP Olivier, N Smit, ER Kalula and GCZ Mhone (eds) *Introduction to Social Security* (2004) 319 (hereinafter referred to as 'Smit Introduction to Social Security') at 323-325. In practice, this area of the South African occupational health and safety system has not been promoted or implemented adequately (*ibid*).

Another important advantage that the compensation system has over the common law is that in cases other than those involving partial disablement of less than 30%, monthly pensions are paid instead of lump-sum benefits.⁸⁹ This caters better for the needs of incapacitated employees, who receive money as they need it.⁹⁰ Having a centralised fund also eases the burden on employers, alleviating them of the burden of huge damages claims that may bankrupt otherwise viable and useful economic enterprises.⁹¹ This is especially important in the South African context, with government encouraging small business development and with the economy being in a strong growth phase.⁹²

However, if one of the primary reasons for statutory, no-fault compensation is a reduction in time and costs, that reason is considerably negated by the administrative crisis in which the compensation system finds itself.⁹³ A pragmatist may argue that it makes no sense to add more weight to an already sinking ship, or before more certainty exists as to the aetiology of psychological stressors impacting on employees. Strands of this argument are found in the fact that many experts at the ILO Meeting of Experts on the List of Occupational Diseases were of the opinion that before the item 'Psychosomatic psychiatric syndromes caused by mobbing' is included in a list of occupational diseases, the term has to be better defined and more information was needed on its causes.⁹⁴

⁸⁹ Myburgh 235.

⁹⁰ E Fultz and B Pieris 'Employment Injury Schemes in Southern Africa: An Overview and Proposals for Future Directions' (1998) *ILO/SAMAT Policy Paper No. 7* available at <http://www.ilo.org/public/english/region/afpro/harare/download/discussionpapers/paps7.doc> (accessed 16 April 2007) 11 criticise the widespread use of lump-sum payments in Southern Africa, citing anecdotal evidence by scheme administrators that these amounts are 'exhausted rapidly by workers'.

⁹¹ Compensating Disease 936.

⁹² See http://www.southafrica.info/doing_business/trends/newbusiness/smallbusiness.htm (accessed 9 June 2007).

⁹³ Compensating Diseases 925.

⁹⁴ ILO Report 13. 'Mobbing' is a collective term used to describe 'some form of systemic harassment and stigmatization, either between a supervisor and a subordinate or between workers and [is] characterized by a sense of unjust treatment'. Victims often suffer ill-health, for example depression and PTSD, and their behaviour sometimes becomes violent. See ILO Report 12.

Spain also suggested a cautious approach:

‘With respect to this section on “Mental and behavioural illnesses”, there is a strong trend to gradually introduce these issues into occupational safety and health. Given the socioeconomic significance of this issue we believe that the competent bodies should be consulted (the economic administration of social security authorities, the labour authorities ...). This would be a new step, given that neither Recommendation No. 194, nor the European schedule of occupational diseases, nor the Spanish tables of occupational diseases contain any provisions on this issue. The matter may perhaps be premature and, in our opinion, should be the subject of in-depth analysis.’⁹⁵

A government expert at the meeting alluded to the difficulties encountered by compensation systems within member states where a disease is included on the ILO list, but where detailed guidance on its application is not included.⁹⁶ South Africa’s system was cited as a prime example where this problem has occurred.⁹⁷

A more principled approach dictates that the state must fulfill its constitutional obligations and that the law, as protector of citizens’ rights, should not allow government to shirk its responsibilities. This is especially so in view of workers’ constitutional rights. The most important rights are those relating to dignity,⁹⁸ to fair labour practices,⁹⁹ to access to social security¹⁰⁰ and to bodily integrity.¹⁰¹ The right to access to social security will form the basis of my analysis of the current system, although the other aforementioned rights may also be relevant.

⁹⁵ ILO official website ‘Replies to Questionnaires on Behavioural and Mental Disorders available at http://www.ilo.org/public/english/protection/safework/health/expmtg05/english/meulod1_e.pdf (accessed 9 June 2007) (hereinafter referred to as ‘ILO Replies to Questionnaires’) 56.

⁹⁶ ILO Report 4.

⁹⁷ *Ibid.*

⁹⁸ Section 10 of the Constitution.

⁹⁹ Section 23 of the Constitution.

¹⁰⁰ Section 27 of the Constitution.

¹⁰¹ Section 12 of the Constitution.

2.5.1 Constitutional considerations

2.5.1.1 *The Bill of Rights and the Constitution's founding values*

A state's treatment of its workers should reflect the kind of society it aspires to.¹⁰² Extensive coverage points towards a communitarian ethos, an ethos of 'ubuntu' that was recognised in the post-amble to the interim Constitution and has received judicial approval.¹⁰³ Respect, care and concern for individuals have also been stated as a founding value of our new democracy.¹⁰⁴

Baxi,¹⁰⁵ in discussing post-colonial constitutionalism, refers to the challenge faced by postcolonial law in guarding against what he terms 'global economic constitutionalism'. He explains this phenomenon thus:

'Just when the reversal of European history indicated possibilities of transcendence, "globalization" translates the Cold War motto "Making the world safe for democracy" into "Making the world safe for foreign investors"! It seeks to transform all Third World states into the clones of Late Capitalism. If self-determination was the signature of postcolonial legality, the globalization of law calibrates the postcolonial states and law to the carnival of global capital in its myriad forms. International financial capital, lethal multinationals..., regimes of suprastatal institutions, international and regional, all combine to escalate networks of power constituting the new global ruling class.

A paradigm shift is already under way: a transition from the paradigm of universal human rights ... to the paradigm of trade-related, market-friendly human rights. Aggregations of global capital and technology make problematic the future of languages of human rights. This emergence of global economic constitutionalism has numerous impacts on the theory and practice of post-colonial dialectic between rule and resistance.'

¹⁰² U'Ren and U'Ren 451.

¹⁰³ *Dikoko v Mokhatla* 2006 (6) SA 235 (CC) para [68]; *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC) para [37]; *Bhe v Magistrate, Khayelitsha* (Commission for Gender Equality as Amicus Curiae); *Shibi v Sithole*; *South African Human Rights Commission v President of the Republic of South Africa* 2005 (1) SA 580 (CC) para [163]; *S v Makwanyane* at para [225] per Langa J, para [263] per Mahomed J, para [308] per Mokgoro J; *Crossley and Others v National Commissioner of South African Police Service and Others* [2004] 3 All SA 436 (T) paras [18]-[20].

¹⁰⁴ *S v Makwanyane* at paras [326], [328] per O'Regan J.

¹⁰⁵ U Baxi 'Postcolonial Legality' in H Schwartz and S Ray (eds) *A Companion to Postcolonial Studies* (2000) 540 at 552.

Baxi goes on to state that one of the phenomena this development has spawned is minimal observance of the collective human rights of workers.¹⁰⁶

2.5.1.2 *The right to access to social security*

Workers' compensation is designed to protect workers against hardships that may result if they are injured or become ill as a result of their employment. It is a means of protecting workers' rights to access to social security, as provided for in the Constitution.¹⁰⁷

Davis, Cheadle and Haysom write the following about the content of this right:

‘The term “social security” is a broad term which may be used to include both social insurance, directly contributed benefits of workers and their families, and social assistance, which includes needs-based assistance from public funds for the most vulnerable who have indirectly contributed as members of society.’¹⁰⁸

What then, are government's obligations in relation to the right of access to social security? The state must take ‘reasonable legislative and other measures, within its available resources, to achieve the progressive realisation’ of the right.¹⁰⁹ The availability of resources and other policy factors must be assessed to determine what government's obligations are.

Broadening of coverage in terms of occupational compensation may have an enormous impact on the financial foundation of the system.¹¹⁰ The financial statements for the previous three financial years indicate that the Compensation Fund is solvent,¹¹¹ but clearly there are areas in which capacity is lacking, e.g.

¹⁰⁶ *Ibid.* See, also, 1.2 above.

¹⁰⁷ Section 27.

¹⁰⁸ MH Cheadle, DM Davis and NRL Haysom *South African Constitutional Law: The Bill of Rights* (2001) 501.

¹⁰⁹ Section 27(2).

¹¹⁰ Erwin 317.

¹¹¹ See the relevant annual reports cited above.

there is a shortage of staff that has a severe impact on the processing of claims.¹¹²

What would extension of coverage to mental-mental injuries¹¹³ caused by gradual stressors entail from a financial perspective? Firstly, psychiatric experts will have to be employed. Secondly, claims managers will have to be trained in order to understand the issues involved in these type of claims. Many of the administrative channels that are presently being utilized can be used, which should cut down on the costs involved.¹¹⁴

A discussion of the exact financial position of the Compensation Fund falls beyond the purview of this work, but it is submitted that one cannot look at institutional capacity in isolation. It is not so much about the strength of the Fund's financial position, but whether it is reasonable to expect it to cover mental-mental injuries. The costs to the Fund must be weighed against the costs of not providing a particular benefit, in this instance coverage for mental-mental injuries.

Specific cases of laxity in the administration of the compensation system may well be found to be unconstitutional, but a more apposite question is whether government is allocating sufficient resources to occupational health and safety and whether the measures that have been taken are reasonable.¹¹⁵ Factors that may be relevant in that enquiry would be whether the mechanisms used to enforce payment of assessments are adequate, the possibility of increasing employers' assessments, streamlining of the claims process, whether existing budgets are being efficiently spent, etc. Is it reasonable that more than ten years

¹¹² *Ibid.*

¹¹³ See 3.2.1 below for the definition of 'mental-mental' injuries.

¹¹⁴ Compensating Disease 930.

¹¹⁵ See *Government of the Republic of South Africa and Others v Grootboom and Others* 2001 (1) SA 46 (CC) paras [47]-[69].

after the adoption of COIDA, the medical advisory panels it provides for have been established in only two of the nine provinces?¹¹⁶

There is a clear lack of urgency in establishing the necessary structures to give effect to the purport, spirit and objects of COIDA. The Court finding such laxity to be unreasonable would not be telling government how to spend its budget; it would merely constitute a pronouncement that government's failure to provide resources is unreasonable and does not ensure the progressive realisation of the right of access to social security.¹¹⁷

In response to the recommendations in the Benjamin and Greef Report, Cabinet passed a resolution in 1999 to develop a National Occupational Health and Safety Policy. A third draft of this policy was distributed in July 2003,¹¹⁸ but it is unclear whether it has been officially accepted. If such policy has indeed been accepted, the lack of awareness of its existence is troublesome. Ultimately the best policy is worth very little if it is not implemented properly, or at all.

2.5.1.3 *International law obligations*

South Africa has bound itself to the obligations imposed by the international instruments it has ratified.¹¹⁹ Even in those instances where South Africa is not

¹¹⁶ Compensation Fund Annual Report 2006 Chapter 6 available at <http://www.labour.gov.za/download/10924/Annual%20Report%20-%20Compensation%20Fund%202006%20-%20Chpt%206.pdf> (accessed 16 April 2007) 22.

¹¹⁷ In *Minister of Health and Others v Treatment Action Campaign and Others* (1) 2002 (5) SA 703 (CC) para [38] the Court stated that determinations of reasonableness 'may in fact have budgetary implications, but are not in themselves directed at rearranging budgets'. T Roux, cited in S Liebenberg 'The Interpretation of Socio-Economic Rights' in *Woolman et al* (eds) *Constitutional Law of South Africa* 2 ed (2003) 33-47 fn 4 comments as follows on this dictum: 'According to this sense of things, the motive behind the intrusion into politics is all-important. If the motive for "rearranging budgets" is to substitute the Court's view on how resources should be allocated for that of the political branches, the intrusion cannot be justified. However, if the primary motive is rights-enforcement, the political branches should (as a matter of constitutional law) and will (as a matter of practical politics) accept the resource-allocation effects of the Court's decision as an inevitable and necessary element of the constitutional compact.'

¹¹⁸ Available at <http://www.kznhealth.gov.za/occhealth/policy2.pdf> (accessed 12 April 2007).

¹¹⁹ See L Jansen van Rensburg and MP Olivier 'International and supra-national law' in MP Olivier, N Smit and ER Kalula *Social Security: A Legal Analysis* (2003) 619 at 621.

legally bound by provisions in a treaty, the Constitution requires any court interpreting the Bill of Rights to consider international law.¹²⁰

The right to social security is enshrined in various international human rights charters.¹²¹ South Africa has ratified the following ILO Conventions relating to occupational health and safety: Equality of Treatment (Accident Compensation) Convention 19 of 1925, Workmen's Compensation (Occupational Diseases) Convention 42 of 1934 (Revised), Occupational Safety and Health Convention 155 of 1981 and Safety and Health in Mines Convention 176 of 1995.¹²²

However, there are two integral ILO Conventions South Africa has not ratified. The International Labour Organisation's Convention 102 on Minimum Standards of Social Security, 1952 includes employment injury benefit as a form of social security and contains provisions regarding the consequences of both occupational accidents and occupational diseases.¹²³ The Benjamin and Greef Committee of Inquiry also recommended that the Employment Injury Benefit Convention 121 of 1964 be ratified by South Africa.¹²⁴

¹²⁰ Section 39(1)(b). In *S v Makwanyane and Another* 1995 (3) SA 391 (CC) para [35] the Court stated that public international law includes binding as well as non-binding law. The Court thus emphasised that non-binding law must be taken into consideration, even if courts are not bound to follow it. Jansen van Rensburg and Olivier 621 also note that the general limitation clause of the Constitution (s 36) imports an international and comparative law friendliness in its requirement that a right 'may be limited ... to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom'. This is so because one of the principal ways in which to determine 'an open and democratic society based on human dignity, equality and freedom' is to do a comparative study of how other open and democratic countries treat similar issues.

¹²¹ Article 25 of the Universal Declaration of Human Rights, articles 9 and 10 of the International Covenant on Economic, Social and Cultural Rights, to name but a few examples.

¹²² See <http://webfusion.ilo.org/public/db/standards/normes/appl/appl-byCtry.cfm?lang=EN&CTYCHOICE=0650&hdroff=1> (accessed 12 April 2007) for a list of ILO Conventions South Africa has ratified, as well as the dates of ratification or accession.

¹²³ Smit Legal Analysis 465.

¹²⁴ *Ibid.* See also, Olivier and Klinck 5, who, in agreement with Smit, recommend the ratification of various other Conventions in this area, viz the Vocational Rehabilitation and Employment (Disabled Persons) Convention 159 of 1983; the Occupational Health Services Convention 161 of 1985 and the Labour Inspection Convention 81 of 1947. They also include the Occupational Safety and Health Convention in this list, but as stated above, South Africa did subsequently accede to this Convention (on 18 February 2003).

The ILO also recently adopted the Promotional Framework for Occupational Safety and Health Convention 187 of 2006. This Convention stresses the importance of a holistic approach to occupational health and safety and requires member states to, *inter alia*, promote continuous improvement of occupational health and safety;¹²⁵ to take active steps to achieve a safer, healthier working environment;¹²⁶ to formulate a national policy on occupational health and safety;¹²⁷ to establish, maintain and periodically review a national system for occupational health;¹²⁸ and to formulate, implement, monitor, evaluate and periodically review a national programme on occupational health and safety.¹²⁹

2.5.2 Arguments against extending the compensation system

2.5.2.1 Floods of claims and possibility of abuse

Arguments against the extension of coverage to gradual mental-mental injuries are, *inter alia*, that it will lead to a flood of claims and is prone to be abused by those who seek to exploit the no-fault system.¹³⁰ That is why an actual event must be traceable. Larson states that there is no real validity to this distinction between sudden and protracted injuries.¹³¹ Furthermore, it is arguable that malingering is a question of fact that has to be dealt with at the fact-finding level.¹³²

Albeit stated in a different context, the following dictum by the Constitutional Court in relation to prisoners' right to vote is also instructive:

¹²⁵ Article 2(1).

¹²⁶ Article 2(2).

¹²⁷ Article 3.

¹²⁸ Article 4.

¹²⁹ Article 5.

¹³⁰ Erwin 316.

¹³¹ A Larson 'Mental and Nervous Injury in Workmen's Compensation' (1969-1970) 23 *Vanderbilt Law Review* 1243 at 1247.

¹³² Larson 1259.

'We cannot deny strong actual claims timeously asserted by determinate people because of the possible existence of hypothetical claims that might conceivably have been brought by indeterminate groups.'¹³³

2.5.2.2 *The legislature must extend coverage*

A second argument against extending cover relates to the fact that any expansion of coverage must be made by the legislature.¹³⁴ Because the legislature originally never intended to cover mental disorders, they must now decide to do so. It is submitted that this line of reasoning is fallacious on at least two grounds. Firstly, as stated in *Urquhart v The Compensation Commissioner*,¹³⁵ extension of cover to mental disorders is merely a new application of already existing cover for personal injuries. The common law has long since discarded a requirement of sudden shock in order for mental injuries to be compensable. The common law forms an essential backdrop to our interpretations of the Act and just as common law entitlements developed case by case, so too must the nature of statutory cover.¹³⁶

Secondly, the circular instruction on PTSD was issued by the Director-General in the Department of Labour, as guided by the technical committee of medical experts that was established in 2000.¹³⁷ Neither the Director-General, nor the technical committee, is directly accountable to the electorate. A rigid adherence to a 'pure' separation of powers doctrine would amount to the executive being allowed unchecked power over the lives of people. It is exactly in these situations where the courts must provide a check on executive power.¹³⁸

¹³³ *August v Electoral Commission* 1999 (3) SA 1 (CC) para [30].

¹³⁴ Erwin 316.

¹³⁵ See 7.2.2 below.

¹³⁶ See G McLay 'Nervous Shock, Tort and Accident Compensation: Tort Regained?' (1999) *Victoria University of Wellington Law Review* 34 available at <http://www.austlii.edu.au/cgi-bin/disp.pl/au/journals/VUWLRev/1999/34.html?query=%20mclay> (accessed 12 April 2006).

¹³⁷ See 1.4.2 above.

¹³⁸ Plasket J in *Vumazonke v MEC for Social Development, Eastern Cape, and Three Similar Cases* 2005 (6) SA 229 (SE) para [9] stated: 'When rights are infringed or threatened, the impugned conduct becomes very much the business of the judiciary: s 38, s 165 and s 172 of the Constitution of the Republic of South Africa, 1996 (the Constitution) make that abundantly clear, placing as they do a duty on the judiciary to remedy such infractions.'

2.5.2.3 *The common law is more suited to deal with evidential difficulties*

A third argument against extending cover may be that the common law process is more appropriate for the settling of disputes regarding mental health, given the evidential difficulties presented. Such an argument, it is submitted, unduly infringes on workers' rights. The whole occupational health system is predicated on the need to relieve workers of the burden of having to prove fault. 'The common law and the law of torts in particular do not meet remotely any conception of a community wide scheme for the alleviation of need.'¹³⁹ Take the facts of *Urquhart*, for example. Urquhart would not have had a claim in terms of the common law because his employers were not negligent, which means that he (and his family or other benefactors) would have had to bear the entire cost of his occupationally-acquired PTSD.¹⁴⁰

2.5.2.4 *The legislature must impose strict liability*

A fourth argument, related to the second argument in that both deal with separation of powers issues, may centre on the fact that saddling employers with what amounts to strict liability is not an exercise the courts should undertake. Reliance may be placed on, *inter alia*, *Wagener v Pharmacare Ltd; Cuttings v Pharmacare Ltd*,¹⁴¹ in which the Supreme Court of Appeal declined to impose strict liability on manufacturers of defective goods, but such reasoning loses sight of the context in which strict liability is imposed. Employers benefit from the

¹³⁹ J Keeler 'Thinking Through the Unthinkable: Collective Responsibilities in Personal Injury Law' (2001) 30 *Common Law World Review* 349 at 379.

¹⁴⁰ *Urquhart v The Compensation Commissioner* is not in conflict with the Constitutional Court's decision in *Jooste v Score Supermarkets*. What was being asked of the Constitutional Court in *Jooste* was to declare that s 35(1) of COIDA was irrational, which it clearly is not. The standard of reasonableness in relation to socio-economic rights is higher than that called for under rationality review (*Bel Porto School Governing Body and Others v Premier, Western Cape, and Another* 2002 (3) SA 265 (CC) para [46]).

¹⁴¹ 2003 (4) SA 285 (SCA). Also, Mr Urquhart had no recourse to the common law, because presumably his employer had not been negligent. Unlike in *Jooste v Score Supermarkets*, there was no policy choice as to which of the common law or statutory intervention is better for workers, because clearly Mr Urquhart had only the latter option. Furthermore, as discussed above, the inclusion of mental disorders into occupational health and safety legislation is arguably an evolution of personal injury claims, which are already provided for in COIDA. It would merely be a response to increased knowledge about mental disorders, as well as to the changing nature of the working environment.

system in that they are relieved of huge damages claims. Also, the court's reluctance in *Wagener* was heavily influenced by what it termed an 'ad-hoc' imposition of strict liability in an area where in-depth investigation, analysis and determination were necessary to 'produce, for use across the manufacturing industry, a cohesive and effective structure by which to impose strict liability'.¹⁴² The legislature has already decided that occupational health and safety requires the imposition of strict liability.

2.5.3 Alternative solutions

The most effective modality of compensating those who suffer from occupationally acquired psychiatric diseases may be to employ a hybrid system that utilises both a statutory compensation scheme and the common law, a common occurrence in Europe.¹⁴³ It is accepted the world over that occupational compensation systems by their very nature are not intended to provide full coverage.¹⁴⁴ If a strict approach to compensating psychiatric injuries in terms of COIDA is taken, it could be argued that those limited benefits must be augmented by allowing a claimant who can prove negligence to sue the employer directly for general damages that are not covered by COIDA.¹⁴⁵

A more radical option would be to bypass the workers' compensation scheme completely and to require employers to take out death and disability insurance with private insurers in an open and competitive market, thereby ensuring that workers are guaranteed prescribed minimum benefits.¹⁴⁶

¹⁴² At para [37].

¹⁴³ Taylor Committee Report 461.

¹⁴⁴ Adler and Schochet 616; Olivier and Klinck 35.

¹⁴⁵ See Taylor Committee Report 461.

¹⁴⁶ Olivier and Klinck 35.

2.6 CONCLUSION

It is clear that the occupational health and safety system is in need of attention, especially in relation to the basis upon which benefits are paid and the amount of such benefits. Nonetheless, it is submitted that psychiatric injuries suffered as a result of and in the course and scope of employment should be accommodated in that system. It may be that common-law actions for damages over and above those covered by the workers' compensation system could be allowed, but it is submitted that the worker's primary recourse should be to the statutory system. A compensation system is a more effective way of compensating workers. If administered properly, it can fulfill an important role in encouraging prevention and rehabilitation; and it performs a social security function by protecting workers against the risk of occupational injuries and diseases.¹⁴⁷

However, the common law may continue to play an integral role in compensating workers who suffer from occupational psychiatric harm. Its continued relevance may be due to various factors: the trend of slow incorporation of psychiatric injury into workers' compensation systems; a deliberately narrow approach as embodied in the circular instruction on PTSD, the exclusionary nature of the South African workers' compensation system generally, as well as claimants not satisfying the requirements of an 'occupational injury' or an 'occupational disease' as required by COIDA.¹⁴⁸

¹⁴⁷ Keeler 56.

¹⁴⁸ See 7.2.1 below.

CHAPTER 3

PSYCHIATRIC HARM IN THE COMMON LAW

3.1 INTRODUCTION

Before compensation for occupationally acquired psychiatric illness will be awarded, whether in terms of COIDA or in terms of the common law, a claimant has to prove that the harm suffered is compensable. This chapter will focus on the nature and extent of psychiatric injury that has traditionally been found to be compensable and where it fits into the common-law paradigm. Such discussion will feed into the debate on what psychiatric injury the workers' compensation system should cover, a topic to be addressed in the next chapter.

The South African law of delict is based on general principles of liability as opposed to recognition of separate and distinct delicts.¹ This generality is tempered by the fact that a distinction is drawn between delicts that cause patrimonial harm (*damnum iniuria datum*) and those that cause injury to personality (*iniuria*).²

Academic opinion differs on whether a third class, namely the action for pain and suffering, should be recognised. Some writers are of the view that it is merely an extension of the action for patrimonial loss. Boberg, for example, argues that the recognition of a claim for damages for pain and suffering as an action *sui generis* only confuses matters and conflicts with the traditional approach of the courts.³ De Villiers, later supported by Price, argued that the action is part of the *actio iniuriarum*, since it aims to protect non-pecuniary interests, but this school of thought does not seem to find much favour.⁴ Other scholars opine that its

¹ Van der Walt and Midgley 7.

² Neethling, Potgieter and Visser 5 and 197. See also Van der Walt and Midgley 7.

³ PQR Boberg *The Law of Delict*, Vol 1 (1984) 18. See also J Burchell *Principles of Delict* (1993) 19 and RG McKerron *The Law of Delict* (1965) 9.

⁴ PJ Visser 'Die Funksie, Aard en Klassifikasie van die Aksie weens Pyn en Leed' 1983 *Obiter* 34 (hereinafter referred to as 'Visser Pyn en Leed') at 43.

development is historically different and that it would be practically unsound to view it as part of the extended *actio legis Aquiliae*. Feenstra concludes that the action for pain and suffering does not emanate from a combination of Germanic and Roman law, but rather from natural law as formulated by medieval and 16th century theologians and later expounded by *Grotius*.⁵

In *Hoffa NO v SA Mutual Fire & General Insurance Co*⁶ Van Winsen J stated that in Roman-Dutch law the form of action available to an injured party was not of major significance, but he was of the view that an independent action for pain and suffering does exist, since some Roman-Dutch writers and cases such as *Union Government (Minister of Railways and Harbours) v Warneke*⁷ make it clear that the Aquilian action applies only 'to cases in which a calculable pecuniary loss has been actually sustained'. However, in *Road Accident Fund v Maphiri*⁸ Harms JA stated that general damages for pain and suffering are 'claimable under the *lex Aquilia*'.

Regardless of one's stance in the above debate, it is trite that for damages⁹ to be awarded, a plaintiff has to prove legally recognised harm.¹⁰ In cases of psychiatric injury it is very often difficult to separate the determination of liability from the quantification of damages,¹¹ but South African law, like most systems,

⁵ R Feenstra 'The Historical Development of Delictual Liability for Killing and for the Infliction of Bodily Harm' 1972 *Acta Juridica* 227. Van der Walt and Midgley 13 and Neethling, Potgieter and Visser 15 also recognise the existence of pain and suffering as a third class of harm, as do D Hutchison (ed), B Van Heerden, DP Visser and CG Van der Merwe *Wille's Principles of South African Law* 8 ed (1991) at 682. See also JM Potgieter 'Emotional Shock' in WA Joubert (ed) *The Law of South Africa* Vol 9 (1996) 19.

⁶ 1965 (2) SA 944 (C) 951C-D and 952A-F.

⁷ 1911 AD 657 at 662.

⁸ 2004 (2) SA 258 (SCA) 264B.

⁹ The term 'damages' encompasses both compensation and satisfaction. PJ Visser, JM Potgieter, L Steynberg and TB Floyd *Visser and Potgieter's Law of Damages* 2 ed (2003) 27 fn 29 write that in most instances of *iniuria* or where someone is unconscious and does not realise his/her loss of amenities of life, compensation is impossible and satisfaction is the only way of reparation. 'Damage' also refers to both patrimonial and non-patrimonial harm. See Neethling, Potgieter and Visser 197-198.

¹⁰ Neethling, Potgieter and Visser 197-198.

¹¹ Questionnaire by European Centre of Tort and Insurance Law in WV Horton Rogers (ed) *Damages for Non-Pecuniary Loss in a Comparative Perspective* (2001) XV.

regards the nature of the harm as relevant to liability. However, recognition of where psychiatric injury fits into the damages framework is essential to understanding why the law awards damages for such injury, which will in turn inform the determination of its boundaries.¹²

Patrimonial or pecuniary loss refers to the reduction in the utility of a patrimonial interest in satisfying the legally recognised needs of the person entitled to such interest.¹³ In factual and economic terms 'patrimony' refers to 'everything a person possesses which has a monetary value'.¹⁴ It can be negatively affected when a patrimonial element is lost, when the value of a patrimonial element is reduced or where a debt is created or increased or an expectation of debt is created or accelerated.¹⁵

Non-patrimonial harm refers to the detrimental impact (change in or factual disturbance of) personality interests deemed worthy of protection by the law' and which does not have economic value.¹⁶ Interests that form part of this 'non-patrimony' include, *inter alia*, 'freedom from pain, emotional shock, psychological diseases, psychiatric injury and physical suffering'.¹⁷ However, it must be clearly understood that the interests so described are not synonymous with the type of harm at issue.¹⁸ Psychiatric injury can cause both patrimonial and non-patrimonial harm.¹⁹ If, for example, a worker is traumatized as a result of seeing his workmate killed in an industrial accident and cannot work for two years due to such trauma, he can potentially claim, *inter alia*, for his past and future medical expenses, loss of income, pain and suffering and loss of amenities of life.

¹² PR McRae 'Whither Nervous Shock? The Current State, Future Direction and Possible Reform of Compensation for Negligently Inflicted Psychiatric Injury after Ramstead' (2001) at <http://www.austlii.edu.au/nz/journals/VUWLR/2001/20.html> (accessed 30 July 2004).

¹³ Neethling, Potgieter and Visser 202; Van der Walt and Midgley 44.

¹⁴ McKerron 48; MG Bridge 'Contractual Damages for Intangible Loss: A Comparative Analysis' (1984) 62 *Canadian Bar Review* 323 at 331.

¹⁵ Neethling, Potgieter and Visser 203; Van der Walt and Midgley 44.

¹⁶ Neethling, Potgieter and Visser 203; Van der Walt and Midgley 47.

¹⁷ Visser *et al* 95.

¹⁸ *Ibid.*

¹⁹ Potgieter 11. See Visser *et al* 32-33 for the relationship between patrimonial and non-patrimonial loss.

A legal system functions by recognising individual, public and social interests and 'by defining the limits within which these interests shall be recognized ... and by endeavoring to secure the interest so recognized within the defined limits'.²⁰ Midgley²¹ sets out a hierarchy of six classes of interests, the least important of which does not attract delictual protection. The latter class includes pain and suffering or emotional grief not associated with the plaintiff's own bodily injury.²² Patrimonial interests connected to pain and suffering associated with the plaintiff's bodily injury enjoy extensive protection and is the second highest class in the hierarchy.²³ Thus, if psychiatric harm does not constitute bodily injury, no claim for Aquilian damages or pain and suffering will lie.²⁴ The bodily injury must also not be trivial, because application of the maxim *de minimus non curat lex* will render it non-actionable.²⁵

This chapter will examine, analyse and comment on the nature of the harm at issue in psychiatric injury cases and what it is likely to be in cases of workplace stress, how the conceptual differences in law and psychology complicate the definition of the harm required, the advantages and disadvantages of allowing claims only for 'recognised psychiatric illnesses' and finally recommendations will be made as to the harm that should be compensable.

²⁰ R Pound 'Interests of Personality' (1914-1915) 28 *Harvard Law Review* 343.

²¹ Midgley Intention 435-437.

²² Midgley Intention 435.

²³ Midgley Intention 436.

²⁴ *Pauw v African Guarantee & Indemnity Co Ltd* 1950 (2) SA 132 (SWA). It would of course be different in a claim based on the *actio iniuriarum*, where 'a wilful attack upon or violation of the feelings of another' is at issue. 'In such a case it might be possible to award compensation for the outrage to the feelings or the insult to the honour; but no *solatium* could be given for mere mental suffering caused by negligence.' (per Innes CJ in *Waring & Gillow Ltd v Sherborne* 1904 TS 340 at 348).

²⁵ *Bester v Commercial Union Versekeringsmaatskappy van SA Bpk* 1973 (1) SA 769 (A) 779H. Neethling, Potgieter and Visser 292. See for example, *Lutzkie v SAR & H* 1974 (4) SA 396 (W). In *Muzik v Canzone Del Mare* 1980 (3) SA 470 (C) 474G Broeksma J refused to award the plaintiff damages for anxiety the latter experienced as a result of eating poisoned mussels and framed his reason thus: 'Even assuming that the anxiety experienced by plaintiff constituted or caused a "senuskok" or "psigiatriese besering", there was no evidence to support the conclusion that it caused plaintiff any mental or physical impairment, or that it affected his bodily well-being in any way.'

3.2 THE NATURE OF THE HARM

3.2.1 Terminology

The term 'nervous shock' has traditionally been used to connote injury to the psyche that is unassociated with bodily injury.²⁶ Its development can be ascribed to the now abandoned requirement that for psychiatric injury to found a delictual claim, it had to have been caused by 'a sudden impact to the senses'.²⁷ Recent criticism²⁸ of the term has led to the adoption of 'psychiatric injury' or 'mental injury'²⁹ as descriptive of the type of claim at issue. The latter two terms, as well as 'psychiatric illness' and 'psychiatric harm', will be used interchangeably as indicative of the type of harm at issue unless other terminology was utilised in a judgment.

Also, the term 'mental-mental' will be used to describe situations in which mental stimuli have caused psychiatric injury.³⁰ The other categories of cases are 'mental-physical', where mental stimuli have caused physical injury; and 'physical-mental', where physical stimuli have caused psychiatric harm.³¹

²⁶ D Chiswick 'Forensic Psychiatry' in JK Mason *Forensic Medicine for Lawyers* (1995) 391 at 416.

²⁷ NJ Mullany 'Negligently Inflicted Psychiatric Injury and the Means of Communication of Trauma – Should It Matter?' in NJ Mullany and AM Linden (eds) *Torts Tomorrow: A Tribute to John Fleming* (1998) 162 at 170. See e.g. *Hambrook v Stokes Bros* [1925] 1 KB 141 at 152, 159 and 165.

²⁸ Van Heerden DCJ in *Barnard v Santam Bpk* 1999 (1) SA 202 (SCA) 208J-209A expressed the opinion that the term 'nervous shock' is, apart from being obsolete and without any specific psychiatric meaning, misleading, but chose to use the term for the sake of convenience. In *Attia v British Gas plc* [1988] QB 304 at 317F-G Bingham LJ described it as 'misleading and inaccurate'. NJ Mullany and PR Handford *Tort Liability for Psychiatric Damage* (1993) 14 state that the term is 'entirely inappropriate, since transient shock does not attract damages. It is the mental and physical consequences which flow from it which may be compensable'. The authors at 14-15 also express the view that such outdated terminology creates confusion and more importantly serves as a constant reminder that a sudden isolated event was once required for damages to be awarded. In this way it stifles development and discourages consistency with modern medical practice. But cf PR McRae *loc cit* where the view is expressed that even though the term nervous shock is misleading, it is preferable to 'psychiatric injury', because it fosters 'continuity and because otherwise "psychiatric injury" would have to do dual service, as both category and a component requirement for liability'.

²⁹ See *Vernon v Bosley (No 1)* [1997] 1 All ER 577 at 597.

³⁰ Larson 1243.

³¹ *Ibid.*

3.2.2 History of the harm required

The South African law relating to psychiatric injury has been heavily influenced by English law due to the dearth of authority in Roman-Dutch law.³² Also, many of the earlier South African judges had received their legal training in England and England was one of the few familiar jurisdictions that attempted a detailed analysis of the issue.³³ Thus, despite judges' insistence that they were applying Roman-Dutch principles, a perusal of the case law reveals substantial reliance on Anglo-American thinking.³⁴ As a result, two artificial limitations were initially placed on recovery for psychiatric harm: firstly, the psychiatric injury had to have flowed from 'physical injury' and secondly, the plaintiff must have apprehended danger to him/herself.³⁵

In the first two cases in South Africa, claims were refused because the damage was regarded as too remote, since the claimants did not fear for their personal safety.³⁶ *Hauman v Malmesbury Divisional Council*³⁷ was the first South African case in which a claim for what was then termed 'nervous shock' was allowed. Kotze J held that according to Roman-Dutch law a plaintiff may recover damages for nervous shock which is

'the result of fright inspiring apprehension of personal injury to himself, caused by the defendant's negligence, where the nervous shock has directly impaired and injured his bodily health and strength; in other words, where it has affected his physical organism'.³⁸

³² J Neethling 'Deliktuele aanspreeklikheid weens die veroorsaking van psigiese letsels' 2000 *TSAR* 1 at 2.

³³ McQuoid-Mason 'Emotional shock – why the Cartesian distinction?' (1973) 36 *THRHR* 115 at 117.

³⁴ McQuoid-Mason 119-123 and the cases cited therein.

³⁵ Neethling 2.

³⁶ *Waring & Gillow Ltd v Sherborne* 1904 TS 340 at 349 and *Sueltz v Bottler* 1914 EDL 176 at 181.

³⁷ 1916 CPD 216.

³⁸ At 220. This was also the basis, in *Creydt-Ridgeway v Hoppert* 1930 TPD 664, for allowing damages for psychiatric injury which the plaintiff had sustained after being bitten by a dog. She experienced severe diarrhea, higher blood pressure, haemorrhoids and insomnia (at 667).

The judge cited no South African authority in reaching this conclusion, nor did he explain the nature of the plaintiff's illness. Confusion existed as to what was meant by 'directly impaired and injured his bodily health and strength' and 'physical organism'. In *Bester v Commercial Union Versekeringsmaatskappy Van SA Bpk*³⁹ Henning J interpreted it as meaning that 'pure' psychological illness is not compensable since it does not constitute injury to a person's physical organism.⁴⁰

It was only in the *Bester* appeal case⁴¹ that clear principles with regard to psychiatric injury were laid down.⁴² Botha JA held that the above *dictum* in *Haumann* was not authority for the proposition that psychiatric injury was compensable only if it manifested itself together with a physical injury.⁴³ He then went on to put paid to the Cartesian distinction between body and mind⁴⁴ by holding that the nervous system is just as much part of the physical body as is an arm or a leg and that injury to it would constitute bodily injury.⁴⁵ The nature of this injury to the nervous system did not enjoy extensive discussion, the Court stating only that 'niksbeduidende emosionele skok van kortstondige duur wat op die welsyn van die persoon geen wesenlike uitwerking het nie', does not attract damages.⁴⁶ The Court made it clear that in psychiatric injury cases damages are not awarded for the initial shock, grief or trauma, but rather for the physical harm that results therefrom.⁴⁷

³⁹ 1972 (3) SA 68 (N).

⁴⁰ At 73G.

⁴¹ 1973 (1) SA 769 (A).

⁴² In *Mulder v South British Insurance Co Ltd* 1957 (2) SA 444 (W) at 447A De Wet J found it unnecessary 'to discuss whether damages are recoverable for nervous shock unaccompanied by illness'.

⁴³ At 778H.

⁴⁴ See McQuoid-Mason 115 for criticism of the first *Bester* case.

⁴⁵ At 779B-C. In this regard, the following *dictum* by Lord MacMillan in *Bourhill v Young* [1942] 2 All ER 396 at 402 was quoted by Botha JA: 'The distinction between mental shock and bodily injury was never a scientific one, for mental shock is presumably in all cases the result of, or at least accompanied by, some physical disturbance.'

⁴⁶ At 779H.

⁴⁷ At 778C. See Mullany and Handford 25 for criticism of the use of the terms 'emotional distress' or 'mental distress' to describe psychiatric or psychological harm that gives rise to damages. The learned authors are of the view that this 'has caused confusion between psychiatric and psychological conditions and normal mental suffering'. They warn that the distinction remains

The subsequent cases dealing with psychiatric injury have not given a more explicit explanation of the nature of the harm that is required. In *Barnard v Santam Bpk* the appeal was decided on the assumption that the appellant had suffered nervous shock that caused 'erkende en beduidende psigiatriese (oftewel psigiese) letsels'.⁴⁸ In *Road Accident Fund v Sauls* Olivier JA cited *Barnard*⁴⁹ as authority for holding that the plaintiff must prove that s/he has sustained 'a detectable psychiatric injury', as opposed to 'mere nervous shock or trauma'.⁵⁰ Similarly, in *Allie v Road Accident Fund*⁵¹ Moosa J accepted it as settled law that a 'detectable psychiatric illness' must be proved.

3.2.3 A medical perspective on psychiatric injury

Psychology as a science is relatively young, having only asserted its independence from physiology and philosophy in 1879 when Wilhelm Wundt started his studies of sensation and perception.⁵² Unlike other sciences, psychology cannot use the generally accepted logic of experimentation of keeping constant all variables but one in order to ascertain the effect the latter has on the phenomenon studied.⁵³ People cannot be subjected to laboratory conditions, nor is human behaviour, except in emergency situations, ever a function of a single stimulus.⁵⁴ This is perhaps why a definition of mental illness has so far proved elusive.⁵⁵ Attempts to define it by reference to deviation from supposedly 'healthy' states have not been successful, since the term 'health' is in itself a nebulous concept.⁵⁶ The circular definition of 'mental illness' in the Mental

imperative in Commonwealth countries where damages are not claimable for mere mental or emotional distress. The position is of course different in the United States of America where 'both types of effect on human wellbeing are compensable in many jurisdictions' (Mullany and Handford 25).

⁴⁸ At 208H and 216E-F.

⁴⁹ 1973 (1) SA 769 (A).

⁵⁰ 2002 (2) SA 55 (SCA).

⁵¹ [2003] 1 All SA 144 (C) at 154*i-j*.

⁵² RI Gordon 'Mental Distress in Psychological Research' (1969) 21 *Baylor Law Review* 520.

⁵³ Gordon 521.

⁵⁴ *Ibid.*

⁵⁵ Mullany and Handford 24.

⁵⁶ Mullany and Handford 25 write that the World Health Organisation defined health as 'a state of complete physical, mental and social well-being, and not merely the absence of disease or

Health Act is unhelpful and merely provides evidence of the definitional difficulties.⁵⁷ The result has been a system of classification in terms whereof psychiatric disorders are grouped together in what is termed 'diagnostic categories'.⁵⁸

Notwithstanding the lack of a precise definition of mental illness, a general biological or scientific explanation of what happens in cases of psychological injury is possible.

Goodrich states that 'an emotion as a purely mental thing does not exist'.⁵⁹ Broadly stated, fear puts 'the body in shape for fight or flight'.⁶⁰ The bodily functions which are not integral to those two alternatives are inhibited, while those that can help the organism to struggle or escape are aided by increased stimulation.⁶¹ Similar bodily reactions are initiated by other emotions such as anger, grief, worry and anxiety. The initial response to emotional or mental trauma may not in itself be harmful. On the contrary, one study showed that the increased adrenin secretion in times of emotional upheaval will, in five minutes, reinvigorate a muscle to the same extent as would one hour's rest.⁶²

However, prolonged emotional or mental trauma will take its toll on the body because the physical responses for fight or flight are still the same, while in modern society people seldom fight or flee.⁶³ Thus, the products that were supposed to be used to escape or struggle now have to be eliminated by the

infirmity'. The Mental Health Act 17 of 2002 provides a similar definition and states in its preamble that 'health is a state of physical, mental and social well-being'. This construction was lambasted by AJ Lewis 'Health as a Social Concept' (1953) 4 *British Journal of Sociology* 109 at 110 as one 'that could hardly be more comprehensive ... or more meaningless'.

⁵⁷ According to the definition in s 1(xxi), mental illness 'means a positive diagnosis of a mental health related illness in terms of accepted diagnostic criteria made by a mental health care practitioner authorised to make such diagnosis'.

⁵⁸ Chiswick 392.

⁵⁹ HF Goodrich 'Emotional Disturbance as Legal Damage' (1921-1922) 20 *Michigan Law Review* 497 at 501.

⁶⁰ Goodrich 499.

⁶¹ Goodrich 500.

⁶² Goodrich 502.

⁶³ *Ibid.*

body as waste.⁶⁴ The human body may not be able to withstand this process, leading to debilitating and permanent harm.⁶⁵

The harm sustained by a plaintiff may be somatic (physical) or psychic 'and not infrequently it is a combination of both'.⁶⁶ Sometimes psychic damage may give rise to physical symptoms⁶⁷ or medical disorders may produce psychiatric symptoms.⁶⁸ Claimants encounter more difficulty when the effect of the psychic trauma 'does not manifest itself physically although it is present psychically'.⁶⁹ It is likely that scientists may one day explain the physical responses of all emotional stimuli.⁷⁰ Until then, the law has to deal with the information at its disposal.

Before more in-depth explanations of the most relevant disorders are proffered, one must understand what actually happens to the body in response to psychic trauma. The latter concept is not easily defined, but if one accepts that the psyche is a biological organ, it must follow that it can be injured by appropriate stimuli.⁷¹ Freud put forward the hypothesis that the whole psychic apparatus is a means of the body regulating which stimuli to allow inside and which to block out.⁷² Psychic trauma results when an undesirable stimulus breaks through the protection of the psyche.⁷³ 'It can be the precipitating factor in almost any known

⁶⁴ Mullany and Handford 29.

⁶⁵ *Ibid.* Goodrich 503 notes: '[It may lead] to the following definite results: the increase in adrenin may produce arteriosclerosis and cardiovascular disease if the strain is prolonged; the glycogen produced may lead to diabetes. ... Nephritis may follow from the elimination strain on the kidneys; increased heart action may cause myocarditis and heart degeneration. Claudication may also result from impaired circulation. Arresting of the digestive processes causes putrefaction and autointoxication, and further strain on the organs of elimination. Changes in saliva occur, pyorrhea develops, teeth decay. Grave's disease may develop from overproduction of thyroid. Actual changes in brain cells take place – irreparable destruction if the stimulus is strong enough.'

⁶⁶ J Harvard 'Reasonable Foresight of Nervous Shock' (1956) *Modern Law Review* 478 at 479.

⁶⁷ *Ibid.*

⁶⁸ RL Taylor *Distinguishing Psychological from Organic Disorders* (2000) 4.

⁶⁹ McQuoid-Mason 125.

⁷⁰ Goodrich 508.

⁷¹ E Tanay 'Psychic Trauma and the Law' (1968-1969) 15 *Wayne Law Review* 1033 at 1034.

⁷² *Ibid.*

⁷³ Tanay 1035.

psychiatric illness' and it can also complicate various 'physical' diseases and injuries.⁷⁴

In *Leong v Takasaki*⁷⁵ the Hawaii Supreme Court distinguished between a primary and a secondary response to traumatic stimuli. The primary response is automatic, instinctive and designed to protect the individual from harm.⁷⁶ It is characterized by emotional responses such as 'fear, anger, grief and shock',⁷⁷ is of short duration, subjective in nature and may in itself have no detrimental effects in the long run.⁷⁸ The secondary response occurs 'when the body can no longer overcome the problem of emotional stress or adequately cope with the traumatic event'.⁷⁹ Notwithstanding the progress in psychiatry, it is still difficult to separate 'normal' primary responses from 'abnormal' secondary reactions, especially where 'milder' disorders that 'overlap with the ordinary feelings experienced in everyday life' are at issue.⁸⁰ It is often the less severe forms of psychiatric illness that form the basis for litigation, thereby raising the issue of compensability.⁸¹

3.2.3.1 Classification of disorders

Generally, mental disorders are divided into psychotic and neurotic categories.⁸² Chiswick explains the difference thus:

'The psychoses are serious disorders in which there is loss of contact with reality, a lack of appreciation of the illness by the sufferer and

⁷⁴ Tanay 1039.

⁷⁵ (1974) 55 Hawaii Law Reports 398 at 411-412.

⁷⁶ JB Kincaid 'Negligent infliction of emotional distress in Illinois – *Rickey v CTA* revisited' (2002) 47(4) *Trial Briefs* available at <http://www.illinoisbar.org/Sections/CivilPractice/2-02a.htm> (accessed 17 January 2005).

⁷⁷ *Ibid.*

⁷⁸ Anonymous 'Comment: Negligently Inflicted Mental Distress: The Case for an Independent Tort' (1970-1971) 59 *Georgetown Law Journal* 1237 at 1249-1250 (hereinafter referred to as 'Independent Tort').

⁷⁹ Mullany and Handford 29.

⁸⁰ *Ibid.*

⁸¹ Mullany and Handford 30.

⁸² Chiswick 392.

abnormalities of thinking and perception – eg delusions (false beliefs) and hallucinations (false perceptions). By contrast, the neuroses are less serious disorders, contact with reality is maintained and the sufferer is normally aware, at least partially, of the fact of the illness.’

This distinction is not necessarily helpful in the classification of disorders, since these classifications are too imprecise.⁸³ However, the classification system is still widely used in everyday clinical practice and is helpful where disorders cannot be more precisely diagnosed due to insufficient information.⁸⁴ Such a system ‘provides a common language’ with which mental health professionals can communicate, shows ‘the natural history of a particular disorder’ and is ‘crucial for administrative and legal documentation and for research purposes’.⁸⁵

Several classification systems are used worldwide; the two most widely used systems in the Western world are the Diagnostic and Statistical Manual of Mental Disorders (DSM-IV-TR),⁸⁶ compiled by the American Psychiatric Association, and the International Classification of Diseases and Related Health Problems (ICD-10),⁸⁷ prepared under the auspices of the World Health Organisation.⁸⁸ The two systems are very similar, there having been close collaboration during their development.⁸⁹ More reliance will be placed on DSM-IV-TR criteria, it being more widely used in clinical trials and having been updated more recently than ICD-10.⁹⁰ A detailed account of DSM-IV-TR diagnostic criteria falls beyond the scope of this work, but the controversy surrounding posttraumatic stress disorder is important for present purposes and will receive particular attention.

⁸³ Mullany and Handford 30-31 fn 88 and fn 89.

⁸⁴ *Ibid.*

⁸⁵ Lundbeck Institute ‘Diagnosis of mental disorders’ available at <http://www.brainexplorer.org/factsheets/Psychiatry%20Diagnosis.pdf> (accessed 20 January 2005).

⁸⁶ American Psychiatric Association *Diagnostic and Statistical Manual of Mental Disorders* 4 ed Text Revision (2000).

⁸⁷ Chiswick 392 states that it is the recognized system in Britain and Europe.

⁸⁸ *Ibid.* China has developed its own system and several other systems are in use in other regions of the world.

⁸⁹ *Ibid.*

⁹⁰ *Ibid.* The DSM-IV was published in 1994, with a text revision, the DSM-IV-TR in 2000. The ICD-10 was published in 1992.

Psychic trauma may cause 'traumatic neuroses, psychoses and psycho-neuroses'.⁹¹ In *Leong v Takasaki*⁹² the Court discussed the most common neurotic reactions and their symptoms, which was usefully summarized by Kincaid:⁹³

- '(1) [T]he anxiety reaction ... produces severe tension and can result in nervousness, weight loss, stomach pains, emotional fatigue, weakness, headaches, backaches, a sense of impending doom, irritability, or indecision;
- (2) the conversion reaction⁹⁴ ... converts consciously disowned impulses into paralysis, loss of hearing or sight, muscle spasms, or other physiological symptoms which cannot be explained by a physical impairment; and
- (3) [the] hypochondrias reaction⁹⁵ [which is] characterized by an over-concern with health, and a fear of illness.'

The most prevalent psychotic disorders are schizophrenia, schizoaffective disorder and delusional disorders.⁹⁶ Schizophrenia is the most serious⁹⁷ and affects 1% of the world's population.⁹⁸ It is an extremely complex disorder with three stages and is characterized by 'gross disturbance of thinking and perception with "blunting" of mood'.⁹⁹ Widely diverging concepts of the condition make definition and description particularly difficult.¹⁰⁰

3.2.3.2 *Post-Traumatic Stress Disorder*

Post-Traumatic Stress Disorder (PTSD) was first recognised as a distinct clinical disorder in the DSM-III, published in 1980.¹⁰¹ Although its clinical features had

⁹¹ Mullany and Handford 31. They define psycho-neuroses as 'intermediate types of disorder displaying characteristics of both neurosis and psychosis'.

⁹² At 412.

⁹³ Kincaid *loc cit*.

⁹⁴ See DSM-IV-TR 492-498.

⁹⁵ See DSM-IV-TR 504-507.

⁹⁶ Lundbeck Institute *loc cit*.

⁹⁷ Mullany and Handford 32.

⁹⁸ Lundbeck Institute *loc cit*.

⁹⁹ Chiswick 393.

