

THE EMPLOYER'S OBLIGATION OF
REASONABLENESS
IN SAFETY MANAGEMENT:
A STUDY DETERMINING THE RELEVANT
PARAMETERS
AND PROVIDING GUIDELINES
FOR THEIR APPLICATION

BY

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TO MY PARENTS

ABSTRACT

The high rate of accidents recorded in South African industry and the human and economic consequences involved reflect inadequacies in existing safety management policies and practices. The universally accepted right of employees to protection and the demands of social policy make the prevailing situation unacceptable. The complexities of the parameters of the employer's obligation for sound safety management requires practical guidelines for its understanding and application. The aim of this research is therefore to determine these parameters and to provide guidelines for their application.

The parameters at issue are regulated by the principles of modern labour law, the developing common law, and statutory law such as MOSA. In order to pursue sound management practices and employment relations, the employer must not only take cognizance of his legal obligations but also various humanitarian, social and economic considerations.

To correlate the complex nature of safety management with the demands of social policy, it is necessary to apply an appropriate standard of conduct to which every safety practice must adhere. This standard relates to the employer's general duty to take fair and reasonable precautions to eliminate or minimize occupational hazards. The employer's conduct is measured in terms of the objective standard of the reasonable employer in labour relations. The concept of *reasonableness* is therefore fundamental to the formulation of the parameters of the employer's obligation.

The parameters are shown to centre round the reasonable foresight of the likelihood of harm and the implementation of reasonable precautionary measures to guard against the occurrence of such foreseeable harm. Furthermore, an unforeseeable incident that occurs in spite of preventive

measures taken may reflect the need for subsequent preventive and corrective action.

There is clearly scope for employers to adopt a more proactive approach in promoting sound safety management practices. Certain statutory, attitudinal and policy changes will be necessary for improved working conditions. These changes will include the formulation and implementation of an objectively-based safety policy that will facilitate the application of the parameters established. The proposed model flow-chart makes it possible to establish whether the parameters have been effectively implemented, and whether the employer or a third party is liable for a particular accident.

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Lastly, I give thanks to God who blessed me with life and determination.

I hereby declare that the work contained in this research, unless specifically indicated to the contrary in the text, is my own original work, and has not previously in its entirety or in part been submitted for any degree at any other University.

I further declare that opinions expressed and conclusions reached are my own and are not to be regarded as representing the views of any other person or institution.

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LIST OF ABBREVIATIONS

CASES

AC	Law Reports (England), Appeal Cases, House of Lords & Privy Council, since 1890
AD	South African Law Reports, Appellate Division, 1910-1946
ALJR	Australian Law Journal Reports, 1958-Current
All ER	All England Law Reports, 1936-Current
All ER Rep ...	All England Law Reports Reprint, 1843-1935
ALR	Argus Law Reports (Australia), 1895-Current
Bing	Bingham's Reports (England), Common Pleas Division, 1822-1834
CBNS	Common Bench Reports (England), New Series, 1856-1865
Ch	Law Reports (England), Chancery Division, since 1890
ChD	Law Reports (England), Chancery Division, 1875-1890
CL	Current Law, 1947-Current
CLR	Calcutta Law Reports
CLR	Cape Law Reports
CLR	Commonwealth Law Reports (Australia), 1903-Current
CLY	Current Law Year Book, 1947-Current
CPD	Cape Provincial Division Reports, 1910-1946
DLR	Dominion Law Reports (Canada), 1912-1955
DLR 2d	Dominion Law Reports, Second Series (Canada), 1956-Current
Dunl	Dunlop, Court of Session Cases (Scotland), 2nd Series, 1838-1862
E & E	Ellis & Ellis's Reports, Queen's Bench (England), 1858-1861
EDL	Eastern Districts Local Division, 1910-1946
Esp	Espinasse's Reports, Nisi Prius, 1793-1807
Exch	Exchequer Reports, Welsby, Hurlstone & Gordon (England), 1847-1856
Ex D	Law Reports, Exchequer Division (England), 1875-1880
F & F	Foster & Finlason's Reports, Nisi Prius, 1856-1867
FLR	Federal Law Reports (Australia), 1957-Current
H & N	Hurlstone & Norman's Reports, Exchequer (England), 1856-1862
ILJ	Industrial Law Journal
IR	Irish Reports, since 1893
JP	Justice of the Peace, 1837-Current
KB	Law Reports, King's Bench Division (England), 1900-1952
KIR	Knight's Industrial Reports, 1966-Current
LILR	Lloyd's List Law Reports, 1919-1950
LJ Ex	Law Journal, Exchequer, 1831-1875
LJKB	Law Journal, King's Bench, 1831-1946
LRCP	Law Reports, Common Pleas Cases (England), 1865-1875

LR Exch	Law Reports, Exchequer Cases (England), 1865-1875
Lloyd's Rep ..	Lloyd's List Law Reports, 1951-Current
LQR	Law Quarterly Review, 1885-Current
LRQB	Law Reports, Queen's Bench, 1865-1875
LT	Law Times Reports (England), 1859-1947
Macq	Macqueen's Scotch Appeal Cases, House of Lord's, 1849-1865
M & W	Meeson & Welsby's Reports, Exchequer (England), 1836-1847
NE	North Eastern Reporter (USA), 1885-1936
NI	Northern Ireland Law Reports, 1925-Current
NW	North Western Reporter (USA), 1879-1941
NY	New York Reports (USA)
NZLR	New Zealand Law Reports, 1883-Current
OLR	Ontario Law Reports, 1901-1930
OPD	Reports of the Orange Free State Provincial Division, 1910-1946
OWR	Ontario Weekly Reporter, 1902-1914
PH	Prentice-Hall Weekly Legal Service, 1923-Current
QB	Queen's Bench Reports (England), 1841-1852
QBD	Queen's Bench Division Law Reports (England), 1891-1901
RR	Revised Reports, 1785-1866
SA	South African Law Reports, 1947-Current
SALR	South African Law Reports to 1948
SALR	South Australian Law Reports, 1865-1920
SASR	South Australian State Reports, 1921-Current
SC	Court of Session Cases (Scotland), 1906-Current
SC	Reports of the Supreme Court of the Cape of Good Hope, 1880-1910
SCR	Supreme Court Reports (Canada), 1876-Current
SJ	Solicitor's Journal, 1856-Current
SLT	Scots Law Times, 1893-Current
SR	Reports of the High Court of Southern Rhodesia, 1911-1955
SR (NSW)	New South Wales, State Reports, 1901-Current
TLR	The Times Law Reports (England), 1884-1952
TPD	Reports of the Transvaal Provincial Division, 1910-1946
TS	Reports of the Transvaal Supreme Court, 1902-1909
WLD	Reports of the Witwatersrand Local Division, 1910-1946
WLR	Western Law Reporter (Canada), 1905-1916
WN	Law Reports, Weekly Notes, 1866-1952
WN (NSW)	Weekly Notes (New South Wales), 1884-Current
WWR	Western Weekly Reports (Canada), 1912-1950, 1971-Current

JOURNALS

Acta Jur	Acta Juridica
AJPH	American Journal of Public Health
ASSAL	Annual Survey of South African Law
BHZ	Business Horizons

BJIR	British Journal of Industrial Relations
CILSA	Comparative and International Law Journal of South Africa
CLP	Current Legal Problems
DJ	De Jure
EL	Employment Law
Environ	The Environmentalist
ILJ	Industrial Law Journal
ILJ (UK)	Industrial Law Journal (United Kingdom)
ILR	International Labour Review
IRJSA	Industrial Relations Journal of South Africa
IRJUK	Industrial Relations Journal of the UK
ISA	Indicator South Africa
JAP	Journal of Applied Psychology
LAWSA	The Law of South Africa
LLB	Labour Law Bulletin
LQR	Law Quarterly Review
Manpower J ...	Manpower Journal
MLR	Modern Law Review
Mod Bus Law ..	Modern Business Law
NSN	National Safety News
NYRB	New York Review of Books
OccH	Occupational Hazards
Occup Psych ..	Occupational Psychology
Pers	Personnel
PhR	Philosophical Review
PJ	Personnel Journal
PPS	Personnel Psychology
PSa	Professional Safety
PSL	Personnel Management
ResM	Responsa Meridiana
RLJ	Rhodesian Law Journal
Safe Manag ...	Safety Management
SAJLR	South African Journal of Labour Relations
SALB	South African Labour Bulletin
SALJ	South African Law Journal
THRHR	Tydskrif vir Hedendaagse Romeins-Hollandse Reg
TSAR	Tydskrif vir die Suid-Afrikaanse Reg

TEXT

CSR	Cost Severity Rate
DIFR	Disabling Injury Frequency Rate
DIIR	Disabling Injury Incidence Rate
FSI	Frequency Severity Indicator
ILO	International Labour Organization
IR	Incidence Rate
ISR	Injury Severity Rate
LRA	Labour Relations Act 28 of 1956
MBO	Management by Objectives
MIC	Methylisocyanate
MOSA	Machinery and Occupational Safety Act 6 of 1983
NMC	National Manpower Commission
NOSA	National Occupational Safety Association
r	Regulation
s	Section
UNISA	University of South Africa
WCA	Workmen's Compensation Act 30 of 1941

GENERAL INTRODUCTION

INTRODUCTION

Regardless of the level of industrial and economic development that the South African economy has achieved, or the attention currently being given to the need for improvement in the sphere of safety management, occupational safety remains an issue of national concern. This is evident from the fact that approximately 247000 occupational injuries were reported in South Africa in 1988, of which 17500 resulted in permanent disabilities and 1700 were fatal cases.¹ The time lost due to these injuries was estimated at 21,9 million working days,² and the total insured cost was R290 million.³ Employers funded a further R300 million in hidden costs.⁴

This situation is unacceptable in both human and economic terms, and points to shortcomings in existing safety management policies and practices. The purpose of this research is to address the issue of sound safety management by attempting to determine the parameters of the employer's obligation in this regard and to provide guidelines for their application. Research to date, while dealing with various individual aspects of the subject, has not been directed specifically to the role of the employer's obligation within the context of the entire spectrum of relevant factors.

In essence, safety management is based on the demands of social policy, with its emphasis on the idea of *reasonableness* as a standard which requires the employer to act fairly and reasonably in order to eliminate or minimize occupational hazards. Such conduct is expressive of sound management practice, enforced by the principles of modern labour law, the developing common law, and statutory law such as MOSA.

1 Workmen's Compensation Commissioner *Workmen's Compensation Act 1941, Report on the 1988 Statistics* 5. The 1988 statistics are the most recent statistics reported by the Workmen's Compensation Commissioner.

2 See Appendix 2.2.

3 See Appendix 2.1.

4 Natal Mercury April 12 1988 5.

SIGNIFICANCE OF RESEARCH

MOSA provides the statutory framework for occupational safety in industry and is the means by which the State has established minimum safety standards in order to adhere to social policy.

Employers may assume that compliance with the requirements of MOSA is sufficient to prevent accidents, and that compensation for accidents is generally catered for by the WCA. This latter assumption is seemingly based on the provisions of s 7(a) of the WCA which excludes the employee's common law action for delictual damages against the employer. Such assumptions may overlook the employer's obligation to act fairly and reasonably in the management of safety, and the totality of the legal consequences for a failure to so act.

Since this particular problem arises out of the employer's failure to recognize the complex nature of the parameters of his obligation, there is a significant need to establish these parameters for the following reasons:

- (a) Notwithstanding the statutory protection provided by the WCA, the employer may, under certain circumstances, be personally liable for the payment of compensation to an injured employee, or his dependants. If, under those circumstances, the employer acts negligently in the management of safety, he may suffer severe financial loss if he has not taken out appropriate insurance.
- (b) Apart from the financial aspect, the sociological discomfort caused by an unsafe working environment may result in the breakdown in the employer-employee relationship or manifest itself in various forms of psychological stress, with the inevitable consequences of depleted productivity and disciplinary action.

- (c) The employer's ignorance or uncertainty as to the nature of the parameters of his obligation may result in an unsafe working condition or act.

Should the parameters be determined, understood & appreciated, the employer would be in a better position to eliminate or minimize occupational hazards, and thereby obviate or limit labour unrest, coupled with improved productivity and favourable socio-economic conditions.

RESEARCH OBJECTIVES

The object of the research is to determine the parameters of the employer's obligation in the management of safety, taking the concept of *reasonable conduct* as the norm.

By virtue of the wide range of components they involve, the parameters of the employer's obligation are flexible and difficult to apply. A model flow-chart will therefore be provided by means of which the parameters will be arranged in such a way as to provide the employer with guidelines for determining the possible outcome of an incident for which he may or may not be liable in the management of safety. The model will also illustrate the potential statutory liability of the Workmen's Compensation Commissioner, and the common law liability of the negligent employee and independent contractor.

The model will be supplemented by suggestions for the formulation and implementation of an objectively-based safety policy which may enable the employer to manage his safety activities effectively in accordance with the parameters established. The implementation of an adequate control system will also be discussed as a means by which safety performance can be measured against the safety objectives, and preventive and corrective action instituted in cases where performance fails to achieve the desired standard. To further assist the

employer in the management of safety, the MBO system of safety control will be considered.

RESEARCH LIMITS

This research has been confined to the ambit of MOSA and the LRA. Although both occupational health and safety are interdependent subject matters, time and space does not allow for treating both in this research. Consequently, only occupational safety is to be the subject of investigation for the stated purpose.

METHODOLOGY

The parameters of the employer's obligation will be determined with reference to South Africa's developing labour law and labour relations theory. The system of labour law will be considered within the sphere of labour legislation, general principles of the law of delict, and South African case law relative to occupational safety.

Since South African law on occupational safety has been influenced in the past by English law, and the case law of certain other countries, the development of the employer's obligation in such jurisdictions as a source of good labour relations practice will be considered. Furthermore, since the notion of *labour practice* would clearly include safety practices, principles of labour relations theory will also be examined. Complementing those principles is the international labour standards which have been accepted as forming part of the South African legal and labour relations system and are therefore a significant element in determining the parameters.

CHAPTER ORGANIZATION

With a view to establishing an adequate foundation for the research, *Chapter 1* analyzes the meaning of the concept of *safety management*, and provides a reasonably acceptable

definition of appropriate words associated with the concept. From this analysis a definition of *safety management* is framed. The employer's course of conduct or practice adopted in the management of safety is examined within the context of labour relations. The prevailing lack of clarity surrounding the meaning of the discipline *labour relations* necessitates the formulation of a definition of the discipline.

Ideally, safety management should not only represent the employer's response to a legal obligation, but also, where appropriate, to humanitarian, social and economic considerations. *Chapter 2*, therefore, focuses on the fact that sound management and labour relations practices should recognize the full range of factors that shape the parameters of the employer's obligation in this respect.

The humanitarian and social responsibilities of the employer are directed towards preventing injury and death, thereby promoting employee morale and public relations, and serving the public interest inherent in social policy. The economic objective is to minimize the cost of accidents on society, the employer, the employee concerned, and his dependants. With regard to the latter objective, attention is directed to the tangible and intangible costs of accidents, which are classified in monetary terms. Furthermore, since the employer may incorrectly assume that compensation for accidents is comprehensively covered by the WCA, it is necessary to analyze the provisions of the WCA to illustrate how failure to adopt sound safety management practices may affect him, and under what circumstances he is not protected by the Act.

The employer's ability to identify occupational hazards is fundamental to the practice of safety management. Accordingly, *Chapter 3* deals with the hazards which the employer may be required to foresee, control, prevent and correct. Such hazards are categorized either in terms of unsafe human acts or unsafe working conditions. The former category includes psychological, physiological and

physiopathological characteristics in the employee, and these are examined as variables likely to influence the accident phenomenon. In the latter category, factors which may give rise to accidents, such as work schedules, type of occupation, and the physical, psychological and organizational climate, are considered.

Chapter 4 examines the integration of the practice of safety management with the rules of *fairness, equity, justice* and *reasonableness*. *Reasonableness*, which implies a duty to act fairly and reasonably, is identified as being the standard in terms of which the fairness or unfairness of a safety practice may be evaluated. In this regard, national labour standards provide important guidelines, and therefore the influence of international labour standards on their formulation and upgrading is also considered, as is the role of the industrial court in determining the fairness or unfairness of a labour practice.

Chapter 5 concentrates on the principles of the employer's delictual obligation. *Delict* is differentiated from *crime* and *breach of contract*. It is also shown that, to found liability in delict, specific criteria are involved, namely, *conduct, wrongfulness, fault, causation* and *harm*. Of these *fault* is the determining criterion in establishing the reasonableness or negligence of the employer's conduct in the management of safety.

To identify the employer's conduct as reasonable or negligent, the objective standard of the *reasonable employer* in labour relations is taken as the norm. *Chapter 6*, therefore, examines the nature and scope of the *reasonable employer* test, and directs attention to the reasonable foreseeability and preventability of harm. Since the relevant circumstances of a particular case must be considered before the employer's conduct can be adjudged as reasonable or negligent, the various factors involved in assessing such circumstances are outlined.

In order to establish the operative South African test for safety matters, the *reasonable employer* test is compared with the English *duty of care* doctrine, which is sometimes applied in South Africa. The implied obligation of the employee to exercise reasonable care and vigilance in the performance of his duties is also considered.

Chapter 7 examines the practical guidelines established in judicial decisions for the required standard of care, which fall into four categories, namely, providing a safe system of work, a competent staff of employees, safe premises for the work, and proper and safe plant. These guidelines, however, are not exhaustive and therefore do not in themselves define the scope of the employer's obligation.

In addition to his common law obligations, the employer has to observe the various statutory provisions of MOSA. *Chapter 8* analyzes those provisions which serve as a framework for the setting and enforcement of minimum safety standards. Such an analysis is necessary because a failure to comply with MOSA may infer that the employer is negligent in the management of safety.

Chapter 9 predicates the parameters of the employer's obligation for sound safety management, which are not to guarantee absolute safety but merely directed to the exercise of reasonable care. To provide guidelines for eliminating or minimizing the consequences of an incident where negligent conduct may be a factor, and to assist in establishing sound safety management practices, a model flow-chart is developed. The model also facilitates the determination of the potential liability of the Workmen's Compensation Commissioner, or the negligent employer, employee, or independent contractor.

Finally, in order to give meaningful effect to the parameters and the model, and to avoid or minimize the prejudicial effects of unsound safety practices, suggestions as to the

formulation and implementation of an objectively-based safety policy are offered. It is also shown that the utilization of an MBO system of safety control could contribute to the promotion of safety.

CHAPTER 1

THE CONCEPT OF SAFETY MANAGEMENT

1.1 INTRODUCTION

The new labour dispensation following the Report of the Commission of Inquiry into Labour Legislation (the *Wiehahn Commission* Report),¹ introduced an additional dimension to safety matters. The idea behind the Commission's recommendations was that a situation in which working conditions were the prerogative of the employer, within a framework prescribed by the State, should be replaced with a more acceptable tripartite system where the State, the employer and the employees would participate as equal partners in labour relations.²

In the course of analyzing the employer's participatory role in a tripartite system, his obligation with regard to the management of safety is accentuated. An analysis of *safety management* implies that its elements must be identified and discussed in order to formulate a reasonably acceptable definition of the concept.

1.2 THE MEANING OF THE WORD 'SAFETY'

1.2.1 'Safe' and 'Safety'

Etymologically, the word *safe* is traceable to several sources. The Latin *salvus* translates into safe, whole or healthy and is

1 The Wiehahn Commission was appointed by the State President on 20 June 1977. The Commission's terms of reference was to inquire into, report upon and make recommendations in connection with the then existing labour legislation administered by the then Department of Labour (now the Department of Manpower), with specific reference to:

- "(i) the adjustment of the existing system for the regulation of labour relations in South Africa with the object of making it provide more effectively for the needs of our changing times,
- (ii) ...
- (iii) ...
- (iv) the methods and means by which a foundation for the creation and expansion of sound labour relations may be laid for the future of South Africa." *The Complete Wiehahn Report* (Part 1) iv.

2 To this end the Commission's recommendation for the establishment of a National Manpower Commission was given effect to in 1979. The NMC represents the interests of the State, employers and employees, and their organizations. See s 2A-D of the LRA as amended by Act 94 of 1979.

akin to *salus*, which may be translated as health or safety.³ The derivation from the Greek relates to the word *holos*, which means complete or entire, and the Sanskrit word *sarva* means unharmed or entire.⁴ The Concise Oxford Dictionary⁵ defines *safe* as "uninjured ... secure, out of or not exposed to danger ... affording security or not involving danger." Similarly, MOSA⁶ defines *safe* as "free from any threat which may cause bodily injury, illness or death."

The noun *safety* has a corresponding meaning to the word *safe* and is defined by the Concise Oxford Dictionary⁷ as "being safe, freedom from danger or risks."⁸ The word *safety* is similarly defined by Thygerson⁹ as a "relative protection from exposure to hazards." The phrase *relative protection* indicates that absolute safety cannot be achieved since it is impossible to eliminate all hazards completely.¹⁰ *Safety* may therefore be defined as freedom, or relative protection, from exposure to hazards or risks which may cause harm resulting in physical injury or death.¹¹ This analysis of the word *safety* exposes the elements of *hazard* and *harm*, which will also be discussed.

1.2.2 The Elements of 'Hazard' and 'Harm'

A condition present in the workplace¹² which contains the probability or danger of causing physical injury, illness or death and/or material damage,¹³ or which detrimentally affects the ability to perform a prescribed function, may be defined as a hazard.¹⁴ A condition may be said to be dangerous if

3 Malasky 7.

4 Malasky 7.

5 The Concise Oxford Dictionary 920.

6 s 1 of MOSA.

7 The Concise Oxford Dictionary 920.

8 Cf Jones-Lee 1.

9 Thygerson *Accidents and Disasters - Causes and Countermeasures* 6. Cf Gloss & Wardle 3; Hammer 118.

10 Gloss & Wardle 3.

11 Cf Malasky 7.

12 The word *workplace* is defined in s 1 of MOSA as "any place where an employee performs work in the course of his employment."

13 *Material damage* implies damage to or loss of equipment or property. Cf Heinrich et al 28.

14 Cf Hammer 118; Thygerson *Safety - Concepts and Instruction* 7.

there is a relative exposure to a hazard or risk.¹⁵ While a hazard may be present, there may be little danger of physical injury or material damage if appropriate precautions are taken to eliminate or minimize the hazard.¹⁶ It may therefore be deduced that if a hazard is found to exist, and appropriate precautions are taken, a safe working environment should be achieved.¹⁷

The word *hazard* suggests that some form of *harm* may result, *harm* in this context referring to the "severity of injury or the physical, functional, or monetary loss that could result if control of a hazard is lost."¹⁸ An employee falling from a steel beam 10 feet above a concrete pavement might suffer a sprained ankle or broken leg. He could be fatally injured in a similar fall from 300 feet. The hazard or danger of falling is the same. The difference lies in the degree of harm, namely, the degree of physical injury or death that would result if a fall occurred.

Physical injury may be described as the physical harm sustained as a result of an accident, such as a laceration, abrasion, bruise, wound or body fracture.¹⁹ *Death*, on the other hand, is "any fatality resulting from a work injury, regardless of the time intervening between the injury and death."²⁰

An unsafe working environment may give rise to an *accident*. Consequently, the word *accident* should also be analyzed and defined, since it has significant implications with regard to safety management.

15 The word *risk* is a synonym for the word *hazard*. Hammer 118; Heuston & Buckley 251; Jones-Lee 1; Malasky 9; Thygeson *Accidents and Disasters - Causes and Countermeasures* 7.

16 An employee welding iron is subject to the danger of damaging his eyes. When he wears safety goggles the danger is reduced, but it is still present if the goggles are incorrectly worn.

17 Heinrich 199.

18 Hammer 118. The delictual element of *harm* is discussed infra 117-9.

19 De Reamer 19.

20 Petersen *Techniques of Safety Management* 53.

1.2.3 The Word 'Accident'

The word *accident* has been used with various shades of meaning.²¹ In part these variations are dictated by the specific focus of interest in mind and its relation to the particular context, such as injuries, fatalities, property damage, responsibility and unsafe behaviour.

Deci and Von Haller Gilmer²² define *accident* as an "unexpected, incorrect, but not necessarily injurious or damaging event that interrupts the completion of an activity."²³ Similarly, Heinrich et al²⁴ define *accident* as "an unplanned and uncontrolled event in which the action or reaction of an object, substance, person, or radiation results in personal injury or the probability thereof." Haddon et al,²⁵ however, restrict the meaning of the word *accident* to an "unexpected occurrence of physical damage to an animate or inanimate structure."²⁶ Regardless of the different definitions for the word, it is generally accepted that an *accident* is a hazardous event that deviates from the expected.

In the light of the above, an *accident* may be defined as an unexpected or hazardous event or course of events arising out of employment which results in physical *injury* or *death*. An accident is preceded by *unsafe, avoidable act(s)* and/or *condition(s)* or *chance occurrences* or *acts of God*. The word *avoidable* refers to the fact that an accident may be foreseeable and therefore preventable, since most accidents are not chance occurrences or acts of God, but tend to reflect inefficiencies in the management system.

Although Deci and Von Haller Gilmer²⁷ and Heinrich et al²⁸ express the opinion that an *accident* does not necessarily

21 McGlade 10-6; Slote 103; Thygeson *Accidents and Disasters - Causes and Countermeasures* 1-3.

22 Deci & Von Haller Gilmer 386.

23 Cf *Fenton v Thorley & Co Ltd* [1903] AC 443.

24 Heinrich et al 23.

25 Haddon et al 28.

26 Cf Simonds & Grimaldi 9.

27 Deci & Von Haller Gilmer 386.

28 Heinrich et al 23.

cause physical harm,²⁹ the definition of *accident* suggested for the purpose of the research is restricted to physical harm.³⁰ The reason for this restriction is to distinguish an *accident* from an *incident*, as discussed below.

1.2.3.1 *Distinguishing between 'Accident' and 'Incident'*

An *incident* is an undesired or dangerous event, or course of events,³¹ that could cause an *accident*.³² In view of the fact that an *accident* is the consequence of an *incident*, the two words are therefore not synonymous.³³ In this regard Bamber³⁴ points out that all accidents are incidents, but all incidents are not accidents. An event which results in physical injury or death should be classified as an *accident*, but where no such harm is caused then the event would rather constitute an *incident*.³⁵

The definition of *accident* suggested for present purposes accentuates four elements that need further discussion, namely, *unsafe human act*, *unsafe working condition*, *chance occurrence* and *act of God*.

1.2.3.2 *The Concepts 'Unsafe Human Act', 'Unsafe Working Condition', 'Act of God' and 'Chance Occurrence'*

An act is deemed unsafe if the physical or mental condition³⁶ of the individual responsible for the act may cause him to injure himself or any other person.³⁷ The performance of a task under less than safe conditions usually constitutes an

29 An employee may stumble while walking along an aisle and suffer no injury.

30 This is in accordance with the WCA definition of *accident* infra 49-53.

31 It is estimated that there are at least 300 events that lead to an accident. Henderson & Cornford 5.

32 Heinrich et al 24; Henderson & Cornford 5.

33 Cf Thygeson *Accidents and Disasters - Causes and Countermeasures* 2.

34 Bamber cited in Ridley 131.

35 A tool-box may drop off a scaffold narrowly missing an employee below. Although there may be no personal injury, the incident may have caused a serious accident if the box fell on the employee's foot.

36 *The Accident Prevention Manual of the Dunlop Rubber Co Ltd* 15 refer to an unsafe act as "some failure of the individual or the personality."

37 Blake 48; Whitlock et al 35-44.

unsafe human act,³⁸ which need not necessarily result in injury or death, but may be a precipitating factor in many accidents.

An *unsafe working condition* is a hazardous condition present in the workplace which in appropriate circumstances may lead to an accident.³⁹ This will include supervisory failure, such as bad housekeeping.⁴⁰ If an employee climbs a rickety ladder, the climbing of the ladder is the *unsafe human act*, while the *unsafe working condition* is the rickety ladder.

Two other factors that may contribute to an accident are an *act of God* and a *chance occurrence*.⁴¹ If an employee is struck by lightning, the incident may be classified as an *act of God*. A *chance occurrence*, on the other hand, is a circumstance in which strictly unexpected mechanical conditions or events are involved, such as when an employee is injured as a consequence of a fan-belt's breaking while in operation. An act of God and a chance occurrence are beyond the employer's ability to prevent or control, and could not be reasonably foreseen. An incident which the employer could foresee, prevent or control should not be considered as an *act of God* or a *chance occurrence*. Such an incident would rather constitute either an *unsafe human act* or *unsafe working condition* according to the circumstances of the particular case.

In the light of the analysis of the word *safety* and the various elements associated therewith, it is appropriate to discuss the concept of *management*, and how it relates to safety, in order to formulate a definition of *safety management*.

38 Blake 48; Gloss & Wardle 163.

39 Blake 49; De Reamer 19; Gloss & Wardle 161.

40 *The Accident Prevention Manual of the Dunlop Rubber Co Ltd* 16.

41 Dessler 627.

1.3. THE CONCEPT 'MANAGEMENT' IN SAFETY MANAGEMENT

1.3.1 The Meaning of 'Management'

The word *management* denotes both the activity or function of management and the person or persons who exercise the function.⁴² As an activity or function, the word *management* refers to:

"a social process that entails responsibility for the effective and economical planning and regulation of the operations of an enterprise; such responsibility involving (a) judgement and decision in determining plans; and (b) the guidance, integration, motivation and supervision of the personnel."⁴³

Robbins⁴⁴ describes *management* as "the universal process⁴⁵ of efficiently getting activities completed with and through other people."⁴⁶ The word *process* refers to the fact that management can be divided into a number of functions,⁴⁷ namely, the internal planning, organizing, directing and controlling of the organizational activities. Individually, these various functions of the management process may be briefly described as follows:

- (a) *Planning* is directed to the determination of organizational objectives and the procedures and methods that will be necessary to achieve these objectives. It is the process of deciding what to do, how to do it, and who is to do it.⁴⁸
- (b) *Organizing* is the establishment of the relations between the activities to be performed, the people to perform them, and the physical factors that are required to

⁴² Kahn-Freund 4.

⁴³ Deverell 19.

⁴⁴ Robbins 6.

⁴⁵ *Freeman v Union Government* 1926 (7) PH M44; *Salvojie v R* 1928 (12) PH K6; *R v Schwartz* 1931 TPD 42; *Superintendent-General of Education (C) v Fife* 1955 (2) SA 279 (C) 285.

⁴⁶ Cf Mills 29, 30.

⁴⁷ Albers 30; Fayol 3.

⁴⁸ Albers 30; Deverell 206.

perform these activities. It involves the development of a structure of interrelated managerial positions in accordance with the requirements of planning.⁴⁹

- (c) *Directing* is concerned with implementing the policies that result from planning, such as supervising and communicating with employees.⁵⁰
- (d) *Control* refers to the reviewing, regulating, co-ordinating⁵¹ and controlling of activities or performance to planned standards and instituting the necessary corrective action to make that performance conform to the standards set.⁵²

Management also refers to a person or persons in the employment of the employer, entrusted with the power to manage the organization.⁵³ The right or power to manage⁵⁴ is the power necessary to manage the affairs of the employer.⁵⁵ It includes the power to manage employees which arises as a consequence of the employment relationship.⁵⁶

The basis of the power to manage employees gives rise to the power of control⁵⁷ which is described in *R v AMCA Services Ltd*⁵⁸ as the "right to control, not only the end to be achieved by the other's labour and the general lines to be followed, but the detailed manner in which the work is to be performed."⁵⁹ As Davies & Freedland⁶⁰ point out, "there can be no employment relationship without a power to command and a duty to obey, incorporating the element of subordination."

49 Albers 30-1; Rideout & Dyson 7; *CIR v Stott* 1928 AD 262.

50 Albers 31.

51 Davies & Freedland *Kahn-Freund's Labour and the Law* 15.

52 Deverell 158; Rideout & Dyson 7. See also *S v Van Wyk & others* 1962 (1) SA 627 (N); *Xakaxa v Santam Insurance Co Ltd* 1967 (4) SA 521 (A).

53 *Superintendent-General of Education (C) v Fife* (supra) 285.

54 Poolman *Principles of Unfair Labour Practice* 93 et seq.

55 In *John Shaw & Sons (Salford) Ltd v Shaw* [1935] 2 KB 113 it was said that if powers are vested in the directors and managers, they alone can exercise those powers.

56 Poolman *Principles of Unfair Labour Practice* 97.

57 Poolman *Principles of Unfair Labour Practice* 97.

58 *R v AMCA Services Ltd* 1959 (4) SA 207 (A) 212H.

59 Cf Hepple & O'Higgins 16.

60 Davies & Freedland *Kahn-Freund's Labour and the Law* 18.

An integral but distinct part of the management function concerned with employees at work and their relations within the organization, is the human resources function. The function relates to the human and social aspects of organization, work, leadership, team-work, motivation, behaviour, communications and human relations.⁶¹ Among its more specific activities are those concerning conditions of employment, including matters pertaining to health and safety.⁶² The formulation of a safety policy and the procedures for its application on the basis of well-defined objectives and principles also falls within its sphere.

In recent years, attention has been directed to understanding the important function of management and its relationship to organizational effectiveness.⁶³ For this reason it may be necessary to discuss the extent to which management style can influence occupational safety.

1.3.2 *The Influence of Management Style on Safety*

Various theories of management style have been advanced.⁶⁴ McGregor,⁶⁵ for example, classifies managers as either Theory X or Theory Y oriented. The Theory X manager believes that employees do not like to work and must be coerced into doing so. The Theory X safety manager is directive, and highlights rules and regulations. He works under the assumption that employees seem to want to get hurt, must be controlled, and are not sufficiently knowledgeable to recognize a hazard. The Theory Y manager, however, believes that employees are not by nature resistant to the employer's needs, and desire to achieve their best potential. The essential task of the Theory Y manager is to arrange organizational conditions and methods so that employees can achieve their best potential.

61 ILO *Labour Management Relations Series* (1968) 54.

62 ILO *Labour Management Relations Series* (1968) 54.

63 McGregor 33; Petersen *Safety Management - A Human Approach* 5.

64 Petersen *Safety Management - A Human Approach* 5 et seq.

65 McGregor 33 et seq.

The Theory Y manager therefore creates opportunities and encourages the growth of employees.

Petersen⁶⁶ expands on McGregor's analysis when he proposes that managerial style can be classified in terms of relationship-orientation, namely, whether management is autocratic or democratic, and also in terms of task-orientation, namely, whether it is job-centred or employee-centred.

A further dimension to McGregor's and Petersen's models, which relates to the effectiveness of management, was added by Reddin.⁶⁷ The introduction of an effectiveness dimension leads to eight categories by which managers may be classified, namely:

- (a) the *effective democrat* is a manager who perceives his main task as one of developing people. He is interested in safety because it affects people and production;
- (b) the *ineffective democrat* is the missionary and is regarded as a good person, but ineffective in getting the work done;
- (c) the *effective structuralist* is the benevolent autocrat who gets results by increasing production and is competent to overcome resistance by employees;
- (d) the *ineffective structuralist* is the autocrat;
- (e) the *effective paternalist* is the executive who is most successful at getting things done;
- (f) the *ineffective paternalist* is the compromiser who knows what should be done but does not deal with it;
- (g) the *effective abdicrat* is the bureaucrat who is good at following rules; and
- (h) the *ineffective abdicrat* is the deserter who has no interest in production, employees or safety.

⁶⁶ Petersen *Safety Management - A Human Approach* 5 et seq.

⁶⁷ Reddin 16.

It may be concluded that the most effective safety management style is one where the manager is democratic, employee-centered and technically efficient.

Safety management, as a particular function of management, is concerned with the relations between the employer and his employees, especially in so far as these contribute to the creation of a safe working environment. With regard to this particular relationship, the words *employee*⁶⁸ and *employer* need to be defined to provide clarity to the context in which the words are used.

1.3.3 *The Status of 'Employee' and 'Employer'*

1.3.3.1 *Statutory Definitions of 'Employee'*

Unless specifically excluded, all persons who are *employees* in terms of the LRA are entitled to the protection of labour law and may not be restricted or prevented from participating in the labour relations system.⁶⁹ The premise of importance to the status of *employee*⁷⁰ is that safety management is concerned with the safety of all persons falling within that definition. In terms of the LRA⁷¹ an *employee* is defined as:

"any person who is employed by or working for any employer and receiving or entitled to receive any remuneration, and, subject to subsection (3), any other person whomsoever who in any manner assists in the carrying on or conducting of the business of an employer; and 'employed' and 'employment' have corresponding meanings."⁷²

In *Borcherds v CW Pearce & F Sheward t/a Lubrite Distributors*⁷³ the court expressed the opinion that the LRA

68 Reference to *employee* or *employees* include the words *worker* or *workers*, *workman* or *workmen*.

69 *H.A van Deventer v Shaftsinkers (Pty) Ltd* unreported case NH 13/2/2025 1. See also *Mnisi & andere v Die Suid-Afrikaanse Ontwikkelingstrust* unreported case NH 11/2/1630A.

70 See *National Union of Textile Workers & others v Stag Packings (Pty) Ltd & another* 1982 (4) 151 (T) 158G-H.

71 s 1 of the LRA.

72 See also *Van Jaarsveld & Coetzee* 11-2, 229; *Colonial Mutual Life Assurance Society v MacDonald* 1931 AD 412; *Fisk v London & Lancashire Insurance Co* 1942 WLD 63.

73 *Borcherds v CW Pearce & F Sheward t/a Lubrite Distributors* unreported case NHN 11/2/1831.

definition of *employee* was wide and therefore supported the contention⁷⁴ that some limitation must be placed on the import of the words used.⁷⁵ Related labour legislation illustrates the necessity for restricting the definition. The definition of *employee* in the Wage Act⁷⁶ and the Basic Conditions of Employment Act⁷⁷ is expressed in identical terms. These Acts deal with wages and conditions of employment. They cannot apply to an independent contractor as is the case with the LRA.

The court in *Borcherds v CW Pearce & F Sheward t/a Lubrite Distributors*⁷⁸ recommended that the wide definition of *employee* in the LRA be limited by the following considerations:

- "(a) There is a distinction between assisting an employer in carrying on his business and performing work which is of assistance to the employer in the carrying on or conducting of his business. Work of the latter category is not assistance within the meaning of that word as used in the Act.
- (b) The assistance must be intended to be repeated with some form of regularity. Assistance on an ad hoc basis or on a single isolated occasion, such as a friend helping out in a case of need, will not make the one who assists an employee.
- (c) Assistance rendered at the will of and in the sole discretion of the one assisting will not make him an employee. Such a relationship creates only social and not legal obligations. Those who voluntarily and without any obligation, except perhaps social, assist at the school tuck-shop are not employees despite the fact that they may have to follow the instructions of

⁷⁴ See in this regard *Oak Industries (SA) (Pty) Ltd v John & another* (1987) 8 ILJ 756.

⁷⁵ Cf *Oak Industries (SA) (Pty) Ltd v John & another* (supra) 756-8.

⁷⁶ s 1 of the Wage Act 5 of 1957.

⁷⁷ s 1 of the Basic Conditions of Employment Act 3 of 1983.

⁷⁸ *Borcherds v CW Pearce & F Sheward t/a Lubrite Distributors* unreported case NHN 11/2/1831.

the one in charge. Chaos would reign if no one had the authority to instruct and direct.

- (d) The obligation to assist must not arise from some other legal obligation to tender that assistance. The obligation may arise *ex contractu* or *ex lege*. The agent assists qua agent and not qua employee. The wife assists in the cafe not as an employee but as part of her duty of mutual support."

The LRA did not intend to deal with legal rights and obligations arising from a legal relationship other than the employer/employee relationship.⁷⁹ It is within the court's jurisdiction to determine the existence or otherwise of an employer/employee relationship between the parties.⁸⁰

The definition of *employee* in MOSA is to a certain extent similar to that of the definition in the LRA, but MOSA includes those persons who work "under the direction or supervision of an employer." The legislator thus incorporates the element of control in MOSA but not expressly in the LRA. The reason is that MOSA imposes an obligation on the employer to institute certain measures to promote occupational safety. The employer is able to comply with such an obligation whenever he has the right to control and supervise, no matter how it arises.

A further distinction between the LRA definition of *employee* and that provided by MOSA is found in the word *assists*. Assistance within the meaning of the LRA excludes an independent contractor or third party, whereas they are specifically included in MOSA. Separate provision is made in the LRA for an independent contractor in the form of a *labour broker*.⁸¹

79 *Padayachee v Ideal Motor Transport* 1974 (2) SA 565 (N); *Ongevallekommissaris v Onderlinge Versekeringsgenootskap AVBOB* 1976 (4) SA 446 (AD); *Smit v Workmen's Compensation Commissioner* 1977 (2) PH K17 (C).

80 *Gcwensha & others v Gaspec* 1988 (2) SA 69 (EC).

81 *Infra* 23-5.

Contrary to the labour legislation discussed above, the WCA does not refer to the word *employee* but the word *workman*,⁸² which includes an *employee* and certain other persons such as an independent contractor.⁸³ For purposes of accidents and compensation, safety legislation has therefore widened the meaning of *employee* to include certain third parties.

For present purposes, the definition of *employee* is as covered in the LRA. However, where the context requires a different approach, MOSA or the WCA will apply. Having discussed the statutory definitions of *employee*, it is necessary to consider the definition of *employer*. Such an examination is required to establish the interdependence of the employer and the employee within the employment relationship.

1.3.3.2 *The LRA Definition of 'Employer'*

The LRA⁸⁴ defines an *employer* as:

"any person whomsoever who employs or provides work for any person and remunerates or expressly or tacitly undertakes to remunerate him or who, subject to subsection (3), permits any person whomsoever in any manner to assist him in the carrying on or conducting of his business; and 'employ' and 'employment' have corresponding meanings."⁸⁵

The *employer*, as defined, may be said to be a proprietorship, partnership, corporate body, public corporation, the State or municipality.⁸⁶

A *manager* is traditionally equated with an *employer*. Few managers are, however, either the owners of capital or the employer of employees. Usually, but not necessarily, a manager is an employee in the upper level of the

82 s 3 of the WCA.

83 The WCA definition of *workman* is discussed infra 44-6.

84 s 1 of the LRA.

85 The definition provided in s 1 of MOSA has a similar meaning. See also Van Jaarsveld & Coetzee 11-2, 236-7.

86 Kahn-Freund 4; *The Complete Wiehahn Report* (Part 5) par 4.41.2.

organizational hierarchy who performs the functions of management, representing the employer as the legal entity.⁸⁷ A *manager* could, in most circumstances, be equated with an *employee*. The non-restrictive nature of the definition of *employee* does not allow or permit a distinction between a managing director or any other level of management employee and a mere unit of labour, regarding considerations of fairness in the employment relationship.⁸⁸

The wording of the definitions of both *employee* and *employer* make provision for two general categories of employee and employment. Included in both definitions is the phrase "subject to subsection (3)," envisaging a distinction between *employment* as covered by the wording excluding *employment* "subject to subsection (3)" and *employment* contemplated in and "subject to subsection (3)." In relation to the *employment* contemplated under subsection (3), attention needs to be directed to the relationship between an *employer*, *employee* and *independent contractor*.⁸⁹

1.3.3.3 *The Relationship between an 'Employer', 'Employee' and 'Independent Contractor'*

The relevant portions of subsection (3) of the LRA provide as follows:

"(3) For the purposes of any provision of this Act or of any applicable agreement ... in the case of persons contemplated in the definition of 'labour broker's office'⁹⁰ in the subsection who have been procured for a specific client or provided to him to render service

⁸⁷ Mills 30, 274; Palmer 32-3; Salamon 194.

⁸⁸ *Stevenson v Sterns Jewellers (Pty) Ltd* (1986) 7 ILJ 318 (IC). The protection of all levels of employees, particularly those classed as *managers* or *executives*, was considered by the court in *Oosthuizen v Ruto Mills (Pty) Ltd* (1986) 7 ILJ 608 (IC).

⁸⁹ *Santos v David F Heath (Pty) Ltd* unreported case NH 11/2/1810.

⁹⁰ A *labour broker's office* is defined in s 1 of the LRA as "any business whereby a labour broker for reward provides a client with persons to render service to or perform work for the client or procures such persons for him, for which service or work such persons are remunerated by the labour broker."

to or perform work for him (in this subsection referred to as the workers) -

- (a) the labour broker⁹¹ concerned shall be deemed to be the employer of such workers, any service rendered to the client or work performed for him shall be deemed to have been rendered to or performed for the labour broker, and the workers concerned shall be deemed in respect of such service or work to be employees of the labour broker ..."

The status of a worker as an employee of a particular employer would depend on whether the worker falls within the first or second category of *employment* referred to in the aforementioned definitions of *employee* and *employer*. Some employment relationships provide that the work of an employee will be done for another person or client in terms of which the worker is to be assigned work at the place and for the benefit of that other person or client. In such circumstances that worker is not the employee of the client but the employee of a *labour broker*, and will be an employee as provided in the phrase "subject to subsection (3)" of the definitions of *employee* and *employer*.⁹² For present purposes the concept *independent contractor* will be substituted for the concept *labour broker* because the concept *independent contractor* is commonly referred to in labour practice.

An *independent contractor* is a person or legal entity who undertakes to perform certain specified work for the benefit of another person. In order to clarify the relationship between an *employer*, *employee* and *independent contractor*, it is necessary to distinguish between a *contract of service* and a *contract for service*. The employer/employee relationship is described as a *contract of service*, whereas a *contract for service* is concerned with employing an independent contractor

91 A *labour broker* is defined in s 1 of the LRA as "any person who conducts or carries on a labour broker's office."

92 See further *Phipps v ESCOM* unreported case NH 13/2/3053; *Addington v Foster Wheeler SA (Pty) Ltd* unreported case NH 3/2/3857.

to perform a specified task.⁹³ In the English case of *Stevenson, Jordan & Harrison Ltd v Macdonald & Evans*⁹⁴ it was said that "(u)nder a contract of service, a man is employed as part of the business, and his work is done as an integral part of the business; whereas under a contract for services, his work, although done for the business, is not integrated into it but is only accessory to it."

An *employee* is a person engaged to obey his employer's orders from time to time, whereas an *independent contractor* is a person engaged to do certain work, but to exercise his own discretion as to the mode and time of doing it. An *independent contractor* is bound by his contract, but is not subject to the authority or supervision of another person.⁹⁵

The relations between employers and employees in the realm of safety management are incorporated into or comprise elements of the discipline *labour relations*. Since *labour relations* is a particular and specialized area of the employer's management function, the concept needs to be discussed. Any discussion of *labour relations* requires a definition of its meaning.⁹⁶

1.4 THE DISCIPLINE 'LABOUR RELATIONS'

There appears to be uncertainty and even confusion regarding the use of the concepts *labour relations* and *industrial relations*.⁹⁷ Sometimes the concepts *labour relations* and *industrial relations* are used as synonyms and are interchangeable.⁹⁸ In other cases, though a distinction may have been made, it is often confusing and unscientific.⁹⁹ It

93 Ridley 78.

94 *Stevenson, Jordan & Harrison Ltd v MacDonald & Evans* [1952] 1 TLR 101, 111.

95 Heuston & Buckley 610; *Colonial Mutual Life Assurance Society v MacDonald* (supra) 436-7; *Honiwell & Stein v Larkin Bros* [1934] 1 KB 196; *Dukes v Martinhusen* 1937 AD 12; *R v Feun* 1954 (1) SA 58 (T).

96 Wiehahn *The Regulation of Labour Relations in a Changing South Africa* 5.

97 Hyman 3; Jubber viii; Poolman *Principles of Unfair Labour Practice* 20.

98 Barret et al 2; Blanpain 21.

99 In 1981 the NMC vaguely distinguished between the concepts. The distinction was that *industrial relations* is *labour relations* in the broader context, namely, the relations between employers and employees in an entire industry, region or country, and often refers to relations between employee and employer organizations. The NMC further pointed out that *industrial relations* deals with conditions of employment and the process of collective bargaining. In its narrower sense, the NMC perceived

is therefore necessary, at least for present purposes, to decide whether the concept *labour relations* or *industrial relations* should be used to identify the discipline.

1.4.1 *Distinguishing between 'Labour Relations' and 'Industrial Relations'*

The NMC¹⁰⁰ uses the concept *labour relations* but draws no distinction between *labour relations* and *industrial relations*. The Department of Manpower¹⁰¹ also prefers the concept *labour relations* but does not use the concept synonymously with *industrial relations*.¹⁰²

Although the Wiehahn Commission¹⁰³ recommended that the title of the Industrial Conciliation Act 28 of 1956 be changed to the Industrial Relations Act 28 of 1956, the title of the Act was nevertheless changed to the Labour Relations Act 28 of 1956. Furthermore, the Manpower Training Act 56 of 1981¹⁰⁴ defines the concept *labour relations* and not *industrial relations*, and no distinction is made between the concepts, nor is it indicated that *labour relations* is different from *industrial relations*.

The Wiehahn Commission,¹⁰⁵ however, uses the concept *industrial relations*¹⁰⁶ to denote the tripartite relationship between the employer, the employee and the State. Some authors¹⁰⁷ generally prefer the concept *industrial relations*,¹⁰⁸ because for some the concept excludes

labour relations as the relations between the employer and his employees (National Manpower Commission *Annual Report* 1981 105). See also Jubber viii; Phillips 3-6.

100 National Manpower Commission *Annual Report* 1989 16.

101 Department of Manpower *Annual Report* 1989 20.

102 Poolman *Principles of Unfair Labour Practice* 28 and Kahn-Freund, cited in Davies & Freedland *Kahn-Freund's Labour and the Law* 16, 72, 201, also prefer to use the concept *labour relations*.

103 *The Complete Wiehahn Report* (Part 5) par 4.130.

104 s 1 of the Manpower Training Act 56 of 1981.

105 *The Complete Wiehahn Report* Chapter 2.

106 The reason for this preference is not dealt with by the Commission.

107 Barrett et al 1; Clegg 1; Flanders 9-10; Hyman 11; Kochan 1; Mills 16.

108 Poolman *Principles of Unfair Labour Practice* 20-2 believes that the preference for the concept *industrial relations* has its origin among economic observers. He states that the industrial revolution which instigated the industrialization process led to the development of *industrial relations* systems which are based on an inter-disciplinary approach to *labour-management* relations.

agricultural employees and domestic servants,¹⁰⁹ while for others the concept conforms to the tripartite character of a modern industrial system.¹¹⁰

Provided the discipline is clearly defined, both concepts may be used synonymously and interchangeably to describe one field of study,¹¹¹ "irrespective of the mild controversy over the semantic differences."¹¹² For present purposes, the concept *labour relations* is preferred as being more apt in terms of current usage in South Africa.

1.4.2 The Meaning of 'Labour Relations'

In its examination of the discipline *labour relations*, the Wiehahn Commission¹¹³ expressed the opinion that several writers on the subject fail to achieve an adequate definition or analysis of the structural elements of the discipline because each attempt at description runs the risk either of being too narrow or out of date, or both. It came to the Commission's attention that there are a few common characteristics of the discipline on which authors appear to agree, namely:

- (a) labour relations forms an integral part of human relations;
- (b) the predominant economic and political ideology of a country influences the nature of its labour relations system; and

109 Hyman 13, 90, 91 and Mills 15 refer to the concept *labour relations* to describe the *labour-management* relations at the organizational level of the private sector in the wider system of industrial society. The exclusion of agricultural employees and domestic servants from the scope of industrial relations is incorrect since the exclusion of any group of employees or employers can only be justified in terms of some statutory authority. See s 2(2) of the LRA.

110 *Labour relations* is used to explain the sum of relations between the private sector employers, employees and their organizations, excluding the Government's participatory function. Kochan 1; Mills 15-6; Sloane & Witney 29.

111 See further on the subject Bendix *Research and Teaching in Industrial Relations - Old Wine in New Bottles* 28; Jubber viii; Phillips 3-6; Poolman *Principles of Unfair Labour Practice* 27.

112 Bendix *Labour and Society in Comparative Socio-economic Systems* 1.

113 *The Complete Wiehahn Report* (Part 5) par 2.2.

(c) labour relations forms the point of convergence of a number of disciplines.¹¹⁴

The Commission¹¹⁵ concluded its analyses of *labour relations* by defining it as a "multidimensional complex of relationships existing in and arising out of the work situation in an organizational context within the parameters of a socio-economic ideology determined by the State." The disciplines of sociology, psychology, economics and labour law¹¹⁶ all fall within the scope of this definition.¹¹⁷ According to the Commission,¹¹⁸ the tripartite relationship between the State, the employer and the employee forms the basis of the labour relations system.¹¹⁹ Society, the organization and the labour object¹²⁰ constitute the other poles in the system.¹²¹

Kahn-Freund¹²² refers to *labour relations* as the relations between management and labour which involve all sorts of relationships, individual and collective, and include matters of occupational safety, industrial disputes,¹²³ collective agreements and job security. According to Kahn-Freund,¹²⁴ the only interest which management and labour have in common is that the inevitable conflict between the parties should be regulated from time to time by reasonably predictable procedures.¹²⁵

114 *The Complete Wiehahn Report* (Part 5) par 2.2.1.

115 *The Complete Wiehahn Report* (Part 5) par 2.2.8.

116 The multi-disciplinary nature of *labour relations* does not allow it to be equated with labour law which has a restrictive interpretation. Labour law is that body of objective rules which regulates the relations among and between the tripartite parties, incorporating the doctrine of fairness and equity. Labour law and labour relations are independent and interdependent fields of learning. Poolman *Principles of Unfair Labour Practice* 28, 71-2.

117 Kahn-Freund, Kassalow, Schregte & Whelan, cited in Jordaan & Davis 201, insist that labour relations systems can only be meaningfully compared if such systems are viewed against their social, economic and political setting in any particular country.

118 *The Complete Wiehahn Report* (Part 5) par 2.2.3.

119 On the concept of *tripartism* in labour relations see Dekker 18ff.

120 *The Complete Wiehahn Report* (Part 5) par 2.2.3 refers to the labour object as the task to be performed by the employee.

121 Cf Kochan 1.

122 Davies & Freedland *Kahn-Freund's Labour and the Law* 16.

123 A dispute is central to the study of *labour relations* since the precincts of dispute delineate the scope and nature of *labour relations*. Cf Clegg 1-4.

124 Davies & Freedland *Kahn-Freund's Labour and the Law* 16-26.

125 The procedures include the ultimate resort to any of those sanctions through which each contending party must assert its power.

Poolman¹²⁶ defines *labour relations* as follows:

"(A) multi-dimensional spectrum of complex relations among and between the bipartite and tripartite parties individually and collectively, arising out of and existing in the work environment in an organizational context within the parameters of a dynamic societal public policy with the object of establishing flexible and objective standards to regulate existing and developing future courses of conduct."¹²⁷

Poolman¹²⁸ distinguishes between the words *relations* and *relationships* in labour relations. He points out that the word *relations* has a broader meaning than the word *relationships* and that they are therefore not necessarily synonymous and interchangeable. Poolman¹²⁹ further recognizes the complex processes that are influenced by a multi-dimensional multiplicity of relations among and between the bipartite and tripartite parties, and the role of social power and public interest in labour relations. He believes that the mixture of multiple disciplines injects normative or value premises peculiar to each society.¹³⁰

The Manpower Training Act¹³¹ defines *labour relations* as follows:

"(A)ll aspects of and matters connected with the relationships between employer and employee, including matters relating to negotiations in respect of the

126 Poolman *Principles of Unfair Labour Practice* 37.

127 Labour relations conduct requires normative regulation or rules of conduct that would and should ensure the maintenance of, and support for, the six basic elements of labour relations. Poolman *The Evolving Concept of Unfair Labour Practice: Its Apparent Uncertainty* 8.

128 Poolman *Principles of Unfair Labour Practice* 27-8.

129 Poolman *Principles of Unfair Labour Practice* 31-7.

130 Poolman *The Evolving Concept of Unfair Labour Practice: Its Apparent Uncertainty* 6. Flanders 9-10 and Dunlop 5-7 also assume the existence of a multi-dimensional complex of relations in the labour relations system in which the parties to the system interact with each other, giving rise to the centrality of a set of rules to regulate human and organizational conduct. Cf Hyman 11-2.

131 s 1 of the Manpower Training Act 56 of 1981.

remuneration and other conditions of employment of the employee, the prevention and settlement of disputes between employer and employee, the application, interpretation and effect of laws administered by the Department (of Manpower) and the management of the affairs of trade unions, employers' organizations, federations and industrial councils."

The dynamism of *labour relations* is illustrated in this definition. It implies a complex of relations between the tripartite parties and their organizations and institutions. The State regulates the aspects and matters in the employment relationship through a legislative process and administrative labour practices to give effect to societal demands. The definition emphasizes a system of rules¹³² which include both substantive¹³³ and procedural rules¹³⁴ of collective bargaining, labour dispute settlement and generally the rules of labour legislation.¹³⁵

Although the nature and scope of labour relations is generally disagreed upon,¹³⁶ it is specifically or by implication agreed that not all human relations fall within the scope of labour relations.¹³⁷ The definitions analyzed indicate that labour relations does include a dynamic spectrum of employment-related inter-relations, institutions and organizations

132 Clegg 1-4 and Flanders 9-10 also define *labour relations* in terms of a system of rules which regulate human and organizational conduct. Poolman *Principles of Unfair Labour Practice* 33 states that to define *labour relations* in terms of *rules* is too restrictive since it disregards or understates the process inherent to arrive at the network of rules.

133 Substantive rules cover the details necessary to give effect to the six basic elements of *labour relations*. Palmer 3.

134 Procedural rules are based on the means of deciding the substantive rules, including those who have the power to set substantive rules, and through which administrative agency (Palmer 3). Clegg 1-4 also refers to a complex set of procedural and substantive rules within an organization that he considers the labour relations system, which he believes could be centralized or decentralized.

135 A different description of the nature of *labour relations* is considered by Margerison 274 who considers the concept as "the study of people in a situation, organization or system interacting in the doing of work in relation to some form of contract, either written or unwritten." Barbash 66, on the other hand, defines *labour relations* as "the area of study and practice concerned with the administration of the employment function in modern public and private enterprise; this function involves workers' unions, managers, Government and the various publics."

136 Hyman 9; Palmer 1-3.

137 Wiehahn *The Regulation of Labour Relations in a Changing South Africa* 4.

influenced by the political, social and economic order of the country concerned.

The primary objective of a labour relations system is the promotion and maintenance of fair labour practices in the exercise of the six basic labour rights¹³⁸ to ensure industrial peace.¹³⁹ The *rights* of employees in the regulation of labour relations does not imply *rights* in the pure legalistic sense, but does refer to the internationally recognized human rights.¹⁴⁰

A definition of *labour relations* can neither be too broad, lest it ceases to be a unique discipline in its own right, nor too narrow, lest its matter is restricted and it loses its inherent dynamism. The definition should, however, be sufficiently wide and clear in its nature to enable systematic analysis. In view of the above, *labour relations* may be defined as a dynamic and complex multiplicity of employment-related relationships, both individual and collective, existing among and between the State, employers, employees and their organizations and institutions within and arising out of the work environment, regulated by a legal, economic, societal and political ideology governed by the State.

Sound safety management is an issue of common concern to the parties within the labour relations system. As an element of the discipline *labour relations*, safety management is encompassed in the definition of *labour practice*, subject to the definition of employer and employee for the purposes of the respective legislation.

138 According to the Wiehahn Commission, the six structural elements or basic labour rights of the labour relations system are referred to as the right to work, the right to associate, the right to bargain collectively, the right to withhold labour, the right to protection and the right to development (*The Complete Wiehahn Report* (Part 5) par 2.3-2.9). These employee rights acquired their public law nature from the rules of international labour law and from their entrenchment in national labour legislation. Poolman *Principles of Unfair Labour Practice* 2; Wiehahn *The Regulation of Labour Relations in a Changing South Africa* 10-11.

139 Poolman *Principles of Unfair Labour Practice* 32.

140 Wiehahn *The Regulation of Labour Relations in a Changing South Africa* 10.

1.5 SAFETY MANAGEMENT AS A 'LABOUR PRACTICE'

1.5.1 The Meaning of 'Practice'

In its customary usage, the word *practice* denotes something done, or not done. The Concise Oxford Dictionary¹⁴¹ describes the word as, inter alia, the habitual doing or carrying on of something, or customary habit as distinct from a profession, or the method of procedure used.¹⁴² A practice may therefore be classified as a course of human conduct and includes the occurrence of instinctive habit which can develop into a custom.¹⁴³ This occurs when a particular habit¹⁴⁴ becomes repetitive behaviour. A *practice* may also mean a single act, namely, an act of doing something.¹⁴⁵

Salamon¹⁴⁶ defines the word *practice* as a "set of decisions or actions which are made in response to a given problem or situation." The word may also denote "a flexible social institution, of a changing nature and variable between enterprises, regions of industry, trade or occupation"¹⁴⁷ which may be established "either formally by agreement or statements or informally by spontaneous, deliberate, intermittent and repeated courses of conduct."¹⁴⁸

1.5.2 The Concept 'Labour Practice'

The concept *labour practice* refers to the fact that the practice must be in the field of labour relations. The word *labour* is defined by the Concise Oxford Dictionary¹⁴⁹ as "bodily or mental work, exertion ... toil tending to supply wants of the community ... strive for purpose." The word denotes not only *activity* but also a *person* who labours for

141 The Concise Oxford Dictionary 805.

142 Cf Brassey et al 52.

143 Poolman *Principles of Unfair Labour Practice* 40.

144 A habit is a course of conduct in a certain manner without recourse to consideration or thought. Poolman *Principles of Unfair Labour Practice* 40.

145 Brassey et al 49.

146 Salamon 388.

147 Brown 42.

148 Poolman *Principles of Unfair Labour Practice* 40-1. Cf Kepple & O'Higgins 4.

149 The Concise Oxford Dictionary 558.

his own benefit. *Activity* refers to the employment task,¹⁵⁰ and includes physical and mental activity.¹⁵¹ *Labour* therefore also refers to the person singularly or persons collectively in connection with employment.¹⁵²

The LRA does not define *labour* but the legislature may have used the word as a synonym for *employment*, which is defined.¹⁵³ The LRA defines *employment* with reference to employer and employee. If *labour* is equated with *employment*, it may be said that a *labour practice* is one that arises out of the relationship between the employer and the employee.¹⁵⁴

In *Marievale Consolidated Mines Ltd v The President of the Industrial Court & others*¹⁵⁵ the court, without attempting to give an exhaustive definition of *labour practice*, defined the concept as "a customary or recognized device, scheme or action adopted in the labour field." A *labour practice* must therefore stem from a course of conduct generally recognized in the field of labour relations.¹⁵⁶

The concept *labour practice* is said to be an abbreviation for *labour relations practice*.¹⁵⁷ A *labour relations practice* is a variable course of conduct which may either promote fairly, or hinder or obstruct unfairly, the labour relations among and between the employer and his employees.¹⁵⁸

1.5.3 *Safety Management Practice*

Safety management refers to the function of management with regard to safety. This management function may include specific or general safety responsibilities, accountabilities

150 Swart et al 11.

151 *Bleazard & others v Argus Printing & Publishing Co Ltd & others* (1983) 4 ILJ 60 (IC) 70H.

152 Reynolds 15.

153 s 1 of the LRA.

154 Cf *Durban City Council v Minister of Labour* 1948 (1) SA 220 (N).

155 *Marievale Consolidated Mines Ltd v The President of the Industrial Court & others* (1986) 7 ILJ 152 (W) 165C.

156 Cf De Kock *Industrial Laws of South Africa* 619; *The Complete Wiehahn Report* (Part 5) par 4.127.11.

157 Poolman *Principles of Unfair Labour Practice* 19.

158 Cf Poolman *Principles of Unfair Labour Practice* 41.

and obligations incumbent upon the employer. The course of conduct adopted by the employer in applying this function may be referred to as the employer's *labour practice*¹⁵⁹ with regard to *safety management*, or simply the employer's *safety management practice*.

1.6 SAFETY MANAGEMENT DEFINED

The relevant elements having been identified, *safety management* may be defined as a process of managing safety measures and foreseeing and controlling occupational hazards so as to prevent and correct unsafe human acts and unsafe working conditions. This process is commensurate with the employer's obligation to promote the safety of employees in the course of their employment.

In recent years, several concepts have emerged that are similar to, and possibly even synonymous with, the concept of *safety management*. Such concepts include *loss prevention*,¹⁶⁰ *loss control*,¹⁶¹ *safety engineering*¹⁶² and *accident prevention*.¹⁶³ The concepts *safety management* and *accident prevention* appear to be the most widely accepted. The definition of *safety management* is virtually synonymous with definitions for *accident prevention*.

159 Cf Poolman *Principles of Unfair Labour Practice* 38.

160 Lees 3.

161 Binford et al 1, 13; Matives & Matives 5-7.

162 Hammer xvi.

163 Heinrich et al 6; National Safety Council 2-3; *The Accident Prevention Manual of the Dunlop Rubber Co Ltd* 3.

CHAPTER 2

SIGNIFICANCE OF SAFETY MANAGEMENT

2.1 INTRODUCTION

Safety management as a function of management does not solely require adherence to the law. In the context of safety management, sound management practices would also necessarily take cognizance of humanitarian, social and economic considerations. The practices adopted reflect the degree of attention paid to these considerations. Account must be taken of these factors in formulating the parameters of the employer's obligation with regard to safety management.

The humanitarian aspect of safety management is concerned with preventing personal injuries and deaths.¹ The physical pain and mental anguish associated with injuries are usually traumatic, while compensation benefits are inadequate. Of even greater concern is the possibility of permanent disablement or death, in view of the negative implications of either for the injured employee and his dependants. This humanitarian responsibility of the employer has been recognized in part by the common law of delict, but more importantly by the State through statutory measures. According to the Wiehahn Commission,² an employee has a right to protection, which implies an obligation on the part of the State and the employer to ensure healthy and safe working conditions.

The establishment of healthy and safe working conditions should be a priority of any socially responsible employer. The extent to which the employer reveals this social commitment is part of his public image. An exceptional safety record serves as proof of this commitment and can contribute to improved human relations.³ Frequent accidents could create

1 Mondy et al 363; Simonds & Grimaldi 27.

2 *The Complete Wiehahn Report* (Part 5) par 2.8.

3 French 588; Simonds & Grimaldi 30-1.

the impression that operations are out of control, and that the employer has little or no consideration for the safety of his employees. This may affect employee morale and result in a lack of confidence in the employer.

The significance of the economic effect of accidents on society, the employer, the injured employee, and his dependants is that it indisputably argues the need for recognizing that safety management is an essential requirement of sound business practice. For this reason the economic considerations of safety management need to be examined. The economic effect of accidents is for present purposes classified in both tangible and intangible cost terms.

2.2 TANGIBLE COSTS

The tangible costs of accidents are the measured and unmeasured monetary expenses which constitute insured and uninsured costs, and the cost to society.

2.2.1 Insured Costs

The insured costs of accidents are mainly provided for by a State insurance fund called the *Accident Fund* established in terms of the WCA.⁴ These costs include transport to hospital, medical attention, hospitalization, rehabilitation and compensation.⁵ However, when the employer is liable⁶ under the WCA for an accident, the *Accident Fund* does not apply. Insured costs not covered by the *Accident Fund* are sometimes covered by appropriate insurance policies with commercial insurers which may include:

- (a) damage to property;
- (b) fire losses;

⁴ *Infra* 44.

⁵ NIOSH *The Cost of an Accident - How it Affects Profits* 2.

⁶ The employer's personal liability to an employee for an accident is discussed *infra* 46-7, 55.

- (c) loss of profits due to (a) and/or (b); and
- (d) extra compensation or stated benefits.⁷

The total insured costs of accidents paid out by the Accident Fund and commercial insurers in 1988 amounted to approximately R290 million.⁸ The insured costs of accidents recovered from the Accident Fund and commercial insurers do not represent the total costs of accidents. Part of the total cost of an accident is borne directly by the injured employee. This is of particular significance in a case of permanent partial disablement where the scheduled benefits of the Accident Fund are inadequate to compensate the injured employee for future loss of earning power. This inadequacy of compensation has as its root cause the difficulty of computing the effect of the loss which may be suffered by an injured employee, coupled with the present inadequate level of statutory funds available. The only practical solution to the latter would be to raise the present level of assessment contributions to the Accident Fund by those employers who fail to adopt sound safety management practices.

2.2.2 *Uninsured Costs*

The second category of tangible costs comprises the uninsured or hidden costs. These costs are not apparent to the employer unless he assigns experts to identify these costs. There appears to be little agreement on precisely what constitutes a hidden accident cost, largely because so many variables are involved. Heinrich⁹ attempts to isolate these costs and lists the following as examples:

- (a) the cost of time lost to the employer by the injured employee who stops work to receive medical attention;
- (b) the cost of time lost by fellow-employees who stop work:
 - (i) out of curiosity;
 - (ii) out of sympathy;

⁷ NOSA *The Cost of an Accident - How it Affects Profits* 2.

⁸ See Appendix 2.1.

⁹ Heinrich et al 82. Cf Cascio & Awad 462.

- (iii) to assist the injured employee; and
- (iv) for other reasons;
- (c) the cost of time lost by supervisors or fellow-employees who stop work to:
 - (i) assist the injured employee;
 - (ii) investigate the cause of the accident;
 - (iii) arrange for the injured employee's production to be continued by some other employee;
 - (iv) select or train a new employee to replace the injured employee; and
 - (v) prepare accident reports or attend hearings before the inspectorate of the Department of Manpower;
- (d) the cost of time spent on the scene of the accident by first aid attendants and hospital department staff;
- (e) the cost due to damage to the machine, tools, other property, or to the spoilage of material;
- (f) incidental cost due to interference with production, failure to fill orders on time, loss of bonuses, payment of forfeits, and other similar causes;
- (g) the cost to the employer under employee welfare and benefit systems;
- (h) the cost to the employer in continuing the wages of the injured employee in full, after his return, even though the services of the employee, who is not yet fully recovered, may for a time be worth less than his normal value;
- (i) the cost that occurs in consequence of the excitement or weakened morale due to the accident; and
- (j) the overhead cost per injured employee, such as the cost of light, heat, rent and other similar items which continue while the injured employee is a non-producer.¹⁰

In addition to the employer's hidden accident costs, the injured employee may also have to bear certain hidden costs

¹⁰ French 589 added a further hidden accident cost to the hidden costs outlined by Heinrich, namely, the legal costs for advice with respect to any potential claims. In addition, Cascio & Awad 462 pointed out that the overhead costs to maintain a first aid station should also be included in the hidden accident costs.

such as:

- (i) the irrecoverable loss of earnings during absence from work, namely, that portion which is not covered by the Accident Fund or commercial insurers;
- (ii) the loss of earnings if the employee's contract of employment is terminated; and
- (iii) the loss of future earnings if the injury precludes the employee's normal advancement in his career or occupation.

The preceding costs do not represent all the hidden accident costs, although Heinrich's analysis clearly outlines the cycle of events that follow after an accident. In 1987 employers funded approximately R300 million in hidden accident costs.¹¹ This was due largely to working days lost.¹² A further hidden accident cost which should be discussed is the reduction in the employer's profit level.

2.2.2.1 The Effect of an Accident on the Employer's Profit Level

The detrimental effect of an accident on the employer's profit level can be illustrated by means of a simple example. When determining the cost of a commodity to be produced, account must be taken of fixed and variable costs. Fixed costs are costs such as salaries, depreciation and municipal rates. Such costs are a function of time, not a function of output. Variable costs consist basically of raw material, packing material, electricity and water. These costs vary in direct proportion to the number of units produced.

In this example it is assumed that the employer's variable costs are R1 a unit and the fixed costs are R300 a week. According to Graph A, as illustrated in Appendix 2.3, the cost per unit decreases as the number of units produced increases.

¹¹ Natal Mercury April 12 1988 9.

¹² Appendix 2.2 illustrates that approximately 21,9 million working days were lost in South Africa in 1988 as a result of accidents. This figure represents approximately 18,6 million working days lost as a result of permanent and fatal injuries.

If 400 units are produced, each unit will cost R1,75 ($R700/R400$). If only 300 units are produced, the cost per unit increases to R2,00 ($R600/R300$). When selling the units at R2,50 each, the profit is 75c ($R2,50 - R1,75$) per unit if 400 units are produced. If production is lowered to 300 units, the profit drops to 50c ($R2,50 - R2,00$) per unit. Therefore, if the employer produces and sells 400 units a week, the profit is R300 ($75c \times 400$).

If it is further assumed that an accident occurs which results in an injury, then two events may occur:

- (a) In terms of Graph A it is assumed that production drops to 300 units for the week. The cost price per unit increases to R2 and the profit falls from R300 ($75c \times 400$) to R150 ($50c \times 300$).
- (b) Overtime has to be worked to maintain the 300 units of output for the week. According to Graph B, as illustrated in Appendix 2.3, this will result in a higher variable cost of R2,25 and a further reduction in profit to R75 ($25c \times 300$).

The preceding example clearly illustrates that an accident may result in a drop in the employer's profit level from R300 to R75 a week. In assessing monetary losses, the employer should therefore also consider the effect of an accident on the level of profit.

The ratio of the uninsured to the insured costs varies amongst employers. Heinrich¹³ maintains that the uninsured costs tend to average about 4 times those of the insured costs, but the ILO¹⁴ states that no definite ratio can be arrived at.

¹³ Heinrich et al 83.

¹⁴ ILO *Accident Prevention, A Workers Educational Manual* 9.

2.2.3 *Cost to Society*

The interdependence of the members of society is based on the principle that the consequences of an accident affecting one member may have repercussions on the others. These repercussions may have adverse effects on the general standard of living, which may be caused by the following:

- (a) an increase in the price of manufactured products, since the expenses and losses resulting from an accident will be added to the costs of the producer;
- (b) a decrease in the gross national product as a result of the adverse effects of accidents on employees and materials; and
- (c) additional expenses incurred to compensate injured employees¹⁵ and to provide safety measures.¹⁶

Financing these latter expenses is one of the obligations of society, because it must promote the safety of its members. In addition, the State promotes occupational safety, under a social policy, through introducing safety legislation, inspections, assistance and research, the administrative costs of which are a cost to society.

2.3 *INTANGIBLE COSTS*

Contrary to tangible costs, the intangible costs of accidents are those costs that cannot be calculated in monetary terms. The intangible cost to an injured employee is the personal pain and suffering which he or his dependants may endure, such as:

- (a) Mutilation, lameness, loss of vision, scars, disfigurement or mental changes.¹⁷ This may reduce life expectation and

¹⁵ In 1988 the Accident Fund compensated employees in excess of R166 million. See Appendix 2.1.

¹⁶ ILO *Encyclopaedia of Occupational Health and Safety* 17.

¹⁷ Appendix 2.2 illustrates that in 1988 employees suffered approximately 127963 reported accidents of which 108697 were temporary total disablement cases, 17504 were permanent disablement cases, and 1762 were fatal cases. According to Appendix 2.4, 57,6% of the permanent disablement cases resulted in the

give rise to physical or psychological suffering. Further expenses may be incurred arising from the injured employee's need to find new interests.

- (b) Subsequent economic difficulties if members of the injured employee's family have to cease their employment in order to look after him.
- (c) Anxiety for the rest of the family, especially in the case of children.¹⁸

The significance of sound safety management practices is illustrated from the results of a programme designed to improve safety by the Tennessee Valley Authority in the United States.¹⁹ Unacceptably high accident rates led to this federal agency adopting the philosophy that safety should be given equal consideration together with other factors contributing to effective production. The implementation of a programme based on this philosophy led to an 80% improvement in the lost working day incident rate. Furthermore, the estimated costs for injuries and illnesses were reduced from 11 million to 6 million dollars between 1983 and 1984. An improvement in employee attitudes and behaviour was also noticeable.

The costs of accidents, as illustrated above, constitute an important motivation for the employer to adopt sound safety management practices, so far as is reasonably practicable. The employer may consider it unnecessary to adopt such practices because he incorrectly assumes that, as may often be the case, compensation for accidents is comprehensively covered by the WCA. Such an assumption overlooks the serious effects of unsound safety management and the employer's legal obligations. This becomes evident from an analysis of the provisions of the WCA.

loss or permanent disablement of fingers, with legs (9,8%), arms (6,7%), and the trunk (6,5%) being the other most prominent location of injuries.

18 ILO *Encyclopaedia of Occupational Health and Safety* 16.

19 Stone et al 32-8. Cf Partlow 37.

2.4 THE WORKMEN'S COMPENSATION ACT 30 OF 1941

Prior to the adoption and promulgation of the first Workmen's Compensation Act in 1914, an injured employee or, in the case of a fatality, the employee's dependants, could at common law claim compensation against the employer for harm suffered, if the injury or death had been caused by negligence or intent.²⁰ This included harm suffered by the employee as a result of his employer, or any fellow-employee acting within the scope and course of his employment. The employer was, however, not liable for damages due:

- (a) solely to the fault of the injured employee;
- (b) to chance;
- (c) to force majeure; or
- (d) to some risk inherent in the work and unconnected with any defect either in the installation of machinery or equipment, the operation of the organization, or in the selection of the employee.²¹

To alleviate this situation, Parliament accepted the first Workmen's Compensation Act in 1914 to provide compensation to employees in the case of all accidents arising out of or in the course of employment, where the accident was not due to the *serious and wilful* misconduct of the employee. This Act and subsequent amendments thereto²² were repealed and replaced by the Workmen's Compensation Act 30 of 1941.²³ The Act of 1941 aims to protect the employer against common law liabilities, while providing a measure of security for employees in the form of compensation. Legislation relating

²⁰ Budlender 22; Swanepoel *Introduction to Labour Law* 103.

²¹ Budlender 23.

²² Namely, the Workmen's Compensation Act 13 of 1917, Act 59 of 1934, and Act 25 of 1941.

²³ Included in the WCA are the Administrative Regulations GNR 581 of 1.9.1961 which deal in the main with the following:

- (a) registration of employers;
- (b) wage returns;
- (c) wages for purposes of assessment;
- (d) notice of accidents;
- (e) claims for compensation; and
- (f) lodging of objections and applications.

to workmen's compensation is a universal principle of social policy accepted by the Wiehahn Commission²⁴ as an essential component of the employee's right to protection.²⁵

2.4.1 *Objectives of the WCA*

The object of the WCA is to "amend and consolidate the laws relating to compensation for disablement caused by accidents to or industrial diseases contracted by workmen in the course of their employment, or for death resulting from such accidents and diseases."²⁶ A further purpose is to protect employers, except those exempted in terms of s 70 of the WCA, from common law liability for harm caused to their employees.

The WCA aims to provide compensation out of the *Accident Fund* to injured employees or their dependants. The Fund derives its income from compulsory annual contributions by employers. Every employer, except those exempted in terms of s 70 of the WCA, who employs one or more employees, is required to pay annual assessments to the Fund.²⁷ Any contractual provision whereby an employee forfeits his right to benefits under the WCA is null and void.²⁸

2.4.2 *Application of the WCA*

2.4.2.1 *A 'Workman' in Terms of the WCA*

The definition of *workman*²⁹ in terms of the WCA is important for the purpose of determining the person or persons falling within the scope of the Act. Certain criteria of the definition will be considered for present purposes. A *workman*

²⁴ *The Complete Wiehahn Report* (Part 5) par 2.8.2.

²⁵ The significance of statutory workmen's compensation is reflected in the attention given to it in the Conventions and Recommendations ratified by the ILO, namely, Convention 12/1921 - Workmen's Compensation (Agriculture); Convention 17/1925 - Workmen's Compensation (Accidents); Convention 18/1925 - Workmen's Compensation (Occupational Diseases); Convention 19/1925 - Equality of Treatment (Accident Compensation); Convention 121/1964 - Employment Injury Benefits.

²⁶ Preamble to the WCA.

²⁷ The Accident Fund is established in terms of s 64. The Workmen's Compensation Commissioner is the administrator and trustee of the Fund. See Chapter VII of the WCA.

²⁸ s 32.

²⁹ s 3. The word *workman* includes employees and certain other persons. Although the WCA refers to *workman*, the word *employee* will be substituted in the research for the word *workman*, unless the context shows otherwise.

includes any person who has entered into a contract of service³⁰ or of apprenticeship or learnership with the employer.³¹ This means that a person is defined as a *workman* only when an employer/employee relationship exists.

The WCA³² also makes provision for any *workman* engaged upon work between the employer and independent contractor. For the purpose of the WCA, any workman engaged upon such work shall be deemed to be the *workman* of the employer,³³ unless the independent contractor is, in respect of that work, assessed as an *employer* in terms of the WCA and has paid all assessments due by him to the Accident Fund.

Several categories of employees are excluded from the definition of *workman*.³⁴ The main category for exclusion comprises employees earning more than R45084 per annum,³⁵ unless prior arrangements have been made with the Commissioner for their inclusion and the terms of that inclusion have been complied with by the employer.³⁶ Such employees excluded from the scope of the WCA would have to claim any damages suffered as a result of an accident directly from the employer under the common law. To protect himself against such action for damages, the employer should insure himself against such risks with an appropriate insurer.

30 In *Ongevallekommissaris v Onderlinge Versekeringsgenootskap AVBOB* (supra) 446 the Appellate Division held that the reference to *service contract* is the common law contract of service. The court further stated that where there are elements of an employer and employee relationship and also elements of another type of relationship existing, such as principal and agent, the correct approach is to determine which relationship most strongly appears from all the facts, or what the dominant impression is that the contract makes in order to determine whether the relationship is that of a contract of service. Cf *Padayachee v Ideal Motor Transport* (supra) 565; *Smit v Workmen's Compensation Commissioner* 1977 (2) PH K17 (C).

31 In *Moresby White v Rangeland Ltd* 1952 (4) SA 285 (SR) the court decided that a director of an organization could be regarded as a *workman* within the meaning of the WCA. There must, however, be a clear distinction between his functions as a director and his duties as a *workman*.

32 s 9.

33 Cf *De Beer v Thomson* 1918 TPD 70.

34 s 3(2).

35 s 3(2)(b). The State President may, by proclamation in the Gazette, increase this amount.

36 s 3(1)(b).

In certain circumstances, a *workman* may die as a result of an accident as defined,³⁷ or otherwise become so incapacitated that he is unable personally to receive and administer the benefits of compensation. In such circumstances, the dependants³⁸ of the injured *workman* or other authorized person administering the benefit or the compensation payable are included in the definition of *workman* and are therefore entitled to claim compensation.³⁹

2.4.2.2 An 'Employer' in Terms of the WCA

Subject to the provisions of the WCA, an *employer* includes any person who employs a *workman*, and any person controlling the business of an employer.⁴⁰ Where an employer temporarily provides the services of an employee to another, he remains the employer of such employee for the duration of the time that the employee works for the other person.⁴¹

Certain employers are exempted from making payments towards the Accident Fund and therefore become personally liable, under the common law, for the payment of compensation to or on behalf of their employees.⁴² Such employers include:

- (a) the State, including Parliament, the South African Development Trust established under the Development Trust and Land Act,⁴³ the government of any territory which is a self-governing territory within the Republic in terms of any law, a territorial authority established under the Black Authorities Act,⁴⁴ and a legislative assembly established under the National States Constitution Act;⁴⁵

37 s 2.