¹⁰⁰ *Ibid*

¹⁰¹ MM Duran 'Nothing New: Unwrapping the Packaging of Post-Traumatic Stress Disorder' (1987-1988) 33 *Loyola Law Review* 1076 at 1077

been observed for centuries, it had previously been known under various names such as 'post-traumatic neurosis', 'post-accident syndrome',¹⁰² 'battle fatigue',¹⁰³ or, in Afrikaans parlance, 'bomskok'.¹⁰⁴ There has been skepticism over the wide range of names the disorder has gone under, but Duran argues that 'when consumption "became" tuberculosis, [it] was no less deadly, only more thoroughly understood and treatable'.¹⁰⁵

The DSM-IV-TR states that the essential feature of PTSD is

'the development of characteristic symptoms following exposure to an extreme traumatic stressor involving direct personal experience of an event that involves actual or threatened death or serious injury, or other threat to one's physical integrity; or witnessing an event that involves death, injury, or a threat to the physical integrity of another person; or learning about unexpected or violent death, serious harm, or threat of death or injury experienced by a family member or other close associate'.¹⁰⁶

It is unique in psychiatric classification because it assumes the existence of one known causative factor.¹⁰⁷ It is normally a dramatic event that triggers the disorder, but less dramatic events may also cause it because of the victim's subjective perception of the danger involved.¹⁰⁸

The DSM-IV-TR broadly describes the following symptoms of PTSD:

'The traumatic event is persistently reexperienced ... [p]ersistent avoidance of stimuli associated with the trauma and numbing of general responsiveness (not present before the trauma) ..., [p]ersistent symptoms of increased arousal (not present before the trauma)....'¹⁰⁹

¹⁰² Mullany and Handford 33

¹⁰³ Duran 1083

¹⁰⁴ *Grobler v Naspers Bpk en 'n Ander* 2004 (4) SA 220 (C) 250F

¹⁰⁵ Duran 1096

¹⁰⁶ DSM-IV-TR 463

¹⁰⁷ Weller 878.

¹⁰⁸ Duran 1079.

¹⁰⁹ DSM-IV-TR 468.

These symptoms must endure for more than one month and must cause 'clinically significant distress or impairment in social, occupational, or other important areas of functioning'.¹¹⁰ The disorder is classified as acute if the symptoms last for less than three months and chronic if it lasts for longer than three months.¹¹¹ The PTSD may be classified as one 'with delayed onset if the symptoms occur at least six months after the precipitating stressor'.¹¹²

The very existence of the disorder has been questioned in some quarters. Objections to it include that it is too imprecise, that its symptoms are not very different from those of other psychiatric diagnoses,¹¹³ that it cannot be objectively determined and that it fails to distinguish normality from pathology.¹¹⁴ However, it is included in both the DSM-IV-TR and the ICD-10, and the courts in various jurisdictions have started taking cognizance thereof.¹¹⁵

Henry LJ in *Frost v Chief Constable of South Yorkshire Police*¹¹⁶ commented that actions involving 'the identification of and compensation for psychiatric damage' are relatively commonplace in road and workplace accidents. Mullany¹¹⁷ predicts that workplace accidents in particular will provide fertile ground for litigation in the coming years, unless the legislature intervenes to curtail workers' rights.¹¹⁸ Successful claims for psychiatric damage have historically been predicated on

¹¹⁰ *Ibid.*

¹¹¹ *Ibid.*

¹¹² *Ibid.*

¹¹³ Mullany and Handford *op cit* 39 write that the disorder's symptoms are 'sometimes confused with other anxiety conditions, anti-social personality disorders, paranoid schizophrenia, alcoholism and other substance abuse, and depressive reactions. The identification difficulties are compounded by the fact that PTSD may coexist with any of these and with other psychiatric disorders'.

¹¹⁴ D Summerfield 'The invention of post-traumatic stress disorder and the social usefulness of a psychiatric category' (2001) 322 *British Medical Journal* 95 at 97-98.

¹¹⁵ M Weller 'Post traumatic stress disorder' (1993) *New Law Journal* 878 at 880 describes it as 'recent sea change which should be welcomed in the interests of justice'.

¹¹⁶ [1998] QB 254 at 280.

¹¹⁷ NJ Mullany 'Negligently inflicted psychiatric injury and the means of communication of trauma – should it matter? in NJ Mullany and AM Linden (ed) *Torts Tomorrow: A Tribute to John Fleming* (1998) 162 at 169.

¹¹⁸ See, also M Higgins 'Keeping the Floodgates Closed' (2003) available at http://www.golds.co.uk/articles/articles_ins_floodgates_april2003.htm (accessed 12 April 2005) and Scottish Law Commission Report.

sudden, dramatic events,¹¹⁹ but apart from industrial accidents, chronic stressors in the workplace may also give rise to delictual claims.

In the United States the first chronic workplace claim to be upheld in a State Court was *Carter v General Motors Corporation*.¹²⁰ The plaintiff had been working as a machine operator, but after a long absence from work was transferred to a 'hub job' that required him to 'take a hub assembly from a nearby fellow employee's table to his own workbench, remove burrs with a file and grind outholes in the assembly on a conveyor belt'. Despite his complaints to his supervisor that he could not cope with the pace of the job and his unsuccessful efforts to find quicker ways to do the task assigned to him, nothing was done to improve the situation, resulting in the foreman berating the plaintiff and the latter suffering 'an emotional collapse requiring hospitalization and shock therapy'.

The Court¹²¹ acknowledged that the case involved gradual emotional pressures that the plaintiff had experienced daily in performing his work. Such pressures had not been shown to be any different from those experienced by his fellow employees. However, the Court found that the crux of the matter was whether industry should bear the burden of the plaintiff's harm. After reviewing relevant precedents, the Court held that mental harm resulting from everyday psychological pressures should be treated no differently than physical injuries sustained as a result of gradual everyday physical pressures. It therefore awarded compensation.

In the English case of *Walker v Northumberland County Council*¹²² the plaintiff was a social worker who suffered a foreseeable nervous breakdown as a result of continuous excessive, distressing and demanding work. Although Mr.

¹¹⁹ ML Selzer 'Psychological Stress and Legal Concepts of Disease Causation' (1970-1971) 56 *Cornell Law Review* 951 at 954.

¹²⁰ 361 Mich 577. See a discussion of the case in JO Skoppek 'Stress Claims in Michigan: Worker's Compensation Entitlement for Mental Disability' (1995) available at <http://www.mackinac.org/article.aspx?ID=5250> (accessed 23 April 2007).

¹²¹ At 585. See Skoppek *loc cit*.

¹²² *Walker v Northumberland County Council* [1995] 1 All ER 737.

Walker's claim was upheld, the courts in England and in other Commonwealth countries still adopt a very conservative approach and generally it must be very clear that psychiatric injury to an average or normal worker was foreseeable.¹²³

Another category of claim in which chronic workplace stressors may play a role is where industrial relations issues such as harassment, discrimination or bullying are involved,¹²⁴ an obvious example being *Grobler v Naspers Bpk en 'n Ander*¹²⁵ In that case, the plaintiff was awarded damages for the psychiatric harm she had suffered as a result of continuous unwanted sexual advances by a fellow employee. The defendant was held vicariously liable for the delict committed by its employee. On appeal, however, the Supreme Court of Appeal found that the employer had failed in its legal duty to provide the plaintiff with a reasonably safe working environment and that it was therefore unnecessary to decide whether the employer was vicarious liability for the sexual harassment committed by its employee.¹²⁶

There has also been an increase in cases where workers claim damages for psychiatric harm arising out of clinical anxiety and/or depression due to their fear of contracting fatal diseases such as cancer or HIV-AIDS¹²⁷ after exposure to

¹²³ See, for example, cases such as *Hatton v Sutherland* [2002] 2 All ER 1; *Pratley v Surrey County Council* [2003] EWCA Civ 1067 available at <http://www.bailii.org/cgi-bin/markup.cgi?doc=ew/cases/EWCA/Civ/2003/1067.html> (accessed 14 April 2005); *Cerebos (Australia) Ltd v Koehler* (2003) available at <http://www.worldlii.org/cgi-bin/worldlii/disp.pl/au/cases/wa/WASCA/2003/322.html> (accessed 14 April 2005).

¹²⁴ Workcover Queensland 'Psychiatric/psychological injury: fact sheet for employers' (2004) available at <http://www.workcover.qld.gov.au/Formsa362sheets/Psychi966loyers.pdf> (accessed 14 April 2005).

¹²⁵ 2004 (4) SA 220 (C). See commentary on this case in J Neethling and JM Potgieter 'Seksuele Teistering en Gedingsvatbare Psigiese Letsels: 'n Mylpaal vir die Suid-Afrikaanse Reg (2004) 16 *Merc LJ* 488 (hereinafter referred to as 'Neethling and Potgieter Seksuele Teistering').

¹²⁶ *Media 24 Ltd and Another v Grobler* 2005 (6) SA 328 (SCA) para [63]; Neethling and Potgieter *Seksuele Teistering* 493 and the authorities cited therein.

¹²⁷ The World Health Organisation has published a set of universal precautions to protect health care workers from contracting blood-borne diseases, including HIV. Although the risk of occupational contamination for health care workers is 3 in 1000, it understandably remains an area of great concern. See Anonymous 'Health Care Workers and HIV Prevention' (2005) available at <http://www.avert.org/needlestick.htm> (accessed 15 April 2005).

dangerous substances or being pricked by needles.¹²⁸ An example is a recent decision by the High Court of Western Australia to compensate an asbestos mill worker for chronic fear of dying and related depression after he was exposed to asbestos due to the negligence of his employers.¹²⁹

3.3 REQUIREMENT OF 'RECOGNISED PSYCHIATRIC ILLNESS'

As was discussed above, our law requires that the plaintiff must have suffered a recognised psychiatric illness.¹³⁰ The Courts in *Allie*¹³¹ and *Sauls*¹³² stated it as being a 'detectable psychiatric illness', but relied on *Bester*¹³³ and *Barnard*¹³⁴ in that regard. Although 'detectable' and 'recognised' are not synonymous, it is submitted that in the context of psychiatric injury litigation they refer to the same requirement. If this illness must be recognised or detectable, the logical question to follow is, by whom?

Courts should be cautious to use the DSM-IV-TR or any other classification system to determine whether psychiatric harm should be compensable. The DSM-IV-TR states:

'It is to be understood that inclusion here, for clinical and research purposes, of a diagnostic category ... does not imply that the condition meets legal or other non-medical criteria for what constitutes mental disease, mental disorder, or mental disability.'¹³⁵

¹²⁸ See Mullany *op cit* 186, TM Dworkin 'Fear of Disease and Delayed Manifestation Injuries: A Solution or a Pandora's Box?' (1984) 53 *Fordham Law Review* 527, FJ Gale and JL Goyer 'Recovery for Cancerphobia and Increased Risk of Cancer (1985) 15 *Cumberland Law Review* 723, JG Fleming 'Probabilistic Causation in Tort Law' (1989) *Canadian Bar Review* 661 (hereinafter referred to as 'Fleming Probabilistic Causation') at 677-678.

¹²⁹ *Maddalena v CSR Ltd and Another* (2004) available at <http://www.worldlii.org/cgi-worldlii/displ/au/cases/wa/WASCA/2004/231.html> (accessed 14 April 2005). See, also, Anonymous 'Asbestos caused psychiatric injury' (2004) available at <http://www.theage.com.au/articles/2004/10/14/1097607332647.html> (accessed 14 April 2005).

¹³⁰ The same requirement is adopted in Australia, Canada, Ireland and New Zealand. See Scottish Law Commission Discussion Paper.

¹³¹ [2003] 1 All SA 144 (C).

¹³² 2002 (2) SA 55 (SCA).

¹³³ 1973 (1) SA 769 (A).

¹³⁴ 1999 (1) SA 202 (A).

¹³⁵ DSM-IV-TR xxxvii.

The DSM-IV-TR also contains cautionary remarks on the use of the system in forensic settings. It recognises that the ultimate questions that need to be answered in psychiatric and legal settings differ.¹³⁶ Psychology assumes that there is no pre-existing truth and then examines the nature of the universe 'by exploring, and experimenting, accepting its results with a grain of salt'.¹³⁷ The law wants to reach decisions to finality; guilty or innocent, judgment for the plaintiff or the defendant.¹³⁸

Furthermore, the categories in the classification system are not indicative of the severity of the illness, nor do they necessarily indicate the causes of a disorder.¹³⁹ Classification systems are silent on the person's degree of control over the behaviours associated with the illness.¹⁴⁰ Also, just because something is a recognised disorder, it does not mean that there is any functional impairment that negatively affects the claimant's quality of life.¹⁴¹

The DSM-IV-TR consists of classifications based on knowledge at the time of its initial publication.¹⁴² Research and clinical experience will lead to increased understanding of the disorders already identified, and may cause new disorders to be identified and currently recognised disorders to be removed from future classifications.¹⁴³ Summerfield is very scathing in his criticism of this aspect: he wants to know where the new diseases come from and where the discarded ones are going.¹⁴⁴ The answer, it is submitted, lies in the purpose of classification. As already mentioned,¹⁴⁵ the primary function of classification is to

¹³⁶ DSM-IV-TR xxxiii.

¹³⁷ Gordon 521. In *Daubert v Merrell Dow Pharmaceuticals, Inc* 113 S Ct 2786 (1993) at 2798-9 Justice Blackmun noted the inherent difference between judicial fact-finding and scientific fact-finding: While the latter is concerned with 'exhaustive cosmic understanding', the former is focused on the 'particularized resolution of legal disputes'.

¹³⁸ *Ibid.*

¹³⁹ DSM-IV-TR xxxiii.

¹⁴⁰ *Ibid.*

¹⁴¹ Scottish Law Commission Discussion Paper *loc cit.*

¹⁴² DSM-IV-TR xxxiii.

¹⁴³ *Ibid.*

¹⁴⁴ Summerfield 96.

¹⁴⁵ See 3.2.3.1 above.

provide guidelines for treatment and by its very nature cannot be cast in stone; it will evolve as more knowledge is acquired.¹⁴⁶ It 'does not encompass all the conditions for which people may be treated or that may be appropriate topics for research efforts'.¹⁴⁷

The Scottish Law Commission proposed that instead of using 'recognisable psychiatric illness' as the threshold requirement, the concept of 'significantly disabling psychiatric injury' should be employed.¹⁴⁸ This would have the advantage that 'the injury and the extent to which it was disabling would be a question of fact in each case'.¹⁴⁹ It is submitted that there is much to be said for this proposal. It moves the focus from classifying the plaintiff's disorder to whether he or she is actually suffering, and if so, in what way.¹⁵⁰

Often experts disagree on the diagnosis in a particular case, but agree on the degree of suffering that the plaintiff is experiencing.¹⁵¹ A classic example is provided by *Grobler v Naspers Bpk en 'n Ander*.¹⁵² Expert witnesses for the opposing parties spent much time arguing about whether PTSD can be caused by sexual harassment over a protracted period as opposed to one single traumatic incident.¹⁵³ This debate prompted Nel J to state:

'The question is whether Samuels [the employee of the defendant] is responsible for Sonja's [the plaintiff's] condition and not how her condition would be classified by the American Psychiatric Association.'¹⁵⁴

¹⁴⁶ Selzer 951 writes: 'Prior to the twentieth century, most illnesses were attributed to evil thoughts or spirits. The current century brought with it a burgeoning scientific spirit followed by a host of real and meaningful disclosures. In the first burst of discovery, every finding appeared conclusive, each a total answer that stood alone. Only later did many of these revelations lead to additional and more sophisticated inquiry. ... Illnesses are invariably more mystifying under closer scrutiny, particularly if one is seeking simple one-to-one etiological explanations.'

¹⁴⁷ DSM-IV-TR xxxvii.

¹⁴⁸ Scottish Law Commission Discussion Paper *loc cit*.

¹⁴⁹ *Ibid*.

¹⁵⁰ See the argument by Mullany and Handford 39 fn 26.

¹⁵¹ Scottish Law Commission Discussion Paper *loc cit*.

¹⁵² 2004 (4) SA 220 (C).

¹⁵³ At 271H-272B.

¹⁵⁴ At 272F.

The Scottish Law Commission prefers the term 'injury' as opposed to 'illness' in order to distinguish symptoms that form part of a pre-existing psychiatric disorder from those that were caused by the incident(s) at issue in a particular case.¹⁵⁵ It is submitted that this is of no real significance because the plaintiff in any event has to prove that the defendant caused the harm complained of and that such harm was foreseeable.

3.3.1 Should claims for mere mental distress be allowed?

Should claims be available for mere mental distress that does not amount to a psychiatric injury as described in *Bester*?¹⁵⁶ This question seems crisp enough, but the following dictum by Sachs J, albeit applied in a different context, lucidly describes how elusive answers to seemingly simple questions can be:¹⁵⁷

'The formal legal issue ... is embedded in an elusive, evolving and resilient matrix made up of varied historical, social, moral and cultural ingredients. At times these emerge and enter explicitly into the legal discourse. More often they exercise a subterranean influence, all the more powerful for being submerged in deep and largely unarticulated philosophical positions.'

The ingredients of the matrix in which psychiatric injury claims are embedded are complex, hence judicial reflection on their 'elements of greater subtlety'¹⁵⁸ and a description of the subject as 'most vexed and tantalising'.¹⁵⁹

Psychiatric injury claims raise issues that are fundamental to the way South African society perceives itself. They challenge us to find ways and means of preserving each person's dignity and freedom within, and as an indelible part of,

¹⁵⁵ Scottish Law Commission Discussion Paper *loc cit*.

¹⁵⁶ 1973 (1) SA 769 (A).

¹⁵⁷ *Volks NO v Robinson* 2005 (5) BCLR 446 (CC) para [149]. The case dealt with the constitutionality of a provision in the Maintenance of Surviving Spouses Act 27 of 1990 that allowed surviving spouses the right to claim maintenance from their deceased spouses' estates if they are unable to support themselves, but did not confer the same benefit on permanent life partners.

¹⁵⁸ Lord Macmillan in *Bourhill v Young* [1943] AC 92 at 103.

¹⁵⁹ Bingham MR in foreword to Mullany and Handford vii.

the great variety of equally important societal structures that exist at a particular time.¹⁶⁰ The non-pecuniary aspect of psychiatric harm also brings to the fore an apparent paradox in that 'a belief that there is more to life than money and property has led to the pecuniary vindication of non-pecuniary interests'.¹⁶¹ When workplace stress is brought into the equation, South African history and social practices become particularly relevant, especially at a time when worker rights are being redefined to reflect the values of a constitutional democracy based on equality, freedom and dignity.¹⁶²

The substantive, policy-based decisions obviously have to be decided by taking into account the procedural realities. In terms of psychiatric injury claims, it is important that we do not create a situation where judges try to assess and evaluate scientific evidence that scientists themselves have not yet fully explored.¹⁶³ In the words of Windeyer J in *Mount Isa Mines Ltd v Pusey*,¹⁶⁴ the law must be 'marching with medicine but in the rear and limping a little'. It is submitted that while regard must be had to this aspect, one must also bear in mind that the legal system must keep pace with an ever-evolving society that constantly increases its knowledge.¹⁶⁵

Factors that impact upon the issue of the nature of the harm required to found a psychiatric injury claim include the following: constitutional and other policy considerations, whether there are other more effective methods of vindicating workers' rights and developments in the law relating to non-pecuniary interests. All these factors must be assessed in the context of the general reticence by our

¹⁶⁰ JD Van der Vyver 'The State, the Individual and Society' (1977) 94 *SALJ* 291.

¹⁶¹ MG Bridge 'Contractual Damages for Intangible Loss: A Comparative Analysis' (1984) 62 *Canadian Bar Review* 323 at 370.

¹⁶² Sections 1(a) and 7(1) of the Constitution.

¹⁶³ PS Milich 'Controversial Science in the Courtroom: Daubert and the Law's Hubris' (1994) 43 *Emory Law Journal* 913 at 914.

¹⁶⁴ (1970) 125 CLR 383 at 395.

¹⁶⁵ The oft-cited dictum by Innes CJ in *Blower v Van Noorden* 1909 TS 890 at 905 springs to mind: 'There come times in the growth of every living system of law when old practice and ancient formulae must be modified in order to keep in touch with the expansion of legal ideas, and to keep pace with the requirements of changing conditions.'

courts to extend remedies in terms of the Aquilian action unless it is considered justified.¹⁶⁶

3.4 CONSTITUTIONAL CONSIDERATIONS

3.4.1 Assumption regarding horizontal application of the Bill of Rights

For purposes of this discussion, it will be assumed that the employer-employee relationship is a private law one and that the horizontal application of the Bill of Rights is therefore in issue.¹⁶⁷ The principles relating to the application of the Bill of Rights as between private persons are set out in s 8(2) of the Constitution:

‘A provision of the Bill of Rights binds a natural or a juristic person if, and to the extent that, it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right.’

In contrast to the detailed obligations imposed upon the State,¹⁶⁸ it would be impossible to regulate the relationship between private persons *inter se* to the same extent. There are too many varying circumstances and all the possibilities can simply not be foreseen.¹⁶⁹ In *Du Plessis v De Klerk* Madala J set out the approach to be followed:

¹⁶⁶ See *Lillicrap, Wassenaar and Partners v Pilkington Brothers (SA)(Pty) Ltd* 1985 (1) SA 475 (A) 500C-D; *Herschel v Mrupe* 1954 (3) SA 464 (A) 478C; *Union Government v Ocean Accident and Guarantee Corporation Ltd* 1956 (1) SA 577 (A) 584H; *Osborne Panama SA v Shell & BP South African Petroleum Refineries (Pty) Ltd and Others* 1982 (4) SA 890 (A) 900H-901A.

¹⁶⁷ ‘Horizontality’ refers to the application of the Bill of Rights between private persons *inter se* as opposed to between the State and private individuals. See I Currie and J de Waal *The Bill of Rights Handbook* 5 ed (2005) 43-52.

¹⁶⁸ Section 7(2) of the Constitution states that the State must ‘respect, protect, promote and fulfil the rights in the Bill of Rights’.

¹⁶⁹ PJ Visser ‘Enkele beginsels en gedagtes oor die horisontale werking van die nuwe grondwet’ (1997) 60 *THRHR* 296 (hereinafter referred to as ‘Visser Horizontal Werking’) at 299. Section 8(3) of the Constitution simply reads:

‘When applying a provision of the Bill of Rights to a natural or juristic person in terms of subsection (2), a court –

(a) in order to give effect to a right in the Bill, must apply, or if necessary develop, the common law to the extent that legislation does not give effect to that right; and
(b) may develop rules of the common law to limit the right, provided that the limitation is in accordance with s 36(1).’

‘We should examine every enumerated right and decide whether it can sensibly be applied in the private domain. In support of this approach, it all depends on the nature and extent of the particular right, the values that underlie it, and the context in which the alleged breach of the right occurs.’¹⁷⁰

It is generally accepted that certain rights, especially rights that coincide with existing subjective rights such as those to personality, are more amenable to horizontal application than others.¹⁷¹ Direct horizontal application takes place when the conduct of private individuals is tested against a provision in the Constitution, for example, where s 23 that deals with unfair labour practices, is at issue.¹⁷² Indirect application occurs when legislation is interpreted, or the common law or customary law developed, in order to give effect to the spirit, purport and objects of the Bill of Rights.¹⁷³

3.4.2 Constitutional rights that may be affected

It is submitted that the constitutional provision relating to fair labour practices may be relevant in appropriate circumstances concerning workplace stress. In *NEWU v CCMA and Others*¹⁷⁴ Landman J contemplated what s 23 of the Constitution aims to protect. Broadly summarised, he concluded¹⁷⁵ that the concept ‘recognizes the rightful place of equity and fairness in the workplace’; that what is lawful is not always fair; that ‘parity between the rights of employers and employees’ is not absolute, but nevertheless important in labour law; that it envisages the use of ‘conventional’ measures and/or statutes to regulate ‘the interaction between employers and employees ... regarding workplace relations’; and that it embraces the common law and particularly the employment contract

¹⁷⁰ 1996 (3) SA 850 (CC); 1996 (5) BCLR 658 (CC) para [161].

¹⁷¹ Visser *Horizontale Werking* 300.

¹⁷² Currie and De Waal 32 and 43. See also, Van der Walt and Midgley 16.

¹⁷³ *Ibid.* But see MH Cheadle, DM Davis and NRL Haysom (eds) *South African Constitutional Law: The Bill of Rights* (2005) 28 who opine that the term ‘direct application’ should be reserved for instances where the constitutionality of conduct is at issue, ‘because every constitutional bill of rights applies directly to legislation, even to legislation regulating private conduct’.

¹⁷⁴ (2003) 24 ILJ 2335 (LC).

¹⁷⁵ At 2339C-2340D.

‘to the extent that they are compatible with constitutional goals and values’. When one considers that the fairness of labour practices is, for the vast majority of workers, determined by collective bargaining with which courts will not interfere, s 23(1) will find application mainly in the regulation of individual employment practices.¹⁷⁶

The other rights in the Bill of Rights that are of particular relevance are those to access to social security,¹⁷⁷ dignity¹⁷⁸ and to bodily and psychological integrity¹⁷⁹. However, the focus of the discussion here will be on the indirect application of the Bill of Rights, particularly how it affects the law of delict relating to mental harm.

3.4.3 Indirect application of the Bill of Rights

Indirect application is facilitated by the following constitutional provisions: Section 173 confers inherent power to the Constitutional Court, the Supreme Court of Appeal and the High Courts ‘to develop the common law, taking into account the interests of justice’. Section 39(2) enjoins the courts to promote the ‘spirit, purport and objects of the Bill of Rights’ when interpreting legislation and when developing the common law or customary law and fundamental rights will inform

¹⁷⁶ I Currie and J De Waal (eds) *The New Constitutional and Administrative Law*, Volume 1 (2001) at 385.

¹⁷⁷ Section 27 of the Constitution.

¹⁷⁸ Section 10 reads: ‘Everyone has inherent dignity and the right to have their dignity respected and protected.’

¹⁷⁹ Section 12 provides:

- ‘(1) Everyone has the right to freedom and security of the person, which the right–
 - (a) not to be deprived of freedom arbitrarily or without just cause;
 - (b) not to be detained without trial;
 - (c) to be free from all forms of violence from either public or private sources;
 - (d) not to be tortured in any way; and
 - (e) not to be treated or punished in a cruel, inhuman or degrading way.
- (2) Everyone has the right to bodily and psychological integrity, which includes the right–
 - (a) to make decisions concerning reproduction;
 - (b) to security in and control over their body; and
 - (c) not to be subjected to medical or scientific experiments without their informed consent.’

concepts such as public policy, *boni mores*, reasonableness, fairness, etc.¹⁸⁰ Section 39(3) states that the Bill of Rights 'does not deny the existence of any other rights or freedoms that are recognised or conferred by common law, customary law or legislation', provided that such rights are consistent with the Bill. New legislation that regulates private law will have to be tested against constitutional provisions, as will legislation that founds a cause of action or a defence in private-law litigation.¹⁸¹

In this regard various general constitutional provisions must be mentioned. The preamble provides that the Constitution is the supreme law of the country and was adopted, *inter alia*, to 'respect those who have worked to build and develop our country', to 'establish a society based on democratic values, social justice and fundamental human rights' and to 'improve the quality of life of all citizens and free the potential of each person'. Section 1 provides that South Africa is founded on 'human dignity, the achievement of equality and the advancement of human rights and freedoms'. Section 7(1) states that the Bill of Rights enshrines the right of all people in South Africa and 'affirms the democratic values of human dignity, equality and freedom'.

Cameron JA in *Fourie and Another v Minister of Home Affairs and Others*¹⁸² emphasised that the normative system established by ss 173, 8(3) and 39(2) was not optional – 'where the common law is deficient, the courts are under a general obligation to develop it appropriately'. This involves a two-stage enquiry: firstly, it must be determined whether, in light of the requirements of s 39(2) of the

¹⁸⁰ See *Van Eeden v Minister of Safety and Security (Women's Legal Centre Trust, as amicus curiae)* 2003 (1) SA 389 (SCA) para [12] and J Neethling and JM Potgieter 'Toepassing van die Grondwet op die Deliktereg' (2002) 65 *THRHR* 265 (hereinafter referred to as 'Neethling and Potgieter Toepassing van die Grondwet') at 271. For a general discussion of the impact of the Constitution on the law of delict, see Van der Walt and Midgley paras [18]-[22].

¹⁸¹ Visser *Horizontale Werking* 300.

¹⁸² 2003 (5) SA 429 (SCA) para [5]. See also *Carmichele v Minister of Safety and Security and Another (Centre for Applied Legal Studies Intervening)* 2001 (4) SA 938 (CC) paras [34] and [39] and Neethling and Potgieter *Toepassing van die Grondwet* 267.

Constitution, the common law must be developed.¹⁸³ If this leads to a positive answer, the second stage is to ascertain the means through which such development is to take place.¹⁸⁴

The Bill of Rights 'has not been introduced into a legal vacuum'.¹⁸⁵ Implicit in the philosophy underpinning indirect application is the idea that the common law and the constitution are complementary, the role of the latter 'being to nudge and influence common-law principles rather than to override them'.¹⁸⁶ However, the common law paradigm remains intact and any development has to take place within that framework.¹⁸⁷ Thus, the logical starting place to determine whether the law as it stands passes constitutional muster, is to examine the current remedies – both in terms of the common law and legislation – for the infringement of mental distress, with particular focus on the position relating to workplace stress.

3.4.3.1 *The redress provided by current common-law delictual actions*

The *actio iniuriarum* seeks to vindicate claimants' personality rights.¹⁸⁸ This action has always been the delictual avenue through which the right to dignity has been vindicated.¹⁸⁹ Visser writes that South Africa finds itself in the fortunate position of having human dignity recognised and protected by both the

¹⁸³ Moseneke J in *S v Thebus and Another* 2003 (6) SA 505 (CC) para [28] stated: 'It seems to me that the need to develop the common law under s 39(2) could arise in at least two instances. The first would be when a rule of the common law is inconsistent with a constitutional provision. Repugnancy of this kind would compel an adaptation of the common law to resolve the inconsistency. The second possibility arises even when a rule of the common law is not inconsistent with a specific constitutional provision but may fall short of its spirit, purport and objects. Then, the common law must be adapted so that it grows in harmony with the 'objective normative value system' found in the Constitution.'

¹⁸⁴ Per Goldstone et Ackermann JJ in *Carmichele v Minister of Safety and Security and Another (Centre for Applied Legal Studies Intervening)* at para [40]. See also, *Wagener v Pharmacare Ltd; Cuttings v Pharmacare Ltd* 2003 (4) SA 285 (SCA) paras [26] and [30].

¹⁸⁵ PJ Visser 'Some Basic Principles on the Application of the Bill of Rights to the Law of Delict' (1998) 31 *De Jure* 143 (hereinafter referred to as 'Visser Basic Principles') at 149.

¹⁸⁶ Van der Walt and Midgley 16.

¹⁸⁷ *Carmichele v Minister of Safety and Security and Another (Centre for Applied Legal Studies Intervening)* at para [45]; Van der Walt and Midgley 18.

¹⁸⁸ Burchell 19.

¹⁸⁹ J Burchell 'Beyond the Glass Bead Game: Human Dignity in the Law of Delict' (1988) *SAJHR* 1 (hereinafter referred to as 'Burchell Human Dignity').

Constitution and the law of delict, the latter obviously being informed by the former.¹⁹⁰ The learned author suggests elsewhere that where the infringement of a fundamental right does not cause pecuniary loss or an *iniuria* in the traditional sense, the *actio iniuriarum* is still the most suitable action if the impugned conduct infringes the right to human dignity as recognised in the Constitution.¹⁹¹

Indeed, in a case such as *Grobler v Naspers en 'n Ander* it is unclear why the plaintiff had not opted to frame a claim in terms of the *actio iniuriarum*, since the harasser's actions at all times were intentional and would have constituted an *iniuria*.¹⁹² The action seems especially appropriate considering the soothing character of satisfaction, as opposed to compensation.¹⁹³ In addition, the threshold for the harm that has to be sustained to found a claim is arguably lower under the *actio iniuriarum* than it is under the Aquilian action and the action for pain and suffering.¹⁹⁴

Aquilian liability is incurred where the plaintiff suffers pecuniary harm that is not too remote and which was wrongfully and intentionally or negligently caused by an accountable defendant.¹⁹⁵ The aim is to 'restore the plaintiff to the patrimonial position that he would have been in' but for the commission of the delict.¹⁹⁶ It

¹⁹⁰ PJ Visser 'The Relevance of the Bill of Rights in the Field of Delict' 1998 *TSAR* 529 (hereinafter referred to as 'Visser Relevance of the Bill of Rights') at 531.

¹⁹¹ Visser *Horizontale Werking* 302.

¹⁹² Neethling and Potgieter *Toepassing van die Grondwet* 267.

¹⁹³ Neethling and Potgieter *Seksuele Teistering* 490. The authors also emphasise the penal nature of the *actio iniuriarum* and cite the following dictum by Greenland J in *Masawi v Chabata* 1991 (4) SA 764 (ZH) 772 in support of their averment: 'As regards *quantum*, it must be borne in mind that the primary object of the *actio iniuriarum* is to punish the defendant by the infliction of a pecuniary penalty, payable to plaintiff as a *solatium* for the injury to his feelings. The Court has to relate the moral blameworthiness of the wrongdoer to the inconvenience, physical discomfort and mental anguish suffered by the victim.' See, also, Visser *Pyn en Leed* 38.

¹⁹⁴ Thirion J in *Edouard v Administrator, Natal* 1989 (2) SA 368 (D) 392H stated: 'In our law damages in respect of mere mental distress and injured feelings are not recoverable under the *actio legis Aquiliae* and I cannot think of any reason why in the case of breach of contract the injured party should be in a more favourable position. If the breach occurred in circumstances which would support the *actio iniuriarum*, then of course damages for non-pecuniary loss would be recoverable in respect of injured feelings and mental distress.'

¹⁹⁵ *Matthews and Others v Young* 1922 AD 492 at 504; Boberg 24; Hutchison *et al* 647; Burchell 23.

¹⁹⁶ Boberg 463.

differs from the *actio iniuriarum* in that it compensates pecuniary harm as opposed to injuries to personality.¹⁹⁷ The two actions also differ in their respective fault requirements – the Aquilian action provides for negligence as a fault requirement, while the *actio iniuriarum* only impugnes intentional acts.¹⁹⁸

As alluded to above,¹⁹⁹ the origin of the action for pain and suffering is controversial. What is not contentious though, is the fact that it aims to compensate ‘negligently caused non-patrimonial loss associated with bodily injury’ and where compensation is impossible, to provide a *solatium* for the loss.²⁰⁰ The requirements in other respects are exactly the same as for the Aquilian action.²⁰¹ Seen in this context, it could be argued that it complements the Aquilian action in that the latter only provides for pecuniary loss.²⁰²

There is some debate about whether the action for pain and suffering is geared towards the same type of satisfaction as the *actio iniuriarum*. Van der Walt and Midgley,²⁰³ Scott²⁰⁴ and Van der Merwe and Olivier²⁰⁵ answer this question positively. However, Visser is of the view that the penal element is lacking in the

¹⁹⁷ NJ Van der Merwe and PJJ Olivier *Die onregmatige daad in die Suid-Afrikaanse reg* 6 ed (1989) at 227.

¹⁹⁸ *Ibid.*

¹⁹⁹ See 3.1 above.

²⁰⁰ Hutchison *et al* 682. Visser Pyn en Leed 50 cites cases such as *Geldenhuis v SAR and H* 1964 (2) SA 230 (C) 235C and *Marine & Trade Insurance v Katz* 1979 (4) SA 961 (A) 983E-G to substantiate his view that the compensation function is primary, but he emphasises (at 52) that satisfaction is not totally useless in cases concerning non-pecuniary loss, provided it is not limited to soothing the feelings of the claimant, but also points to a symbolic reparation for the infringement of the claimant's rights. But cf Van der Walt and Midgley para [143], who write that ‘[d]amages in respect of non-patrimonial loss do not serve a compensatory function, for such loss does not have an economic or pecuniary value. Instead the emphasis is on providing satisfaction for the plaintiff in so far as it is possible for an award of money to do so.’ In support of their averment they cite the cases of *Mutual & Federal Insurance Co Ltd v Swanepoel* 1988 (2) SA 1 (A) 10-11 and *Venter v Nel* 1997 (4) SA 1014 (D) 1017.

²⁰¹ *Ibid.*

²⁰² Visser Pyn en Leed 39.

²⁰³ Van der Walt and Midgley 13 write: ‘The action [for pain and suffering] probably developed under the influence of the customary Germanic law in regard to penalties payable as compositions for various types of bodily injuries and the views of the exponents of natural law during the medieval era and the sixteenth century’.

²⁰⁴ WE Scott *Die Geskiedenis van die Oorerflikheid van Aksies op grond van Onregmatige Daad in die Suid-Afrikaanse Reg* (1976) 178.

²⁰⁵ Van der Merwe and Olivier 181.

action for pain and suffering, thereby rendering its function completely different to that of the *actio iniuriarum*.²⁰⁶

It is submitted that if traditionally there were a penal element in the *actio iniuriarum*, constitutional imperatives dictate that it be watered down, if not completely abolished. Support for this assertion is found in the following dictum, delivered in the context of whether retraction and/or apology should be used more often as a compensatory measure in defamation cases:²⁰⁷

‘It should be a goal of our law to emphasise, in cases of compensation for defamation, the re-establishment of harmony in the relationship between the parties, rather than to enlarge the hold in the defendant’s pocket, something more likely to increase acrimony, push the parties apart and even cause the defendant financial ruin. The primary purpose of a compensatory measure, after all, is to restore the dignity of a plaintiff who has suffered the damage and not to punish the defendant. A remedy based on the idea of *ubuntu* or *botho* could go much further in restoring human dignity than an imposed monetary award in which the size of the victory is measured by the quantum ordered and the parties are further estranged rather than brought together by the legal process. It could indeed give better appreciation and sensitise a defendant as to the hurtful impact of his or her unlawful actions, similar to the emerging idea of restorative justice in our sentencing laws.’

From the foregoing it is clear that claimants have to overcome several hurdles in order to claim damages for mental distress. If the claim is brought under the *actio iniuriarum*, only intentionally caused infringements attract compensation and currently an *iniuria* in the traditional sense has to be proved, although it is arguable that the concept of *iniuria* has to be expanded in light of constitutional imperatives regarding human dignity.²⁰⁸ The damages payable will be in the form of a *solatium*, thus no patrimonial loss will be made good. A claim under the

²⁰⁶ Visser Pyn en Leed 46.

²⁰⁷ Per Mokgoro J in *Dikoko v Mokhatla* 2006 (6) SA 235 (CC) para [68]. Sachs J, in the same case (at paras [112]-[117]), also called for less emphasis on the patrimonial dimensions of defamation cases and greater focus on restorative justice. Although both judgments reflect minority views and are therefore not binding on courts, they express ‘strong sentiments that cannot lightly be ignored.’ (see JR Midgley ‘Delict’ (2006) 1 *Juta’s Quarterly Review of South African Law*)

²⁰⁸ Visser Relevance of the Bill of Rights 532.

Aquilian action or the action for pain and suffering has the requirement that an injury to the nervous system has to be proved.²⁰⁹

In practice, it is not necessary for claimants to name the cause of action in terms of which s/he is claiming.²¹⁰ However, rule 18(1) of the Uniform Rules of Court requires the plaintiff to set out the alleged damages 'in such a manner as will enable the defendant reasonably to assess the quantum thereof'. The rule also states that the plaintiff

- '... shall as far as practicable state separately what amount, if any, is claimed for –
- (a) medical costs and hospital and other similar expenses and how these costs and expenses are made up;
 - (b) pain and suffering, stating whether temporary or permanent and which injuries caused it;
 - (c) disability in respect of –
 - (i) the earning of income (stating the earnings lost to date and how the amount is made up and the estimated future loss and the nature of the work the plaintiff will in future be able to do);
 - (ii) the enjoyment of amenities of life (giving particulars); and stating whether the disability concerned is temporary or permanent; and
 - (d) disfigurement, with a full description thereof and stating whether it is temporary or permanent.'

The crux is that the defendant must be in a position to estimate the *quantum*, regardless of whether the damages claimed are general or special.²¹¹ However, it is submitted that compliance with this rule might not necessarily indicate a sound theoretical approach to the issue of damages. In more than one case emotional shock claims are treated as a component of the Germanic remedy for pain and suffering without the plaintiff proving or it being stated that the plaintiff has suffered an injury to his health or well-being.

²⁰⁹ See 3.2.2 above.

²¹⁰ *Matthews and Others v Young* at 505; *Minister of Finance v EBN Trading (Pty) Ltd* 1998 (2) SA 319 (N) 324B-D.

²¹¹ *Bell, Van Niekerk and Van Niekerk v Oudebaaskraal (Edms) Bpk* 1985 (1) SA 127 (C).

In *N v T*,²¹² for example, an application for default judgment was brought in an action for damages. The plaintiff was the mother of a child who had been raped by the defendant when she was eight years old. The plaintiff claimed damages on behalf of her minor daughter and also in her personal capacity. Williamson J held that it was clear from the authorities²¹³ that the plaintiff was entitled to damages in her personal capacity, although she had not been physically injured.

Although it is trite that physical impact to the body is not a prerequisite for compensation for psychiatric harm, the reasoning adopted by Williamson J does not take into account that damages are awarded only in relation to pain and suffering that flows from the *plaintiff's* physical injury.²¹⁴ She may or may not have suffered a recognised or detectable psychiatric injury. That requirement is never addressed in the judgment. It merely states that she 'was very shocked by the whole incident and has had the ongoing distress of having to witness and handle on a daily basis her daughter's trauma. Her suffering has been and still is very real'.²¹⁵ On the face of it, however, the pain and suffering was not linked to any personal injury suffered by the plaintiff, since there was no evidence of psychiatric injury. It is submitted that such an approach is not theoretically sound.

Similarly, in *Seymour v Minister of Safety and Security*,²¹⁶ the plaintiff claimed damages for 'pain and suffering, emotional shock, deprivation of liberty, post-traumatic syndrome, invasion of privacy, intimidation and *contumelia*'. He had been unlawfully arrested and detained by a policeman who had since been

²¹² 1994 (1) SA 862 (C).

²¹³ Counsel for the plaintiff had cited *Bester v Commercial Union Versekeringsmaatskappy van SA Bpk* 1973 (1) SA 769 (A) 779A-C, 779H; *Boswell v Minister of Police and Another* 1978 (3) SA 268 (E) 272H-274H; *Masiba and Another v Constantia Insurance Co Ltd and Another* 1982 (4) SA 333 (C) 342B-343H.

²¹⁴ See *Union Government (Minister of Railways and Harbours) v Warneke* 1911 AD 657; *Van der Walt and Midgley* 33. In *Edouard v Administrator, Natal* Thirion J emphasised the personal nature of the claim for damages for pain and suffering, noting that it is not transmissible on death or by cession for that very reason.

²¹⁵ At 864F.

²¹⁶ 2006 (5) SA 495 (T).

dismissed. Even if one bears in mind that the case was one concerned only with *quantum*, the haphazard way in which the claim was framed leaves much to be desired. Also, Willis J mentions only the *actio iniuriarum* in his judgment and does not address the issue of whether damages for pain and suffering are competent. In light of the fact that a psychiatrist had testified to the 'extreme stress' the plaintiff had been under during his arrest and detention.²¹⁷

The outcomes of the above two cases are arguably just. One is also cognisant of the differences in approach between legal scholars and judges.²¹⁸ However, the principles of liability still remain important and judges should not be allowed to change them only to ensure justice *inter partes*.²¹⁹ After all, a judge's opinion should not be a substitute for a legal rule or principle, because then the criterion to decide cases becomes the judge, not the law.²²⁰ If there are constitutional considerations that favour the award of damages, the common law must be developed²²¹ or constitutional damages may be awarded.²²² However, such development must occur in an open and transparent manner.

²¹⁷ A psychiatrist had in fact testified to the 'extreme stress' the plaintiff had been under during his arrest and detention (para [4]). It is arguable that a more detailed explanation of the plaintiff's psychological condition was warranted. Indeed, in the appeal judgment, reported as *Minister of Safety and Security v Seymour* 2006 (6) SA 320 (SCA) it became clear (at para [9]) that the psychiatrist had 'diagnosed moderate to severe symptoms of depression and symptoms of post-traumatic stress, and expressed the view that the symptoms would respond to treatment.'

²¹⁸ See PM Nienaber 'Regters en juriste' 2000 *TSAR* 190. At 191 the judge of appeal writes: 'Die juris se funksie is om die reg van buite te beskryf; die regter s'n om dit van binne te bedryf. Die regter is 'n funksionaris. Sy primêre taak is om die dispuut voor hom te besleg, nie om die reg te sistematiseer nie. Die regter is nie in eerste plaas regsfilosoof, regshervormer of selfs regswetenskaplike nie. Dogma is vir hom 'n distraksie. Die juris daarenteen, is primêr begaan oor die stand en sisteem van die reg, oor tese, sintese en hipotese.'

²¹⁹ JR Midgley 'Principles of liability in the modern law of delict: Holy cows or horses for courses?' in TJ Scott and D Visser (eds) *Developing Delict – Essays in Honour of Robert Feenstra* 79 (hereinafter referred to as 'Midgley Holy Cows') at 97-98.

²²⁰ Nienaber 193.

²²¹ See the general guidelines for such development at 3.4.3 above.

²²² See *Fose v Minister of Safety and Security* 1997 (3) SA 786 (CC); *Modderfontein Squatters, Greater Benoni City Council v Modderklip Boerdery (Pty) Ltd (Agri SA and Legal Resources Centre, amici curiae)*, *President of the Republic of South Africa and Others v Modderklip Boerdery (Pty) Ltd (Agri SA and Legal Resources Centre, amici curiae)* 2004 (6) SA 40 (SCA); *MEC, Department of Welfare, Eastern Cape v Kate* 2006 (4) SA 478 (SCA) for examples of when damages are an appropriate remedy.

3.4.3.2 *Considerations within the law-of-obligations paradigm*

The nature and limits of delictual liability will obviously be informed by its place in the law of obligations. Lord Steyn expresses the view that a system with an extensive theory of contract law can afford to narrow the boundaries of tort law and vice versa.²²³ Paradoxically, it can also be argued that, despite the fact that delict and contract are separate subsystems, these two branches can learn from each other,²²⁴ particularly in view of the fact that the so-called 'tort-contract divide' is becoming somewhat blurred.²²⁵

If one looks at developments in contract law, there has been considerable debate about contractual damages for non-pecuniary loss. In *Edouard v Administrator, Natal*, Thirion J held that generally, injured feelings and other non-pecuniary interests are to be protected by the law of delict.²²⁶ This reasoning was approved by the then Appellate Division in the subsequent appeal.²²⁷

Kerr expresses the opinion that South African law should not follow the English approach of allowing contractual damages for mental inconvenience or distress, since it would add 'an additional item to virtually every breach-of-contract

²²³ Lord Steyn 'Perspectives of Corrective and Distributive Justice in Tort Law' in J Steyn (ed) *Democracy Through Law: Selected Speeches and Judgments* (2004) 253 at 255.

²²⁴ H Collins 'Productive learning from the collision between the doctrinal subsystems of contract and tort' in D Visser (ed) *The Limits of the Law of Obligations* (1997) 55 at 65 writes: 'What we should recognise is that the different subsystems of law, contract and tort, have both been developing principles which reflect their learning about the environment in which the law of that subsystem operates, and also have been struggling to achieve coherent moral objectives. The principles are then tested and redefined in the process of mutual observation between legal regulation and social practice. ... The method of productive learning does involve the adoption of loose analogies, such as the comparison between the position of third party beneficiaries of contracts and claims for pure economic loss in tort. It also involves the instrumental use of principles and concepts derived from one subsystem in another in order to further an intended policy objective. It differs from casual instrumentalism, however, by its recognition that the principles of the different doctrinal systems have been tested and refined by reference to particular social practices. Legal principles in the contract system reflect and support the variety of social practices of exchange, and legal principles in the realm of tort have been refined by reference to the practices of liability insurance and the social costs of accident avoidance.'

²²⁵ D Hutchison and B Van Heerden 'The tort/contract divide seen from the South African perspective' in D Visser (ed) *The Limits of the Law of Obligations* (1997) 97.

²²⁶ At 391C and 393D.

²²⁷ *Administrator, Natal v Edouard* 1990 (3) SA 581 (A). At 590A-B Van Heerden JA stated: '[I]n South African law intangible loss is in principle awarded only in delict and then, apart from infringements of rights of personality, only in the case of a bodily injury.'

claim'.²²⁸ He disagrees with McGregor's suggestion that damages should be awarded when the breach affects not the plaintiff's business interests, but his/her 'personal, social and family interests' and provided that the parties had foreseen such damage.²²⁹ He submits that if *Jockie v Meyer*²³⁰ is to be reconsidered and damages for mental inconvenience or distress are allowed, the line should be drawn according to the 'magnitude of the foreseeable distress and not according to the interest, commercial or otherwise, involved'.²³¹

If Kerr's approach is to be analogously applied in deciding claims for mental distress in delict, it would seem that the current system is to be maintained. After all, the magnitude of the mental distress determines whether the psychic trauma can be classified as a recognisable psychiatric illness or not. It is arguable that requiring a detectable psychiatric illness is setting the bar too high, since there may be instances where the injury is substantial, yet does not constitute a 'detectable' psychiatric injury.

3.4.3.3 *Public policy generally*

The requirement of a recognised psychiatric injury is generally accepted to be informed by public policy. Before the policy grounds that have been relied on in defence of this threshold requirement are considered in-depth, it is apposite to

²²⁸ AJ Kerr 'Mitigation Expenses and Charges, and Inconvenience and Mental Distress in Contract' (1977) 94 SALJ 132 at 136.

²²⁹ Kerr 136. Cf I Ramsay 'Contracts – Damages for Mental Distress – Injury to Feelings' (1977) 55 *Canadian Bar Review* 169 at 174, who seems to favour the approach suggested by McGregor: 'The classification of a contract into personal or commercial may provide a useful test for a court in determining whether damages for disappointment, vexation and mental distress may be recovered.'

²³⁰ 1945 AD 354. Tindall JA, with whom the rest of the Court concurred, held at 367-368: 'A claim for damages for an injury to a man's feelings suffered under such as those disclosed in the present case is, in our law, founded on an alleged *injuria* or *contumelia*.... If an action lies in such a case, it is the *actio injuriarum*.... To award such damages in an action alleging merely breach of contract would, in effect, be to try and action for an *injuria* (it might be for defamation) as a matter of aggravation of damages caused by breach of contract. ... [T]he magistrate was not entitled to award damages for the injury to the plaintiff's feelings which he suffered as a result of the refusal of accommodation by the defendant.'

²³¹ Kerr 137.

discuss the role of public policy in the law, more specifically in the field of delict. Van Aswegen²³² defines policy considerations as being:

‘... substantive reasons for judgments reflecting values accepted by society. They consist in moral or ethical values, valuable in themselves, or in desirable goals of collective societal welfare, but there is no reason why these two types of policy consideration cannot overlap.’

The law of delict is particularly amenable to policy considerations and many decisions have expressly been stated to be determined or influenced by such considerations.²³³ Implicit in public policy grounds is the recognition that ‘the broader social interest of the public at large’ is important.²³⁴ It often involves competing social interests that are solved with considerable difficulty.²³⁵

Corbett, in discussing the concepts that underlie criteria such as public policy, *boni mores*, the legal convictions of the community and so forth, beautifully describes the essence of what policy factors should aspire to:

‘[T]he policy decisions of our courts which shape and, at times, refashion the common law must also reflect the wishes, often unspoken, and the perceptions, often but dimly discerned, of the people. A community has certain common values and norms. These are in part a heritage from the past. To some extent too they are the product of the influence of other communities; of the interaction that takes place between peoples in all spheres of human activity; of the sayings and writings of the philosophers, the thinkers, the leaders, which have universal human appeal; of the living example which other societies provide. It is these values and norms that the judge must apply in making his decision. And in doing so he must become “the living voice of the people”; he must “know us better than we know ourselves”; he must interpret society to itself.’

How then, have our courts interpreted our common norms and values in relation to the compensability of mental distress? The first policy argument that is

²³² A Van Aswegen ‘Policy considerations in the law of delict’ (1993) 56 *THRHR* 171 at 174.

²³³ Van Aswegen 171 and the authorities cited in fn 1.

²³⁴ CR Symmons ‘The Function and Effect of Public Policy in Contemporary Common Law’ (1977) 51 *Australian Law Journal* 185 at 189.