38 s 4 defines the various dependants of a workman.

39 ss 3(1)(c) and 4.

40 s 5(1).

41 s 5(2). ss 5(3), (4) and (5) make provision for other people who fall within the definition of *employer*.

42 Such employers may, if they so desire, join the scheme upon the Commissioner's approval.

43 Development Trust and Land Act 18 of 1936.

44 Black Authorities Act 68 of 1951.

45 National States Constitution Act 21 of 1971.

- (b) a local authority employing five hundred or more employees, if such local authority has obtained from the Commissioner a certificate of exemption; and
- (c) an employer who has obtained from a commercial insurer a policy of insurance, with the approval of the Commissioner, for the full extent of his potential liability under the WCA to all employees employed by him, and for as long as he maintains such policy in force.⁴⁶

The WCA has extra-territorial application.⁴⁷ Where an employer continues business mainly within the Republic of South Africa and the usual place of employment of his employees is in the Republic, and an accident occurs to an employee while temporarily employed by such employer outside the Republic, the employee will be entitled to compensation⁴⁸ as if the accident occurred in the Republic.⁴⁹

2.4.3 *Administration of the WCA*

The WCA⁵⁰ is administered by the Workmen's Compensation Commissioner⁵¹ who is assisted by such other persons who are in the opinion of the Minister of Manpower⁵² necessary to enable the Commissioner to carry out its functions.⁵³ The numerous functions of the Commissioner are outlined in s 14 of the WCA, and include the following:

- (a) determining whether a particular person is a workman, employer, principal or contractor for the purposes of the WCA;
- (b) receiving notices of accidents and claims for compensation;

⁴⁶ s 70(1).

⁴⁷ s 10.

⁴⁸ The employee will not be entitled to compensation if he works outside the Republic for a period exceeding 12 months, save by arrangement between the Commissioner, the employee and the employer concerned, and subject to such conditions as the Commissioner may determine.

⁴⁹ s 10(1).

⁵⁰ Chapter II of the WCA deals with the administration of the Act.

⁵¹ The Commissioner is appointed by the State President.

⁵² The Minister is required to consult with the Commissioner. s 12(2).

⁵³ s 12.

- (c) enquiring or cause an enquiry to be made into accidents;
- (d) adjudicating upon all claims and other matters submitted to him for decision; and
- (e) administering the Accident and Reserve Funds.

The Commissioner may at any time, after giving notice to the employee concerned and giving him an opportunity to be heard, review the compensation he has granted, on any of the conditions set out in s 24(1). The word *review* means the right of the Commissioner to "confirm the award (of compensation) or order the discontinuance, suspension, reduction or increase of any such compensation, or, in the case of any decision referred to in sub-section (1)bis,⁵⁴ confirm, set aside or vary that decision."⁵⁵

The WCA⁵⁶ also provides for objections and appeals against the decision of the Commissioner. Any person affected by a decision of the Commissioner, and any trade union or employers' organization of which that person was a member at the time in question, may within the prescribed time and in the prescribed manner lodge with the Commissioner an objection against that decision.⁵⁷ An objection so lodged must be considered and determined by the Commissioner assisted by at least two assessors appointed or designated under s 13 of the WCA. The Commissioner may, if he deems it expedient, invite the assistance of any medical assessors.⁵⁸

After the consideration of an objection, the Commissioner must, subject to the approval of not less than one half of the assessors (excluding any medical assessors), confirm any decision in respect of which the objection was lodged, or give such other decision as in his opinion is equitable.⁵⁹ If the Commissioner and not less than one half of the assessors are

⁵⁴ s 24(1)bis provides that "(t)he commissioner may, after notice to any party concerned, at any time review any decision, not being an award of compensation, given by him under (the WCA)."

⁵⁵ s 24(2).

⁵⁶ s 25.

⁵⁷ s 25(2)(a).

⁵⁸ Medical assessors are appointed in terms of s 13(4)bis.

⁵⁹ s 25(4).

unable to reach an agreement on an objection, the Commissioner is obliged to submit the matter in dispute to the Minister.⁶⁰

2.4.4 *Compensable Accidents*

To establish the circumstances under which accidents may be compensated in terms of the WCA, it is necessary to consider the statutory definition of *accident* which is defined as an incident "arising out of and in the course of a workman's employment and resulting in a personal injury."⁶¹

An incident must take place suddenly and unexpectedly to be classified as an *accident* in terms of the WCA.⁶² If the incident is the result of an expected and drawn-out process, it does not qualify as an *accident*. Similarly, the injury must be caused by some untoward or unexpected event, its nature, time and place capable of being ascertained precisely.⁶³ The word *injury* is wide enough to include not only external but also internal injuries.⁶⁴

Although the relationship between the work and the accident is not precisely explained in the WCA,⁶⁵ the general rule is that an accident must both arise *out of* and *in the course of* an employee's employment.⁶⁶ Whether an accident arises *out of* employment is always a question of fact, depending on the circumstances of a particular case. In *Minister of Justice v Khoza*⁶⁷ it was held that an accident is compensable when "it was the actual fact that (the employee) was in the course of

60 s 25(4).

61 s 2.

62 *Innes v Johannesburg Municipality* 1911 TPD 12.

63 *Nicosia v Workmen's Compensation Commissioner* 1954 (3) SA 897 (T).

64 In *Nicosia v Workmen's Compensation Commissioner* (supra) 898 the moving of a heavy instrument was involved, causing the employee to slip a disc in his back. Although the injury was not visible, the court held it to fall within the meaning of the WCA. Cf *Yates v South Kirkby Collieries* [1910] 2 KB 538.

65 *Minister of Justice v Khoza* 1966 (1) SA 410 (A).

66 There are several cases dealing with the question of whether the accident arose *out of* or *in the course of* employment. See in this regard *Feldman (Pty) Ltd v Mall* 1945 AD 733; *African Guarantee & Indemnity Co Ltd v Minister of Justice* 1959 (2) SA 437 (AD); *Minister of Justice v Khoza* (supra) 410; *Botes v Van Deventer* 1966 (3) SA 182 (AD).

67 *Minister of Justice v Khoza* (supra) 419H.

his employment that brought the (employee) within the range or zone of the hazard giving rise to the accident causing injury."⁶⁸

Mureinik⁶⁹ submits that an accident occurs *out of* an employee's employment when, in a broad sense, there is a causal relationship or *nexus* between the employment and the accident. He argues that this causal connection is present if the employee is injured at his place of work. The reason for this causal connection is that the employee must always do his work somewhere, and that if the employee is injured where he works, then his injury is as a result of his employment. There are certain exceptions to this hypothesis, which should not be regarded as exhaustive, namely:

- (a) the *nexus* would be absent only if, for example, the accident occurred at a place different from that required by his work; or
- (b) if the *nexus loci* between the work and the accident was broken by the employee himself; or
- (c) if the injury was caused by somebody with motives unrelated to the employee's job, for example, from an assault.

Mureinik's hypothesis suggests that an accident will only be compensable if the work is a *causa sine qua non* of the accident. The phrase *in the course of the employment* means that the employee must be injured while he is working,⁷⁰ while the phrase *to arise out of the employment* requires only that whatever the employee is doing when the accident occurs should be broadly connected to the nature of his work. Likewise, an accident will not be compensable under the conditions mentioned in (a), (b) and (c) above.

⁶⁸ It is submitted that the better view would not be to insist on this as a strict requirement as it is possible for an employee who is engaged in dangerous work to be injured by an agency external to the physical task he is performing. Swanepoel *Introduction to Labour Law* 130.

⁶⁹ Mureinik *Workmen's Compensation and the Mugging that Arose Out of Employment* 36. Cf Heyne 330.

⁷⁰ *Mkize v Martens* 1914 AD 382, 390; *Van der Byl Estate v Swanepoel* 1927 AD 141; *Ward v Workmen's Compensation Commissioner* 1962 (1) SA 728 (T).

A more precise criterion for determining whether an employee was acting *in the course of* his employment is proposed by Salmond and Heuston:⁷¹

"(An employer) is responsible not merely for what he authorizes his (employee) to do, but also for the way in which he does it⁷² ... On the other hand, if the unauthorized and wrongful act of the (employee) is not so connected with the authorized act as to be a mode of doing it, but is an independent act, the (employer) is not responsible."⁷³

The WCA expands on the meaning of the phrases *to arise out of* and *in the course of* an employee's employment in the following respects:

- (a) An accident resulting in the serious disablement or death of an employee is deemed to arise out of and in the course of his employment. This is notwithstanding the fact that an employee may, at the time when the accident occurred, have acted:
 - (i) in contravention of any law applicable to his employment; or
 - (ii) contrary to any instructions issued by or on behalf of his employer; or
 - (iii) without instructions from his employer; and
 - (iv) that such an act is performed by the employee for the purposes of, and in connection with, his employer's business.⁷⁴
- (b) The conveyance of an employee free of charge to or from his place of work by means of transport controlled⁷⁵ and

⁷¹ Salmond & Heuston cited in Heuston & Buckley 620-1.

⁷² *Priestly v Dumeyer* (1898) 15 SC 393; *Weir Investments Ltd v Paramount Motor Transport* 1962 (4) SA 589 (D); *Francis Freres & Mason (Pty) Ltd v PU Transport Corporation Ltd* 1964 (3) SA 23 (D).

⁷³ Passage cited in *Canadian Pacific Railway Co v Lockhart* [1942] AC 591, 599, [1942] 2 All ER 464 (PC) 467. Cf *Beard v London General Omnibus Co* [1900] 2 QB 530; *Mkize v Martens* (supra) 382-3; *Sauer NO v Duursema* 1951 (2) SA 222 (O).

⁷⁴ s 27(2).

⁷⁵ s 27(3). In *S v Van Wyk & others* (supra) 627 the court defined the word *control* in this context as "the function or power of directing and regulating." In *Assistent - Ongevallekommissaris v Ndevu* 1980 (1) SA 143 (EC) the court ruled that although the word *control* should be widely interpreted, the

specially provided by his employer for the purpose of such conveyance, is deemed to take place *in the course of* such employee's employment.⁷⁶

- (c) Where an employee is disabled or dies while he was involved, with the consent of his employer, in training for or the performance of emergency services, then such accident is deemed to arise *out of and in the course of* his employment. The employee is also protected in the event where he performs one or more of these emergency services outside his employer's premises, provided he has the employer's consent.⁷⁷

In a situation where an employee is engaged in the furtherance of his own interest and is subsequently injured, he is not subject to the protection of the WCA, provided the employee was not also engaged in the employer's interest.⁷⁸ Practical joking, skylarking and horseplay are typical of human nature but are unlikely to arise *out of and in the course of* an employee's employment.⁷⁹

A final aspect to consider is when an employee is deemed to be working or not working for the purpose of the WCA. The general rule is that an employee begins his work as soon as he

transport should still be under the true control of the employer. There must still be that degree of control exercised over the transportation which would entitle the employer to:

- (a) terminate the service at will;
- (b) determine the conditions upon which the scheme is to run;
- (c) determine the beginning, end and stopping points of the route;
- (d) determine the times of arrival at each route; and
- (e) decide on the type of vehicle to be used. Cf *Le Roux 'Beheer oor Werkersvervoer en die Ongevallewet* 100; *Ongevallekommissaris v Santam Versekeringsmaatskappy BPK* 1965 (2) SA 193 (T); *Xakaxa v Santam Insurance Co Ltd* (supra) 521.

76 s 27(3) will not be applicable to the situation where the employer provides free transport to employees to and from town after pay-day to visit shops. *Gumede & andere v Suid-Afrikaanse Eagle Versekeringsmaatskappy Bpk* 1989 (3) SA 741 (T).

77 s 28.

78 Where an employee is, for example, partly involved in his own interest and partly involved in the interest of the employer, then the employee may claim the protection of the WCA. An employee will not, however, be protected if he abandons his duties. *Schaeffer & Heyne* 13; *Johannesburg City Council v Marine & Trade Insurance Co* 1970 (1) SA 181 (W).

79 *Scott Middellike Aanspreeklikheid in die Suid-Afrikaanse Reg* 141-4; *Van der Merwe & Olivier* 517-8; *Smith v Crossley Brothers Ltd* (1951) 95 SJ 655; *Hudson v Ridge Mfg Co Ltd* [1957] 2 QB 348, [1957] 2 All ER 229; *Sidwell v British Timken* (1962) 106 SJ 243; *Coddington v International Harvesters Co of Great Britain Ltd* (1969) 6 KIR 146; *Chapman v Oakleigh Animal Products* (1970) 8 KIR 1063.

arrives on the premises where he performs his work,⁸⁰ and naturally continues with his work until he leaves the premises. The phrase *in the course of an employee's employment* therefore mainly concerns the premises and operations on which, or in respect of which, the employee is engaged in the performance of his duties as an employee, and during normal working hours.⁸¹ For an employee to remove himself from *the course of* his employment, he must completely abandon his duties, as, for example, when he leaves his place of work and enters or crosses a public road.⁸² Consequently, travelling to and from work does not arise *in the course of* employment,⁸³ except in the case of free transport provided by the employer.

The right to claim compensation from the Commissioner is limited to an *accident* as defined. However, those employees whose injuries arise from causes other than the statutorily defined *accident* can institute a delictual action for damages against the employer.⁸⁴

80 *Ongevallekommissaris v Santam Versekeringsmaatskappy Bpk* (supra) 196.

81 *Kay v ITW* [1968] 1 QB 140.

82 *Ward v Workmen's Compensation Commissioner* (supra) 728. See in general Scott *Middellike Aanspreeklikheid in die Suid-Afrikaanse Reg* 135 et seq; Van der Merwe & Olivier 514 et seq; *Mkize v Martens* (supra) 382-3; *Minister of Police v Rabie* 1986 (1) SA 117 (A) 134; *Witham v Minister of Home Affairs* (1989) 1 SA 116 (ZH) 126.

83 In *Ongevallekommissaris v Santam Versekeringsmaatskappy Bpk* (supra) 196 the court indicated that where, as in that case, an employee operates from his home as a base from which it is his duty to work, the travelling to and from his home on a project connected with his employment must be considered to be in fulfilment of his contract and therefore arises *out of* and *in the course of* his employment. Cf ILO *Judicial Decisions in the Field of Labour Law* (1988) 199.

84 See Budlender 23 on the difficulties facing employees who wish to pursue this course.

2.4.5 *The Employee's Right to Compensation*

2.4.5.1 *The Commissioner's Liability*

According to s 27(1) of the WCA, if an accident⁸⁵ results in an employee's death or disablement,⁸⁶ the employee is, or his dependants are, entitled to compensation, provided that the accident is not attributed to the *serious and wilful misconduct*⁸⁷ of the employee. If the accident is so caused, no compensation is payable under the WCA, unless the accident results in serious disablement or the employee dies in consequence thereof, leaving a party who is dependent upon him. In this case the Commissioner or, if authorized thereto by the Commissioner, the employer concerned, may refuse to pay the cost of medical aid, or such portion thereof as the Commissioner may determine.

The right to periodical payments ceases under the following conditions:

- (a) upon termination of any temporary disablement; or
- (b) when the employee resumes the work upon which he was employed at the time of the accident; or
- (c) resumes any work at the same or greater remuneration; or
- (d) when the employee is awarded compensation for permanent disablement.⁸⁸

85 In *Nicosia v Workmen's Compensation Commissioner* (supra) 897 the court considered the meaning of the word *accident* as used in s 27 and held that the word was used in its popular and ordinary sense as denoting an *unlooked-for mishap* or an *untoward event* which was not expected or designed. The court further pointed out that this meaning is wide enough to cover a case where a mishap has occurred, not due to an external accident, but due to what may be described as an *internal accident* where, during the course of the employee's employment, some bodily displacement has taken place through a pre-existing weakness.

86 The Act distinguishes between temporary partial, temporary total, and permanent disability. In this regard see ss 2, 38 and 39.

87 In terms of s 2, *serious and wilful misconduct* is defined as:

- "(a) drunkenness; or
- (b) a contravention of any law or statutory regulation made for the purpose of ensuring the safety or health of workmen or of preventing accidents to workmen if the contravention is committed deliberately or with a reckless disregard of the terms of such law or regulation; or
- (c) any other act or omission which the Commissioner, having regard to all the circumstances, considers to be serious and wilful misconduct."

88 s 36.

The Commissioner may renew periodical payments if the employee suffers further disablement as a result of the same accident. Similarly, periodical payments may be renewed if the employee undergoes further medical, surgical or remedial treatment necessitating further absence from work if, in the opinion of the Commissioner, the treatment will reduce the disability from which the employee suffers.⁸⁹

2.4.5.2 *The Employer's Liability*

The effect of s 7 of the WCA is to exclude an injured employee's common law action for damages against his employer, including claims occasioned by the employer's negligence. This section provides as follows:

- "(a) no action at law shall lie by a workman or any dependant of a workman against such workman's employer to recover any damages in respect of an injury due to an accident resulting in the disablement or the death of such workman; and
- (b) no liability for compensation on the part of such employer shall arise save under the provisions of this Act in respect of any such disablement or death."⁹⁰

Section 7 does not protect the employer under the following conditions:

- (i) if he is not an *employer* as defined in the WCA;
- (ii) if the injured employee is excluded from the WCA definition of a *workman*;
- (iii) if the accident is not an *accident* as defined in the WCA; and
- (iii) where the accident is the result of the deliberate wrongdoing of the employer.⁹¹

⁸⁹ s 36.

⁹⁰ *Van Deventer v Workmen's Compensation Commissioner* 1962 (4) SA 28 (T) 29E-H.

⁹¹ *Table Bay Stevedores (Pty) Ltd v SAR & H* 1959 (1) SA 386 (A) 390.

Uncertainty exists as to whether the protection afforded by s 7(a) extends to the employer's vicarious liability⁹² for the acts of his employees. Scott⁹³ expresses the opinion that s 7(a) does not protect the employer vicariously liable at common law. The correct approach is, however, that the scope of s 7(a) does extend to the vicarious liability of the employer.⁹⁴

Section 7(a) does not exclude a prohibitory interdict⁹⁵ against the employer for failing to adopt sound safety management practices. A prohibitory interdict would be available to an employee not only to restrain the employer from unsafe practices, but also from breaches of a statutory duty.⁹⁶ In the case of the statutory duty, the common law requirements for an interdict would have to be met, namely:

- (a) a clear right on the part of the applicant;
- (b) a violation of the applicant's rights actually committed or reasonably apprehended; and
- (c) the non-availability of other satisfactory remedies.⁹⁷

In the case of unsafe practices, the application for a prohibitory interdict would be based on the employer's common law obligation to take reasonable precautionary measures for the safety of employees, as well as the unfair labour practice⁹⁸ jurisdiction of the industrial court.

92 The employer's vicarious liability is discussed *infra* 148-50.

93 Scott *When an Employer is Not an Employer* 32-3. Cf *Bhoer v Union Government & another* 1956 (3) SA 582 (C); *Mkhunwana v Minister of Defence* 1984 (4) SA 745 (E).

94 Rycroft & Jordaan 262; *Pettersen v Irwin & Johnson Ltd* 1963 (3) SA 255 (C); *Vogel v SAR* 1968 (4) SA 452 (E).

95 An interdict is an injunction granted by the court for the protection of, for example, a statutory and common law right. A prohibitory interdict prohibits the employer from committing or continuing with a wrongful act. Neethling et al 214-5.

96 Cheadle *Safety Legislation & the Common-Law Remedies* 163-6. The rule for granting an interdict prohibiting the breach of a statutory duty was stated in *Roodepoort-Maraisburg Municipality v Eastern Properties Ltd* 1933 AD 87. See also *Patz v Greene & Co* 1907 TS 427; *Madrassa Anjuman Islamia v Johannesburg Municipality* 1917 AD 718; *Modern Appliances Ltd v African Auction & Estates (Pty) Ltd* 1961 (3) SA 240 (W).

97 Neethling et al 215; *Setlogelo v Setlogelo* 1914 AD 221, 227.

98 An *unfair labour practice* is defined in s 1 of the LRA.

2.4.5.3 *Third Parties' Liability*

The common law action for damages is preserved by s 8(1) of the WCA as against any third party responsible for the accident.⁹⁹ The provisions of this section point out that an employer cannot in any circumstances be regarded as a third party in relation to his own employee.¹⁰⁰ The effect of s 8(1) is that where a third party negligently causes an accident compensable under the WCA, the injured employee or, if he dies, his dependants, may under the relevant circumstances claim compensation from:

- (a) the third party; and/or
- (b) the Commissioner; or
- (c) the employer liable under the WCA.

In *Bonheim v South British Insurance Co Ltd*¹⁰¹ it was held that the legislature had not intended that an injured employee could recover more than such amount of damages from a negligent third party as would, when added to the sum representing the compensation receivable by him, constitute his full common law damages. The principle here is that an injured employee be placed in the same position he was before the accident occurred, and not in a better position. An injured employee will therefore not be allowed to make a profit out of his misfortune.

Section 8(1)(b) confers on the Commissioner¹⁰² or the employer¹⁰³ a right of recourse against a negligent third party to recover any compensation that may have been paid

⁹⁹ Some of the more important cases dealing with the interpretation of s 8(1) include *Van Der Westhuizen & another v SA Liberal Insurance Co* 1948 (4) SALR 997 (CPD); *Wille v Yorkshire Insurance Co Ltd* 1962 (1) SA 183 (D); *Bonheim v South British Insurance Co Ltd* 1962 (3) SA 259 (AD).

¹⁰⁰ *Kau v Fourie* 1971 (3) SA 623 (T).

¹⁰¹ *Bonheim v South British Insurance Co Ltd* (supra) 259.

¹⁰² *Workmen's Compensation Commissioner v Norwich Union Fire Insurance Society Ltd* 1953 (2) SA 546 (AD); *African Guarantee & Indemnity Co Ltd v Workmen's Compensation Commissioner* 1963 (2) SA 636 (AD); *South British Insurance Co Ltd v Crescent Express (Pty) Ltd* 1964 (3) SA 640 (D).

¹⁰³ *Table Bay Stevedores (Pty) Ltd v SAR & H* (supra) 386.

under the WCA as a result of the accident.¹⁰⁴ This right of recourse is subject to the condition that the amount recoverable may not exceed the amount of damages that the injured employee would have been entitled to recover under the WCA.¹⁰⁵

It appears from the decision of the Appellate Division in *SAR & H v SA Stevedores Services Co*¹⁰⁶ that s 8(1)(b) further protects the employer who is causally negligent together with a third party for the injury or death of an employee.¹⁰⁷ This enhanced protection may enable the employer to escape liability for the payment of compensation, while the third party may carry the burden of liability for damage caused.

It is not inequitable for the third party to reimburse the employer, or the Commissioner, where the third party has been the sole cause of an employee's injury or death. Following the decision of the Appellate Division in *SAR & H v South African Stevedores Services Co*¹⁰⁸ it appears to be unfair, however, that the employer should be reimbursed in full where he was causally negligent for an employee's injury or death. Where an accident in which an employee is injured or dies is caused by the negligence of both his employer and a third party, the WCA ought to confer upon the employer, and the Commissioner, a right to recover compensation paid in terms of the WCA to the extent that the employer was not at fault. An appropriate amendment to the WCA would therefore be necessary to relieve third parties from the excessive liability imposed under s 8(1)(b).

104 The recovery of compensation from a third party is a statutory claim and not one founded in delict. *SAR & H v SA Stevedores Services Co Ltd* 1983 (1) SA 1066 (A) 1088-9.

105 *Wille v Yorkshire Insurance Co Ltd* (supra) 183.

106 *SAR & H v SA Stevedores Services Co Ltd* (supra) 1068.

107 In *SAR & H v SA Stevedores Services Co Ltd* (supra) 1068 the claimant (the widow of the deceased employee) had sustained damages to the amount of R20 300, and both the *Stevedores* (third party) and the *Railways* (employer) were held accountable for the accident. The *Railways* were accordingly allowed to claim the full amount paid to the claimant as compensation from the *Stevedores* in terms of s 8(1)(b). The *Stevedores* were therefore held liable to pay their portion of the damages (R7012,28) as well as that of the *Railways* (R13 287,72).

108 *SAR & H v SA Stevedores Services Co Ltd* (supra) 1068.

2.4.6 Increase in Compensation Payable

An important provision of the WCA¹⁰⁹ is that an injured employee may apply to the Commissioner for an increase in the compensation ordinarily payable to him¹¹⁰ if the accident is due:¹¹¹

"(a) to the negligence-

- (i) of his employer;¹¹² or
- (ii) of a person entrusted by such employer with the management, or in charge of the business or any branch or department thereof;¹¹³ or
- (iii) of a person having the right to engage or discharge workmen on behalf of the employer; or
- (iv) of a certified engineer appointed to be in general charge of machinery, or a person appointed to assist such certified engineer in terms of any regulation made under the Mines and Works Act, 1956 (Act No. 27 of 1956); or
- (v) of a person appointed to be in charge of machinery in terms of any regulations made under the Machinery and Occupational Safety Act, 1983 (Act No. 6 of 1983); or

(b) to a patent defect in the condition of the premises, works, plant, material or machinery used in such business, which defect the employer or any such person has knowingly or negligently caused or failed to remedy."¹¹⁴

109 s 43(1)(a) and (b).

110 The amount of increased compensation payable to an injured employee is a sum which the Commissioner deems equitable under the circumstances {s 43(3)}. See Benjamin *Additional Compensation for Accidents at Work: An Underutilized Remedy* 15.

111 In *Mey v SAR & H* 1937 CPD 359 it was decided that *due to* meant *caused by* and that the accident inquiry must determine the cause of the accident. This interpretation was affirmed by the Appellate Division in *Fred Saber (Pty) Ltd v Franks* 1949 (1) SA 388 (A) 403.

112 In *Fred Saber (Pty) Ltd v Franks* (supra) 403 it was said that, notwithstanding the negligence of the employer, if an accident was caused by an employee's own negligence, or if it was caused by the combined negligence of the employer and the employee, the accident was not then *due to* the employer's negligence and the employee could not recover increased compensation.

113 *Le Roux v SAR* 1954 (4) SA 275 (T); *SAR & H v Celliers* 1959 (4) SA 31 (T).

114 The judgement in *Stoltz v SAR & H* 1950 (3) SA 592 (T) would appear to support the proposition that the condition of the premises, works, plant, material or machinery of the employer cannot be said to be

The effect of this provision is to preserve the vicarious liability of the employer in respect of the negligent acts of a limited category of employees.¹¹⁵ A causal connection has to be established between the employer's negligence, or the defect, and the accident.¹¹⁶

2.4.7 *Recovery of Compensation*

An employee must give notice of an accident in writing to his employer in the prescribed manner.¹¹⁷ The employer must forthwith, after having been informed or having gained knowledge of the accident, inform the Commissioner of such accident in the prescribed form.¹¹⁸ In any event, no claim for compensation will be considered by the Commissioner after 12 months of the date of the accident.¹¹⁹

A claim for compensation must be lodged with the Commissioner or the employer concerned within 6 months of the date of the accident, or the date of death of the employee. Failure to comply with this requirement could lead to the rejection of the claim.¹²⁰

In any litigation against the Commissioner, the injured employee, or his dependants, would not, as would be the case in common law, have to establish fault on the part of the employer or a third party. All that is necessary is that it must be shown that the accident, which caused injury or death, arose out of or in the course of the employee's employment.

The significance of the WCA is that a claim for compensation is in the nature of an administrative act rather than

defective within the terms of s 43(1)(b) unless such premises, works, plant, material or machinery constitute a danger to an employee who takes reasonable care for his own safety.

115 Benjamin *Additional Compensation for Accidents at Work: An Underutilized Remedy* 16.

116 *SAR & H v Stoltz* 1951 (2) SA 344 (A) 352F.

117 s 50.

118 s 51(1).

119 s 54(3).

120 s 54(1).

litigation which is time-consuming and costly. A further advantage is that an unsophisticated employee does not need to understand legal and medical technicalities. A disadvantage, however, is that compensation awarded under the WCA is considerably lower than damages awarded for accidents by the civil courts. It is also argued that there are bureaucratic delays in payment.¹²¹

2.5 SUMMARY

Sound safety management practices and employment relations require adherence to humanitarian, social and legal considerations. Furthermore, the recognition of economic factors in the management of safety is an essential prerequisite of sound business practice.

The significance of sound safety management practices is that these should prevent or minimize injuries and deaths, improve employee morale, and reduce the tangible and intangible costs of accidents to society, the employer, the injured employee, and his dependants.

The employer may consider it irrelevant to incorporate adequate safety measures into his strategic policy objectives because of the protective provisions of the WCA. The WCA provides social security for the injured employee in the form of compensation, and to some extent security for the employer against his common law liability. Although s 7(a) of the WCA excludes an injured employee's common law action for delictual damages against the employer, the employer may, under certain circumstances, be liable for the payment of compensation.

¹²¹ Cheadle *Safety Legislation and the Common-Law Remedies* 161; Rycroft & Jordaan 257; Scott *Safety and the Standard of Care* 161.

APPENDIX 2.1

TOTAL INSURED COSTS OF ACCIDENTS BY INSURER AND NATURE OF PAYMENT FOR 1988

Insurers	Periodical Payments	Capitalized Value of Pension	Lump Sum	Medical Aid	Total
Accident Fund	23899304	54704548	15716568	69199032	163519451
Accident Fund - Employers s 81	1055746	1651572	667845	----	3375163
Prov. Admin & Black Homelands	1038556	2575376	417542	14953	4046426
South African Transport Services	1932297	232996	526704	----	2691996
Government Departments	4199343	8943716	1696299	3467558	18306917
Local Authorities (Exempted)	852077	1453673	289489	18765	2614005
Rand Mutual Assurance Co Ltd	10545610	40602098	12370808	----	63518517
Fed Employers Mutual Ass Co Ltd	1402405	3885858	727644	2650685	8666592
South West Africa - Admin	1493	----	16200	----	17693
Total	44926831	114049837	32429098	75350993	266756759
<i>MEDICAL COSTS NOT GIVEN IN INDIVIDUAL CASE REPORTS:</i>					
Estimated on Accident Fund Ratio					2459940
Incomplete on Accident Fund Ratio					10935247
Unknown on Accident Fund Ratio					1838396
Taken from Published Figures					8288184
Total Medical Costs Not Given in Individual Case Reports					23521767
Total Cost - All Insurers					290278526

Source - Workmen's Compensation Commissioner *Workmen's Compensation Act 1941, Report on the 1988 Statistics.*

APPENDIX 2.2

**AVERAGE ACTUAL NUMBER OF WORKING DAYS LOST PER REPORTED
ACCIDENT ACCORDING TO EXTENT OF DISABLEMENT FOR 1988**

Type of Disablement	Accident Fund & Employers with s 81 - Medical Approval			Govt Depts, SATS, Prov. Admin & Black Homeland Authorities			Exempted Municipalities & Mutual Associations		
	No. of Cases	Days Lost	Average	No. of Cases	Days Lost	Average	No. of Cases	Days Lost	Average
Temporary	71591	1305242	18,2	17903	302430	16,9	19203	416739	21,7
Permanent	8381	555222	66,2	1082	76372	70,6	8041	500112	62,2
Fatal	1018	3241	3,2	200	251	1,3	544	182	0,3
Total	80990	1863705	22,6	19185	379053	20,7	27788	917033	33,0

Total Number of Working Days Lost as a Result of the 1988 Accidents:

Reported Cases*	3159791 Working Days
Unreported Cases**	126126 Working Days
Permanent & Fatal Cases**	<u>18671040 Working Days</u>
Total	<u>21956957 Working Days</u>

* The balance of the reported cases numbering 127963 resulted in a loss of 3159791 working days including Sundays. If an adjustment of 1/7 is made for Sundays in respect of cases where disablement exceeds 6 days, the number of working days lost is calculated at 2733829.

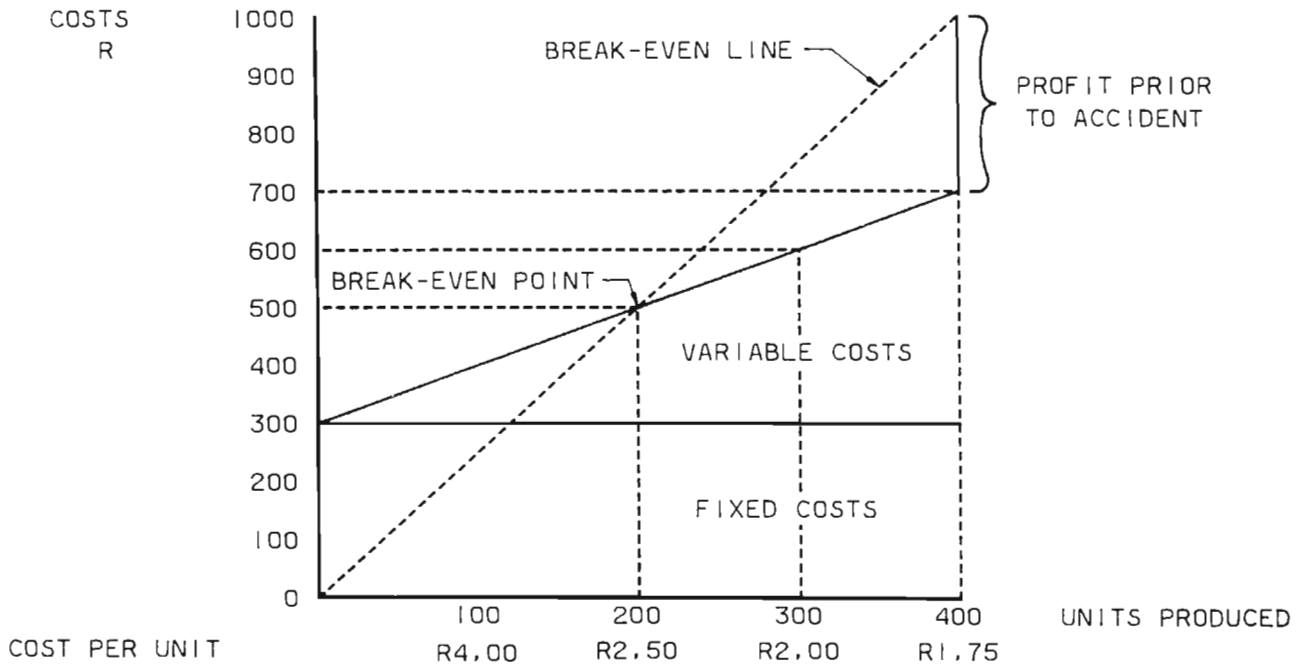
** Statistics determined by the Workmen's Compensation Commissioner.

Source - Workmen's Compensation Commissioner *Workmen's Compensation Act 1941, Report on the 1988 Statistics.*

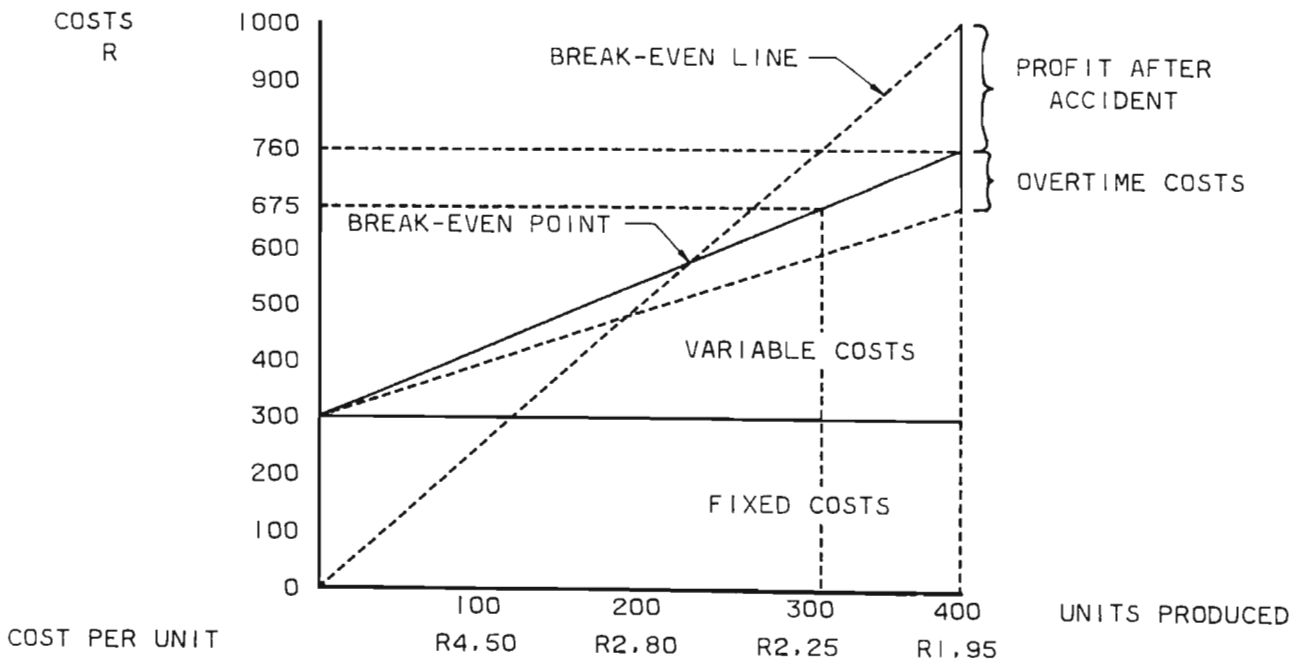
APPENDIX 2.3

THE EFFECT OF AN ACCIDENT ON THE EMPLOYER'S PROFIT LEVEL

GRAPH A



GRAPH B



APPENDIX 2.4

PERMANENT INJURIES ACCORDING TO LOCATION OF INJURY FOR 1988
ACCIDENT FUND ONLY

%	Location of Injury
57,6	Fingers
9,8	Legs
6,7	Arms
6,5	Trunk
5,1	Head
4,1	Eyes
2,6	Toes
2,3	Hands
1,2	Feet
4,1	General

For each location of injury, the number of permanent disablement injuries as a percentage of the total number of permanent disablement cases is shown.

Source - Workmen's Compensation Commissioner *Workmen's Compensation Act 1941, Report on the 1988 Statistics*.

CHAPTER 3

IDENTIFYING OCCUPATIONAL HAZARDS

3.1 INTRODUCTION

The employer is required to reasonably foresee occupational hazards in the management of safety in order to prevent and correct unsafe human acts and unsafe working conditions. If a hazard is foreseen and preventive and corrective measures are not promptly taken, accidents may be expected to recur.¹ The prevention and correction of occupational hazards suggest that the employer must exercise control over his employees and the working environment. To exercise such control, the employer should be able to identify occupational hazards.

By analyzing the occupational hazards revealed in available contemporary research on the subject, this chapter offers guidelines for identifying occupational hazards in the interests of improving safety management.

3.2 THEORIES ILLUSTRATING THE CAUSE AND EFFECT OF ACCIDENTS

The word *cause* is defined as "that which occasions or effects a result."² Three theories will be examined which illustrate the circumstances which lead up to or *cause* an accident and its consequential *effects* of personal injury and/or material loss.

3.2.1 *The Domino Theory*

The *domino theory* proposed by Heinrich³ is based on the principle that a chain or sequence of events can be listed in chronological order to illustrate the circumstances leading to an accident and resulting in an injury. Each event may have

¹ ILO *Accident Prevention, A Workers Educational Manual* 12.

² Heinrich 77.

³ Heinrich 13-6.

more than one cause, that is, be multi-causal. Heinrich⁴ argues that the occurrence of an accidental injury invariably results from a completed sequence of factors culminating in the accident itself. He⁵ postulates five factors or stages in the accident sequence, namely:

- (a) environmental influences; leading to
- (b) fault of person; constituting the incentive for
- (c) an unsafe human act and/or unsafe working condition; which results in
- (d) the accident; which leads to
- (e) the injury.⁶

Each stage is dependent on and necessarily follows the previous one. Heinrich⁷ compares these five stages to five dominoes placed on end and so aligned that the fall of the first domino precipitates the fall of the entire row. An injury is therefore invariably caused by an accident and the accident in turn is always the result of the factor that immediately precedes it. Removal of any one of the first four dominoes will break the sequence and thereby prevent the injury. Therefore, in order to promote safety, the *unsafe human act and/or unsafe working condition* domino needs to be removed. By removing this domino the two previous dominoes can fall, but the *accident* and *injury* dominoes remain standing.

3.2.2 *An Updated Domino Theory*

Bird and Loftus⁸ have extended Heinrich's domino theory to reflect the influence of management in the cause and effect of

⁴ Heinrich et al 22.

⁵ Heinrich et al 22.

⁶ According to Heinrich et al 22, inherited traits of character, such as recklessness and stubbornness, and the social environment, may develop undesirable traits of character which may cause faults of person, such as ignorance of safety practices. This in turn may constitute proximate reasons for committing unsafe human acts or for the existence of unsafe working conditions. Unsafe human acts and/or unsafe working conditions may result directly in accidents which cause injuries.

⁷ Heinrich et al 4.

⁸ Bird & Loftus 39-48.

an accident. They modify the sequence of events in terms of the domino theory as follows:

- (a) lack of management control; permitting
- (b) basic causes (personal and job factors); that lead to
- (c) immediate causes (unsafe acts or conditions); which are the proximate causes of
- (d) the incident or accident; which results in
- (e) personal injury and/or material loss.

Through their approach, Bird and Loftus promote the concept of *loss control*, which refers to the reduction in the wastage of both human and material resources through more efficient management control.

An accidental event in India illustrates the importance of management control and the disastrous effects of a lack of such control. During the night of December 2, 1984, the accidental release of MIC at Union Carbide's Bhopal plant in India caused the death of an estimated 2500 people, and may have affected another 100 000.⁹ It is believed that the event is the worst industrial accident in history.¹⁰ Small doses of MIC, which is an extremely toxic chemical, cause irritation to the eyes. In large doses it reacts vigorously with fluids in the lungs, causing choking and death.

The accident at Bhopal was caused by about 40 tons of MIC escaping from a pressure vessel into the air and being diffused over squatter settlements situated around the factory. Safety systems did not work and many precautions were completely neglected. Examination of the factors surrounding the accident revealed a dismal lack of safety control. Bowonder¹¹ identified as follows a sequence of

9 Bowonder 89-90.

10 Bowonder 90.

11 Bowonder 89-103.

interlinking factors that may have led to the disaster:

- (a) *Technology*: The initial choice of technology was unwise. The use of a highly toxic substance such as MIC for the production of pesticides was permitted by the Government in a country with low levels of literacy when other less toxic manufacturing procedures could have been used which would have been easier to control.
- (b) *Factory Site*: The factory was situated close to a highly populated area which was expanding rapidly.
- (c) *Design*: The design of the plant did not take sufficient care of the toxicity of MIC.
- (d) *Communication and Public Ignorance*: The public were poorly informed as to the toxic nature of MIC and procedures to be followed in the event of a leak.
- (e) *Maintenance*: The plant was improperly maintained which led to the failure of back-up systems.
- (f) *Training*: Staff were inadequately trained to deal with an emergency.

A causal chain of events was initiated leading from lack of management control to unsafe acts and conditions, and finally to the accident. The chain of events could have been controlled if proper procedures had been followed. The incident caused widespread reaction in the United States and has subsequently led to the tightening of national standards related to emissions of toxic substances into the air.¹²

The updated domino theory proposed by Bird and Loftus¹³ is nevertheless still an over-simplification of the sequence of events leading to an accident, which may be explained by the multi-causality theory.

¹² Kendall 67-72.

¹³ Bird & Loftus 39-48.

3.2.3 *The Multi-Causality Theory*

The term *multi-causality* takes into account that there may be more than one cause to an accident. If it is assumed that there are two causes to an accident, it may be said that each of these contributory causes is equivalent to the third domino in Heinrich's domino theory, and can represent an unsafe human act or unsafe working condition. Each of these causes can itself comprise multi-causes.

The theory of multi-causation is that contributing causes combine in a random fashion to result in an accident. In reality, an accident sequence is a combination of both the domino and multi-causality theories. Petersen¹⁴ compares and contrasts both theories and illustrates the comparative narrowness of the domino theory in relation to the multi-causality theory. He expresses the opinion that the restrictive scope of the domino theory has severely limited the identification and control of the underlying causes of accidents.

The multi-causality theory has its basis in epidemiology. According to Gordon,¹⁵ epidemiological techniques can be used to examine accidents. He believes that if the characteristics of the *host* (injured individual), the *agent* (unsafe act and/or condition), and of the supporting *environment* could be described in detail, more understanding of accident causes could be achieved than by following the domino technique. Gordon's theory is based on the principle that an accident is the result of a complex and random interaction between the *host*, the *agent*, and the *environment*, and cannot be explained by considering only one of the three factors.

Several causes of an accident may be found, but for present purposes attention is only directed to those occupational hazards which the employer could reasonably foresee or

¹⁴ Petersen *Techniques of Safety Management* 16-9.

¹⁵ Gordon 504-15.

control. A discussion of such hazards necessarily implies the constituent parts of unsafe human acts and unsafe working conditions as revealed in available research. Factors such as an *act of God* or a *chance occurrence* are beyond the employer's ability to foresee or control and are therefore not considered.

3.3 UNSAFE HUMAN ACTS

An occupational accident is often the consequence of the unsafe behaviour of an employee.¹⁶ Some of the most common employee traits that have been found to relate to high accident rates are the following:

- (a) failing to secure equipment;
- (b) operating equipment at improper speeds, such as too slow or too fast;
- (c) making safety devices inoperative by removing, adjusting or disconnecting them;
- (d) taking an unsafe position or posture, such as standing or working under suspended loads, or lifting with a bent back;
- (e) using unsafe equipment or using equipment unsafely;
- (f) servicing equipment in motion;
- (g) distracting, teasing, abusing or startling; and
- (h) failing to use safe attire or personal protective devices, such as safety goggles.¹⁷

Some or all of these traits may be explained according to certain psychological, physiological and physiopathological characteristics of an employee.

16 Deci & Von Haller Gilmer 386; *The Accident Prevention Manual of the Dunlop Rubber Co Ltd* 15.

17 Armstrong 264; Deci & Von Haller Gilmer 386; Dessler 629; Heinrich et al 34; Heneman et al 697; *NOSA Safety Subjects* 48; Ringrose 124. Appendix 3.1 illustrates the unsafe human acts which have caused the most accidents in South African industries for 1988. According to Appendix 3.1, employees operating machinery or equipment without authority, or who fail to secure such machinery or equipment, account for prominent unsafe acts.

3.3.1 *Psychological Characteristics*

Psychological characteristics are closely correlated with other factors which conceptually belong to different categories, for example, age has a psychological as well as a physiological effect on the individual. The psychological dimension would relate to a decline, perhaps, in manual dexterity, while the physiological aspect underlying this would be age and its effects on the central nervous system.

Numerous psychological reasons may exist for unsafe employee behaviour, among them the following attitudinally oriented factors:

- (a) the employee may consider the unsafe behaviour easier, less troublesome or faster;
- (b) the unsafe behaviour may be considered as the best means of performing a task;
- (c) safety precautions may be considered unnecessary in the belief that the employee can look after himself in all circumstances;
- (d) an experienced employee may believe he is able to determine his own means of accomplishing his work; or
- (e) the employee may be ignorant or unaware of the safety procedure or method.¹⁸

In a study¹⁹ conducted in the South African mining industry it was found that employee attitudes towards safety were important psychological factors in the effectiveness of safety management.

Psychological factors in employees which have been established as contributing to accidents include level of experience, age, fatigue, stress and accident-proneness, each of which will be discussed individually.

¹⁸ ILO *Accident Prevention, A Workers Educational Manual* 104.

¹⁹ Fairley & Coldwell 43-83.

3.3.1.1 *Level of Experience*

Research evidence indicates that untrained employees and employees who are new on the job have substantially higher frequencies of accidents than trained or experienced employees.

Van Zelst²⁰ investigated the effect of training and experience on accident rates in a large plant in Indiana in the USA. He found, for example, that the average monthly accident rate of about 1200 employees declined steadily for the first 5 months on the job, after which the rate remained nearly constant for approximately a 5 year period. When newly hired employees were given formal training, Van Zelst found that the initial accident frequency was lower for this trained group and that the group's accident frequency declined to a normal expected level within 3 months by contrast with the 5 month period in the case of untrained employees.

Neuloh et al²¹ also found lower accident frequency rates among skilled employees. They attributed this phenomenon to the fact that skilled employees may become more cautious and attentive as a matter of habit. They further expressed the opinion that an employee's native dexterity could also improve his accident record, but to a lesser extent than his degree of specialized skill.

McCormick and Tiffin²² reported that the number of hospital treatments per accident for each employee in the course of 1 year's observation fell progressively with increasing experience, the latter expressed in years of service on the job held at the time of the study. Although experienced employees are not handicapped by unfamiliarity with their surroundings, their familiarity with the risks of the job often makes them less careful. Safety measures may then be

20 Van Zelst 313-7.

21 Neuloh et al cited in International Occupational Safety and Health Information Centre 17.

22 McCormick & Tiffin 520-1.

neglected until the occurrence of an accident acts as a reminder of the importance of safety precautions.

The fact that job experience and accidents are related suggests a greater awareness on the part of the employer to provide safety training for all new employees. If a group of employees are given safety training prior to job performance, they should experience significantly fewer accidents during the early period of employment than those employees who have had no such training.

3.3.1.2 Age

Accident surveys²³ have revealed a relationship between an employee's age and the occurrence of an accident. These surveys do, however, not reveal entirely consistent results. Different patterns may therefore be found with different jobs or activities. There are numerous reasons for these differences, the most important being:

- (a) the non-homogeneity of the groups of employees studied, both in group composition and in individual job experience;
- (b) the nature of the work; and
- (c) differences in risk exposure.²⁴

Research data from the United States²⁵ has indicated that younger employees have more accidents than older employees, and that young male employees have about twice as many accidents as young female employees.²⁶ For example, one set of figures revealed that employees aged between 18 and 22 made up 7,35% of the workforce but suffered 10,62% of the total number of accidents. Employees in this age group are young and have little job experience.

23 Dessler 631; McCormick & Tiffin 524-6; Van Zelst 313-7.

24 International Occupational Safety and Health Information Centre 15.

25 ILO *Accident Prevention, A Workers Educational Manual* 34.

26 Cf Calhoon 246.

Van Zelst,²⁷ in his investigations, found that a group of 614 employees of an average age of 29 years with 3 years job experience had a significantly greater accident rate than a roughly comparable-sized group aged 41 years, also with 3 years of job experience. He observed that age actually had a stronger positive effect upon accident rates than job experience. He tentatively concluded that the immaturity of employees was a large factor in explaining the accident rates of young employees.

McCormick and Tiffin,²⁸ referring to data collected in a steel mill, noted that the accident rate fell with an increase in age. Similarly, Dessler²⁹ found that accidents were generally most frequent among employees between the ages of 17 and 28,³⁰ declining thereafter to reach a low among employees in their late 50s and 60s.³¹

Accident rates may decline with an increase in age because there may be a heightened sense of responsibility and a need for safety, accompanied by a better appreciation of the work environment.

3.3.1.3 *Fatigue*

It is generally agreed³² that fatigue increases the risk of accidents, and the greater the fatigue, the greater the risk. The relationship between fatigue and accidents is complex and it is not easy to draw simple conclusions. Fatigue is the inevitable result of continued exertion, either mental or physical.³³ The factors that may increase fatigue at the

27 Van Zelst 313-7.

28 McCormick & Tiffin 524-6.

29 Dessler 631.

30 Schulzinger, cited in Calhoon 246, found that 50% of all accidents investigated occurred among employees under the age of 25.

31 Cf Zohar 96-102.

32 Armstrong 262; Deci & Von Haller Gilmer 390-1; ILO *Accident Prevention, A Workers Educational Manual* 106-8.

33 Armstrong 262.

place of employment are:

- (a) badly designed machines;
- (b) high temperature or humidity;
- (c) excessive noise;
- (d) inadequate lighting or glare;
- (e) the nature of the floor upon which an employee has to stand; and
- (f) the absence of training in the performance of tasks with the least amount of exertion.³⁴

Vernon et al³⁵ studied the relationship between fatigue and accident rates and observed that during the first hour of the morning's work there was a consistently low accident rate. During the second and third hour the accident rate reached the highest level of the day. They further observed that there was sometimes a slight fall before the midday break. In the afternoon accident frequency followed almost the same curve as in the morning, sometimes with a more definite fall in the last hour of work.

Many shift-workers suffer from fatigue, largely due to the fact that mentally and physically they are adapted to a specific time of the day.³⁶ If, for example, they remain awake at night, they tend to feel tired and lethargic because their body expects to rest at that time and not to undertake physical or mental work. Studies³⁷ have shown that employees tend to make more mistakes and to work at a slower rate on the nightshift, because a high proportion of nightshift-workers sleep less than day-workers and their sleep is of a less restful quality.

The influence of fatigue differs among employees. Employees who are very interested in their jobs may commit all their attention to their tasks and may not feel fatigue. However,

³⁴ Armstrong 262.

³⁵ International Occupational Safety and Health Information Centre 210.

³⁶ ILO *Accident Prevention, A Workers Educational Manual* 107.

³⁷ French 596; International Occupational Safety and Health Information Centre 20-1.

employees who are nervous or not interested in their jobs may suffer from fatigue and may tend to become inattentive and careless at times.³⁸

The problem of fatigue should be overcome if accidents are to be reduced.³⁹ Possible ways in which the fatigue factor could be eliminated or reduced include reducing nightshifts, making provision for more work breaks,⁴⁰ screening employees for the jobs for which they are best suited, and reducing fatigue-inducing factors such as excessive noise or badly designed machines.

3.3.1.4 Stress

Another accident-inducing factor may be excessive stress. The adjustment-stress theory suggests that "unusual, negative, distracting stress upon the organism increases its liability to accident or other low quality behavior."⁴¹ In essence, the theory states that an employee under distracting stress is more liable to cause an accident than a non-stressed employee.⁴²

According to Levi,⁴³ stress is "a stereotype in the body's responses to, generally speaking, influences, demands or strains." Stress is a constraining or impelling force upon an employee's mental or physical energy. Internal stress may be caused by factors such as disease, alcohol, or anxiety. External stress is occasioned by noise, heat, dirt, fumes and excessive physical strain.⁴⁴

38 ILO *Accident Prevention, A Workers Educational Manual* 107.

39 Par IV(10) of the ILO Recommendation 164/1981 stipulates that the employer should take all reasonable practicable measures to eliminate excessive physical and mental fatigue with a view to raising the standard of health and safety in industry.

40 Par IV(10) of the ILO Recommendation 164/1981 provides that the employer should ensure that the organization of work, particularly with respect to hours of work and rest breaks, does not adversely affect industrial health and safety.

41 Korman 192.

42 Deci & Von Haller Gilmer 393.

43 Levi cited in ILO *Occupational Safety and Health Series* 1.

44 Beach 532.

A small degree of stress is not harmful and may enhance an employee's ability to perform, but too much stress may be harmful because it can result in carelessness or a loss of concentration, which in turn may lead to an accident.

3.3.1.5 *Accident-Proneness*

The *accident-proneness* theory regards accident-proneness as another possible source of accidents.⁴⁵ Employees who repeatedly have accidents are alleged to be accident-prone. They are said to engage in unsafe behaviour because of some peculiar set of constitutional characteristics.⁴⁶ The accident-proneness theory emphasizes that under conditions of equal risk, there exists a statistically significant difference in the number of accidents that occur to those employees falling in the accident-prone group as compared with those employees falling outside this group. The difference stems from the fact that the members of the accident-prone group present certain physical or psychological characteristics which are acquired in infancy and which predispose them to accidents. This theory suggests that a process of careful selection at the time of recruitment could result in a substantial reduction in the frequency of accidents.⁴⁷

Although there is disagreement⁴⁸ about the concept of accident-proneness, it may be true that some employees have more accidents than can reasonably be attributed to chance. It would also appear that an employee may be accident-prone at one period of time during his life, but not at another period of time.⁴⁹ Other research evidence⁵⁰ indicates that employees who have high injury rates in a specific year are the employees who are most likely to have high rates the following year.

45 Beach 531; Deci & Von Haller Gilmer 392; Miner & Miner 483.

46 Beach 532; Deci & Von Haller Gilmer 392.

47 ILO *Encyclopaedia of Occupational Health and Safety* 20.

48 ILO *Accident Prevention, A Workers Educational Manual* 108.

49 Dessler 631; Zohar 96-102.

50 Miner & Miner 483.

The problem of accident-proneness has been studied by three different methods with the approaches respectively based on applied psychology, psychosomatics and psychoanalysis.⁵¹ Bonnardel⁵² observes a frequent lack of "concrete intelligence" in accident repeaters, while Drake⁵³ notes a "lack of adjustment between perception and motor reaction." Taking large-scale clinical observations as his basis, Schulzinger⁵⁴ observes that at some time in an employee's life he passes through a period during which, as a result of psychologically-or environmentally-induced factors, he is more readily subjected to an accident.⁵⁵

Although the accident-proneness theory received considerable support during the 1960s and 1970s, it has now largely been disproved. According to the ILO,⁵⁶ employees are far more likely to be victims of the law of probability than to be accident-prone.

While some accidents have their root cause in the psychological factors discussed above, others may be attributed to the employee's physical condition.

3.3.2 *Physiological Characteristics*

Those employees who have eye defects or who suffer ill health may expose themselves, and other employees, to abnormal risks. Recommendation 31 of the ILO⁵⁷ points out that the incidence and gravity of accidents depend not only on the dangers inherent in the work, the kind of equipment in use, and physical and psychological factors, but also on physiological factors such as vision and left-handedness.

51 International Occupational Safety and Health Information Centre 13.

52 Bonnardel cited in International Occupational Safety and Health Information Centre 13.

53 Drake cited in International Occupational Safety and Health Information Centre 13.

54 Schulzinger cited in International Occupational Safety and Health Information Centre 14.

55 For a further discussion of the concept of *accident-proneness* see Thygersen *Accidents and Disasters - Causes and Countermeasures* 75-7.

56 ILO *Accident Prevention, A Workers Educational Manual* 108.

57 Par 2 of Recommendation 31/1929.

3.3.2.1 *Vision*

Sight is an important physiological factor to consider because of the influence that changes in visual acuity have upon accident rates. McCormick and Tiffin⁵⁸ succeed in proving that sight is a factor causing certain occupational accidents. They proved that, even when the safety engineer's accident report did not indicate that the sight variable was involved, statistics indicated that employees whose eyesight was not adequate for the job in question had more accidents than those whose vision met the necessary standards.

Another investigation⁵⁹ found that only 37% of a group of machine operators who passed visual tests had accidents during a given year, whereas 67% of those who did not pass the visual tests had accidents. It would therefore appear that poor vision may contribute to an employee's accident susceptibility.

The employer may alleviate or prevent sight-related accidents by introducing pro-active employment policies such as compulsory eye testing, matching degrees of vision with specific tasks, and improving working area lighting.

3.3.2.2 *Left-Handedness*

The problem of left-handedness as a physiological accident-inducing factor has not been the subject of any extensive study, although Rennes and Saint-Just have provided some research evidence.

Rennes⁶⁰ furnishes some interesting data on this problem, indicating that 22% of accident-repeaters in industry are left-handed, whereas among employees with good accident records, only 5% are left-handed. On the basis of this data,

⁵⁸ McCormick & Tiffin 523-4.

⁵⁹ Cited in Deci & Von Haller Gilmer 389.

⁶⁰ Rennes cited in International Occupational Safety and Health Information Centre 26.

Saint-Just⁶¹ concludes that left-handed employees have more accidents than right-handed employees, because tools and equipment are designed for right-handed use and are therefore unsuited for use by left-handed employees.

If reasonably practicable, the employer should provide tools and equipment designed for left-handed users, or alternatively to adjust or adapt it to suit the operator's left-handedness.

3.3.3 *Physiopathological Characteristics*

Physiopathological characteristics in employees such as alcoholism and drug abuse have also been related to accidents.

3.3.3.1 *Alcoholism*

Alcoholism is characterized by uncontrolled and compulsive drinking that interferes with normal living patterns.⁶² Trice et al⁶³ identify three categories of drinking behaviour. The first category they identify as *normal drinking*, which does not impair functioning nor interfere with efficient job performance. The second category they identify as *deviant drinking*, where an employee regularly drinks to excess to the point that job performance is impeded. The third category, which is the most dangerous, is *alcoholic addiction*, which they define as a "physiological loss of control over drinking behaviour."

Godard⁶⁴ conducted a study on male mortality in an industrial environment based on 97 case-histories of employees who died before the age of 65. On the strength of this study, Godard observes that 7 of the 16 fatal cases resulting from accidents involved employees who were under the influence of alcohol, and that 50% of the prematurely deceased employees exhibited the familiar symptoms of alcoholism.

61 Saint-Just cited in International Occupational Safety and Health Information Centre 27.

62 Mondy & Noe 367.

63 Trice et al cited in Beach 544.

64 Godard cited in International Occupational Safety and Health Information Centre 27.

According to Observer & Maxwell,⁶⁵ accident rates are higher in younger male employees who have abused alcohol than in older employees. The lower accident rates among older employees could be attributed to the fact that older employees are more skilled at their task and therefore impairment is less marked.

Metz and Marcoux⁶⁶ affirm that a high blood alcohol content might influence the accident rate, and note that moderate or heavy drinkers are more liable to have accidents than light drinkers or total abstainers.⁶⁷ They observe that employees who have had more than one accident, drink more heavily than those who have had none, and that employees who have had one or more serious accidents are heavier drinkers than those employees whose previous accidents are of a minor nature. In conclusion, they emphasize that drinking accounted for 7.4% of all accidents. When accidents which result in work stoppage are added, this rate is increased to 15%.

Trice and Roman⁶⁸ report that employees who are under the influence of alcohol do not show an exceptional number of on-the-job accidents. This they attribute to the fact that these employees frequently resort to absenteeism whenever they are more afraid of accidents and are often removed from potentially dangerous jobs by supervisors.⁶⁹

3.3.3.2 *Drug Abuse*

The problems of alcoholism and drug abuse are closely related and have many points in common.⁷⁰ A study in the United

65 Observer & Maxwell cited in Hore & Plant 13.

66 Metz & Marcoux cited in International Occupational Safety and Health Information Centre 28.

67 Observer & Maxwell, cited in Hore & Plant 13, observed that the accident rate of an alcohol-abuse group is 3 times greater than that of the control group. Similarly, studies in the United States and France indicate that the number of work-related accidents among alcoholics is 2 to 3 times greater than among other employees. Shahandeh 208.

68 Trice & Roman cited in Schramm 17, 125.

69 Cf Schramm 125.

70 See Shahandeh 207-22 for a discussion on alcohol and drug abuse in the workplace.

States reports that the drug-dependent employees meet with twice as many accidents as the non-drug-dependent employees.⁷¹

Drugs affect physiological functions and sensorimotor skills such as reaction time, motor performance, vision and performance of divided-attention tasks. They also affect cognitive functions, including emotion, mood, learning, memory and intellectual performance.⁷² A drug abuser is therefore subjected to the increasing probability of an accident because his strength and judgement is impaired.

It is evident from the foregoing that occupational accidents are usually caused by a group of circumstances such as unsafe human acts, although unsafe working conditions may also prevail. Since the essence of safety management is the intricate inter-relationship which exists between the employee and his working environment, the influence of one cannot be appreciated without considering its interaction with the other.

3.4 UNSAFE WORKING CONDITIONS

The unsafe working conditions which may induce accidents are the following:

- (a) improperly guarded equipment, such as unguarded or inadequately guarded equipment;
- (b) defective equipment, such as rough, slippery, sharp or inferior equipment;
- (c) hazardous arrangements or procedures in, on or around machines or equipment, such as the unsafe design, construction or layout of a plant;
- (d) unsafe storage, such as the congestion or overloading of materials;

71 Shahandeh 211.

72 Shahandeh 210.

- (e) improper illumination, such as insufficient lighting or glare;⁷³
- (f) improper ventilation, such as insufficient air change or an impure air source;⁷⁴
- (g) unsafe dress or apparel, such as lack of or defective gloves, goggles, shoes or loose clothing;
- (h) high temperatures;⁷⁵
- (i) noise and vibration;⁷⁶ and
- (j) unsafe methods, processes and planning.⁷⁷

Unsafe working conditions may be compounded by factors such as work schedules, type of occupation, and the physical, psychological and organizational climate.

3.4.1 *Work Schedules*

In some circumstances accident rates vary in relation to work schedules. Vernon⁷⁸ observes that accident rates increase slowly during the first 5 or 6 hours of the workday, but tend to increase rapidly during the latter part of the workday.⁷⁹

73 The Travelers Insurance Co of the United States, cited in Calhoon 247, observes that 24% of all accidents relate to poor lighting. Both quality of work and safety have shown improvement with better lighting and with changes in colour, such as painting moving parts different colours from their background. Cf Chruden & Sherman 644-5.

74 The atmospheric properties in the workplace may influence an employee's behaviour and affect the extent to which he is able to perform his work safely. Certain vapours, for example, create dizziness while others may cause drowsiness or visual disturbances. Chruden & Sherman 645.

75 Simonds & Grimaldi 394-5 pointed out that accidents increase with high temperature and with temperature considerably below the comfort level of approximately 70° F. Accidents tend to drop to their lowest level at approximately 67,5° F.

76 Prolonged exposure to intense noise reduces an employee's vigilance, reduces motor reactions, decreases muscular strength and diminishes resistance. Exposure to intense vibration has a similar effect on an employee, with the difference that when vibration is transmitted to the hand and wrist, it is the skin's sensory system that is affected. Calhoon 247; Chruden & Sherman 646-7; Razumov 165.

77 Armstrong 264; Beach 531; Chruden & Sherman 644-7; Dessler 627; Gloss & Wardle 161-3; NOSA *Safety Subjects* 47; *The Accident Prevention Manual of the Dunlop Rubber Co Ltd* 16. Appendix 3.1 illustrates the unsafe working conditions which have been found to cause the most accidents, whereas Appendix 3.2 depicts the instrumental and other causes of accidents for 1988. According to Appendix 3.1, improperly guarded and defective equipment are the most prominent unsafe mechanical conditions, and improper illumination and ventilation the most common unsafe physical conditions. Appendix 3.2 illustrates that machinery, automobiles and metal stock are the most notable work-related accident-inducing factors. Automobiles, bricks, rocks, stones and explosives are the most fatal.

78 Vernon 1-14.

79 This was also the finding of a British study in which 2367 occupational accidents were analyzed. It was found that more accidents occurred in the morning than in the afternoon, with a peak time for accidents occurring after mid-morning. ILO *Accident Prevention, A Workers Educational Manual* 32.

According to Vernon's findings, this tendency is so marked that during a 12-hour workday women experienced $2^{1/2}$ times as many accidents as during a 10-hour workday. Vernon therefore concludes that the increase in the accident rate exceeds the increase in the number of hours worked. Dessler⁸⁰ believes that the results of Vernon's findings is due partly to fatigue and partly to the fact that accidents occur more often during nightshifts.

3.4.2 *Type of Occupation*

Some occupations are inherently more dangerous than others. Occupations requiring mental skills, such as accountants, are usually conducive to safer working environments than those occupations demanding physical skills, such as crane operators.⁸¹ According to one study,⁸² a craneman in a steel mill suffers approximately 3 times as many accidents as a foreman. Job evaluation procedures should therefore reflect the hazards of a particular occupation.

3.4.3 *The Physical, Psychological and Organizational Climate*

Kerr et al⁸³ correlated accident rates of 7100 employees in a large tractor factory over a 5-year period. They found that a comfortable working environment was the single most significant factor relating to a low accident rate. They also found that poor working conditions, where heat, noise and dirt prevail, create tension and frustration in the employee, causing him to have more accidents. Plant housekeeping and favourable working conditions therefore contribute positively to safety.

80 Dessler 629.

81 Appendix 3.3 illustrates the number of accident cases according to industry and extent of disablement for 1988. The iron and steel industry, characterized by employees working with hot and heavy materials, and the trade and commercial industry, characterized by employees involved with motor transport, are clearly the most dangerous industries. The industries characterized by high fatality rates are the agriculture and forestry industry, and the building and construction industry, characterized by employees working with heavy and bulky objects.

82 Cited in McCormick & Tiffin 514.

83 Kerr et al 108-11.

In a different study conducted by Kosinar et al,⁸⁴ injury severity and frequency data were obtained from 147 organizations in the automotive and machine-shop industries. Injury frequency was found to be the greatest in industries where there was a high seasonal lay-off rate, where employees frequently needed to lift heavy materials, and where there were poor living conditions. Injury severity was found to be the greatest in industries where there was no stated penalty for tardiness, where extreme workplace temperatures existed, and where employees were working under dirty and sweaty conditions. Kosinar et al⁸⁵ conclude that the loss of, or threat to, individuality may induce pre-occupational distractions which result in unsafe employee behaviour.

3.5 IDENTIFYING THE MAJOR OCCUPATIONAL HAZARDS

Over the years attempts have been made by various groups of individuals to classify occupational accidents according to whether they are caused by unsafe human acts or unsafe working conditions. Some of the earlier studies point out that 85% to 90% of all accidents are caused by unsafe human acts, and only 10% to 15% by hazardous working conditions.⁸⁶ Heinrich,⁸⁷ for example, in his study of 75000 accidents, established the popular 88:10:2 ratio. This ratio means that 88% of all accidents are caused by unsafe human acts, 10% by unsafe working conditions, and 2% by conditions which could not be foreseen or prevented.

More recent analyses of accident statistics reveal that the majority of accidents are due to a combination of unsafe human acts and unsafe working conditions.⁸⁸

84 Kosinar et al 43-51.

85 Kosinar et al 51.

86 Beach 531.

87 Heinrich cited in ILO *Accident Prevention, A Workers Educational Manual* 34.

88 Beach 531; ILO *Accident Prevention, A Workers Educational Manual* 34-5.

3.6 SUMMARY

It is clear from the available contemporary research and statistics consulted that unsafe human acts and unsafe working conditions are the most prominent occupational hazards. Human accident-inducing factors have been shown to relate in various ways to the employee's psychological, physiological and physiopathological characteristics. At the same time, accidents also arise from the numerous hazards that employees are exposed to in the workplace, such as long work schedules, dangerous occupations, and an unsatisfactory physical, psychological and organizational climate.

APPENDIX 3.1

NUMBER OF ACCIDENTS ACCORDING TO ACCIDENT TYPE, UNSAFE WORKING CONDITIONS AND UNSAFE HUMAN ACTS FOR 1988

Description	No. of Accidents
<u>ACCIDENT TYPE</u>	
Struck by Falling, Flying or Moving Objects	80107
Striking Against	34126
Caught in, on or between	23267
Fall to Different Level	19380
Slip or Over-Exertion	13016
Fall on Same Level	10909
Contact with Temperature Extremes	6736
Inhalation, Absorption, Ingestion	5599
Contact with Electrical Current	758
Accident Type - N.E.C.	23854
Unclassified - Insufficient Data	29587
Total	247339
<u>UNSAFE WORKING CONDITIONS</u>	
Improperly Guarded Equipment	2771
Defective Equipment	2756
Hazardous Arrangements, Procedures, etc	139
Improper Illumination	8
Unsafe Dress or Apparel	5
Improper Ventilation	3
Unsafe Mechanical or Physical Condition - N.E.C.	123
Unclassified - Insufficient Data	64572
No Defective Agencies	176940
Total	247317
<u>UNSAFE HUMAN ACTS</u>	
Operating without Authority, Failure to Secure or Warn	126344
Operating or Working at Unsafe Speed	6
Using Unsafe Equipment, Hands Instead of Equipment or Equipment Unsafely	6
Unsafe Loading, Placing, Mixing, Combining, etc	6
Failure to Use Safe Attire or Personal Protective Devices	5
Taking Unsafe Position or Posture	1
Making Safety Devices In-Operative	--
Working on Moving or Dangerous Equipment	--
Distracting, Teasing, Abusing, Starting, Horseplay, Violence, etc	--
Unsafe Acts - N.E.C.	1
Unclassified - Insufficient Data	64574
No Unsafe Act	56396
Total	247339

APPENDIX 3.2

INSTRUMENTAL AND OTHER CAUSES OF ACCIDENTS FOR 1988

Cause	Accidents	Medical Aid	Temporary Disablement	Permanent Disablement	Fatal
Machinery	32003	17342	11021	3603	37
Automobiles	22472	8686	11994	1114	678
Metal Stock	20244	10956	8304	969	15
Hand Tools	17994	9827	7196	953	18
Nails & Spikes	13525	9669	3602	253	1
Metal Sheets, Pipes & Poles	10892	5832	4367	678	15
Bricks, Rocks, Stones, etc	9108	2835	4872	1298	103
Other Vehicles	8625	2969	4615	931	110
Lifting, Hoisting Machinery & Conveyors	6840	2396	3256	1109	79
Floors, Sidewalks, Runways & Roads	6752	3213	3242	295	2
Platforms, Scaffolds & Stairs	6615	2839	3476	282	18
Hot Irons & Hot Substances	6001	3137	2614	211	39
Corrosive & Poisonous Substances	5686	3477	1929	241	39
Lumber & Woodworking Material	4986	2334	2489	159	4
Boxes, Benches, Chairs & Tables	4420	2479	1823	116	2
Animals, Reptiles, Germs & Viruses	3840	2094	1653	77	16
Ladders	3399	1385	1840	169	5
Electrical Apparatus	758	297	323	92	46
Explosives	651	222	256	125	48
Other Working Surfaces	13757	7024	6376	349	8
All Other Agencies	46459	20319	22068	3825	247
Total	245027	119332	107316	16849	1530

Source - Workmen's Compensation Commissioner *Workmen's Compensation Act 1941, Report on the 1988 Statistics.*

APPENDIX 3.3

ACCIDENTS ACCORDING TO INDUSTRY AND EXTENT OF DISABLEMENT FOR 1988

Industry	No. of Cases	Medical Aid	Temporary Disablement	Permanent Disablement	Fatal
Iron & Steel	41191	27192	12107	1788	104
Trade & Commerce	19295	10946	7596	652	101
Agriculture & Forestry	19265	7580	10218	1215	252
Building & Construction	16482	8662	6972	726	122
Food, Drink & Tobacco	13958	7825	5467	628	38
Transport	10171	4725	4918	372	156
Wood	9897	4984	4203	684	26
Local Authorities	9199	5211	3672	265	51
Chemical	8188	4867	2856	441	24
Mining	6962	3282	3071	535	74
Textiles	6678	4037	2418	219	4
Glass, Bricks & Tiles	5401	2948	2166	264	23
Personal Services, Hotels	3631	2026	1463	129	13
Printing & Paper	2632	1398	1115	115	4
Educational Services	1399	834	520	39	6
Banking, Finance, Insurance	1305	715	520	63	7
Medical Services	1245	870	336	37	2
Leather	1211	709	466	33	3
Charitable, Religious, Political & Trade Organ.	930	527	372	30	1
Entertainment & Sport	823	484	301	36	2
Diamonds, Asbestos, Bitumen	655	405	201	49	-
Professional Services	613	338	240	29	6
Fishing	594	178	385	28	3
Total	181725	100743	71583	8377	1022

Source - Workmen's Compensation Commissioner *Workmen's Compensation Act 1941, Report on the 1988 Statistics.*

CHAPTER 4

FAIRNESS AS A CRITERION OF SAFETY MANAGEMENT

4.1 INTRODUCTION

The complex nature of safety management requires a standard of conduct in the exercise of that function. The appropriate standard relates to a sound labour relations practice which is based on the principle of *fairness*.¹ This principle forms part of the South African common law² and underlies the conduct of the employment relationship.³ Fairness recognizes the dignity of the employee which in turn may promote equitable labour relations.⁴

Since every labour relations practice must adhere to the requirement of fairness,⁵ the employer's safety management practice should include a positive obligation in terms of which the practice may be evaluated for its fairness or unfairness, with reasonable certainty and accuracy. It is therefore necessary to examine the nature and scope of this obligation in the realm of safety management.

4.2 THE NATURE AND SCOPE OF 'FAIRNESS'

Fairness is a contested concept,⁶ since one person's conception of fairness in any given situation will frequently differ from another's. Not only will conceptions of fairness differ because of differences or errors of judgement between

¹ Poolman *Principles of Unfair Labour Practice* 20; *Whitcutt v Computer Diagnostics & Engineering (Pty) Ltd* (1987) 8 ILJ 356 (IC) 362I-J.

² Cf Megarry & Baker 5.

³ Salamon 46.

⁴ *National Automobile & Allied Workers Union v Pretoria Precision Castings (Pty) Ltd* (1985) 6 ILJ 369 (IC) 378F-I; *National Union of Mineworkers v Amcoal Collieries Ltd t/a New Denmark Collieries* unreported case NH 11/2/1212 68.

⁵ Poolman *Principles of Unfair Labour Practice* 3.

⁶ It is a concept that admits of different conceptions. See Baxter 633 and the authorities cited therein.

individuals, but also because different individuals may hold different ideas of fairness.⁷

4.2.1 *The Meaning of 'Fairness'*

It is difficult to define the concept of *fairness*. The problem is not the meaning of the word, but what its scope and content is in the context of the definition.⁸ The industrial court has generally refrained from defining the concept of *fairness* in any precise terms,⁹ but has stressed that *fairness* has to be judged in the context of the facts of each case.¹⁰ This implies that in order to determine the *fairness* of a labour practice, all relevant matters surrounding the specific case in the framework of the labour practice are to be considered, and the deciding criteria are to be uncovered, evaluated and weighed.¹¹

The word *fairness* is today equated to *equitable, equity, equality, unbiased, reasonable, impartial, balanced, just, honest, free from irregularities, according to the rules, equality*.¹² Voet¹³ also equates *good* and *fair*. He emphasizes that the "law is the art of the good and the fair on the basis of the good and the fair judges decide, pronounce judgment, assess and interpret everywhere the good is united with the fair, and the fair with the good."

7 Baxter 633.

8 Brassey et al 60.

9 Where the industrial court has attempted to define *fairness*, the results have not been very successful {*SA Diamond Workers' Union v The Master Diamond Cutters' Association of SA* (1982) 3 ILJ 87 (IC) 116F-H}. In other instances the court has substituted one vague concept with other, equally vague ones. This has ranged from conceptions of the *reasonable employer* to the *boni mores* of society {*National Union of Minevorkers & others v Vaal Reefs Exploration & Mining Co Ltd* (1987) 8 ILJ 776 (IC) 779}. See Cockrell 86-7 for a comment in this regard.

10 *United African Motor & Allied Workers Union v Fodens (SA) (Pty) Ltd* (1983) 4 ILJ 212 (IC) 225.

11 Ehlers 43.

12 Poolman *Principles of Unfair Labour Practice* 42. Cf Curzon 3; Ehlers 40; Hanbury & Maudsley 3-4; Megarry & Baker 5; Newman 15; Van Zyl 278.

13 Voet 1.1.5.

Fairness is strongly linked with *the best* customs,¹⁴ traditions and social rules.¹⁵ The difficulty with the concept is that personal values lead to many different ideas of what *the best* is. This has led to the adoption of a utilitarian or democratic notion of *fairness* which regards as fair that which is in the interests of or acceptable to the majority. A majority rule is, however, not necessarily always right or fair.¹⁶ Cockrell¹⁷ submits that "(t)he ideological category of fairness separates those who are playing the game according to the rules from those who are not."

In establishing what is fair or unfair, cognizance must be taken of social facts,¹⁸ since law is a product of society and is based on the values and ideals of a particular society.¹⁹ Legal rules are, therefore, guidelines as to what is or should be socially adequate.²⁰

4.2.1.1 *Fairness and Public Policy*

*Public policy*²¹ reflects the general interest of society requiring that a certain course of conduct should or should not be approved or condoned.²² Public policy has been described as "a principle of judicial legislation or interpretation founded on the current needs of the community."²³ The judicial concept of *fairness* must therefore be measured in accordance with public policy or the moral code of the community, the *boni mores*.²⁴ This code requires the

14 *Custom*, according to Voet 1.3.27, is an "unwritten right, brought in gradually by the usage of those who practice it, and having the strength of law." Cf Hughes 188 et seq.

15 Salamon 47.

16 Salamon 47.

17 Cockrell 100.

18 Hosten 78; Mureinik in Corder 187; Poolman *Principles of Unfair Labour Practice* 67; Voet 1.3.19; Wedderburn 3.

19 Grey 32; Patterson 223-30; Voet 1.3.27.

20 Hosten 78-9; Patterson 229-30; Voet 1.3.36.

21 With regard to the concept *public policy* see Gurvitch 48; Hosten 78; Poolman *Principles of Unfair Labour Practice* 36-7; Wedderburn 3.

22 Poolman *Principles of Unfair Labour Practice* 37.

23 Winfield cited in Du Plessis & Davis 89.

24 Boberg *The Law of Delict* 33 et seq; Neethling et al 31 et seq; Poolman *Principles of Unfair Labour Practice* 52; Van Der Merwe & Olivier 58 et seq; Van der Walt *Delict: Principles and Cases* 21 et seq;

employer to conform to the accepted or prevailing moral values regulating human conduct.

The *boni mores* criterion is an objective criterion²⁵ since the task of the judge is to:

"define and interpret the legal convictions of the community (good morals) in a particular instance, having regard for legal rules and principles and court decisions in which the convictions of the community have found expression in the past, supplemented by the evidence before him and all the information he has gathered, and subsequently to apply this interpretation to the problem concerned, taking into consideration the particular circumstances of the matter."²⁶

Since there is a decisive dependence of law on morality, the values of a particular society are based on the moral views of that society. Such values may succumb to the influence of changes in those moralities; they may themselves even bring about changes in those moralities.²⁷ There is therefore "free traffic between law and morality."²⁸

There is much in the South African culture that fosters the notion of morality as a perfect code of fair and unfair, leaving no scope for interpretation.²⁹ No set of moral convictions are, however, complete, and most, if not all, require interpretation. For Dworkin,³⁰ the interpretation of moral convictions requires *constructive interpretation*.³¹

Hawker v Life Offices Association of SA 1987 (3) SA 777 (C) 781; *Elida Gibbs (Pty) Ltd v Colgate Palmolive (Pty) Ltd* (1) 1988 (2) SA 350 (W) 356-7.