²³⁵ Symmons 192.

advanced is the fact that it will lead to unlimited liability and a flood of litigation, thereby draining judicial resources.²³⁶ A closely related argument is that it would lead to the successful litigation of fraudulent claims.²³⁷

3.4.3.4 *Floods of litigation and limitless liability*

The floodgates argument has been used on many occasions and in various contexts.²³⁸ In relation to procedural matters such as standing and class actions it often hits the brick wall of judicial disapproval.²³⁹ However, in cases that have substantial economic consequences, it is generally recognised that it is an important factor that has an impact on insurability.²⁴⁰ Many employers may be unable to 'absorb and distribute extra costs arising from judicial expansion of its civil liability'.²⁴¹ This not only impacts on the employer concerned, but may have consequences for labour and the community in general.²⁴²

In the United States, some commentators argue that the supposed threat of a flood of litigation has failed to materialize in those jurisdictions where recovery

²³⁶ DB Marlowe 'Negligent Infliction of Mental Distress: A Jurisdictional Survey of Existing Limitation Devices and Proposal Based on an Analysis of Objective versus Subjective Indices of Stress' (1988) 33 *Villanova Law Review* 781 at 819.

²³⁷ *Ibid.*

²³⁸ In *Ngxuzo and Others v Permanent Secretary, Department of Welfare, Eastern Cape, and Another* 2001 (2) SA 609 (E) it was unsuccessfully employed in relation to standing in representative and class actions.

²³⁹ In *Wildlife Society of South Africa and Others v Minister of Environmental Affairs and Tourism of the Republic of South Africa and Others* [1996] 3 All SA 462 (Tk) 473b-d Pickering J dealt with it thus: 'It is well, however, to bear in mind a remark by Mr Justice Kirby, President of the New South Wales Court of Appeal, ... namely that it may sometimes be necessary to open floodgates in order to irrigate the arid ground below them. I am not persuaded by the argument that to afford *locus standi* to a body such as first applicant in circumstances such as these would be to open the floodgates to a torrent of frivolous or vexatious litigation against the State by cranks and busybodies. Neither am I persuaded, given the exorbitant costs of Supreme Court litigation, that should the law be so adapted cranks and busybodies would indeed flood the courts with vexatious or frivolous claims. ... Should they be tempted to do so, I have no doubt that an appropriate order of costs would soon inhibit their litigious ardour.'

²⁴⁰ Hutchison and Van Heerden 109.

²⁴¹ Symmons 193.

²⁴² *Ibid.*

has been liberalized.²⁴³ Others have warned against too simplistic a view on what is termed 'enterprise liability'.²⁴⁴

The American and South African economies can hardly be mentioned in the same breath as far as development is concerned. South Africa has to be particularly careful in adopting decisions from that jurisdiction that may have economic pitfalls. In an economy that is struggling to curb unemployment and looking for means to encourage businesses to engage in labour-intensive activities, extending liability may have dire, albeit unintended, consequences. Lord Steyn also writes that particular features of the American tort system makes it particularly expansive and have caused it to be viewed with some skepticism in England and Europe generally.²⁴⁵

In relation to mental distress, the argument is that it will be difficult, if not impossible, to draw a distinction between compensable and non-compensable mental distress.²⁴⁶ Many people see the debate as being between two alternatives, either grant recovery only for a psychiatric illness or make it a 'free for all' where every frivolous, subjective, insubstantial mental emotion can form the basis of the claim. Such an all-or-nothing, zero-sum approach is fundamentally flawed. It elevates the nature of the harm into the only limiting element in psychiatric injury claims, while that is not the case. All the elements of an action have the potential to be means of limitation.

It is not at all easy to distinguish between primary and secondary reactions,²⁴⁷ yet the law at present allows recovery for the former but not the latter. Psychiatrists have cautioned that their diagnostic criteria are not meant to set legal standards,²⁴⁸ so it is a problem that the law itself has to deal with.

²⁴³ Marlowe 789.

²⁴⁴ Symmons 193.

²⁴⁵ Steyn 18-19.

²⁴⁶ Scottish Law Commission Discussion Paper *loc cit*.

²⁴⁷ Mullany and Handford 29.

²⁴⁸ See fn 135 above.

Proponents of the threshold of a recognizable psychiatric illness argue that people get emotionally scarred all the time, whereas physical injury does not occur on such a regular basis.²⁴⁹ As Southin J stated in *Rhodes v Canadian National Railway*²⁵⁰ in awarding damages for emotional distress:

‘... the question of policy is better answered not by saying that scars on the flesh are compensable but scars on the mind are not, but by making all awards for scars on the mind, including scars said to lead to “psychiatric illness”, conventional, even as damages for pain and suffering have been made conventional.’

3.4.3.5 *Successful litigation of fraudulent claims*

There exists a perception that psychiatric injury is not objectively determinable, let alone mental distress, thereby opening the door for fraudulent claims. If it is objectively detectable, then it is too difficult to prove, so as a matter of policy such claims should not make it into court. In *Frost v Chief Constable of South Yorkshire Police*²⁵¹ Henry LJ stated that the risk of fraudulent claims is ‘greatly reduced by objective psychological tests’.²⁵² Furthermore, the risk is no greater than in cases of, for example, back injuries ‘where there is often a wide gap between observable symptoms and complaints’.²⁵³

It is highly unsatisfactory that genuine claims should be ignored because of an unfounded fear of spurious litigation. The nature of the psychological or psychiatric harm should not be a threshold matter.²⁵⁴ The analogy of the reliability of scientific evidence in criminal trials can be used. Reliability issues are not dealt with in terms of admissibility, the rationale being that it will factor into the issue of the weight to be attached to such evidence.²⁵⁵ It is submitted

²⁴⁹ Scottish Law Commission Discussion Paper *loc cit*.

²⁵⁰ (1990) 75 DLR 4th 248 at 289.

²⁵¹ [1998] QB 254.

²⁵² At para [79].

²⁵³ *Ibid*.

²⁵⁴ *Ibid*. See also Duran 1098.

²⁵⁵ L Meintjes Van der Walt *Expert Evidence in the Criminal Justice Process: A Comparative Perspective* (2001) 156.

that a similar approach is called for in cases of mental injury. Judges are aware of the possibility of fraudulent claims and will therefore assess evidence in light thereof.²⁵⁶

The notion that people have a need to be the victims of traumatic events has proven an emotionally persuasive argument.²⁵⁷ One writer comments that PTSD has become a 'means by which people seek victim status' and its 'associated moral highground'.²⁵⁸ In this regard the unconscious honest, but erroneous, belief on the part of a plaintiff that he or she suffers from a psychiatric injury must not be confused with the 'wilful, deliberate and fraudulent imitation or exaggeration of illness intended to deceive' in order to obtain some consciously desired benefit, i.e. malingering.²⁵⁹

Although malingering has been proven to be 'more common when litigation is a factor',²⁶⁰ experts have developed methods of detecting malingering that are too complex to explain here.²⁶¹ That there are psychoneuroses where sufferers genuinely believe that they suffer from an illness cannot be denied.²⁶² One of these is 'sinistrosis', in which the patient experiences an accident and becomes obsessed with the idea that 'every accident constitutes an injury for which the fullest indemnity must be claimed and received'.²⁶³ In occupational injury cases 'ergophobia', i.e. 'an abnormal aversion to work' is also particularly relevant. It usually results from a 'deep rooted fear or dread not readily dispelled by reason'.²⁶⁴ Persons suffering from these conditions are not malingerers and their

²⁵⁶ Duran 1098.

²⁵⁷ Tanay 1037.

²⁵⁸ Summerfield 96.

²⁵⁹ M Keschner 'Simulation of Nervous and Mental Disease' (1945-1946) 44 *Michigan Law Review* 715.

²⁶⁰ Keschner 718.

²⁶¹ Goodrich 505. The writer quotes Sir John Collie on the point that the malingerer is at a great disadvantage to the doctor in terms of skill. The contest, in many cases, is an unequal one in which 'a skilled and experienced investigator is pitted against an ignorant and crafty rogue'.

²⁶² Keschner 716.

²⁶³ *Ibid.*

²⁶⁴ Keschner 717.

claims should not be denied solely because their illnesses cause them to testify to symptoms that do not in fact exist.

The prevalence of so-called 'compensation neurosis' has frequently been overstated.²⁶⁵ For some reason, there is a 'ready assumption of intent to swindle' that is not supported by the evidence.²⁶⁶ It must not be forgotten that the 'mechanisms of denial and belated mastery are the chief psychic defences' against traumatic events.²⁶⁷ Victims often have a deep-seated need to deny the fact that they are helpless, borne out of the 'universal need to feel invulnerable'.²⁶⁸

3.4.3.6 *Difficulties of proof*

Mental distress is more difficult to prove than a secondary psychiatric illness,²⁶⁹ because the latter is generally manifested by physical symptoms which can be objectively assessed.²⁷⁰ In cases of neuroses it is possible to observe patients for a relatively long period.²⁷¹ Still, courts in the United States have remarked that cases of mental distress are 'not so substantially different from, and easier to feign than, physical injury as to require qualitatively different rules of recovery'.²⁷² The difficulty is no less in claims for pain and suffering which is based on subjective symptoms.

3.4.3.7 *Compensation culture*

Another policy concern is the fear that the law will foster a compensation culture where people are awarded damages for 'normal human reaction to the

²⁶⁵ Weller 879.

²⁶⁶ Weller 880.

²⁶⁷ Tanay 1039.

²⁶⁸ Tanay 1038.

²⁶⁹ Independent Tort 1259.

²⁷⁰ Independent Tort 1260.

²⁷¹ *Ibid.*

²⁷² Marlowe 789.

vicissitudes of life'.²⁷³ People will then, so the argument goes, 'choose to present themselves as medicalised victims rather than as feisty survivors'.²⁷⁴

As society evolves, individuals may make more varied demands and put pressure on the law to increase 'the scope and character of legal rights'.²⁷⁵ The proliferation in claims for mental injury may bear testimony to this, rather than the escalation of a culture of blame. The issue is not whether anyone should be pampered, but whether 'a person suffering from a real injury should be recompensed to the degree to which the law is capable of providing a remedy'.²⁷⁶

3.4.3.8 *Discouragement of rehabilitation*

The argument is often raised that as long as plaintiffs are engaged in litigation, they wittingly or unwittingly lose the incentive to recover from their illness.²⁷⁷ This may be the case, especially where the plaintiff's predisposition to mental injury is substantially higher than the objective cause of that injury.²⁷⁸ However, this is not always the case and it frequently happens that litigation is beneficial for the plaintiff. 'Individuals become aware of their pathology, acquire motivation and financial resources for treatment.'²⁷⁹ Furthermore, it may help them to regain a sense of control over their surroundings and it 'might restore a sense that the environment is ultimately fair and just'.²⁸⁰ It is for courts to develop methods of 'generally identifying situations where legal redress is likely to be beneficial'.²⁸¹

²⁷³ Scottish Law Commission Discussion Paper *loc cit*.

²⁷⁴ Summerfield 96.

²⁷⁵ Pound 343.

²⁷⁶ Independent Tort 1263.

²⁷⁷ Summerfield 96.

²⁷⁸ Marlowe 832.

²⁷⁹ Tanay 1042.

²⁸⁰ Marlowe 833.

²⁸¹ *Ibid*.

3.4.3.9 *Alternative and/or complementary measures to prevent workplace psychological harm*

Alternative and/or complementary measures exist to protect workers' dignity and these measures could potentially *prevent* workplace stress. Such measures include the protection of whistleblowers,²⁸² the Basic Conditions of Employment Act,²⁸³ the provisions relating to unfair labour practices in the Labour Relations Act,²⁸⁴ the Employment Equity Act²⁸⁵ and measures in the Occupational Health and Safety Act²⁸⁶ that are geared toward limiting workplace accidents and – diseases. Also, workers can apply to court for interdicts where there is an infringement, or a threatened infringement of their rights.²⁸⁷

The mechanisms for preventing workplace injuries and illnesses must also be taken into account, since they may contribute to reducing mental distress. In the

²⁸² Protected Disclosures Act 26 of 2000.

²⁸³ Act 75 of 1997. It provides for issues relating to working hours, leave, meal intervals, protection of employees before and after birth of a child, etc. and applies to all employers and employees except 'members of the National Intelligence Agency, the South African Secret Service and the South African National Academy of Intelligence', 'unpaid volunteers working for an organisation serving a charitable purpose' and 'the directors and staff of Comsec' (s 3).

²⁸⁴ Act 66 of 1995. Section 186(2) defines an unfair labour practice as
'... any unfair act or omission that arises between an employer and an employee involving –
(a) unfair conduct by the employer relating to the promotion, demotion, probation (excluding disputes about dismissals for a reason relating to probation) or training of an employee or relating to the provision of benefits to an employee;
(b) the unfair suspension of an employee or any other unfair disciplinary action short of dismissal in respect of an employee;
(c) a failure or refusal by an employer to reinstate or re-employ a former employee in terms of any agreement; and
(d) an occupational detriment, other than dismissal, in contravention of the Protected Disclosures Act, 2000 (Act No. 26 of 2000), on account of the employee having made a protected disclosure defined in that Act.'

²⁸⁵ Act 55 of 1998. Section 6, for example, prohibits unfair discriminations on listed grounds and subsection (3) specifically states that harassment on any of those grounds constitutes unfair discrimination. It provides for a scheme whereby designated labour inspectors can issue compliance orders, which orders could in appropriate circumstances be converted into orders of the Labour Court (s 39(6)).

²⁸⁶ Act 85 of 1993. Section 7(1) authorises the chief inspector to direct an employer to prepare a written health and safety policy. It is submitted that there should be scope in such a policy to address measures to protect the mental health of employees. Section 8 deals with the general duties of employers to their employees, subsection (1) confirming the common-law duty to provide a reasonably safe working environment.

²⁸⁷ HJ Erasmus *Superior Court Practice* (1999) E8-1. The requirements for the granting of an interdict are set out in *Setlogelo v Setlogelo* 1914 AD 221 at 227.

words of a Canadian commentator, '[t]he approach to optimum conditions of industrial health and safety must be *eclectic*'.²⁸⁸ It must include 'information, education, technical assistance, encouragement, a scrutiny of construction plans, remedial orders, enforcement of regulations and orders through the use of sanctions'.²⁸⁹

A recent case in New Zealand saw an engineering firm become the first company to be convicted of 'failing to provide a safe working environment' after an employee suffered mental harm as a result of work overload.²⁹⁰ In South Africa, there does not seem to be regulations in place for the criminal prosecution of companies that fail to curb workplace stress. Thompson and Benjamin write that a prosecutorial approach to industrial safety has various limitations, including that it is resource-intensive, that it is difficult to ensure convictions for 'offences other than those involving technical breaches of regulations', that fines may not be an effective deterrent and that it may cause the development of an antagonistic relationship between the regulator and employers.²⁹¹

3.4.3.10 *Should the common law be developed?*

From the above discussion, it appears as if the policy considerations dictate that the requirement of a recognised psychiatric illness or, alternatively, a detectable psychiatric injury, should be maintained. The current remedies under the common law, as well as other methods of preventing stress at work, are adequate to protect individuals' constitutional rights and are not contrary to the spirit, purport and objects of the Constitution. While human dignity is one of the

²⁸⁸ Thompson and Benjamin G1-7.

²⁸⁹ *Ibid.*

²⁹⁰ New Zealand Press Association 'Employers warned to tackle job stress after court decision' (2005) at http://www.nzherald.co.nz/index.cfm?c_id=1&ObjectID=10120445 (accessed 28 April 2005). R Towner and A Scott-Howman 'Still stressed about stress?' available at http://www.bellgully.com/resources/resource_00502.asp (accessed 31 May 2007) write that the employee had complained to her chief executive officer that she was suffering from stress. The company did hire additional staff, but the District Court found that it had not done enough to protect the said employee.

²⁹¹ Thompson and Benjamin G1-8.

cornerstones of our constitutional dispensation, and living with mental illness certainly impairs human dignity, it is submitted that the normative system established by our Constitution also requires individuals to take responsibility for their mental well-being.

3.5 CONCLUSION

In many recent cases across various jurisdictions there seems to be dissatisfaction with what Mullany and Handford call 'an unnecessarily severe limitation on the range of permissible claims'.²⁹² Southin J succinctly states the rationale for doing away with the need for a recognised psychiatric injury in the Canadian case of *McDermott v Ramadanovic Estate*:²⁹³

'[W]hat is the logical difference between a scar on the flesh and a scar on the mind? If a scar on the flesh is compensable although it causes no pecuniary loss, why should a scar on the mind be any the less compensable? In both cases, there are serious difficulties of assessment. That has not been allowed to stand in the way of the courts making awards nor non-pecuniary losses. Nor has it prevented awards for pain caused by physical injury which is ... a "bad memory".

And, too, pain from a physical injury is not the result of a "recognizable psychiatric illness". It is the result of the interplay of tissue, nerve and brain. But to the sufferer, what is difference between physical pain and emotional pain? Indeed, the former may be easier to bear, especially with modern analgesics, than the latter.

Therefore, with the greatest of respect, I reject Lord Denning's limitation (if he intended it as a limitation of law) of recovery to cases of "recognizable psychiatric illness".'

This approach is certainly a radical deviation from what is the norm in most common-law jurisdictions. It is submitted that it is practically not possible to equate physical injury with psychiatric injury, simply because of society's perceptions regarding psychiatry. The South African system, in terms of the legal, regulatory, institutional and economic environment, is not yet ready to deal

²⁹² Mullany and Handford 21.

²⁹³ (1988) 27 BCLR 2d 45 at 53.

with claims for mere mental distress, particularly in the field of employment. Recognising this shortcoming not an implicit condonation of the ignorance; it must be addressed by utilizing the abovementioned means that are available. Those means encourage individuals to take responsibility for their own mental well-being and to close the stable door before the horse that is their sanity bolts. The case for the development of the common law, in my view, should at this stage fall at the first hurdle and the requirement of a 'recognised' or 'detectable' psychiatric illness should remain in claims under the Aquilian action and the Germanic remedy for pain and suffering.

CHAPTER 4

WRONGFULNESS AND THE EMPLOYER'S LEGAL DUTY

4.1 INTRODUCTION

Compensation in terms of the law of delict will be awarded if the defendant's conduct was wrongful, that is the harm must have been caused in a legally reprehensible manner.¹ 'Conduct is wrongful if it either infringes a legally-recognised right of the plaintiff or constitutes the breach of a legal duty owed by the defendant to the plaintiff.'² In *Coronation Brick v Strachan Construction*,³ Booyesen J stated that the issue may be approached from either the point of view of the plaintiff, in which case the focus is on the infringement of a subjective right, or from the point of view of the defendant, the issue then being whether the latter has breached a legal duty owed to the plaintiff.⁴

4.1.1 Terminology

It is important to clarify the terminology to be used in relation to wrongfulness at the outset. There has been recent academic debate as to the duty, if any, the

¹ Rumpff CJ in *Minister van Polisie v Ewels* 1975 (3) SA 590 (A) 597A-B held: 'Dit skyn of dié stadium van ontwikkeling bereik is waarin 'n late as onregmatige gedrag beskou word ook wanneer die omstandighede van die geval van so 'n aard is dat die late nie alleen morele verontwaardiging ontlok nie maar ook dat die regsoortuiging van die gemeenskap verlang dat die late as onregmatig beskou behoort te word...'; Neethling, Potgieter and Visser 31; Van der Walt and Midgley 67.

² Van der Walt and Midgley 68 ; See also, Neethling, Potgieter and Visser 31.

³ 1982 (4) SA 371 (D) 379H-380D.

⁴ Boberg 32 writes that it doesn't really matter whether one approaches wrongfulness from the 'right' or 'duty' perspective, since 'right and duty are correlative concepts: the one necessarily implies the other'. Van der Walt and Midgley 70, however, caution that 'a duty is not always a correlative of a subjective right'. They explain their argument thus (at 73, fn 38): 'A legal duty may be in respect of a fundamental right or a subjective right. In addition, it is sometimes impossible to identify the presence of a subjective right where liability is imposed in respect of omissions and breaches of statutory duties. It is also arguable that one's subjective right to privacy, for example, may be circumscribed either by a right of someone else or by a suitable ground for justification. The subjective right to privacy still exists, but it has been disturbed in a legally-acceptable manner. The contrary view is that the right exists only to the extent that it is circumscribed.'

defendant owes the plaintiff.⁵ The English notion of 'duty of care' has been criticised by our courts and academic commentators for conflating the elements of wrongfulness and negligence.⁶ It therefore will not be employed here, save in the context of English cases that may employ that term.

Harms JA in *Telematrix (Pty) Ltd t/a Matrix Vehicle Tracking v Advertising Standards Authority SA*⁷ criticised use of the term 'legal duty' in relation to wrongfulness. He cited the example of a judicial officer being under a legal duty to decide cases correctly, but whose negligent failure to comply with this duty may not necessarily be wrongful. This reasoning was supported by Brand JA in *Trustees, Two Oceans Aquarium Trust v Kantey & Templer (Pty) Ltd*,⁸ the judge of appeal stating that it would have been better, in the context of wrongfulness, to refer to a 'duty not to be negligent', as opposed to a 'legal duty', since the former term makes it clear that the issue at hand is whether negligent conduct should be actionable in the particular circumstances of the case.

While the reservations expressed by the Supreme Court of Appeal in relation to the term 'legal duty' are duly noted,⁹ I will continue to employ that term, since it has been considered settled for a considerable period.¹⁰

4.1.2 The legal duty not to cause harm

Lord Atkin in *M'Alister (or Donoghue) (Pauper) v Stevenson*¹¹ enunciated what is the basis of our legal duty concept in the following way:

⁵ See A Fagan 'Rethinking wrongfulness in the law of delict' (2005) 122 SALJ 90; J Neethling 'The conflation of wrongfulness and negligence: Is it always a bad thing for the law of delict?' (2006) 123 SALJ 204; RW Nugent 'Yes, it is always a bad thing for the law: A reply to Professor Neethling' (2006) 123 SALJ 557.

⁶ in *Telematrix (Pty) Ltd t/a Matrix Vehicle Tracking v Advertising Standards Authority SA* 2006 (1) SA 461 (SCA) para [14]; *Steenkamp NO v Provincial Tender Board, Eastern Cape* 2007 (3) SA 121 (CC).

⁷ At para [14].

⁸ 2006 (3) SA 138 (SCA) para [12].

⁹ The term 'duty not to act negligently' was also preferred in *Minister of Transport NO and Another v Du Toit and Another* 2007 (1) SA 322 (SCA) para [3].

¹⁰ *Trustees, Two Oceans Aquarium Trust v Kantey & Templer (Pty) Ltd* para [12].

‘You must take reasonable care to avoid acts and omissions which you can reasonably foresee would be likely to injure your neighbour. Who then, in law is [your] neighbour? The answer seems to be persons who are so closely and directly affected by [your] act that [you] ought reasonably to have them in contemplation when [you] are directing [your] mind to the acts or omissions which are called in question.’

In the absence of an established legal norm or a recognised ground of justification, wrongfulness is assessed according to the criterion of reasonableness,¹² which may be expressed in various ways: the legal convictions of the community,¹³ the prevailing conceptions in a particular community at a given time,¹⁴ or the *boni mores* of the community.¹⁵ The defendant's act or omission must incite not only moral indignation, but the legal convictions of the community must demand that the harm suffered by the plaintiff be made good by the defendant.¹⁶

In determining whether the defendant should be held liable, various factors have to be balanced in order to decide whether the legal convictions of the community favour liability or not.¹⁷ Relevant factors include the nature and extent of the foreseeable or foreseen loss; the possible value to society of the harmful conduct; the costs of preventing the harm; the probable success of preventative measures; the nature of the relationship between the parties; the defendant's motive and knowledge of his/her wrongful conduct; economic considerations;

¹¹ [1932] AC 562 at 580.

¹² *Simon's Town Municipality v Dews and Another* 1993 (1) SA 191 (A) 196F; Van der Walt and Midgley 69; Neethling, Potgieter and Visser 33-34. Van der Walt and Midgley 71 further note that the test is objective and viewed from the point of view of the reasonable bystander.

¹³ *Minister van Polisie v Ewels* 1975 (3) SA 590 (A) 597A-B; *BOE Bank Ltd v Ries* 2002 (2) SA 39 (SCA) 46l; *Van Eeden v Minister of Safety and Security* 2003 (1) SA 389 (SCA) para [10]; Van der Walt and Midgley 71.

¹⁴ *Cape Town Municipality v Bakkerud* 2000 (3) SA 1049 (SCA) para [14]; *Ries v Boland Bank PKS Ltd* 2000 (4) SA 955 (C) 968G-H.

¹⁵ *Universiteit van Pretoria v Tommie Meyer Films (Edms) Bpk* 1977 (4) SA 376 (T) 387B-C; *Financial Mail (Pty) Ltd v Sage Holding Ltd* 1993 (2) SA 451 (A) 462F-G; *McMurray v HL & H (Pty) Ltd* 2000 (4) SA 887 (N) 904I-905B.

¹⁶ *Ibid.*

¹⁷ *Administrateur, Transvaal v Van der Merwe* 1994 (4) SA 347 (A) 361H-J; *Moses v Minister of Safety and Security* 2000 (3) SA 106 (C) 114B-D; Neethling, Potgieter and Visser 35; Van der Walt and Midgley 71.

comparative experiences; ethical and moral considerations; other considerations relating to public policy; and the values underpinning the Constitution.^{18 19}

4.1.1 Wrongfulness in psychiatric injury cases

Van der Walt and Midgley note that the issue of wrongfulness is not addressed at all in arguably the two leading South African cases on psychiatric injury, namely *Bester v Commercial Union Versekeringsmaatskappy van SA Bpk*²⁰ and *Barnard v Santam Bpk*,²¹ it seemingly being taken for granted that the infliction of psychiatric injury is *prima facie* wrongful and that wrongfulness will be addressed only if the defendant specifically raises a defence against it.²² In *Barnard* the Court noted that in English law both foreseeability and a duty of care must be present for liability to ensue²³ and later indicated that the position is much the same in our law.²⁴

The preferred approach in cases of psychiatric injury seems to be to lump all the policy factors under the heading of legal causation.²⁵ This approach will be followed in this work, given the system of statutory regulation of occupational psychiatric injury that is suggested and the extensive policy considerations that inform the causation enquiry in the workers' compensation framework.

¹⁸ *Carmichele v Minister of Safety and Security (Centre for Applied Legal Studies Intervening)* 2001 (4) SA 938 (CC) para [43]; *Minister of Safety and Security v Van Duivenboden* 2002 (6) SA 431 (SCA) para [22]; Van der Walt and Midgley 74-75; Neethling, Potgieter and Visser 36-37.

¹⁹ Neethling, Potgieter and Visser 35.

²⁰ 1973 (1) SA 769 (A).

²¹ 1999 (1) SA 202 (SCA).

²² Van der Walt and Midgley 92.

²³ At 212D-E.

²⁴ At 215D.

²⁵ Van der Walt and Midgley 92. See *Barnard* at 215-217; *Road Accident Fund v Sauls* at 61G-63I. Van der Walt and Midgley 92 aver, however, that in principle there should be no objection to discussing policy factors under wrongfulness, thereby bringing the test for liability in cases of psychiatric injury in line with general principles.

4.2 EMPLOYER'S LEGAL DUTY TO EMPLOYEES

An employer's duty to employees may be in the form of a statutory duty, breach of which could be wrongful for delictual purposes; or a common law duty that arises from contract or delict.

4.2.1 Common law duties

Wallis writes that an employer's duty to create a reasonably safe working environment has its common law origins in delict.²⁶ Some employment law writers assume that the duty is a consequence of an implied or residual term of the employment contract,²⁷ Concurrent duties are accepted in our law²⁸ and it is possible that the employer's duty may well be derived from both delict and contract.²⁹

Various jurisdictions recognise that the employer owes the employee a legal duty by virtue of the relationship between the parties.³⁰ This duty is commonly said to be subdivided into three categories, viz the duty to provide a safe system of work (including competent staff and supervision), safe premises and safe plant (including tools).³¹ However, this is not a closed list of categories and does not

²⁶ Wallis 3-16.

²⁷ *Ibid.* See also *Paterson v South African Railways and Harbours* 1931 CPD 289 at 294 and *McDonald v General Motors South Africa (Pty) Ltd* 1973 (1) SA 232 (E) at 234.

²⁸ *Lillicrap, Wassenaar and Partners v Pilkington Brothers (SA)(Pty) Ltd* 1985 (1) SA 475 (A) 496C-H and 502B-F; *Van der Walt and Midgley* 57-58.

²⁹ *Johnstone v Bloomsbury Health Authority* [1992] 1 QB 333 (CA) 340G-H; *Matthews v Kuwait Bechtel Corporation* [1959] 2 QB 75; *Davie v New Merton Board Mills Ltd* [1958] 1 All ER 67; *Wilson and Clyde Coal Co v English* [1937] 3 All ER 628 at 641.

³⁰ Examples from English case law include: *General Cleaning Contractors Ltd v Christmas* [1952] 2 All ER 1110; *Wilson v Tyneside Window Cleaning Co* [1958] 2 QB 110; *Wilson and Clyde Coal Co v English*; *Davie v New Merton Board Mills Ltd*; *Qualcast (Wolverhampton) v Haynes* [1959] 2 All ER 38. Australian case law supporting this proposition include *TNT Australia (Pty) Ltd v Christie and Others* [2003] NSWCA 47 available at <http://www.austlii.edu.au/cgi-bin/disp.pl/au/cases/nsw/NSWCA/2003/47.html?query=TNT%20Australia%20v%20Christie> (accessed 21 June 2007) and *Naidu v Group 4 Securitas Pty Ltd and Another* [2005] NSWSC 618 available at http://www.austlii.edu.au/cgi-bin/disp.pl/au/cases/nsw/supreme_ct/2005/618.html (accessed 21 June 2007). See, also, A Scott 'Safety and the Standard of Care' (1980) 1(3) *ILJ* 161 at 185; Neethling, Potgieter and Visser 62.

³¹ Scott 165.

limit the scope of the duty.³² The duty will no doubt have to adapt to the changing nature of work, with the fast development of the knowledge-based economy.³³

In *Van Deventer v Workmen's Compensation Commissioner*³⁴ Boshoff J defined the employer's duty thus:

'An employer owes a common-law duty to a workman to take reasonable care for his safety. The question arises in each particular case as to what reasonable care is required. This is a question of fact and depends upon the circumstances of each particular case.'

This definition encompasses both an objective assessment as to what care should reasonably be expected of the employer (a policy issue) and whether the employer in a particular case has been negligent (a factual issue)³⁵ In this chapter, the focus is on the policy issue, while negligence is to be addressed in the following chapter.

4.2.1.1 *Duty is non-delegable*

The employer cannot delegate its legal duty to provide a safe and healthy work environment to someone else.³⁶ The personal nature of this duty must not be construed literally though, for an employer in modern times may seldom have direct dealings with employees.³⁷ However, such employer may still be

³² Scott 166.

³³ See 1.3 above.

³⁴ 1962 (4) SA 28 (T) 31B-C.

³⁵ Scott 165; Boberg 35.

³⁶ *Naidu v Group 4 Securitas Pty Ltd and Another* [2005] NSWSC 618 para [188] available at http://www.austlii.edu.au/cgi-bin/disp.pl/au/cases/nsw/supreme_ct/2005/618.html (accessed 21 June 2007); *TNT Australia Pty Ltd v Christie and Others* [2003] NSWCA 47 available at <http://www.austlii.edu.au/cgi-bin/disp.pl/au/cases/nsw/NSWCA/2003/47.html> (accessed 21 June 2007).

³⁷ Scott 184.

vicariously liable for the negligent conduct of persons acting in the course and scope of their employment with that employer.³⁸

4.2.2 Statutory Duties

Various statutes may impose duties, the breach of which may found wrongful conduct for delictual purposes. However, the common-law duty an employer owes an employee to provide a safe and healthy work environment will always remain. The practical effect is that statutory provisions are relevant to determine whether the *boni mores* of society favour delictual compensation or whether alternative remedies are available under the relevant statute or some other law.

In cases involving psychiatric harm to employees, the relevant statutes are likely to be in the sphere of occupational health and safety, as well as anti-discrimination legislation. It is apposite to identify some of the statutes that may find application in such cases.

4.2.2.1 Occupational Health and Safety Act (OHSA)³⁹

The most obvious statute that may be relevant is the Occupational Health and Safety Act, which postulates: 'Every employer shall provide and maintain, as far as is reasonably practicable, a working environment that is safe and without risk to the health of his employees.'⁴⁰ Without derogating from this general duty, the Act sets out specific duties, all of which could be potentially relevant to occupationally related psychiatric injury. These are:

- '(a) [T]he provision and maintenance of systems of work, plant and machinery that, as far as is reasonably practicable, are safe and without risks to health;

³⁸ *Ibid.* For the general principles of vicarious liability, see, *inter alia*, *NK v Minister of Safety & Security* (2005) 26 ILJ 1205 (CC); *Minister of Police v Rabie* 1986 (1) SA 117 (A); *Jordaan v Bloemfontein Transitional Local Authority and Another* 2004 (3) SA 371 (SCA); *Govender v Minister of Safety & Security* 2001 (4) SA 273 (SCA). O' Regan J in *NK v Minister of Safety & Security* at para [24] fn 30 noted that the principle of vicarious liability is not limited to our common law; it is also to be found in customary law rules.

³⁹ Act 85 of 1993.

⁴⁰ Section 8.

- (b) taking such steps as may be reasonably practicable to eliminate or mitigate any hazard or potential hazard to the safety or health of employees...;
- (c) making arrangements for ensuring, as far as is reasonably practicable, the safety and absence of risks to health in connection with the production, processing, use, handling, storage or transport of articles or substances;
- (d) establishing, as far as is reasonably practicable, what hazards to the health or safety of persons are attached to any work which is performed, any article or substance which is produced, processed, used, handled, stored or transported and any plant or machinery which is used in his business, and he shall, as far as is reasonably practicable, further establish what precautionary measures should be taken with respect to such work, article, substance, plant or machinery in order to protect the health and safety of persons, and he shall provide the necessary means to apply such precautionary measures;
- (e) providing such information, instructions, training and supervision as may be necessary to ensure, as far as is reasonably practicable, the health and safety at work of his employees;
- (f) as far as is reasonably practicable, not permitting any employee to do any work or to produce, process, use, handle, store or transport any article or substance or to operate any plant or machinery, unless the precautionary measures, contemplated in paragraphs (b) and (d), or any other precautionary measures which may be prescribed, have been taken;
- (g) taking all the necessary measures to ensure that the requirements of [the] Act are complied with by every person in his employment or on premises under his control where plant or machinery is used;
- (h) enforcing such measures as may be necessary in the interest of health and safety;
- (i) ensuring that work is performed and that plant or machinery is used under the general supervision of a person trained to understand the hazards associated with it and who have the authority to ensure that precautionary measures taken by the employer are implemented; and
- (j) causing all employees to be informed regarding the scope of their authority as contemplated in section 37(1)(b).'

The OHSA also imposes a duty on employers to, as far as is reasonably practicable,

'cause every employee to be made conversant with the hazards to his health and safety attached to any work which he has to perform, any

article or substance which he has to produce, process, use, handle, store or transport and any plant or machinery which he is required or permitted to use, as well as with the precautionary measures which should be taken and observed with respect to those hazards’.

The duties in the OHSA mostly relate to the protection of employees against physical harm, a fact that is hardly surprising given the traditional focus on ‘physical’ injuries in a production economy.⁴¹ Most of the employer’s duties in the OHSA are qualified by the phrase ‘as far as is reasonably practicable’. These qualifications accord with the common law requirement that wrongfulness must be assessed with reference to general reasonableness.⁴²

4.2.2.2 *Basic Conditions of Employment Act (BCEA)*⁴³

This Act places an obligation on the employer to regulate the working time of each employee with due regard to the provisions of any Act concerning occupational health and safety, the health and safety of employees, the Code of Good Practice on the Regulation of Working Time and the family responsibilities of employees.⁴⁴

4.2.2.3 *Protected Disclosures Act (PDA)*⁴⁵

This Act provides that no employer may subject any employee to any occupational detriment, as defined in the Act, on account, or partly on account, of having made a protected disclosure (also as defined in the Act).⁴⁶

⁴¹ See 1.2.4 and 2.1.1 above.

⁴² See 4.1.2 above.

⁴³ Act 75 of 1997.

⁴⁴ Section 7. Section 6 of the Act specifies that s 7 applies also to senior managers, sales staff who travel and regulate their own work hours and employees who work less than 24 hours a month for an employer. The other provisions in the part of the Act regulating working hours do not apply to these categories of employees.

⁴⁵ Act 26 of 2000. Section 3 provides that no employer may subject any employee to any occupational detriment, as defined in the Act, on account, or partly on account, of having made a protected disclosure (also as defined in the Act).

⁴⁶ Section 3 read with s 1(i), (vi) and (ix). The relevant definitions in s 1 are as follows:

‘(vi) “occupational detriment”, in relation to the working environment of an employee, means—

(a) being subjected to any disciplinary action;
(b) being dismissed, suspended, demoted, harassed or intimidated;
(c) being transferred against his or her will;

4.2.2.4 *Employment Equity Act (EEA)*⁴⁷

The EEA places a positive obligation on every employer 'to promote equal opportunity in the workplace by eliminating unfair discrimination in any employment policy or practice'.⁴⁸

(d) being refused transfer or promotion;
(e) being subjected to a term or condition of employment or retirement which is altered or kept altered to his or her disadvantage;
(f) being refused a reference, or being provided with an adverse reference, from his or her employer;
(g) being denied appointment to any employment, profession or office;
(h) being threatened with any of the actions referred to paragraphs (a) to (g) above;
(i) being otherwise adversely affected in respect of his or her employment, profession or office, including employment opportunities and work security;

'(ix) "*protected disclosure*" means a *disclosure* made to-

(a) a legal adviser in accordance with section 5;
(b) an employer in accordance with section 6;
(c) a member of Cabinet or of the Executive Council of a province in accordance with section 7;
(d) a person or body in accordance with section 8; or
(e) any other person or body in accordance with section 9, but does not include a *disclosure*—

(i) in respect of which the employee concerned commits an offence by making that *disclosure*; or

(ii) made by a legal adviser to whom the information concerned was disclosed in the course of obtaining legal advice in accordance with section 5;

(i) "*disclosure*" means any disclosure of information regarding any conduct of an employer, or an employee of that employer, made by any employee who has reason to believe that the information concerned shows or tends to show one or more of the following:

(a) That a criminal offence has been committed, is being committed or is likely to be committed;

(b) that a person has failed, is failing or is likely to fail to comply with any legal obligation to which that person is subject;

(c) that a miscarriage of justice has occurred, is occurring or is likely to occur;

(d) that the health or safety of an individual has been, is being or is likely to be endangered;

(e) that the environment has been, is being or is likely to be damaged;

(f) unfair discrimination as contemplated in the Promotion of Equality and Prevention of Unfair Discrimination Act, 2000 (Act No. 4 of 2000); or

(g) that any matter referred to in paragraphs (a) to (f) has been, is being or is likely to be deliberately concealed;

⁴⁷ Act 55 of 1998.

⁴⁸ Section 5.

4.2.3 Breach of statutory duties: General principles

Breach of any of the above statutory duties may found a delictual claim for damages for psychiatric injury by an employee.⁴⁹ However, wrongfulness does not lie in the breach of a statutory duty *per se*, but in the fact that reasonableness requires that the plaintiff, in the circumstances, be compensated for the infringement of his/her right.⁵⁰

The nature of and scope of a specific duty will influence the requirements for liability. A duty may be absolute or it may require a reasonable standard of care in the exercise of the duty.⁵¹ Also, even if a breach of a statutory duty is wrongful, it may still not satisfy the other requirements for liability, most notably fault.⁵²

McKerron sets out the requirements that a plaintiff must prove for wrongfulness to be constituted:⁵³ the relevant statutory measure(s) must provide the plaintiff with a private law remedy; the plaintiff is a person for whose benefit and protection the statutory duty was imposed; the nature of and manner in which the harm occurred are such that it was contemplated by the enactment; the

⁴⁹ Midgley is of the view that the enquiry as to whether breach of a statutory duty or the negligent exercise of a statutory power will entitle a specific claimant to a civil remedy is one relating to standing, because such claimant in essence has to prove that s/he 'has a direct interest in the matter and not merely the interest which all citizens have'. See Van der Walt and Midgley 104. For an example where this issue was dealt with as one of standing, see *Bedfordview Town Council and Strydom R Another v Mansyn Seven (Pty) Ltd and Others* 1989 (4) SA 599 (W).

⁵⁰ *Steenkamp NO v Provincial Tender Board, Eastern Cape* 2007 (3) SA 121 (CC) para [40]; *Olitzki Property Holdings v State Tender Board and Another* 2001 (3) SA 1247 (SCA) para [12]; Van der Walt and Midgley 105-106.

⁵¹ Van der Walt and Midgley 106. In *Lascon Properties (Pty) Ltd v Wadeville Investment Co (Pty) Ltd* 1997 (4) SA 578 (W) 583E, for instance, the Court stated that although the relevant enactment did impose a legal duty, it did not imply a standard of care.

⁵² Van der Walt and Midgley 106; Neethling, Potgieter and Visser 69 fn 230.

⁵³ McKerron 257; Neethling, Potgieter and Visser 69-70. Jansen JA in *Da Silva and Another v Coutinho* 1971 (3) SA 123 (A) 144B-D expressed doubt as to whether the requirements postulated by McKerron are wholly accurate: 'These requirements ... are based mainly on English authorities, and reference to textbooks dealing with the law of tort in England shows that they are clearly derived from that system. It may well be questioned whether the reception of these principles into our system is as complete as appears to be assumed, thus displacing to some extent principles of negligence and remoteness basic to our law of delict. However, it is unnecessary to decide this, a fundamental question which has not been argued.'

defendant was in breach of the statutory provision; and there was a causal nexus between the transgression of the statutory provision and the harm.

The Constitutional Court in *Steenkamp NO v Provincial Tender Board, Eastern Cape*⁵⁴ set out factors that will influence the wrongfulness inquiry where breach of a statutory duty or the negligent exercise of a statutory function is at issue:

‘Our Courts ... and courts in other common-law jurisdictions readily recognise that factors that go to wrongfulness would include whether the operative statute anticipates, directly or by inference, compensation of damages for the aggrieved party; whether there are alternative remedies such as an interdict, review or appeal; whether the object of the statutory scheme is mainly to protect individuals or advance public good; whether the statutory power conferred grants the public functionary a discretion in decision-making; whether an imposition of liability for damages is likely to have a 'chilling effect' on performance of administrative or statutory function; whether the party bearing the loss is

⁵⁴ At para [42]. Footnote 44 of the judgment gives a useful summary of comparative law on the issue: ‘The case law in the United Kingdom suggests that the question of whether a statutory duty can give rise to a private cause of action is a question of construction of the statute. It requires an examination of the policy of the statute in order to decide whether it was intended to confer a right to compensation for breach. In this regard see, for example, *Gorringer v Calderdale* [2004] 2 All ER 326 (HL) in paras 23 and 71; *Stovin v Wise (Norfolk County Council, Third Party)* [1996] AC 923 (HL) at 952; *X and Others (minors) v Bedfordshire County Council*; *M (a minor) v Newham London Borough Council*; *E (a minor) v Dorset County Council and Other Appeals* [1995] 2 AC 633 at 739; *R v Deputy Governor of Parkhurst Prison, Ex parte Hague* [1992] 1 AC 58 (HL) at 159, 168-71.

In Australia it has been held that, in determining whether a public authority has breached a common-law duty by failing to exercise a statutory power, it is essential to examine the words and policy of the legislation. See, for example, *Pyrenees Shire Council v Day* (1998) 192 CLR 330 at 377 [126] per Gummow J; *Crimmins v Stevedoring Industry Finance Committee* (1999) 200 CLR 1 ([1999] HCA 59) at 19 [27] per Gaudron J, 59 [160] per Gummow J, 72 [203] per Kirby J; *Brodie v Singleton Shire Council* (2001) 206 CLR 512 ([2001] HCA 29) at 540 [56] per Gaudron J, McHugh J and Gummow J. In some cases the High Court has found that the statutory provisions at issue indicate that the Legislature intended to cover the field and exclude all common-law duties of care. In this respect, see *Crimmins* 18-19 [26-27] per Gaudron J. For a similar result in New Zealand, see *South Pacific Manufacturing Co Ltd v New Zealand Security Consultants & Investigations Ltd* [1992] 2 NZLR 282 (CA) at 297-298 per Cooke P.

The Supreme Court of Canada has held that in order to determine whether a duty of care will be owed by a statutory authority the words of the empowering statute must be examined to determine, *inter alia*, whether the statutory powers at issue have produced a decision that was in the 'policy' or 'operational' spheres. Decisions on whether or not to exercise a statutory power reside in the policy realm (and are thus immune from liability in tort), whereas, once the decision to exercise a statutory power is made, the manner in which it is exercised may give rise to liability in negligence. See, for example, *City of Kamloops v Nielsen* [1984] 2 SCR 2 at 11-13; *Just v British Columbia* [1989] 2 SCR 1228 at 1239-45; *Brown v British Columbia (Minister of Transportation and Highways)* [1994] 1 SCR 420.’

the author of its misfortune; whether the harm that ensued was foreseeable. It should be kept in mind that in the determination of wrongfulness foreseeability of harm, although ordinarily a standard for negligence, is not irrelevant. The ultimate question is whether on a conspectus of all relevant facts and considerations, public policy and public interest favour holding the conduct unlawful and susceptible to a remedy in damages.'

4.2.3.1 Private law remedy

In *Callinicos v Burman*⁵⁵ the Court recognised that breach of a statutory duty may found a claim in delict, subject to the qualification that 'such a *prima facie* right of action must, however, yield to the intention of the Legislature as reflected in the statute ... the question is in every case one as to the intention of the Legislature in creating the duty'.⁵⁶

The intention of the legislature is to be gleaned from a consideration of the statute as whole: the nature of the powers conferred, the nature of the duties involved in their exercise, the prescribed procedures their exercise, the channels for redress by aggrieved persons and the legislature's objective in conferring these powers.⁵⁷ If the language of the statute makes it clear that the party complaining of or affected by the non-compliance with a statutory obligation is confined to a particular remedy, such party is restricted to that remedy.⁵⁸ However, difficulties arise where a statute provides for a penalty for breach of a particular duty, but is silent on whether a civil remedy for its breach was intended

⁵⁵ 1963 (1) SA 489 (A).

⁵⁶ At 497H.

⁵⁷ *Knop v Johannesburg City Council* 1995 (2) SA 1 (A) 28C-D; Van der Walt and Midgley 104. An application of this exercise is found in *Lascon Properties (Pty) Ltd v Wadeville Investment Co (Pty) Ltd* at 583E-F: 'The regulation does not impose a standard of care but imposes a duty in absolute terms. In my view, it must be inferred from such imposition of a duty that those who have suffered as a consequence of a failure to comply with such duty should be entitled to compensation therefor. The regulation clearly was intended to place both the duty to prevent the escape of noxious water arising from mining operations and the risk of damage caused by such water on the persons responsible for and benefiting from the mining operation. Accordingly, it seems to me to be the proper inference that the Legislature intended to provide a civil remedy for damage caused by a breach of the regulation extending beyond a mere interdict.'

⁵⁸ At 498A.

or not.⁵⁹ The mere fact that certain duties are reinforced by criminal sanctions does not mean that the legislature necessarily intended to limit the complainant to that remedy.⁶⁰ Similarly, the fact that a statute prescribes a special remedy, does not necessarily exclude a civil remedy.⁶¹

4.2.3.2 *Claimant one of the persons for whose benefit duty was enacted*

The claimant will be a person for whose benefit a duty was imposed in at least two possible ways:⁶² The first instance is where the legislature has imposed a duty for the benefit of a particular group of persons and the plaintiff is a member of such group.⁶³ The claimant need not prove that s/he has suffered loss, because such loss will be presumed by the Court.⁶⁴ The second instance occurs where a duty has been imposed in the public interest, however, the plaintiff must then prove that '[s/he] has suffered patrimonial damage' as a result of the breach of the statutory duty.⁶⁵ In practice, courts are reticent to grant a civil remedy where the statute was enacted in the public interest and not to protect individual interests.⁶⁶

4.2.3.3 *Nature and manner of harm contemplated by enactment*

The plaintiff has to prove that the nature of the harm and the manner of its occurrence were within the contemplation of the legislature when the statute was enacted. The factual matrix of the English case of *Gorris v Scott*⁶⁷ is illustrative of this requirement and appears in a questionnaire set by the European Centre

⁵⁹ *Da Silva and Another v Coutinho* at 149D.

⁶⁰ At 136A.

⁶¹ *Coetzee v Fick* 1926 TPD 213 at 216; *Callinicos v Burman* 1963 (1) SA 489 (A) 498A.

⁶² *Bedfordview Town Council and Strydom R Another v Mansyn Seven (Pty) Ltd and Others* at 602A-B.

⁶³ *Patz v Greene & Co* 1907 TS 427; *Lascon Properties (Pty) Ltd v Wadeville Investment Co (Pty) Ltd* at 583B-D.

⁶⁴ *Patz v Greene* at 433; *Bedfordview Town Council and Strydom R Another v Mansyn Seven (Pty) Ltd and Others* at 601E-I; Neethling, Potgieter and Visser 69 fn 236.

⁶⁵ *Ibid.*

⁶⁶ *Hall v Edward Snell & Co Ltd*; *Woolfson v Simpson Bros & Co Ltd* 1940 NPD 314; *Ellis v Vickerman* 1954 (3) SA 1001 (C); *Knop v Johannesburg City Council* at 31.

⁶⁷ (1874) LR 9 Ex as cited in Van der Walt and Midgley 108.

of Tort and Insurance Law:⁶⁸ A statute requires a sea carrier to keep animals in pens to prevent the spread of disease. While P's animals are being carried on deck without pens they are swept overboard and drown. Neethling states that, in terms of South African law, there was probably no wrongfulness because the statute did not contemplate the harm and the manner in which it occurred.⁶⁹ The purpose of the statutory provisions was not to avoid the drowning of animals, but to prevent the spread of contagious diseases among animals.⁷⁰

4.2.3.4 *Defendant in breach of statutory duty*

In *Da Silva and Another v Coutinho*⁷¹ the Court stated that the determination of whether the respondent's conduct in that cases was in breach of the statutory duty depended on whether his conduct had been 'wanting in the application of that care, in the exercise of his duty, which the Act envisaged'.

4.2.3.5 *Causal nexus between transgression of the statutory provision and harm suffered*

In *Jordaan v Smith*⁷² this causation requirement was stated as being in the form of the *conditio sine qua non* test. This obviously relates to factual causation, but the exact determination of legal causation is still uncertain.⁷³ At the very least this requirement means that even though a defendant has acted unlawfully, there has to be an indication that the transgression has caused the plaintiff harm.⁷⁴

⁶⁸ J Spier (ed) *Unification of Tort Law: Causation* (2000) 4.

⁶⁹ Spier 98.

⁷⁰ Van der Walt and Midgley 105.

⁷¹ 1971 (3) SA 123 (A).

⁷² 1915 EDL 166.

⁷³ *Da Silva and Another v Coutinho* 147G-H; Van der Walt and Midgley 107.

⁷⁴ *Bophuthatswana Transport Holdings (Edms) Bpk v Matthysen Busvervoer (Edms) Bpk* 1996 (2) SA 166 (A) 174F-G and 175H-I.

4.2.4 Possible application of breach of statutory duties in workplace psychiatric harm sphere

Could breach of any of the abovementioned statutes give rise to a successful claim for compensation for psychiatric harm suffered in the course and scope of employment? Let us assume that the plaintiffs in cases of occupational psychiatric harm are persons for whose benefit the duties were enacted, that there is a causal nexus between the breach of the duty and the harm suffered, that psychiatric harm is contemplated by each of the abovementioned statutes and that the employer was in breach of one of these duties. The question that has to be answered in each instance is thus whether the legislature intended for there to be a common law cause of action in the event of a duty being breached.

4.2.4.1 Occupational Health and Safety Act

The OHSA, similar to the BCEA, provides for various health and safety representatives,⁷⁵ health and safety committees⁷⁶ and inspectors,⁷⁷ appointed by the Minister of Labour, to monitor compliance with its provisions. It also creates various offences where certain sections in the Act are contravened.⁷⁸ The Act is silent on whether a civil remedy is available to those who suffer harm as a result of the breach of a duty in the Act. It may be that most injuries or diseases that result from contraventions of the OHSA will constitute occupational injuries or occupational diseases for purposes of COIDA. In those cases a civil remedy is precluded.