25 Neethling et al 31-2; Van der Merwe & Olivier 58 et seq; Van der Walt *Delict: Principles and Cases* 21.

26 Neethling et al 35. Rumpff JA's approach in *S v Goliath* 1972 (3) SA 1 (A) is an example of the interpretation of the convictions of the community in a particular case on the basis of present-day ethical, moral, philosophical and religious opinions, legal development and the viewpoints in force in other countries. Cf *Hawker v Life Offices Association of South Africa* 1987 (3) SA 777 (C).

27 Dworkin in Cohen 247 et seq; Patterson 230 et seq.

28 Mureinik in Corder 188.

29 Mureinik in Corder 187.

30 Dworkin *Law's Empire* 73 et seq.

31 *Infra* 98.

Mureinik³² submits that the moral convictions of a society come into play in three distinct ways:

"first, as part of the constructive interpretation of the legal system, serving to determine its contents; secondly, as part of the constructive interpretation of the legal system, serving to determine whether it bears a generally supportive interpretation; and, thirdly, if it does, serving to determine whether the moral guidance that that furnishes about enforcement and obedience is overridden by other moral considerations."

It may be deduced from the above that societal normative demands³³ have an important bearing upon the *fairness* or *unfairness* of a labour practice.³⁴ Fairness is a concept of legal art which forms an integral part of the theory of *jurisprudence*.

4.2.1.2 The Meaning of 'Jurisprudence'

The word *jurisprudence* is derived from a Latin word *jurisprudentia* which means "skill in the law"³⁵ or "knowledge of law."³⁶ This meaning of the term is still applied in the Concise Oxford Dictionary,³⁷ namely, "skill in law knowledge." The Dictionary³⁸ lists a further meaning to

³² Mureinik in Corder 198.

³³ Societal normative demands include the protection and development of employees, non-discrimination, equal employment opportunity, equality of treatment of employees, the promotion of the free market system, the humanization of the workplace, social upliftment and the improvement of the quality of life of employees. Patterson 284; Wiehahn *Perspectives on Safety Consciousness - Its Relevance also to Industrial Relations* 7; *The Complete Wiehahn Report* (Part 1) par 3.1.

³⁴ Cf De Kock *Industrial Laws of South Africa* 554-5; *Metal & Allied Workers Union & others v Barlows Mfg Co Ltd* (1983) 4 ILJ 283 (IC) 285.

³⁵ Hughes 8.

³⁶ Patterson 7.

³⁷ The Concise Oxford Dictionary 545.

³⁸ The Concise Oxford Dictionary 545.

jurisprudence: "science³⁹ or philosophy⁴⁰ of human law." The latter definition is assigned to the term in this research.

Jurisprudence, according to Patterson,⁴¹ consists of the "general theories of, or about, law." He identifies two types of juristic theory which he names the *internal* and *external*. The former assumes or creates a delimitation of the field of law and explores the concepts, terminology and relations of the various parts of the law.⁴² The external relations of the legal system is correlated to "ethical, economic, political and social beliefs and practices, to things that are analytically distinct though not causally separated from the law."⁴³ Jurisprudence in this *external* sense includes the body of general theories concerning law which have been recommended, accepted, and carried forward as part of the cultural tradition.

Austin,⁴⁴ the first Professor of Jurisprudence in the University of London,⁴⁵ states that the appropriate subject of jurisprudence is positive law: "law established in an independent political community, by the express or tacit authority of its sovereign or supreme government." Austin⁴⁶ equates *jurisprudence* to the science of what is essential to the law in a particular community, combined with the science of what it ought to be. *Jurisprudence* is therefore perceived as the "science concerned with the exposition of the

39 Lloyd 7 postulates that in the limited sense in which the social sciences are described, it is reasonable to designate jurisprudence as a science: "For it may be said to concern itself with patterns of behaviour of man in society and to be engaged both in accumulating facts and clarifying them in this field, and with discerning regularities of human behaviour or establishing ways of bringing about or controlling such regularities." Cf Hughes 9-10; Patterson 10-2; Pound in Pollack 635 et seq.

40 According to Patterson 8, *philosophy of law* means broadly *general theory of law*. The choice between a philosophy or a science of law is to a large extent a matter of terminology. See further Dworkin *Law's Empire* 6; Lloyd 10-2; Patterson 8-10.

41 Patterson 2.

42 Patterson 2.

43 Patterson 3.

44 Austin in Lloyd 20.

45 Hughes 9.

46 Austin in Lloyd 22.

principles, notions, and distinctions"⁴⁷ which are common to a system or body of law.⁴⁸

A lucid exposition of the meaning of *jurisprudence* is provided by Voet:⁴⁹ "an acquaintance with things both human and divine, a science of justice and injustice, an art of doing what is good and fair, a true and not a feigned philosophy." Voet⁵⁰ further points out that "(t)he end of jurisprudence is justice."

The central theme of contemporary jurisprudence is *adjudication*,⁵¹ which needs to be discussed.

4.2.1.2.1 ADJUDICATION

"Jurisprudence", says Dworkin,⁵² "is the general part of adjudication, silent prologue to any decision at law." By that he means that a judge's jurisprudential commitments are the basis of his justification for his decision.⁵³ In order to secure a better understanding of the concept of *fairness* it is necessary to consider the theory of *adjudication*. Mureinik⁵⁴ supports this approach by stating that:

"In part, that is because it is the function of the judges to state the law; and the manner in which they do that, in a jurisdiction such as [South Africa], makes it the most public, the most self-conscious, and the most influential way of doing it. And that makes the study of what the judges do a most instructive way to understand the law itself. So important is the judges' function of stating the law that the theory of adjudication has come to be

47 Austin in Lloyd 21.

48 The system or body of law is the positive laws and rules of a particular or specified community. Austin in Lloyd 20.

49 Voet 1.1.4.

50 Voet 1.1.7.

51 Dworkin *Law's Empire* 90; Mureinik in Corder 182.

52 Dworkin *Law's Empire* 90.

53 Cf Hart in Gavison 39-40.

54 Mureinik in Corder 182.

understood, in contemporary jurisprudence, as the study of how judges answer questions of law."

Adjudication, according to Dworkin,⁵⁵ is the *constructive interpretation*⁵⁶ of prior legislative and judicial decisions. *Constructive interpretation* means reading the record of decisions to be interpreted in the way which makes of them the best⁵⁷ that they can be.⁵⁸ Making the record *the best that it can be* means making of it a morality that affords the best possible justification for the exercise of political power;⁵⁹ which means making the legal system as legitimate as it can be.⁶⁰

Voet⁶¹ further points out that:

"you must not come to a decision as to the intention of a law until you have examined the whole of it; for very often the clear meaning of a law may emerge from what precedes or what follows. Next that interpretation of the law must always be applied which is free from defect, which is more suited to the thing in hand, and which is more agreeable to the intention of the legislator."

An emblem of the Dworkinian position is that to every question of interpretation there is always, in principle, "one right answer."⁶² Interpretation must therefore be approached on the premise that a correct interpretation exists and that the object of the practice is to find it.

Since adjudication is the constructive interpretation of previous legal decisions, it requires the judge to cast those

⁵⁵ Dworkin *Law's Empire* 52-3, 225-6.

⁵⁶ See Grey 33 for a lucid summary of Dworkin's theory of interpretation.

⁵⁷ The meaning of the word *best* in this context varies with the kind of thing to be interpreted. The *best* work of art that a play can be is the one that is aesthetically the most satisfying. The *best* statute that an Act of Parliament can be is the one that is morally the most appealing.

⁵⁸ Mureinik in Corder 184.

⁵⁹ Cf Voet 1.3.19.

⁶⁰ Dworkin *Law's Empire* 191, 411.

⁶¹ Voet 1.3.20.

⁶² Dworkin *A Matter of Principle* Part 2. Cf Cohen Part 3.

decisions in "their most appealing light, morally,"⁶³ and objectively,⁶⁴ in terms of fairness,⁶⁵ justice,⁶⁶ procedural due process⁶⁷ and integrity.⁶⁸ The first three principles require the record of decisions to be read so as to optimize its appeal in terms of those principles,⁶⁹ and the latter requires it to be read so as to optimize its coherence.⁷⁰ Adjudication, therefore, if it is *constructive interpretation*, conduces to the coherence of the record and to its fairness and justice.

4.2.2 Fairness and Equity

No satisfactory definition of *equity* can be established since it is impossible to foresee or cater for all the circumstances that would justify equitable relief.⁷¹ The Concise Oxford Dictionary⁷² refers to *fairness* as being synonymous to *equity*, and defines the latter as a "recourse to principles of justice to correct or supplement law" and a "system of justice supplementing or prevailing over common and statute law." Similarly, in modern English statutes the concepts *equitable* and *fair* are treated as being of equivalent meaning.⁷³ This

63 Mureinik in Corder 189.

64 The ethos of social science is the search for objective truth. Dworkin *Law's Empire* Part 2; Mureinik in Corder 186; Myrdal in Lloyd 16. Cf Cohen Part 3.

65 *Fairness*, according to Dworkin *Law's Empire* 164, concerns the law-making process, and requires that political power be distributed democratically so that people will have a roughly equal chance to have their opinions count.

66 *Justice*, in Dworkin's terminology, "is concerned with the decisions that the standing political institutions ought to make." It is committed with the correctness of substantive decisions to distribute resources and confer rights. Dworkin *Law's Empire* 165.

67 *Procedural due process* concerns the application of law, and requires that people should have reasonable notice of what their legal rights are and access to procedures that give them a reasonable opportunity to enforce those rights. The concept *procedural due process* is the American equivalent of the British concept *procedural fairness*. On *procedural fairness* see Poolman *Principles of Unfair Labour Practice* 57-9.

68 *Integrity* plays a central role in Dworkin's thought. It means adhering, in the decision before one, to the principles upon which one depends to justify one's other decisions. Integrity, says Dworkin *Law's Empire* 263, 404, 405, combines fairness, justice and procedural due process "in the right relation." See further Dworkin *Law's Empire* 165-7, 183-4.

69 Mureinik in Corder 192.

70 See further on the subject of *coherence* Dworkin *Law's Empire* 19-20, 178 et seq; Mureinik in Corder 195-6.

71 Ehlers 40; Megarry & Baker 13; Poolman *Equity, the Court and Labour Relations* 10.

72 The Concise Oxford Dictionary 326.

73 Megarry & Baker 6; *Westminster Bank Ltd v Edwards* [1942] AC 529, 535; *R v Minister of Housing & Local Government, ex parte Finchley Borough Council* [1955] 1 WLR 29, 31.

is also the approach adopted by Poolman⁷⁴ and the industrial court.⁷⁵

Roos⁷⁶ and the Wiehahn Commission⁷⁷ refer to the vagueness surrounding the words *fairness* and *equity*. In this regard Newman⁷⁸ states that "(m)uch of the uncertainty is due to the fact that law must balance the interests of the individual against the interests of society, and each set of interests is differently affected by moral codes."

The origin and growth of equity must be comprehended in the context of the common law. It originated from the common law and has never existed independently of it.⁷⁹ In English law, *equity* is granted recognition alongside common law.⁸⁰ Although there is no *law of equity* in South African law as there is in English law,⁸¹ equity and equitable considerations do play a role in South Africa when the existing law is deficient or when the enforcement of the existing law may have patently inequitable consequences.⁸²

74 Poolman *Principles of Unfair Labour Practice* 42.

75 *Allied Workers Union v Pretoria Precision Castings (Pty) Ltd* (1985) 6 ILJ 369 (IC); *Commercial Catering & Allied Workers Union of SA & another v Wooltrue t/a Woolworths (Randburg)* unreported case NH 11/2/1643.

76 Roos 103.

77 The Wiehahn Commission spoke about the danger of going astray in a "wilderness of philosophical considerations." *The Complete Wiehahn Report* (Part 5) par 4.127.17.

78 Newman 15.

79 Curzon 6.

80 The Chancery Division of the English High Court of Justice still deals with equity matters. See in general Megarry & Baker 7-13 on the history of equity.

81 The English system of *equity* does not apply in South Africa as was pointed out in *Kent v Transvaalsche Bank* 1907 TS 774: "The Court (Supreme Court of the Transvaal) has again and again had occasion to point out that it does not administer a system of equity as distinct from a system of law. Using the word equity in its broad sense we are always desirous to administer equity; but we can only do so in accordance with the principles of Roman-Dutch law. If we cannot do so in accordance with those principles, we cannot do so at all."

82 Henning 242; Van Zyl 278. That the courts in South Africa do take equity into consideration in matters concerning the employment relationship can be inferred from cases such as *SA Association of Municipal Employees v Minister of Labour* 1948 (1) SA 528 (T) 532; *George Divisional Council v Minister of Labour & another* 1954 (3) SA 300 (C) 305; *Cape Town Municipality v Minister of Labour* 1965 (4) SA 770, 774G, 779H; *National Industrial Council for the Iron, Steel, Engineering & Metallurgical Industry v Viljoen NO & others* 1974 (1) SA 80 (T) 83C; *Sigwebela v Huletts Refineries Ltd* (1980) 1 ILJ 51, 51H.

Equity is the body of rules which evolved to mitigate the severity of the rules of the common law.⁸³ Decisions on the ground of *equity* or *fairness* must be regarded as a correction of the law where the law is defective or silent, due to its conservatism.⁸⁴ Equity and law therefore form integral parts of one system,⁸⁵ and both incorporate the principles of *fairness* and *reasonableness* in the particular circumstances to avoid or minimize hardship and injustice.⁸⁶

4.2.3 Fairness and Justice

The concept of *justice* is difficult to define in precise terms.⁸⁷ According to Hahlo & Kahn,⁸⁸ *justice* is "the prevailing sense of men of goodwill as to what is fair and right - the contemporary value system," which implies that it amounts to little more than the shared views of particular persons at a particular time, and is influenced by society's sense of values.⁸⁹

In the biblical context,⁹⁰ law is used synonymously with justice. In legal context, however, law and justice are not synonymous as justice is that attribute whereby law attains peace and stability.⁹¹ Justice is therefore the ideal to which law ought to conform.⁹² Voet⁹³ correctly points out

83 Hanbury & Maudsley 4; Megarry & Baker 5-6; Poolman *Principles of Unfair Labour Practice* 48; *Metal & Allied Workers Union & others v Barlows Mfg Co Ltd* (1983) 4 ILJ 283 (IC) 287, 293.

84 Grotius cited in Voet 1.1.6 defined *equity* as "A virtue of intention, which corrects something, in which the law fails on account of its generality." See also Poolman *Principles of Unfair Labour Practice* 34-7, 66-9; *The Complete Wiehahn Report* (Part 5) par 4.127.18.

85 There is no conflict between equity and law. A structure has been established by which the justification for equitable intervention is accepted by the common law. Cf Hanbury & Maudsley 17.

86 Buckland *Equity in Roman Law* 5-14; Poolman *Principles of Unfair Labour Practice* 48; *Mynwerkersunie v O'Okiep Copper Co Ltd & 'n ander* (1983) 4 ILJ 140 (IC) 145.

87 Dlamini 274.

88 Hahlo & Kahn 31.

89 *Equity* and *justice* are related concepts but are not to be regarded as synonymous. See in this regard Bodenheimer 183; Cheng 185, 206; Dlamini 274-80; Hanbury & Maudsley 3; Kamenka & Tay 114; McDowell 5; Van Zyl 278, 289.

90 Deuteronomy 16 18; Ezekial 33 19; Isaiah 1 10-17; Jeremiah 9 24; 1 Kings 10 9; Proverbs 12 12,16; 2 Samuel 8 15.

91 In the South African legal context, justice is usually dealt with in relation to the courts and the function of judges or other judicial officers. Van Zyl 274.

92 Dlamini 271-2.

93 Voet 1.3.5.

that the main requisites of law is that "it ought to be just and reasonable - both in its form, for it prescribes what is honourable and forbids what is base; and in its form, for it preserves equality and binds the citizens equally."

No legal system, however, can always secure perfect justice because, as Beinart⁹⁴ states, "that is an ideal rather than a working proposition." The criteria for *just law* as a prerequisite for justice are *reasonableness*, *generality*, *equality*,⁹⁵ *fair process* and *certainty*.⁹⁶ Justice is not the justice of the law courts but rather equitable justice⁹⁷ and fairness that meets the requirements of reasonableness.⁹⁸

4.2.4 *Fairness and Reasonableness*

The respective concepts of *fairness*, *equity* and *justice* all share the legally accepted idea of *reasonableness* in the circumstances of the case. This is in accordance with Poolman⁹⁹ who equates *reasonableness* with the latter concepts. Similarly, the words *unfairly*, *inequitable* or *unjustified* may be considered to mean *unreasonable*.

Reasonableness implies the *fairness*¹⁰⁰ of the conduct concerned, determined objectively¹⁰¹ according to the circumstances of the case and weighed according to natural reason,¹⁰² taking into account legal factors,¹⁰³ public policy considerations,¹⁰⁴ and even religious norms.¹⁰⁵ Like

94 Beinart *The Rule of Law* 106.

95 The reference to *equality* as a criterion for just law pertains to the concept of *equity* and its meaning and scope. Salamon 47.

96 Van Zyl 274. Bodenheimer 185 explains that "(t)he just man, either in private or public life, is a person who is able to see the legitimate interests of others and to respect them The just employer is willing to consider the reasonable claims of his employees."

97 Jackson 18, 19.

98 Poolman *Principles of Unfair Labour Practice* 43.

99 Poolman *Principles of Unfair Labour Practice* 42.

100 Poolman *Principles of Unfair Labour Practice* 59-61.

101 The finding of the court in *Zuke & others v Minister of Manpower & Another* (1985) 6 ILJ 193 (D) confirms the need for an objective test of reasonableness.

102 Poolman *Principles of Unfair Labour Practice* 15-6, 53; *Metal & Allied Workers Union v Hart Ltd* (1985) 6 ILJ 478 (IC).

103 See Gurvitch 236-8.

104 *Supra* 93-5.

105 Religious considerations take cognizance of the religious ethic of respect for dignity manifested in the theological principle of treating others in exactly the same manner you would like them to treat

fairness, *reasonableness* excludes the stare decisis rule in that "decisions which provide guidelines as to what is 'reasonable' do not constitute legally binding precedents."¹⁰⁶

Fairness and *reasonableness* are not always synonymous with *lawfulness*. The former are inherently flexible or equitable concepts,¹⁰⁷ and conduct which may otherwise be entirely lawful may still be unfair or unreasonable.¹⁰⁸ Fairness and reasonableness will be achieved if a particular course of conduct is lawful and just,¹⁰⁹ and in accordance with strict law and equity.¹¹⁰

The fairness and reasonableness of a safety management practice is evaluated against the conduct of the reasonable employer in labour relations.¹¹¹ The employer is required to ensure that fair and reasonable precautions are taken for the safety of employees, thereby eliminating or limiting the causes of accidents.¹¹² This implies a general duty to act fairly and reasonably.¹¹³

4.2.4.1 *The Duty to Act Fairly and Reasonably*

The duty to act fairly is a duty to act reasonably, and not to threaten the common interest,¹¹⁴ such as to promote safe work standards, and not detrimentally affect the employment relationship. In deciding upon a safety issue, the employer

you (Matthew 7 12; Luke 6 31). This is closely aligned with the Christian rule of loving one's neighbour as oneself (Matthew 22 39; Luke 10 27). See further Heyns 297; Hosten 5.

106 Heppel cited in Poolman *Equity, the Court and Labour Relations* 11.

107 Fairness and reasonableness are determined with reference to the circumstances of a particular case. *SA Diamond Workers' Union v The Master Diamond Cutters' Association of SA* (supra) 101F.

108 Cockrell 87; *Council of Mining Unions v Chamber of Mines of SA* (1985) 6 ILJ 293 (IC) 295C.

109 The word *just* has a wider meaning than *lawful* because it permits a court to pay due regard to factors that are excluded by strict law. Poolman *Principles of Unfair Labour Practice* 53.

110 Poolman *Principles of Unfair Labour Practice* 53.

111 Chapter 6 infra.

112 It is in the interest of industry as a whole in its relations with the public that such a policy be implemented, for example, an accident could lead to lost productivity time and capacity, reflecting adversely upon society at large. See Baxter 629-30; *R v Campbell (Pty) Ltd* 1956 (1) SA 256 (SR) 264.

113 Poolman *Principles of Unfair Labour Practice* 46.

114 Cockrell 100.

is acting fairly when he applies his mind to the issue in question, fairly assesses the circumstances, and fairly and honestly attempts to protect his employees against foreseeable hazards.¹¹⁵

The duty to act fairly and reasonably does not only relate to a positive act, but also to a negative act or an omission to act. A failure to act may be unfair if such failure prejudices an employee.¹¹⁶ Similarly, an omission to act in circumstances which would reasonably require some positive act, would be unfair.¹¹⁷

When there is a failure in the duty to act fairly, it may be necessary to adopt the equitable criterion of *good cause* or *excuse* in order to avoid injustice as far as possible.¹¹⁸

4.2.5 The Good Cause Criterion

The *good cause* criterion recognizes the consideration of all relevant circumstances and the merits of the case in the exercise of an unfettered discretion.¹¹⁹ It is any fact or circumstance that can warrant an act or an omission to act and will make the conduct just and equitable as between the parties.¹²⁰

It is difficult and undesirable to define *good cause* as a definition may have the effect of being too restrictive.¹²¹ No general rule would be likely to cover the varying

115 Baxter 616; *Durban City Council v Jailani Cafe* 1978 (1) SA 151 (D).

116 Poolman *Principles of Unfair Labour Practice* 45.

117 Hosten 465; McKerron *The Law of Delict* 14-24; Scott *Safety and the Standard of Care* 172, 183; Van den Heever 41.

118 Hanbury & Maudsley 74-5; Poolman *Equity, the Court and Labour Relations* 11; *Glynn v Keele University* 1971 WLR 487.

119 *MacFie v Union Government* 1923 (2) PH K3 (T). In *Horn v Kroonstad Town Council* 1948 (3) SA 861 (O) 865 the court held that the manner in which an unfettered discretion should be exercised is according to the rules of reason and justice and not according to private opinion. The discretion must be exercised within the limits to which an honest man competent to discharge of his office ought to confine himself.

120 *Duma v Klerksdorp Town Council* 1951 (4) SA 522 (T). Cf *SA Association of Municipal Employees v Minister of Labour* 1948 (1) SA 528 (T) 532; *George Divisional Council v Minister of Labour & Another* 1954 (3) SA 300 (C) 305.

121 *Cohen Bros v Samuels* 1906 TS 224; *Van den Berg v Robinson* 1952 (3) SA 748 (SR).

circumstances which may arise. An otherwise justifiable reason could per definition be excluded as a *good cause* for a particular course of conduct.¹²²

Generally stated, *good cause* or *excuse* refers to the giving of a reasonable explanation for particular conduct. Each case will have to be dealt with on merits and decided whether *good cause* has been shown.¹²³ If the employer has given a reasonable explanation for the conduct and has treated the reason as sufficient for the particular conduct, the court may find that the employer acted reasonably under the circumstances. Reasonable conduct may be present if the employer acted reasonably in treating the reason as sufficient for taking the particular course of conduct.

Poolman¹²⁴ states that the deficiencies "in the law may be corrected on good cause shown to satisfy the general duty to act fairly and the principles of labour relations." The *good cause* criterion is therefore appropriate to good labour relations and the determination of fairness and reasonableness demanded of all labour practices.

The determination of a *good cause* which prima facie justifies a course of action needs to be tested whether a reasonable employer, having regard to all the circumstances of the case and equity, would or should have acted in the particular manner.

Important guidelines in the evaluation of the fairness and reasonableness of safety management are the national labour standards. Such standards are the product of the norms of society and are necessary to regulate the conduct of the employer, and to ensure that he conforms to that which is socially acceptable.

122 Poolman *Equity, the Court and Labour Relations* 12.

123 *Cohen Bros v Samuels* 1906 TS 224; *R v Finnis* 1948 (1) SA 788 (SR); *Loubser v Loubser* 1958 (4) SA 683 (C).

124 Poolman *Equity, the Court and Labour Relations* 13.

4.3 NATIONAL LABOUR STANDARDS

A strong influencing factor for the development and improvement of national labour standards are the authoritative international labour standards adopted by the ILO and other codes of labour practices, the English common law, and certain other similar legal systems.¹²⁵

4.3.1 The International Labour Organization

The ILO was established in 1919 with the purpose of formulating and administering flexible and objective international labour standards to advance the cause of social justice.¹²⁶ The ILO sets standards through the adoption of international Conventions and Recommendations, as regulated by its Constitution.¹²⁷

The legal character of ILO Conventions and Recommendations differs considerably. Conventions are meant to create international obligations for the States which ratify them. When ratified, a Convention has the same legal status as an international treaty. The member-state is legally bound to implement the obligations it has accepted, and it must report periodically on the extent to which it is doing so.¹²⁸ Recommendations, by contrast, do not give rise to binding obligations, but simply provide a guide to Governments on the standards they can be expected to implement domestically.¹²⁹ The ILO¹³⁰ points out that "Conventions and Recommendations should remain universal in character, and that the special

125 Various countries, according to the demands of national custom and practice, have resorted to international labour standards as a universal value system, to upgrade and develop their labour relations system. Hosten 21, 22; ILO *The Impact of International Labour Conventions and Recommendations* 3.

126 In 1944 the International Labour Conference adopted a declaration which defined the specific objectives of the ILO as being to ensure a "reasonable share of progress for employers, employees and society as a whole." The declaration provides that social justice is the inherent principle upon which international labour standards are based. Blanpain par 5; Valticos *The Future Prospects for International Labour Standards* 681.

127 Valticos *International Labour Law* 42.

128 Blanpain par 70-1.

129 Blanpain par 70-1.

130 ILO cited in Valticos *The Future Prospects for International Labour Standards* 680.

needs of countries at different stages of development should be taken into account through appropriate provisions in these instruments."¹³¹

The Preamble of the ILO's Constitution refers to "the protection of the worker against sickness, disease and injury arising out of his employment."¹³² For this reason a large part of the ILO standards relate, directly or indirectly, to health and safety. This is reflected in more than 30 Conventions and Recommendations adopted in this field.¹³³

It is generally accepted that ILO standards provide guidelines for national labour law and practice, and can define its objectives.¹³⁴ Such standards must therefore be referred to when seeking to assess what is fair in labour relations.¹³⁵

4.3.2 Other International Standards

In addition to ILO standards, health and safety standards are also promulgated at other international levels. The United Nation's¹³⁶ International Covenant on Economic, Social and Cultural Rights¹³⁷ provides that just and favourable conditions of work should ensure healthy and safe working conditions. At the European level, the European Social

¹³¹ See in this regard Servais 193-206; Valticos *The Future Prospects for International Labour Standards* 680, 689.

¹³² Valticos *International Labour Law* 147.

¹³³ Poolman *Principles of Unfair Labour Practice* 116.

¹³⁴ Brassey et al 171; Du Toit *Developments in International Labour Standards and their Potential Effect on South Africa* 50; *Report of the Department of Manpower Utilisation* viii; *The Complete Wiehahn Report* (Part 5) par 4.5; *United African Motor & Allied Workers Union v Fodens (SA) (Pty) Ltd* (supra) 225-7; *Metal & Allied Workers Union v Stobar Reinforcing (Pty) Ltd* (1983) 4 ILJ 84 (IC) 90; *Van Zyl v O'Okiep Copper Company* (1983) 4 ILJ 125 (IC) 134; *Metal & Allied Workers Union v BTR Sarmcol* (1987) 8 ILJ 65 (IC) 68; *Olivier v AECI Plofstowwe & Chemikalie* unreported case NH 13/2/3243 9.

¹³⁵ In the research, reference to such ILO standards will be made as and where applicable.

¹³⁶ The United Nation's Organization does not normally attend to labour matters, but is dependent on the ILO who is its specialized agency. The organization has, however, incorporated labour matters in a number of universal declarations and covenants. Blanpain par 129; Poolman *Principles of Unfair Labour Practice* 79.

¹³⁷ Article 7(b) of the International Covenant on Economic, Social and Cultural Rights cited in Valticos *International Labour Law* 162. This is only one of many relevant United Nations instruments. See Hepple & O'Higgins 181.

Charter¹³⁸ and the European Economic Communities'¹³⁹ Action Programme on Occupational Health and Safety also contain provisions relating to healthy and safe working conditions.¹⁴⁰

Safety standards promulgated by the United Nation's Organization or the European Community establish mainly principles of practice, while the ILO Conventions and Recommendations develop international standards. Although safety standards are promulgated at various international levels, the most important authoritative source for the development of fair national labour standards is the ILO.¹⁴¹

4.3.3 *International Labour Law*

International labour standards do form part of the South African legal system¹⁴² although the South African courts have, in most cases, avoided a full examination of the relevant rule of international law by relying on English authority.¹⁴³

138 The most comprehensive instrument in the European system for the protection of human rights is the European Social Charter. The Charter is only one of a series of Conventions drafted or in the process of being drafted under the auspices of the Council of Europe relating to working conditions. The standards incorporated in the Charter and prepared with the assistance of the ILO are in the main equivalent to the ILO standards. Blanpain par 134, 163; Hepple & O'Higgins 178; Jacobs 101-21.

139 Although the main purpose of the European Communities is economic in nature, a number of social objectives have been included in the treaties forming the communities and the various legislative instruments in their legal systems. Blanpain par 137; *The European Economic Community - National and International Impact* 42-9; *The European Economic Community - Work and Home* 45-7, 144.

140 In *Metal & Allied Workers Union v BTR Sarmcol* (supra) 65 the industrial court refers to the EEC Code as being relevant to South Africa. Cf Ehlers 44.

141 The recognition of international labour standards in South Africa is, however, not absolute. Where infringements of internationally protected rights occurs in South Africa and that infringement is deemed justifiable, no breach of international standards is deemed to have occurred. Poolman *Principles of Unfair Labour Practice* 190.

142 *The Complete Wiehahn Report* (Part 5) pars 3.3.1, 3.11.2, 4.5; *Briesch v Geduld Property Mines Ltd* 1911 TPD 707; *Nduli v Minister of Justice* 1978 (1) SA 893 (A) 905; *Inter-Science Research & Development Services (Pty) Ltd v Republica Popular De Mocambique* 1980 (2) SA 111 (T) 124; *Kaffrarian Property v Government of Republic of Zambia* 1980 (2) SA 709 (EC) 714.

143 Dugard 357; Schreiner 52-60; Van den Heever 34; Van der Walt *Delict: Principles and Cases* 2. There is controversy on the issue whether South African law should depart from English law. Stuart 362-3 points out that "(a)n English rule should only be unmasked and deported where there is a better solution in the pure Roman-Dutch law and not simply because it is English. Pride in our legal system should stem from the solutions it achieves, not from the purity of its ancestry." See generally on the subject Boberg *Oak Tree or Acorn - Conflicting Approaches to Our Law of Delict* 150; Cameron 38; Dyzenhaus *LC Steyn in Perspective* 380; Redivivus 17; Van Blerk 365; Van der Merwe & Olivier 15-23; *Regal v African Superslate (Pty) Ltd* 1963 (1) SA 102 (A); *Trust Bank van Afrika Bpk v Eksteen* 1964 (3) SA 402 (A).

The value of international labour law as a source of good labour relations practice depends on how closely the social conditions of the country in question approximate those of South Africa. It is the duty of the court to apply the principles of international labour law in South African law¹⁴⁴ in so far as they do not conflict with legislation and the common law,¹⁴⁵ or detract from the principles sought in Roman-Dutch law.¹⁴⁶ In those cases where conflict is deemed to have occurred, the court is not obliged to follow the system of precedent.¹⁴⁷

Since the nature of employment and the inevitable battery of occupational health and safety problems are universal in character, there is sufficient reason to draw on the guidance of the ILO standards, the English common law and certain other similar legal systems as:

- (a) non-binding persuasive authority in South African law; and
- (b) an authoritative source upon which to develop national fair labour standards.

The determination of the fairness or unfairness of a labour practice, which would or should also include a safety management practice, falls within the jurisdiction of the industrial court.¹⁴⁸

¹⁴⁴ In *Mahlangu v CIM Deltak* (1986) 7 ILJ 346 (IC) 354C-D the court said that "(t)he decisions of foreign jurisdictions ought to have a strong persuasive influence on the industrial court's decision and serve as guide-lines in the absence of any relevant South African case law."

¹⁴⁵ *South Atlantic Islands Development Corporation v Buchan* 1971 (1) SA 234 (C) 238; *Inter-Science Research & Development Services (Pty) Ltd v Republica Popular De Mocambique* (supra) 124.

¹⁴⁶ *Nduli v Minister of Justice* (supra) 906.

¹⁴⁷ In *Stevenson v Sterns Jewellers (Pty) Ltd* (supra) 324F the court expressed the opinion that "one should not easily and without a certain reservation transplant foreign legal principles on to ours - very often they are based on particular statutes and cannot readily be read outside that context." Cf *SA Diamond Workers' Union v The Master Diamond Cutters' Association of SA* (supra) 120E-G; *United African Motor & Allied Workers Union v Fodens (SA) (Pty) Ltd* (supra) 230C-D.

¹⁴⁸ *Brassey et al* 61-2; *Cheadle The First Unfair Labour Practice Case* 201-2; *Mureinik Unfair Labour Practices: Update* 113-4; *Consolidated Frame Cotton Corporation Ltd v The President, Industrial Court* (1986) 7 ILJ 489 (A) 495D-E; *Atlantis Diesel Engines (Pty) Ltd v Roux NO* (1988) 9 ILJ 45 (CPD).

4.4 THE ROLE OF THE INDUSTRIAL COURT

As a result of the recommendation of the Wiehahn Commission,¹⁴⁹ the industrial court¹⁵⁰ was established in 1979 as a court¹⁵¹ of equity to administer and apply *fairness* and *equity* in accordance with the general duty to act fairly.¹⁵² The court is intended to regulate and set objective guidelines for fair labour relations practices¹⁵³ and to administer the principles of *fairness* and *equity*.¹⁵⁴ The functions of the industrial court are prescribed under s 17(11) of the LRA.¹⁵⁵

The status of the industrial court¹⁵⁶ is that of an administrative tribunal exercising a judicial discretion¹⁵⁷ in its decision-making process.¹⁵⁸ The court does not have the status of a superior court,¹⁵⁹ and therefore it has no power to establish labour law guidelines by judicial precedent.

149 The Wiehahn Commission recommended that an industrial court supersede the industrial tribunal. The reasons put forward included the complexity of labour law and the need for specialization. The Commission considered the general courts to be too formal and cumbersome. *The Complete Wiehahn Report* (Part 1) par 4.22-4.24, 4.28.

150 Internationally, the concept *labour court* is preferred. Le Roux *Substantive Competence of Industrial Courts* 184.

151 The word *court* means a court as constituted under the LRA. Cf *R v Kruger* 1951 (2) SA 295 (T).

152 Poolman *Equity, the Court and Labour Relations* 3; *The Complete Wiehahn Report* (Part 5) par 4.127.17.

153 Poolman *Equity, the Court and Labour Relations* 2.

154 Roos 101; *Mlozana & others v Faure Engineering (Pty) Ltd* (1987) 8 ILJ 432 (IC) 434G.

155 In *National Union of Mineworkers & another v Kloof Gold Mining Co Ltd & others* (1987) 8 ILJ 138 (IC) 141J-142B the industrial court observed that the functions of the court as set out in s 17(11) "do not seem to be mutually exclusive and appear to have some common features." The legislature also had in mind that the industrial court should "adopt an equitable or fair approach when performing its functions," although they are separately listed or categorized. The *common features* constitute the court of equity nature of those judicial functions. See Poolman *Equity, the Court and Labour Relations* 9.

156 For a discussion on the status of the industrial court see Davis 271-4; Landman *The Status of the Industrial Court* 278-83.

157 See *Transport & General Workers Union v Borough of Empangeni* unreported case NHN 13/2/131 19 where the court clearly stated the nature of the *judicial and quasi-judicial* functions of the industrial court.

158 Poolman *Equity, the Court and Labour Relations* 3-4. Brassey et al 11 refer to the industrial court as a quasi-judicial tribunal.

159 Davis 272; Landman *The Status of the Industrial Court* 278-83; *Moses Nkadineng & others v Raleigh Cycles (SA) Ltd* (1981) 2 ILJ 34 (IC) 40G-H; *SA Technical Officials' Association v President of the Industrial Court & others* (1985) 6 ILJ 186 (A) 190. The Wiehahn Commission considered it advisable that the industrial court should be a specialized court, with its own status. By opting for a specialist court, the Wiehahn Commission was identifying itself with international trends. *The Complete Wiehahn Report* (Part 5) pars 4.25.12.

The industrial court is required to give decisions that it deems equitable and fair,¹⁶⁰ having regard to the circumstances of the particular case,¹⁶¹ and is not bound by previous legal precedent.¹⁶² The wide discretionary power in terms of equity and fairness requires the industrial court to fulfil its functions as a court of equity rather than a court of law.¹⁶³

The Wiehahn Commission¹⁶⁴ made one important distinction between the general courts and the industrial court. The general courts must apply legal rules in their hearings and findings, but as is the case in most labour cases, the industrial court would not only apply legal rules, but also sociological, economical, political, psychological and other aspects which are as important as the legal aspects.¹⁶⁵

The general courts are not courts of equity. They apply the law to the given facts without considering the circumstances of the particular case, and attempt to act equitably and fairly in applying the law.¹⁶⁶ The industrial court's powers are wider¹⁶⁷ and more flexible than the general courts. The industrial court may perform most of the functions of a court

160 Le Roux *Substantive Competence of Industrial Courts* 197.

161 *National Industrial Council for the Iron, Steel, Engineering & Metallurgical Industry v Viljoen NO & others* (supra) 83; *National Union of Mineworkers & another v Western Areas Gold Mining Co Ltd* (1985) 6 ILJ 380 (IC) 388; *General Workers Union & another v Dorbyl Marine (Pty) Ltd* (1985) 6 ILJ 52 (IC) 58; *Khan & others v Rainbow Chicken Farms (Pty) Ltd* (1985) 6 ILJ 60 (IC) 69; *Koyini & others v Strand Box (Pty) Ltd* (1985) 6 ILJ 453 (IC) 461.

162 Poolman *Principles of Unfair Labour Practice* 230-1; Roos 107; *National Union of Textile Workers & others v Sea Gift Surfwear Manufacturers* (1985) 6 ILJ 391 (IC) 393.

163 In *SA Laundry, Dry Cleaning, Dyeing & Allied Workers Union & others v Advance Laundries Ltd t/a Stork Napkins* (1985) 6 ILJ 544 (IC) 565 the court pointed out that the industrial court is not purely a court of law but also a court of equity.

164 *The Complete Wiehahn Report* (Part 1) par 4.22.6.

165 Parsons 8; *The Complete Wiehahn Report* (Part 1) par 4.25.14.

166 *Kloof Gold Mining Co Ltd v National Union of Mineworkers* (1987) 8 ILJ 99 (T) 101H-I.

167 The wide and equitable discretionary power of the industrial court is limited only by specific statutory exclusions.

of law¹⁶⁸ with regard to labour matters,¹⁶⁹ and is required and allowed to apply equity as a general duty to act fairly in labour relations, which may modify the legal rule. The industrial court, as a court of equity, is therefore expected to make a more profound analysis of a particular case than the general courts of law, although its function is to interpret the law as it finds it and not to create it.¹⁷⁰

4.5 SUMMARY

The concepts of *fairness*, *equity* and *justice* are generally equated to the notion of *reasonableness* in the circumstances of the particular case. Since *fairness* is defined in terms of *reasonableness*, labour relations conduct can be evaluated objectively as being either *reasonable* or *unreasonable*. Reasonableness may therefore be used to measure the subjective conduct of the employer which has or may have unfair effects for an employee. This implies that the employer has a duty to act fairly and reasonably in the management of safety. The determination of the fairness or unfairness of the employer's conduct is the function of the industrial court.

The application of the already recognized international labour standards as guidelines should assist in establishing uniform and fair safety standards based on the broadest possible foundations.

168 In *Moses Nkadameng & others v Raleigh Cycles (SA) Ltd* (supra) 35 the industrial court held that the expression *a court of law* is not confined to a particular court but must be read as referring to whichever court would have performed the function had it not been for the provisions of s 17(11)(a) of the LRA. In other words, if the matter is one which would have been heard by the Supreme Court had it not been for the provisions of s 17(11)(a), then the industrial court can perform the functions which the Supreme Court can perform. Similarly, if it is a matter which the magistrate's court would have heard, then the industrial court can perform the functions which a magistrate's court can perform. Cf *Lucky Mamabolo & others v Putco Ltd* (2) (1981) 2 ILJ 208 (IC) 214F-G.

169 s 17(11)(a) of the LRA provides that the industrial court may "perform all the functions, excluding the adjudication of alleged offences, which a court of law may perform in regard to a dispute or matter arising out of the application of the provisions of the laws administered by the Department of Manpower." The LRA does not specify the nature of the functions, the powers of the court in respect thereof, and the mode of enforcement of any judgement or order made. Each matter will have to be considered in the light of the issues involved. Cf Davis 273; *Moses Nkadameng v Raleigh Cycles (SA) Ltd* (supra) 34; *SA Technical Officials' Association v President of the Industrial Court & others* (supra) 186-7; *National Union of Textile Workers & others v Jaguar Shoes (Pty) Ltd* (1985) 6 ILJ 92 (IC).

170 Parsons 3.

CHAPTER 5

PRINCIPLES OF THE EMPLOYER'S DELICTUAL OBLIGATION

5.1 INTRODUCTION

The employer's obligation towards his employees as regards safety management is regulated by the common¹ and statute law.² The statutory obligation is founded in terms of MOSA, while the common law requires the employer to take all reasonable measures to prevent the occurrence of harm that could reasonably be foreseen.

Common law tends to supplement and direct the application of statute law. Therefore, an examination of the employer's common law delictual obligation will first be made, followed by an examination of the various statutory provisions in terms of MOSA. Both examinations will form the foundation for the determination of the parameters of the employer's obligation.

5.2 THE MEANING OF 'DELICT'

Some authors define a *delict* as a breach of duty by the wrongdoer. According to McKerron,³ a *delict* is defined as "(t)he breach of a duty imposed by law, independently of the will of the party bound, which will ground an action for damages at the suit of any person to whom the duty was owed and who has suffered harm in consequence of the breach." Similarly, Van der Walt⁴ defines a *delict* as "wrongful and blameworthy conduct which causes harm to a person."⁵ Other authors such as Neethling et al,⁶ Van den Heever,⁷ and Van der

¹ With regard to the principles of the *common law* see Ridley 116; Sykes 7.

² With regard to the principles of the *statute law* see Hosten 245; Milne et al 776.

³ McKerron *The Law of Delict* 5.

⁴ Van der Walt *Delict: Principles and Cases* 2.

⁵ A delict is mainly that kind of wrongdoing which has, through the ages, been defined in the cases, evolved by judicial creation, and which continues to be created and redefined. Cf James & Brown 3.

⁶ Neethling et al 4.

⁷ Van den Heever 3.

Merwe and Olivier⁸ consider a *delict* to be an infringement of the claimant's right. These definitions have the same meaning, it is merely the emphasis that is shifted.

The law of delict identifies which interests are recognized by the law, under which circumstances its infringement constitutes a delict, and how such disturbance of the harmonious balance of interests may be restored.⁹ According to Roman and Roman-Dutch authorities, the word *delict* is commonly used to include both criminal and civil wrongs.¹⁰ In the employment situation, the law of delict has developed into a specialized field for determining the circumstances under which the employer may be held liable for harm caused to an employee. The injured employee has a corresponding personal right¹¹ to claim reparation for the harm done by his employer. The word *delict* is here used in a narrower sense, similar to that of *tort*¹² under English law,¹³ which denotes a civil, as opposed to a criminal wrong.

To found liability under delict, it is not sufficient merely to cause another to suffer harm. The wrongdoer must also have acted in a wrongful and culpable way. This means that five requirements or elements, namely, conduct, wrongfulness, fault, causation and harm must be present before an act may be classified as a delict. If any one or more of these elements

8 Van der Merwe & Olivier 49-51.

9 Van der Merwe & Olivier 1.

10 Boberg *The Law of Delict* 1; McKerron *The Law of Delict* 1.

11 In this context the word *right* is concerned with the relationship between legal subjects where the law relates a legal rule to a particular legal subject, creating a right and corresponding duty. Hosten 588.

12 The word *tort* is derived from the Latin *tortus*, meaning twisted or crooked, and is connected with the French *tort*, meaning wrong. The law of tort is concerned with a breach of duty, other than under contract, leading to liability for damages. In very general terms a tort, like a delict, is a civil wrong which is actionable at the suit of the person injured, and which the law will redress with damages. An examination of the meaning of the word *tort* is found in Fleming 1; James & Brown 3; Winfield 1.

13 English law has contributed to the superstructure of the South African law of delict, but the South African law of delict is still founded on the principles and concepts of Roman and Roman-Dutch law. The English word *tort* is therefore not a precise equivalent of the South African word *delict*, the former being subject to certain limitations which do not affect the latter. In South African practice the two terms are often treated as interchangeable. Lee 320-2; Macintosh & Norman-Scoble 3; Schreiner 52-60; Van den Heever 34.

is missing, a delict is not present and consequently there is no liability.

In South African law the bases of delictual liability are the *aquilian action* and the *actio injuriarum*. In the *aquilian action*, which provides a general remedy for wrongs to interests of substance, damages for a wrongful and culpable (intentional or negligent) causing of patrimonial or pecuniary damage is claimed.¹⁴ The words *damage* and *damages* are not synonymous. *Damage* (as the element of harm) is the loss suffered by the claimant, whereas *damages* is the monetary compensation that the court awards the claimant. *Damages* is therefore awarded for *damage*.

Mere mental distress, injured feelings, inconvenience or annoyance cannot support an award of *aquilian* damages. For these damages, if caused intentionally, the claimant may seek the recovery of sentimental damages under the *actio injuriarum*.¹⁵ Both the *aquilian* action and the *actio injuriarum*¹⁶ require that the wrongdoer should have been at fault.¹⁷

The law of delict aims to protect the interests of individuals in the community. For present purposes, the protection of the interests of an employee against the employer's wrongful acts and omissions will be considered. It is also appropriate to

14 Boberg *The Law of Delict* 18; McKerron *The Law of Delict* 10; Neethling et al 5; Van der Merwe & Olivier 14; Van der Walt *Delict: Principles and Cases* 2, 17.

15 Boberg *The Law of Delict* 18; McKerron *The Law of Delict* 10; Neethling et al 5; Van der Merwe & Olivier 15; Van der Walt *Delict: Principles and Cases* 2.

16 For a general statement and comparison of the fundamentals of the *aquilian* action and the *actio injuriarum* see *Matthews v Young* 1922 AD 492; *Bredell v Pienaar* 1924 CPD 203. The basic principles of liability in the *aquilian* action and the *actio injuriarum* are dealt with in De Jager 347; McKerron *The Law of Delict* 10; Price *Aquilian Liability and the Duty of Care: A Return to the Charge* 182; Van der Merwe 174; Van der Merwe & Olivier 24; Van der Walt *Delict: Principles and Cases* 18.

17 Apart from these two actions, a further application to the law of delict is the *action for pain and suffering* which evolved from Germanic customs. In the *action for pain and suffering*, compensation for injury to personality as a result of the wrongful and negligent or intentional impairment of the bodily or physical-mental integrity is claimed. See generally on the subject *Union Government v Warneke* 1911 AD 657, 665-6; *Hoffa NO v SA Mutual Fire & General Insurance Co Ltd* 1965 (2) SA 944 (C); *Regering van die Republiek van SA v Santam Versekeringsmaatskappy Bpk* 1970 (2) SA 41 (NC); *Government of the Republic of SA v Ngubane* 1972 (2) SA 601 (A); *Strougar v Charlier* 1974 (1) SA 225 (W); *Lutzkie v SAR & H* 1974 (4) SA 396 (W); *Evins v Shield Insurance Co Ltd* 1980 (2) SA 814 (A).

distinguish between a delict and two other similar legal phenomena, namely, crime and breach of contract.

5.3 *DELICT DISTINGUISHED FROM 'CRIME' AND 'BREACH OF CONTRACT'*

Both a delict and a crime are a form of unlawful conduct. The distinction lies in the interest affected and the remedy that the law affords.

5.3.1 *Delict and Crime*

A crime is a criminal act considered primarily as prejudicial to the public interest, whereas a delict is a civil wrong considered as prejudicial to an individual.¹⁸

In the case of a crime, the State, as representative of the community, will institute proceedings in the form of a criminal prosecution which is concerned with punishing the wrongdoer in order to protect society as a whole. The civil action in delict is instituted by the injured person and aimed primarily to compensate the person by compelling the wrongdoer to pay for the harm caused.¹⁹

The primary object of an action in delict is to provide compensation for harm imposed, whereas a criminal prosecution is directed to inflict punishment for the disregard of a duty. Crime and delict must, however, be regarded as complementary, not mutually exclusive conceptions, for some delicts are also crimes and almost all crimes that result in harm to an individual are also delicts.²⁰

18 On the relationship between delictual and criminal liability see McKerron *The Law of Delict* 1-2; Van den Heever 2; Van der Merwe & Olivier 1; Van der Walt *Delict: Principles and Cases* 5-7.

19 McKerron *The Law of Delict* 1.

20 Theft, assault and malicious injury to a person or property are wrongs which will give rise to civil as well as to criminal proceedings. Crime and delict should therefore only be distinguished by having regard to the different nature of criminal and civil proceedings. Boberg *The Law of Delict* 3; McKerron *The Law of Delict* 1; Van der Walt *Delict: Principles and Cases* 5-6.

5.3.2 *Delict and Breach of Contract*

A contract is a legally binding agreement established between the contracting parties or their agents, which gives rise to legal obligations within the parameters of the law.²¹ A contract of employment is essentially one of personal service, which gives rise to duties and obligations on both the employer and the employee.²² Although a breach of contract is a species of civil wrong, it should not be classed as a delict.²³ The rules governing liability for breach of contract differ from the rules governing liability for delict,²⁴ and constitute a special body of law.²⁵

A delict is distinguished from a breach of contract in that a delictual obligation rests upon rules of law independently of the will of the party bound, while a breach of contract is based on an obligation arising from an agreement between the parties which is voluntarily assumed.²⁶ The distinction in the employment situation is evident from the fact that the law, by general rule, imposes on the employer, without his consent, certain delictual obligations, such as the obligation to take reasonable care not to expose his employees to unnecessary foreseeable hazards. The employer may, however, owe towards a particular employee a specific obligation under the employment contract, such as the obligation not to

21 Kerr 1; Treitel 5.

22 Selwyn *Law of Employment* 72.

23 *Lillicrap, Wassenaar & Partners v Pilkington Brothers (SA) (Pty) Ltd* 1985 (1) SA 475 (A) 495H-I.

24 The rules, for example, governing remoteness of damage in contract are different from those which govern it in delict. On the relationship between delictual and contractual liability see Boberg *The Law of Delict* 1 et seq; Erasmus & Gauntlett par 16; Fleming 168 et seq; James & Brown 4 et seq; Macintosh & Norman-Scoble 2-3; McKerron *The Law of Delict* 2; Munkman 82 et seq; Van der Merwe & Olivier 482 et seq; Van Warmelo 227 et seq; *Jockie v Meyer* 1945 AD 354; *Essa v Divaris* 1947 (1) SA 753 (A); *Wellworths Bazaars Ltd v Chandlers Ltd* 1948 (3) SA 348 (W); *Guggenheim v Rosenbaum* (2) 1961 (4) SA 21 (W); *Bristow v Lycett* 1971 (4) SA 223 (A); *Ranger v Wykerd & another* 1977 (2) SA 976 (A); *Pilkington Brothers (SA) (Pty) Ltd v Lillicrap, Wassenaar & Partners* 1983 (2) SA 157 (W); *Lillicrap, Wassenaar & Partners v Pilkington Brothers (SA) (Pty) Ltd* (supra) 475-77.

25 The differences in historical development and contemporary approach to contractual and delictual liability make it convenient to keep these two sources of liability distinct, as South African courts and authors generally do. It may, however, become increasingly difficult to maintain the distinction in the future.

26 Macintosh & Norman-Scoble 2; McKerron *The Law of Delict* 2-3; Munkman 82-3.

instruct the employee to carry heavy equipment, which obligation arises from the employer's own choice and volition.

Although a delict must be distinguished from a breach of contract, it should be observed that the same act or omission may give rise to both a breach of contract and a delict.²⁷ This is the case where the act or omission constitutes both a breach of obligation arising out of a contract and a breach of obligation imposed by law, independently of the contract. If the employer is under a contractual obligation not to instruct an employee to carry heavy equipment, and the employee is subsequently injured as a result of the employer's insistence that he carry heavy equipment, then the employee has a cause of action against the employer both in contract and in delict. The cause of action in contract arises because there is an express obligation on the employer not to instruct the employee to carry heavy equipment. The action in delict arises because the employer is required to ensure the reasonable safety of an employee.

Although the employer's obligation not to expose his employees to unnecessary foreseeable hazards is generally founded in delict, it can also be expressed as an aspect of the contractual relationship if this is advantageous.²⁸ The action in contract is rarely used,²⁹ largely for procedural reasons³⁰ and because the basis of assessment of harm is less beneficial.³¹ It appears that it is optional for an injured employee to claim in either delict or contract. Whenever it

27 *Van Wyk v Lewis* 1924 AD 438, 443; *Donoghue v Stevenson* [1932] AC 562, 609-10.

28 In *Matthews v Kuwait Bechtel Corporation* [1959] 2 QB 57 an employee under an English contract, injured abroad, was held entitled to base his claim on contract to bring it within the jurisdiction of the English courts. See also *Walker v British Guarantee Association* [1852] 18 QB 277; *Smith v Baker & Sons* [1891] AC 325; *SAR & H v Cruywagen* 1938 CPD 219; *Davie v New Merton Board Mills Ltd* [1959] 1 All ER 346, [1959] AC 604; *Quim v Burch Brothers Builders Ltd* [1966] 2 QB 370; *Keys v Shoefayre Ltd* [1978] IRLR 467.

29 In *Wright v Dunlop Rubber Co Ltd* (1973) 13 XIR 255 it was suggested that there are substantive advantages in a contractual action. In this case it was held that although the employer had no duty in tort to rescue an employee from a situation caused by the negligence of a third party, he had a contractual duty of care which would extend to dangers enhanced by his own failure.

30 A procedural advantage of an action in delict may be the greater ease in securing the production of documents.

31 *Munkman* 82-3; *Rideout & Dyson* 96; *Koufos v Czarnikow Ltd* [1969] 1 AC 350.

is necessary for an employee to rely upon the actual terms of a contract, he must sue in contract, but if he does not need to rely on such terms, it is optional for him to sue either in contract or in delict.³² If an employee sues in delict, the onus of establishing negligence is his responsibility,³³ irrespective of the fact that a contract existed between the parties.³⁴

Whatever the nature of action, an injured employee may have to prove negligence.³⁵ An employee who may sue in contract or in delict should frame his action in the alternative. If he adopts this course, it would seem that he may reap the benefit of whichever claim he establishes to be the substantial one. If both claims prove to be substantial, he acquires the advantages attendant upon the superior claim.³⁶

5.4 THE ELEMENTS OF DELICTUAL LIABILITY

5.4.1 Conduct

A prerequisite for delictual liability is that harm must have been caused by means of some *act* or *conduct*.³⁷ According to Boberg,³⁸ an act "is the conduct of a person that is voluntary in the sense that it is, or is capable of being, controlled by that person's will." This implies that the law of delict takes cognizance only of voluntary human conduct. Such conduct may either be in the form of a positive act (commission) or a negative act (omission).³⁹

32 *Van Wyk v Lewis* (supra) 443.

33 *Kotze v Johnson* 1928 AD 320.

34 *Lee v Reynolds* 1928 EDL 367.

35 It may not always be necessary for an employee to prove negligence in order to establish a breach of contract. *Frenkel v Ohlsson's Cape Breweries Ltd* 1909 TS 957, 962-3; *Daly v Chisholm* 1916 CPD 562; *Nel v Dobie* 1966 (3) SA 352 (N); *British Road Services Ltd v AV Crutchley & Co Ltd* [1967] 2 All ER 785, 790.

36 Winfield 81. On the advantage to an employee as far as the onus of proof is concerned of suing in contract rather than in delict see *Manley van Niekerk (Pty) Ltd v Assegai Safaris & Film Productions (Pty) Ltd* 1977 (2) SA 416 (A) 422-3.

37 De Wet & Swanepoel 48 et seq; Neethling et al 21; Van Der Merwe & Olivier 24 et seq; Van der Walt *Delict: Principles and Cases* 57.

38 Boberg *The Law of Delict* 41.

39 De Wet & Swanepoel 49; Neethling et al 21; Van der Merwe & Olivier 25; Van der Walt *Delict: Principles and Cases* 57.

It is incorrect to assume that every act has a positive and negative element, or that all conduct can be categorized as either a commission or an omission.⁴⁰ It is therefore necessary to distinguish between a *commission* and an *omission*.⁴¹

5.4.1.1 *The Distinction between 'Commission' and 'Omission'*

The employer who has control over a dangerous situation and fails to take reasonable precautions to prevent harm to an employee, for example, when the employer instructs an employee to climb onto scaffolding without ensuring his safety, is more likely to be a case of negligent exercise of control (*commission*) than of *omission*.⁴² This must, however, be distinguished from the situation where the employer fails to take precautions against the occurrence of harm, and such failure is not an integral part of positive conduct. The employer who refrains from assisting an employee who is being assaulted by a fellow-employee, constitutes an example of an *omission* because there is a failure to act positively to prevent harm.⁴³

Many *omissions* are also merely indications of legally deficient positive conduct. A situation where the employer instructs an employee to weld iron but does not provide the employee with safety goggles, constitutes a course of positive conduct (*commission*) on the part of the employer, namely, the instruction to perform a dangerous act. The failure to provide safety goggles (*omission*) indicates negligent or deficient positive conduct.⁴⁴ It is, however, a separate issue whether the *omission* in question is wrongful, that is, whether there is a legal duty to act positively.

40 Van der Walt *Delict: Principles and Cases* 60n20.

41 Van der Walt *Delict: Principles and Cases* 58 points out that the distinction between a *commission* and an *omission* is accepted both in the history of the South African law of delict and in legal practice, and further explains why it is difficult to distinguish between these two forms of conduct. See also Boberg *The Law of Delict* 211; *Regal v African Superslate (Pty) Ltd* (supra) 102-3; *Meskin v Anglo-American Corp of SA Ltd* 1968 (4) SA 793 (W); *Minister van Polisie v Ewels* 1975 (3) SA 590 (A).

42 Neethling et al 27; Van der Walt *Delict: Principles and Cases* 58.

43 Cf *Minister van Polisie v Ewels* (supra) 590.

44 Cf Van der Walt *Delict: Principles and Cases* 58.

5.4.2 Wrongfulness

An act which causes harm to another is in itself not sufficient to give rise to delictual liability. For liability to follow, the incident must at least be brought about in a wrongful or legally reprehensible manner.⁴⁵ *Wrongfulness* or *unlawfulness* is therefore "that quality of damage-producing activity which makes it an actionable delict."⁴⁶

In the employment situation, the employer's conduct will be considered wrongful if the conduct constitutes a breach of a *legal duty* under statute or the common law.⁴⁷ The phrase *legal duty* implies that the interest of an employee is protected against the employer's wrongful or negligent conduct.⁴⁸ A *legal duty* is defined as an "obligation, recognized by law, to avoid conduct fraught with unreasonable risk of danger to others."⁴⁹

It is necessary to consider the circumstances under which the employer will be held liable for his failure to comply with a legal duty.

5.4.2.1 Liability for an Omission

If in the particular circumstances a legal duty exists to act positively, and there is a failure to comply with that duty,

45 Boberg *The Law of Delict* 30; Neethling et al 29; Van der Merwe & Olivier 49; Van der Walt *Delict: Principles and Cases* 20.

46 Boberg *The Law of Delict* 30.

47 Cf *Union Government v National Bank of SA Ltd* 1921 AD 121, 128; *Universiteit van Pretoria v Tommie Meyer Films (Edms) Bpk* 1977 (4) SA 376 (T) 387.

48 The prerequisite of a legal duty of care is illustrated in *Haynes v Harwood* [1935] 1 KB 146, 152: "Negligence in the air will not do; negligence, in order to give a cause of action, must be the neglect of some duty owed to the person who makes the claim." In *Kemp & Dougall v Darngavil Coal Co Ltd* 1909 SC 1314, 1319 it was said that "a man cannot be charged with negligence if he has no obligation to exercise diligence." See also *Union Government v National Bank of SA Ltd* (supra) 134; *Cape Town Municipality v Paine* 1923 AD 207; *Palsgraf v Long Island Railroad Co* (1928) 248 NY 339; *Donoghue v Stevenson* (supra) 562-5; *Bottomley v Bannister* [1932] 1 KB 458; *Bourhill v Young* [1943] AC 92, [1942] 2 All ER 396; *Workmen's Compensation Commissioner v De Villiers* 1949 (1) SA 474 (C); *Union Government v Ocean Accident & Guarantee Corp Ltd* 1956 (1) SA 577 (A).

49 Fleming 125.

then the omission to act is wrongful.⁵⁰ An employer of a dynamite factory has a legal duty towards his employees to take the necessary precautions to prevent injury from an explosion.⁵¹ If the employer does not take such precautions, his failure to comply with a legal duty points to the wrongful nature of his omission.⁵²

A failure to act in the absence of a legal duty does not entail liability.⁵³ An employer who does not provide a sub-contractor, who is standing on a scaffold, with the necessary precautionary equipment, is an omission which may be considered lawful. Provided the employer owes no duty to the sub-contractor, no obligation is placed on the employer to prevent the consequent fall of the sub-contractor. Whether an omission is wrongful or lawful is a matter to be determined by the circumstances of a particular case.⁵⁴

To establish wrongfulness is not sufficient to prove liability for an omission. There must also be an element of *fault*, in the sense that the employer ought reasonably to have foreseen and avoided the danger of harm.⁵⁵

5.4.3 *Fault*

Fault or *blameworthiness* is generally accepted as the subjective element of delictual liability.⁵⁶ There are two

50 Roman-Dutch law does accept the principle that an omission to comply with a positive legal duty is actionable. Van der Walt *Delict: Principles and Cases* 29; *Hallivell v Johannesburg Municipal Council* 1912 AD 659, 671.

51 Cf *Silva's Fishing Corporation (Pty) Ltd v Maveza* 1957 (2) SA 256 (A); *Mtati v Minister of Justice* 1958 (1) SA 221 (A); *S v Russell* 1967 (3) SA 739 (N); *S v Van As* 1967 (4) SA 594 (A); *Minister van Polisie v Ewels* (supra) 597; *De Beer v Sergeant* 1976 (1) SA 246 (T) 251.

52 Cf *Victoria East Divisional Council v Pieterse* 1926 EDL 38; *Cremer v Afdelingsraad, Vryburg* 1974 (3) SA 252 (NC); *Minister van Polisie v Ewels* (supra) 597; *Blackwell v Port Elizabeth Municipality* 1978 (2) SA 168 (SECL).

53 In *Le Lievre v Gould* [1893] 1 QB 491, 497 it was said that "(a) man is entitled to be as negligent as he pleases towards the whole world if he owes no duty to them." See generally on the subject *Silva's Fishing Corporation (Pty) Ltd v Maveza* (supra) 264-5; *Peri-Urban Areas Health Board v Munarin* 1965 (3) SA 367 (A) 373; *Minister of Forestry v Quathlamba* 1973 (3) SA 69 (A) 81-2.

54 Neethling et al 48; Van der Walt *Delict: Principles and Cases* 29.

55 Boberg *The Law of Delict* 211.

56 Boberg *The Law of Delict* 269; Neethling et al 103; Van der Merwe & Olivier 111; Van der Walt *Delict: Principles and Cases* 60.

main forms of fault, namely, *intention* and *negligence*. These forms of fault generally refer to the legal blameworthiness for the reprehensible state of mind or conduct for a wrongful act, and are dependent on the evaluation of the factors involved in the particular circumstances of the case.⁵⁷ In safety management, these factors mainly refer to the employer's degree of care exercised at the time of his wrongful conduct. Thus, for example, the employer is negligent if he acted with insufficient care. Wrongful conduct on the part of the employer is therefore an essential prerequisite for the existence of fault.⁵⁸

Any examination of intent and negligence should be preceded by a discussion of *accountability* because fault in the legal sense does not necessarily coincide with moral or ethical blameworthiness.

5.4.3.1 *Accountability*

According to Neethling et al,⁵⁹ a person is *accountable* if "he has the necessary mental ability to distinguish between right and wrong and if he can also act in accordance with such insight."⁶⁰ A person must have the required mental ability to appreciate the nature and possible consequences of conduct in a particular situation and the ability to take precautionary or avoiding action. The element of *accountability* therefore requires a person to appreciate the danger involved in a particular situation, the ability to avoid such danger or take the necessary precautionary measures, and the ability to control impulsive conduct.⁶¹ Subjective factors such as the person's knowledge, experience, training, mental development and maturity must all be taken into account.⁶² *Accountability*

57 Boberg *The Law of Delict* 268-9; Neethling et al 103; Van der Walt *Delict: Principles and Cases* 60.

58 Wrongful conduct is an essential requirement for the existence of fault because it would be illogical to find fault on the part of an employer who has acted lawfully.

59 Neethling et al 104.

60 See also Van der Merwe & Olivier 112; Van der Walt *Delict: Principles and Cases* 60.

61 Van der Walt *Delict: Principles and Cases* 61.

62 Neethling et al 104-5; Van der Walt *Delict: Principles and Cases* 61; *Jones v Santam Versekeringsmaatskappy Bpk* 1965 (2) SA 542 (A); *Neuhaus v Bastion Insurance Co Ltd* 1968 (1) SA 398 (AD).

on the part of the wrongdoer is therefore a prerequisite for the existence of fault.

The application of the element of *accountability* in the employment situation reveals that since the employer is engaged in an organization for his own profit,⁶³ and has control over his employees and potentially dangerous systems of production, he owes those employees a legal duty to take reasonable care for their safety. This necessarily implies that the employer cannot escape fault on the basis that he lacks *accountability* for his intentional or negligent conduct.

5.4.3.2 *Intent*

Intent is a legally reprehensible state of mind consisting of the direction of the will at a particular consequence which a person knows to be wrongful.⁶⁴ To produce that consequence may be:

- (a) the person's primary objective; or
- (b) a necessary and foreseen consequence of attaining his primary objective; or
- (c) a possible and foreseen consequence of achieving his primary objective to which he reconciles himself.⁶⁵

The employer's wrongful conduct will seldom be founded upon intention but will be mainly in the form of negligence.

5.4.3.3 *Negligence*

The employer's conduct is *negligent* if he does not observe that degree or standard of care which the law of delict requires.⁶⁶ To act negligently is to behave carelessly,

⁶³ *Silva's Fishing Corporation (Pty) Ltd v Maweza* (supra) 256-7 was a case involving an omission on the part of the wrongdoer. The court held that there was legal duty to act which arose, inter alia, because the wrongdoer was engaged in an organization for his own profit.

⁶⁴ Boberg *The Law of Delict* 268; Neethling et al 105; Van der Merwe & Olivier 115; Van der Walt *Delict: Principles and Cases* 62; *Dantex Investment Holdings (Pty) Ltd v Brenner* 1989 (1) SA 390 (A) 396.

⁶⁵ Boberg *The Law of Delict* 268-9.

⁶⁶ Neethling et al 111; Van der Walt *Delict: Principles and Cases* 65.

inadvertently or absentmindedly, namely, without attention.⁶⁷ The non-negligent employer must not only pay attention but must adapt his conduct to the demands of the situation. This implies that the employer must be conscious of those features of his situation that are relevant to the performance of what he is doing, without harmful and unintended consequences.

Negligence as a form of fault must not be confused with an omission which is a form of conduct. Both an omission and a desired positive act may be negligent. The relevance of negligence, therefore, is not restricted to omissions.

The negligence issue is discussed in Chapter 6 where it will be shown that the conduct of the employer is measured objectively in terms of the standard of the *reasonable employer* in labour relations. When the employer should have foreseen the likelihood of harm occurring and guarded against its occurrence, as the reasonable employer would have done in the circumstances, but failed to take such steps, the employer's conduct is considered to be negligent.

5.4.3.4 *Vicarious Liability*

The rapid growth of industrial and technological development exposes employees to a greater range of hazards against which they can hardly protect themselves. The requirement to protect employees against such hazards stresses the need for the development of a field of liability without fault coupled with the traditional area of liability based on fault.⁶⁸ An element of the axiom *liability without fault* which is recognized in South African law and which is particularly relevant to the parameters of the employer's obligation in safety management is the principle known as the employer's *vicarious liability*.⁶⁹

⁶⁷ Mogridge 271; Neethling et al 111.

⁶⁸ Neethling et al 301-3.

⁶⁹ See in general on the subject Boberg *The Law of Delict* 332; Neethling et al 312-6; Scott *Middellike Aanspreeklikheid in die Suid-Afrikaanse Reg* 199 et seq; Van der Merwe & Olivier 508 et seq.

According to Barlow,⁷⁰ *vicarious liability* in delict is:

"the liability of one person for the delictual acts of another, such liability arising from the relationship between the person who commits the delict and the person who is held liable, but existing independently of any relationship between the injured party and the person who is held liable, and of any personal fault, mediate or immediate, on the part of the latter."⁷¹

If an employee performs a negligent act which causes harm to a fellow-employee or third party, the employer will be liable if such harm was reasonably foreseeable. The employer will, however, not be liable if such harm could not have been reasonably foreseen.⁷² Although the employer may not be liable in the latter case, he may be *vicariously liable* for the negligent act of his employee. Therefore, if an employee injures a fellow-employee, the injured employee would have a course of action against the employer, not in his capacity as the injured employee's employer, but in his capacity as the employer of the negligent employee.⁷³

The principle of the employer's *vicarious liability* did not generally apply in South African law, but was developed from English law.⁷⁴ The rationale for this liability is controversial, and several theories have been proposed, namely:

- (a) the *culpa in eligendo* theory, which proposes that the employer's liability rests on his own fault;⁷⁵
- (b) the *interest or profit* theory, which argues that the employer, as the recipient for the benefits or potential

⁷⁰ Barlow 1.

⁷¹ Cf Neethling et al 312.

⁷² Scott *Middellike Aanspreeklikheid in die Suid-Afrikaanse Reg* 48; *Van Deventer v Workmen's Compensation Commissioner* (supra) 28; *Minister of Police v Mbilini* 1983 (3) SA 705 (A).

⁷³ *Bhoer v Union Government & another* (supra) 582; *Pettersen v Irwin & Johnson Ltd* (supra) 255; *Vogel v SAR* (supra) 452.

⁷⁴ Van Der Merwe & Olivier 508-9.

⁷⁵ In *Feldman (Pty) Ltd v Mall* (supra) 738 and *Ables Groceries (Pty) Ltd v Di Ciccio* 1966 (1) SA 834 (T) 839 the courts strongly opposed this argument.

benefits of the services of an employee, must also bear the burdens;⁷⁶

- (c) the *identification* theory, which identifies an employee as the employer's arm, namely, if an employee acts, the employer, in fact, is acting;⁷⁷
- (d) the *solvency* theory, which maintains that an employee will usually be unable to meet any substantial claim for damages, whereas the employer will normally have the financial resources to pay for such claims;⁷⁸ and
- (e) the *risk or danger* theory, which states that the work which is entrusted to an employee creates certain risks of prejudice,⁷⁹ for which the employer, on the grounds of fairness and justice, should be held liable as against prejudiced outsiders.⁸⁰ This theory is suggested as the true rationale for the employer's vicarious liability.⁸¹

The employer is not vicariously liable for the negligence of an independent contractor,⁸² but may be so liable in cases where he owes a direct obligation to the person injured, where the obligation is one which cannot be delegated to the contractor.⁸³

In establishing whether the employer is vicariously liable, the employee must, when the negligent act is committed, act within the scope and course of his employment.⁸⁴ If the employer expressly authorizes the negligent act, or whether he authorizes the act and the employee performs it in a negligent

76 Neethling et al 302, 312. Van der Walt *Risiko-aanspreeklikheid uit Onregmatige Daad* 203 et seq contends this justification of liability without fault as unacceptable.

77 Neethling et al 312.

78 Neethling et al 312.

79 The phrase *risks of prejudice* refers to the commission of delicts.

80 Arthurs et al 92-3; Atiyah 3-27; Selwyn *Law of Employment* 94; Scott *Middellike Aanspreeklikheid in die Suid-Afrikaanse Reg* 30, 37; *Minister of Police v Rabie* (supra) 134-5.

81 Neethling et al 3; Scott *Middellike Aanspreeklikheid in die Suid-Afrikaanse Reg* 30 et seq; Van der Walt *Strict Liability in the South African Law of Delict* 55 et seq.

82 Scott *Middellike Aanspreeklikheid in die Suid-Afrikaanse Reg* 79 et seq; Van der Merwe & Olivier 510; *Smit v Workmen's Compensation Commissioner* 1979 (1) SA 51 (A).

83 The employer may be vicariously liable for not providing a safe system of work, or for not ensuring compliance with statutory safety standards (*Wilsons & Clyde Coal Co Ltd v English* [1938] AC 57, [1937] 3 All ER 628 (HL)). See also *Holliday v National Telephone Co* [1899] 2 QB 392; *Hamilton v Farmers'* [1953] 3 DLR 382 (NSSC); *Salsbury v Woodland* [1970] 1 QB 324.

84 Neethling et al 314; Scott *Middellike Aanspreeklikheid in die Suid-Afrikaanse Reg* 135 et seq.

manner,⁸⁵ he will be liable.⁸⁶ If the employer expressly forbids the act, he may still be vicariously liable if the act was done in the scope and course of the employee's employment.⁸⁷

5.4.4 Causation

A further requirement for delictual liability is a *causal nexus* between the employer's conduct and the harm sustained by an injured employee.⁸⁸ The employer can therefore not be held liable if his conduct did not contribute to the harm. The question whether there is a *causal nexus* in a particular case, is a question of fact which must always be answered in the light of the available evidence.⁸⁹ The dual problem surrounding the delictual element of *causation* is authoritatively enunciated in *Minister of Police v Skosana*:⁹⁰

"Causation in the law of delict gives rise to two rather distinct problems. The first is a factual one and relates to the question whether the negligent act or omission in question caused or materially contributed to ... the harm giving rise to the claim. If it did not, then no legal liability can arise ... If it did, then the second problem becomes relevant, viz whether the negligent act or omission is linked to the harm sufficiently closely or directly for legal liability to ensue or whether, as it is said, the harm is too remote. This is basically a juridical problem in which considerations of legal policy may play a part."

Harm caused by the employer's wrongful and intentional or negligent conduct is recoverable. Whether the word *harm*

85 *Sheppard Publishing v Press Publishing* (1905) 10 OLR 243 (DC); *Lloyd v Grace Smith* [1912] AC 716 (HL); *Canadian Pacific Railway Co v Lockhart* [1942] AC 591, [1942] 2 All ER 464 (PC); *Century Insurance Co v Northern Ireland Road Transport Board* [1942] AC 509.

86 See in general *Feldman (Pty) Ltd v Mall* (supra) 741; *Minister of Police v Rabie* (supra) 134.

87 Conduct which arises within the scope and course of an employee's employment is examined supra 49-53.

88 Boberg *The Law of Delict* 380 et seq; Neethling et al 145 et seq; Van der Walt *Delict: Principles and Cases* 94 et seq.

89 Neethling et al 145; Van der Walt *Delict: Principles and Cases* 94-5.

90 *Minister of Police v Skosana* 1977 (1) SA 31 (A) 34.

should include only harm of a pecuniary nature, or both harm of a pecuniary and non-pecuniary nature, is a subject of uncertainty.

5.4.5 *Harm*

According to Van der Walt,⁹¹ the word *harm* is defined as:

"'n Afname in die nuttigheid van 'n getroffe vermoënsbestanddeel of vermoënstruktuur vir die planmatige bevrediging van die betrokke vermoënshebbende se erkende behoeftes."

Van der Walt, with whom Boberg,⁹² and Van der Merwe and Olivier⁹³ agree, argues that the word *harm* only refers to harm of a pecuniary nature because pecuniary loss is fundamentally different from non-pecuniary loss, and there is no meaningful common denominator which may include both these concepts.

Neethling et al,⁹⁴ however, state that:

"damage is a comprehensive concept with pecuniary and non-pecuniary ... loss as its two mutually exclusive components."

Neethling et al, together with McKerron,⁹⁵ Pauw⁹⁶ and Pont,⁹⁷ accept a wider meaning of the word *harm* which includes both harm of a pecuniary and non-pecuniary nature. In order to establish the correct approach, it is necessary to clarify the meaning of the concepts *pecuniary* and *non-pecuniary loss*.

91 Van der Walt *Die Voordeeltorekeningsreël - Knooppunt van Uiteenlopende Teorieë oor die Oogmerk met Skadevergoeding* 3.

92 Boberg *The Law of Delict* 485.

93 Van der Merwe & Olivier 179.

94 Neethling et al 181.

95 McKerron *The Law of Delict* 51.

96 Pauw *Aspects of the Origin of the Action for Pain, Suffering and Disfigurement* 248.

97 Pont *Vergoeding van Skade op grond van 'Loss of Expectation of Life'* 12.

5.4.5.1 *Pecuniary Loss*

The word *pecuniary* is defined by the Concise Oxford Dictionary⁹⁸ as "(consisting) of money." Boberg⁹⁹ defines *pecuniary loss* as "a calculable pecuniary loss or diminution in (the plaintiff's) patrimony (estate) resulting from the defendant's unlawful and culpable conduct." Reinecke¹⁰⁰ refers to the word *patrimony* as consisting of the various patrimonial rights (personal rights, real rights and immaterial property rights) as well as certain expectations of such rights. An accident may diminish the patrimony in various ways¹⁰¹ and cause damage, for example, an employee who incurs medical expenses after suffering an injury.

The concept *pecuniary loss* relates to material damage which is calculable in monetary terms, such as medical expenses incurred as a result of physical injury. By implication the pecuniary nature of harm refers to physical harm but excludes an injury to personality, which is of a non-pecuniary nature.¹⁰²

5.4.5.2 *Non-Pecuniary Loss*

Neethling et al¹⁰³ define *non-pecuniary loss* as "the harmful impairment (or factual disturbance) of the legally protected personality interests of a person which does not affect his economic position."¹⁰⁴ The harm referred to is the infringement of a personality interest such as bodily integrity, mental distress, and emotional shock.¹⁰⁵

98 The Concise Oxford Dictionary 755.

99 Boberg *The Law of Delict* 475.

100 Reinecke 28, 56.

101 Reinecke 35-7.

102 *South British Insurance Co Ltd v Harley* 1957 (3) SA 368 (A).

103 Neethling et al 195.

104 This definition was adopted in *Edouard v Administrator, Natal* 1989 (2) SA 368 (D) 386. See also McKerron *The Law of Delict* 3fn21.

105 Boberg *The Law of Delict* 475; Neethling et al 178, 198.

5.4.5.3 *Pecuniary and Non-Pecuniary Nature of Harm*

In *Cape Town Municipality v Paine*¹⁰⁶ the word *harm* was only regarded as of a pecuniary nature. However, in *Perlman v Zoutendyk*,¹⁰⁷ harm of both a pecuniary and non-pecuniary nature was recognized. Although the majority judges in *Herschel v Mrupe*¹⁰⁸ disapproved the reasoning in *Perlman v Zoutendyk*, none of them held that non-pecuniary loss can never be recovered in an action for negligence.

The absolute requirement of physical harm to found delictual liability was rejected by the Appellate Division in *Bester v Commercial Union Versekeringsmaatskappy van Suid-Afrika Bpk.*¹⁰⁹ The court found that it was unnecessary to distinguish between physical and psychological harm, necessitated by the requirement of emotional shock, because the brain and nervous system were as much a part of the physical body as an arm or a leg.

In the light of the above, the question whether the word *harm* should be interpreted in a narrow sense including only harm of a pecuniary nature, or whether it has a wider meaning which includes harm of a pecuniary and non-pecuniary nature, should be a matter for determination according to the circumstances of the particular case with no fixed rules.¹¹⁰

5.5 SUMMARY

The employer's common law obligation concerning safety management is founded in delict, although it may be expressed as an aspect of the contractual relationship. The basic principle of this obligation, which is subject to the provisions of s 7 of the WCA, is that if the employer causes

106 *Cape Town Municipality v Paine* (supra) 207.

107 *Perlman v Zoutendyk* 1934 CPD 151.

108 *Herschel v Mrupe* 1954 (3) SA 464 (A).

109 *Bester v Commercial Union Versekeringsmaatskappy van SA Bpk* 1973 (1) SA 769 (A) 779.

110 See further on the subject Lawson 36; McKerron *The Duty of Care in South African Law* 195-6; Morison 9; Neethling et al 182-4; Price *Aquilian Liability and the Duty of Care: A Return to the Charge* 143-6; Reinecke 56.

harm to an employee as a result of his wrongful and blameworthy conduct, he will be liable for damages.

The reasonableness of the employer's conduct is generally established by means of the delictual element of *fault*, in the form of *negligence*. It is with regard to this element of *fault* that the special or particular category of the reasonable man, namely, the reasonable employer, will be featured.

CHAPTER 6

THE REASONABLENESS OF THE EMPLOYER'S CONDUCT

6.1 INTRODUCTION

The means of establishing the fairness or reasonableness of human conduct is based on the standard of the *reasonable man*.¹ The *reasonable man* is a normal, average person,² who is presumed to be sane, sober, adult, and socialized into a Western European culture.³ He is not expected to be extraordinarily careful, talented or developed.⁴ The *reasonable man* in labour relations as the term refers to the employer means the *reasonable employer*, and the employee as the *reasonable employee*.

Labour relations standards or guidelines for good labour practice law imply the equitable balancing or bringing into equilibrium of conflicting interests or expectations. To determine the standard of reasonableness of the employer's conduct in labour relations, an objective standard is an imperative.⁵ The standard of reasonableness as the criterion of negligence may therefore be regarded as an objective,⁶ rather than a subjective,⁷ fact.

1 Boberg *The Law of Delict* 274; Cooper 48-9; Neethling et al 111; Poolman *Principles of Unfair Labour Practice* 46; Van der Walt *Delict: Principles and Cases* 65-7.