However, there may be cases in which a breach of a duty in the OHSA will not necessarily entitle an employee to compensation under COIDA. An employer's

⁷⁵ Section 17. Section 18 sets out the functions of these health and safety representatives.

⁷⁶ Section 19. Section 20 sets out the functions of these health and safety committees.

⁷⁷ Section 28. Section 29 sets out the functions of these inspectors, while section 30 sets out their special powers.

⁷⁸ Section 38.

legal duty to employees is independent of COIDA,⁷⁹ therefore a delictual claim should still be available. There does not appear to be any other alternative remedies.

4.2.4.2 *Basic Conditions of Employment Act*

The BCEA aims to advance economic development and social justice by giving effect to and regulating the right to fair labour practices, as enshrined in the Constitution.⁸⁰ It seeks to achieve this goal by establishing and enforcing basic conditions of employment, regulating the variation of basic conditions of employment and giving effect to South Africa's obligations as a member of the ILO.⁸¹

The BCEA provides for the appointment of labour inspectors to promote, monitor and enforce compliance with an employment law.⁸² These labour inspectors may secure written undertakings from employers to comply with the provisions of the Act.⁸³ They may also issue compliance orders where they have reasonable grounds to believe that an employer is not complying with the provisions of the Act.⁸⁴

The Act creates offences relating to the use of child labour,⁸⁵ disclosure of confidential information secured as a result of the provisions of the Act⁸⁶ and obstruction, undue influence and fraud.⁸⁷

⁷⁹ Scott 185 writes that the legal duty is owed to an employee while s/he is in employment; the question whether or not that employee was injured in the course and scope of employment is irrelevant to establishing a such duty.

⁸⁰ Section 2.

⁸¹ *Ibid.*

⁸² Section 63. The functions of these labour inspectors are set out in s 64, while they are granted powers of entry and the power to question and inspect by s 65 and s 66 respectively.

⁸³ Section 68.

⁸⁴ Section 69.

⁸⁵ Sections 43, 44, 46 and 48.

⁸⁶ Section 90.

⁸⁷ Section 92.

The Act further provides that the Labour Court has, subject to the Constitution and unless otherwise provided for in the Act, exclusive jurisdiction in respect of all matters in terms of the Act, except in respect of the abovementioned offences.⁸⁸ The Labour Court has concurrent jurisdiction with the civil courts to hear and determine matters relating to contracts of employment, regardless of whether or not a basic condition of employment constitutes a term of those contracts.⁸⁹ That Court is granted the power to, *inter alia*, make any determination it considers reasonable on any matter concerning a contract of employment, which determination may include an order for specific performance, an award of damages or an award of compensation.⁹⁰

It is apparent that the BCEA delineates its scope in relation to the duties it imposes and the provisions of contracts of employment. It is silent on compensation or damages that are unrelated to the contract of employment. It thus appears as if breach of, for example, regulations relating to working hours lead to psychiatric harm, an employee may still have an action in terms of the law of delict.

4.2.4.3 *Employment Equity Act*

The EEA was enacted to promote equality and democracy, eliminate unfair discrimination in employment, ensure the implementation of employment equity to redress the effects of past discrimination, achieve a diverse workforce, promote economic development and an efficient workforce and give effect to South Africa's obligations as a member of the ILO.⁹¹ Clearly the Act has a broader societal purpose, but it also seeks to protect the rights of individuals in the sphere of employment.

⁸⁸ Section 77(1).

⁸⁹ Section 77(3).

⁹⁰ Section 77A(e).

⁹¹ Preamble.

The EEA provides for the monitoring and enforcement of the Act by employees, trade unions and labour inspectors.⁹² It also provides for written undertakings to comply and the issuing of compliance orders.⁹³ The Labour Court has exclusive jurisdiction to determine any dispute about the interpretation or application of the Act, except if the Act provides otherwise.⁹⁴ The Act also grants the Labour Court the power to award compensation and damages in appropriate circumstances.⁹⁵ If an employee has been unfairly discriminated against, the employer may be ordered to pay compensation and/or damages to such employee.⁹⁶ Furthermore, in certain circumstances, a contravention of the Act by an employee will be deemed to have been perpetrated by his/her employer unless the employer proves that it did all that was reasonably practical to prevent the said contravention.⁹⁷

It is arguable that given the specific provisions in the EEA regarding the payment of compensation and/or damages, the legislature did not intend that there should be a delictual action available to those who suffer psychiatric harm as a result of unfair discrimination or any other contravention of the Act. However, since there is no cap on the amount of compensation or damages that may be awarded in terms of the Act, the action available to the employee is very much in the nature of a delictual claim.⁹⁸ It may therefore be argued that claimants may choose to utilise a common-law action instead of an action based on the statute, since the choice of action will make little difference in practice.

⁹² Sections 34-35.

⁹³ Sections 36-37.

⁹⁴ Section 49.

⁹⁵ Section 50(1)(d) and (e); *Ntsabo v Real Securities CC* [2004] 1 BLLR 58 (LC).

⁹⁶ Section 50(2)(a) and (b).

⁹⁷ Section 60. See, also, R Le Roux 'Section 60 of the Employment Equity Act 1998: Will a Comparative Approach Shake this Joker Out of the Pack?' (2006) 27(3) *Obiter* 1.

⁹⁸ J Grogan 'Damages for sexual harassment' (2004) February *Employment Law Journal* LexisNexis database.

4.2.4.4 *Protected Disclosures Act*

The PDA's overarching objectives are:⁹⁹

- (a) to provide for procedures in terms of which employees may disclose information regarding illegal or irregular conduct by their employers or fellow-employees; and
- (b) to provide for the protection of those persons who make protected disclosures.

The PDA provides for remedies, stating that any employee who has been subjected to occupational detriment may approach any court, including the Labour Court, for appropriate relief or may pursue any other process allowed or prescribed by law.¹⁰⁰ The wide discretion given to employees in their choice of remedy is probably indicative of the fact that the PDA does not preclude a remedy in terms of the law of delict.

⁹⁹ Preamble. Section 2 sets out the full objectives and the applications of the Act:

'2. (1) The objects of this Act are—

(a) to protect an *employee*, whether in the private or the public sector, from being subjected to an *occupational detriment* on account of having made a *protected disclosure*;

(b) to provide for certain remedies in connection with any *occupational detriment* suffered on account of having made a *protected disclosure*; and

(c) to provide for procedures in terms of which an *employee* can, in a responsible manner, disclose information regarding *improprieties* by his or her *employer*,

(2) *This Act* applies to any *protected disclosure* made after the date on which this section comes into operation, irrespective of whether or not the *impropriety* concerned has occurred before or after the said date.

(3) Any provision in a contract of employment or other agreement between an *employer* and an *employee* is void in so far as it—

(a) purports to exclude any provision of *this Act*, including an agreement to refrain from instituting or continuing any proceedings under *this Act* or any proceedings for breach of contract; or

(b) (i) purports to preclude the *employee*; or

(ii) has the effect of discouraging the *employee*,
from making a protected disclosure.'

¹⁰⁰ Section 4(1).

4.3 POSSIBLE FACTUAL SCENARIOS INVOLVING OCCUPATIONAL PSYCHIATRIC HARM

Now that the general principles relating to wrongfulness and breach of statutory duty have been set out, it is apposite to cite some factual examples where the application of these principles may become contentious in cases involving occupational psychiatric harm and to examine how these issues may be resolved.

4.3.1 Workloads and work pressures

In most of the cases dealing with workplace psychiatric injury,¹⁰¹ the injuries resulted from the heavy workloads or work pressures. What does the law expect of an employer in these circumstances? So often we hear the saying 'time is money' and commercial organisations are under increasing pressure to become more productive. On the other hand, declining socio-economic conditions create massive challenges for the public service (i.e. the public health care system, educational services, police services, social services, etc.)¹⁰² and it is imperative, in this context, that the standards expected of employers are not too high. As Hale LJ put it in *Hatton v Sutherland*, 'We are not here concerned with

¹⁰¹ *Walker v Northumberland County Council* [1995] All ER 737 (QBD); *Hatton v Sutherland* [2002] 2 All ER 1; *Barber v Somerset County Council* [2004] 2 All ER 385 (HL), *McDonald or Cross and Another v Highlands and Islands Enterprise and Another* available at [http://www.bailii.org/cgi-bin/markup.cgi?doc=scot/cases/ScotCS/2000/307.html&query=title%20\(%20"mcdonald%20or%20Ocross"%20\)](http://www.bailii.org/cgi-bin/markup.cgi?doc=scot/cases/ScotCS/2000/307.html&query=title%20(%20) (accessed 23 January 2006); *Hartman v South Essex Mental Health and Community Care NHS Trust* [2005] EWCA Civ 6 available at <http://www.bailii.org/cgi-bin/markup.cgi?doc=ew/cases/EWCA/Civ/2005/6.html&query=%20hartman> (accessed 22 January 2006); *Young v The Post Office* [2002] EWCA Civ 661 available at [http://www.bailii.org/cgi-bin/markup.cgi?doc=ew/cases/EWCA/Civ/2002/661.html&query=title\(young%20near%20post%20Office\)](http://www.bailii.org/cgi-bin/markup.cgi?doc=ew/cases/EWCA/Civ/2002/661.html&query=title(young%20near%20post%20Office)) (accessed 22 January 2006); *Koehler v Cerebos (Australia) Ltd* [2005] HCA 15; *Bonser v RJB Mining* [2003] EWCA Civ 1296 and *Sinnott v FJ Trousers Pty Ltd* [2000] VSC 124 available at <http://www.austlii.edu.au/cgi-bin/sinodisp/au/cases/vic/VSC/2000/124.html> (accessed 22 January 2006) were all cases in which excessive workload/work pressure was alleged.

¹⁰² A Sprince 'Recovering Damages for Occupational Stress: *Walker v Northumberland County Council* (1995) XVII *Liverpool Law Review* 189 at 193 writes: 'The sudden escalation of competition and pressure has created a highly charged atmosphere in which employees work longer hours, take on more tasks and responsibilities and suffer more stress as a result.'

comparatively simple things such as gloves, goggles, earmuffs or non-slip flooring.¹⁰³

When excessive work pressure is at issue, many solutions may be theoretically viable:¹⁰⁴ allowing the employee a sabbatical, transferring him or her to another department or to allocate different work, redistribution of duties, extra assistance for a period, arranging treatment or counseling, etc. In the United States, the Equal Employment Opportunity Commission¹⁰⁵ has found the following accommodations made by employers to be reasonable: 'modified working schedules involving limited overtime, no night shifts, transfers, or leaves of absence.'¹⁰⁶

4.3.2 Risk Assessments

Do some or all employers have a duty to carry out risk assessments in order to ensure employees' mental health? In *McDonald or Cross and Another v Highlands and Islands Enterprise and Another*¹⁰⁷ the family of the deceased sued the employer because the deceased had committed suicide and the family alleged that it was due to excessive work pressures. The employee had been off work for two months due to occupational stress and his family submitted, *inter alia*, that the employer, knowing that stress at work could be harmful and that the deceased had suffered from it, should have carried out an assessment of the risks to which he was exposed at work.

¹⁰³ *Hatton v Sutherland* at para [33].

¹⁰⁴ *Ibid.*

¹⁰⁵ The Equal Opportunity Employment Commission is a US Federal Agency that was established in 1964 to deal with discrimination in employment. 'It can bring suit on behalf of alleged victims of discrimination against private employers. It also serves as an adjudicatory for claims of discrimination brought against federal agencies.' It is tasked with enforcing Title VII of the Civil Rights Act of 1964, the Equal Pay Act of 1963, the Age Discrimination in Employment Act of 1967, sections 501 and 505 of the Rehabilitation Act of 1973, Titles I and V of the Americans with Disabilities Act (ADA) of 1990 and the Civil Rights Act of 1991. See <http://www.answers.com/topic/equal-employment-opportunity-commission> (accessed 9 February 2006).

¹⁰⁶ S Stefan "'You'd have to be crazy to work here": Worker stress, the abusive workplace and title 1 of the ADA' (1997-1998) 31 *Loyola of Los Angeles Law Review* 795 at 799.

¹⁰⁷ At para [73].

It is instructive to look at the background against which this argument was advanced. At that point, regulation 3 of the Management of Health and Safety at Work Regulations of 1992 provided, *inter alia*:¹⁰⁸

‘(1) Every employer shall make a suitable and sufficient assessment of
—

- (a) the risks to health and safety of his employees to which they are exposed whilst they are at work; and
- (b) ...
for the purpose of identifying the measures he needs to take to comply with the requirements and prohibitions imposed upon him by or under the relevant statutory provisions.’

These regulations, together with the relevant approved code of practice, were according to counsel for the claimants, a guide as to what the common law duty resting on the employer required it to do.¹⁰⁹ This submission was rejected, the Court holding that these regulations and code of practice were not meant to deal with cases of stress at work.¹¹⁰

Counsel for the pursuers’ primary argument was that evidence as to what the practice in industry was, was irrelevant.¹¹¹ A secondary argument was that on the evidence, employers in Scotland in 1993 carried out such risk assessments in accordance with good practice.¹¹² The Court rejected this submission as well, and placed particular reliance on a report¹¹³ that highlighted the difficulties of carrying out risk assessments in relation to mental health. The relevant passages in the report read:¹¹⁴

¹⁰⁸ *Ibid.*

¹⁰⁹ At para [74].

¹¹⁰ At para [74] read with paras [99]-[102].

¹¹¹ *Ibid.*

¹¹² *Ibid.*

¹¹³ At para [75].

¹¹⁴ *Ibid.*

- i. "Further research and development is required to translate ... information [identifying psychosocial hazards which pose a threat to employees] into a form which can be used in auditing and analysis of workplaces and organisations" (page 51, paragraph 3.5);
- ii. "... only a minority of organizations appear to be directly and deliberately addressing the management of occupational stress" (page 63, paragraph 5.1);
- iii. "In summary, it must be concluded that the jury is still out on stress management training: ... Stressor reduction/hazard control is, for several reasons the most promising area for interventions, although again, there is not yet sufficient information to be confident about the nature and extent of their effectiveness" (page 73, paragraph 5.4);
- iv. "In particular, there is a lack of an adequate framework for good practice in addressing stress-related problems in the workplace" (page 75, paragraph 6.0);
- v. "The formulation of policy at both national and organisational level is an important early step in developing stress management interventions" (page 79, paragraph 6.2);
- vi. "It is argued that the framework that has been made explicit in the Management of Health & Safety at Work Regulations 1992 ... can be extended from the more tangible hazards of work to encompass psychosocial hazards, stress and stress management" (page 87, paragraph 6.8);
- vii. "The first conclusion must be that knowledge is not yet sufficient to support comprehensive and detailed legislative controls. ... It should now be possible to formulate general principles for stress management and related hazard control ... Policies could usefully focus on [*inter alia*] ... the provision of guidance on good practice in the process of intervention, and reasonably practicable intervention strategies ..." (pages 89-90, paragraph 7.0).'

The Court went on to hold¹¹⁵ that it is not the employer's duty to look for difficulties in the employee's working conditions that were not identified at the time as being relevant to his illness.¹¹⁶ A reasonable employer would ask the worker what he or she perceives to be the pressures that cause illness, and would then assess these factors and take steps to improve the situation.

¹¹⁵ At para [79].

¹¹⁶ Van Zyl 28 notes that persons experiencing normal levels of stress should not, from a cost-effective perspective, unnecessarily be exposed to stress management courses.

What can one glean from the approach taken by the Scottish Court? In South Africa, s 8(2)(d) of the Occupational Health and Safety Act¹¹⁷ requires employers to establish,

‘as far as is reasonably practicable, what hazards to the health or safety of persons are attached to any work which is performed ... and he shall, as far as is reasonably practicable, further establish what precautionary measures should be taken with respect to such work ... in order to protect the health and safety of persons, and he shall provide the necessary means to apply such cautionary measures’.

Does this provision apply to stress at work? It is submitted that for similar reasons to those given in *McDonald or Cross and Another v Highlands and Islands Enterprise and Another*, these provisions relate only to ‘physical’ injuries and diseases.¹¹⁸ As stated in the report cited, provisions relating to ‘physical’ risks may be a useful starting point in addressing stress management at work, but at present there is insufficient information to deal effectively with stress at work. Expecting employers to carry out risk assessments is, it is submitted, going beyond what the reasonable employer in present-day South Africa would do.

What about inherently stressful occupations such as police work, social work, teaching, health work, etc? Shouldn’t there be an obligation to carry out risk assessments? The duty to take reasonable steps to prevent psychiatric harm is owed to each employee as an individual, but it is submitted that the resources in many organisations, particularly in the public sector, may not at present allow for individual risk assessments. Van Zyl, for example, cites some of the methods of

¹¹⁷ Act 85 of 1993.

¹¹⁸ Sections 43 and 44 provide for the promulgation of regulations and the incorporation of health and safety standards within those regulations. Apart from regulations dealing with Post-Traumatic Stress Disorder (for example GN 936 in GG 25132 of 27 June 2003 deals with compensation for PTSD), there is no indication that the Act is meant to apply to mental illness arising from gradual stressors at work.

measuring stress, but mentions some of the disadvantages of each method; all the disadvantages noted invariably have cost and/or time implications.¹¹⁹

However, there may be a duty to create awareness and create an environment of empathy and understanding. For example, the South African Police Service, in its bi-monthly journals distributed amongst staff, has articles on recognising the signs of stress, together with self-evaluation questionnaires,¹²⁰ and suicide prevention.¹²¹ It is submitted that in inherently stressful occupations there may be a duty to train and prepare individuals for difficult situations they are likely to experience, a topic that will enjoy attention below. The problem in these situations is not necessarily the assessment of risk because the nature of the work inevitably carries risk¹²² – the solution lies in affording people adequate training and guidance.

In *State of New South Wales v Seedsman*¹²³ a young, female police officer working in the Child Mistreatment Unit had suffered PTSD after being exposed, in the course of her employment, to crimes committed against children.¹²⁴ The appeal Court agreed with the trial judge's finding that the appellant had failed to provide a safe system of work.¹²⁵ The Court accepted extensive evidence

¹¹⁹ Van Zyl 29. Physiological measurements are often expensive and complicated, observation and behavioural indicators should be utilized in tandem with other methods, interviews with employees are time consuming, etc.

¹²⁰ SAPS Journal May/June 2005 available at http://www.saps.gov.za/doc_pubs/publications/journal/mayjun05/signs_of_stress.htm (accessed 1 February 2006).

¹²¹ SAPS Journal February/March 2005 available at http://www.saps.gov.za/docs_pubs/publications/journal/febmch05/suicide.htm (accessed 1 February 2006). Van Zyl *op cit* 30 writes that self-evaluation questionnaires can be applied easily and are cost-effective because they can be used with a whole group of individuals simultaneously. However, there is a danger that people may deny their symptoms or the questionnaire itself may be ambiguous.

¹²² In *State of New South Wales v Seedsman* [2000] NSWCA 119 at para [68] the Court cited an article given to social workers involved in child protection, particularly where the author stated: 'I believe that anyone who becomes involved with the problem of child abuse is "at risk" – the risk is, of being caught up in an abusing system where the worker is battered and responds by battering. This I call the "battered professional syndrome".'

¹²³ *State of New South Wales v Seedsman* [2000] NSWCA 119.

¹²⁴ At para [1].

¹²⁵ At para [82].

relating to the police department's knowledge of stress within its ranks and their refusal to deal with the issue.¹²⁶ Also, an expert witness, one Dr Adams, testified regarding what could be expected of an employer of police at the relevant time:

'This included, as his Honour accepted, the need for a period of training, including training on counselling techniques; regular case management and debriefing sessions and other forms of support; a system of early identification of symptoms of stress or "burnout" or incipient "burnout" and appropriate support systems and relief mechanisms. Dr Adams indicated that, from his training as a counsellor in the early 1960's, recommendations of this general character "would be considered as fairly basic and common knowledge in counselling work or any related service dealing with persons, particularly children, in stressed, social/interpersonal circumstances". He emphasised that the relevant knowledge and skills were available in the early 1980's and earlier.'¹²⁷

4.2.3 Harassment or bullying

Black's Law Dictionary defines 'harassment' as

'[w]ords, conduct or action (usu. repeated or persistent) that, being directed at a specific person, annoys, alarms, or causes substantial emotional distress in that person and serves no legitimate purpose.'¹²⁸

The EEA provides that the harassment of an employee constitutes unfair discrimination and prohibits it on any one, or a combination of grounds, namely 'race, gender, sex, pregnancy, marital status, family responsibility, ethnic or social origin, colour, sexual orientation, age, disability, religion, HIV status, conscience, belief, political opinion, culture, language and birth'.¹²⁹ It is submitted that employers must be particularly sensitive to workplace dynamics in the context of the aforementioned prohibited grounds.

Harassment or bullying may also take on forms that are unrelated to any of the aforementioned grounds, for example it may occur because an employee is a

¹²⁶ At para [81].

¹²⁷ At para [66].

¹²⁸ BA Garner (ed) *Black's Law Dictionary* 8ed (2004) 733.

¹²⁹ Section 6(3) read with s 6(1).

whistleblower. In *Waters v Commissioner for the Metropolis*,¹³⁰ for instance, the complainant, a police officer, had been subjected to 'protracted harassment and victimisation by other officers because she had broken a workplace taboo in making a complaint against a male colleague'.

4.2.3.1 Sexual harassment

In South Africa, the National Economic Development and Labour Council,¹³¹ in terms of the Labour Relations Act, has adopted a Code of Good Practice in Relation to Sexual Harassment.¹³² The code defines sexual harassment as 'unwanted conduct of a sexual nature' and goes on to state that 'the unwanted nature of sexual harassment distinguishes it from behaviour that is welcome and

¹³⁰ [2000] UKHL 50 available at <http://www.worldlii.org/cgi-worldlii/disp.pl/uk/cases/UKHL/2000/50.html?query=waters+v+commissioner+for+the+metropolis> (accessed 17 January 2006).

¹³¹ This council was established in terms of the National Economic, Development and Labour Council Act 35 of 1994. Its stated objectives, as enumerated in s 5(1), are to:

- '(a) strive to promote the goals of economic growth, participation in economic decision-making and social equity;
- (b) seek to reach consensus and conclude agreements on matters pertaining to social and economic policy;
- (c) consider all proposed labour legislation relating to labour market policy before it is introduced in Parliament;
- (d) consider all significant changes to social and economic policy before it is implemented or introduced in Parliament;
- (e) encourage and promote the formulation of co-ordinated policy on social and economic matters.'

¹³² GN 1367 of 1998 available at <http://www.labour.gov.za> (accessed 14 February 2006). Section 203 of the Act reads:

- '(1) *NEDLAC* may –
- (a) prepare and issue codes of good practice; and
- (b) change or replace any code of good practice.
- (2) Any code of good practice, or any change to or replacement of a code of good practice, must be published in the Government Gazette.
- (3) Any person interpreting or applying this Act must take into account any relevant code of good practice.
- (4) A Code of Good Practice issued in terms of this section may provide that the code must be taken into account in applying or interpreting any employment law.'

mutual'.¹³³ It goes on to differentiate between sexual attention and sexual harassment¹³⁴ and outlines some forms of sexual harassment.¹³⁵

Employers are expected to 'create and maintain a working environment in which the dignity of employees is respected'.¹³⁶ They should establish a climate in which victims of sexual harassment feel that their grievances will be addressed with the necessary gravity and that they won't suffer reprisals.¹³⁷ Employers should also issue policy statements, expressing concern and a commitment to dealing with the problem,¹³⁸ develop clear procedures to deal with sexual harassment 'in a sensitive, efficient and effective way',¹³⁹ and may resolve the problem informally or by means of a formal procedure.¹⁴⁰ The code suggests that as far as is practicable, employers should appoint a person outside line management whom victims of sexual harassment may approach for confidential advice.¹⁴¹

Confidentiality must be ensured¹⁴² and where an employee's existing sick leave has been exhausted, the employer should consider granting 'additional sick leave in cases of serious sexual harassment where the employee on medical advice requires trauma counseling'.¹⁴³ Employers and employer organisations should

¹³³ Clause 3(1). The Code of Good Practice regarding sexual harassment as adopted by the European Commission in 1991 defines sexual harassment as 'unwanted conduct of a sexual nature, or other conduct based on sex affecting the dignity of women and men at work'. See J Hemming (ed) *Discrimination in the Workplace: A Practical Guide* (1997) 163.

¹³⁴ Clause 3(2).

¹³⁵ Clause 4.

¹³⁶ Clause 5(1).

¹³⁷ *Ibid.*

¹³⁸ Clause 6.

¹³⁹ Clause 7.

¹⁴⁰ Clause 7(2), (3) and (4).

¹⁴¹ Clause 7(1). The clause further provides that such a person:

- 'a. could include persons employed by the company to perform inter alia such a function, a trade union representative or co-employee, or outside professionals;
- b. should have the appropriate skills and experience or be properly trained and given adequate resources; and
- c. could be required to have counseling and relevant labour relations skills and be able to provide support and advice on a confidential basis.'

¹⁴² Clause 8.

¹⁴³ Clause 9.

also address the issue of sexual harassment in employees' orientation, education and training programmes.¹⁴⁴

There are various scenarios in which sexual harassment may become an issue and therefore various legal remedies that are available to those who institute such claims.¹⁴⁵ All these scenarios will not be extensively exhausted in this work; instead only those claims where psychiatric harm suffered by the victim of harassment is not merely incidental to another labour-law dispute, will be noted.

Employees who are victims of sexual harassment may utilise the provisions in the EEA, as the plaintiff did in *Ntsabo v Real Security CC*.¹⁴⁶ She was awarded general damages for *contumelia*, humiliation, impairment of dignity and *injuria*.¹⁴⁷ She was also awarded damages in respect of the costs of future psychological treatment she would need as a result of the sexual harassment. Victims of sexual (or other forms of) harassment may also choose to institute a claim under the Aquilian action, provided they satisfy the requirements of such an action.¹⁴⁸

¹⁴⁴ Clause 10(2).

¹⁴⁵ A Rycroft 'Compensating the harassed employee' (2004) available at <http://www.lexisnexis.co.za/ServicesProducts/presentations/17th/AlanRycroft.doc> (accessed 17 September 2007) identifies six possible scenarios, viz;

- (a) an existing employee who has been harassed and who claims that the employer's failure to take disciplinary action against the harasser constitutes an unfair labour practice in terms of s 186 (2) of the Labour Relations Act 66 of 1995;
- (b) an existing employee who has been harassed and then claims that the employer's conduct constitutes a violated his/her constitutional right to fair labour practices; (see, in this regard, *Piliso v Old Mutual Life Assurance Co (SA) Ltd and Others* (2007) 28 ILJ 897 (LC))
- (c) an existing employee who has been harassed and who claims that the employer's failure to take disciplinary action against the harasser constitutes unfair discrimination in terms of s 6(3) of the Employment Equity Act 55 of 1998;
- (d) a former employee who claims constructive dismissal in terms of s 186(e) of the LRA as a result of sexual harassment;
- (e) a former employee who was harassed and claims unfair discrimination in terms of the EEA; and
- (f) a former employee who was sexually harassed and proceeds in terms of the general law of delict.

¹⁴⁶ [2004] 1 BLLR 58 (LC).

¹⁴⁷ At 101.

¹⁴⁸ See *Grobler v Naspers Bpk en 'n Ander* 2004 (4) SA 220 (C); *Media 24 Ltd and Another v Grobler* 2005 (6) SA 328 (SCA).

4.3 THE INTERFACE BETWEEN THE EMPLOYER'S DUTY AND CONTRACTS OF EMPLOYMENT

It was stated above that the duty an employer owes an employee may arise from the contract entered into between the parties, or from the common law of delict. It is therefore possible that an employee who has suffered occupational psychiatric harm may sue for damages in terms of contract or in terms of delict, thus a concurrence of actions is possible. In principle, our law does not prohibit such a situation.¹⁴⁹ However, if a claim is framed in terms of the law of delict, it must be shown that the defendant infringed a right that the plaintiff had independently of the contract.¹⁵⁰

Let us assume that an employee has entered into a contract of employment with an employer. Their respective rights and obligations are set out in that contract, but the employee may also have other rights that have accrued to him/her independently of the contract or as a result of an implied term of the contract, including rights relating to occupational health and safety.¹⁵¹ However, an interesting situation is created if there is tension between the employer and employee's respective contractual undertakings and the employer's legal duty to ensure the health and safety of employees.

The employee has a duty to perform his/her functions, while the employer has a duty to take reasonable care not to injure the employee's health. These duties exist side by side, but it is their interaction that causes difficulties. An illustration of these difficulties is to be found in *Johnstone v Bloomsbury Health Authority*.¹⁵² A junior doctor's contract provided that he would work for 40 hours per week and be available, on call, for up to 48 hours a week on average.¹⁵³ The plaintiff

¹⁴⁹ *Lillicrap, Wassenaar and Partners v Pilkington Brothers (SA) (Pty) Ltd* 496C-H.

¹⁵⁰ *Lillicrap, Wassenaar and Partners v Pilkington Brothers (SA) (Pty) Ltd* 499H-I.

¹⁵¹ J Grogan *Workplace Law* 9 ed (2007) 50-51 notes that while the employment contract can be regarded as the founding act of the employment relationship, it is not the sole basis upon which the parties' subsequent rights and obligations are determined. See also Wallis 5-21.

¹⁵² [1992] QB 333.

¹⁵³ At 340E-F.

alleged that he had been required to work very long hours with inadequate sleep. As a result, he suffered from stress, depression, anxiety, exhaustion and he had become suicidal.¹⁵⁴ He further alleged that the defendants ought to have known that it would damage his health if he were to work excessive hours and without proper rest.¹⁵⁵

The defendants argued that if the employer's duty to take reasonable care for the employee's health was an implied term of the contract, it cannot override an express term that the employee is to work a certain number of hours.¹⁵⁶ Even if the employer's duty of care arises in tort, that duty of care cannot override the employee's express obligations.¹⁵⁷ The three judges took differing views as to the interaction between the employee's contractual obligation and the employer's duty not to injure the employee's health.

Stuart-Smith LJ held that despite the fact that Dr Johnstone had agreed to the stated working hours, an employee cannot be held to have agreed to hold an employer immune from the latter's liability for failing to take reasonable care for the safety of the employee.¹⁵⁸ The duty of care is owed to an individual employee and employees have different mental and physical capacities.¹⁵⁹ If the defendants knew or ought to have known that they by requiring the plaintiff to work the hours they did, he would suffer harm to his health, they should not have required him to work longer hours than those he safely could have done.¹⁶⁰

Leggatt LJ had difficulties in accepting this approach. He expressed the view that the rights and obligations of the parties were delimited by the employment

¹⁵⁴ At 341C-D.

¹⁵⁵ At 341A-B.

¹⁵⁶ At 337D.

¹⁵⁷ At 337E.

¹⁵⁸ At 343H-344C. There is authority in South African law for the same proposition: *SAR & H v Cruywagen* 1938 CPD 219 at 225-226; *Oosthuizen v Homegas (Pty) Ltd* 1992 (3) SA 463 (O) 472F-475E; Wallis 3-16.

¹⁵⁹ At 344E.

¹⁶⁰ *Ibid.*

contract. 'The defendants cannot be said by the mere fact of requiring the plaintiff to work no more hours than he had contracted to work, to be in breach of any contractual duty owed to him.'¹⁶¹ Even if the employer's duty was delictual, the duty to take care cannot trump the express terms of the employment contract.¹⁶² If the plaintiff's work was too arduous and he fell ill because of it, it was not because the defendants had breached any duty owed to him.¹⁶³

Browne-Wilkinson VC agreed with Leggatt LJ that the scope of the employer's duty of care fell to be determined by taking into account the express terms of the employment contract.¹⁶⁴ If the contract had imposed an absolute obligation to work the additional 48 hours a week, it would have precluded an argument that the employer was in breach of his implied duty of care for the employee's health.¹⁶⁵ However, the employment contract contained no absolute requirement as to the amount of overtime; the employers had a discretion.¹⁶⁶ There is no reason why they should not be required to exercise that discretion in conformity with the normal implied duty to take reasonable care of the employee's health.¹⁶⁷

This tension between contract and delict, which is equally applicable if one assumes that the employer's duty has its origin in an implied term of the contract, was commented on in *Lillicrap, Wassenaar and Partners v Pilkington Brothers (SA) (Pty) Ltd*.¹⁶⁸

'[T]he Aquilian action does not fit comfortably in a contractual setting When parties enter into such a contract, they normally regulate those features which they consider important for the purpose of the relationship which they are creating. This does not of course mean that the law may not impose additional obligations by way of *naturalia* arising by implication of law, or ... those arising *ex delicto* independently of the

¹⁶¹ At 349C.

¹⁶² *Ibid.*

¹⁶³ At 349D.

¹⁶⁴ At 350F-G.

¹⁶⁵ *Ibid.*

¹⁶⁶ At 350H.

¹⁶⁷ At 351D.

¹⁶⁸ At 500G-I.

contract. However, in general, contracting parties contemplate that their contract should lay down the ambit of their reciprocal rights and obligations. To that end they would define, expressly or tacitly, the nature and quality of the performance required from each party.'

Where excessive workload or work pressure is alleged to have caused a recognised psychiatric illness, the question of what the employment contract expects of the employer and employee respectively, becomes relevant. The inquiry is ultimately still one into the reasonableness or otherwise of the employer's conduct, with due regard to the contractual relationship between the employer and the employee.¹⁶⁹ Issues that may be relevant in determining the reasonableness of the employer's conduct include the size and scope of the employer's operation, its resources, whether it is in the public or private sector, the interests of other employees, and so forth.

Lord Rodger in *Barber v Somerset County Council*¹⁷⁰ emphasised that the reasonableness of the steps taken by the employer had to be assessed within the framework of the employment relationship, the rights and duties of which are determined in part by the contract of employment. He pointed out that Mr Barber, a mathematics teacher, had chosen to accept two positions in the school in order to sustain his level of income and that it was the combined workload of these positions that he found intolerable.¹⁷¹ It was possible for him to give up one of these positions, but there was no evidence as to the effect this would have had on his illness and it would of course have necessitated a reduction in his salary.¹⁷² If he had refused to do this, as he was entitled to do, it could be argued he had to accept the concomitant risk to his mental health.¹⁷³ On the other hand, it could also be argued that the employer was under a duty not to employ him because they were aware that he ran the risk of illness.¹⁷⁴

¹⁶⁹ *Hatton v Sutherland* at para [33].

¹⁷⁰ [2004] 2 All ER 385 (HL).

¹⁷¹ At para [25].

¹⁷² At para [28].

¹⁷³ At para [29].

¹⁷⁴ At para [30].

Furthermore, the duty which the claimant sought to impose on the council to reduce his workload and make it possible for him to continue in both his posts in contractual terms amounted to a change in his job specification. The learned judge had difficulty in accepting that this could easily be done.¹⁷⁵

‘Mr Barber would be at work, drawing his normal pay, but doing less than his contractual duties – the council being obliged to provide him with assistance to top up the deficit. It is easy to see that, in practice, colleagues would often rally round to help a teacher when he returned after being off sick. And they might well do so at other times when they felt that, perhaps because of a family illness, a colleague was going through a difficult patch. But it is a rather different thing to say that the council’s duty of reasonable care to an employee requires them to provide him with assistance for an indefinite period even to the extent of employing a supply teacher so that he can do the amount of work he can cope with, but less than the amount for which he is being paid in terms of his contract. The difficulty of framing an implied term to that effect and reading it into a contract of employment is obvious.’

Similarly, in *Koehler v Cerebos (Australia) Ltd* the High Court of Australia considered the impact the employment contract would have on what modifications the employer could reasonably be expected to make to accommodate employees who were at risk of mental illness. Some of the questions raised were:¹⁷⁶

- Is an employer obliged to employ additional workers to assist an embattled employee?
- If the contract sets out the employee’s tasks, does a reduction in those tasks to stave off psychiatric injury entitle the employer to reduce the employee’s remuneration?
- What must the employer do if the employee refuses a variation in the employment contract?

¹⁷⁵ At para [32].

¹⁷⁶ At para [21].

- Are different issues raised where the contract fixes the employee's duties than when the employee's duties are variable at the instance of the employer or by mutual agreement?
- If an employee is known to be at risk of psychiatric illness, may the employer dismiss him or her instead of continuing to run the risk?
- Would dismissing the employee be in contravention of anti-discrimination legislation?

This work will not attempt to answer these questions *in vacuo*; rather, it is submitted that the circumstances of a particular case will determine what can be reasonably expected of an employer. Issues such as the industry or sector involved, the nature of the employee's work, the resources available to the employer, the level of the employee's post and so forth, must be taken into account in making this assessment. The terms of the employment contract are also relevant in the determination of whether an employer has been negligent, a topic that will be discussed in the next chapter.¹⁷⁷

In principle, an employer is not expected to dismiss an employee¹⁷⁸ who accepts the risk of a breakdown in his/her health, for as Devlin LJ observed in *Withers v Perry Chain Co Ltd*,¹⁷⁹ 'The relationship between employer and employee is not that of schoolmaster and pupil. ... The employee is free to decide for herself what risks she will run....'

4.4 CONCLUSION

This chapter briefly considered the requirements for wrongfulness in a delictual action for damages for occupational psychiatric harm. The legal duty on employers not to injure the employee's health may have its origins in an implied

¹⁷⁷ See 5.7.1.1 below.

¹⁷⁸ See *Koehler v Cerebos (Australia) Ltd* at para [53].

¹⁷⁹ [1961] 3 All ER 676 (CA) 680.

contractual term or in the common law of delict, the latter duty being circumscribed by the *boni mores* of the community.

Various statutory duties exist to safeguard employee's mental health, the most relevant for present purposes being the OHSA, the BCEA, the EEA and the PDA. Whether a breach of these duties may give rise to a finding of wrongfulness in a delictual sense, depends on various factors, the most pertinent being the intention of the legislature in creating the various duties. It was concluded that all the aforementioned statutes do not preclude a civil action if breach of a relevant duty causes the requisite harm and satisfies all the other requirements of the cause of action relied upon.

One of the contentious issues in relation to workplace psychiatric harm is the interaction between the rights and obligations of the employer and employee, as determined by the employment contract, and the duty the employer owes the employee to take reasonable care for his/her health. It may not be reasonable to expect employers to accommodate employees who are incapable of performing work that they have contractually bound themselves to do. On the other hand, employees cannot be taken to have agreed to limit an employer's liability for failing to take reasonable steps to guard their health.

It is submitted that ultimately the inquiry still centres on the reasonableness of the employer's conduct, the provisions of the employment contract being but one of the factors that is relevant. Other factors may include the sector that the parties are working in, the resources available to the employer, the nature of the work the employee's engaged in and the level of the employee's employment.

In principle, an employer is not expected to dismiss an employee who accepts the risk of a mental breakdown, because such an employee is free to decide on the risks s/he is willing to run.

CHAPTER 5

NEGLIGENCE

5.1 INTRODUCTION

This chapter focuses on the general concepts involved in determining negligence and their application in the context of psychiatric injury suffered in the course and scope of employment. It is sometimes difficult to distinguish wrongfulness and negligence.¹ The principal difference is that wrongfulness is assessed *ex post facto* from the view of the reasonable bystander, taking into account the interests of the parties to the case and society at large, while negligence is assessed objectively from the point of view of a person in the position of the defendant with no regard for the interests of the plaintiff or society.² Also, it is generally accepted that wrongfulness is logically anterior to negligence, i.e. if conduct is not deemed wrongful, the negligence enquiry falls away.³

Negligence is relevant to workplace stress claims both in relation to statutory workers' compensation claims for increased compensation due to the employer's negligence⁴ and where common law actions are instituted. While the general principles of negligence postulated in this chapter are extracted from South African case law, the scenarios for negligence in the workplace and the principles

¹ *Local Transitional Council of Delmas and Another v Boshoff* 2005 (5) SA 514 (SCA) paras [18]-[21]; *Gouda Boerdery BK v Transnet* 2005 (5) SA 490 (SCA); *Minister of Safety and Security v Van Duivenboden* 2002 (6) SA 431 (SCA) para [12].

² Van der Walt and Midgley 67.

³ *Mostert v Cape Town City Council* 2001 (1) SA 105 (SCA) para [43]; *Cape Town Municipality v Bakkerud* 2000 (3) SA 1049 (SCA) para [9]; *Administrateur, Transvaal v Van der Merwe* 1994 (4) SA 347 (A) 364G; Van der Walt and Midgley 67; Neethling, Potgieter and Visser 142; Van der Merwe and Olivier 111. But cf *Mkhatswa v Minister of Defence* 2000 (1) SA 1104 (SCA) in which Smalberger JA specifically stated that a determination of negligence 'is the logical starting point to any enquiry into the defendant's liability, for without proof of negligence the plaintiff cannot succeed in his action and considerations of wrongfulness and remoteness (legal causation) will not arise'; *Sea Harvest Corporation (Pty) Ltd v Duncan Dock Cold Storage (Pty) Ltd* 2000 (1) SA 827 (SCA) 837I-838I; A Mukheibir 'The Cart Pulling the Horse – Does the Enquiry as to Wrongfulness Necessarily Precede the Question of Fault?' 2001 *Obiter* 397. It is submitted that the emphasis on negligence in many cases arises because wrongfulness is not contentious at all (see the *Sea Harvest* case at 837H), but it is wrong to assert that as a matter of logic, an enquiry into negligence precedes the determination of wrongfulness.

⁴ See 7.4 below.

postulated in dealing with them are gleaned from English, Australian and Scottish law for the simple reason that apart from *Grobler v Naspers Bpk en 'n Ander*,⁵ South African courts have not dealt with workplace stress claims in the context of the law of delict.

5.2 GENERAL REQUIREMENTS FOR NEGLIGENCE

The traditional test for negligence was authoritatively stated in *Kruger v Coetzee*:

‘For the purposes of liability *culpa* arises if –

- (a) a *diligens paterfamilias* in the position of the defendant –
 - (i) would foresee the reasonable possibility of his conduct injuring another in his person or property and causing him patrimonial loss; and
 - (ii) would take reasonable steps to guard against such occurrence; and
- (b) the defendant failed to take such steps.’⁶

However, one must bear in mind that dividing the ‘test’ into stages is no more than a useful aid; the focus is on the actual standard of conduct, not the formulation of a test.⁷

Since the *Kruger v Coetzee* formulation, three variations on this ‘test’ have emerged.⁸ Firstly, there is a completely abstract approach in which the exact manner and the nature of the harm need not be foreseeable and legal causation is used as the limiting element.⁹ Secondly, a relative approach to negligence is

⁵ 2004 (4) SA 220 (C).

⁶ 1966 (2) SA 428 (A) 430.

⁷ *Sea Harvest Corporation (Pty) Ltd v Duncan Dock Cold Storage (Pty) Ltd* at para [21]; Van der Walt and Midgley 169.

⁸ Van der Walt and Midgley 169.

⁹ *Ibid.* An example of this approach is found in *Groenewald v Groenewald* 1998 (2) SA 1106 (SCA), a case in which the defendant had locked the plaintiff in an office on the third floor of a building. When she tried to escape, she fell and injured herself. Counsel for the defendant argued that the latter must have foreseen ‘harm of the general nature suffered by the plaintiff’ to be at fault (at 1112F-G). Streicher JA (at 1112I-J) rejected this contention and held that negligence is found ‘if a reasonable person in the position of the defendant would have realised that harm to the plaintiff might be caused by [his] conduct, even if the consequences of that conduct would not cause the plaintiff the very harm she actually suffered or harm of that general nature.’ The Court proceeded to address the reasonable foreseeability issue as part of the flexible approach to causation, preferring to use that as a means of limiting liability (at 1114D-H). As was pointed out in *Mukheiber v Raath and Another* 1999 (3) SA 1065 (SCA) 1078G, this

taken, in terms whereof wrongfulness and fault are used for purposes of limitation.¹⁰ Legal causation falls away completely, for, as Boberg states, 'the issue is not one of causation, but one of limitation of liability for consequences already caused.'¹¹

The third variation on the 'test' for negligence is a hybrid of the aforementioned tests, in that a restrictive, relative interpretation of the *Kruger v Coetzee* formulation is adopted, but legal causation is still endorsed.¹² The fact that causation is regarded as necessary, independent element of a delict places South African law in congruence with other modern legal systems and the judgments in *Sea Harvest Corporation (Pty) Ltd v Duncan Dock Cold Storage (Pty) Ltd* and *Mkhatswa v Minister of Defence* have hopefully cleared up any misconceptions as to the position in our law.¹³

abstract approach causes the Court to approach the element of remoteness already armed with a wrongful and negligent act that has caused harm.

¹⁰ Van der Walt and Midgley 69.

¹¹ PQR Boberg *The Law of Delict* (1984) 439. The author continues: '[T]he need to have recourse to remoteness is a self-imposed burden of those who refuse to see that negligence, being a failure to act as a reasonable man would have done in particular circumstances, cannot be divorced from those circumstances and therefore contains all the ingredients for the effective limitation of liability.' Olivier JA in *Mukheiber v Raath and Another* at 1078-1079 adopted Boberg's formulation of the test for negligence. The judge of appeal stated that the abstract and relative approaches differ in 'methodology and approach', but that they would generally give identical results (at 1079D). The issue in dispute was solely whether public policy excluded or limited the liability of a doctor who had negligently told a patient that he had performed a sterilisation procedure on her, as a result of which she had ceased taking contraceptives and had an unplanned child (at 1079E).

¹² Van der Walt and Midgley 69. In the *Sea Harvest* case (at 839J) the Court emphasised that no one theory can be allowed to dictate the result of every case: 'A rigid adherence to what is in reality no more than a formula for determining negligence must open the way to injustice in unusual cases. Whether one adopts a formula which is said to reflect the abstract theory of negligence or some other formula there must always be, I think, a measure of flexibility to accommodate the "grey area" case.' The hybrid approach is favoured by Neethling, Potgieter and Visser (at 173), who aver that legal causation becomes especially important in cases where remote consequences are at issue. Scott (at 365) agrees with this contention, stating that 'it may well be possible to hold that a certain *type* of damage has been reasonably foreseeable (negligence established in terms of the relative approach), but that the defendant is not liable in delict due to the fact that the *specific result* he has caused, cannot be imputed to him, as being too remote....'

¹³ Neethling and Potgieter *Seksuele Teistering* 484.

5.3 STANDARD OF CARE

The conduct of the defendant is measured against that of the reasonable person in the same position as the defendant.¹⁴ The characteristics ascribed to this ideal citizen will influence the assessment as to what the defendant should have foreseen and the steps he or she should have taken (if any) to prevent the harm.¹⁵ It therefore has a central place in the determination of negligence.¹⁶

Neethling, Potgieter and Visser emphasise that the reasonable person serves as the legal personification of what society expects from its members.¹⁷ Thus, in *Weber v Santam Versekeringsmaatskappy*¹⁸ Joubert JA expressed the view that there is no purpose in ascribing 'various anthropomorphic characteristics' to the reasonable person, because in the end all that matters is the 'Court's judgment of what is reasonable, because the Court places itself in the position' of the reasonable person.

The reasonable person is presumed to have a minimum level of knowledge and mental capacity that enables him or her to appreciate the dangerous consequences of certain actions.¹⁹ Everyone's conduct is measured against this standard and no allowance is made for illiteracy, stupidity, ignorance or the like.²⁰ However, if a person professes special knowledge or skill, he or she will be held

¹⁴ Burchell 86; Van der Walt and Midgley 174 write that the reasonable person criterion is 'the embodiment of an external and objective standard of care'.

¹⁵ Van der Walt and Midgley 174.

¹⁶ Neethling, Potgieter and Visser 131. In an oft-cited dictum, Holmes JA in *S v Burger* 1975 (4) SA 877 (A) 879D-E colourfully described the criterion of the reasonable person: 'One does not expect of a *diligens paterfamilias* any extremes such as Solomonic wisdom, prophetic foresight, chameleonic caution, headlong haste, nervous timidity, or the trained reflexes of a racing driver. In short, a *diligens paterfamilias* treads life's pathway with moderation and prudent common sense.' Similarly, in *Herschel v Mrupe* 1954 (3) SA 464 (A) 490F Van den Heever JA described the reasonable person as '... not ... a timorous faintheart always in trepidation lest he or others suffer some injury; on the contrary, he ventures out into the world, engages in affairs and takes reasonable chances. He takes reasonable precautions to protect his person and property and expects others to do likewise.'

¹⁷ Neethling, Potgieter and Visser 132.

¹⁸ 1983 (1) SA 381 (A) 410-411.

¹⁹ Van der Walt and Midgley 174.

²⁰ Neethling, Potgieter and Visser 133.

to the standards required of the reasonable person possessing such knowledge and skill.²¹

The test is an objective one, but the reasonable person must be placed in the same external circumstances as the defendant at the time of the alleged delict.²² Where professional or trade practices are involved, the Court will take into account the usual and recognised practice in that field.²³ However, if that practice is negligent, its widespread recognition will not absolve the defendant from liability.²⁴ Also, a higher standard of care is required when engaging in an intrinsically dangerous occupations or pursuits.²⁵

5.4 REASONABLE FORESEEABILITY OF HARM: GENERAL PRINCIPLES

It is generally accepted that in assessing whether a defendant had been negligent in causing harm, the first element involves determining whether a reasonable person in the position of that defendant would have foreseen harm to others.²⁶

Given the wide variety of scenarios that may occur, there are no hard and fast rules,²⁷ but the following factors may be relevant in establishing whether the defendant should have foreseen harm: the degree of risk, what the extent of the damage would be if the harm did eventuate and the costs or difficulties involved

²¹ JC Macintosh and C Norman-Scoble *Negligence in delict* 4 ed (1958) 24; Van der Walt and Midgley 176; Neethling, Potgieter and Visser 136.

²² Burchell 86; Van der Walt and Midgley 175.

²³ *Colman v Dunbar* 1933 AD 141 at 157.

²⁴ *Ibid.*

²⁵ Macintosh and Norman-Scoble 24. In *Durban City Council v SA Board Mills Ltd* 1961 (3) SA 397 (A) 405H Van Blerk JA agreed with the contention that '... in view of the dangerous characteristic of fire the standard of diligence required of the appellant is a high one. But I wish to stress that it still remains a standard of diligence such as may be expected from a reasonable man under the circumstances, and it is not converted into an absolute duty to insure against damage by fire.'

²⁶ Van der Walt and Midgley 177; Neethling, Potgieter and Visser 126-129.

²⁷ Neethling, Potgieter and Visser 129.

in guarding against the risk.²⁸ These factors may interplay, thus in *Lomagundi Sheetmetal (Pvt) Ltd v Basson*²⁹ the Court held that even though the risk of stover next to a silo being ignited by welding sparks coming from on top of the silo was not very great, the resultant harm would be extensive and was not costly or difficult to guard against.

5.5 REASONABLE FORESEEABILITY IN OCCUPATIONAL PSYCHIATRIC HARM CASES

5.5.1 Inherent difficulties

In *Walker v Northumberland*³⁰ Colman J explained the difficulties inherent in foreseeing psychiatric injury as a result of work pressure. Particularly in the professions, workers have discretion in deciding when and for how long they work, but the character and volume of the work may drive them to breaking point:

‘Given that professional work is intrinsically demanding and stressful, at what point is the employer’s duty to take protective steps engaged? What assumption is he entitled to make about the employee’s resilience, mental toughness and stability of character, given that people of clinically normal personality may have a widely differing ability to absorb stress attributable to their work?’³¹

5.5.2 Foreseeability is assessed in the context of the individual claimant

It is no defence for an employer to state that a person of ordinary mental fortitude would not have cracked under the stress that caused the claimant’s psychiatric injury.³² The test must be applied in the context of what the employer knew or ought to have known about the claimant’s mental fortitude.³³ In *Hatton v Sutherland* the English Court of Appeal formulated the enquiry as follows:

²⁸ *Lomagundi Sheetmetal Engineering (Pvt) Ltd v Basson* 1973 (4) SA 523 (RA) 524H-525A. See also, McKerron 37.

²⁹ 1973 (4) SA 523 (RA); Van der Walt and Midgley 178.

³⁰ [1995] 1 All ER 737 (QB).

³¹ At 749e-g.

³² *Hatton v Sutherland* at 13d.

³³ *Paris v Stepney Borough Council* [1951] AC 367 at 376. See also, *Porteous v National Coal Board* 1967 SLT 117.

‘... whether a harmful reaction to the pressures of the workplace is reasonably foreseeable in the individual employee concerned. Such a reaction will have two components: (1) an injury to health; which (2) is attributable to stress at work.’³⁴

What is envisaged is the assessment of the employee’s personal characteristics and circumstances and their interplay with his/her work demands and work environment at the relevant time. The nature of psychiatric injury is such that it may be more readily foreseeable in a known individual than in the public at large.³⁵

5.5.3 The test is the same for all occupations

The ‘test’ to determine foreseeability is the same for all occupations. There are no jobs that are so intrinsically stressful that psychiatric harm is always foreseeable.³⁶ Similarly, the issue of foreseeability does not have to be related to a specific profession.³⁷ There may be characteristics of a specific job, for instance police work, that raise particular issues, but such peculiarities do ‘not justify an approach which ignores relevant analogies and knowledge derived from other occupations’.³⁸

The nature and extent of the employee’s work are relevant to the standard of care expected of an employer. Where the work is intellectually or emotionally demanding, the employer must be more vigilant than when the workload is not particularly heavy or where an employee does not find his/her job demanding.³⁹ In *Dickson and Another v Creevey*⁴⁰ the Court noted that the work of a leading hand in a drilling crew was not inherently stressful compared to that of, for

³⁴ [2002] 2 All ER 1 (CA) 14b.

³⁵ At para [23].

³⁶ *Hatton v Sutherland* at 14j. *Hartman v South Essex Mental Health and Community Care NHS Trust* [2005] EWCA Civ 6 at para [30] available at <http://www.bailii.org/cgi-bin/markup.cgi?doc=ew/cases/EWCA/Civ/2005/6.html&query=%20hartman> (accessed 22 January 2006).

³⁷ *State of New South Wales v Seedsman* [2000] NSWCA 119 at para [60].

³⁸ At para [62].

³⁹ *Hatton v Sutherland* at 14d.

⁴⁰ [2001] QSC 340 at para [32].

example, the police officer dealing with child sex abuse cases in *State of New South Wales v Seedsman*.

Of further relevance is whether others doing the same work are under harmful levels of stress.⁴¹ If there is no available evidence on that the question then becomes whether the particular employee was exposed to ‘a materially higher’ risk than fellow-employees on the same level or whether circumstances or characteristics peculiar to the plaintiff and that the defendant was or ought to have been aware of, were present.⁴²

5.5.4 Employer is expected to keep abreast of and respond to knowledge about the nature and effects of workplace stress

With workplace stress becoming an ever-increasing problem and with knowledge in this area expanding, employers are required to keep abreast of the latest developments and to implement necessary changes flowing from new knowledge within a reasonable period of time. In *Barber v Somerset County Council*⁴³ Lord Walker seemingly approved of the trial judge’s taking into account a publication by the Health and Safety Executive entitled *Managing Occupational Stress: A Guide for Managers and Teachers in the Schools Sector* in assessing whether senior management at public school should have recognised that the claimant was at risk of suffering a nervous breakdown owing to overwork. The trial judge had stated of the document:⁴⁴

‘[I]t ... highlighted the need to be sensitive to stress in teaching staff. It also highlighted the need to be aware of stress and the need to develop a supportive culture for teachers. The senior management team at East Bridgewater were not aware of this HSE guide nor did they in any sense

⁴¹ In *Walker v Northumberland CC* at 752e Colman J stated: ‘There is no evidence that the council had hitherto encountered mental illness in any other of its area officers or that area officers with heavy workloads or others in middle management in the social services as distinct from fieldworkers were particularly vulnerable to stress-induced mental illness.’

⁴² *Hatton v Sutherland*; *Walker v Northumberland* at 752g; *Dickson and Another v Creevey*; *Koehler v Cerebos (Australia) Ltd* [2005] HCA 15 at para [55].

⁴³ [2004] 2 All ER 385 (HL) 405c-d.

⁴⁴ As quoted by Lord Walker *supra*.

follow its content. Had they done, the crisis which affected the claimant would in all probability have been averted.'

Similarly, in *State of New South Wales v Seedsman*,⁴⁵ the Court took into consideration the knowledge and skills available to the employer at the time of the alleged delict in identifying the psychiatric risks in the relevant employment sphere. In *Hartman v South Essex Mental Health and Community Care NHS Trust*⁴⁶ the Court of Appeal did not express disagreement with the trial judge's assertion that the fact that the employer was 'a Health Authority and not the occupiers of a scrap yard', should have led them to have 'better insight into medical issues'.

5.5.5 Consideration of an employee's right to privacy

An interesting issue that has a bearing on both foreseeability and the steps the employer is expected to take once psychiatric injury is foreseeable, is the extent of the employer's knowledge of the claimant's condition, given an employee's right to privacy. In *Hatton v Sutherland* Hale LJ warned that an employer should have good reason to request an 'employee's permission to obtain further information' from the latter's medical advisors.⁴⁷

In *Hartman v South Essex Mental Health and Community Care NHS Trust*⁴⁸ the claimant had worked for the defendant on an agency basis and was medically assessed before her appointment in a permanent position. Counsel for the plaintiff argued that the employer should have taken into account the results of a pre-employment assessment by its Occupational Health Department (OHD) nine years previously.⁴⁹ Scott Baker LJ rejected this contention on two grounds, the

⁴⁵ *State of New South Wales v Seedsman* at paras [66]-[82].

⁴⁶ At para [29] (para [47] of the quoted text from the Court *a quo's* judgment).

⁴⁷ At para [29].

⁴⁸ At paras [21] and [22].

⁴⁹ At para [32]. The questionnaire that the claimant filled out stipulated that the information obtained was 'for use by the occupational health service only'. Immediately below this was typed 'PERSONAL AND CONFIDENTIAL'. The claimant indicated that she had suffered from high blood pressure, had had an anxiety attack and was on anti-depressants. The nurse had indicated

first being that the employer could not be expected to have access to confidential information given to the OHD⁵⁰ and the second that the information was 'old history'.⁵¹ The learned Lord Justice asserted that had the OHD negligently concluded that the plaintiff was fit for work, the employer may have been vicariously liable for that negligence, but that was not in issue.⁵²

Jinabhai and Ryan write that the occupational health practitioner is under an ethical obligation to ensure that '[m]edical records and specific medical reports' are released 'only with the written permission of workers'.⁵³ Employers can therefore not be held to have foreseen the risk of psychiatric injury if the information needed to reach such a conclusion was not available to the employer. Of course, this does not mean that there may not be circumstances in which there is a legal duty on an OHD to seek an employee's permission to disclose information the employer needs to know if proper safeguards are to be erected to ensure the employee's welfare.⁵⁴

5.5.6 What an employer should glean from an employee's conduct and the surrounding circumstances

What ought the employer to assume from the employee's conduct and the surrounding circumstances in cases of workplace stress? In *Hatton v Sutherland*⁵⁵ the Court postulated general guidelines that are usefully summarised in the headnote:

'The employer was generally entitled to take what he was told by his employee at face value, unless he had good reason to think the

that she had consulted a doctor about the claimant's anxiety problem, but the doctor stated that the claimant should be passed fit for employment since she had seemed to be coping well with her part-time duties.

⁵⁰ At para [33].

⁵¹ At para [36].

⁵² *Ibid.*

⁵³ CC Jinabhai and M Ryan 'Environmental and Occupational Health' in MA Dada and DJ McQuoid-Mason (eds) *Introduction to Medico-Legal Practice* (2001) 126.

⁵⁴ *Hartman* at para [35].

⁵⁵ At 2d.

contrary. He did not generally have to make searching inquiries of the employee or seek permission to make further inquiries of his medical advisors. To trigger a duty to take steps, the indications of impending harm to health arising from stress at work had to be plain enough for any reasonable employer to realise that he should do something about it.'

Psychiatric injury is more readily foreseeable if the employer is putting unreasonable strain on the employee.⁵⁶ However, the Court emphasised the importance of the signs given by the employee.⁵⁷ This principle is easily stated, but considerably more difficult to apply. To illustrate the difficulty courts have experienced in determining what an employer should have read into signs given by the employee, reference will be made to *Walker v Northumberland CC*,⁵⁸ *Hatton v Sutherland*,⁵⁹ *Barber v Somerset County Council*⁶⁰ and *Koehler v Cerebos (Australia) Ltd*.⁶¹

5.5.6.1 *Walker v Northumberland County Council*

In *Walker's* case, the plaintiff, a social worker, had suffered two breakdowns, one in November 1986 and another in September 1987. In relation to the first breakdown, the Court held that it was not reasonably foreseeable that the claimant would suffer injury to his health.⁶² The claimant had written a letter to the director of social services requesting one week's leave and had also complained about the lack of manpower, both at a meeting in August 1986 and in a letter in that same month.⁶³ The Court held that these complaints were in the nature of the claimant not being able to provide 'effective management', particular staffing problems faced by the claimant's department, and that his

⁵⁶ At para [26].

⁵⁷ At 14g.

⁵⁸ [1995] All ER 737 (QBD).

⁵⁹ [2002] 2 All ER 1.

⁶⁰ [2004] 2 All ER 385 (HL).

⁶¹ [2005] HCA 15.

⁶² At 755f.

⁶³ At 752h-753h.

superior, one Mr Davison, could not reasonably have been aware that 'Mr Walker was in real danger of mental illness'.⁶⁴

After his first breakdown, Mr Walker took about four months' leave. Before his return to work in March 1987, he told his superior that he would not be able to cope with the same workload and requested that the area which he was responsible for, be split into two.⁶⁵ This request was turned down, but Mr Davison assured him that he would be assisted by another person for as long as he (Mr Walker) deemed necessary.⁶⁶ This support was not forthcoming;⁶⁷ on the contrary, Mr Walker's workload increased and he suffered another breakdown.⁶⁸ The Court had no qualms in finding that it ought to have been foreseen that the claimant would again succumb to mental illness and that it could threaten his career.⁶⁹

5.5.6.2 *Hatton v Sutherland*

In *Hatton v Sutherland*, only one of the claimants, Mrs Jones, succeeded in her claim, although the Court expressed some hesitation.⁷⁰ She was an administrative assistant and had to work what the Court of Appeal termed 'excessive hours'. She did complain to management, which included a five-page document outlining her objections to being overworked.⁷¹ She did not go off work for health reasons at any time; there was no particular medical event that may have alerted her employers to the risk of psychiatric injury.⁷² Her working hours exceeded the hours stipulated in her employment contract.⁷³ She also made two

⁶⁴ At 753j-754a.

⁶⁵ At 755g.

⁶⁶ At 755h.

⁶⁷ At 756h Colman J stated: '[O]nce Mr Robinson was not fully available to assist Mr Walker, it was quite likely, if not inevitable, that he would again break down.'

⁶⁸ At 756e.

⁶⁹ At 756a and 757b.

⁷⁰ At 24g-h.

⁷¹ At para [62].

⁷² At para [64].

⁷³ At para [61].

written complaints to the effect that her work situation caused problems to her health, but mentioned nothing about psychiatric injury.⁷⁴

5.5.6.3 *Barber v Somerset County Council*

Another of the appeals reported under the name of *Hatton v Sutherland* was that of Mr Barber, a secondary school teacher, who had thereafter appealed to the House of Lords, as reported in *Barber v Somerset County Council*.⁷⁵ The Court of Appeal had found against Mr Barber and had described the factual circumstances thus:⁷⁶

‘Mr Barber had developed depressive symptoms during the autumn 1995 term but told no one at school about these. He felt worse during the spring 1996 term but again told no one at school. He explored the possibility of other jobs or taking early retirement. In May 1996 he had three weeks off work with depression: he was surprised to be told the diagnosis as he had never thought of himself in that way. When he came back he had an informal meeting with the head, Mrs Hayward, and raised his concerns that he was finding things difficult. On 16 July 1996, he saw Mrs Newton, who was more sympathetic. This was very shortly before the end of the summer term. He did not tell either of them about the symptoms of weight loss, lack of sleep and out-of-body experiences which he described in his evidence.’

The Court of Appeal expressed the following views in light of these facts:⁷⁷ The claimant himself did not even regard himself as a candidate for psychiatric illness until he was diagnosed. The first time the school knew of any problem with his health was after his return from sick leave. He told the headmistress only that he was not coping. He made more explicit references to her two deputies, but did not explain the symptoms he was experiencing. All this happened just before the summer holidays, a time at which teachers can relax and recuperate. He was not even able to tell his doctor about his symptoms until a month before the breakdown. In addition, he had not told anybody at school of his difficulties. In

⁷⁴ At para [65].

⁷⁵ [2004] 2 All ER 385 (HL).

⁷⁶ At para [55].

⁷⁷ At para [58].

those circumstances, so the Court held, it was difficult to find a point at which the school acquired a duty to take preventative measures. I

On appeal, the House of Lords overturned the decision of the Court of Appeal. Lord Walker accepted the proposition that a distinction be drawn between ‘what Mr Barber himself thought or felt about his state of health ... and what he communicated about it to his employer’, and that that distinction was of cardinal importance as far as foreseeability was concerned.⁷⁸ The Court accepted the general guidelines postulated in *Hatton v Sutherland*, but reiterated that each case must depend on its own facts.⁷⁹ Lord Walker, in whose judgment the majority concurred, stated that it was a borderline case, but nevertheless went on to find that the Court of Appeal had been wrong in overturning the trial judge’s finding that the employer had breached its duty of care:⁸⁰

‘The Court of Appeal was concerned about the timing of the breach, but for my part I do not think there is much room for doubt about that. The employer’s duty to take some action arose in June and July 1996, when Mr Barber saw separately each member of the school’s senior management team. It continued so long as nothing was done to help Mr Barber. The Court of Appeal evidently considered that Mr Barber was insufficiently forceful in what he said at these interviews, and that he should have described his troubles and his symptoms in much more detail. But he was already suffering from depression, and neither Mrs Hayward nor Mrs Newton was a sympathetic listener. What the Court of Appeal failed to give adequate weight to was the fact that Mr Barber, and experienced and conscientious teacher, had been off work for three weeks ... with no physical ailment or injury. His absence was certified by his doctor to be due to stress and depression. The senior management team should have made inquiries about his problems and see what they could do to ease them, in consultation with officials at the council’s education department, instead of brushing him off unsympathetically (as Mrs Hayward and Mrs Newton did) or sympathizing but simply telling him to prioritise his work (as Mr Gill did).’

⁷⁸ At 400e.

⁷⁹ At 406c.

⁸⁰ At 407e-h.

5.5.6.4 *Koehler v Cerebos (Australia) Ltd*

In *Koehler v Cerebos (Australia) Ltd*⁸¹ the High Court of Australia again expressed agreement with the guidelines in *Hatton v Sutherland*, but took a very strict approach in applying them. The salient facts were:⁸² The employee, who worked as a sales representative, was retrenched, but was re-engaged on a part-time basis as a merchandising representative. The employment contract set out her working hours, starting date, salary structure and car allowance, but made no reference to the duties she was expected to perform. When the employee reported for her first day of work, she was shown a list of the areas she needed to cover and immediately stated that it was impossible to do. She was told to try it for one month and that if she could not cope, she should inform her supervisor, which she did. In the following months she complained orally and in writing on numerous occasions that the area she had to cover was too big, that there were too many stores, too little time and that she was working more than eight-hour days.

She suggested that either she be given an extra day in which to do the work, or that certain stores be removed from her list and given to other representatives. Her suggestions were not taken up and the employer took no other action to alter the work expected of her. Five months later she became ill. Initially it was thought that her ailment was purely physical, but she was later diagnosed with 'fibromyalgia syndrome', a psycho-physical disorder that caused 'pain amplification', as well as a major depressive illness.

The Court found that the employee's agreement to do the work runs contrary to the contention that the employer ought reasonably to have foreseen psychiatric harm as a consequence of her performing those tasks.⁸³ There was no

⁸¹ [2005] HCA 15.

⁸² At paras [7]-[10] and [12]-[13].

⁸³ At para [28]. McHugh, Gummow, Hayne and Heydon JJ went on: 'It runs contrary to that contention because agreement to undertake the work not only evinced a willingness to try but also was not consistent with harbouring, let alone expressing, a fear of danger to health.'

indication, explicit or implicit, that the employee was particularly vulnerable.⁸⁴ Her complaints indicated an industrial relations problem, not danger to her psychiatric well-being.⁸⁵ When the claimant went on sick leave, she and her doctor thought that the injury was physical as opposed to psychiatric.⁸⁶ In those circumstances, so the Court held, a reasonable employer would not have any reason to suspect a risk to the employee's psychiatric health.

5.5.6.5 *Analysis of the cases relating to signs of distress from employee*

Hor, in a commentary on *Koehler v Cerebos (Australia) Ltd*, writes that the approach in that case is decidedly more strict than that adopted in *Hatton v Sutherland* and *Barber v Somerset County Council*, because the latter two cases do not require external signs of distress:

'[U]nder English law, an employer may be held liable for psychiatric injury if an employee has clearly indicated problems with their workload and the employer fails to take appropriate steps in response. The onus is placed on the employee to alert the employer of the employee's inability to cope, not to demonstrate symptoms of psychiatric injury.'⁸⁷

She goes on to state that courts must take into account the nature of psychiatric injury and that workers often will feel inhibited because they want to be perceived as being competent.⁸⁸ Very often the employee him/herself is not even aware of the symptoms of psychiatric harm.⁸⁹

⁸⁴ At para [41]. At para [55] Callinan J stated: 'In my opinion, it was far-fetched and not foreseeable that the appellant, a competent, seemingly well woman would suffer within six months of taking up a part-time position, a disabling psychiatric injury, or indeed, any psychiatric injury by reason of the work that the position entailed.'

⁸⁵ At para [41]. Similarly, in *Walker* at 753f-j the claimant had written a letter to a superior regarding a shortage of staff. The Court held that the letter was 'an entirely coherent and balanced presentation suggesting particular solutions to a particular staffing problem'. Even against the backdrop of inadequate support, the letter had not been an indication that the claimant was at serious risk of mental injury.

⁸⁶ *Ibid.*

⁸⁷ R Hor 'Psychiatric Injury in the Workplace: The Implications of *Koehler v Cerebos*' (2005) 27 *Sydney Law Review* 557 at 563.

⁸⁸ *Ibid.* See also Van Zyl 28 who writes that at work it may not be easy to spot signs of stress because reputations have to be protected. A classic case of a worker not informing the employer of dangers to mental health is *Pratley v Surrey County Council* [2003] EWCA Civ 1067 available at <http://www.bailii.org/cgi->

It is submitted that the high threshold postulated by the courts in all these cases is caused by *what* must be foreseeable, as opposed to the formulation of the foreseeability inquiry. In *Bonser v UK Coal Mining Ltd (named in the case as RJB Mining UK Ltd)*, for example, the Court reiterated that *Hatton* required that a recognisable psychiatric injury be foreseeable – mere stress due to overwork is not sufficient.⁹⁰

Having said that, courts can, and it is submitted, should, in appropriate circumstances hold that an employer should have foreseen that there may be a correlation between an employee's 'exposure to stressful situations' and 'consequences of an adverse character on ... [that employee's] mental well being'.⁹¹ Again, such an inference is influenced by factors such as the nature of

[bin/markup.cgi?doc=ew/cases/EWCA/Civ/2003/1067.html&query=%20pratley](http://www.bailii.org/cgi-bin/markup.cgi?doc=ew/cases/EWCA/Civ/2003/1067.html&query=%20pratley) (accessed 22 January 2006). At para [5] Mance LJ recorded the following facts as found by the trial court: 'Unknown to and unsuspected by Mrs Elrick [the claimant's immediate superior], Miss Pratley deliberately withheld from Mrs Elrick information about the actual pressures and their effect on her. The judge identified two particular respects in which this occurred. First, Miss Pratley worked extraordinary amounts of overtime, which she did not record and in respect of which she did not claim time in lieu. Thus, in the months of May, June and July 1996 she only recorded 7, 5 and 8 hours overtime respectively. But in her evidence she said that by this time she was by mid-1996 "working at least 4 hours overtime each evening, sometimes more, about 6 hours on a Saturday, sometimes in the office and 6 hours on a Sunday at home". All that she said in her witness statement was that she told Mrs Elrick that she was working more than an additional 4 hours a week. But the judge found that she gave no clue to the actual hours that she said in evidence that she was working, and that Mrs Elrick had no idea that she was working anything like those hours. It has not been suggested that Mrs Elrick should have had any such idea. Secondly, when Miss Pratley had 2 weeks sick leave in March 1996, for reasons recorded in her doctor's certificate as "neuralgia", her doctor in fact suggested that her headaches were probably due to stress, but she had asked him not to record that on the certificate. She was, the judge found, concerned to hide from Mrs Elrick both the extent of the overtime she found it necessary to put in and also that her neuralgia could be related to stress at work.'

⁸⁹ *Ibid.*

⁹⁰ [2003] EWCA Civ 1296 available at <http://www.bailii.org/cgi-bin/markup.cgi?doc=ew/cases/EWCA/Civ/2003/1296.html&query=%20bonser> (accessed 22 January 2006). See also, *State of New South Wales v Seedsman* at paras [24]-[26]; *Gillespie v Commonwealth of Australia* (1991) 104 ACTR 1 para [66]. In *Garrett v Camden London BC* [2001] All ER 202 para [63] Simon Brown LJ emphasised the difficulties in foreseeability, causation and deciding on the reasonable standard of care: 'Many, alas, suffer breakdowns and depressive illnesses and a significant proportion could doubtless ascribe some at least of their problems to the strains and stresses of their work situation: be it simply overworking, the tensions of difficult relationships, career prospect worries, fears or feelings of discrimination or harassment, to take just some examples. Unless, however, there was a *real risk of breakdown* which the claimant's employers ought reasonably to have foreseen and which they ought properly to have averted, there can be no liability.'

⁹¹ *Seedsman* at para [34].

the work, the period of time during which the employee was exposed to stressors, the nature of the stressors, etc. As was stated in *Mount Isa Mines Ltd v Pusey*,⁹² sometimes the circumstances dictate that 'no special medical or psychiatric knowledge is required ... to foresee the possibility of injury by way of mental disturbance'.

In *Koehler* the Court made much of the fact that the claimant had contractually bound herself to perform the duties assigned to her, even though the contract was silent on the duties she was to perform and contained merely the bare bones of the employment relationship.⁹³ Hor takes issue with this approach, stating that the principle that the employer may assume that an employee is able to perform what he or she has contracted to do applies only if the employee gives the impression that he or she is coping:⁹⁴

'It appears unpersuasive that the principle should also prevail when the employee has clearly indicated that they are incapable of coping. After all, employers' duties may need to be read in light of the surrounding circumstances. While it is true that Ms Koehler signed the contract, it is also crucial that from the very first time she saw her "territory listing", she strongly objected to the amount of work she had to perform. Her agreement may be more accurately summarised as "reluctant" rather than "willing". Nevertheless, the High Court appears disposed to prioritise the formality of the contractual arrangement whilst allowing employers to close their eyes to an employee's immediate and persistent complaints about the level of the workload. The implication of such an approach is that an employee is expected promptly to refuse to sign a contract if they fear they will not be able to perform. Clearly such an expectation overlooks the reality that many employees may not have the luxury of refusing the opportunity of work.'

The Court insisted that foreseeability must be assessed at the time of entering into the contract of employment, as 'the obligations of the parties are fixed at the time of the contract until and unless they are varied'.⁹⁵ Such an approach, it is

⁹² (1970) 125 CLR 383 (HCA).

⁹³ At para [28].

⁹⁴ Hor 564.

⁹⁵ At para [36].

submitted, overlooks the fact that the onset of a psychiatric injury may be a drawn-out process. Many things could happen in the period between the signing of the agreement and the eventual onset of psychiatric injury. Also, the employment contract is but one of many legal instruments that set out the rights and duties of the parties to the employment relationship.⁹⁶ As discussed in the previous chapter, the employee's contractual duties and the employer's duty to take reasonable care for the employee's safety exist side by side and the former cannot simply be deemed to override the latter or *vice versa*.⁹⁷

However, it is arguable that the length of time between the signing of the agreement and the onset of psychiatric injury should be relevant in the foreseeability inquiry. In *Koehler* only six months had elapsed between the signing of the employment contract and the claimant's mental breakdown; in addition, one must bear in mind that she was working on a part-time basis.⁹⁸ This does not mean that someone working on a part-time basis can never succeed with a claim, but as was noted in *Wheeldon v HSBC Bank Ltd*,⁹⁹ it is only in exceptional circumstances that such a claim will succeed. It is submitted that there should be an inverse relationship between the likelihood of the impending psychiatric injury on the one hand, and the clarity or urgency of the warning signs of the risk of such injury, on the other.

Snell writes that the high threshold set by the courts makes it highly unlikely that employers will be held liable for an employee's first breakdown; it is only when the employee has a breakdown and returns to work that the employer is clearly on notice that psychiatric illness may ensue.¹⁰⁰ This was, of course, the situation

⁹⁶ J Grogan *Workplace Law* 9 ed (2007) 50-51. The influence of the contract of employment on the legal duty owed by the employer was discussed at 4.3 above.

⁹⁷ See 4.3 above.

⁹⁸ At para [55] of the judgment, Callinan J stated: 'In my opinion, it was far-fetched and not foreseeable that the appellant, a competent, seemingly well woman would suffer within six months of taking up a part-time position, a disabling psychiatric injury, or indeed, any psychiatric injury by reason of the work that the position entailed.'

⁹⁹ *Hartman* at para [87].

¹⁰⁰ JM Snell 'Personal Injury Update' (2003) 153 *New Law Journal* 1603.

in *Walker v Northumberland County Council* and *Barber v Somerset County Council*.

Another matter in which the employer was held liable after the return of an employee from stress-related illness, is *Young v The Post Office*.¹⁰¹ The Court of Appeal held that the employers knew that the claimant had been off work for four months due to occupational stress and that it was therefore plainly foreseeable that there might be a recurrence if appropriate measures were not taken.¹⁰²

In *Hatton v Sutherland*, Hale LJ noted some signs of impending mental breakdown in the absence of express warning:

‘Factors to take into account would be frequent or prolonged absences from work which are uncharacteristic for the person concerned; these could be for physical or psychological complaints; but there must also be good reason to think that the underlying cause is occupational stress rather than other factors; this could arise from the nature of the employee’s work or from complaints made about it by the employee or from warnings given by the employee or others around him.’¹⁰³

5.5.7 The significance of a medical certificate after lay-off related to occupational stress

An issue arising out of an employee returning to work after leave necessitated by occupational stress, is what the employer can assume about the employee’s condition upon the latter’s return. In *Hatton v Sutherland*¹⁰⁴ the Court stated that the expiry of a general practitioner’s certificate is not an indication that the employee is now fit to resume his/her duties, nor is it conclusive proof that that employee is no longer at risk of suffering a recurrence:

¹⁰¹ [2002] EWCA Civ 661 available at [http://www.bailii.org/cgi-bin/markup.cgi?doc=ew/cases/EWCA/Civ/2002/661.html&query=title\(young%20near%20post%20office\)](http://www.bailii.org/cgi-bin/markup.cgi?doc=ew/cases/EWCA/Civ/2002/661.html&query=title(young%20near%20post%20office)) (accessed 22 January 2006).

¹⁰² At para [23].

¹⁰³ At para [28].

¹⁰⁴ At para [30].

'A GP's certificate is limited in time but many disorders are not self-limiting and may linger on for some considerable time. Yet an employee who is anxious to return to work, for whatever reason, may not go back to his GP for a further certificate when the current one runs out. Even if the employee is currently fit for work, the earlier time-limited certificate carries no implication that the same or a similar condition will not recur. The point is a rather different one: *an employee who returns to work after a period of sickness without making further disclosure or explanation to his employer is usually implying that he believes himself fit to return to the work which he was doing before.* The employer is usually entitled to take that at face value unless he has other good reasons to think the contrary'

Similarly, in *McDonald or Cross and Another v Highlands and Islands Enterprise and Another*¹⁰⁵ the Outer House of the Scottish Court of Session found that although the employee's doctor's certificate that he was fit to return to work was in no way qualified or conditional, and the employers were not notified that he was fit only for modified duties or a reduced workload, it was not appropriate to take a 'snap-shot' of the employers' knowledge at a particular point in time. Cognisance had to be taken of the employers' knowledge when the employee went off work, how that knowledge was supplemented while he was off work, as well as when he returned to work.¹⁰⁶

5.6 PREVENTABILITY OF HARM: GENERAL PRINCIPLES

The need to take steps to prevent harm from occurring is borne only once the employer did foresee or ought to have foreseen the risk of psychiatric harm.¹⁰⁷ Even if harm were foreseeable, the question remains whether a reasonable employer would have taken steps to guard against the risk.¹⁰⁸ Very often this

¹⁰⁵ Opinion of Lord Macfadyen dated 5 December 2000 available at [http://www.bailii.org/cgi-bin/markup.cgi?doc=scot/cases/ScotCS/2000/307.html&query=title%20\(%20"mcdonald%20or%20Ocross"%20\)](http://www.bailii.org/cgi-bin/markup.cgi?doc=scot/cases/ScotCS/2000/307.html&query=title%20(%20) (accessed 23 January 2006) at para [71].

¹⁰⁶ *Ibid.*

¹⁰⁷ Van der Walt and Midgley 179; Neethling, Potgieter and Visser 142.

¹⁰⁸ Lord Rodger in *Hatton* at para [18] stated: '[E]ven where a court finds that such injury was foreseeable, it must go on to consider what steps the employer could reasonably be expected to take once he was aware of that risk and whether they would have been effective.'

second leg of the negligence test is not afforded adequate consideration.¹⁰⁹ In *Hatton v Sutherland* Hale LJ alluded to the temptation to reach a conclusion that an employer was negligent on the basis that harm was foreseeable and that such harm did occur, without considering what the employer *should* (not could) have done.¹¹⁰

Factors that impact on the steps the employer should have taken are the degree or extent of the risk created by the actor's conduct,¹¹¹ the gravity of the possible consequences if the risk of harm materialises,¹¹² the utility of the actor's conduct¹¹³ and the burden of eliminating the risk of harm.¹¹⁴ ¹¹⁵ These factors interact and the relative weight to be accorded to one or more factors will vary from one case to the next.¹¹⁶

In *Stokes v Guest, Keen and Nettlefold (Bolts and Nuts) Ltd*¹¹⁷ the widow of a tool-setter claimed damages from his employers, alleging that 'his death from scrotal cancer was caused by long exposure in his work to contact with mineral

¹⁰⁹ *Kruger v Coetzee* at 430F; Neethling, Potgieter and Visser 130.

¹¹⁰ At para [33].

¹¹¹ In *Herschel v Mrupe* 1954 (3) SA 464 (A) 477 Schreiner JA stated: '[T]he circumstances may be such that a reasonable man would foresee the possibility of harm but would nevertheless consider that the slightness of the chance that the risk would turn into actual harm, correlated with the probable lack of seriousness if it did, would require no precautionary action on his part ... [and] if ... the harm, if it happened, would probably be trivial the reasonable man might not guard against it even if the chances of its happening were fair or substantial.'

¹¹² In *Ngubane v SA Transport Services* 1991 (1) SA 756 (A) 777 the Court emphasised the degree and nature of the risk, as well as the gravity of the consequences if the risk were to materialize: 'The risk – in fact the near certainty – of serious, if not fatal, injury resulting from starting a train when persons are in the act of leaving or boarding a coach is as obvious as can be.'

¹¹³ Burchell 102 uses the example of an ambulance rushing a patient to hospital in an emergency and how the social value of getting a sick or injured person proper care may justify the assumption of greater risks than would normally be assumed reasonable for other motorists. See also, *Johannesburg City Council v Public Utility Transport Corporation Ltd* 1963 (3) SA 157 (W) in which it was held that the driver of a fire engine may make a much higher assumption of what other traffic will do than an ordinary driver.

¹¹⁴ For example, in *Gordon v Da Mata* 1969 (3) SA 285 (A) the Court held that because it would be relatively simple and inexpensive for a greengrocer to collect cabbage leaves in a receptacle when they were being removed, the latter should have taken precautionary measures and had therefore negligently caused the plaintiff to slip on the cabbage leaves.

¹¹⁵ Van der Walt and Midgley 179; Neethling, Potgieter and Visser 142-143.

¹¹⁶ Van der Walt and Midgley 130; Neethling, Potgieter and Visser 131-133.

¹¹⁷ [1968] 1 WLR 1776 at 1779.

oils and was due to the defendants' common law negligence'. Swanwick J set out the general principles applicable to assessing the employer's conduct:

'[T]he overall test is still the conduct of the reasonable and prudent employer, taking positive thought for the safety of his workers in the light of what he knows or ought to know; where there is a recognised and general practice which has been followed for a substantial period in similar circumstances without mishap, he is entitled to follow it, unless in the light of common sense or newer knowledge it is clearly bad; but, where there is developing knowledge, he must keep reasonably abreast of it and not be too slow to apply it; and where he has in fact greater than average knowledge of the risks, he may be thereby obliged to take more than the average or standard precautions. He must weigh up the risk in terms of the likelihood of injury occurring and the potential consequences if it does; and he must balance against this the probable effectiveness of the precautions that can be taken to meet it and the expense and inconvenience they involve. If he is found to have fallen below the standard to be properly expected of a reasonable and prudent employer in these respects, he is negligent.'¹¹⁸

This same test can be applied in the context of psychiatric harm suffered in the course and scope of employment.¹¹⁹

¹¹⁸ At 1783D-F. See also *Council of the Shire of Wyong v Shirt and Others* (1980) 146 CLR 40 at 47 where the test was stated as being whether a reasonable man in the employer's position would have foreseen a risk of injury to the worker. This formulation does not deal with the preventability of the harm, which is the second strand of the negligence inquiry (see Neethling, Potgieter and Visser 137).

¹¹⁹ Lord Scott in *Barber* argues that Hale LJ's statement of the principles in *Hatton* is to be preferred to that of Swanwick J in *Stokes*. He asserts that Lord Walker's preference for the *Stokes* formulation is misguided, because *Stokes* dealt with the risk of physical injury. Lord Scott was of the view that in cases such as *Barber*, the onus is on the employee to alert the employer of possible dangers to psychiatric health, whereas such an approach is unwarranted in cases of physical injury. It is submitted that there is nothing incongruent between the principles set out in *Stokes* and *Hatton* respectively. *Hatton* is merely the application of the principles set out in *Stokes* to circumstances involving psychiatric injury. It is submitted that Lord Walker did not profess to choose between *Hatton* and *Stokes*, but merely warned that Hale LJ's guidelines did not constitute legal rules and that the general principles were still to be derived from Swanwick J's judgment in *Stokes*. Hale LJ herself quoted the principles enunciated in *Stokes* and proceeded from those, which militates against the argument that she meant to postulate a different set of principles.

5.7 PREVENTABILITY OF OCCUPATIONAL PSYCHIATRIC HARM

Coppins has suggested a three-stage categorization of workplace stress claims, namely 'stress as a result of the pressure of work', 'involvement in traumatic events' and 'mental injury as a result of inadequate employment guidance'.¹²⁰ The steps to be taken by an employer in each of these categories will be addressed *seriatim*, because in certain respects each category raises unique issues.

5.7.1 Excessive workload/work pressure

In each case involving workplace psychiatric injury, the crux of the matter often is how reasonable it is to expect an employer to take measures to guard against the relevant harm, whether in general or in a particular case.¹²¹ Issues that may be relevant include the size and scope of the employer's operation, its resources, whether it is in the public or private sector, the interests of other employees, and so forth.

In *Walker v Northumberland County Council*¹²² the Court held the following in relation to what the County Council should have done after the claimant's first nervous breakdown and upon his return to work:

'Having regard to the reasonably foreseeable size of the risk of repetition of Mr Walker's illness if his duties were not alleviated by effective additional assistance and to the reasonably foreseeable gravity of the mental breakdown which might result if nothing were done, I have come to the conclusion that the standard of care to be expected of a reasonable local authority required that in March 1987 such additional assistance should be provided, if not on a permanent basis, at least until restructuring of the social services had been effected and the workload on Mr Walker thereby permanently reduced. That measure of additional assistance ought to have been provided, notwithstanding that it could be expected to have some disruptive effect on the council's provision of services to the public. When Mr Walker returned from his first illness

¹²⁰ E Coppins 'Psychiatric Injury in Employment' (1996-1999) 8 *Auckland University Law Review* 387 at 389.

¹²¹ *Hatton* at para [33].

¹²² *Walker* at 759j-760c.

the council had to decide whether it was prepared to go on employing him in spite of the fact that he had made it sufficiently clear that he must have effective additional help if he was to continue at Blyth Valley. It chose to continue to employ him, but provided no effective help. In so doing it was, in my judgment, acting unreasonably and therefore in breach of its duty of care.'

5.7.1.1 *Interface between contract of employment and steps employer can take*

The issue of whether the employer is obliged to provide additional support to an employee raises interesting questions regarding the relationship between the parties' employment contract and the steps the employer can reasonably be expected to take to safeguard the employee's mental wellbeing.

In *Barber v Somerset County Council*, a public school mathematics teacher, was also returning from a layoff necessitated by stress. The employer averred that the school at which Mr Barber taught had severe problems, that all its teachers were overworked and that there were no funds to employ additional staff.¹²³ The majority of the Court rejected this argument, Lord Walker holding that '[a]t the very least the senior management team should have taken the initiative in making sympathetic inquiries about Mr Barber when he returned to work, and making some reduction in his workload.'¹²⁴ They should have monitored his condition and if necessary, more drastic action, including the employment of a supply teacher, should have been taken because the cost of a supply teacher would be less than losing a valued and experienced member of staff.¹²⁵

Lord Rodger agreed that the appeal should be allowed and that Mr Barber was entitled to compensation, but expressed some reservations on the extent to which Lord Walker had expected the local authority to cater for Mr Barber's condition. Firstly, he emphasised that the reasonableness of the steps taken by

¹²³ At para [68].

¹²⁴ *Ibid.*

¹²⁵ *Ibid.*

the employer had to be assessed within the framework of the employment relationship, the rights and duties of which are determined in part by the contract of employment.¹²⁶

5.7.1.2 *Provision of counselling service by employer*

Generally speaking, an employer who offers a confidential counselling service is unlikely to be found in breach of the required standard of care, unless the demands placed upon the employee are totally unreasonable.¹²⁷ For example, in *Wheeldon v HSBC Bank Ltd*¹²⁸ employer bank's own OHD had recommended that something be done to ease the employee's workload, but her superiors failed to discuss with her the options available to assist her, for example, training her for another position or moving her to a different branch for a temporary period.

In *McDonald or Cross and Another v Highlands and Islands Enterprise and Another*¹²⁹ an interesting issue emerged when the employer referred the employee, whom they knew to be emotionally fragile, to an advisor on stress management who had no expert skills in diagnosing and treating psychiatric illness. The plaintiff alleged that the employers had been negligent because they 'knew or ought to have known that a vulnerable person such as the deceased would be at risk' of falling into a state of hopelessness if he perceived himself as not responding to treatment from a 'specialist counsellor'.¹³⁰ It was the employer's duty to refer the employee to a real specialist with the requisite qualifications.

¹²⁶ See 4.3 above.

¹²⁷ *Ibid.* In *Best v Staffordshire University*, a case dealt with in the same judgment as that of *Hartman*, the Court stated at para [59] that the university had a counseling service available, but that the claimant, a senior lecturer in computing, had chosen not to make use of it. It was not fatal to the plaintiff's case, but it was a factor that the Court *a quo* should have taken into account in assessing whether the university had taken the requisite steps in order to avert the risk.

¹²⁸ At paras [74], [84] and [87].

¹²⁹ At para [16]. The woman described herself in evidence as 'a freelance health promotion, research and training consultant'.

¹³⁰ At para [93].

The Court held¹³¹ that the employer had no real knowledge of the nature of the employee's illness or its severity. The employee was referred to the consultant for help in coping with the stressful aspects of his work, not to treat him for psychiatric illness. On the evidence, the employer could not reasonably have foreseen that the consultant's intervention would have adverse consequences on the employee's mental health and therefore did not fail in discharging its duty to prevent harm to the employee.

5.7.1.3 *Active steps required by employer*

It is not sufficient for the employer to be sympathetic, while not actively implementing steps to assist an employee who is known to be at risk of psychiatric illness. In *Young v The Post Office*¹³² the employee had been on sick leave for four months after a nervous breakdown. Two of his superiors had visited him during this period and had promised to assess the changes that needed to be made to alleviate some of the burden on him. However, when he returned to work, he was required to play an active part in a rather strenuous workshop and was left to run things because his immediate superior had gone on holiday.¹³³

Counsel for the defendants argued that the claimant had been given permission to come and go as he pleased and did not even have to attend work if he did not feel like it.¹³⁴ However, the Court of Appeal agreed with the findings of the judge *a quo* to the effect that the employer was negligent in failing to adhere to the arrangements made while the claimant was still on sick leave.¹³⁵ Had they done so, they would not have been in breach of the standard of care.

¹³¹ At para [95].

¹³² At para [9].

¹³³ *Ibid.*

¹³⁴ At para [17].

¹³⁵ At para [24].

The claimant must also prove that the steps the employer should have taken would have prevented harm and this is likely to require expert evidence.¹³⁶ After all, a reasonable employer will not take steps that in all probability will be ineffective, but it is submitted that such a judgment will depend on the degree of risk of the harm eventuating, the seriousness of the injury if it were to occur, the utility of the defendant's conduct and the costs involved in taking the precautions.¹³⁷ It is very difficult to predict what effect, if any, the suggested responses by the employer would have had.¹³⁸

5.7.2 Insufficient training or guidance

Coppins writes that the employer's neglect in providing proper 'training, instruction, preparation, and supervision' may result in mental injury.¹³⁹

Scenarios that may occur are:

- '(i) Where the employee has not been warned of the potentially adverse conditions of a new post and has not been provided with a description of the circumstances rendering it difficult to cope;
- (ii) Where there has been no preparation on how to deal with and know what techniques to use in the new environment;
- (iii) Where an employee has been posted to a foreign country and no information on the new culture has been offered; and/or
- (iv) Where the employer has taken few steps to relieve the various stresses faced by the employee or offer any other protection from the immediate employment environment.'¹⁴⁰

In *Gillespie v Commonwealth of Australia*¹⁴¹ the plaintiff, an administrative officer in Australia's Department of Foreign Affairs and Trade, had suffered panic and anxiety attacks after having been posted to Venezuela and having struggled to cope with the difficult working and living conditions in that country. The plaintiff

¹³⁶ *Hatton v Sutherland* at para [34].

¹³⁷ In *Barnard v Santam Bpk* at 213H-I Van Heerden DCJ emphasised the interrelation between the elements of foreseeability and preventability. Just because something was not statistically probable does not necessarily mean that the defendant should not have taken precautions.

¹³⁸ *Ibid.*

¹³⁹ Coppins 392.

¹⁴⁰ *Ibid.*

¹⁴¹ (1991) 104 ACTR 1.

alleged that the defendant had been negligent in posting him to Venezuela without proper warning of the environment he was to enter into; failing to find out how Australia's Foreign Affairs Department's personnel would adapt to life in Caracas; failing to post him back to Australia or to counsel him after he had suffered a panic attack; and failing to increase his living allowance in the face of the high costs of living.¹⁴²

In relation to the preventative steps the defendant should have taken before the plaintiff was posted to Caracas, the Court held:¹⁴³

'Exactly what the plaintiff was supposed to have been told about Venezuelan culture in order to make the preparation adequate, is difficult if not impossible to determine, but I do conclude in his favour that it was known to the defendant that conditions in Caracas were particularly difficult and despite the plaintiff's experience in Buenos Aires and Singapore he was likely to encounter much greater difficulty than any experienced by him in any previous posting. With the information available to the defendant on those matters, I think reasonableness required that the plaintiff be told something of the difficulties. That would have involved a relatively simple and inexpensive briefing, whether oral or written, by another officer, of whom there must have been several, who had knowledge of what was contained in the defendant's files about conditions already experienced in preparing to set up a new post in Caracas.'

The Court, however, found that it was not reasonable to expect the employer to hand over to the plaintiff all the documents in its possession and which related to conditions in Venezuela.¹⁴⁴

As to the second part of the inquiry, namely whether the plaintiff's anxiety state could have been avoided if the employer had adopted the measures suggested by the plaintiff, the Court concluded that the plaintiff would have accepted the

¹⁴² At para [3].

¹⁴³ At para [91].

¹⁴⁴ At para [98]. The Court stated: 'Whilst ... it was unreasonable of the defendant to withhold from the plaintiff the precise message which these documents spell out, namely that Caracas was a new post with difficulties as great, if not greater than any other Australian diplomatic post, it was the failure to convey the message and not the omission to supply the source material which was unreasonable.'

mission even had the employer warned him of the conditions in Caracas, the employer was sensitive after the plaintiff's panic attack and provided treatment and reduced his working hours and in general could not have taken any other steps to prevent the plaintiff's illness.¹⁴⁵ The Court also took into account the utility of the defendant's conduct and noted that the Australian embassy was one of fifty in Caracas and none of those embassies thought about closing down because of the risk of anxiety states to employees.¹⁴⁶

In *State of New South Wales v Seedsman*¹⁴⁷ a young, female police officer working in the Child Mistreatment Unit had suffered PTSD after being exposed, in the course of her employment, to crimes committed against children. The appeal Court agreed with the trial judge's finding that the appellant had failed to provide a safe system of work.¹⁴⁸ The Court accepted extensive evidence relating to the police department's knowledge of stress within its ranks and their refusal to deal with the issue.¹⁴⁹

In *Young v The Post Office* the Court alluded to the fact that the claimant's stress was intensified by the fact that various computer systems relevant to his work were introduced and that he tried to get to grips with the computer, but had failed because he had not received any training.¹⁵⁰

Similarly, in *Sinnott v FJ Trousers Pty Ltd*¹⁵¹ some of the allegations made by the employee, a computer operations supervisor at a factory, were that no adequate assistance or technical support was provided; that the employee was expected to perform electronics work for which he was not trained and which caused him considerable anxiety; and that the employer had failed to instruct or train the employee in the safe and proper performance of his duties. Although the Court

¹⁴⁵ At paras [101]-[104].

¹⁴⁶ At para [105].

¹⁴⁷ At para [1].

¹⁴⁸ At para [82].

¹⁴⁹ At para [81].

¹⁵⁰ At paras [3]-[4].

¹⁵¹ At para [27].

did not deal with the merits in detail, as the case was merely an application to strike out, it accepted that if these allegations were proved, the plaintiff's case was not untenable.¹⁵²

5.7.3 Exposure to traumatic events

This section will deal with both sudden traumatic occurrences such as workplace accidents, as well as more drawn-out traumatic experiences such as harassment (sexual or otherwise) and what has been referred to as a generally abusive workplace.

Some occupations carry a heightened risk of exposure to trauma.¹⁵³ In the United States studies have shown the incidence of PTSD in these occupations to be at anywhere from 10% to 35%, compared with 1% to 8% in the general population.¹⁵⁴ It is submitted that in cases involving these occupations it is particularly important that the Court is not blinded by the horrors of what the claimant has been exposed to, but maintains focus on whether the employer was negligent in either causing the trauma, failing to prevent the trauma, or not providing adequate preparation or assistance to deal with it.

5.7.3.1 Workplace accidents

Claimants generally have a less difficult task in claiming damages for psychiatric injury if they have also suffered a 'physical' injury. Very often these damages will be claimed under the heading of pain and suffering.¹⁵⁵ The more difficult challenge of obtaining damages for 'pure psychiatric' injury can be encountered

¹⁵² At para [143].

¹⁵³ F Slusarz 'Workplace Stress Claims Resulting from September 11th' (2002-2003) 18 *Labor Law* 137 at 142. The occupations the author mentions are the 'police, firefighters, emergency service personnel, hospital staff, health and social services workers, mental health professionals, and rescue workers'.

¹⁵⁴ *Ibid.*

¹⁵⁵ See 3.4.3.1 above.

where, for example, an employee in the course and scope of employment, watches a colleague or any other person being injured or dying.

The English courts, who have been particularly resistant to the extension of liability for psychiatric injury, have allowed recovery for psychiatric injuries suffered by employees. In *Dooley v Cammell Laird & Co Ltd*¹⁵⁶ a crane driver was lowering heavy containers into a ship's hold when one of the ropes holding a container snapped. The claimant suffered psychiatric injury as a result of his fear that he had hurt some of his co-workers who were working below. Donovan J held that the plaintiff was within the range of physical impact or shock and that the employers had breached their duty of care in providing a defective rope.

In many cases of workplace accidents, the negligence of the employer is not disputed or is decided on a basis that is unrelated to psychiatric injury, but the elements of harm, wrongfulness and causation often create difficulties.¹⁵⁷

5.7.3.2 Harassment

The definition of harassment and the forms it may take were mentioned in the previous chapter.¹⁵⁸ Hemming usefully summarises the steps to be taken by an employer where there are allegations of harassment:¹⁵⁹ Details must be obtained from the complainant; it should be noted and the complainant must confirm that the facts are correctly set out in the note; and in serious cases the employer should consider suspending the alleged perpetrator pending an investigation, a right that should preferably be contained in the disciplinary code and/or employment contract.

¹⁵⁶ [1951] Lloyd's Reports 271.

¹⁵⁷ For example, in *Frost v Chief Constable of the South Yorkshire Police* [1997] 1 All ER 540 (CA) 544b-c it was not disputed that the immediate cause of the disaster in which 96 spectators died and many more were seriously injured at an English Premiership football match in Sheffield, was due to the negligence of a senior officer who had opened an outer gate to the grounds without cutting off access to two spectators' pens from which there was no exit. The defendant, however, disputed that he owed a duty of care to the claimants.

¹⁵⁸ See 4.2.3 above.

¹⁵⁹ Hemming 172-173.

The accused should then be asked to provide full details of his/her views on the allegations and should be requested to make a written statement. Usually the name of the accuser must be revealed and this should be explained to him/her. If there are discrepancies in the versions of the accused and the accuser, a disciplinary hearing should be held, where the accused is given adequate opportunity to defend him/herself.

After the hearing has been concluded, an appropriate penalty must be considered, if necessary. In serious cases, the likely outcome could be dismissal, while less serious offences may necessitate the transfer of the harasser or victim to other duties where practicable, or the giving of a written or final written warning. Under the common law, an employer may in certain circumstances be expected to dismiss an employee who poses a threat to the wellbeing of his/her colleagues.¹⁶⁰ It is arguable on analogous grounds that in cases of sufficient gravity, it may be expected of an employer to dismiss a harasser because s/he poses a threat to another employee's physical and/or mental wellbeing.

In *Media 24 Ltd and Another v Grobler*,¹⁶¹ a superior's failure to take action after the complainant had brought her grievances to his attention, was held to constitute negligent conduct. The Court held that it was of no consequence that the complainant had not laid a formal complaint and had not utilised the company's grievance procedure.

¹⁶⁰ In *Hudson v Ridge Manufacturing Co Ltd* [1957] 2 All ER 229 the following was held: '[T]he employers were liable to the plaintiff in damages for breach of their duty at common law to provide competent workmen, because, if a workman, by his habitual conduct, was likely to prove a source of danger to his fellow workmen, it was the employer's duty to remove that source of danger, and the plaintiff's injury was sustained as a result of the employers' failure to take proper steps to put an end to C's horseplay or to remove him from their employment if he persisted in it

¹⁶¹ At paras [71]-[72].

In *Waters v Commissioner for the Metropolis*¹⁶² Lord Slynn of Hadley expounded on the employer's obligation in the following terms:

'If an employer knows that acts being done by employees during their employment may cause physical harm to a particular fellow employee and he does nothing to supervise or prevent such acts, when it is in his power to do so, it is clearly arguable that he may be in breach of his duty to that employee. It seems to me that he may also be in breach of that duty if he can foresee that such acts may happen and if they do, that physical or mental harm may be caused to an individual. I would accept (Evans LJ was prepared to assume without deciding) that if this sort of sexual assault is alleged (whether it happened or not) and the officer persists in making complaints about it, it is arguable that it can be foreseen that some retaliatory steps may be taken against the woman and that she may suffer harm as a result. Even if this is not necessarily foreseeable at the beginning it may become foreseeable or indeed obvious to those in charge at various levels who are carrying out the Commissioner's responsibilities that there is a risk of harm and that some protective steps should be taken.'