2 In *Herschel v Mrupe* (supra) 490 the hypothetical *reasonable man* was characterized as a person who "ventures out into the world, engages in affairs and takes reasonable chances ... takes reasonable precautions to protect his person and property and expects others to do likewise." He displays neither "the foresight of a Hebrew prophet" in anticipating harm nor "the agility of an acrobat" in avoiding it. See Van der Merwe & Olivier 128; *Glasgow Corporation v Muir* [1943] AC 448, 457; *Coetzee & Sons v Smit* 1955 (2) SA 553 (A) 559; *Broom & another v Administrator, Natal* 1966 (3) SA 505 (D), 516; *Van Aswegen v Minister van Polisie en Binnelandse Sake* 1974 (1) PH J1 (T); *S v Burger* 1975 (4) SA 877 (A); *Minister van Vervoer v Bekker* 1975 (3) SA 128 (O).

3 Heyns 281; Mogridge 268; *Glasgow Corporation v Muir* (supra) 457.

4 Poolman *Principles of Unfair Labour Practice* 46.

5 Poolman *Principles of Unfair Labour Practice* 16; *Van Niekerk v Atoomenergiekorporasie van SA Bpk* unreported case NH 13/2/2632 38; *National Union of Mineworkers & others v Winterveldt Chrome Mines Ltd* unreported case NH 13/2/3991 3; *Van Neel v Jungle Oats Co* unreported case NHK 11/2/170.

6 Dendy *A Fresh Perspective on the Unforeseeable Plaintiff* 60; James & Brown 48; McKerron *The Law of Delict* 25; Pollock 336; Poolman *Principles of Unfair Labour Practice* 46-7; *Jones v Santam Versekeringsmaatskappy Bpk* (supra) 551E-G.

7 There are strong objections to a subjective test of reasonableness, the most obvious of which is its failure to indicate a standard by which the employer's conduct is to be judged. Hunt 375-9.

The reasonableness or negligence of the employer's conduct arises from or is caused by some act or omission. The objective test for such alleged reasonable or negligent behaviour should be the standard of the *reasonable employer* in labour relations.⁸

6.2 THE STANDARD OF THE REASONABLE EMPLOYER

The employer is required to adhere to a single standard of care,⁹ namely, the care that would be shown in the circumstances of the case by the reasonable employer.

6.2.1 The Standard of Care

The standard of care "is a standard which is one and the same for everybody under the same circumstances."¹⁰ Although only a single standard of care is required, it may demand greater or lesser precautionary measures depending on the nature of the particular risk involved. The degree of care¹¹ which the reasonable employer exercises will therefore vary according to the circumstances of the case.

The required standard of care is often erroneously formulated in terms of a *duty*, such as a "duty to exercise constant visual supervision".¹² This assumption is incorrect because the required standard of care does not have the status of a legal principle or rule.¹³ The word *duty* should be confined

⁸ Rideout & Dyson 195.

⁹ Cooper 49; Van der Walt *Delict: Principles and Cases* 65; *Cape Town Municipality v Paine* (supra) 230; *Goode v SA Mutual Fire & General Insurance Co Ltd* 1979 (4) SA 301 (W) 305G.

¹⁰ *Jones v Santam Versekeringsmaatskappy Bpk* (supra) 551G. See also Fleming 112; Heuston & Buckley 249; *Transvaal Provincial Administration v Coley* 1925 AD 24, 27-8; *Dukes v Martinhusen* (supra) 22; *Coetzee & Sons v Smit* (supra) 559-60; *Gordan v Da Mata* 1969 (3) SA 285 (A) 289; *Griffiths v Netherlands Insurance Co of SA Ltd* 1976 (4) SA 691 (A) 695; *Buys v Lennox Residential Hotel* 1978 (3) SA 1037 (C).

¹¹ The degree of care is a question of fault and not of wrongfulness. Neethling & Potgieter 84, 86 stress the different application of the reasonableness criterion to wrongfulness and fault respectively. The distinction is also made in *Regal v African Superslate (Pty) Ltd* (supra) 111-12; *Minister van Polisie v Ewels* (supra) 597.

¹² *Rusere v The Jesuit Fathers* 1970 (4) SA 537 (R) 541. Cf *Farmer v Robinson Gold Mining Co Ltd* 1917 AD 501, 544-5 (a duty to fence in a machine); *Transvaal & Rhodesian Estates Ltd v Golding* 1917 AD 18, 25 ("a duty to fill up or to fence the spot").

¹³ Scott *Safety and the Standard of Care* 166; Van der Walt *Delict: Principles and Cases* 66.

to a description of the legal duty owed to an employee, and the phrase *standard of care* should be directed to the application of the degree of care required in the circumstances of the case.¹⁴

The phrase *standard of care* does not denote that the employer is required to guarantee his employees absolute safety under all circumstances of employment.¹⁵ The employer need not take every possible precaution to avoid causing harm to his employees. He is therefore not bound to furnish the safest machinery, neither to provide the best possible means for its operation, in order to relieve him from his safety obligation.

Attributes such as knowledge and skill have a bearing on the employer's conduct in the management of safety, and must therefore be considered.

6.2.2 *Knowledge and Skill*

The reasonable employer is presumed to have reasonable knowledge which will enable him to perceive and appreciate the harmful potentialities of certain courses of conduct.¹⁶ This means that he should possess at least the minimum knowledge concerning:

- (a) the qualities and habits of employees; and
- (b) the qualities, characteristics and capacities of things and forces in so far as they are matters of common knowledge at a given time in a particular community.¹⁷

The reasonable employer must have the reasonable degree of alertness and concentration necessary for using his senses to

¹⁴ *SAR v Van Vuuren* 1936 AD 37, 43; *Manderson v Century Insurance Co Ltd* 1951 (1) SA 533 (A) 543-4; *S v Van Deventer* 1963 (2) SA 475 (A) 480-2.

¹⁵ *Titus v Bradford* [1924] 36 ALR 1480 cited in *Barker v Union Government* 1930 TPD 120.

¹⁶ Van der Walt *Delict: Principles and Cases* 69.

¹⁷ The reasonable employer would be assumed to know about matters of everyday experience, such as the operation of well-known natural laws (such as the law of gravity), the dangers attached to explosives or electricity, and that certain common commodities are dangerous, poisonous or inflammable (such as alcohol or petrol). Herbert 12; Street 126; Van der Walt *Delict: Principles and Cases* 69.

perceive his surroundings and recognize any hazard involved. He must also, to a reasonable degree, have the power to correlate past experience and knowledge with the specific facts of a situation in order to perceive and judge the risks involved.¹⁸

Skill, on the other hand, is that special competence which is not part of the ordinary character of the reasonable employer but the result of aptitude developed by special training and experience.¹⁹ Lack of knowledge or skill is, per se, not negligence. Nevertheless, an employer who engages in a profession which demands special knowledge or skill should have the skilled knowledge required of his profession.²⁰ He is also expected to keep reasonably abreast of current literature or knowledge concerning the hazards of modern production processes and means available to eliminate or minimize them,²¹ but is not expected to know of matters known only in specialist circles.²²

A greater degree of care may be expected of an employer who has greater than average knowledge or skill with regard to the risks involved in a particular employment situation.²³ Such an employer may be required to exercise his superior qualities in a manner reasonable under the circumstances. The legal standard of care in effect becomes that of the reasonable employer endowed with the employer's particular superior qualities.

18 Van der Walt *Delict: Principles and Cases* 69-70.

19 Fleming 99.

20 Munkman 36; Van der Walt *Delict: Principles and Cases* 66; *Van Wyk v Lewis* (supra) 443-4; *Brown v Hunt* 1953 (2) SA 540 (A) 545B-C; *Mouton v Die Mynwerkersunie* 1977 (1) SA 119 (A) 142G-H.

21 *Heuston & Buckley* 249; *Salmond* 250; *Brown v Hunt* (supra) 540; *Wright v Dunlop Rubber Co Ltd* (supra) 255; *Cartwright v Sankey* (1973) 14 KIR 349; *Palm v Elsley* (1974) 2 SA 381 (C); *Griffiths v Netherlands Insurance Co of SA Ltd* (supra) 691; *Mouton v Die Mynwerkersunie* (supra) 119; *Smith v Inglis* (1978) 83 DLR 215; *Thompson v Smiths Shiprepairers Ltd* [1984] QB 405.

22 *General Cleaning Contractors Ltd v Christmas* [1953] AC 180, 189-90, [1952] 2 All ER 1110, 1114-5; *Riddick v Weir Housing Corporation Ltd* 1971 SLT 24; *Wallhead v Ruston & Hornsby Ltd* (1973) 14 KIR 285.

23 *Stern v Podbrey* 1947 (1) SA 350 (C) 364; *Stokes v Guest, Keen & Nettlefold (Bolts & Nuts) Ltd* [1968] 1 WLR 1776, 1783; *Cartwright v Sankey* (supra) 349; *Clark v Welsh* 1976 (3) SA 484 (A) 486; *Smith v Inglis* (supra) 215.

Similarly, an employer who engages in a profession, trade, calling or any other activity which demands special knowledge and skill must not only exercise reasonable care, but also measure up to the standard of competence of the reasonable employer professing such knowledge and skill.

The test for determining whether the employer acted reasonably or negligently in the management of safety is, for present purposes, referred to as the *reasonable employer* test.

6.2.3 *The Reasonable Employer Test*

In order to achieve the greatest possible measure of accuracy and certainty, the subjective conduct of the employer must be made subject to a test of an objective standard.²⁴ This implies that the conduct of the employer must be measured in terms of what a reasonable employer in labour relations ought to do, should do, or ought not to do having regard to the merits and the circumstances surrounding the case.

The reasonable employer test is not purely objective,²⁵ since no form of behaviour can be absolutely nor truly objective. No society, except as a utopian ideal, could tolerate absoluteness or true objectiveness. Some balance must be exercised between that which is absolute and that which is humanly objective. Should the conduct of the employer therefore fail to measure up to the test of perfect objective reasonableness where the *reasonable employer* would also fail, his conduct would not be judged unreasonable.²⁶

The test incorporates a measure of subjectivity in so far as it takes into account the circumstances in which the employer found himself. *Circumstances* relate to "the factual state of

²⁴ Poolman *Principles of Unfair Labour Practice* 11.

²⁵ Poolman *Principles of Unfair Labour Practice* 46.

²⁶ Poolman *Principles of Unfair Labour Practice* 46.

affairs surrounding and affecting a labour practice."²⁷
According to Poolman:²⁸

"The subjective element relates to the class of persons to which the person belongs. His conduct is then measured against that of the reasonable member of that class. For example, when applying the 'reasonable test' to a child, certain adaptations will have to be made. Reasonableness is then not determined according to whether the child acted as a reasonable man, but rather whether he acted as a 'reasonable child' in the circumstances."

The reasonable employer is required to conduct himself according to the circumstances of the "relative profession and how the 'reasonable professional man', ought to conduct himself, eg the 'reasonable plumber', doctor, dentist, etc."²⁹ A higher degree of skill and competence is therefore required of the *reasonable employer* than, for example, the *reasonable child*.

The reasonable employer test prescribes rules of "conduct which in all fairness may be expected of a person to subscribe to the requirements of the class of person of which he is a member or party,"³⁰ namely, the custom and practice accepted in industry. *Reasonableness* is therefore concerned with both the subjective evaluation of the circumstances of a labour practice and the objective standard demanded of the reasonable employer in labour relations.

Since the reasonable employer is defined in terms of an objective standard, what the employer may regard as reasonable is not relevant to the question of his negligence.³¹ The test

27 Poolman *Principles of Unfair Labour Practice* 195.

28 Poolman *Principles of Unfair Labour Practice* 47.

29 Poolman *Principles of Unfair Labour Practice* 47. Cf Hosten 478; McKerron *The Law of Delict* 35-9; Scott *Safety and the Standard of Care* 168-71; Van der Walt *Delict: Principles and Cases* 70-2.

30 Poolman *Principles of Unfair Labour Practice* 47.

31 *Sierborger v SAR & H* 1961 (1) SA 498 (A) 505A; *S v Mosia* 1975 (4) SA 65 (T) 67; *AA Mutual Insurance Association Ltd v Manjani* 1982 (1) SA 790 (A) 796G-H; *Vorster v AA Mutual Insurance Association Ltd* 1982 (1) SA 145 (T) 153C-D.

is authoritatively and comprehensively set out in *Kruger v Coetzee*:³²

"For the purposes of liability (negligence) arises if -

(a) a (reasonable employer) in the position of the (employer);

(i) would foresee the reasonable possibility of his conduct injuring (an employee) in his person or property and causing him patrimonial loss; and

(ii) would take reasonable steps to guard against such occurrence; and

(b) the (employer) failed to take such steps (failed to exercise the standard of care)."³³

To sum up, the steps and precautionary measures which the reasonable employer would take in the particular circumstances establish the actual standard of care required, and the employer's failure to take such steps indicates his non-compliance with this standard, which raises the question of negligence.

The two prerequisites for the determination of reasonableness or negligence are the reasonable foreseeability and preventability of harm,³⁴ both of which concepts require discussion.

6.3 THE REASONABLE FORESEEABILITY OF HARM

Before negligence can be established it must be shown that the harm was *reasonably foreseeable*, namely, that the reasonable employer in the same circumstances as the employer would have foreseen the likelihood of harm occurring.³⁵

32 *Kruger v Coetzee* 1966 (2) SA 428 (A) 430.

33 Cf *Nicholson v Eastern Rand Proprietary Mines Ltd* 1910 WLD 235, 237-8; *Barker v Union Government* (supra) 128-9; *Van Heerden v SA Pulp & Paper Industries Ltd* 1946 AD 382, 385; *Union Government v Ocean Accident & Guarantee Corporation Ltd* (supra) 577; *Peri-Urban Areas Health Board v Munarin* (supra) 367; *MacDonald v General Motors SA (Pty) Ltd* 1973 (1) SA 232 (E) 234; *Protea Assurance Co Ltd v Matinise* 1978 (1) SA 963 (A) 972F; *Murray v UNISWA* 1979 (2) SA 825 (D) 832F.

34 Boberg *The Law of Delict* 274; Neethling et al 118; Van der Walt *Delict: Principles and Cases* 68.

35 *Farmer v Robinson Gold Mining Co Ltd* (supra) 522; *Transvaal & Rhodesian Estates Ltd v Golding* 1917 AD 18; *Joubert v SAR* 1930 TPD 154; *Wasserman v Union Government* 1934 AD 228, 231.

6.3.1 *The Nature of the Foreseeable Harm*

Negligence is based not only on whether the incident was foreseeable but also on whether there was a reasonable likelihood of harm occurring.³⁶ The word *likelihood* denotes "a possibility of harm to another against the happening of which a reasonable man would take precautions."³⁷

The *reasonable foreseeability of harm* extends to all harm which may arise out of and in the course of an employee's employment, but does not extend to harm which may occur beyond the scope of such employment.³⁸ Only the general nature or the kind of harm which actually occurred is required to be reasonably foreseeable.³⁹ It is not a requirement that the actual consequence of the harm,⁴⁰ its degree or extent,⁴¹ or the particular manner of its occurrence⁴² should have been reasonably foreseen.

The employer is required to "guard against reasonable probabilities, but (is) not bound to guard against fantastic possibilities."⁴³ However, the fact that the harm which has occurred is unique in character, or has happened previously on a minimal number of occasions, does not necessarily mean that the employer is under no obligation to take precautions

36 *Chapman v Hearse* [1961] 106 CLR 112, 155.

37 *Joffe & Co Ltd v Hoskins & another* 1941 AD 431, 451.

38 *Supra* 49-53.

39 *Harvey v Singer Mfg Co Ltd* 1960 SLT 178, 1960 SC 155; *Hughes v Lord Advocate* [1963] AC 837, [1963] 1 All ER 705; *Doughty v Turner Mfg Co Ltd* [1964] 1 QB 518, [1964] 1 All ER 98; *Robinson v Roseman* 1964 (1) SA 710 (T) 715; *S v Bernardus* 1965 (3) SA 287 (A) 302; *Kruger v Van der Merwe* 1966 (2) SA 266 (A); *Botes v Van Deventer* (*supra*) 182; *Overseas Tankship (UK) Ltd v The Miller Steamship Co (Pty) Ltd, The Wagon Mound (No 2)* [1967] 1 AC 617, [1966] 2 All ER 709; *Tremain v Pike* [1969] 1 WLR 1556.

40 *Herschel v Mrupe* (*supra*) 474.

41 *Herschel v Mrupe* (*supra*) 474; *Robinson v Roseman* (*supra*) 715; *Botes v Van Deventer* (*supra*) 190-1.

42 *Robinson v Roseman* (*supra*) 715; *S v Bernardus* (*supra*) 307; *Kruger v Van der Merwe* (*supra*) 266; *Portwood v Svamvur* 1970 (4) SA 8 (RA) 16-7; *Da Silva v Coutinho* 1971 (3) SA 123 (A) 148; *Manuel v Holland* 1972 (4) SA 454 (R); *BAT Rhodesia Ltd v Fawcett Security Organization (Salisbury) Ltd* 1972 (4) SA 103 (R); *Minister van Polisie en Binnelandse Sake v Van Aswegen* 1974 (2) SA 101 (A) 108.

43 The employer is not expected to guard against hazards which are exceptional or unique, or which no reasonable employer is expected to anticipate. *Blyth v Birmingham Waterworks Co* (1856) 11 Exch 781; *Smith v Baker & Sons* (*supra*) 325; *Fardon v Harcourt-Rivington* [1932] 146 LT 391, 392; *Bolton v Stone* [1951] AC 850, [1951] 1 All ER 1078; *Close v Steel Co of Wales Ltd* [1962] AC 367, [1961] 2 All ER 953; *Bruggemann v Ace Nominees* (1987) 41 SASR 25.

against it.⁴⁴ The employer will be required to take precautions if the harm actually complained of, though unforeseeable, ensues upon harm of a similar kind which could have been anticipated.⁴⁵ In exceptional circumstances foresight with regard to improbable events may be demanded.⁴⁶

That which can be foreseen depends on the employer's knowledge at the time of the accident, namely, either what the employer actually knows, or what the reasonable employer in his position should know.⁴⁷ If with such knowledge no risk can be foreseen, there is no obligation on the employer to take the necessary safety precautions. Within the limits of what is foreseeable, human conduct must be taken into account. This includes the probability that a hazard may be created or magnified by the negligence of another person,⁴⁸ for example, when experience indicates such negligence to be common.⁴⁹

It is not possible to formulate exact legal criteria for the determination of the reasonable foreseeability of harm.⁵⁰ Such foreseeability will depend on the degree of probability of the manifestation of the harm relative to the circumstances of the case.⁵¹ The greater the probability that harm will occur, the easier it will be to establish that such harm was reasonably foreseeable.⁵²

44 *Grant v Australian Knitting Mills Ltd* [1936] AC 85; *Protheroe v Railway Executive* [1951] 1 KB 376; *Camner v Northern & London Investment Trust* [1951] AC 88.

45 *Smith v Leech Brain & Co Ltd* [1962] 2 QB 405, [1962] 3 All ER 1159; *Hughes v Lord Advocate* [1963] AC 837, [1963] 1 All ER 705.

46 *Bolton v Stone* [1951] AC 850, [1951] 1 All ER 1078; *Overseas Tankship (UK) Ltd v The Miller Steamship Co (Pty) Ltd, The Wagon Mound (No 2)* [1967] 1 AC 617, [1966] 2 All ER 709.

47 For example, what a chemical manufacturer should know about the behaviour of chemicals. *Doughty v Turner Mfg Co Ltd* [1964] 1 QB 518, [1964] 1 All ER 98.

48 *Grant v Sun Shipping Co Ltd* [1948] AC 549, 567, [1948] 2 All ER 238, 247; *London Passenger Transport Board v Upson* [1949] AC 155, 176, [1949] 1 All ER 60, 72.

49 The employer must take into account the probability that an employee may have a sudden attack of illness, for example, that a scaffolder may have a sudden attack of giddiness when working at a height. *Holtum v WJ Cearns Ltd* (1953) *The Times* July 23.

50 Neethling et al 120; Van der Walt *Delict: Principles and Cases* 77.

51 Neethling et al 121.

52 The opposite is also true. In *Boltone v Stone* [1951] 1 All ER 1078 the court held that in the circumstances of the case the risk of causing injury sustained by the claimant was so small that the reasonable man would not have foreseen it. Cf *Lomagundi Sheetmetal & Engineering (Pty) Ltd v Basson* 1973 (4) SA 523 (RA); *Ablort-Morgan v Whyte Bank Farms (Pty) Ltd* 1988 (3) SA 531 (EC).

Whether the foreseeability of harm should include the foreseeability of emotional shock is a subject which requires particular consideration.

6.3.1.1 *The Foreseeability of Emotional Shock*

Neethling et al⁵³ define *emotional shock*⁵⁴ as a "sudden painful emotion or fright resulting from the realisation or perception of an unwelcome or disturbing event which brings about an unpleasant mental condition such as fear, anxiety or grief." Emotional shock may be of an organic or non-physical nature, or a combination of these two forms.⁵⁵ Emotional shock may be caused by, inter alia, the following factors:

- (a) an employee's fear for his own safety⁵⁶ or for that of another person;⁵⁷
- (b) by observing an accident;⁵⁸ or
- (c) by experiencing other disturbing events.⁵⁹

Since in this field there is scant authority in Roman-Dutch law, South African courts have consistently sought guidance in English law⁶⁰ in determining whether the employer should reasonably have foreseen the infliction of emotional shock.⁶¹ English courts have shown a pronounced reluctance to concede that a duty of care⁶² may exist in these circumstances,⁶³ preferring the general rule that the foreseeability of shock

53 Neethling et al 243.

54 See in general on the subject Boberg *The Law of Delict* 174 et seq; Corbett & Buchanan 1, 36, 54; Neethling et al 243-6; Potgieter 1-14; Van der Merwe & Olivier 328 et seq.

55 Potgieter 2-3.

56 *Hauman v Malmesbury Divisional Council* 1916 CPD 216; *Creydt-Ridgeway v Hoppert* 1930 TPD 664.

57 *Sueltz v Boltittler* 1914 EDL 176; *Els J v Bruce* 1922 EDL 295.

58 *Mulder v South British Insurance Co Ltd* 1957 (2) SA 444 (W); *Lutzkie v SAR & H* (supra) 396. Cf *McLoughlin v O'Brian & others* 1983 (1) AC 410.

59 *Els J v Bruce* (supra) 295; *Creydt-Ridgeway v Hoppert* (supra) 664; *Boswell v Minister of Police* 1978 (3) SA 268 (EC).

60 Neethling et al 244.

61 There may be foreseeable harm by shock from the causing of an accident as illustrated in *Dooley v Cammell Laird & Co Ltd & Mersey Insulation Co Ltd* (1951) 1 Lloyd's Rep 271 (shock to the crane driver when the sling broke and the load fell); *Chadwick v British Transport Commission* [1967] 2 All ER 945 (shock of rescuer at bad railway accident brought on neurosis).

62 As to the English *duty of care* doctrine infra 156-161.

63 *Chester v Waverley Municipal Council* (1939) 62 CLR 1; *Bourhill v Young* [1943] AC 92, [1942] 2 All ER 396.

does give rise to an obligation on the employer to safeguard an employee against such shock. This rule applies whether an employee's apprehension is for his own safety or for that of others.⁶⁴

The Appellate Division decision in *Bester v Commercial Union Versekeringsmaatskappy van SA Bpk*⁶⁵ is the authoritative case in the field of liability for emotional shock. In this case it was established that the criterion of liability for harm caused by emotional shock is the foreseeability of harm by shock,⁶⁶ and the foreseeability of such shock is not a question of remoteness of harm but an issue directed at fault (negligence).⁶⁷ Accordingly, damages will only be awarded for emotional shock that is reasonably serious⁶⁸ and not for an "insignificant emotional disturbance having no material effect upon a person's welfare."⁶⁹

With regard to whether the employer is negligent in cases involving emotional shock, the court will closely examine the circumstances of the case⁷⁰ in order to determine whether emotional shock was a reasonably foreseeable outcome of the

64 *Hambrook v Stokes Bros* [1925] 1 KB 141 (CA); *Bourhill v Young* [1943] AC 92, [1942] 2 All ER 396; *Dooley v Cammell Laird & Co Ltd & Mersey Insulation Co Ltd* (supra) 271; *King v Phillips* [1953] 1 QB 429, [1953] 1 All ER 617 (CA); *Boardman v Sanderson* [1964] 1 WLR 1317; *Beiscak v National Coal Board* [1965] 1 All ER 895, [1965] 1 WLR 518.

65 *Bester v Commercial Union Versekeringsmaatskappy van SA Bpk* (supra) 769.

66 *Overseas Tankship (UK) Ltd v Morts Dock & Engineering Co Ltd, The Wagon Mound* [1961] AC 388, 426; *McLoughlin v O'Brian & others* (supra) 412.

67 Boberg *The Law of Delict* 192.

68 Conditions such as insomnia, anxiety, neuroses, hysteria or other mental illnesses caused by shock are taken into account. In *Boswell v Minister of Police* (supra) 268-9 a physician testified that the shock suffered by the claimant would have "a substantial effect on her health" and her claim was therefore allowed on appeal. Emotional shock of a short duration which has no substantial effect on health, is usually ignored. See also *Beiscak v National Coal Board* [1965] 1 All ER 895, [1965] 1 WLR 518; *Masiba v Constantia Insurance Co Ltd* 1982 (4) SA 333 (C).

69 Boberg *The Law of Delict* 176. Cases in which it was found that the shock was not serious enough to merit compensation are *Layton & Layton v Wilcox & Higginson* 1944 SR 48; *Lutzkie v SAR & H* (supra) 398; *Muzik v Canzone del Mare* 1980 (3) SA 470 (C).

70 Cf *Waube v Warrington* 1935 258 NW 497, 216 Wis 603.

employer's conduct.⁷¹ Factors that may play a role are whether:

- (a) the shock resulted from physical harm;⁷²
- (b) an employee was in danger of being physically injured;⁷³
- (c) an employee personally witnessed the events causing the shock;⁷⁴ and
- (d) the employer had knowledge of these circumstances, and, if so, to what degree.⁷⁵

It may, however, be necessary to limit the employer's liability for foreseeable harm in the form of emotional shock because "it would be an entirely unreasonable burden on all human activity if the defendant were compelled to pay for the lacerated feelings of every casual bystander at an accident, or every distant relative of the person injured."⁷⁶

If the employer could reasonably have foreseen the likelihood of harm occurring, the problem arises whether he should not also have been able to foresee the identity of the person who would suffer the harm. The point at issue is commonly referred to as the problem of the *unforeseeable plaintiff*.⁷⁷

71 A distinct case where emotional shock may be regarded as a reasonable foreseeable outcome of the employer's conduct is a false alarm given deliberately, recklessly (*Wilkinson v Downton* [1897] 2 QB 57) or carelessly (*Barnes v Commonwealth* (1920) 37 SR (NSW) 511). Cf *Chester v Waverley Municipal Council* (1939) 62 CLR 1; *Schneider v Eisovitch* [1960] 2 QB 430, [1960] 1 All ER 169.

72 The Appellate Division in *Bester v Commercial Union Versekeringsmaatskappy van SA Bpk* (supra) 779 rejected the absolute requirement of physical harm to found delictual liability.

73 *Bester v Commercial Union Versekeringsmaatskappy van SA Bpk* (supra) 781; *Masiba v Constantia Insurance Co Ltd* (supra) 343. In both cases it was stated that emotional shock suffered in circumstances where the claimant feared personal injury will be more foreseeable than shock suffered as a result of the seeing or hearing of another's suffering. See also *Mulder v South British Insurance Co Ltd* (supra) 449.

74 Liability is, however, not excluded in cases where an employee only heard or learned about a disturbing event. *Bester v Commercial Union Versekeringsmaatskappy van SA Bpk* (supra) 781; *Boswell v Minister of Police* (supra) 268; *McLoughlin v O'Brian & others* (supra) 411.

75 Boberg *The Law of Delict* 176.

76 Prosser 334. Cf Dworkin *Law's Empire* 23-9.

77 See in general Boberg *The Law of Delict* 308-11; Dendy *A Fresh Perspective on the Unforeseeable Plaintiff* 45-62; *Palsgraf v Long Island Railroad Co* (1928) 248 NY 339, 162 NE 99; *Bourhill v Young* [1943] AC 92, [1942] 2 All ER 396; *Workmen's Compensation Commissioner v De Villiers* (supra) 474; *SAR & H v Marais* 1950 (4) SA 610 (A).

6.3.2 The 'Foreseeable' and 'Unforeseeable Plaintiff'

Boberg⁷⁸ illustrates the problem of the *unforeseeable plaintiff*⁷⁹ by postulating the following question: "is a defendant, who ought to have foreseen and guarded against harm to A, nevertheless not negligent in an action by B because he could not foresee that B would be harmed?"⁸⁰ The problem arises when the employer performs an act or allows an act to be performed without taking due precaution, which results in harm not only to the *foreseeable plaintiff* but also to the *unforeseeable plaintiff*. The foreseeability requirement to establish negligence focuses on the foreseeability of harm occurring, whereas the *unforeseeable plaintiff* doctrine focuses on the identity of the injured person.

South African law would seem to deny a remedy to the *unforeseeable plaintiff*,⁸¹ since liability is limited to foreseeability. This means that the standard of care expected of the reasonable employer in given circumstances depends partly on whom he is dealing with.⁸² South African law does not require a higher standard of care than is reasonable. Therefore, if harm to an employee is not reasonably foreseeable, the reasonable employer need not take any steps to guard against it.

The general approach⁸³ to the problem of the *unforeseeable plaintiff* is "that to allow the *unforeseeable plaintiff* a remedy in any circumstances would be to require of the defendant a higher standard of care than a reasonable man would observe - for if the plaintiff was *unforeseeable*, then the reasonable man would not have taken any steps to protect

78 Boberg *The Law of Delict* 308.

79 The *unforeseeable plaintiff* doctrine originated in American and English law. *Palsgraf v Long Island Railroad Co* (1928) 248 NY 339, 162 NE 99; *Bourhill v Young* [1943] AC 92, [1942] 2 All ER 396.

80 Cf Dendy *A Fresh Perspective on the Unforeseeable Plaintiff* 45-6.

81 *Workmen's Compensation Commissioner v De Villiers* (supra) 474; *SAR & H v Marais* (supra) 610; *Prince & another v Minister of Law & Order & others* 1987 (4) SA 231 (E). Cf *Administrateur Natal v Trust Bank van Afrika Bpk* 1979 (3) SA 824 (A); *Leon Bekaert SA (Pty) Ltd v Rauties Transport (Pty) Ltd* 1984 (1) SA 814 (W).

82 Boberg *The Law of Delict* 309.

83 Dendy *A Fresh Perspective on the Unforeseeable Plaintiff* 56.

him." Dendy,⁸⁴ however, disagrees with this approach and states that "if the unforeseeable plaintiff would not have been harmed had the defendant behaved as he should, then the defendant ... ought to be held liable to the unforeseeable plaintiff."⁸⁵

It is argued⁸⁶ that the notion of restricting liability for harm to *foreseeable plaintiffs* only is contrary to the principles of Roman and Roman-Dutch law. However, the matter of the *unforeseeable plaintiff* has not been finally decided.⁸⁷ The employer's liability in South Africa at present is therefore assessed as being restricted to the *foreseeable plaintiff*.

6.4 THE REASONABLE PREVENTABILITY OF HARM

To determine whether the employer should have taken the necessary precautionary measures to prevent the occurrence of harm is dependent on criteria such as the nature and extent of the risk, and the cost and difficulty of taking precautionary measures.

6.4.1 The Nature and Extent of the Risk

The nature and extent of the risk may be so small and the chance of serious harm resulting therefrom so slight that the employer would not be required to guard against such risk.⁸⁸ The phrase *chance of harm* refers to both the chance of harm

⁸⁴ Dendy *A Fresh Perspective on the Unforeseeable Plaintiff* 57.

⁸⁵ Dendy *A Fresh Perspective on the Unforeseeable Plaintiff* 62 further submits that "if liability towards unforeseeable plaintiffs be possible, as I have submitted it should be, a similar approach must be adopted when dealing with harm of an unforeseeable kind to a foreseeable plaintiff."

⁸⁶ Millner 27; Price *Aquilian Liability and the Duty of Care: A Return to the Charge* 143; Van Den Heever 43-4; Van der Walt *Delict: Principles and Cases* 28fn10.

⁸⁷ Boberg *The Law of Delict* 275.

⁸⁸ *Wasserman v Union Government* (supra) 228; *Bolton v Stone* [1951] AC 850, [1951] 1 All ER 1078; *Herschel v Mrupe* (supra) 477; *Carmarthenshire County Council v Lewis* [1955] AC 549; *Hilder v Associated Cement Manufactures* [1961] 1 WLR 1434; *Scott v Johannesburg City Council* 1962 (1) SA 645 (W); *Swinley v Stephenson* (1962) 79 WN (NSW) 750; *Close v Steel Co of Wales Ltd* [1962] AC 367, [1961] 2 All ER 953; *Broom & another v Administrator, Natal* (supra) 505; *Lomagundi Sheetmetal & Engineering (Pty) Ltd v Basson* (supra) 523; *Miller v Jackson* [1977] QB 966.

actually materializing, and the gravity of the consequences if it does.

In circumstances where the employer exposes his employees to a risk of serious consequences, the employer would be required to take precautionary measures to prevent or minimize such risk of harm, even if the chance of harm was slight.⁸⁹ The employer may, for example, have to provide goggles to an employee who has the use of only one eye, but may not be required to provide goggles to an employee who has the use of both eyes. An accident occurring to a one-eyed employee may lead to total blindness which may not necessarily be the case with an employee who has the use of both eyes.⁹⁰ Protection in the form of goggles should be provided for two-eyed employees, as well as for one-eyed employees, if the risk is sufficiently great.⁹¹

Similarly, the reasonable employer would only neglect a risk of small magnitude if he had some valid reason for doing so. However, the difficulty, expense and advantages of eliminating the risk must also be considered, as well as the general practice in such cases.⁹²

6.4.2 *The Cost and Difficulty of Taking Precautionary Measures*

The employer may be justified in neglecting to eliminate a risk of small magnitude if eliminating it would have involved considerable expense. The employer would therefore be entitled to weigh the risk against the difficulty and cost of

89 *Overseas Tankship (UK) Ltd v The Miller Steamship Co (Pty) Ltd, The Wagon Mound (No 2)* [1967] 1 AC 617, [1966] 2 All ER 709; *Lomagundi Sheetmetal & Engineering (Pty) Ltd v Basson* (supra) 523.

90 *Paris v Stepney Borough Council* [1951] AC 367 (HL).

91 Cf *Smith v Howdens Ltd* (1953) NI 131; *Morris v West Hartlepool Steam Navigation Co Ltd* [1956] AC 552, [1956] 1 All ER 385 (HL); *Nolan v Dental Mfg Co Ltd* [1958] 2 All ER 449, [1958] 1 WLR 936; *Overseas Tankship (UK) Ltd v The Miller Steamship Co (Pty) Ltd, The Wagon Mound (No 2)* [1967] 1 AC 617, [1966] 2 All ER 709; *Lomagundi Sheetmetal & Engineering (Pty) Ltd v Basson* (supra) 523; *Union National South British Insurance Co Ltd v Vitoria* 1982 (1) SA 444 (A); *Vorster v AA Mutual Insurance Association Ltd* (supra) 145.

92 *Goldman v Hargrave* [1967] 1 AC 645.

eliminating it.⁹³ This implies that in every case the chance of harm must be compared with and balanced against the cost and difficulty involved in effectively eliminating or minimizing the risk of harm.⁹⁴

If the cost and difficulty involved in taking precautionary measures against a risk of harm outweighs the magnitude of the risk, the employer would not be required to take any steps to prevent the risk of harm.⁹⁵ However, where the risk of harm can be eliminated or minimized without substantial expense or inconvenience, then the employer would be required to take the necessary precautionary measures.⁹⁶

The greater the risk, the greater the precautions which have to be taken, with proportionately less consideration given to the cost of precautionary measures in time, trouble or money.⁹⁷ If the risk to life or serious injury is substantial, and no precautions would avail against it, the employer may be required to discontinue with the dangerous activity.⁹⁸

Whether the employer's conduct is reasonable or negligent depends on the reasonable foreseeability and preventability of harm in the *circumstances* of the particular case.⁹⁹

93 *Overseas Tankship (UK) Ltd v Miller Steamship Co (Pty) Ltd, The Wagon Mound (No 2)* [1967] 1 AC 617, [1966] 2 All ER 709; *Goldman v Hargrave* (supra) 645.

94 *Neethling et al* 122; *Salmond* 257; *Daborn v Bath Tramways Motor Co Ltd* [1946] 2 All ER 333; *Bressington v Commissioner of Railways* (1947) 75 CLR 339; *Latimer v AEC Ltd* [1953] 2 All ER 449, [1952] 2 QB 701; *Watt v Hertfordshire County Council* [1954] 2 All ER 368, [1954] 1 WLR 835; *Morris v West Hartlepool Steam Navigation Co Ltd* [1956] AC 552, [1956] 1 All ER 385; *Hicks v British Transport Commission* [1958] 2 All ER 39, [1958] 1 WLR 493; *Goldman v Hargrave* (supra) 645; *Gawtry v Waltons Wharfingers & Storage Ltd* [1971] 2 Lloyd's Rep 489 CA; *Wyong SC v Shirt* (1980) 146 CLR 40.

95 In *Haves v Railway Executive* (1952) 96 SJ 852 it was held that it is not necessary that the current should be cut off for every minor repair on electric railway lines, because this may immobilize the electric railways of the country. *Botes v Van Deventer* (supra) 182; *City of Salisbury v King* 1970 (2) SA 528 (RA); *Hindle v Joseph Porritt & Sons Ltd* [1970] 1 All ER 1142.

96 *Gordan v Da Mata* (supra) 285.

97 In *SAR & H v Cruywagen* (supra) 225-6 it was said that "(w)here there is a risk to human life, no precaution must be neglected to secure the safety of the workmen." Cf *Morris v Luton Corporation* [1946] 1 All ER 1, 4; *Edwards v National Coal Board* [1949] 1 KB 704, 710; *Bath v British Transport Commission* [1954] 2 All ER 542; *Marshall v Gotham Co Ltd* [1954] AC 360.

98 *Bolton v Stone* [1951] AC 850, [1951] 1 All ER 1078.

99 *Boberg The Law of Delict* 355 et seq; *Neethling et al* 123; *Van der Walt Delict: Principles and Cases* 76-86; *Moubray v Syfret* 1935 AD 199.

6.5 NEGLIGENCE AND THE CIRCUMSTANCES OF THE CASE

There are several factors which should be taken into account when considering the circumstances in which the employer found himself. These are discussed in turn below.

6.5.1 *The Degree of Care Required*

The employer is required to exercise a greater degree of care when exposing his employees to dangerous working conditions than when exposing them to safer conditions, for example, a reasonable employer will not show the same anxious care when instructing an employee to carry a hammer as he would a pound of dynamite.¹⁰⁰

The employer must also consider the class of employee likely to suffer from his conduct. He would therefore be required to exercise a greater degree of care with an unskilled employee than with a skilled employee.¹⁰¹

The required degree of care varies directly with the risk involved¹⁰² and is dependent on factors such as the gravity, frequency and foreseeability of the recognizable risk.¹⁰³ The degree of care tends to increase with the likelihood that the employer's conduct will cause harm.¹⁰⁴

6.5.2 *The Abnormal Susceptibility or Infirmary of an Employee*

The employer will not be liable for harm resulting from the abnormal susceptibility or infirmity of an employee of which

100 *Beckett v Newalls Insulation Co Ltd* [1953] 1 WLR 8, 17; *Gilmour v Simpson* 1958 SC 447; *Dahlberg v Navduik* [1969] 10 DLR 2d 319; *Wright v Dunlop Rubber Co Ltd* (supra) 273.

101 *South British Insurance Co Ltd v Smit* 1962 (3) SA 826 (AD); *Haley v London Electricity Board* [1965] AC 778, [1964] 3 All ER 185 (HL); *Neuhaus v Bastion Insurance Co Ltd* (supra) 398.

102 *Palsgraf v Long Island Railroad Co* (1928) 248 NY 339, 162 NE 99; *Northwestern Utilities Ltd v London Guarantee & Accident Co Ltd* [1936] AC 108, 126; *Glasgow Corporation v Muir* (supra) 456; *Paris v Stepney Borough Council* (supra) 381.

103 *Mercer v Commercial Road Transport* (1936) 56 CLR 580, 601.

104 Fleming 104-5; Heuston & Buckley 253-4; Neethling et al 121; Street 118; Van der Walt *Delict: Principles and Cases* 78-9.

he neither knew nor could reasonably have foreseen.¹⁰⁵ If the employer is aware that an employee has some characteristic or incapacity which will increase the risk of harm, he may be required to exercise a greater degree of care.¹⁰⁶

The employer is not normally required to:

- (a) have employees medically examined to see if they are fit for the work;¹⁰⁷ or
- (b) refuse employment to individuals liable to, for example, dermatitis;¹⁰⁸ or
- (c) inquire, on displaying a safety notice, whether any of his employees are illiterate.¹⁰⁹

An employee who knowingly suffers from an abnormal susceptibility which exposes him to additional risk of harm is obliged to disclose this to his employer.¹¹⁰

6.5.3 *The Relevance of Previous Incidents and Complaints*

The occurrence or non-occurrence of previous similar incidents is relevant to whether the employer should reasonably have foreseen the likelihood of harm and taken the necessary precautionary measures. The fact that previous incidents may have only resulted in minor injuries, is not necessarily an adequate reason for failing to foresee that in the future a similar incident might cause a serious injury.¹¹¹

The absence of previous incidents, although a material circumstance in rebutting negligence, is not conclusive, since

105 In *Clayton v Caledonia Stevedoring* (1948) 81 LILR 332 the employee who, unknown to his employer, had a hypersensitive skin, as a result of which he contracted dermatitis from handling ammonium chloride, was unable to recover damages from his employer. Cf *Withers v Perry Chain Co Ltd* [1961] 3 All ER 676, [1961] 1 WLR 1314.