Lord Hutton emphasised that not every course of bullying or victimisation will found a case against the employer.¹⁶³ It is only if the employer knows or ought to have known that the harassment is taking place and fails to prevent it, that liability will ensue.¹⁶⁴

It is interesting to note that in terms of the Code of Good Practice on Sexual Harassment,¹⁶⁵ employers are not expected to take disciplinary action against non-employees,¹⁶⁶ yet it is arguable that failure by an employer to protect an employee adequately in circumstances where the employer knew or ought to have known of the risk or incidence of sexual harassment,¹⁶⁷ will saddle the latter with liability, regardless of whether the perpetrator of the harassment is a fellow-employee or a third party. For example, if an employer is aware that a client is

¹⁶² [2000] UKHL 50 available at <http://www.worldlii.org/cgi-worldlii/disp.pl/uk/cases/UKHL/2000/50.html?query=waters+v+commissioner+for+the+metropolis> (accessed 17 January 2007).

¹⁶³ *Supra*.

¹⁶⁴ *Supra*.

¹⁶⁵ GN 1367 of 1998 available at <http://www.labour.gov.za> (accessed 14 February 2006).

¹⁶⁶ Clause 2(2). Clause 2(1) states that although the code is intended to guide employers and employees, the perpetrators and victims of sexual harassment may include job applicants, clients, suppliers, contractors and others having dealings with a business.

¹⁶⁷ *Media 24 Ltd and Another v Grobler* 2005 (6) SA 328 (SCA).

sexually harassing an employee and does nothing about it, the employer is in breach of the reasonable standard of care.¹⁶⁸

Employers are expected to 'create and maintain a working environment in which the dignity of employees is respected'.¹⁶⁹ They should establish a climate in which victims of sexual harassment feel that their grievances will be addressed with the necessary gravity and that they won't suffer reprisals.¹⁷⁰ Employers should also issue policy statements, expressing concern and a commitment to dealing with the problem,¹⁷¹ develop clear procedures to deal with sexual harassment 'in a sensitive, efficient and effective way'¹⁷² and may resolve the problem informally or by means of a formal procedure.¹⁷³ The code suggests that as far as is practicable, employers should appoint a person outside line management whom victims of sexual harassment may approach for confidential advice.¹⁷⁴

Confidentiality must be ensured¹⁷⁵ and where an employee's existing sick leave has been exhausted, the employer should consider granting 'additional sick leave in cases of serious sexual harassment where the employee on medical advice

¹⁶⁸ In *Go Kidz Ltd v Bourdouane* EAT 1110/95 cited in Hemming 172 a company that organised children's parties was liable to a female employee who was sexually harassed by a parent whom she hosted. He had made a series of sexual remarks to the employee, who had complained to one of the directors. The director requested her to go back to the party because none of the other staff members were available. The situation deteriorated to the point of the parent continuing to make offensive remarks, pressing himself against the complainant and pinching and smacking her bottom. The Employment Appeal Tribunal held that once the complaint had been made to the director, he should have taken steps to prevent the employee from being subjected to further harassment.

¹⁶⁹ Clause 5(1).

¹⁷⁰ *Ibid.*

¹⁷¹ Clause 6.

¹⁷² Clause 7.

¹⁷³ Clauses 7(2), (3) and (4).

¹⁷⁴ Clause 7(1). The clause further provides that such a person:

- 'a. could include persons employed by the company to perform inter alia such a function, a trade union representative or co-employee, or outside professionals;
- b. should have the appropriate skills and experience or be properly trained and given adequate resources; and
- c. could be required to have counseling and relevant labour relations skills and be able to provide support and advice on a confidential basis.'

¹⁷⁵ Clause 8.

requires trauma counseling'.¹⁷⁶ Employers and employer organisations should also address the issue of sexual harassment in employees' orientation, education and training programmes.¹⁷⁷

Although the adoption of a policy on sexual harassment points towards an employer being aware of a problem,¹⁷⁸ the presence or absence of such a policy is not necessarily indicative of whether an employer has exercised a reasonable standard of care in a particular situation.¹⁷⁹ Just as Albert Einstein warned that a constitution's strength 'lies entirely in the determination of each citizen to defend it',¹⁸⁰ so a workplace policy on sexual harassment only protects workers if it is pursued with zeal. It must be made known to existing personnel and given to new staff members and it must be updated and implemented after consultation with employees.¹⁸¹

In *Media 24 Ltd and Another v Grobler* the first appellant had had a policy in place,¹⁸² but was still held to be liable based on the negligence of one of its employees.¹⁸³ The respondent had declined to make use of the company's formal grievance procedures, but had reported it to her immediate manager, who had failed to take action. The Court held that this failure was culpable because the manager had had no reason to believe that the complainant was not being sexually harassed; on the contrary, on the evidence he should have realised, even if he had in fact not, that her complaints had some merit. In these circumstances, the manager was negligent. If he had acted in a reasonable manner and had reported it to the chief manager, the latter would have at least

¹⁷⁶ Clause 9.

¹⁷⁷ Clause 10(2).

¹⁷⁸ In *Dickson and Another v Creevey* [2001] QSC 340, a case in which workplace bullying was at issue, the court afforded much consideration to whether it would have been reasonable at that point in time and in that place to expect the employer to have a policy on harassment.

¹⁷⁹ Hemming 170.

¹⁸⁰ Available at <http://www.brainyquote.com/quotes/quotes/a/alberteins148849.html> (accessed 15 February 2006).

¹⁸¹ Hemming 170-171.

¹⁸² At para [27].

¹⁸³ At paras [71]-[72]. Actually, the first appellant agreed to assume liability on behalf of one of its wholly-owned subsidiaries, Nasionale Tydskrifte Ltd (see para [3]).

warned the harasser that his chances of promotion were placed in jeopardy by his conduct and that he could even be dismissed. Such a warning would probably have been of considerable deterrent value and would have prevented the incident which the Court held had caused the injury complained of.

The harassment does not necessarily have to be directed at the victim.¹⁸⁴ The establishment and maintenance of an offensive working environment, such as displaying nude pin-ups and offensive and unwanted office banter, may also be actionable. It is in this context that an organisational ethos that clearly disapproves of sexual harassment is especially important.

5.7.3.3 *Fear of disease*

In some instances employees suffer psychiatric injury as a result of intense fear that their work has exposed them to the risk of contracting serious illnesses such as cancer, or being exposed to HIV/AIDS.

In *Maddalena v CSR Ltd and Another*¹⁸⁵ the appellant had suffered depression and anxiety after being exposed to asbestos in the mine where he worked. His brother and some of his workmates had succumbed to asbestos-related complications and as a result, he had reacted very badly to his mild respiratory illness and lived in what an expert called 'chronic fear'.¹⁸⁶ The Court referred the matter back to the Court *a quo* on the basis that the appellant had suffered a psychiatric injury that had been caused by one of the respondents' negligence in

¹⁸⁴ Hemming 165-166.

¹⁸⁵ [2004] WASCA 231 available at <http://www.worldlii.org/cgi-bin/worldlii/disp.pl/au/cases/wa/WASCA/2004/231.html?query=%5e+maddalena> (accessed 15 February 2006). This decision has since been overturned by the High Court of Australia in *CSR Ltd v Della Maddalena* [2006] HCA 1 available at <http://www.austlii.edu.au/cgi-bin/sinodisp/au/cases/cth/HCA/2006/1.html?query=Maddalena> (accessed 17 September 2007), but the grounds for doing so were procedural in nature and did not alter the statement of principles as discussed here.

¹⁸⁶ At paras [31]-[37].

exposing the appellant to asbestos.¹⁸⁷ Templeman J stated the following in the course of the judgment:¹⁸⁸

‘In my view, the present case has many similarities to *Napolitano v CSR Ltd*, unreported; SCt of WA (Seaman J); Library No 94087; 30 August 1994. In that case, the plaintiff, who had worked at Wittenoom at about the same time as the appellant, developed a psychiatric illness as a result of his exposure to asbestos. This manifested itself as "a major depressive disorder". Although the plaintiff eventually developed mesothelioma, Seaman J awarded him damages for "a very long period of misery and unhappiness and fear" from 6 October 1989 until 23 March 1994, when the plaintiff was diagnosed as suffering from mesothelioma.’

From this passage it is clear that the compensation for psychiatric harm is not awarded in the form of ‘parasitic damage’ incidental to the physical illness, but follows upon ‘pure mental trauma’. Such compensation, under our law, is however only payable if the claimant has proven a recognised psychiatric illness.¹⁸⁹

An area in which fear of disease may become particularly important, is that of occupational transmission of HIV/AIDS. It is important that employers take the necessary precautions to avoid liability, especially in view of the fact that compulsory HIV-testing of employees or applicants for employment is not permitted unless the Labour Court has issued its approval.¹⁹⁰

The Department of Labour has issued a Code of Good Practice on Key Aspects of HIV and Employment¹⁹¹ in terms of the Employment Equity Act.¹⁹² The

¹⁸⁷ At para [165].

¹⁸⁸ At para [167].

¹⁸⁹ See 3.3 above.

¹⁹⁰ Section 7(2) of the Employment Equity Act 55 of 1998; *PFG Building Glass (Pty) Ltd v Chemical Engineering Pulp Paper Wood & Allied Workers Union and Others* (2003) 24 ILJ 974 (LC); *Irvin & Johnson Ltd v Trawler & Line Fishing Union and Others* (2003) 24 ILJ 565 (LC); *Joy Mining Machinery, A Division of Harnischfeger (SA)(Pty) Ltd v National Union of Metalworkers of SA and Others* (2002) 23 ILJ 391 (LC).

¹⁹¹ Regulation No. R1298, RG 6942, 1 December 2005.

¹⁹² Section 54 provides:

‘(1) The Minister may, on the advice of the Commission –
(a) issue any code of good practice; and
(b) change or replace any code of good practice.

Code¹⁹³ states that the risk of HIV-transmission in the workplace is minimal, but that workplace accidents involving bodily fluids do occur. Every workplace must comply with the provisions of the Occupational Health and Safety Act¹⁹⁴ and, including the Regulations on Hazardous Biological Agents,¹⁹⁵ and the Mine Health and Safety Act.¹⁹⁶

Policies on the subject must deal with the risk of exposure in that particular workplace, training, awareness, education on the use of universal infection control measures. Appropriate equipment and materials to protect employees from the risk of contracting HIV must be available, as well as the steps employees should take in the event of occupational accidents.

Netcare, a hospital group, suggests that preventative measures include:¹⁹⁷

‘Disinfecting surfaces or equipment that comes into contact with blood or other bodily fluids using paper towels or disposable cloths plus warm soapy water and disinfectant products; watching out for and disposing of broken glass or sharp edges; using double dustbin bags to hold potentially infectious objects ...; and ensuring that [a] first-aid kit is properly stocked with personal protective equipment (like gloves, eye shields and masks).’

If one applies the general principles of negligence in assessing the employer’s conduct, there has to be a holistic enquiry into the risk of the harm eventuating, the likely extent of the damage if the risk were to eventuate and the costs or difficulties involved in guarding against the risk.¹⁹⁸ It is submitted that, given the fatal consequences of HIV-infection and the relatively inexpensive preventative

(2) Any code of good practice, or any change to, or replacement of, a code of good practice must be published in the *Gazette*.’

¹⁹³ Clause 8 deals with the promotion of a safe workplace.

¹⁹⁴ Act 85 of 1993.

¹⁹⁵ Regulation No. R 1390, RG 7233, 27 December 2001.

¹⁹⁶ Act 29 of 1996.

¹⁹⁷ Available at <http://www.hivcare.netcare.co.za/index.asp?LinkID=5&ContentID=5> (accessed 15 February 2006).

¹⁹⁸ See fn 28 above.

measures postulated above, employers have to be very vigilant in protecting employees from HIV-infected substances.

5.8 CONCLUSION

The determination of negligence has to occur in the context of ordinary human experience. The challenge in relation to psychiatric injury is that the science of psychology/psychiatry is relatively young and often 'ordinary human experience' in that context is difficult, if not impossible, to ascertain.¹⁹⁹ Given the inherent fragility of our emotional states, findings as to foreseeability and preventability in psychiatric injury become all the more important. In some instances employers will not foresee the risk of psychiatric injury, in others it will be too costly or time-consuming to prevent the risk, the employee's contractual obligations have to be considered and there will be cases where no precaution could have prevented the risk from materialising.

It is trite that negligence is factual in nature, so the importance of the factual matrix in each case cannot be overemphasised. However, certain guidelines have been laid down by Commonwealth courts in relation to psychiatric harm resulting with occupational origins and employers would do well to familiarise themselves with the standards of care that have been formulated by courts.

It seems clear that courts generally require an employee to show some signs of distress and that such distress has escalated or may escalate into a recognised psychiatric illness. This threshold is fairly high and has been under watchful judicial guard. However, courts should not, where appropriate, spare the purses of employers who go about their business without reasonable care for the wellbeing of their employees.

¹⁹⁹ See 3.2.3 above for a discussion on the relative youth of the science of psychology and the conceptual differences between law and psychology that complicate various aspects of cases relating to psychiatric harm.

CHAPTER 6

CAUSATION

6.1 INTRODUCTION

This chapter focuses on causation of psychiatric harm in terms of the common law and the lessons to be learnt for purposes of framing statutory requirements relating to workers' compensation. Particular emphasis is placed on issues relating to factual causation, egg-shell personalities, independent intervening causes and the burden of proof. South African jurisprudence on indeterminate defendants and indeterminate causation, which are issues that are bound to arise in relation to occupationally-acquired psychiatric injury, is relatively under-developed. Therefore reliance is placed on the jurisprudence in other commonwealth countries.

Causation, which Sopinka J in *Snell v Farrell* defined as '... an expression of the relationship that must be found to exist between the tortious act of the wrongdoer and the injury to the victim in order to justify compensation of the latter out of the pocket of the former,'¹ is traditionally divided into what has been termed 'factual causation' and 'legal causation'.²

¹ (1990) 75 DLR 4th 289 at 298-299.

² *Minister of Police v Skosana* 1977 (1) SA 31 (A) 34-35. PJ Zwier "'Cause in Fact" in Tort Law – A Philosophical and Historical Examination' (1982) 31 *De Paul Law Review* 769 at 774. J Stapleton 'Cause-in-fact and The Scope of Liability' (2003) 119 *Law Quarterly Review* 388 (hereinafter referred to as 'Stapleton Cause-in-fact') does not seem to favour this terminology, because 'courts should reject the packaging of disputes in vague causal terminology, because it fails to distinguish between the two substantive underlying arguments relevant to the dispute about responsibility [the factual element and the normative element]'. She approves (at 389) of the fact that the American Law Institute's *Restatement (Third) of Torts: Liability for Physical Harm (Basic Principles)* has abandoned 'long-standing terminology such as "legal cause"'. Instead, she suggests that the factual element be known as 'historical involvement in [the plaintiff] suffering actionable damage' and the normative element as 'scope of liability for consequences'.

6.2 FACTUAL CAUSATION

6.2.1 The Current Position in South Africa

Factual causation can determine innocence, but is not in itself sufficient to found liability. It is therefore an exclusionary test, 'allowing a court to weed out defendants without having to decide whether their conduct was legally culpable'.³ Corbett CJ in *International Shipping Co Ltd v Bentley*⁴ explained the test for factual causation thus:

'The enquiry as to factual causation is generally conducted by applying the so-called "but-for" test, which is designed to determine whether a postulated cause can be identified as a *causa sine qua non* of the loss in question. In order to apply this test one must make a hypothetical enquiry as to what probably would have happened but for the wrongful conduct of the defendant. This enquiry may involve the mental elimination of the wrongful conduct and the substitution of a hypothetical course of lawful conduct and the posing of the question as to whether upon such an hypothesis plaintiff's loss would have ensued or not. If it would in any event have ensued, then the wrongful conduct was not a cause of the plaintiff's loss; *aliter*, if it would not so have ensued. If the wrongful act is shown in this way not to be a *causa sine qua non* of the loss suffered, then no legal liability can arise.'

Generally, in the case of an omission, a hypothetical addition test is employed, with the omitted act which should have been performed being added to the factual complex.⁵ If the harm would not have occurred had the act been performed, factual causation is present; conversely, if the harm would nevertheless have ensued despite the act being performed, then factual causation is absent and the defendant will not be held liable.⁶ However, this is not an inflexible rule and there may be cases involving positive acts where a

³ EJ Weinrib 'A Step Forward in Factual Causation' (1975) 38 *Modern Law Review* 518 at 518-519; JG Fleming *The Law of Torts* 9 ed (1998) 220.

⁴ 1990 (1) SA 680 (A) 700F-G.

⁵ *Siman & Co (Pty) Ltd v Barclays National Bank Ltd* 1984 (2) SA 888 (A) 915E-F; R Whiting 'Factual Causation in Perspective' in E Khan (ed) *Fiat Iustitia, Essays in Memory of Oliver Deneys Schreiner* (1983) 370 at 371.

⁶ *Ibid.*

hypothetical lawful course of conduct is substituted for the defendant's unlawful conduct to establish factual causation.⁷

Corbett J (as he then was) had indicated in *Minister of Police v Skosana* that a negligent act or omission that 'materially contributed' to the harm suffered may suffice.⁸ This alternative to the *sine qua non* test has not received much judicial or academic attention, even in cases where *Skosana* is cited as an authority.⁹ This is so probably because, in practice, the 'but-for' test very often does not give rise to difficulties and yields acceptable results.¹⁰ However, there may be situations in which the 'but-for' test yields unacceptable results. In fact, as long

⁷ *Ibid.* Corbett JA (as he then was) at 915H cites, *inter alia*, the example of where a driver is alleged to have negligently driven at an excessive speed and thereby caused a collision: 'In order to determine whether there was factually a causal connection between the driving of the vehicle at an excessive speed and the collision it would be necessary to ask the question whether the collision would have been avoided if the driver had been driving at a speed which was reasonable in the circumstances. In other words, in order to apply the but-for test one would have to substitute a hypothetical positive course of conduct for the actual positive course of conduct.' See, also, *Black v Joffe* 2007 (3) SA 171 (C), in which the defendant had provided false evidence in another trial in which the plaintiff had claimed damages from a third party. The plaintiff had lost that case and then instituted action against the defendant for damages flowing from his false testimony. The Court (at para [38]) held that it 'could not consider the matter on the basis of what would have happened had the defendant not testified', but that it instead had to consider what would have happened had the defendant's testimony been true.

⁸ This is in conflict with the emphatic statement by Viljoen AJA in his minority judgment in the same matter (at 44C) that 'the *conditio sine qua non* test is logically the only test to be applied' for purposes of factual causation.

⁹ *Mukheiber v Raath* 1999 (3) SA 1065 (SCA) para [34]: 'As far as factual causation is concerned, this Court follows the *conditio sine qua non* – or 'but-for' – test (*Minister of Police v Skosana* 1977 (1) SA 31 (A) at 34F-35G)'; *Minister of Safety and Security and Another v Carmichele* 2004 (3) SA 305 (SCA) (hereinafter referred to as "SCA 2") para [55]: 'Causation has two elements. The first is the factual issue which has to be established on a balance of probabilities by a plaintiff and the answer has to be sought by using the 'but-for' test...'. JR Midgley 'Revisiting Factual Causation' in G Glover (ed) *Essays in Honour of AJ Kerr* (2006) 277 (hereinafter referred to as 'Midgley Revisiting Factual Causation') at 279 fn 14 argues that although Corbett CJ in his formulation in *International Shipping Co* (cited above fn 3) appears to do the same, the learned Chief Justice did state in *Skosana* (at 35C-D) that 'generally speaking (there may be exceptions – see *Portwood v Svamvur* 1970 (4) SA 8 (RAD)) no act, condition or omission can be regarded as a cause in fact unless it passes [the *sine qua non*] test.' It is submitted that even in the *International Shipping* formulation (at 700F) Corbett CJ stated that 'generally' the but-for test is utilised.

¹⁰ *Gibson v Berkowitz* 1996 (4) SA 1029 (W) 1040G. In *Siman & Co (Pty) Ltd v Barclays National Bank Ltd* at 915A-B Corbett JA (as he then was) stated: 'In a case such as the present one, which is uncomplicated by concurrent or supervening causes emanating from the wrongful conduct of other parties ..., the but-for or, *causa sine qua non*, test is, in my opinion, an appropriate one for determining factual causation. BM McLachlin 'Negligence Law – Proving the Connection' in NJ Mullany and AM Linden (eds) *Torts Tomorrow, A Tribute to John Fleming* (1998) 16 at 18; P Cane *Atiyah's Accidents, Compensation and the Law* 6 ed (1999) 92.

ago as 1984, the then Appellate Division recognised that 'concurrent or supervening causes' may complicate the enquiry into factual causation.¹¹

6.2.2 The but-for test and possible concerns in the area of workplace psychiatric illness

Other jurisdictions have not accepted the 'but-for' test as the sole mechanism for determining factual causation.¹² Most academic writers, both in South Africa and abroad, recognise that the test is flawed in some respects.¹³ The criticisms of the test is, in short, that it is not a test, but rather an *ex post facto* rationalisation of a pre-determined causal nexus, that it involves clumsy and circular reasoning and that it fails in cases of so-called cumulative causation.¹⁴

In recent times factual causation has received much attention in the United States, England, Australia and Canada.¹⁵ McLachlin argues that this is so because the twentieth century has brought changes that raise problems of causation:

'We are more acutely aware of the links between the environment and health problems, giving rise to claims where none would have lain before. ... Our increasing awareness leads us to focus not on the

¹¹ *Siman & Co (Pty) Ltd v Barclays National Bank Ltd* at fn 6.

¹² In *March v E & MH Stramare (Pty) Ltd* (1991) 171 CLR 506 at 516 McHugh J stated: 'The "but-for" test gives rise to a well-known difficulty in cases where there are two or more acts or events which would each be sufficient to bring about the plaintiff's injury. The application of the test "gives the result, contrary to common sense, that neither is a cause." Winfield and Jolowicz on Tort, 13th ed (1989), p. 134. In truth, the application of the test proves to be either inadequate or troublesome in various situations in which there are multiple acts or events leading to the plaintiff's injury: see, e.g., *Chapman v Hearse*, *Baker v Willoughby* [1970] AC 467; *McGhee v National Coal Board* The cases demonstrate the lesson of experience, namely, that the test, applied as an exclusive criterion of causation, yields unacceptable results and that the results which it yields must be tempered by the making of value judgments and the infusion of policy considerations.'

¹³ ADJ Van Rensburg 'n Kritiese Beskouing van die Conditio Sine Qua Non-Oorsaaklikheids-teorie soos Uiteengesit deur ons Suid-Afrikaanse Skrywers' in *Huldigingsbundel Daniel Pont* (1970) 384; ADJ Van Rensburg 'Nog Eens Conditio Sine Qua Non' 1977 TSAR 101; Boberg 384-385. See also F Trinidad and P Cane *The Law of Torts in Australia* 3 ed (1999, 2001 reprint) 476; Stapleton Cause-in-fact 390.

¹⁴ Burchell 114-115.

¹⁵ McLachlin 16.

tortious act – the concept of neighbourly negligence suffices – so much as on the link between the tortious act and the injury and how one proves that link. The increasing technical nature of processes and our understanding of them may interpose many steps between a tortious act and injury, making it difficult to prove with certainty the precise cause of the injury. ... The plaintiff may be able to establish that the defendant's product or procedure could foreseeably cause the injury from which he or she suffers. But the plaintiff may be unable to prove that in this particular case he or she would not have sustained the injury "but for" the defendant's tortious act, whether because of the complexity of the processes involved, the interaction of other environmental factors, or the simple impossibility of knowing precisely what triggered the plaintiff's body to respond to the toxin or the process.¹⁶

Thomson sets out four reasons why alternative approaches to the *conditio sine qua non* test are adopted in difficult cases, namely, difficulty of proof, the perceived need to regulate activities of which increased risk is a 'byproduct of technological advance', increased public acceptance of egalitarianism and the fact that there is no other mechanism other than the tort system to provide redress to victims of activities with increased risk.¹⁷

Many of the cases in which the 'but-for' test has been problematic have concerned cases involving plaintiffs who have suffered man-made diseases or medical conditions not related to traumatic, sudden occurrences.¹⁸ In these cases difficulties of proof often arise and the all-or-nothing nature of the 'but-for' test offends many people's innate sense of fairness and justice.¹⁹

¹⁶ McLachlin 17.

¹⁷ JJ Thomson 'The Decline of Cause' (1987) *Georgetown Law Journal* 137 at 138.

¹⁸ See, for example, *Fairchild v Glenhaven Funeral Services* [2002] 3 All ER 305 (HL); *Bonnington Castings Ltd v Wardlaw* [1956] AC 613; *McGhee v National Coal Board* [1973] 1 WLR 1; *Wilsher v Essex Area Health Authority* [1988] 1 AC 1074; *Snell v Farrell* (1990) 72 DLR 4th 289.

¹⁹ McLachlin 16.

6.2.2.1 Indeterminate defendant and indeterminate causation cases

Indeterminate defendant cases occur when it is unclear which of a number of possible defendants was responsible for the loss.²⁰ A classic example of such a scenario can be found in *Cook v Lewis*,²¹ where two hunters simultaneously and negligently shot at the victim, but only one hit the victim.²² Indeterminate causation cases often overlap with cases involving indeterminate defendants or indeterminate plaintiffs,²³ and occur when it is known that the defendant had acted negligently vis-à-vis the plaintiff, but it is unclear whether the defendant's conduct actually caused the harm to the plaintiff.²⁴

It is foreseeable that the same or similar issues will arise in proving factual causation in cases involving workplace psychiatric injury. Psychiatric injuries often have a delayed onset, i.e. there is a time lag between when the stressor occurs and when the disease or injury manifests.²⁵ This may cause one problem or a combination of problems relating to indeterminate defendants and indeterminate causes.

6.3 ALTERNATIVES/COMPLEMENTS TO THE BUT-FOR TEST

Lofgren succinctly describes alternatives to the traditional approach in what he terms 'inherent uncertainty-type cases':²⁶ reducing the standard of proof of

²⁰ In *Fairchild v Glenhaven Funeral Services* at para [156] Lord Rodger stated: 'Broadly speaking, [authorities from various jurisdictions] appear to me to demonstrate two things: first, that other systems have identified the need to adopt special rules or principles to cope with situations where the claimant cannot establish which of a number of wrongdoers actually caused his injury; secondly, that there are considerable divergences of view and indeed uncertainty as to the proper area within which any such special rules or principles should apply.'; Fleming Probabilistic Causation 664; McLachlin 19.

²¹ [1952] 1 DLR 1.

²² See also, *Summers v Tice* 33 Cal 2d 80, 199 P 2d 1 (Cal 1948).

²³ Indeterminate plaintiff cases are also problematic, but because employers generally know who their employees are, it will not be such a big issue in the employment sphere and will therefore not be discussed. For a brief discussion of the issue, see Fleming Probabilistic Causation 679-680.

²⁴ McLachlin 19.

²⁵ See 7.2.4.5 below; Fleming Probabilistic Causation 676.

²⁶ D Lofgren 'Factual Causation in Delict: A Look at the Law in Scotland and Sweden' (2002) available at <http://www.law.ed.ac.uk/evl/02repdl.htm> (accessed 7 September 2006).

causation, either explicitly or through substituting the 'but for' test for a less stringent test; or making factual inferences, but still awarding damages on an all-or-nothing basis; similarly reducing the standard of proof, but awarding damages proportionately; treating the loss of chance of recovery or a better outcome as the injury itself, and award damages based on the percentage of the chance lost; or reversing the burden of proof.

Midgley also discusses some alternatives and/or complements to the 'but-for' test that have received approval in various common-law jurisdictions, i.e. an objective *sine qua non* test, policy and common sense, fact and intuition, material contribution and increasing the risk and/or creating opportunities for harmful events.²⁷ This work will focus on the methods that may prove particularly relevant in cases of occupational psychiatric harm, namely, the objective *sine qua non* test and the material contribution test.

6.3.1 Objective *sine qua non* test

The issue of whether the 'but-for' test is objective or subjective was raised in the landmark *Carmichele* cases.²⁸ The salient facts were that one Coetzee, who had previously been charged with attempted rape and attempted murder and released on warning, had attacked Ms Carmichele. She subsequently was successful in claiming damages from the Minister of Safety and Security and the Minister of Justice, alleging that the police and the prosecutor had failed in their legal duty to prevent her from being harmed. Her case was that the prosecutor should have opposed bail, given that the police and the prosecutor had relevant information that they had failed to place before court. The magistrate, who would have ultimately decided on whether or not to release Coetzee, had testified that

²⁷ Midgley Revisiting Factual Causation 288-300.

²⁸ The references for these cases, in chronological order, are: Initial CPD judgment unreported; *Carmichele v Minister of Safety and Security and Another* 2001 (1) SA 489 (SCA); *Carmichele v The Minister of Safety and Security and Another (Centre for Applied Legal Studies Intervening)* 2001 (4) SA 938 (CC); *Carmichele v Minister of Safety and Security and Another* 2003 (2) SA 656 (C) (hereinafter referred to as 'CPD 2'); *Minister of Safety and Security and Another v Carmichele* 2004 (3) SA 305 (SCA) (hereinafter referred to as 'SCA 2').

he would still have released Coetzee, even if the relevant information had been placed before him.

The Cape High Court, in the fourth of the five cases in the saga, accepted the suggestion by the Constitutional Court²⁹ that a subjective test would not be in the interests of justice and held that 'a reasonable court would have refused to allow Coetzee bail or to release him on his own recognizances'.³⁰ The Supreme Court of Appeal disagreed:

'The first leg of causation, being a question of fact, cannot depend on policy considerations such as whether or not a judicial officer should be called to testify. Causation in this type of case will then no longer be a factual matter of what the effect of certain conduct on the probabilities "would" have been; it would then become a value judgment of what it "should" have been. Factual issues cannot be decided differently depending on the type of case.'³¹

The Court held that although the enquiry was subjective, it may be presumed factually that judicial officers conform to reasonable norms:

'It is fair to deduce that any particular judicial officer, on the probabilities and as a matter of fact, would have so acted. The proper inquiry is, thus, what the relevant judicial officer, who is factually assumed to make decisions reasonably, would, on the probabilities, have done.'³²

Thus this test, although subjective, has an objective element to it. Midgley argues that although the SCA was in a position to exclude the magistrate's evidence because it was speculative, a court may not always have that option

²⁹ The Constitutional Court had stated the following at para [76]: 'It may well be that in deciding whether a magistrate could or might have refused to release Coetzee on bail an objective test must be applied, and that the evidence of the magistrate who happened to have been seized with the matter is neither relevant nor admissible. On this approach the court would have regard to the law as it should have been applied by a reasonable magistrate on the facts given to him by the prosecutor. The question of causation, in the event of the conduct of either the police or the prosecutors being unlawful, was not considered by the High Court or the SCA. This too is a complex issue that may ultimately depend on the facts as they emerge at the end of the case.'

³⁰ CPD 2 at para [37].

³¹ SCA 2 at para [59].

³² SCA 2 at para [60].

and an offensive and/or unjust result might ensue.³³ However, he is not convinced that the employment of a completely objective test is the answer to more appropriately aligning liability with fairness and justice:

‘[S]uch an objective approach, which emphasises what ought to have happened, would swing an enquiry that is primarily factual towards a more evaluative one, and from one that has causation as its object to one where proper behaviour becomes the focus. There is also a further difficulty associated with an objective test: it is incompatible with the modern trend, in medical negligence cases, towards patient autonomy when dealing with healthcare decisions, irrespective of the rationality of a particular patient’s decision. An objective enquiry which focuses on what a reasonable patient would have done, would fly in the face of such a doctrine.’³⁴

In *Reibl v Hughes*,³⁵ a case in which a modified objective test was endorsed, Laskin CJC stated, in relation to cases of medical negligence, that a purely objective approach would defer completely to medical evidence, since a reasonable patient who has been informed of attendant risks will almost always act in accordance with the physician’s assessment and advice.³⁶ At the other end of the spectrum, the danger of a completely subjective test is that it is too reliant on a witness’s testimony as to what s/he would have done in a particular situation.³⁷

Cory J in *Arndt v Smith*,³⁸ in support of the modified objective test, explained it thus:

³³ Midgley Revisiting Factual Causation 285.

³⁴ Midgley Revisiting Factual Causation 289.

³⁵ (1981) 114 DLR 3d 1 (SCC).

³⁶ At 15.

³⁷ In *Hollis v Dow Corning Corporation* (1996) 129 DLR 4th 609 (SCC) para [67] Sopinka J stated the following about the evidence of a plaintiff as to what s/he would have done in a given situation: ‘In evaluating the opinion, the trier of fact must discount its probity not only by reason of its self-serving nature, but also by reason of the fact that it is likely to be coloured by the trauma occasioned by the failed procedure. For this reason, the most reliable approach in determining *what would in fact have occurred* is to test the plaintiff’s assertion by reference to objective evidence as to what a reasonable person would have done.’

³⁸ [1997] 2 SCR 539.

‘The test ... relies on a combination of objective and subjective factors in order to determine whether the failure to disclose *actually* caused the harm of which the plaintiff complains. It requires that the court consider what the reasonable patient *in the circumstances of the plaintiff* would have done if faced with the same situation. The trier of fact must take into consideration an “particular concerns” of the patient and any “special considerations affecting the particular patient” in determining whether the patient would have refused treatment if given all the information about the possible risks.’³⁹

Given this explanation, one may well ask what the difference is between this modified objective test and the subjective test with an objective element, as enunciated by the Supreme Court of Appeal in *Carmichele*. Indeed, as was seen in *Arndt v Smith*, distinguishing between the two tests may be difficult.⁴⁰ Cory J in that case stated that the real distinction lies in the fact that the modified objective test does not take cognisance of the relevant person’s idiosyncrasies or unreasonably held beliefs or fears.⁴¹ Yet, in some instances the causal sequence has to be ‘constructed’ by the Court, and in doing so a degree of speculation is introduced⁴² and, it is submitted, objective indicators of what a certain actor within a causal sequence would have done would have to be consulted.

If one compares the facts of *Carmichele* with those in *Arndt v Smith*, it is clear that in both cases the majority of the courts were uncomfortable with relying on the relevant witness’ evidence of what they would have done in the given situation. Maybe the question is not so much whether the Court should ask what a reasonable person would have done as opposed to what the person in question would have done, but in what circumstances the Court is entitled to rely on objective indicators of what the relevant individual would have done. It is

³⁹ At para [6].

⁴⁰ McLachlin J in *Arndt v Smith* at para [34] had identified the approach taken by the trial judge as a subjective one, whereas Sopinka and Iacobucci JJ (at paras [21]-[27]) were of the view that he had applied a modified objective test.

⁴¹ At para [17].

⁴² Fleming 221; Stapleton Cause-in-fact 400.

therefore submitted that the combination of objective and subjective factors⁴³ relied upon by courts will vary according to the circumstances of each case, 'having regard to the different circumstances in which the relevant duties arise, and the consequent difference in the nature of these duties'.⁴⁴

In *Hollis v Dow Corning Corporation*,⁴⁵ for example, the majority of the Supreme Court of Canada held, in an action based on a manufacturer of breast implants' failure to warn of the risks associated with the implants, that the conventional subjective 'but-for' test was appropriate in determining whether doctors would have relayed warnings to patients. The Court, however, specifically endorsed the application of the modified objective test in medical negligence actions, emphasising the unique policy considerations applicable to the doctor-patient relationship.⁴⁶ The doctor's duty is to provide the best medical advice possible, whereas a manufacturer by its very nature is expected to act in a more self-serving manner.⁴⁷ Furthermore, manufacturers are often commercial entities far removed from the consumer. They hold an informational advantage and are not expected to tailor their warnings to the needs and abilities of individual patients.⁴⁸ For these reasons, so the argument went, it was prudent to maintain the subjective, more plaintiff-friendly, 'but-for' test.

If a subjective test is followed, a witness's evidence as to what s/he would have done becomes more relevant than it would be if a modified objective approach is taken. Does this mean that his/her evidence will have to be accepted without the Court considering the veracity thereof? It is here that Osborne takes issue with the arguments against the subjective test, because they often discount that

⁴³ In *Arndt v Smith* at para [64] McLachlin J noted that there is little profit in debating whether the test adopted by Laskin CJ in *Reibl v Hughes* is subjective or objective, since it is clear that both objective and subjective factors were considered.

⁴⁴ *Hollis v Dow Corning Corporation* at para [46].

⁴⁵ (1996) 129 DLR 4th 609 (SCC).

⁴⁶ At para [46].

⁴⁷ At para [44].

⁴⁸ *Ibid.*

courts are at liberty to determine causation by taking into account more than just the relevant person's testimony:

'The court must make an assessment of credibility which would appear not to be easier nor more difficult than in other contexts. There may also be relevant evidence from third parties to assist the trier of fact.'⁴⁹

McLachlin J in *Arndt v Smith* cited with approval similar sentiments expressed by Fontigny and concluded that the preponderance of authority in most common-law jurisdictions, as well as academic opinion, favour the adoption of a subjective test, but the reasonableness of one choice over another is an important factor.⁵⁰ Robertson argues that the modified objective test has made it difficult for individual plaintiffs to prove causation.⁵¹

6.3.1.1 *Objective sine qua non test in cases of occupational psychiatric harm*

How is the foregoing discussion relevant to workplace stress cases? As an example, take the facts of *Johnstone v Bloomsbury Health Authority*,⁵² a case in which a doctor sued his employers for damages because they had allegedly failed to provide a safe working environment by contractually requiring him to work intolerable hours that damaged his health and endangered the health of his patients. In order to establish whether factual causation is present, it may have to be determined whether, even if the requisite working hours in the plaintiff's contract had been decreased, he would not still have worked excessive hours that would have damaged his health. This determination is complicated by the fact that people want to be perceived as being able to cope and will therefore

⁴⁹ PH Osborne 'Annotation to *Arndt v Smith*' (1995) 25 CCLT (2d) 264 at 267.

⁵⁰ At para [55].

⁵¹ G Robertson 'Informed Consent Ten Years Later: The Impact of *Reibl v Hughes*' (1991) 70 *Canadian Bar Review* 423 at 426.

⁵² [1992] QB 333.

tend to overextend themselves, even without pressure from external sources such as the employer.⁵³

If a subjective test, akin to the one adopted by the SCA in *Carmichele*,⁵⁴ is used, the plaintiff's evidence would assume more importance, because instead of asking what a reasonable doctor in his position would have done, the Court would ask, whether the doctor would have worked less. In determining this, the Court will evaluate the plaintiff's evidence on the matter, bearing in mind that he would face cross-examination. Colleagues and/or other third parties' evidence as to his state of mind at the time could be considered, as well as other objective indicators as to what he would have done. The test remains subjective, but it is not purely so, since objective factors are considered.

This approach is illustrated in *Media 24 Ltd and Another v Grobler*,⁵⁵ in which Farlam JA inferred what the causal sequence would have been if a manager of the first appellant company had taken steps to protect the claimant from the harassment of the second appellant:

'If Van As had acted earlier in the way I have suggested I am satisfied that Wager should (and on the probabilities would) at least have informed the second appellant that his conduct *vis-à-vis* the respondent had not gone unnoticed and have warned him that, if such conduct persisted, not only his ambition of rising to a senior managerial position in the company would come to naught but there was a very real danger of his being dismissed. I think it overwhelmingly probable, knowing what we do about the personality of the second appellant and his relationship with Wager, that such a warning would in all probability have done the trick and prevented the flat incident from taking place. I have already found that, if the flat incident had not taken place, the respondent would not have suffered the psychological injury on which her claim is based.'⁵⁶

⁵³ See 5.5.1 above.

⁵⁴ SCA 2 para [60].

⁵⁵ 2005 (6) SA 328 (SCA).

⁵⁶ At para [72].

The question Farlam JA asked was not, and it is submitted, should not be, how a reasonable person in the position of the second appellant would have reacted, but how the second appellant, given the evidence (testified to by third parties) relating to his personality traits and his relationship with his superior, would have reacted. It is submitted that this approach is preferable to one that has as its basis the reactions or decisions of the reasonable person in the position of the person in question.

6.3.2 Material Contribution

As indicated above, Corbett J (as he then was) in *Minister of Police v Skosana* had indicated that a defendant's material contribution to the harm may suffice to found the requisite factual causation.

Whiting states that in its simplest form, a distribution theory dictates that 'an act is a factual cause of a result if it in some way contributes to the occurrence of the result.'⁵⁷ Concepts such as 'material contribution' and 'substantial factor' are variants of such a theory, but they build in an application of the maxim *de minimis non curat lex*.⁵⁸ Although the material contribution test has not been extensively developed in South African law, many other jurisdictions have made use of it (or variants thereof),⁵⁹ particularly in cases involving industrial disease or environmental health issues.⁶⁰

⁵⁷ Whiting 371.

⁵⁸ *Ibid.* For an application of the substantial factor test, see *Corey v Havener* 65 NE 69 (1902), in which two noisy and smoke-emitting motor tricycles passed the plaintiff and frightened the latter's horse, as a result of which the plaintiff was injured. The Supreme Court of Massachusetts held both defendants liable because each of their conduct had been a 'substantial factor' in causing the plaintiff's harm.

⁵⁹ Stapleton Cause-in-fact 393 states that US courts have adopted a 'substantial factor' test where the but-for test has proved inadequate, but describes it as a 'vacuous, or at best impressionistic, incantation'. She welcomes the fact that the device has been abandoned in the 2003 draft of the *Restatement (Third) of Torts: Liability for Physical Harm (Basic Principles)*.

⁶⁰ Midgley Revisiting Factual Causation 297.

Stapleton argues that the term 'material contribution' is ambiguous and covers three distinct situations.⁶¹ Firstly, it may refer to an orthodox case where the total injury is divisible. D1 and D2 are both careless drivers who injure C; D1 injures C's left arm and D2 injures his right arm. A defendant in such a case is liable only for the part of the injury with which he was historically involved. In some cases there may not yet be a medical basis on which to devise the harm and then either defendant may by default be liable for the whole of the plaintiff's injuries.

The second situation is an orthodox case where the total injury is indivisible. She uses the example of a prison warder, D1, negligently allowing a prisoner, D2, to escape and D2 causing damage to C. D1 materially contributed to C's damage and can therefore be held liable jointly and severally for the entire injury; no apportionment is allowed.

The third situation arises where the chances of contracting a disease, for example mesothelioma, are dose-related, but the actual injury is indivisible. This evidentiary gap raises two questions, the first one being whether the defendant's contribution to the risk should be deemed sufficient to found liability. The second question is whether apportionment should be adopted to reflect the fact that there were other sources of risk, an issue that will be discussed below.

If one accepts that something has made a material contribution to a result, the implication is that it has already been established that it is in fact a contributing cause. Thus, the material contribution cannot necessarily assist in closing all evidentiary gaps.

This assertion can be illustrated by analysing the possible mechanisms by which a disease can be caused:

⁶¹ Stapleton Cause-in-fact 394-395.

'First, the disease may occur via a single-hit mechanism where a single "insult" such as the inhalation of a single fibre or a mineral results in the total injury suffered. Infectious diseases are typically caused in this way. A well-known non-disease example of a single "insult" mechanism is *Cook v Lewis* [1952] 1 D.L.R. 1. Secondly, the mechanism may be cumulative. Here each exposure, including the first, results in some actual injury. Each exposure is by itself a but-for factor to some actual injury even though it is not a but-for factor to the entire condition. Asbestosis is caused by such a mechanism ... Thirdly, a disease may operate by a threshold mechanism where there is no injury at all until the accumulated dose exceeds some threshold. Here a pre- and less-than-threshold dose is not by itself a but-for factor to any actual injury. Where the threshold is passed, any pre-threshold dose is not by itself a but-for factor to any actual injury. Where the threshold is passed, any pre-threshold dose is a cause of the entire injury which is triggered. Noise-induced deafness seems to be caused by such a mechanism.'⁶²

There is nothing wrong with applying a material contribution test where the disease is caused by cumulative factors, or via a threshold mechanism, since the issue of whether it is a 'but-for' factor in causing the disease is irrelevant.⁶³ However, if a disease is indivisible, there can be no question of it being contracted cumulatively.⁶⁴ In the case of mesothelioma, for example, it is known that it is an indivisible disease, but it is not known whether its mechanism is by way of a single 'insult' or by means of a threshold.⁶⁵ In such an instance, it should not merely be required of a plaintiff to show that the defendant's conduct made a material contribution or was a substantial factor in causing the plaintiff's harm.⁶⁶ If such a course is adopted, it is by means of a fiction, the need for which has to be substantiated.⁶⁷

⁶² J Stapleton 'Two Causal Fictions at the Heart of U.S. Asbestos Doctrine' (2006) 122 *Law Quarterly Review* 189 (hereinafter referred to as 'Stapleton Causal Fictions') at 191.

⁶³ *Ibid.*

⁶⁴ *Ibid.*

⁶⁵ *Ibid.*

⁶⁶ *Ibid.*

⁶⁷ Stapleton Causal Fictions 194. The author notes that, unlike in other common-law countries, courts in the US generally, once negligence has been established, tend to resolve issues of causation in favour of the plaintiff. She proffers various reasons why even beleaguered defendants have not taken issue with these fictions as employed in US asbestos cases: firstly, there is a multiplicity of jurisdictions in the US and tort law is a state matter, meaning that there are 51 separate tort law regimes in the US; secondly, since most US employees are barred from suing their employers in tort, they sue other parties in order to obtain tort-level damages, leading to the notorious phenomenon of a typical US asbestos claim naming several dozen defendants;

Hamer expresses a similar view, stating that where causes operate cumulatively, the material contribution doctrine finds application, but where they operate independently, it cannot be applied.⁶⁸ He uses the decision in *Wilsher v Essex Area Health Authority*⁶⁹ to substantiate his argument. In *Wilsher* a premature baby had undergone certain medical procedures and as a result of a breach of duty, had developed a condition abbreviated as RFL, which involved permanent retinal damage. The illness could have come about as a result of the breach or three other possible factors. Relying on *McGhee v National Coal Board*⁷⁰ the majority of the Court of Appeal found that if a party creates a risk of injury or increases an existing risk of injury by breaching a duty owed to another party and the latter party suffers injury within the scope of the risk, the first party is taken to have caused the injury, even though the existence or extent of the contribution resulting from the breach may be uncertain or unknown.

Sir Nicolas Browne-Wilkinson VC dissented and expressed the crux of his opinion as follows:⁷¹

'The position, to my mind, is wholly different from that in the *McGhee* case [1973] 1 WLR 1, where there was only one candidate (brick dust) which could have caused the dermatitis, and the failure to take a precaution against brick dust causing dermatitis was followed by dermatitis caused by brick dust. In such a case, I can see the common sense, if not the logic, of holding that, in the absence of any other evidence, the failure to take the precaution caused or contributed to the dermatitis. To the extent that certain members of the House of Lords decided the question on inferences from evidence or presumptions, I do not consider that the present case falls within their reasoning. A failure to take preventative measures against one out of five possible causes is no evidence as to which of those five caused the injury.'

thirdly, the medical testimony about asbestos diseases has been confused; finally, the most powerful force by far is the operation of the US costs rule that defendants pay their own costs even if they prevail at trial – defendants therefore want claims to be settled as cheaply as possible and will not likely pursue fine doctrinal points regarding causation.

⁶⁸ D Hamer 'Chance would be a Fine Thing': Proof of Causation and Quantum in an Unpredictable World' (1999) *Melbourne University Law Review* available at <http://www.austlii.edu.au/journals/MULR/1999/24.html> (accessed 6 October 2006).

⁶⁹ [1987] QB 730 at 771-772.

⁷⁰ [1973] 1 WLR 1.

⁷¹ At 779.

Hamer states that the decisions in both *Bonnington Castings v Wardlaw*⁷² and *McGhee v National Coal Board*⁷³ were taken on the assumption that the causes operated cumulatively.⁷⁴ However, Fleming notes that commentators were puzzled by the *McGhee* decision, one of the reasons being the House of Lords' failure to distinguish between alternative and cumulative causes by relying on its earlier decision in *Wardlaw*, in which the plaintiff's lung condition had resulted from the combined effect of two workplace sources of dust, only one for which the defendant had been responsible.⁷⁵ However, Lord Reid did allude to this distinction by stating that it was impossible on the facts of *McGhee* to ascertain whether the dermatitis started with a single abrasion or multiple abrasions, which made it distinguishable from *Wardlaw*.⁷⁶ Lord Simon, on the other hand, appears to have framed the ratio of his decision on the basis of cumulative causation.⁷⁷

In *Barker v Corus (UK) plc; Murray v British Shipbuilders (Hydrodynamics) Ltd and others; Patterson v Smiths Dock Ltd and Others*⁷⁸ Lord Scott stated that in his view, *Fairchild* was decided on the basis that the defendant had 'materially contributed to the risk of the eventual outcome'.⁷⁹ It is submitted that the material contribution test was indeed at work in both *McGhee* and *Fairchild*, but before

⁷² [1956] AC 613.

⁷³ [1973] 1 WLR 1.

⁷⁴ Hamer *loc cit*.

⁷⁵ Fleming Probabilistic Causation 669.

⁷⁶ At 5.

⁷⁷ He stated (at 8) that 'where an injury is caused by two (or more) factors operating cumulatively, or (or more) of which factors is a breach of duty and one (or more) is not so, in such a way that it is impossible to ascertain the proportion in which the factors were effective in producing the injury or which factor was decisive, the law does not require a pursuer or plaintiff to prove the impossible, but holds that he is entitled to damages for the injury if he proves on a balance of probabilities that the breach or breaches of duty contributed substantially to causing the injury. If such factors so operate cumulatively, it is, in my judgment, immaterial whether they do so concurrently or successively'. Lord Bridge in *Wilsher v Essex Area Health Authority* also attempted to explain the decision in *McGhee* on the basis of cumulative causation, but as J Stapleton 'The Gist of Negligence: Part 2 The Relationship Between "Damage" and Causation' (1988) 104 *Law Quarterly Review* 389 (hereinafter referred to as 'Stapleton Gist of Negligence') at 403-404 and Fleming Probabilistic Causation 670 submit, this argument is weakened by the fact that there is no reason for drawing an inference of cumulative causation as opposed to alternative causation.

⁷⁸ [2006] UKHL 20 available at

<http://www.publications.parliament.uk/pa/ld200506/ldjudgmt/jd060503/barker-1.htm> (accessed 15 July 2006).

⁷⁹ At para [59].

that standard could be applied the Court had to assist the plaintiffs to jump an evidentiary gap by equating creating a risk of injury with actually causing that injury, a topic that is discussed below.

6.3.2.1 *Material contribution in occupational psychiatric harm cases*

If one applies the above law to workplace stress, the primary question would be by which mechanism a particular psychiatric injury is caused. Let us examine the mechanisms by which PTSD may be caused. If a worker suffers from PTSD after witnessing an horrific accident in the workplace, it is an example of PTSD being caused by a single 'insult'.⁸⁰ In such an instance, it would normally not be difficult for a claimant to prove that the defendant's negligent conduct was a 'but-for' factor in causing his/her harm.

However, where a threshold or cumulative mechanism was at work, the defendant may aver that other factors may have contributed to the plaintiff's psychiatric injury. In *Grobler v Naspers Bpk en 'n Ander*,⁸¹ for example, the plaintiff had had financial problems, an unhappy marriage and an extra-marital affair. The Court held that although all these factors may have contributed or may have caused the plaintiff to be more vulnerable, the second defendant's sexual harassment is what had caused her psychiatric damage.⁸²

The Court was faced with conflicting testimony regarding whether a series of low-grade stressors may lead to PTSD in cases of sexual harassment of females and children.⁸³ Nel J found that where male and female experts differed on this point,

⁸⁰ An example would be the scenario in *Vanuatu National Provident Fund Board v Aruhuri and others*, 1 November 2001, Vanuatu Court of Appeal. Available at <http://www.worldlii.org/cgi-worldlii/disp.pl/v.../16.html?query=%22+psychiatric+injury%2> (accessed 20 February 2004). In this case an unruly mob laid siege on the offices of the National Provident Fund Board in Port-Vila, armed with sticks, stones and metal pipes and weapons and projectiles. It was recognised that if the workers in the building could have proven a recognisable injury, they would have been entitled to damages on that basis.

⁸¹ At 272G-H.

⁸² *Ibid.*

⁸³ At 271J-272B.

the opinion of the female experts should carry more weight.⁸⁴ With respect, such reasoning is highly questionable, but the learned judge also held that even if he was wrong on this point, the classification of the disease was not the primary issue; instead the issue was whether the defendant had caused the claimant actionable harm.⁸⁵ If a series of stressors is accepted to cause PTSD in certain cases, it would be an example of a threshold mechanism. The pre-threshold 'dosage' of stressors is not by itself sufficient to cause injury as defined in law, but when the threshold is passed, each stressor is considered a cause of the entire injury.

On appeal, in *Media 24 Ltd and Another v Grobler*,⁸⁶ the Court found that the claimant's PTSD was caused by one sufficiently severe traumatic incident, and Farlam JA stated that but for that incident, the harm would not have occurred. He then went on to state that this particular occurrence may have been 'the straw that broke the camel's back', but it was what ultimately caused the psychiatric injury.⁸⁷ It is unclear whether the learned judge of appeal had in mind a single 'insult' or a threshold mechanism, but if one looks at the evidence as accepted by the Court, it is submitted that in effect a threshold mechanism had caused the claimant's psychiatric injury.

A casual review of the cases on workplace stress reveals that chronic work stressors will normally cause illnesses such as depression or those generally associated with what are loosely termed nervous breakdowns.⁸⁸ As was discussed in the chapter on harm, it is difficult to distinguish between a person simply feeling despondent and clinical depression: it is simply a matter of

⁸⁴ At 272D-E.

⁸⁵ At 272F.

⁸⁶ At para [60].

⁸⁷ *Ibid.*

⁸⁸ See *Walker v Northumberland County Council* [1995] 1 All ER 737 (QB), *Hatton v Sutherland* [2002] 2 All ER 1 (CA), *Barber v Somerset County Council* [2004] 2 All ER 385 (HL) and *Koehler v Cerebos (Australia) Ltd* [2005] HCA 15.

degree.⁸⁹ Clinical depression seems to be a classic example of a disease caused by a threshold mechanism.

In cases of cumulative stressors or diseases caused via a threshold mechanism, it may be difficult to determine whether the harm was caused by work stress or whether the latter resulted because of the claimant's inability to cope with the other negative aspects of his/her life. In *McDonald or Cross and Another v Highlands and Islands Enterprise and Another*⁹⁰ a man had committed suicide and a claim was instituted against his former employer on the basis that his suicide had been caused by work-related stress. In the course of judgment Lord Macfadyen made the following observations:⁹¹

'[T]he relationship between work conditions and depressive illness is potentially complex. It was not, I think, disputed that stressful working conditions can cause a person to develop a depressive illness. Conversely, I do not consider that it was seriously questioned that depressive illness can affect adversely a person's ability to cope with his work. There can develop what was referred to in evidence as a vicious circle or vicious cycle in which the more depressed a person becomes, the worse he performs at work, and the more he perceives that he is performing badly at work, the worse his depression becomes. When the matter comes to be investigated once the depression is established, it is very difficult to break into the circle and identify where it began. Once circumstance in which it might be possible to do so would be if there were clear evidence that the conditions of work were such as to be objectively likely to precipitate depression.'

The court had earlier found that the working conditions faced by the deceased were not objectively such that one could determine that that was what had caused his depression.⁹² The plaintiff led evidence to the effect that the

⁸⁹ See 3.2.3 above.

⁹⁰ Scottish Outer House, Court of Session, 5 December 2000. Available at <http://www.bailii.org/cgi-bin/markup.cgi?doc=scot/cases/ScotCS/2000/307.html&query=McDonald%20Cross%20Highlands> (accessed 10 October 2006).

⁹¹ At para [48].

⁹² At paras [21]-[34].

deceased had expressed his perception that his working conditions were causing his depression.⁹³ The Court assessed this aspect as follows:⁹⁴

'The difficulty about treating it as evidence of the cause of the illness is that it comes almost wholly from the period during which James Cross was already suffering from a depressive illness. I accept the evidence that such an illness is likely to impair the sufferer's confidence and self-esteem and his ability to think and to concentrate, to exercise judgement and to make decisions. It is therefore hardly surprising that once he had become depressed, James Cross's ability to do his job was impaired, and that he was conscious of such impairment. That consciousness of inability to cope would, I accept, tend to make the depression worse. To that extent, his perception that the problem lay in the stress of his work was no doubt partially sound. It seems to me to be right to conclude that for James Cross to work on after he had become depressed operated at least as what was referred to in the evidence as a "maintaining factor". I do not consider, however, that the evidence of James Cross's own perception of the cause of his condition can in these circumstances be accepted as reliable evidence that the originating cause of his depression was stress caused by his working conditions.'

Whiting argues that both the 'but-for' test and the material contribution test 'have an indispensable role to play in determining factual causation', but he is of the view that the test to be adopted is dependent on the type of result that eventuates.⁹⁵ The learned author distinguishes between positive and negative results. He states that 'one causes a positive result when one causes injury, death or damage to or destruction of property, while one causes a negative result when one causes something not to happen'.⁹⁶

He then argues that causing a negative result necessarily involves a 'but-for' inquiry, since one has to ask what would have occurred if the defendant's impugned conduct had not taken place. Causing a positive result, on the other hand, involves 'bringing about a change in reality, not preventing it'.⁹⁷ It is

⁹³ At para [19].

⁹⁴ At para [49].

⁹⁵ Whiting 371.

⁹⁶ Whiting 372.

⁹⁷ Whiting 373.

therefore unnecessary to resort to a hypothetical inquiry such as the *sine qua non* test: a causal connection is established simply by asking whether the alleged cause has materially contributed to the result.⁹⁸

Midgley, on the other hand, states that the material contribution test should be used as a supplementary test where the 'but-for' test is inappropriate and/or inadequate.⁹⁹ It is submitted that Midgley's approach is preferable. If one accepts that the material contribution test is less stringent than the 'but-for' test, there is no principled reason for preferring one test above the other depending on the type of result it causes.

The material contribution test does have the potential to considerably broaden liability, for, as Trinidad and Cane point out, 'a defendant can be held liable for the whole of a loss even though all that can be proved on the balance of probabilities is that [a defendant] contributed to it.'¹⁰⁰ However, the contribution also has to be material and it is submitted that courts must be vigilant in distinguishing between causes that were material in causing the harm and those that were not. Furthermore, an equitable balancing of the interests of plaintiffs and defendants can be achieved by developing the law relating to apportionment of damages.¹⁰¹

⁹⁸ *Ibid.*

⁹⁹ Midgley Revisiting Factual Causation 295 fn 116.

¹⁰⁰ Trinidad and Cane 476.

¹⁰¹ Although some commentators argued otherwise (see Boberg 668), the then Appellate Division in *South British Insurance Co Ltd v Smit* 1962 (3) SA 826 (A); held that fault is the sole criterion for apportioning damages under the Apportionment of Damages Act 34 of 1956. The South African Law Reform Commission Project 96 *Report on the Apportionment of Damages Act 34 of 1956* (2003) 71 notes that courts in South Africa have preferred a 'simple, commonsense, intuitive allocation of fault to each party'. However, the Commission, after reviewing developments in other Commonwealth jurisdictions, expressed the view that such an approach is outdated and unnecessarily limiting. Instead it recommended (at 77) that various factors be taken into account in the process of apportionment, including 'the relationship between the parties; the nature, quality and causative effect of (i) the acts and omissions of the wrongdoer or of each wrongdoer, (ii) the plaintiff's failure, if any, to act with due regard to his or her own interests; and (iii) any fault on the part of the plaintiff or any wrongdoer.'

Allowing the nature of the relationship between the employer and employee, as well as causation, to be factors in the apportionment of damage allows for a more nuanced approach that recognises that responsibility means more than fault. The causative potency of the parties' acts may be an important way of apportioning blame between an employer and employee who have

6.3.3 *Increasing the risk of and/or creating opportunities for harmful events*

There may be situations in which a plaintiff cannot prove that the defendant's conduct had actually caused the plaintiff's harm, but at most that the defendant had increased the risk of the harm and/or had created opportunities for the harm to eventuate. This inability may stem from the fact that the facts that have to be proved are within the peculiar knowledge of the defendant,¹⁰² or that science in that area has not developed to the extent of providing sufficiently detailed causal relationships between the defendant's conduct and the plaintiff's harm.¹⁰³ In cases involving more than one defendant, it may be possible to establish that one or more of the defendants was/were responsible for the plaintiff's loss, but it may be impossible to establish which defendant(s) was/were to blame.¹⁰⁴

A case in which both problems of indeterminate defendants and indeterminate harm arose, is *Fairchild v Glenhaven Funeral Services*.¹⁰⁵ The claimants had all developed mesotheliomas¹⁰⁶ after being exposed to asbestos in the course of their work. Lord Bingham explained the causative difficulties as involving the lack of medical knowledge as to how exactly a mesothelial cell is transformed into a mesothelioma cell, with the result that there is 'no way of identifying, even on a balance of probabilities, the source of the fibre or fibres which initiated the genetic process which culminated in the malignant tumour'.¹⁰⁷ Thus, if a worker

both contributed to the latter suffering from an occupational psychiatric injury. For example, in cases of psychiatric injury caused by excessive workloads it often happens that the employee does not complain to superiors because of fear of adverse consequences. The employers may nevertheless foresee that psychiatric injury is a possibility and do nothing about the situation. In such a case, it may be just and equitable not just to examine the degree of their respective negligence, but also the causative effect of each of their negligent conduct on the plaintiff's harm.

¹⁰² McLachlin 17; Stapleton Gist of Negligence 397.

¹⁰³ *Fairchild v Glenhaven Funeral Services* at para [7]; Stapleton Gist of Negligence 398.

¹⁰⁴ Stapleton Gist of Negligence 392; J Stapleton 'Occam's Razor Reveals an Orthodox Basis for *Chester v Afshar*' (2006) 122 *Law Quarterly Review* 426 at 428.

¹⁰⁵ [2002] 3 All ER 305 (HL).

¹⁰⁶ A malignant tumour of the pleura, sometimes of the peritoneum. JM Hawkins *The Oxford Senior Dictionary* (1982) defines the pleura(at 477) as one of two membranes that lines the chest and surrounds the lungs, while the peritoneum is defined (at 462) as the membrane lining the abdomen.

¹⁰⁷ At para [7].

is employed successively by two employers and develops a mesothelioma as a result of his/her working conditions, it may be because of a single asbestos fibre inhaled while working for either employer, or many fibres inhaled while working for either employer, or many fibres inhaled while working for both employers. The House of Lords unanimously held that both employers could be held liable, but each Law Lord reached that conclusion through different reasoning.

The Court relied heavily on the decision in *McGhee v National Coal Board*,¹⁰⁸ in which a worker had contracted dermatitis after working in a brick kiln. The claimant in that case had alleged that his employer's failure to provide showers was a breach of duty that had materially increased the risk of him contracting the disease. There were two possible causes of his dermatitis, viz the dust that clung to his body while working and to which he had not been wrongfully exposed, and the dust that continued to cling to his body while he was cycling home, which he alleged constituted a wrongful exposure.¹⁰⁹

The plaintiff's expert had testified that he could not state that the provision of showers probably would have prevented the disease, but that it would have materially decreased the risk.¹¹⁰ The Lord Ordinary in the Court *a quo* had drawn a distinction between materially increasing the risk of injury and materially contributing to the injury, finding that the former is insufficient for purposes of causation.¹¹¹ Three of the members of the House of Lords expressly rejected this distinction on appeal, holding that in the circumstances of the case materially increasing the risk of harm should be held equivalent to materially contributing to the harm.¹¹²

¹⁰⁸ [1973] 1 WLR 1.

¹⁰⁹ Weinrib 521.

¹¹⁰ 1973 SC (HL) 37 at 42-43.

¹¹¹ *Ibid.*

¹¹² Per Lord Reid at 5, Lord Simon at 8 and Lord Salmon at 12-13.

This put paid to the notion expressed by Lord Bridge in *Wilsher v Essex Area Health Authority*¹¹³ that the decision in *McGhee* had laid down no new principle of law, but that it was merely the result of a robust application of existing law. Lord Bingham stated that the opinions in *McGhee*, with the possible exception of that of Lord Kilbrandon, could not possibly be read as decisions of fact based on orthodox principles.¹¹⁴ Lord Hoffmann concurred, stating that ‘however robust or pragmatic the tribunal may be, it cannot draw inferences of fact in the teeth of the undisputed medical evidence’.¹¹⁵ The experts had testified that it could not be established that the provision of showers would have prevented the plaintiff’s disease, but only that the risk of the disease was increased by the failure to provide showers.

If one is to accept that this principle is a relaxation of traditional requirements for factual causation, the natural question that arises is what the limits of this relaxation should be. Lord Bingham expressly stated that it is to be expected that the principle affirmed in *Fairchild v Glenhaven Funeral Services* will be the subject of analogous and incremental development, but that cases doing so must be decided as and when they arise.¹¹⁶

It is clear that considerable differences of opinion exist within the House of Lords as to the reasons for and ambit of the decisions in *McGhee v National Coal Board* and *Fairchild v Glenhaven Funeral Services*.¹¹⁷ It is submitted that at the very least the crux of both decisions lies in the recognition that in certain instances, on grounds of policy, the requirements of causation are relaxed. As

¹¹³ [1988] 1 AC 1074.

¹¹⁴ At para [21]; Weinrib 521 fn 14.

¹¹⁵ At para [70].

¹¹⁶ At para [34].

¹¹⁷ This bears out Stapleton’s assertion [in Cause-in-fact 388] that the area of ‘causation, remoteness, proximate cause and so on’ are notoriously difficult and resists the ‘traditional common law method of bottom-up case law synthesis because the legal reasoning on which past case law was based is often obscure’.

Lords Reid, Simon and Salmon recognised in *McGhee*, materially contributing to the risk of harm is equated with materially contributing to the harm itself.¹¹⁸

That still does not shed much light on the effect these two cases will have on future decisions. As Lord Bingham indicated in *Fairchild*, it is impossible to forecast in which situations the principle adopted in *Fairchild* will be applied and that it will have to be the subject of incremental development.¹¹⁹ However, there are some guidelines we can extrapolate from later cases as to the circumstances in which increasing the risk of harm will be equated with causing that harm. It is also important that we assess how these guidelines may be applied in cases of workplace psychiatric illness.

6.3.3.1 *Increasing the risk of harm and workplace psychiatric illness*

Firstly, it was made clear in *Barker* that the *Fairchild* principle only applies in single-agent cases, meaning that the causes must operate in roughly the same way.¹²⁰ Thus, if a worker suffers from a mental condition that is caused by exposure to long-term stressors, proof that the employer had exposed the employee to sudden trauma is not likely to lead to a relaxation of the traditional requirements for factual causation.

Secondly, where possible alternative causes are also under the control of the defendant, courts will be more willing to compromise orthodox requirements of causation.¹²¹ Thus, if possible causes of psychiatric injury are all work related, the courts may be more lenient than if the alternative causes are not work related.¹²²

¹¹⁸ Per Lord Reid at 5, Lord Simon at 8 and Lord Salmon at 12-13.

¹¹⁹ See fn 116 above.

¹²⁰ At paras [22], [64] and [114].

¹²¹ Fleming Probabilistic Causation 670.

¹²² Obviously it does not mean that courts will never award compensation where alternative non-work causes are present. See, for example, *Grobler v Naspers en 'n Ander* at 272G-I, where other non-work related causes of the plaintiff's psychiatric illness were recognised, but the court

Given the uncertain aetiology of mental conditions that result from a series of sexual abuses and mental conditions that are the result of a sequence of stressful working conditions, the spectre of alternative causes within the workplace is not far-fetched. However, a perusal of the case law reveals that most claims involve possible alternative causes that are not under the control of the defendant. One would therefore be dealing with a scenario analogous to *Wilsher v Essex Area Health Authority*, as opposed to one similar to *McGhee v National Coal Board* or *Fairchild v Glenhaven Funeral Services*.

Thirdly, there is a strong policy basis for the decisions in *McGhee* and *Fairchild*. The harm at issue was a recurring industrial disease and fairness dictated that if there were evidential difficulties, the employer who had put the employee at risk should bear the 'cost' of the deficient medical knowledge in that particular field.¹²³ Fleming cites *Fitzgerald v Lane* as an example of a case where the plaintiff's interests overwhelmed the defendants' and the latter were held liable. In that case a jaywalker had been hit successively by two cars, but there was no balance of probability as to which of the defendant drivers had caused his injuries.¹²⁴ The Court of Appeal, relying on *McGhee*, held both drivers liable.

It is submitted that there are various other policy factors that may be relevant in the sphere of psychiatric injury, which may include the following factors: What are the relative positions of the plaintiff and defendant in the sense of their respective bargaining power to determine the conditions that impact on the risk of psychiatric injury? Is the threat of psychiatric injury once-off or recurring? What control does the employer have over the employee's work hours?

nevertheless found that her condition had been materially caused by the harassment she suffered at the hands of her colleague.

¹²³ Per Lord Nicholls in *Fairchild* at para [42].

¹²⁴ Fleming Probabilistic Causation 671.

6.4 LEGAL CAUSATION

The question of legal causation is one concerned with limiting the boundaries of liability. Van der Walt and Midgley state that courts must strike an equitable balance between the interests of the wrongdoer and of the innocent victim.¹²⁵ In essence the question of legal causation is not a logical concept concerned with causation but a moral reaction, involving a value judgment and applying common sense, aimed at assessing whether the result can fairly be said to be imputable to the defendant.¹²⁶

Numerous theories of causation have developed and the most important of these are the adequacy theory, the foreseeability theory and the direct consequences theory.¹²⁷ South African and English courts have traditionally recognised two approaches.¹²⁸ One school advocates that a wrongdoer should only be liable for consequences that a reasonable person could have foreseen at the time the wrongful act was perpetrated.¹²⁹ Another school argues that a defendant is liable for all the direct consequences of his/her act, whether probable or improbable, and which are not caused by new and independent intervening causes.¹³⁰ Criticisms of these traditional general tests for legal causation include the fact that they are useless because they inevitably lead to the use of language so vague that courts may attach any meaning to them, and they often disguise the creative policy decisions made by judges.¹³¹

After much confusion, the then Appellate Division in *S v Mokgethi*¹³² expressed a preference for an elastic criterion. This criterion focuses on whether an adequately close connection exists between the conduct and its factual

¹²⁵ Van der Walt and Midgley 202.

¹²⁶ *Ibid.*

¹²⁷ Neethling, Potgieter and Visser 273; Neethling 185.

¹²⁸ McKerron 126.

¹²⁹ Van der Merwe and Olivier 202.

¹³⁰ McKerron 126.

¹³¹ HLA Hart and AM Honoré *Causation in the law* (1959) 4.

¹³² 1990 (1) SA 32 (A) 40-41. This approach was also endorsed in *International Shipping Co (Pty) Ltd v Bentley* 1990 (1) SA 680 (A) 701D-E.

consequence. It also emphasises the policy considerations and concepts such as reasonableness, fairness and justice.¹³³

Neethling, Potgieter and Visser note that in terms of the flexible approach, the various theories of legal causation are at the aid of the imputability question and not *vice versa*.¹³⁴ This means that the various theories should be seen as indicators echoing legal policy as to when liability should be imputed to a person; liability is imputed when, depending on the surrounding circumstances, it is a direct consequence of the conduct, or there is an adequately close relationship between the persons, or the harm was reasonably foreseeable, or for a combination of such reasons, or merely for reasons of legal policy.

In *Smit v Abrahams*¹³⁵ Botha JA criticized the view of the Court *a quo* that reasonable foreseeability of loss is the only key criterion for determining liability. He stated that reasonable foreseeability may be used as a contributory test in the application of the flexible approach, but it cannot bar the latter approach.¹³⁶ Undeniably, in terms of his approach, the case could have been disposed of without any reference to reasonable foreseeability. Based on the facts, he would, *merely as a matter of policy*, have imputed to the defendant the loss for the hiring of a substitute vehicle by the plaintiff, whose automobile was damaged beyond repair and who, because of his financial difficulties, was incapable of purchasing a substitute vehicle.¹³⁷

6.4.1 Foreseeability important in cases of occupational psychiatric harm

Although the traditional tests of causation are subsidiary to the flexible criterion, our courts have tended to emphasise foreseeability in psychiatric injury cases.¹³⁸

¹³³ Botha JA in *Smit v Abrahams* 1994 (4) SA 1 (A) 18E-F commented that the worth of this approach lies in its flexibility and that any attempt to make it more rigid should be resisted.

¹³⁴ Neethling, Potgieter and Visser 188. See, also, Van der Walt and Midgley 203.

¹³⁵ At 17E-F.

¹³⁶ *Ibid.*

¹³⁷ At 17C-D and 19D.

¹³⁸ JR Midgley 'The role of foreseeability in psychiatric injury cases' (1992) 55 *THRHR* 441.

The role of foreseeability in determining legal causation is influenced by whether an abstract, relative or hybrid approach to negligence is followed.¹³⁹ However, this work proceeds on the basis that foreseeability may be relevant to wrongfulness, negligence and causation. In the context of legal causation it relates to whether there is a sufficient causal nexus between the wrongful act and the harm that occurred. It has already been decided that the defendant had been negligent.¹⁴⁰ The issue then becomes whether s/he should be held liable for that negligence.

In *Pratley v Surrey County Council*¹⁴¹ a care manager had been overworked and it was apparent to her employers. Her immediate supervisor then promised her that a new system would be implemented that would lighten her case load. She went on a three-week holiday and upon her return discovered that the promise of the new system would not be honoured. The judge had accepted that her reaction to this broken promise was a major cause of her ensuing depressive illness.

One of the issues was whether the type of injury to the claimant was foreseeable. 'What exactly was foreseeable? Was it a general risk of illness at some or any time? Or was it a risk of illness arising through continuing work overload over a longer future term, as distinct from any risk of immediate collapse ...?',¹⁴² Is this distinction a relevant one? The Court found that a distinction needed to be drawn between the risk of illness due to overwork on the one hand, and the risk of immediate collapse upon hearing disappointing news. The judge in the Court a

¹³⁹ See 5.2 above.

¹⁴⁰ In *Minister of Police v Skosana* 1977 (1) SA 31 (A) 41G Viljoen AJA purported to assess negligence without recourse to reasonable foreseeability. Visser 397 rightly, it is submitted, criticizes this approach.

¹⁴¹ [2003] EWCA Civ 1067 available at <http://www.bailii.org/cgi-bin/markup.cgi?doc=ew/cases/EWCA/Civ/2003/1067.html&query=Pratley> (accessed 27 February 2007).

¹⁴² At para [22].

quo had held that the relevant risk *in casu* was the latter and that it had not been foreseeable.¹⁴³ On appeal, the Court of Appeal agreed:

‘There is a potentially relevant distinction between a risk of psychiatric injury arising from continuing overload in the future, and a risk of collapse in the short-term arising from disappointment of a “cherished idea” developed as a result of a conversation about possible problems if there was continuing work overload over a future period. The harm in each case is psychiatric injury, but not only does it occur by quite different mechanisms, more importantly it occurs at quite different times in circumstances calling for a response at different times. It follows that the judge was right to consider whether the risk of immediate collapse was foreseeable, which he held it was not.’¹⁴⁴

From this passage it is clear that the general nature and manner of occurrence of the psychiatric harm that ensued, must be foreseeable.

6.4.2 Egg-shell personalities

It goes without saying that some individuals are mentally more resilient than others; we all have differing capacities to deal with mental stresses and strains.¹⁴⁵ What will often have to be determined in terms of the flexible criterion for causation,¹⁴⁶ is whether the plaintiff’s predisposition to mental injury is such that the harm complained of was unforeseeable and that the defendant can therefore not be held liable for the harm suffered.

The so-called ‘thin-skull’ rule¹⁴⁷ and its application to psychiatric injury in South African law was succinctly set out in *Masiba and Another v Constantia Insurance Co Ltd and Another*:¹⁴⁸

¹⁴³ At para [23].

¹⁴⁴ At para [25].

¹⁴⁵ In *Grobler v Naspers Bpk en 'n Ander* 2004 (4) SA 220 (C) 272G-I it was stated that even though the plaintiff’s other life problems (financial troubles, her husband having served time in jail and her having an extra-marital relationship with a colleague) rendered her vulnerable to emotional problems, the alleged sexual harassment she was exposed to had caused her PTSD.

¹⁴⁶ *Clinton-Parker v Administrator, Transvaal; Dawkins v Administrator, Transvaal* 1996 (2) SA 37 (W) 64J-65A.

¹⁴⁷ The term ‘thin skull’ or ‘eggshell skull’ was first used in England in 1901 in *Dulieu v White* [1901] 2 KB 669 at 679. Although the same terminology was not used, a rule akin to it was

‘Regard being had to the physical condition of the deceased and his long history of hypertension the present case affords an almost classic instance of the so-called “thin-skull case”, the rule being that a negligent defendant is bound to take his victim as he finds him. ... It being a *sine qua non* of liability where non-physical injury is inflicted that this harm should have been foreseeable, the application of the “thin-skull rule” to cases involving injury of this nature is that once a psychiatric injury of gravity sufficient to render it actionable is foreseeable, then the injured party can recover for more extensive psychiatric damage which is attributable to his pre-existing weakness’

This dictum was applied in *Gibson v Berkowitz and Another*,¹⁴⁹ the Witwatersrand Local Division holding that the ‘defendants ... found the plaintiff with all her built-in stresses and strains’¹⁵⁰ and were therefore liable for the negative effect of all the stressors the plaintiff was exposed to as a result of the defendants’ wrongful, negligent conduct.¹⁵¹

In England, it has been generally accepted that the exacerbation of a mental injury or disorder does not fall outside the ambit of the thin-skull rule.¹⁵² Similarly, in the US, most jurisdictions have applied the rule to mental injuries.¹⁵³

The crux of the matter is whether actionable harm was foreseeable. It matters not that the *extent* of the harm is more severe than the plaintiff could have foreseen.¹⁵⁴ In psychiatric injury cases it is important to bear in mind that a

recognised in the United States as early as 1899, the Court in *Spade v Lynn & BRR* 52 NE 747 (Mass 1899) holding that ‘the defendant must answer for the actual consequences of that wrong to her as she was, and cannot cut down her damages by showing that the effect would have been less upon a normal person.’ See SM Eden ‘I Am Having a Flashback ... All the Way to the Bank: The Application of the “Thin Skull” Rule to Mental Injuries – *Poole v Copland, Inc.*’ (2001) 24 *North Carolina Central Law Journal* 180 at 183.

¹⁴⁸ 1982 (4) SA 333 (C) 342D-F. This dictum was approved in *Clinton-Parker v Administrator, Transvaal* 1996 (2) SA 37 (W) 65A-C.

¹⁴⁹ 1996 (4) SA 1029 (W).

¹⁵⁰ At 1050A.

¹⁵¹ At 1050B-G.

¹⁵² PJ Rowe ‘The demise of the thin skull rule?’ (1977) 40 *Modern Law Review* 377 at 379. He cites the following cases: *Malcolm v Broadhurst* [1970] 3 All ER 508; *Love v Port of London Authority* [1959] 2 Lloyd’s Rep 541; *Constable v (TF) Maltby Ltd* [1955] 1 Lloyd’s Rep 569; *Dooley v Cammell Laird & Co Ltd* [1951] 1 Lloyd’s Rep 271; *Marcroft v Scruttons* [1954] 1 Lloyd’s Rep 395.

¹⁵³ Eden 184.

¹⁵⁴ Rowe 387.

recognised psychiatric illness must have been foreseeable to a person of ordinary fortitude. If such harm is not foreseeable, the defendant is not negligent and should not be held liable. Eden argues that such a limitation is imperative, otherwise the burden on defendants is unfair.¹⁵⁵

In workers' compensation cases, where negligence is not required, pre-existing conditions will be addressed in terms of causation. The thin-skull rule is not an exception to the foreseeability requirement; it merely reflects that the same standard for causation should apply equally to individuals with or without pre-existing conditions.¹⁵⁶

A factual example of how a pre-existing condition may complicate a case of workplace mental injury can be found in the North Carolina case of *Poole v Copland, Inc.*¹⁵⁷ In that case, a woman had filed claims against a former co-worker and her former employer, alleging that the sexual harassment she had been subjected to had caused flashbacks of repressed memories of childhood sexual abuse she had suffered.¹⁵⁸ This had caused her to suffer PTSD and a dissociate disorder.¹⁵⁹ The Supreme Court of North Carolina upheld the ruling of the Court *a quo* that the thin skull rule applied to tortious conduct that exacerbated a pre-existing mental condition.¹⁶⁰

6.4.3 *Novus actus interveniens*

There may be cases where it is arguable that other traumatic events or chronic stressors in the claimant's life constitute independent intervening causes that are responsible for his/her psychiatric injury. In *Gibson v Berkowitz*¹⁶¹ the defendant submitted that various factors cumulatively constituted independent, intervening

¹⁵⁵ Eden 180.

¹⁵⁶ Adler and Schochet 615.

¹⁵⁷ 348 NC 260 and discussed in Eden 180.

¹⁵⁸ Eden 180.

¹⁵⁹ Eden 182.

¹⁶⁰ Eden 183.

¹⁶¹ At 1041G-H.

causes that broke the chain of legal causation between the defendant's wrongful, negligent act and the mental disorder suffered by the plaintiff. These alleged factors were: the trial stress she was exposed to at various stages of proceedings, excessive drug treatment in a psychiatric facility, threats that the plaintiff's child may be taken away from her, financial pressures and family problems.¹⁶²

One such intervening cause is what is termed 'compensation neurosis'. It involves a situation in which the injured employee is disabled by 'an unconscious desire to obtain or prolong compensation' or anxiety over the outcome of the litigation.¹⁶³ In *Gibson v Berkowitz* the Court held that even though the plaintiff's condition was partly influenced by compensation neurosis, this did not constitute an intervening cause. The Court emphasised that '[t]rial stress in itself cannot therefore break the causal chain between the defendant's negligence and the plaintiff's present major depressive disorder'.¹⁶⁴

Although the majority of jurisdictions in the US have held that genuine compensation neurosis is compensable, some jurisdictions have held that it constitutes an independent cause.¹⁶⁵ Smith Pryor argues that there are two possible reasons for this: Firstly, courts' denials of compensation are aimed at implementing a genuineness approach.¹⁶⁶ Secondly, courts may be of the view that it will promote the elimination or, at the very least prevent the exacerbation, of the neurosis.¹⁶⁷

¹⁶² At 1041E-F.

¹⁶³ A Larson 'Mental and Nervous Injury in Workmen's Compensation' (1970) 23 *Vanderbilt Law Review* 1243 at 1256.

¹⁶⁴ At 1048F-G. The Court (at 1048B-F) relied on the judgment in *Moehlen v National Employers' Mutual General Insurance Association Ltd* 1959 (2) SA 317 (SR) 319H-320C where a similar sentiment was expressed.

¹⁶⁵ EL Felter Jr 'Workers' Compensation Claims for Heart Attack and Mental Illness' (1988) 11 *Workers' Compensation Law Review* 125 at 130; Larson 1256; E Smith Pryor 'Compensation and the Ineradicable Problems of Pain' (1991) 14 *Workers' Compensation Law Review* 307 at 365.

¹⁶⁶ Smith Pryor 366. She opposes this reason, because 'the mere involvement of secondary-gain factors does not render pain non-genuine'.

¹⁶⁷ *Ibid.* The author (at 368) also does not support this approach, submitting that it is too general an explanation of judicial behaviour and that the tendency to deny compensation rather stems

6.5 THE BURDEN OF PROOF

The plaintiff is required to prove the causal link on a balance of probabilities only.¹⁶⁸ The enquiry requires 'a sensible retrospective analysis of what would probably have occurred, based upon the evidence and what can be expected to occur in the ordinary course of human affairs rather than an exercise in metaphysics'.¹⁶⁹

Viscount Maugham in *Joseph Constantine Steamship Line v Imperial Smelting Corporation Ltd*¹⁷⁰ described the burden of proof as 'an ancient rule founded on considerations of good sense ... [which] should not be departed from without strong reason.'

Courts in various Commonwealth jurisdictions have held that there is strong enough reason to depart from the traditional approach to the burden of proof. Sopinka J in *Snell v Farrell*¹⁷¹ stated that in difficult cases Canadian courts, after the decision in *McGhee v National Coal Board* but before *Wilsher v Essex Area Health Authority*, had either shifted the burden of proof or proceeded on the basis of an inference of causation. The distinction made no practical difference because in both instances the onus shifted to the defendant.

Two of three justices in the High Court of Australia in *Chappell v Hart*¹⁷² accepted that the burden of proof should be shifted in a case where the plaintiff can 'demonstrate that a breach of duty has occurred which is closely followed by damage'. Kirby J explained that in such cases a *prima facie* causal connection will have been established and it is then up to the defendant to disprove it.¹⁷³

from a deficient understanding of the neurosis and the manner in which the availability of compensation influences the plaintiff's experience. Moreover, a court's individualized prediction that denying compensation will aid a particular plaintiff's rehabilitation will add little to the system's stance on when to award or deny compensation on that basis.

¹⁶⁸ *Gibson v Berkowitz* 1996 (4) SA 1029 (W).

¹⁶⁹ *Minister of Safety and Security v Van Duivenboden* 2002 (6) SA 431 (SCA) para [25].

¹⁷⁰ [1942] AC 154 at 174.

¹⁷¹ At para [24].

¹⁷² (1998) 156 ALR 517 at 527 and 548.

¹⁷³ At 548.

The English cases reveal that a full reversal of the burden of proof in some instances has been advocated, but it has ultimately been rejected by the House of Lords. Lord Wilberforce in *McGhee v National Coal Board*¹⁷⁴ stated:

‘[I]t is a sound principle that where a person has, by breach of a duty of care, created a risk, and injury occurs within the area of that risk, the loss should be borne by him unless he shows that it had some other cause.’

Lord Bridge in *Wilsher v Essex Area Health Authority*, however, held that if Lord Wilberforce meant to indicate a reversal of the burden of proof instead of a mere evidential burden on the defendant where a *prima facie* case has been made out by the plaintiff, it was a minority opinion.¹⁷⁵ The majority of the House of Lords in *Fairchild v Glenhaven Funeral Services* agreed with this finding.¹⁷⁶ In short, there is a relaxation of the standard of proof, but the burden of proof remains as it has always been.

Robertson submits that there are problems in determining when to shift the burden of proof or the evidential burden to defendants.¹⁷⁷ Sopinka J in *Snell v Farrell* suggested that it might be appropriate where the facts are peculiarly in the knowledge of the defendant, or where the defendant’s misconduct destroyed the means of proof.¹⁷⁸

¹⁷⁴ At 6.

¹⁷⁵ At 1087F-G.

¹⁷⁶ Per Lord Bingham at para [22]; per Lord Hoffmann at para [65]; and per Lord Hutton at para [109]. See also the Canadian case of *Haag v Marshall* (1989) 61 DLR 4th 371 at 378, where Lambert JA stated: ‘It is clear from those decisions that *McGhee* is not now, and never was, authority for the legally adventurous proposition that if a breach of duty is shown, and damage is proven within the area of risk that brought about the duty, and if the breach of duty materially increases the risk of damage of that type, then the onus of proof shifts from the plaintiff to the defendant to disprove the causal connection. That proposition could be derived only from the speech of Lord Wilberforce and it is now clear that it was never a binding principle emerging from the *McGhee* case.’

¹⁷⁷ DW Robertson ‘The Common Sense of Cause in Fact’ (1997) 75 *Texas Law Review* 1765 at 1800.

¹⁷⁸ (1990) 75 DLR 4th 289.

McLachlin¹⁷⁹ notes that it will likely be applied in indeterminate defendant cases involving few defendants who have all been negligent. However, where the number of defendants increases, the risk of saddling an 'innocent' defendant with liability increases and it will become less acceptable. Similarly, where there is a chance that a particular defendant did not engage in any wrongful conduct, let alone causing the plaintiff's harm, it will be less acceptable to shift the burden.

In cases involving acute stressors, such as when an employee is involved in an accident, alternative causes may be easier to discount and shifting the evidential burden may be just and equitable. However, where chronic stressors have caused harm, it will be difficult to separate non-occupational causes from occupational causes and placing an evidential burden on the defendant may be too onerous.

6.6 CONCLUSION

The recent developments in the law of causation are reflecting the profound observation that '[a]s we acquire more knowledge, things do not become comprehensible, but more mysterious'.¹⁸⁰ The all or nothing nature of the 'but-for' test does not take into account this truth and causes problems in cases where there are indeterminate defendants or indeterminate causes. Although this issue has not received much judicial attention in South Africa, it is bound to arise in occupational psychiatric injury cases.

Causation in such cases is especially difficult due to the nature of psychiatric injury and the difficulty of proving causal connections beyond a balance of probabilities. In order to reach a balance of equity between plaintiffs and defendants, courts will have to be innovative, yet prudent in their approach to causation. In this regard, it is submitted that the unnecessarily harsh effects of a

¹⁷⁹ McLachlin 20.

¹⁸⁰ Durant as cited at <http://www.wku.edu/teaching/db/quotes/byintelligence.php> (accessed 27 February 2007).

rigid approach to causation can be ameliorated by the careful, yet innovative, application of the but-for test, the material contribution test, and recognising that equating the creation of a risk of injury with actually causing that injury may be needed in admittedly limited circumstances in which it is clear that more than one defendant had been negligent, but it cannot be determined which defendant's negligent conduct has caused the harm. This relaxation of traditional requirements for factual causation may also be needed where psychiatry has not evolved to determine the precise mechanisms that operated to cause the plaintiff's psychiatric injury.

Causation in terms of both the common law and COIDA has a strong policy base. The flexible criterion for legal causation is also underpinned by policy. It is untenable for South African law to keep applying a formulaic 'but-for' test because factual causation is not supposed to be heavily influenced by policy. Such an approach is out of step with developments in other Commonwealth jurisdictions and disregards the complicated nature of psychiatry injury in the workplace.

CHAPTER 7

COMPENSATION UNDER COIDA

7.1 INTRODUCTION

This chapter examines the specific requirements for compensation for psychiatric harm set by COIDA. In chapter two of this work I submitted that compensation under COIDA should be the primary vehicle for vindicating workers' rights,¹ because it offers a more holistic, cost-effective solution to the problem of workplace stress and the concomitant psychiatric harm. However, although the compensation system is designed to be simple, the process is sometimes difficult because the interpretation of COIDA can cause problems.²

7.1.1 Requirements for compensation under COIDA

COIDA allows for compensation only for personal injury suffered as a result of an occupational injury or an occupational disease, so a claimant has to prove that his/her psychiatric harm constitutes a personal injury that is either an occupational injury or an occupational disease. Furthermore, claimants under COIDA have to prove a causal connection between the accident or the disease and the loss suffered by the employee, without there being a break in causality.³ Increased compensation is awarded, on application, if the claimant can prove that the employer or persons in managerial positions were negligent.

These requirements are obviously informed by common-law notions of the harm that is compensable, negligence and causation, as discussed in previous chapters. However, all these elements have to be aligned with the compromise nature of the workers' compensation system and may therefore have to be adapted to fit into the workers' compensation paradigm.

¹ See 2.6 above.

² Anonymous 'COIDA Compensation – Do Psychiatric Disorders Qualify?' (2006) 8 *Beaumont's Employment Service* 48.

³ Smit Legal Analysis 474.

Also, there are specific requirements that claimants under COIDA will have to meet. The overarching requirement is that the occupational injury or disease must have arisen 'out of and in the course and scope of [the claimant's] employment.'⁴

7.2 PSYCHIATRIC HARM: 'OCCUPATIONAL INJURY' OR 'OCCUPATIONAL DISEASE'?

7.2.1 *Legislative framework*

COIDA provides for compensation for both occupational injuries and occupational diseases. Recovery for occupational injuries is limited to those injuries suffered in consequence of an accident.⁵ A rather circular definition of 'accident' is provided, i.e. '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'. The benefits to which section 22 entitles a claimant are for an occupational injury, which is defined as 'a personal injury sustained as a result of an accident'. It is clear that the Act does not provide clarity on the meaning of 'accident'.⁶

'Occupational disease' is defined as 'any disease contemplated in section 65(1)(a) or (b)'.⁷ Section 65 in turn provides that compensation is payable to an employee who can prove that s/he has either contracted a disease mentioned in Schedule 3 and that such disease had arisen out of and in the course of employment, or that s/he has contracted a disease other than one contemplated

⁴ COIDA in s 1(i) defines 'accident' 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 an employee'. Section 1 (xxxi) states that an 'occupational disease' means 'any disease contemplated in section 65 (1)(a) or (b)'. Section 65 deals with diseases that have 'arisen out of and in the course and scope of [the employee's] employment'. 'Occupational injury' is defined in s 1 (xxxii) as 'a personal injury sustained as a result of an accident'.

⁵ Section 22.

⁶ Section 1.

⁷ Section 1.

in Schedule 3 and that such disease had arisen out of and in the course of employment. Once again, no clear definition of 'disease' is provided.

The circular instruction on PTSD states that PTSD is to be regarded as an occupational injury in terms of COIDA.⁸ It further provides that an occupational injury does not include an occupational disease unless that occupational disease results from an occupational injury.⁹

This is in line with the policy regarding PTSD that was adopted by the Compensation Fund in 2003.¹⁰ The impact of that policy is that there must be an objectively verifiable and identifiable traumatic event and that a series of events or the inherent stressful nature of a job is not sufficient for purposes of recovery under the Act. In its annual report for the year ending March 2003 the Compensation Fund reiterated that PTSD is administratively regarded as an occupational injury because it 'follows on an accident for which time and place can be determined'.¹¹ However, in its annual reports for both 2004 and 2005 PTSD is grouped with occupational diseases.¹²

7.2.2 Case law

In *Grobler v Naspers Bpk en 'n Ander*¹³ Nel J noted that, although cases such as *McQueen v Village Deep GM Co Ltd*¹⁴ and *Langeberg Foods Ltd and Another v*

⁸ GN 936 in GG 25132 of 27 June 2003.

⁹ Preamble.

¹⁰ A technical committee of experts was established in 2000 and drafted various policies regarding occupational diseases, including a policy on PTSD that was concluded in 2002 and led to the abovementioned circular instruction. The 2002-2003 Annual Report is available at <http://www.labour.gov.za/docs/reports/Compensation%20fund%20AR%20200-03.pdf> (accessed 20 March 2006).

¹¹ Compensation Fund Annual Report for period ending March 2003 at 30.

¹² Compensation Fund Annual Report for period ending March 2004 available at <http://www.labour.gov.za/download/8516/Annual%20Report%20-%20Compensation%20Fund%202004.pdf> (accessed 20 March 2006) at 20. The corresponding report for 2005 is available at <http://www.labour.gov.za/download/10302/Annual%20Report%20-%20Compensation%20Fund%202005.pdf> (accessed 20 March 2005) at 25.

¹³ 2004 (4) SA 220 (C).

¹⁴ 1914 TPA 344.

*Tokwe*¹⁵ extended the definition of ‘accident’ to include injuries that were caused intentionally, it was doubtful that such extension would apply to sexual attacks. In any event, so the learned judge held, COIDA did not make provision for cases where a claimant has been harassed over a period of several months, i.e. it did not apply where gradual stressors have caused psychiatric injury.¹⁶ He stated that it was clear that the Act requires a specific event in order for it to fall within the definition of ‘accident’. Nel J was of the view that this requirement is implicit in, for example, the s 43 requirement that a claim be instituted within 12 months of the date of the accident, or the s 44 provision that such claim prescribes within 12 months of the accident.

The Supreme Court of Appeal, in the appeal case,¹⁷ took the view that since the event that caused the claimant’s PTSD did not take place as a result of or in the course of her employment, it was unnecessary to deal with whether PTSD constitutes an occupational disease within the meaning of COIDA. Counsel for the first appellant seems to have abandoned the argument that a series of events may constitute an accident as required by the Act. Instead, he focused on the development of occupational diseases resulting from prolonged exposure to work-related hazards.¹⁸ Farlam JA remarked that it may well be that employees may claim in terms of s 65 of COIDA for psychiatric disorders sustained as a result of being exposed to sexual harassment in the workplace, but that the facts at hand did not require the Court to make a decision on that point.¹⁹

¹⁵ [1997] 3 All SA 43 (E). A security guard employed by the first appellant had allegedly assaulted the claimant after having seen him smoke dagga on company premises, which was against company policy. At 49e-f the Court stated: ‘That second appellant’s actions were deliberate in the sense that they constituted an assault does not detract from the notion that respondent was injured as a result of an accident because “even where the act is intentional as regards third parties, as long as it was not intended so far as the workman was concerned it must be taken to be an accident *qua* the workman” – per De Villiers JP in *McQueen v Village Deep GM Co Ltd* 1914 TPD 344 at 348.’

¹⁶ At 299H-300B.

¹⁷ *Media 24 Ltd and Another v Grobler* 2005 (6) SA 328 (SCA).

¹⁸ At para [32].

¹⁹ At para [77].

In *Urquhart v The Compensation Commissioner*²⁰ the Court disagreed with the requirement of a single stressful injury-inducing event. The claimant had developed PTSD as a result of being exposed to highly stressful incidents as a result of and in the course of his employment as a press photographer.²¹ The Compensation Commissioner had rejected his claim for compensation in terms of COIDA because he had failed to show that the cause of the PTSD was a single work-related event which amounted to an accident within the meaning of the Act.²²

Jones J, with whom AR Erasmus J concurred, disagreed with the Commissioner's finding that the condition for which compensation is claimed must be shown to have been caused by one specific event, stating that it is not supported by the wording of the Act, the ordinary meaning of the word 'accident' or the spirit and purpose of the Act.²³ As far as the wording is concerned, the Court held that the law has long recognised that psychological trauma is as much a personal injury as a broken limb, and nothing in the definitions of 'accident' and 'occupational injury' in the Act indicate a contrary intention.²⁴ These definitions are not so much definitions as a broad classification to ensure different compensation for different kinds of disorder.²⁵

The judge was of the view that while the approach adopted by the Commissioner may be workable in more conventional cases where there is a physical injury after a specific accident, it is not appropriate in cases where there may be

²⁰ 2006 (1) SA 75 (E).

²¹ At 78C. At 78A-B some of these incidents were named: '...horrible scenes of death, violence, social unrest and political riot, and conflict between citizens and armed police. He has been attacked physically. His presence at occasions of crowd violence in the townships of Port Elizabeth and its surrounds has at times exposed him to considerable personal danger. He published photos of police brutality which brought him into conflict with the police authorities and resulted in threats from certain quarters in the police with the use, and indeed abuse, or their emergency powers to his detriment and that of his wife and children.'

²² At 79E.

²³ At 82E-F.

²⁴ At 81I-J.

²⁵ *Ibid.*

multiple causation in relation to psychological trauma suffered over many years.²⁶ The Act must be interpreted in a more flexible manner, especially in view of the Constitution and the purpose of the Act, which in *Davis v Compensation Commissioner*²⁷ was stated as being to assist workers as far as possible: The Act should not be interpreted restrictively so as to prejudice workers if it is capable of being interpreted in a manner more favourable to him/her.

The Court also found that it is hardly a novel concept that a series of events may constitute an accident within the meaning of COIDA. In support of this finding, the judge cited *Nicosia v Workmen's Compensation Commissioner*,²⁸ in which Roper J held that even if there was a pre-disposition to injury which caused an ordinary movement in the course of the worker's employment to lead to injury, there was what may be called an internal accident that satisfies the requirement of an accident within the meaning of what was the Workmen's Compensation Act.²⁹

In *Briesch v Geduld Proprietary Mines Ltd*³⁰ it was held that in order to constitute an accident within the meaning of the Workmen's Compensation Act³¹ in force at the time, 'the injury must be caused by some untoward or unexpected event, capable of definite ascertainment as to nature, time and place, but there need not necessarily be any agency external to the workman injured'. Smith J held that a strain occasioned to a worker in the course of his work and which caused a complete rupture incapacitating him from employment constituted an accident, even though previous strains in the course of his work had started the protrusion leading to the rupture.

²⁶ At para [17].

²⁷ 1995 (3) SA 689 (C) 694F-G.

²⁸ 1954 (3) SA 897 (T).

²⁹ Act 30 of 1941.

³⁰ 1911 TPD 707.

³¹ Act 36 of 1907.

7.2.3 Critical analysis of South African law and policy

It is clear that COIDA does in fact make provision for acute stressors, but the position in relation to gradual stressors or trauma is uncertain. This uncertainty is caused by the requirement that an accident needs to have been the cause of an occupational injury and the fact that many psychiatric injuries develop gradually. It is therefore necessary to ascertain whether COIDA can be interpreted to provide for compensation for psychiatric injury sustained as a result of gradual stressors. In order to do so, I will consider the legislative history of COIDA, as well as the meanings to be ascribed to 'accident' and 'disease' as used within the Act.

7.2.3.1 Legislative history

Troost, writing on the development of American law in this area, notes that many occupational health and safety statutes were drafted at a time when psychiatric injury in the workplace was not a subject that had received widespread attention and only industrial accidents that were sudden and caused 'physical' injuries were taken into account.³² For this reason courts have found it easier to award compensation where mental stimuli caused physical injuries or vice versa, because it resembles the purely physical injuries the drafters of the statutes had envisioned.³³

Mental injuries caused by mental stimuli have not received such a warm reception and are mostly awarded where sudden frights have caused a psychiatric injury, because there is a discernable event that precipitated the injury.³⁴ For example, in *Yates v South Kirby Collieries Ltd*³⁵ the English Workmen's Compensation Act of 1906 was interpreted to cover a collier who was unable to return to work as a result of finding a badly injured workmate who had

³² GM Troost 'Workers' Compensation and Gradual Stress in the Workplace' (1985-1986) *Workmen's Compensation Law Review* 145 at 154.

³³ Troost 155; F Slusarz 'Workplace Stress Claims Resulting from September 11th' (2002-2003) 18 *Labor Law* 137 at 139.

³⁴ *Ibid.*

³⁵ [1910] 2 QB 538.

been knocked down by a timber prop and some coal and who had died fifteen minutes later.

The development of this area of the law in South Africa has followed a similar pattern. The first Workmen's Compensation Act of the Union of South Africa was promulgated in 1914, two years before the first case in which damages for nervous shock was allowed.³⁶

In moving the second reading of the Workmen's Compensation Bill in the House of Assembly in June 1914, the Minister of Public Works explained the rationale behind the adoption of measures to deal with industrial accidents.³⁷ Under Roman-Dutch law, a worker could claim compensation if he suffered injury as a result of the negligent conduct of the employer or a fellow-worker. He could not claim if there's proof of contributory negligence on his part. Workers had difficulty bringing action because of the costs involved and as a result Employer's Liability Acts were passed in the Cape in 1886 and in Natal in 1896.³⁸ However, the worker still had to prove negligence and there was no machinery set up where he could call on legal assistance in an inexpensive manner. For these reasons, the Employer's Liability Acts were replaced by Workmen's Compensation Acts, the Cape following the British example in 1905³⁹ and the Transvaal doing the same in 1907.⁴⁰

The Minister emphasised that a worker was entitled to reasonable, but limited, compensation if he was injured in the course of employment. As the work was done for the employer, the employer was the proper person to saddle with liability for injuries sustained. The existing procedure had to be simplified and made less

³⁶ *Hauman v Malmesbury Divisional Council* 1916 CPD 216.

³⁷ Union of South Africa, House of Assembly Debates (1914) Fourth Session, First Parliament at 2114.

³⁸ Act 12 of 1896.

³⁹ Workmen's Compensation Act 40 of 1905.

⁴⁰ Workmen's Compensation Act 34 of 1907.

costly if justice were to prevail.⁴¹ The underlying principle was to protect the poor and the helpless people who in many cases were least able to protect themselves, and least able to take advantage of the law passed for their benefit.

A series of Workmen's Compensation Acts followed, the one being promulgated repealing its predecessor.⁴² The final Workmen's Compensation Act was replaced by COIDA in 1993. Apart from the development of a policy to deal with PTSD in the workplace, no record exists of any discussions or debates regarding the incorporation into COIDA of compensation for psychiatric injury caused by gradual workplace stressors.

The Court in *Urquhart* reasoned that because psychiatric injury is a personal injury and it is not specifically precluded from forming the basis of a claim for compensation, the Act must be read so as to include it, even if psychiatric injury was not specifically contemplated by the legislature. The issue is whether the Act can in fact reasonably be read in the manner adopted by the Court and whether there is not another more viable alternative.

7.2.3.2 *Insights from English law*

Section 22 of COIDA states that an employee is entitled to compensation if s/he 'meets with an accident' resulting in disablement or death. As to the meaning of the word 'accident', South African courts have cited extensively from English law, because our workers' compensation statutes were derived largely from the English equivalents.⁴³ Bowen LJ in *South Staffordshire Tramways Co Ltd v*

⁴¹ At the second reading of the Bill in the Senate the Minister also emphasised that the costs involved in bringing an action and the time that elapsed before a case was finalized practically defeated the ends of justice because the worker was unable to maintain his rights up until the final court of appeal. See Parliament of South Africa, Senate Debates (1914) Fourth Session, First Parliament at 463.

⁴² Since the Union of South Africa was formed in 1910, Workmen's Compensation Acts were promulgated in 1914 (Act 25 of 1914), 1934 (Act 59 of 1934) and 1941 (Act 30 of 1941).

⁴³ *Nicosia v Workmen's Compensation Commissioner* at 901H-902A.

*Sickness & Accident Assurance Association Ltd*⁴⁴ said the following regarding the ambit of the word 'accident':

'The word "accident" is not a technical legal term with a clearly defined meaning. Speaking generally, but with reference to legal liabilities, an accident means any unintended and unexpected occurrence which produces hurt or loss. But it is often used to denote any unintended and unexpected loss or hurt apart from its cause; and if the cause is not known the loss or hurt itself would certainly be called an accident. The word "accident" is also often used to denote both the cause and the effect, no attempt being made to discriminate between them. The great majority of what are called accidents are occasioned by carelessness; but for legal purposes it is often important to distinguish careless from other unintended and unexpected events.'

In *Fenton v Thorley*⁴⁵ Lord Lindley also discussed the meaning of 'accident' in the context of the now repealed English Workmen's Compensation Act of 1906:

'Etymologically, the word means something which happens – a rendering which is not very helpful. We are to construe it in the popular sense, as plain people would understand it, but we are also to construe it in its setting, in the context, and in the light of the purpose which appears from the Act itself. Now, there is no single rigid meaning in the common use of the word. Mankind have taken the liberty of using it, as they use so many words, not in any exact sense but in a somewhat confused way, or rather in a variety of ways. We say that some one met a friend in the street quite by accident, as opposed to appointment, or omitted to mention something by accident, as opposed to intention, or that he is disabled by an accident, as opposed to disease, or made a discovery by accident, as opposed to research or reasoned experiment. When people use this word they are usually thinking of some definite event which is unexpected, but it is not always, for you might say of a person that he is foolish as a rule and wise only by accident. Again, the same thing, when occurring to a man in one kind of employment, would not be called accident, but would be so described if it occurred to another not similarly employed. A soldier shot in battle is not killed by accident, in common parlance. An inhabitant trying to escape from the field might be shot by accident. It makes all the difference that the occupation of the two was different. In short, the common meaning of

⁴⁴ [1891] 1 QB 402 at 407.

⁴⁵ [1903] AC 443 at 453.

this word is ruled neither by logic nor by etymology, but by custom, and no formula will precisely express its usage for all cases.'

From the above it is clear the requirement of an 'accident' is not as straightforward as it may appear. The meaning of the word will be influenced by the context in which it is used and the rationale for defining its meaning within that context.

7.2.3.3 *The position in New Zealand*

The meaning of 'accident' in relation to workers' compensation statutes has received judicial attention in New Zealand. Initially, in *Accident Compensation Corporation v F*,⁴⁶ the New Zealand High Court held that 'injury by accident' did not include a psychiatric injury that was not 'parasitic on a contemporaneous or earlier physical injury to the claimant'. However, this decision was later overturned by the Court of Appeal in *Accident Compensation Commissioner v E*.⁴⁷ The claimant's employer had sent her on a stressful management training course, as a result of which she suffered a psychiatric breakdown and landed up in hospital. She subsequently received psychiatric treatment for depressive symptoms, her standard of work declined and she eventually left her employment. In the course of the judgment, the Court stated:

'We see no other construction than that mental consequences of the accident are included in the term personal injury by accident whether or not there is also physical injury.... It would be a strange situation if cover under the Act for a person suffering serious mental consequences caused by an accident were to depend upon whether or not some physical injury however slight also is sustained. Further it would create major difficulties should it be necessary in particular cases to separate physical and mental injuries.'⁴⁸

The New Zealand legislature intervened and passed the Accident Rehabilitation and Compensation Insurance Act in 1992.⁴⁹ Despite strong criticism, that Act provides that mental injury is compensable only if 'physical' injury is also

⁴⁶ [1991] 1 NZLR 234.

⁴⁷ [1992] 2 NZLR 426.

⁴⁸ At 433-434.

⁴⁹ Coppins 397.

present.⁵⁰ The provision was ostensibly enacted because government feared escalating costs as a result of mental stress claims.⁵¹ The 1992 Act was repealed in 2001 by the Injury Prevention, Rehabilitation and Compensation Act, which continued the refusal of coverage for mental injuries save in very limited specified circumstances.⁵² The result is that claimants who wish to claim damages for mental injuries caused by mental stimuli and resulting from and in the course and scope of employment, must do so in terms of the common law.⁵³ The advantages and drawbacks of this situation were discussed in an earlier chapter.⁵⁴

7.2.3.4 *Position(s) in the United States*

In a number of United States jurisdictions the need for a physical blow or force to fulfill the 'accident' requirement has been used to prevent the award of compensation in mental stress cases.⁵⁵ Many jurisdictions also limit the definition of 'injury' to 'only violence to the physical structure of the body'. So, for example,

⁵⁰ Section 4(1) of the Act defines 'personal injury' as '[D]eath of, or physical injuries to, a person, and any mental injury suffered by that person which is an outcome of those physical injuries.' Section 7(4) states that personal injury related to 'non-physical stress' shall not be regarded as 'a gradual process, disease, or infection arising out of and in the course of employment.'

⁵¹ Coppins *op cit* 398 notes that no New Zealand statistics were provided to explain the basis on which the government's fear of a cost explosion was based.

⁵² Act 49 of 2001 available at

http://www.legislation.govt.nz/libraries/contents/om_isapi.dll?clientID=2030514777&infobase=pal_statutes.nfo&jump=a2001-049&softpage=DOC (accessed 28 March 2006). 'Personal injury' is defined in s 26 (1) to include the death of a person, physical injuries suffered by the a person, including, for example, a strain or sprain, *mental injury suffered by a person because of physical injuries suffered by the person*, mental injuries suffered by a person as a result of certain criminal acts committed by another, or damage (other than wear and tear) to dentures or prostheses that replace a part of the human body (my emphasis). This Act was amended in relation to occupational injuries and diseases by Act 45 of 2005 (available at <http://gpacts.knowledge-basket.co.nz/gpacts/public/text/2005/an/045.html> (accessed 9 September 2007)), but those amendments have not changed the restrictive definition of 'personal injury' in relation to mental harm.

⁵³ Coppins 400 writes that the statutory reform creates a curious state of law in that for the first time in over a century, the liability of employers for mental injuries in the employment sphere is largely governed by the common law category of negligence. JM Miller 'Compensation for Mental Trauma Injuries in New Zealand' available at <http://massey.ac.nz/~trauma/issues/1998-3/miller1.htm> (accessed 9 September 2007) strongly disapproves of the limited scope of the statutory compensation system, arguing that 'the only people who really benefit from a return to the increased opportunities for litigation are the lawyers and the insurance companies.'

⁵⁴ See 2.3 above.

⁵⁵ RR Gonzales 'Emotional Stress – Now a Cause of Compensable Injury?' (1973-1974) 34 *Louisiana Law Review* 846 at 847.

in *Bekeleski v OF Neal Co.*⁵⁶ a woman was denied compensation after being stuck in a broken lift at work for thirty minutes with only a dying man for company. The Court held that there was no injury to the physical structure of the body.

This Cartesian distinction between body and mind was discussed in the chapter on harm and not much needs to be said here, except that it is generally accepted to be outdated and based on a fallacious understanding of the human body.⁵⁷

7.2.3.5 *A series of psychological stressors*

In cases of 'physical' injury a series of accidents may lead to a successful claim.⁵⁸ Juge and Shraberg, however, argue that treating back injuries and psychiatric injuries in the same way is not only unfair, but medically unjustified.⁵⁹

'There is perhaps an unspoken and unconscious belief that even a minor event which results in a back injury to a worker should be compensable because sympathy lies with the laborer or skilled craftsmen who has literally worn his body out over the years working for various employers. The last employer should bear the cost of the "straw that broke the camel's back" not so much because his employment caused the disability, but rather as an expression of public policy that the compensation system should cover the injuries caused by industrial employment. ... This rationale, however, cannot fairly be applied in psychological disorder claims since the emotional stresses and lifetime experiences that contribute to a mental disability are not the exclusive

⁵⁶ 141 Neb 657 (1942). See ER Render 'Mental Illness as an Industrial Accident' (1963-1964) 31 *Tennessee Law Review* 288 at 290.

⁵⁷ Even with a requirement of 'damage or harm to the physical structure of the body', the Texas Supreme Court in *Bailey v American General Insurance Co* 154 Tex 430 (1955) extended cover to a worker who suffered psychiatric injury after seeing a workmate plunge to his death when the scaffolding on which they had been standing gave way on one end. The Court reasoned that the whole person must be examined, not just the readily observable physical structure. See Troost *op cit* 165.

⁵⁸ JL Greenberg 'Causation and Threshold Determinations in Workers' Compensation Psychiatric Stress Claims: Back to the Future?' (1992-1993) 20 *Western State University Law Review* 111 at 114 writes of the situation in California: 'The view that a series of repetitive physical injuries or stresses could be seen as a cumulative period of "trauma" evolved judicially within the workers' compensation tribunal and subsequently through court opinions.'

⁵⁹ DP Juge and D Shraberg 'Marking Out Boundaries: The Relationship between Work and Psychological Disorders, a Legal and Medical Analysis' (1984-1985) 3 *Workmen's Compensation Law Review* 323 at 341-342.

province of the employment environment. Often the employment has played only a minor role in the emotional stresses of an employee.'

Some jurisdictions have held, as the Compensation Commissioner sought to do in *Urquhart*, that an 'accident' must be traceable to a particular external event or cause. Due to their very nature, gradual stressors may not satisfy this requirement.⁶⁰ It is to be borne in mind that PTSD is not the only recognisable psychiatric injury that may result from stress at work. Anxiety states, clinical depression, etc. are also prevalent in the workplace, but in many instances these complications arise as a result of gradual stressors and there may not be, as was the case in both *Grobler* and *Urquhart*, an event that constitutes the straw that breaks the camel's back.

Larson notes that there is no reason, as a matter of grammar, to require that an injury be by accident and to then proceed to look for 'the accident'.⁶¹ 'Accident' may refer to both the cause of the injury or the resulting damage to the claimant.⁶² The distinction is especially important where a considerable period of time elapses between when the cause occurs and when the effect becomes apparent, or where there is no one particular mental trauma.

7.2.3.6 *Concrete language of COIDA*

Even though the requirement of an accident does not *per se* limit a worker's right to claim for a mental-mental injury,⁶³ the concrete language of COIDA may be an obstacle if a claimant is unable to prove a specific event that caused the injury. This is the primary reason for Nel J's rejection in the *Grobler* case⁶⁴ of the argument that COIDA can be interpreted to provide for gradual stressors.

⁶⁰ Troost 154.

⁶¹ Cited in Troost 154 fn 34.

⁶² Render 295.

⁶³ See 3.2.1 above for the definition of 'mental-mental' injury.

⁶⁴ See 7.2.2 above.

If gradual stressors are compensable, when is prescription to start running if the requirement is that a claim be instituted within 12 months of the accident? Similarly, how does a court navigate around the PTSD circular instruction's requirement that symptoms of the disorder be experienced by the employee and confirmed by medical evidence within six months of the accident? Given the department of labour's clear policy not to provide for PTSD caused by stressors untraceable to a particular event, how can workers vindicate their rights if they suffer mental-mental injuries?

It is submitted that difficulties with prescription can be avoided by accepting that occupational psychiatric harm constitutes an occupational disease.

7.2.4 Mental disorders as 'occupational diseases'

7.2.4.1 South African case law

As a result of the conclusion reached by the Court in *Urquhart* on the issue of the meaning of 'accident' in the context of COIDA, it was unnecessary to decide whether PTSD constituted an occupational disease within the meaning of the Act.⁶⁵ The Supreme Court of Appeal in *Media 24 and Another v Grobler* also left the issue open because they found that the employee's PTSD did not result from a work-related incident.⁶⁶

In *Mouton v The State* the tribunal appointed in terms of s 91(2) of COIDA rejected a claim by a worker in the Department of Correctional Services who had developed a major depressive disorder.⁶⁷ The tribunal had only considered s 22 of COIDA, i.e. the requirements for an occupational injury. However, Traverso DJP held that it should have considered the requirements for an occupational disease.

⁶⁵ At para [19].

⁶⁶ At para [77].

⁶⁷ Unreported CPD judgment dated 30 August 2002, case no A38/2002.

Similarly, in *Odayar v Compensation Commissioner*⁶⁸ the Court held that the failure to consider PTSD was as the result of the circular instruction on PTSD, the provisions of which was contrary to COIDA. In terms of s 65(1)(b) 'an employee who claims for an occupational disease such as post-traumatic stress disorder must prove that the disease arose "out of and in the course of his or her employment"'; and the employee need not prove exposure 'to an extreme traumatic event or stressor', as required by the circular instruction.⁶⁹

Neither *Mouton v The State*, nor *Odayar v Compensation Commissioner* contained extensive discussions as to why PTSD, or psychiatric injuries in general, are to be construed as occupational diseases instead of occupational injuries. It is an issue that warrants closer attention, because it has potentially adverse consequences for workers who wish to claim for occupationally-acquired psychiatric injury, but who cannot prove an accident, as required by COIDA.

7.2.4.2 Definition of 'disease'

As is the case with occupational injuries, not much clarity is provided on the meaning of 'disease'. Dorland's Illustrated Medical Dictionary defines it thus:

'[A]ny deviation from or interruption of the normal structure or function of any part, organ, or system (or combination thereof) of the body that is manifested by a characteristic set of symptoms and signs and whose etiology, pathology and prognosis may be known or unknown.'⁷⁰

There is some debate on whether the psychiatric disorders in the DSM-IV-TR are diseases or syndromes,⁷¹ but it is submitted that the purpose of defining 'disease'

⁶⁸ [2005] JOL 16306 (N).

⁶⁹ At 4. The Court also held that the Director-General of the Department of Labour was not empowered to issue regulations, therefore the circular instruction was no more than an internal guideline as to how to deal with claims for PTSD.

⁷⁰ 26th Edition (1981) as cited in JEB Myers 'Expert Testimony Describing Psychological Syndromes' (1992-1993) 24 *Pacific Law Journal* 1449 at 1452.

⁷¹ RH Durham (ed) *Encyclopedia of Medical Syndromes* (1960) ii describes the difference between diseases and syndromes: 'The terms *syndrome* and *disease* are often unwittingly used interchangeably although they are not synonymous. In general, a syndrome evokes more

in COIDA is merely to distinguish it from occupational injuries, which have different requirements, and to indicate that there must be a deviation from the worker's 'normal' state of health that is not self-induced and that is not of transitory effect.

7.2.4.3 *Relevant comparative law*

Albeit mostly in the context of accused persons in criminal cases pleading insanity, English, Australian and Canadian courts have grappled with the definition of 'disease of the mind'.⁷² Some of the observations made are instructive in determining the meaning of 'disease' in the context of worker's compensation. In *R v Rabey*⁷³ Martin JA stated:

'Although the term "disease of the mind" is not capable of precise definition, certain propositions may, I think, be asserted with respect to it. "Disease of the mind" is a legal term, not a medical term of art; although a legal concept, it contains a substantial medical component as well as a legal or policy component. ... The medical component of the term, generally, is medical opinion as to how the mental condition in question is viewed or characterised medically. Since the medical component of the term reflects or should reflect the state of medical knowledge at a given time, the concept of "disease of the mind" is capable of evolving with increased medical knowledge with respect to mental disorder or disturbance.'

In *Cooper v R*⁷⁴ Dickson J explained that

'in a legal sense "disease of the mind" embraces any illness, disorder or abnormal condition which impairs the human mind and its functioning, excluding however, self-induced states caused by alcohol or drugs, as well as transitory mental states such as hysteria or concussion'.

interest and is more challenging than a disease because its relationships are more obscure and its etiology is less apparent. If, subsequently, a specific etiologic factor does become manifest, the condition should then be reclassified to a disease.'

⁷² See JB Saunders (ed) *Words and Phrases Legally Defined* 3 ed (1989) 85-86.

⁷³ [1977] 79 DLR 414 (Ont CA) 425.

⁷⁴ [1980] 1 SCR 1149 (SCC) 1159.

It is difficult to find a reason why a recognisable psychiatric injury does not satisfy any of the above definitions of disease. Even though the DSM-IV-TR⁷⁵ seems to regard the psychiatric disorders in it as syndromes, they are recognised as known disorders with a scientific basis.⁷⁶ When one considers the policy factors involved in awarding workers' compensation, it is submitted that what is important is the fact that benefits are ultimately awarded not for the disease, but for the loss of earning capacity resulting therefrom.⁷⁷

7.2.4.4 *Dictates of international law*

Section 233 of the Constitution provides that when interpreting any legislation, courts must prefer any reasonable interpretation of the legislation that is consistent with international law over any other interpretation that is not.⁷⁸

The International Labour Organisation in 2002 adopted a List of Occupational Diseases in view of the 'need to strengthen identification, recording and notification procedures for occupational accidents and diseases'.⁷⁹ Paragraph 3 of that recommendation provided for a regular review by meetings of experts, the last such meeting having taken place in December 2005.⁸⁰ At this meeting, it

⁷⁵ The DSM-IV-TR defines mental disorders thus: '[E]ach of the mental disorders is conceptualized as a clinically significant behavioral or psychological syndrome or pattern that occurs in an individual and that is associated with present distress (e.g.) a painful symptom) or disability (i.e., impairment in one or more important areas of functioning) or with a significantly increased risk of suffering death, pain, disability, or an important loss of freedom. In addition, this syndrome or pattern must not be merely an expectable and culturally sanctioned response to a particular event, for example, the death of a loved one. Whatever its original cause, it must currently be considered a manifestation of a behavioral, psychological, or biological dysfunction in the individual. Neither deviant behavior (e.g., political, religious or sexual) nor conflicts that are primarily between the individual and society are mental disorders unless the deviance or conflict is a symptom of a dysfunction in the individual, as described above.'

⁷⁶ E Beecher-Monas 'Gate-keeping Stress: The Science and Admissibility of Post-traumatic Stress Disorder' (Fall 2001) 24 *University of Arkansas Little Rock Law Review* 9 at 30.

⁷⁷ *Carter v General Motors Corporation* 361 Mich. 577 (1960), as cited in Rensder 293.

⁷⁸ See, also, J Kentridge and D Spitz 'Interpretation' in M Chaskalson *et al* (eds) *Constitutional Law of South Africa* (Revision Service 5, 1999) 11-38.

⁷⁹ Recommendation 194 of the International Labour Organisation, adopted on 20 June 2002. Available at <http://www.ilo.org/ilolex/english/recdisp2.htm> (accessed 3 April 2006).

⁸⁰ ILO official website 'Meeting of Experts on Updating the List of Occupational Diseases' at Geneva, 13-20 December 2005. General discussion (hereinafter referred to as 'ILO General Discussion') available at

was decided that a new section entitled 'mental and behavioural disorders' should be adopted.⁸¹ There was disagreement between the experts representing governments and workers on the one hand, and experts representing employer organisations on the other, on the details of the section.⁸² However, it is clear that most jurisdictions regard mental disorders as occupational diseases.⁸³

7.2.4.5 *Effect of recognising mental disorders as occupational diseases*

It is apparent that mental disorders have much more in common with 'diseases' than 'injuries' under COIDA. Firstly, the delayed onset of many mental disorders is more in keeping with a disease than an injury. Secondly, as mentioned above, the Compensation Fund itself, in its previous two annual reports, classed PTSD with diseases and they are recognised as such by the ILO and most other jurisdictions.

The effect of recognising mental disorders as occupational diseases will be that a claimant will not have to prove an accident.⁸⁴ The difficulties encountered as to when prescription is to start running will be avoided. Instead, s 68 of COIDA requires that an employee give written notice of the occupational disease to his/her employer or the employer where s/he was last employed 'as soon as possible after the commencement' of that disease. It is submitted that this

<http://www.ilo.org/public/english/standard/relm/gb/docs/gb295/pdf/meulod.pdf> (accessed 31 March 2006).

⁸¹ In ILO Report 54-59, 86 of 120 member states supported the introduction of a new section on mental and behavioural disorders.

⁸² Both sets of experts agreed on the inclusion of PTSD in the list. However, the government and worker experts supported the inclusion of the following section, while the employer experts opposed it:

'Any other mental or behavioural disorder not mentioned in preceding item 2.4.1 [PTSD] where a link is established between exposure to risk factors arising from work activities and the mental disorder contracted by the worker.'

⁸³ Canada indicated that two of its ten provincial jurisdictions regarded mental disorders as the result of accidents rather than diseases. Finland also stated that a national working group had decided that post-traumatic syndromes that result from occupational accidents are compensated as occupational injuries. See ILO Report 55.

⁸⁴ Section 65(1)(b) only requires that the disease has arisen out of and in the course and scope of employment. In *Compensating Disease*, the author stated that 39 states at that time required that occupational diseases be contracted "by accident", a provision that sometimes work to deny benefits for diseases that result from chronic exposure to harmful agents in the workplace.

requirement is much more in step with the reality that it may take a while for symptoms of mental disorders to manifest and be diagnosed.⁸⁵ The employee may also give written notice of the disease in the prescribed manner to the Compensation Commissioner.⁸⁶

7.3 CAUSATION UNDER COIDA

7.3.1 *General challenges*

Causation of psychiatric injuries in cases of workers' compensation is problematic for various reasons. The field of psychiatry is technically complex and a proper understanding of the issues requires at least a basic understanding of psychiatric principles and the causes of mental disorders, lending an interdisciplinary dimension to the dispute resolution.⁸⁷

Secondly, causation in workers' compensation is a policy choice that is 'essentially rooted in the compromise nature of the workers' compensation system itself'.⁸⁸ This policy dimension causes an increased focus on the nature of the risk that the system is intending to cover, which is particularly problematic in cases of psychiatric injuries.⁸⁹ The fact that administrative bodies, not judicial bodies, make initial factual and legal determinations causes technical difficulties

⁸⁵ Compensating Disease 924 notes that many US states had enacted provisions that prohibited claims unless disability or death occurred within a specified period of time after the last day of work or the last injurious exposure to a substance. This requirement was particularly harsh given the delayed onset of many occupational diseases.

⁸⁶ The Compensation Commissioner is appointed in terms of s 2(1)(a) of COIDA and his/her functions are set out in s 6A:

'The Commissioner shall –

(a) receive notices of accidents and occupational diseases, claims for compensation, medical reports and accounts, objections, applications, returns of earnings and payments due to the compensation fund;

(b) by notice in the *Gazette* prescribe the rules referred to in section 56(3)(c), as well as the forms to be used and the particulars to be furnished in connection with notice of occupational injuries and diseases, claims for compensation or any other form or matter which he or she may deem necessary for the administration of this Act.'

⁸⁷ L Joseph 'The Causation Issue in Workers' Compensation Mental Disability Cases: An Analysis, Solutions, and a Perspective' (1983) 36 *Vanderbilt Law Review* 263 (hereinafter referred to as 'Joseph Causation Issue') at 265.

⁸⁸ Joseph Michigan Experience 1088; Adler Schochet 610.

⁸⁹ Joseph Michigan Experience 1088.

because administrators have to make evaluative decisions in mental injury cases where objective determination of causation is often impossible.⁹⁰ These decisions may potentially conflict with policy directives of the workers' compensation system as a whole.

7.3.2 Navigating causation difficulties

Joseph argues that the complexities of causation in mental injury claims preclude any fair and just determination thereof under workers' compensation law.⁹¹ Instead, he proposes that such claims be dealt with in terms of thematic legislation that focuses specifically on employment related psychiatric injuries and legislation for compensation for disabling diseases of unknown cause.⁹² Such legislation would exist side-by-side with the workers' compensation statutes. This solution can be interpreted as a reaction to the uncertain aetiology of some diseases and is analogous to, albeit more radical than, the provisions in COIDA that create a presumption of occupational origin for certain diseases.

However, such an all-or-nothing approach is not the only option. Lasky submits that even though there are practical difficulties with the operation of the workers' compensation system, these defects can be remedied.⁹³ Adler and Schochet⁹⁴ agree and argue that for causation to be a workable element of the system, the compromise nature of the system itself has to be borne in mind. For them, the policy role of causation in determining the ambit of the system itself dictates that an objective, if somewhat arbitrary, causation standard be adopted. Their proposed causation standards are discussed more fully below.⁹⁵

⁹⁰ Joseph Causation Issue 312 argues that if the administrative trier is favourable towards compensation, s/he may create a class of beneficiaries that is overinclusive. Conversely, if an administrative trier's preference is against compensation, an underinclusive class of beneficiaries may be created.

⁹¹ Joseph Causation Issue 316.

⁹² Joseph Causation Issue 318.

⁹³ H Lasky 'Psychiatry and California's Workers' Compensation Laws: A Threat and a Challenge' (1980) 17(1) *California Western Law Review* 1.

⁹⁴ Adler and Schochet 610-611.

⁹⁵ See 7.3.5 below.

An arbitrary standard of causation may cause undue hardship, but the harsh effects of such an approach may be ameliorated by allowing civil claims against employers in certain circumstances, as proposed by the Taylor Committee of Enquiry into a Comprehensive Social Security System for South Africa.⁹⁶

7.3.3 Course and scope of employment requirement: General principles

The term 'arising out of and in the course and scope of employment' has been judicially considered on numerous occasions, but those pronouncements are still difficult to apply to different factual complexes. In *Minister of Justice v Khoza*⁹⁷ Rumpff JA (as he then was) discussed the meaning of the term:

'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 ontstaan "uit sy diens" as die ongeval in verband staan met sy werksaamhede. Die Wetgewer het daardie verband nie omskryf nie en eis alleen in breë sin 'n kousale verband tussen diens en ongeval. Wanneer hierdie onomskrewe verband gesien word in die lig van die doel en ingrypende omvang van Wet 30 van 1941, moet dit myns insiens bevind word dat die kousale verband tussen ongeval en diens in die algemeen voldoende geskep word wanneer die ongeval plaasvind op die plek waar die werksman by die uitvoering van sy diens is.'

In *Rauff v Standard Bank Properties (A Division of Standard Bank of SA Ltd) and Another*⁹⁸ the Court explained that this requirement essentially has two legs that are both necessarily factually related: The first is whether the accident was indeed 'arising out of' the employment and the second whether the accident was adequately integrated with the 'course of employment'.

⁹⁶ See 2.5.3 above.

⁹⁷ 1966 (1) SA 410 (A) 417C-E. This dictum has been applied in various subsequent cases: *Sparg v Workmen's Compensation Commissioner* 1990 (1) SA 169 (E); *Johannesburg City Council v Marine & Trade Insurance Co Ltd* 1970 (1) SA 181 (W); *Kau v Fourie* 1971 (3) SA 623 (T); *Workmen's Compensation Commissioner v Van Rooyen* 1974 (4) SA 816 (T).

⁹⁸ 2002 (6) SA 693 (W) para [9.1].

7.3.3.1 *Serious and wilful misconduct*

An employee will forfeit his/her entitlement to compensation where an accident results from his/her 'serious and wilful misconduct',⁹⁹ unless such accident results in serious disablement or the employee dies as a result of such accident and leaves behind a dependant who is wholly financially dependent on him/her. However, the Director-General may pay, or order an employer individually liable or the mutual association concerned to pay, the cost of medical aid or a portion thereof in respect of an employee who has made him/herself guilty of serious and wilful misconduct.

7.3.3.2 *Presumptions*

The plight of an employee found guilty of serious and wilful misconduct is improved in that an accident shall, in certain circumstances, be deemed to have arisen out of and in the course and scope of employment, even if the employee concerned was at the time of the accident contravening a law or acting without instructions. The qualifying condition is that the Director-General of Labour must be of the opinion that the employee was acting for purposes of or in the interests of the employer.¹⁰⁰ Whether the employee's conduct is sufficiently closely connected with the business of the employer is a question of fact and the onus rests on the claimant to prove such connection.¹⁰¹

⁹⁹ The Act, in s 1(xlii), states: "serious and willful misconduct" means:

- (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 willfully 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 willful misconduct.'

¹⁰⁰ Section 22(4).

¹⁰¹ *Augustyn v Workmen's Compensation Commissioner* 1948 (1) SA 115 (T) 119 on the position in relation to s 27(2) of the Workmen's Compensation Act 30 of 1941. Barry JP stated: '[The provisions of s 27(2) require that the] act done by the workman must be "for the purposes of and in connection with his employer's business". Whether the act falls within the description is a question of fact and the onus of proof is on the workman or his dependant.'

The Act also states that the conveyance of an employee free of charge to or from his/her place of work for work purposes by means of a vehicle driven by the employer or one of his/her designated employees and specially provided for this purpose shall be deemed to have taken place in the course of that employee's employment.¹⁰² Similar provisions exist where employees meet with accidents during training for or while performing emergency services.¹⁰³

7.3.4 Course and scope of employment requirement in cases of psychiatric harm

The requirement that an injury or disease must arise out of and in the course and scope of employment is complicated considerably in psychiatric injury cases:

‘A claimant's subjective mental stresses, his employment stresses, or his nonemployment environmental stresses each quantitatively or qualitatively may have contributed to his disability in a more-probable-than-not sense.’¹⁰⁴

An illustration of these difficulties is found in *Hammond v Compensation Commissioner and Another*,¹⁰⁵ a case in which a former policeman claimed compensation on the grounds that his PTSD had been caused by his continued exposure to gruesome events and life-threatening situations where members of the police force were killed. The Court held that the tribunal that had heard his

¹⁰² Section 22(5).

¹⁰³ Section 25 reads:

‘If an employee meets with an accident –

- (a) while he is, with the consent of his employer, being trained in organized first aid, ambulance or rescue work, fire-fighting or any other emergency service;
- (b) while he is engaged in or about his employer's mine, works or premises in organized first aid, ambulance or rescue work, fire-fighting or any other emergency service;
- (c) while he is, with the consent of his employer, engaged in any organized first aid, ambulance or rescue work, fire-fighting or other emergency service on any mine, works or premises other than his employer's,

such accident shall, for the purposes of this Act, be deemed to have arisen out of and in the course of his employment.’

¹⁰⁴ Joseph Causation Issue 306.

¹⁰⁵ [2005] JOL 15581 (T).

appeal had correctly found that the appellant 'had to prove [a] causal link between his condition and his employment', and that he had failed to do so.¹⁰⁶

7.3.5 Specific causation requirements for psychiatric injury cases

The circular instruction on PTSD makes it clear that PTSD is not compensable under COIDA unless:

- '1 The employee was exposed to an extreme, traumatic event or stressor; and
2. The employee experienced an extreme, traumatic event or stressor that arose out of and in the course of his/her employment; and
- 3 The employee experienced symptoms of Post Traumatic Stress Disorder within six months of the accident that are confirmed by medical evidence at that stage; and
4. The employment-related trauma or stressor was a pertinent factor in the development of Post Traumatic Stress Disorder or played an active role in the course of Post Traumatic Stress Disorder; and
5. Notice of the claim for compensation was made to the employer or the Compensation Commissioner or the employer individually liable or the mutual association within one year after the date of accident.'

In similar vein, Adler and Schochet submit that a psychiatric disorder should not be deemed the result of a work-related injury, unless:¹⁰⁷

1. 'the psychiatric disorder is recognized under DSM-IV; and
2. the claimant experienced an acute trauma or unusual stressor that arose from and occurred in the course of employment; and
3. the symptoms of the psychiatric disorder appeared within 6 months thereafter; and
4. the employment-related trauma or stressor was a positive factor in the development of the disorder or played an active role in the course of the disorder; and
5. notice of a claim for psychiatric injury (to the insurer or the employer), stating facts under paragraphs 1, 2, 3, and 4 above, is made no later than 6 months after the appearance of such symptoms.'

¹⁰⁶ At 6.

¹⁰⁷ Adler and Schochet 611.

The requirements set by the circular instruction on PTSD and those proposed by Adler and Schochet are similar. It therefore makes sense to discuss both sets of requirements together. However, in order to aid analysis, each of the requirements will be discussed *seriatim*.

7.3.5.1 *A recognised psychiatric disorder*

The requirement of a recognised psychiatric disorder was discussed in a previous chapter¹⁰⁸ and need not be further elaborated upon here.

7.3.5.2 *Acute trauma or unusual stressor*

The second requirement is that of ‘an acute trauma or unusual stressor’. An ‘acute stressor’ closely resembles the ‘single incident’ requirement that was held to be deficient in *Urquhart v The Compensation Commissioner*.¹⁰⁹ An ‘unusual stressor’ is potentially wider and caters for chronic stressors, but requires that they be unusual in the context of both the relevant individual and the ordinary conditions of the specific workplace.¹¹⁰

An illustration of an ‘unusual stressor’ approach is found in Slusarz’s submission that employees who worked in office buildings across the Hudson River in downtown Manhattan and who watched events unfold on September 11th, 2001, would have to prove that witnessing the terrorist attack constituted an accident under the New Jersey Workers’ Compensation Law.¹¹¹ In order to do so, they should demonstrate that they did not seek out a terrorist attack to witness and that their mental-mental injuries were an unexpected result of having performed their duties by going to work that day.¹¹²

¹⁰⁸ See 3.3 above.

¹⁰⁹ 2006 (1) SA 75 (E).

¹¹⁰ Adler and Schochet 612.

¹¹¹ Slusarz 155.

¹¹² *Ibid*.

The 'unusual stressor' requirement appears to have unduly harsh consequences. Troost submits that a serious shortcoming of such a requirement is that it strives to obtain an objective measure of an inherently subjective injury:

'[I]t is predicated on the fallacious belief that the existence of extraordinary or unusual events assures that subsequent mental injuries are genuine and work-related and on the converse belief that the absence of such events indicates that the alleged injuries are not genuine or work-related'.¹¹³

He further argues that because the levels of stress in occupations vary, this requirement is skewed in favour of those in low-stress professions and unnecessarily harsh on those in highly stressful occupations.¹¹⁴ A police officer, for example, may never be able to claim for mental injuries suffered in the course and scope of employment, because the mental stressors that caused his/her injuries are not 'unusual' in that profession.

Filteau submits that the 'unusual stressor' approach diminishes the effectiveness of workers' compensation and rejuvenates the efficacy of a common-law claim. He argues that once a causal nexus is established between a worker's occupation and his/her psychiatric harm, complicated doctrines of legal causation must be abandoned in favour of a more modern approach that 'merely requires industry to pay for the ills it causes'.¹¹⁵

7.3.5.3 *Symptoms to appear within six months after incident*

The third requirement that the symptoms of the psychiatric disorder appear within six months after the incident is controversial. Adler and Schochet acknowledge that this approach is 'somewhat underinclusive' and may in some instances be more stringent than the requirements of the DSM-IV, but argue that it should be

¹¹³ Troost 161.

¹¹⁴ Troost 162.

¹¹⁵ RJ Filteau 'When Stress Becomes Distress: Mental Disabilities under Workers' Compensation in Massachusetts (1979-1980) 15 *New England Law Review* 287 at 304.

adopted in the name of 'judicial economy and fraud prevention' and that the benefits of 'predictability, notice and objective standards prevail'.¹¹⁶

The Court in *Urquhart v The Compensation Commissioner* emphasised the counterargument to this compromise approach, stating that the workers' compensation system should assist a worker as far as possible.¹¹⁷ The dilemma is where to draw the line between pragmatism and an unnecessarily underinclusive system.

In *Mohlomi v Minister of Defence*,¹¹⁸ Didcott J discussed the necessity of rules that limit the time during which litigation may be launched, after which he stated:

'It does not follow, however, that all limitations which achieve a result so laudable are constitutionally sound for that reason. Each must nevertheless be scrutinised to see whether its own particular range and terms are compatible with the right which s 22 bestows on everyone to have his or her justiciable disputes settled by a court of law. The right is denied altogether, of course, whenever an action gets barred eventually because it was not instituted within the time allowed. But the prospect of such an outcome is inherent in every case, no matter how generous or meagre the allowance may have been there, and it does not *per se* dispose of the point, as I view that at any rate. What counts, rather, I believe, is the sufficiency or insufficiency, the adequacy or inadequacy, of the room which the limitation leaves open in the beginning of the exercise of the right. For the consistency of the limitation with the right depends upon the availability of an initial opportunity to exercise the right that amounts, in all the circumstances characterising the class of case in question, to a real and fair one. The test, thus formulated, lends itself to no hard and fast rule which shows us where to draw the line.'

However, a counter-argument could be the importance of obtaining finality in claims, thereby streamlining the claims process, which is necessary to maintain the system and obviously to the benefit of all workers who may require compensation. The reasonableness or otherwise of the prescription provisions

¹¹⁶ Adler and Schochet 613.

¹¹⁷ See 7.2.2 above.

¹¹⁸ 1997 (1) SA 124 (CC) para [12].

can only be determined upon consideration of the nature of and practicalities involved in the claims process, topics that unfortunately fall beyond the ambit of this work.

On the face of it, the six-month period seems very short, given the nature of psychiatric injuries. Also, in terms of the current South African system, a claimant such as Mr Urquhart would not receive compensation at all. He cannot prove negligence; yet it was the very nature of his work that exposed him to mental hazards. It seems unduly harsh to deprive such a claimant of a legal remedy, especially since there seemed to be no difficulties of proof in that case.

7.3.5.4 *Employment to have played an active role in development of psychiatric disorder*

The fourth requirement entails that the psychiatric injury must not merely be coincidental with employment, but that it needs to have played an active role in the development of the disease. It does not appear to be repugnant to the general requirements of causation¹¹⁹ and it seems a prudent, common-sense requirement. All that has to be said here is that it is often difficult to isolate a work-related stressor as the precipitating cause of a mental disorder.¹²⁰

7.3.5.5 *Claim to be instituted within one year*

The fifth requirement that a claim be instituted within one year (in terms of the circular instruction on PTSD) after the claimant has become aware of the disease is more restrictive than the requirement in s 68 of COIDA that a claimant institute a claim 'as soon as possible' after s/he becomes aware of the existence of a relevant disease. If psychiatric injuries are to be construed as diseases, it is arguable that this explicit time period is *ultra vires* COIDA and therefore unlawful.

¹¹⁹ See Chapter 6 above.

¹²⁰ Juge and Shraberg 333.

7.3.6 Validity of the circular instruction on PTSD in terms of administrative law

The circular instruction on PTSD lays down very restrictive requirements for claims relating to occupationally-related claims for PTSD. However, claimants may be successful in challenging the validity of these provisions on administrative-law grounds. Such challenges might prove important, because they will necessitate a reconsideration of these provisions and their adverse impact on claimants who have suffered PTSD in the course and scope of their employment.

The circular instruction on PTSD was issued in terms of s 97 of COIDA, which empowers the Minister to make regulations after consultation with the Compensation Board. The instruction would probably constitute a regulation made regarding 'any matter which shall or may be prescribed by regulation in terms of' COIDA.¹²¹ This enabling provision is not particularly clear on the parameters of such regulations.

The Constitution states that our democracy is founded upon, *inter alia*, the rule of law.¹²² At the very least the rule of law includes the principle of legality,¹²³ which Baxter submits includes the following specific principles:¹²⁴

- the perpetrator of the action in question must be legally empowered to perform the act;
- administrative action may only be taken by the lawfully constituted authority;
- the act must have been performed in accordance with the circumstantial and procedural requisites prescribed by the empowering legislation;
- the power to act must have not be exercised unreasonably;
- the decision to act must be taken in a fair manner;

¹²¹ Section 97(1)(g).

¹²² Section 1(c).

¹²³ *Fedsure Life Assurance Ltd and Others v Greater Johannesburg Transitional Metropolitan Council* at para [58].

¹²⁴ L Baxter *Administrative Law* (1984) 59.

- action taken without lawful authority generally attracts the same liability as would the acts of private persons.’

The status and reviewability of subordinate legislation was one of the issues to be decided in *Minister of Health and Another NO v New Clicks South Africa (Pty) Ltd and Others (Treatment Action Campaign and Another as Amici Curiae)*.¹²⁵ The majority of the Court found that under both s 33 of the Constitution and the Promotion of Administrative Justice Act (PAJA),¹²⁶ the making of regulations in terms of an empowering provision constitutes administrative action.¹²⁷ PAJA provides that a court may judicially review administrative action if, *inter alia*, the action itself contravenes a law or is not authorised by the empowering provision,¹²⁸ the action was taken for a reason not authorised by the empowering provision,¹²⁹ because irrelevant considerations were taken into account and relevant considerations were not considered,¹³⁰ and/or the action is otherwise unlawful or constitutional.¹³¹

It is submitted that the circular instruction on PTSD is reviewable on at least two grounds: Firstly, in terms of s 97(1)(g) of COIDA, only the Minister of Labour is granted the power to issue regulations in terms of that Act. The Director-General or a technical committee has no such power.¹³² Secondly, if mental disorders fall within the definition of an occupational disease, a circular instruction issued by the Director-General cannot be used to declare PTSD an ‘occupational injury’. Whilst bearers of constitutional obligations should be given appropriate leeway to

¹²⁵ 2006 (2) SA 311 (CC).

¹²⁶ Act 3 of 2000.

¹²⁷ At para [113] Chaskalson CJ stated: ‘To hold that the making of delegated legislation is not part of the right to just administrative action would be contrary to the Constitution’s commitment to open and transparent government.’ He continued at para [126]: ‘To have excluded the implementation of legislation from PAJA would have been inconsistent with the Constitution. The implementation of legislation, which includes the making of regulations in terms of an empowering provision, is therefore not excluded from the definition of administrative action.’

¹²⁸ Section 6(2)(f)(i).

¹²⁹ Section 6(2)(e)(i).

¹³⁰ Section 6(2)(e)(iii).

¹³¹ Section 6(2)(i).

¹³² See fn 59 above.

determine the best way to meet those obligations,¹³³ they should not be allowed to defeat the purpose of those obligations.

It is desirable that the requirements for claims relating to PTSD and other occupationally-related psychiatric disorders be set in transparent and inclusive forums. It is especially important if those requirements are restrictive and limit employees' rights to compensation if such harm eventuates.

7.4 INCREASED COMPENSATION DUE TO EMPLOYER NEGLIGENCE

Although COIDA is principally a no-fault scheme, it does provide for increased compensation in cases where an employer or certain persons in authoritative positions in the employer's business are negligent.¹³⁴ Claims for additional compensation may also be lodged where an injury or disease occurred as a result of a patent defect in plant or machinery and which the employer or another responsible person intentionally or negligently failed to remedy or to have remedied.¹³⁵

If the claimant can prove negligence on the part of the employer or a manager in the employer's service, the Compensation Commissioner may award an amount of compensation that he deems equitable.¹³⁶ However, such amount may not exceed the economic loss the Commissioner expects the employee to suffer.¹³⁷ The costs of increased compensation may be transferred to employers in that the Commissioner may increase their assessment rates.¹³⁸

¹³³ Per O' Regan J in *Rail Commuters Action Group and Others v Transnet Ltd t/a Metrorail and Others* 2005 (2) SA 359 (CC) para [38].

¹³⁴ Whether the relevant employer or another person in authority was negligent will be determined according to the common-law principles discussed in Chapter 5.

¹³⁵ Section 56(2); Compensation Fund Annual Report for the year ending 31 March 2004 at 29.

¹³⁶ Section 56(4)(a).

¹³⁷ Section 56(4)(b).

¹³⁸ Section 56(7).

A negligible number of claims for increased compensation are lodged with the Compensation Fund each year.¹³⁹ The underutilisation of this mechanism may be due to ignorance of the legislative provisions and the general inability of employees to institute claims.¹⁴⁰ It is conceivable that this underutilisation would be more pronounced in cases of psychiatric harm due to society's general mistrust of psychiatry, difficulties in proving employer negligence and the fact that claims for psychiatric harm are relatively novel in this country.

7.5 CONCLUSION

Although COIDA should theoretically be the primary vehicle through which employees who suffer occupational psychiatric harm vindicate their rights, the nature of the workers' compensation system, the nature of psychiatric harm and the interaction of these factors create many challenges.

Firstly, there is uncertainty as to whether gradual stressors are to be accommodated within COIDA and if so, what the requirements for such compensation are or should be. It is submitted that recognition of psychiatric harm as an occupational disease, as opposed to an occupational injury, is

¹³⁹ Thompson and Benjamin 137; Myburgh 232. During the financial year ended 31 March 2002, only 27 claims for increased compensation were lodged, with 99 such applications carried over from previous years (Compensation Fund Annual Report for the year ended 31 March 2002 available at <http://www.labour.gov.za/download/8515/Annual%20Report%20-%20Compensation%20Fund%202002.pdf> (accessed 18 September 2007) at 16). During the 2003 financial year, that figure had increased to 34 claims, with 94 such applications carried over from previous years (Compensation Fund Annual Report for the year ended 31 March 2003 at 22). During the 2004 financial year 30 claims for additional compensation were lodged, with 115 such claims awaiting finalisation (Compensation Fund Annual Report for the year ended 31 March 2004 at 29). The 2005 financial year saw the Fund receiving only 18 claims for increased compensation, with 115 such applications carried over from previous years (Compensation Fund Annual Report for the year ended 31 March 2005 at 36). During the year ended 31 March 2006, the Fund received only 13 claims for increased compensation, with no data made available for the number of such claims carried over from previous years (Chapter 9 of the Compensation Fund Annual Report for the year ended 31 March 2006 available at <http://www.labour.gov.za/download/10920/Annual%20Report%20-%20Compensation%20Fund%202006%20-%20Chpt%209.pdf> (accessed 18 September 2007) at 33). These statistics reflect two worrying aspects, viz the negligible number of claims for increased compensation and the inordinately slow rate of adjudication of such claims.

¹⁴⁰ Smit Legal Analysis 480.

desirable. It will mean that the vexing 'accident' requirement is bypassed and it is a more realistic approach that recognises the nature of psychiatric injury.

Secondly, causation under COIDA raises many policy issues that stem from the compromise nature of the workers' compensation system. In addition, psychiatric injury is a very technical field that does not lend itself to the administrative efficiency goal of the workers' compensation system. Stringent causation requirements may be necessary, but the need for efficiency must be balanced against the need to protect injured workers as far as possible.

Thirdly, it is arguable that the circular instruction on PTSD is reviewable because it is in conflict with COIDA and because the Director-General does not have the authority to issue regulations under COIDA. Moreover, the circular instruction on PTSD does not state the requirements that have to be met and the procedures that have to be followed where psychiatric harm other than PTSD is at issue.

In conclusion, COIDA can potentially provide employees with a quicker, more cost-effective remedy. However, apart from the administrative difficulties faced by the Compensation Fund, psychiatric harm poses peculiar conceptual challenges and issues of proof of compensable harm. Given the conservative stance adopted by compensation authorities and the strict prescription requirements that have been set, it is arguable that the common law will continue to play an important role in providing a remedy to employees who suffer occupational psychiatric harm where such harm has occurred in circumstances that preclude a claim in terms of COIDA.

CHAPTER 8

CONCLUDING REMARKS AND RECOMMENDATIONS

8.1 INTRODUCTION

The world of work has changed with the economic shift from a mainly industrially-focused world economy to a knowledge-based economy; globalisation and localisation; the proliferation of non-standard employment relationships; the marginalisation of non-paying care work; and the impact of digital technology. These are some of the factors that are changing the nature of the pressures experienced by workers, with mental stressors becoming more prevalent. These mental stressors are increasingly causing injuries and diseases that have hitherto either not been very common in the occupational sphere, or that have not been scientifically identified or recognised. Policymakers are therefore faced with the challenge of adapting occupational health and safety measures to guard against these 'new' risks in the context of all the components of effective social security, viz prevention, rehabilitation and compensation

8.2 POSSIBLE CAUSES OF ACTION

8.2.1 Compensation under COIDA

The South African courts have not definitively set out the applicability of COIDA to psychiatric harm suffered in the course and scope of employment. The major challenge in this regard is how to incorporate psychiatric harm caused by gradual stressors into a system that was established to deal mainly with acute, sudden events. If courts find that it is indeed possible to incorporate gradual stressors into the COIDA framework, employees are forced to claim in terms of that Act by virtue of its bar on common-law claims.

8.2.2 Common law of delict

If an employee cannot claim in terms of COIDA, s/he may utilise a common-law delictual action. This delictual action may be in the form of either the *actio legis Aquiliae*, coupled with the Germanic remedy for pain and suffering, or the *actio iniuriarum*. The latter action, at present, is restricted to cases of intentional wrongdoing. Since most cases of occupational psychiatric harm result from negligent conduct, the Aquilian action and the Germanic remedy for pain and suffering are more likely to find application.

The Constitutional Court has already confirmed that the exclusion of common-law actions in cases of occupational injuries and diseases covered by COIDA does not fall foul of the constitution. So, if a worker would be entitled to receive compensation for occupational psychiatric harm in terms of the statutory workers' compensation system, a common-law remedy would not be possible. However, workers' compensation legislation was never intended to provide full cover against the consequences of all occupational injuries and diseases. Given the generally conservative approach adopted in cases of psychiatric injury and the strict approach intimated by the circular instruction on PTSD issued by the Department of Labour, it is foreseeable that the common law of delict may continue to play an important role in cases of psychiatric harm suffered by employees in the course and scope of their employment.

Even if I am wrong in this assertion, the common law still remains relevant for various reasons: the statutory regime excludes many workers, e.g. those who have not entered into a contract of service, learnership or apprenticeship and those involved in non-standard forms of work; COIDA does not exclude fault entirely when it comes to increased compensation; COIDA should be interpreted, where possible, in consonance with the common law; and the common law may inform the interpretation of statutory provisions.

8.2.3 *Other statutory remedies*

There are statutory remedies that are not specifically geared toward compensating employees for occupational psychiatric harm, but may do so indirectly. These remedies include those provided by the Employment Equity Act for harassment and other forms of discrimination that fall within the ambit of that Act. Although this study did not include discussion thereof, employees may also obtain compensation for harassment related to unfair labour practices and constructive dismissals in terms of the Labour Relations Act.

8.3 WORKERS' COMPENSATION OR THE COMMON LAW?

On a policy level, it is necessary to determine which of the statutory workers' compensation system or the common law is the more appropriate vehicle through which to vindicate workers' rights when they suffer occupationally-related psychiatric harm. The common law is arguably more thorough and has a deterrent effect, but it is laborious and expensive. The statutory system is more cost-effective, but there are systemic difficulties within the present system and the complicated nature of psychiatric injury may make it difficult for administrators to accommodate it properly within the current system.

It may not be as simple as choosing one system over the other. It may be advisable to adopt a hybrid system that utilises both a statutory compensation scheme and the common law, a common occurrence in Europe. If a strict approach to compensating psychiatric injuries in terms of COIDA is taken, it could be argued that those limited benefits must be augmented by allowing a claimant who can prove negligence to sue the employer directly for general damages that are not covered by COIDA.

8.4 SUBSTANTIVE REQUIREMENTS FOR COMPENSATION

The conclusions regarding the various substantive requirements set by both the common law and COIDA were discussed at the end of each chapter. Suffice it to

say that all these substantive requirements must pass constitutional muster, so courts and policymakers need to pay particular attention to the rights to access to social security, to fair labour practices and human dignity. The constitutional values of equality, dignity, freedom and ubuntu-botho must also be reflected in these requirements.

8.5 RECOMMENDATIONS

In light of the conclusions reached in this thesis, I recommend that:

- A. *a hybrid system for compensation for stress-related psychiatric harm suffered in the course and scope of employment be adopted, with the statutory compensation scheme providing relatively limited benefits and the common law providing general damages if the claimant can prove negligence on the part of the employer;*
- B. *the requirement of a recognised psychiatric illness be maintained for both statutory compensation and compensation in terms of the common law;*
- C. *all parties' interests are carefully balanced in delineating the employer's legal duty to employers and that undue weight not be accorded to the terms of the contract of employment;*
- D. *more attention be paid to factual causation and the development of alternatives/complements to the traditional conditio sine qua non test;*
- E. *the validity of the circular instruction on PTSD be tested on administrative-law grounds; and*
- F. *the stringent prescription requirements set by the circular instruction on PTSD be reviewed.*

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