106 *Paris v Stepney Borough Council* (supra) 367; *Cork v Kirby Maclean* [1952] WN 399, [1952] 2 All ER 402; *Haley v London Electricity Board* [1965] AC 778, [1964] 3 All ER 185; *Porteous v National Coal Board* 1967 SLT 117; *Bailey v Rolls Royce (1971) Ltd* [1984] ICR 688.

107 *Parkes v Smethwick Corporation* (1957) 121 JP 415, 55 LGR 438.

108 *Withers v Perry Chain Co Ltd* [1961] 3 All ER 676, [1961] 1 WLR 1314.

109 *James v Hepworth & Grandage Ltd* [1968] 1 QB 94, [1967] 2 All ER 829.

110 *Cork v Kirby Maclean* [1952] WN 399, [1952] 2 All ER 402.

111 *Kilgollan v William Cooke & Co Ltd* [1956] 1 WLR 527, [1956] 2 All ER 294.

it does not follow that an incident must first have occurred before a safety management practice can be condemned as unsafe.¹¹²

Similar considerations apply to previous complaints by employees. In *British Aircraft Corporation v Austin*¹¹³ it was said that:

"employers are ... under an obligation ... to act reasonably in dealing with matters of safety or complaints of lack of safety which are drawn to their attention by employees. Unless the matter is drawn to their attention or the complaint is obviously not bona fide or is frivolous, it is only by investigating individual complaints promptly and sensibly that employers can discharge their general obligations to take reasonable care for the safety of their employees."¹¹⁴

The rationale which may be deduced from the aforementioned statement is that if the employer fails to discharge his obligation to investigate and to assuage the employee's fear for his safety, then the employer is negligent and the employee may refuse to continue working.

6.5.4 *Hazard Unknown at the Time of the Accident*

If a hazard is one which the employer neither knew nor ought reasonably to have known, he will not be liable for a resulting accident, because he is not required to foresee harm if the hazard is unknown at the time.¹¹⁵ However, if a hazard is generally known in the industry, or if it has been specifically referred to in bulletins or journals supplied by

¹¹² *Morris v West Hartlepool Steam Navigation Co Ltd* [1956] AC 552, [1956] 1 All ER 385.

¹¹³ *British Aircraft Corporation v Austin* (1978) IRLR 382, 386.

¹¹⁴ Cf *Drake & Wright* 25 et seq; *St Annes Board Mill Co Ltd v Brein* (1973) IRLR 309; *Walmsley v UDEC Refrigeration* (1972) IRLR 80.

¹¹⁵ *Riddick v Weir Housing Corp Ltd* (supra) 24; *Joseph v Ministry of Defence* (1980) *The Times* March 4.

the trade, knowledge of the hazard will be imputed to the employer.¹¹⁶

6.5.5 *Justifiable Error of Judgement*

Another factor which should be taken into account in determining the reasonableness or negligence of the employer's conduct is a justifiable error of judgement in a situation of sudden emergency.¹¹⁷ This is taken into account by the so-called doctrine of *sudden emergency*.

The principle underlying the doctrine of *sudden emergency* is that a person confronted by a situation of sudden emergency is not in a position to evaluate carefully the best course of conduct to follow. A course of conduct which is unnecessary, incorrect or dangerous is not negligent if the reasonable employer in the same situation of imminent danger would have acted in the same manner.

6.5.6 *Standard Practices*

Since the required standard of care is basically determined with reference to community standards, it is important to establish whether the employer's conduct conformed to the standard practices in the industry.¹¹⁸ Failure to comply with standard practices is often the strongest indication of the presence of negligence, because it suggests that the employer did not do what other employers in the same industry consider proper and feasible.

116 *Graham v Co-operative Wholesale Society Ltd* [1957] 1 WLR 511, [1957] 1 All ER 654; *Bryce v Swan Hunter Group* [1988] 1 All ER 659.

117 See in general on the subject Boberg *The Law of Delict* 333 et seq; Neethling et al 124; Van der Merwe & Olivier 134; Van der Walt *Delict: Principles and Cases* 82-3; *SAR v Symington* 1935 AD 37, 45; *Van Staden v Stocks* 1936 AD 18; *Brown v Hunt* (supra) 545-6; *Stolzenberg v Lurie* 1959 (2) SA 67 (W); *S v Mkwana* 1967 (2) SA 593 (N); *Palm v Elsley* (supra) 381; *Mfihlo v Port Elizabeth Municipal Council* 1976 (3) SA 183 (SE); *Samson v Winn* 1977 (1) SA 761 (C).

118 Fleming 109; Fridman 193; *Paris v Stepney Borough Council* (supra) 382.

Conformity with standard practices is usually indicative¹¹⁹ but not conclusive of the absence of negligence.¹²⁰ If standard practices were accepted as conclusive determination of the required standard of care, it would follow that employers engaged in an industry were free to formulate their own standards of care by adopting careless methods.¹²¹ The standard of care is therefore necessarily determined by what the reasonable employer would ordinarily do and not by what some employers in fact do in certain circumstances.¹²²

6.5.7 Safety Standards

A safety standard is any standard, whether or not prescribed by law, which will promote the safety of employees in the course of their employment.¹²³ Safety standards are increasingly formulated by expert professional or administrative bodies, such as NOSA¹²⁴ in South Africa and internationally by the ILO. If issued under legislative authority and purporting to be mandatory, such standards are binding and non-compliance may be treated as negligence.¹²⁵ Even if a safety standard is not mandatory, it would play an important role in the determination of negligence, on the

119 In *Grioli v Allied Building Co Ltd* (1985) *The Times* April 10 it was held that because there was no significant practice for carpenters to use gauntlets to protect against cuts by glass, the employer was therefore not liable for his failure to provide a gauntlet.

120 In *Morris v West Hartlepool Steam Navigation Co Ltd* [1956] AC 552, [1956] 1 All ER 385 it was decided that evidence of standard practice is of little value unless it is shown to have been followed without mishap for a sufficiently long period and in similar circumstances. See also *Van Wyk v Lewis* (supra) 444, 457; *Colman v Dunbar* 1933 AD 141, 157; *Moubray v Syfret* (supra) 203; *Van Heerden v SA Pulp & Paper Industries Ltd* (supra) 382; *Botes v Van Deventer* (supra) 195; *Broom & another v Administrator, Natal* (supra) 519; *Griffiths v Netherlands Insurance Co of SA Ltd* (supra) 695.

121 In *Brown v John Mills & Co (Llanidloes) Ltd* (1970) 114 SJ 149 it was said that "no one could claim to be excused for want of care because others were as careless as himself." See also *General Cleaning Contractors Ltd v Christmas* [1953] AC 180, 195; *Hunter v Hanley* 1955 SC 200, 206; *Morris v West Hartlepool Steam Navigation Co Ltd* [1956] AC 552, [1956] 1 All ER 385; *Cavanagh v Ulster Weaving Co Ltd* [1960] AC 145, [1959] 2 All ER 745; *Brown v Rolls-Royce Ltd* [1960] 1 All ER 577.

122 *Fleming* 110; *Bank of Montreal v Dominion Gresham Guarantee & Casualty Co Ltd* [1930] AC 659, 666; *EB Savory & Co v Lloyds Bank Ltd* [1932] 2 KB 122; *Colman v Dunbar* (supra) 157.

123 Cf s 1 of MQSA.

124 NOSA is a non-profit organization that receives financial aid from the Workmen's Compensation Commissioner, in terms of s 14(2) of the WCA, and various employer organizations. NOSA's main objectives are to "guide, educate, train and motivate the various levels of management and the workforce alike in the techniques of accident and occupational disease prevention" NOSA *Annual Report 1989-1990* 2.

125 *Infra* 192-3.

basis of persuasive evidence of expert opinion as to the minimum safety requirements.

Non-compliance with a safety standard may suggest or imply negligence, especially if the standard is adhered to by other employers in the same industry. In this manner, standard practices and safety standards may formulate the legal standard of reasonable care.¹²⁶

In the light of what has been discussed above, it is possible to establish guidelines for the standard of the reasonable employer in safety management.

6.6 *GUIDELINES FOR THE STANDARD OF REASONABLENESS*

The reasonableness of the employer's conduct is measured in terms of the standard of the reasonable employer in labour relations with regard to the particular circumstances of the case. For the employer to meet the standard of reasonableness required in the management of safety, he must:

- (a) meet the standard of competence required of his profession and possess the necessary skilled knowledge;
- (b) be reasonably acquainted with current knowledge concerning the hazards of modern production processes and means available to eliminate or minimize them;
- (c) exercise any superior qualities he may possess in a manner reasonable under the circumstances;
- (d) take the necessary safety precautions¹²⁷ in order to protect employees against the occurrence of reasonable foreseeable harm. In establishing whether an employer has taken the necessary precautionary measures, the following criteria are applied:
 - (i) when an employee is exposed to a risk of serious injury, the reasonable employer will take the

¹²⁶ Fleming 111.

¹²⁷ The requirements concerning the implementation of the necessary precautionary measures is summarized infra 212-4.

- necessary precautionary measures to prevent or minimize such risk of harm;
- (ii) although the reasonable employer is not required to guard against risk where the nature and extent is small and the chance of serious harm resulting therefrom is slight, the reasonable employer will only neglect a risk of small magnitude if he had some valid or good reason for doing so;
 - (iii) if the magnitude of the risk of harm outweighs the cost and difficulty involved in implementing precautionary measures, the reasonable employer will take the necessary steps to prevent the risk of harm. In the event of the cost and difficulty exceeding the magnitude of the risk, the reasonable employer will still take preventive measures, provided such measures do not involve substantial expense or inconvenience;
- (e) exercise a greater degree of care to protect his employees against harm if the circumstances so warrant;
 - (f) take the necessary preventive and corrective action to avoid a recurrence of an incident;
 - (g) investigate any complaints lodged by employees concerning unsafe working conditions or acts, and, if necessary, take preventive and corrective action to rectify such unsafe conditions or acts; and
 - (h) conform to safety standards and the standard practices in his industry.

Adherence to the above criteria is not per se *reasonableness*. To establish whether the employer acted reasonably in the circumstances requires an objective evaluation. This means that the court has to decide what a reasonable employer, mindful of the habits, practice and custom of industrial life and the standards of justice and fair dealing prevalent in the community, would have done under similar circumstances.

South African courts have on occasion not used the *reasonable employer* test in the determination of negligence, but have

referred to the so-called *duty of care* doctrine¹²⁸ of English law.¹²⁹ Analyzing the doctrine and comparing it with the reasonable employer test reveals the significance of its application in South African law.

6.7 THE DUTY OF CARE DOCTRINE

The duty of care doctrine involves two elements, namely, a duty to take care and a breach of that duty.¹³⁰ These two components are usually distinguished as the *duty issue* and the *negligence issue*.¹³¹ According to the doctrine it is first established whether the employer owed the injured employee a duty of care (the *duty issue*), followed by the determination of whether there was a breach of this duty (the *negligence issue*). If a duty of care is present and there is a breach of this duty, the employer is said to be negligent.

6.7.1 The Duty Issue

Two factors are necessary for a duty of care to exist:

- (a) the employer must have had a legal duty to conform to reasonable standards of care;¹³² and
- (b) the harm must be such as the reasonable employer would have foreseen and guarded against.¹³³

128 Boberg *The Law of Delict* 274; Cooper 24-5; Neethling et al 126; Van der Merwe & Olivier 129-30; Van der Walt *Delict: Principles and Cases* 23.

129 *Heaven v Pender* (1883) 11 QBD 503, 506-7 may be considered as the crystallizing point of the development of the duty of care doctrine in the English law of torts. In this case the court, for the first time, presented the doctrine in the clearest terms. The doctrine is also firmly established in American law. ILO *Judicial Decisions in the Field of Labour Law* (1982) 36; McKerron *The Duty of Care in South African Law* 189.

130 Neethling et al 126; Van der Walt *Delict: Principles and Cases* 24.

131 *Administrateur Natal v Trust Bank van Afrika Bpk* (supra) 833C-F.

132 Millner 25; Van der Walt *Delict: Principles and Cases* 26, 66. In *Le Lievre v Gould* (supra) 497 it was pointed out that "(a) man is entitled to be as negligent as he pleases towards the whole world if he owes no duty to them."

133 Cooper 25; McKerron *The Law of Delict* 29; *Cape Town Municipality v Paine* (supra) 216; *Workmen's Compensation Commissioner v De Villiers* (supra) 474; *Union Government v Ocean Accident & Guarantee Corporation Ltd* (supra) 585; *Peri-Urban Areas Health Board v Munarin* (supra) 373.

The existence or non-existence of a legal duty is essentially a policy issue¹³⁴ or a reflection of a social norm.¹³⁵ The policy issue sets bounds to legal obligations and tries "to balance the individual interests of the claimant against the broader ones of the community."¹³⁶ Assuming that the existence of a duty of care has been established, it is necessary to determine whether there was a breach of this duty.

6.7.2 *The Negligence Issue*

In order to determine whether the employer was in breach of his duty of care, two factors need to be established:

- (a) the standard of care required of the employer in the circumstances; and
- (b) whether the employer's conduct complied with that standard.

Whether the employer's conduct is a breach of a duty is a question of foresight, the standard being that of the reasonable employer.¹³⁷

6.7.3 *Distinguishing between the 'Reasonable Employer' Test and the 'Duty of Care' Doctrine*

In order to illustrate the difference between the *reasonable employer* test and the *duty of care* doctrine, it is necessary to outline the different stages of inquiry of each procedure.

¹³⁴ Fleming 128 refers to some of the factors that give substance to the concept of policy: "In the decision whether to recognise a duty in a given situation, many factors interplay: the hand of history, our ideas of morals and justice, the convenience of administering the rule and our social ideas as to where the loss should fall. Hence, the incidence and extent of duties are liable to adjustment in the light of evolving community attitudes."

¹³⁵ See, in general, McKerron *The Law of Delict* 240-6; Millner 45-74; Mureinik *The Contract of Service: An Easy Test for Hard Cases* 247-57; Van der Walt *Delict: Principles and Cases* 27; *Silva's Fishing Corporation (Pty) Ltd v Maweza* (supra) 256; *R v AMCA Services Ltd* (supra) 207; *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1964] AC 465, [1963] 2 All ER 575; *Tobacco Finance (Pty) Ltd v Zimnat Insurance Co Ltd* 1982 (3) SA 55 (Z).

¹³⁶ *Greenfield Engineering Works (Pty) Ltd v NKR Construction (Pty) Ltd* 1978 (4) SA 901 (N) 917.

¹³⁷ Cooper 25; McKerron *The Law of Delict* 29; *Cape Town Municipality v Paine* (supra) 216; *Glasgow Corporation v Muir* (supra) 457; *Peri-Urban Areas Health Board v Munarin* (supra) 373.

In terms of the *reasonable employer* test, the court generally considers the issue in terms of the following stages:

- (a) whether the reasonable employer would have foreseen harm;
- (b) whether the reasonable employer would have taken the necessary precautionary measures to guard against such harm;
- (c) what the nature of those measures would be; and
- (d) whether the employer exercised those measures.

The inquiry with regard to a *duty of care* poses the following questions:

- (a) did the employer owe the injured employee a duty of care?
- (b) what was the content of the duty? and
- (c) did the employer discharge it?

In so far as a duty of care arises when the reasonable employer in the position of the employer would have foreseen harm and taken the necessary precautionary measures to guard against such harm, it is evident that the *duty of care* doctrine does not differ from the *reasonable employer* test but merely condenses parts (a) and (b) of the *reasonable employer* test into a single question.

In determining the existence of a duty of care, the doctrine's dual nature enables the court to decide wrongfulness and fault simultaneously,¹³⁸ which is not the approach adopted by the *reasonable employer* test. The *reasonable employer* test considers wrongfulness as notionally separable from fault.

Policy considerations are a specific requirement of the *duty of care* doctrine, but a *sine quo non* of the *reasonable employer* test. Both are objective tests, and, where

¹³⁸ Van der Merwe & Olivier 129 observe that the duty approach to negligence "getuig van 'n hopelose verwarring tussen onregmatigheid en skuld. As teenkant van 'n reg staan 'n plig, die verbreking van welke plig, *duty*, regskenking, dws onregmatigheid, en nie sonder meer skuld nie, daarstel." See also Boberg *The Law of Delict* 279; De Jager 355; Neethling et al 127; Reyneke 313; *Van der Merwe v Austin* 1965 (1) SA 43 (T).

appropriate, attention may need to be given to policy considerations in the determination of negligence.

As a test for negligence, the duty of care doctrine is a circuitous and cumbersome substitute for the *reasonable employer* test. Whether the doctrine should be adopted in South African law is an issue which needs to be discussed.

6.7.4 *The Application of the Duty of Care Doctrine in South African Law*

Until the mid-seventies the duty of care doctrine, despite critical opposition,¹³⁹ appeared to be firmly established in South African law.¹⁴⁰ In *Cardoso v SAR*¹⁴¹ the court expressly refrained from endorsing the view that the doctrine is part of South African law. However, in the later case of *SAR & H v Marais*¹⁴² the court expressed its support for the doctrine and pointed out that argument from an academic point of view on the matter was irrelevant.¹⁴³

McKerron,¹⁴⁴ a staunch defender of the doctrine,¹⁴⁵ expresses the opinion that the doctrine is an indispensable part of the South African law of negligence. He alleges¹⁴⁶ that most of the critics of the doctrine either overlook the policy-based aspects of the requirement, or ignore it, therefore committing themselves to "the untenable proposition that all harm caused

139 Beinart *De Lege Aquilia* 205; Conradie 144; Pont *The Law of Delict*, Prof. R.G. McKerron 166; Price *The Conception of "Duty of Care" in the Actio Legis Aquiliae* 269.

140 *Herschel v Mrupe* (supra) 485H; *Peri-Urban Areas Health Board v Munarin* (supra) 373F. Cooper 43 contends that the reason for the acceptance of the doctrine during this period was because the South African courts did not fully appreciate the fact that wrongfulness is separable from fault.

141 *Cardoso v SAR* 1950 (3) SA 773 (W) 780.

142 *SAR & H v Marais* (supra) 621. The judge of Appeal referred to a number of Appellate Division decisions in support of his statement, including *Farmer v Robinson Gold Mining Co Ltd* (supra) 501 and *Cape Town Municipality v Paine* (supra) 207.

143 The doctrine was also supported in *Nicholson v East Rand Proprietary Mines Ltd* (supra) 235; *Union Government v National Bank of SA Ltd* (supra) 121; *Lahrs v SAR & H* 1923 EDL 329; *Barker v Union Government* (supra) 120; *SAR & H v Cruywagen* (supra) 219; *Van Deventer v Workmen's Compensation Commissioner* (supra) 28; *MacDonald v General Motors SA (Pty) Ltd* (supra) 232.

144 McKerron *The Duty of Care in South African Law* 190; McKerron *The Law of Delict* 34-5.

145 Other South African authorities who defend the doctrine are Pauw *Aspekte van die Begrip Onregmatigheid* 265 (who finds room for the duty approach to wrongfulness); Rowland 20 (a supporter); Snyman 188 (who unjustifiably finds the duty of care indispensable).

146 McKerron *The Law of Delict* 35.

to another which could reasonably have been foreseen and guarded against is *prima facie* actionable."¹⁴⁷

Despite judicial support for the doctrine, various authorities have questioned its necessity,¹⁴⁸ while others have called for its total rejection.¹⁴⁹ The doctrine is foreign to the principles of Roman¹⁵⁰ and Roman-Dutch law¹⁵¹ and from a legal-historical view should therefore be rejected.

There are other cogent reasons to be advanced for rejecting the doctrine. Although in *SAR & H v Marais*¹⁵² where the court supported the use of the doctrine, it did recognize that it was "immaterial whether the doctrine is described as the duty to take care or whether liability is based on the failure to act in accordance with the standard of what a reasonably prudent person would realise, in regard to the persons who might possibly be injured by his conduct."

Furthermore, the doctrine is said to be tautologous¹⁵³ in the sense that the test for ascertaining the existence of a duty and the test for determining whether there is a breach share a common factor, namely, whether the reasonable employer would

147 McKerron *The Law of Delict* 35. Millner 27 states that it is only when the policy function of the duty of care doctrine is ignored and the matter examined exclusively in terms of reasonable foresight, that the concept may be considered redundant. According to McKerron *The Duty of Care in South African Law* 195, there is no such universal principle of liability.

148 In *Hawker v Prudential Assurance Co of SA Ltd* 1987 (4) SA 442 (C) 450H-I it was said that "(t)here is ... a dispute as to whether the concept of a 'duty of care' is a necessary part of our law." The dispute referred to is that between those who perceive the function of the duty of care concept as a vehicle for expressing, inter alia, the policy-based conclusion that conduct in a particular case was wrongful and, on the other hand, those who treat the concept as pertaining solely to negligence. See also Beinart *De Lege Aquilia* 205; Buckland *The Duty to Take Care* 639; Conradie 144; Cooper 43; Dendy *Clarity and Confusion on the Duty of Care* 401; Swanepoel *Bedenkings oor die Regsplig by die Onregmatige Daad* (1957) 198, 266, (1958) 134.

149 Neethling et al 127; Pont *The Law of Delict*, Prof. R.G. McKerron 166; Price *The Conception of Duty of Care in the Actio Legis Aquiliae* 269; Price *Aquilian Liability for Negligent Statements* (1950) 138, 257, 411, (1951) 78; Price *Aquilian Liability and the Duty of Care: A Return to the Charge* 120; Van den Heever 43; *Administrateur Natal v Trust Bank van Afrika Bpk* (supra) 833.

150 Buckland *The Duty to Take Care* 639; Conradie 142-6; Price *Aquilian Liability and the Duty of Care: A Return to the Charge* 120-2.

151 McKerron *The Law of Delict* 34; Neethling et al 127; Price *Aquilian Liability and the Duty of Care: A Return to the Charge* 120; Swanepoel *Bedenkings oor die Regsplig by die Onregmatige Daad* (1958) 134.

152 *SAR & H v Marais* (supra) 622.

153 Van der Merwe & Olivier 129 state that the doctrine creates "'n hopelose verwarring tussen onregmatigheid en skuld." See also Lawson & Markesinis 95; Millner 26; Price *The Conception of Duty of Care in the Actio Legis Aquiliae* 180; Stone 181-2.

have foreseen and guarded against the harm.¹⁵⁴ Van der Walt,¹⁵⁵ however, points out that there is no tautology in the practical application of the doctrine, for "the recognition of the duty of care in a particular situation is the outcome of a value judgment" dependent not on the foreseeability of harm alone, but on "a comparative judicial evaluation of the relevant individual and social interests involved in the particular circumstances of the case."

The doctrine is also labelled as ambiguous, since it is often difficult to determine whether the inquiry is directed at wrongfulness or fault.¹⁵⁶ South African courts sometimes use the duty of care doctrine as a synonym for the existence of a legal duty to determine wrongfulness.¹⁵⁷ To avoid confusion, the duty involved in the test for wrongfulness must be described as a *legal duty* and not as a *duty of care*.

Since, in the light of the above, the doctrine is clearly alien to the South African common law and may be cumbersome, confusing and ambiguous, there is no reason why it should be used as a test for negligence. In most cases the South African courts simply apply the reasonable employer test.¹⁵⁸

154 The tautology involved in posing these questions separately was demonstrated by Winfield, cited in Millner 26: "At present the court appears to consider twice over what a reasonable man would do." This tautology caused Prosser 325 to describe the doctrine as a "shorthand statement of a conclusion, rather than an aid to analysis in itself."

155 Van der Walt *Delict: Principles and Cases* 26-7.

156 Boberg *The Law of Delict* 279 suggests that it is best to avoid the duty of care concept entirely, but if it is to be used, the concept belongs to wrongfulness rather than fault. See also De Jager 355; Neethling et al 127; Reyneke 313; Van der Merwe & Olivier 129.

157 *Administrateur Natal v Trust Bank van Africa Bpk* (supra) 824; *Coronation Brick (Pty) Ltd v Strachan Construction Co (Pty) Ltd* 1982 (4) SA 371 (D); *Barlow Rand Ltd t/a Barlow Noordelike Masjinerie Mpy v Lebos* 1985 (4) SA 341 (T).

158 Van der Walt *Delict: Principles and Cases* 23 points out that the doctrine is limited to the field of pure economic loss and liability for an omission. In *Shell & BP SA Petroleum Refineries (Pty) Ltd v Osborne Panama SA* 1980 (3) SA 653 (D) and *Franschhoekse Wynkelder (Ko-operatief) Bpk v SAR & H* 1981 (3) SA 36 (C) the courts found the doctrine, expressly in its policy-based aspect, a useful tool with which to approach the recoverability of pure economic loss. Pure economic loss may comprise patrimonial loss that does not result from any damage to property or injury to personality. See also *Union Government v Ocean Accident & Guarantee Corp Ltd* (supra) 577; *Peri-Urban Areas Health Board v Munarin* (supra) 367; *Combrinck Chiropraktiese Kliniek (Edms) Bpk v Datsun Motor Vehicle Distributors (Pty) Ltd* 1972 (4) SA 185 (T); *Coronation Brick (Pty) Ltd v Strachan Construction Co (Pty) Ltd* (supra) 371.

6.8 THE PERSONAL NATURE OF THE EMPLOYER'S OBLIGATION

The personal nature of the employer's safety management obligation implies that the obligation cannot be delegated by the employer to another person, however competent that person may be, so as to discharge the employer from responsibility for its performance.¹⁵⁹ The obligation is not personal in any literal sense because the employer is not bound to supervise his employees personally, since he may not be sufficiently qualified to do so. Under these circumstances the employer would be held liable for the negligence of persons so acting on his behalf.¹⁶⁰ His liability will apply whether the person to whom the duty was delegated is an employee, independent contractor,¹⁶¹ or a third party.¹⁶²

The employer's safety management obligation can be described as absolute. If such an obligation could be delegated it would effectively deprive an employee of redress in modern conditions of large-scale enterprise.

It must be noted, however, that the employer is not liable for a person who is not in any true sense his delegate.¹⁶³ Similarly, the employer is not liable if the person to whom the safety obligation was entrusted was solely to blame for his own injury.¹⁶⁴

Furthermore, although there is an obligation on the employer to provide for the safety of his employees, there is a

¹⁵⁹ *Wilsons & Clyde Coal Co Ltd v English* [1938] AC 57, [1937] 3 All ER 628; *Paris v Stepney Borough Council* (supra) 367; *Davie v New Merton Board Mills Ltd* [1959] 1 All ER 346, [1959] AC 604; *Driver v Willett (Contractors)* [1969] 1 All ER 665.

¹⁶⁰ *Van Deventer v Workmen's Compensation Commissioner* (supra) 31D.

¹⁶¹ In England, an employer was held liable for the failure of an independent contractor to install sufficient insulation in an electrical kiosk (*Paine v Colne Valley Electricity Supply Co Ltd & British Insulated Cables Ltd* [1938] 4 All ER 803). Similarly, in Canada, an employer was held liable for the negligence of an independent contractor to follow a safe method in operating machinery at a farm (*Marshment v Borgstrom* (1942) SCR 374). See also *Dukes v Martinhusen* (supra) 12; *Peri-Urban Areas Health Board v Munarin* (supra) 367.

¹⁶² Munkman 98; *Scott Safety and the Standard of Care* 185.

¹⁶³ *Wilson v Tyneside Window Cleaning Co* [1958] 1 QB 110, [1958] 2 All ER 265; *Davie v New Merton Board Mills Ltd* [1959] 1 All ER 346, [1959] AC 604; *Sullivan v Gallagher* (supra) 70; *Summer v William Henderson & Sons Ltd* [1964] 1 QB 450, [1963] 1 All ER 408.

¹⁶⁴ *Manwaring v Billington* [1952] 2 All ER 747; *Johnson v Croggan & Co Ltd* [1954] 1 All ER 121.

corresponding obligation on an employee not to breach the proper performance of his contract of employment.

6.9 THE IMPLIED OBLIGATION OF THE EMPLOYEE

Under the employment contract an employee by implication undertakes to exercise the care of a *reasonable employee* in the performance of his duties. An act contrary to the proper performance of his employment contract will be misconduct. The circumstances relating to an employee's misconduct and the effect of such misconduct will be examined below.

6.9.1 Care and Skill

The employer is entitled to expect an employee, and especially an experienced employee, to exercise reasonable care and skill in the performance of his duties.¹⁶⁵

If an employee is engaged in work which calls for special skill, he must not only exercise reasonable care but also measure up to the standard of proficiency that can be expected from a *reasonable employee* in such a profession.¹⁶⁶ In *Harmer v Cornelius*¹⁶⁷ it was said that "the failure to afford the requisite skill which has been expressly or impliedly promised is a breach of legal duty and therefore misconduct."

If an employee does not claim to possess a particular skill,¹⁶⁸ or is employed on work other than the one in which he claims to possess a certain skill at the time of his employment,¹⁶⁹ he undertakes no responsibility.

165 *Nicholson v East Rand Proprietary Mines Ltd* (supra) 235; *Lewis v The Union Steel Corporation of SA Ltd* 1926 WLD 166; *Barker v Union Government* (supra) 120; *Lister v Romford Ice & Cold Storage Co Ltd* [1957] AC 555, [1957] 1 All ER 215; *Van Deventer v Workmen's Compensation Commissioner* (supra) 28; *MacDonald v General Motors SA (Pty) Ltd* (supra) 232.

166 *Mitchell v Dixon* 1914 AD 519; *Van Wyk v Lewis* (supra) 438; *Dale v Hamilton* 1924 WLD 184; *Qualcast (Wolverhampton) Ltd v Haynes* [1959] AC 743, [1959] 2 All ER 38; *McWilliams v Sir William Arroll & Co Ltd* [1962] 1 All ER 623, [1962] 1 WLR 295; *Richardson v Stephenson Clarke Ltd* [1969] 3 All ER 705, [1969] 1 WLR 1695.

167 *Harmer v Cornelius* (1858) 5 CBNS 236, 247.

168 *Harmer v Cornelius* (supra) 236; *Lister v Romford Ice & Cold Storage Co Ltd* [1957] AC 555, [1957] 1 All ER 215.

169 *Harvey v RG O'Dell Ltd* [1958] 2 QB 78, [1958] 1 All ER 657.

There are spheres in which the employer and the employee must exercise their discretion in the fulfillment of their respective obligations. It is difficult to define these spheres, but where the system or mode of operation is complicated, very dangerous, prolonged, or involves a number of employees performing different functions, it is reasonable for the employer to decide on the system that should be adopted. Conversely, where the operating procedure is simple and is frequently executed, it is reasonable for the employee to claim responsibility.¹⁷⁰

In each case the question of whether the employer was negligent by relying on the implied obligation of an employee depends on the facts of the situation.¹⁷¹ If an employee voluntarily assumes risk he may be held liable as a consequence thereof.¹⁷²

6.9.2 Disobedience

Refusal to obey the employer's orders is wrongful and may be regarded as misconduct,¹⁷³ because the employer is entitled to regulate the conduct of his employees during the course of their employment. The orders must, however, be lawful, and refusal to obey unlawful or improper orders is not misconduct.¹⁷⁴

Disobedience may be warranted where an employee apprehends danger to his own life. An employee is not bound to risk his

170 In the Australian case of *O'Connor v Commissioner for Government Transport* (1963) 100 CLR 225 the experience of an employee was a relevant factor in an isolated operation where alternative methods of performing the work existed. The experienced employee, in deciding something left to his discretion, chose a method which proved to be dangerous. See also *Winter v Cardiff Rural District Council* [1950] 1 All ER 819, 822H-823A; *Staveley Iron & Chemical Co Ltd v Jones* [1956] AC 627, 638, [1956] 1 All ER 403, 405.

171 *Lewis v The Union Steel Corporation of SA Ltd* (supra) 172; *Barker v Union Government* (supra) 129.

172 In *Waring & Gillow Ltd v Sherborne* 1904 TS 340, 344 it was said that "(h)e who, knowing and realising a danger, voluntarily agrees to undergo it has only himself to thank for the consequences." Cf *Lahrs v SAR & H* (supra) 333; *SAR & H v Cruywagen* (supra) 225; *MacDonald v General Motors SA (Pty) Ltd* (supra) 237C.

173 Fridman 448.

174 *Turner v Mason* (1845) 14 M & W 112.

own safety in the employer's service¹⁷⁵ and may if he thinks fit decline any task in which he reasonably apprehends injury to himself.¹⁷⁶

To be classified as misconduct, the employee's act must be so grave as to show that it was inconsistent with the proper performance of the employment contract.

6.9.3 *Effect of Misconduct*

An employee may have to indemnify the employer, either completely¹⁷⁷ or partially,¹⁷⁸ for losses sustained by the employer as a result of misconduct.

The principal legal significance of an employee's misconduct arises where the employee in the course of his employment injures a third party.¹⁷⁹ In these circumstances the employer may be vicariously liable to the injured third party. The negligent employee may, however, have to indemnify the employer for the breach of his implied obligation, unless:

- (a) the employer had given the employee some task beyond his competence, or had failed to give him proper instruction;
- (b) the employer, or one of his other employees, contributed to the harm; or
- (c) there is some other intervening factor which precludes the recovery.¹⁸⁰

The employer must always take into account the possible negligent practices of an employee, albeit that an employee,

175 *Limland v Stephens* (1801) 3 Esp 269, 270.

176 *Priestley v Fowler* (1837) 3 M & W 1, 6; *Wiggett v Fox* (1856) 11 Exch 832, 839; *Woodley v Metropolitan District Ry* (1877) 2 Ex D 384, 397; *Palace Shipping Co Ltd v Caine* [1907] AC 386; *Robson v Sykes* [1938] 2 All ER 612. Danger to an employee's own safety is different from fears for the safety of others. *Turner v Mason* (supra) 112; *Bowes & Partners Ltd v Press* [1894] 1 QB 202; *Bird v British Celanese Ltd* [1945] 1 All ER 488.

177 *Janata Bank v Ahmed* [1981] ICR 791, [1981] IRLR 457.

178 An employee partially indemnifies the employer where he only partially has to contribute to the employer's loss.

179 In this respect see *Bowers* 41; *Scott Safety and the Standard of Care* 173-6; *Smith & Wood* 152; *Titman & Camp* 23.

180 *Lister v Romford Ice & Cold Storage Co Ltd* [1957] AC 555, [1957] 1 All ER 215.

in the performance of his duties, must exercise reasonable care and skill.

6.10 SUMMARY

Reasonableness in the circumstances of a particular case, based on the general duty to act fairly, is the most equitable and objective method of evaluating the employer's conduct in the management of safety. Since the industrial court's approach is that of an objective test, no distinction should be made in evaluating the practices of the employer.

The characterization of the employer's conduct is deduced by the application of the standard of the *reasonable employer* in labour relations. The employer is required to take reasonable care for the safety of his employees, and the employee must exercise reasonable care and vigilance in the performance of his duties.

The employer's conduct may be considered negligent if the reasonable employer, in the same circumstances, would have foreseen the likelihood of harm occurring and guarded against its occurrence, but failed to take such steps.

Whether the foreseeable harm should include only harm of a pecuniary nature, or both pecuniary and non-pecuniary harm, is a matter where each case is treated on its own merits, with no fixed rules. In addition, it is suggested that the foreseeability of harm should be restricted to the *foreseeable plaintiff*.

Although the *duty of care* doctrine has been applied by our judicial system in the determination of negligence, the *reasonable employer* test appears to be the more appropriate test for safety matters in South Africa.

An analysis of the nature of the employer's standard of reasonable care is essential for determining the parameters of his obligation in safety management.

CHAPTER 7

THE STANDARD OF REASONABLE CARE

7.1 INTRODUCTION

Judicial decisions have established practical guidelines for the required standard of care in the management of safety.¹ In *Wilsons & Clyde Coal Co Ltd v English*² the employer's safety management obligation was described as "threefold, the provision of a competent staff of men, adequate material, and a proper system and effective supervision." This classification was apparently also adopted in *SAR & H v Cruywagen*³ when it was said that "it is not the condition of the premises, works, plant or machinery alone which is being attacked, but it is the whole system ... which is ... defective."⁴

The important criteria of the employer's safety management obligation have been determined by the courts as the provision of:

- (a) a safe system of work with adequate supervision and instruction;
- (b) a competent staff of employees;
- (c) safe premises; and
- (d) safe plant.⁵

This classification of the employer's obligation provides a guideline to the main categories of factual situations from

¹ Holmes 123-4 points out that the courts are constantly engaged in formulating standards for their own guidance where cases involving similar circumstances frequently recur. See also Glass 4; Street 120; *Dyer v SAR* 1933 AD 10, 19-20; *SAR v Van der Merwe* 1934 AD 129, 135; *SAR v Bardeleben* 1934 AD 473; *SAR v Symington* (supra) 37; *SAR v Van Vuuren* (supra) 43; *Hoffman v SAR* 1966 (1) SA 842 (AD).

² *Wilsons & Clyde Coal Co Ltd v English* [1938] AC 57, 78. Cf ILO *Judicial Decisions in the Field of Labour Law* (1982) 36-7; *Smith v Baker & Sons* (supra) 325.

³ *SAR & H v Cruywagen* (supra) 229.

⁴ See also *Butler v Fife Coal Co Ltd* [1912] AC 149, 174; *Vaughan v Ropner & Co Ltd* [1947] 80 LlLR 119, 121; *Wilson v Tyneside Window Cleaning Co* [1958] 2 QB 110, 116; *Van Deventer v Workmen's Compensation Commissioner* (supra) 31.

⁵ This obligation is treated separately in the research, although some authors such as James & Brown 103, Selwyn *Law of Employment* 82 and Street 203 prefer to treat it as a derivation of (c).

which the standard of care arises.⁶ These categories, which will be discussed individually, are not mutually exclusive and do not limit the scope of the employer's common law liability.⁷

7.2 SAFE SYSTEM OF WORK

The employer is required to establish and enforce a proper and safe system of work by whatever means are appropriate.⁸ The system of work is the standard procedure of performing work in a particular trade or industry of which the employer is assumed to be expressly or implicitly aware. In *Speed v Thomas Swift & Co Ltd*⁹ the court expressed the opinion that a system of work may include:

"the physical lay-out of the job ... the sequence in which the work is to be carried out, the provision in proper cases of warnings and notices and the issue of special instructions. A system may be adequate for the whole course of the job or it may have to be modified or improved to meet circumstances which arise. Such modifications or improvements appear to me equally to fall under the head of system."¹⁰

In *Winter v Cardiff Rural District Council*¹¹ it was said that in order to differentiate between what falls within or outside

6 As to the implications of treating the standard of care as comprising separate categories other than as a source of guidelines see *Wilson v Tyneside Window Cleaning Co* [1958] 2 All ER 265, 273-4; *Cavanagh v Ulster Weaving Co Ltd* [1960] AC 145, 166.

7 The court can extend the range of the employer's obligation to analogous and novel situations. *Van der Walt Delict: Principles and Cases* 25; *Herschel v Mrupe* (supra) 464; *Union Government v Ocean Accident & Guarantee Corporation Ltd* (supra) 577.

8 *Wilsons & Clyde Coal Co Ltd v English* [1938] AC 57, [1937] 3 All ER 628; *Speed v Thomas Swift & Co Ltd* [1943] 1 KB 557, [1943] 1 All ER 539; *Colfar v Coggins & Griffith (Liverpool) Ltd* [1945] AC 197, [1945] 1 All ER 326; *Rees v Cambrian Wagon Works Ltd* [1946] 175 LT 220; *Winter v Cardiff Rural District Council* [1950] 1 All ER 819; *General Cleaning Contractors Ltd v Christmas* [1953] AC 180, [1952] 2 All ER 1110; *Ward v TE Hopkins Ltd* [1959] 3 All ER 225; *Van Deventer v Workmen's Compensation Commissioner* (supra) 28.

9 *Speed v Thomas Swift & Co Ltd* [1943] 1 All ER 539, 542.

10 Cf *Wilsons & Clyde Coal Co Ltd v English* [1938] AC 57, [1937] 3 All ER 628 (HL); *Donovan v Cammell Laird* [1949] 2 All ER 82; *Hayes v NE British Road Services* [1977] 7 CL 173.

11 *Winter v Cardiff Rural District Council* (supra) 819.

the ambit of a *system of work* it is necessary to distinguish:

"between a case where sufficient and adequate provisions have been made, which will, if carried out, protect the employees unless one of his fellows does not use proper care in carrying out the system, and a case where the system itself makes no such provision."

The determinants of a safe system of work include matters such as the following:

- (a) the general organization of the premises, plant and employees with due regard to safety;
- (b) the implementation of warnings and safety precautions; and
- (c) the provision of safety equipment, clothing, training, special instructions and disciplinary procedures.¹²

These factors should all be taken into account when determining whether a system of work is safe.¹³ This implies that the employer must devise and maintain safe working practices which would largely depend upon the level or levels of danger and complexity inherent in the workplace.

Since there is an element of risk in the performance of most industrial operations, the employer is not expected to ensure that his system of work is accident-proof. The system of work must, however, not expose an employee to a foreseeable hazard which could be eliminated or minimized by the exercise of reasonable care.¹⁴

12 Selwyn *Industrial Law Notebook* 21; Whincup *Modern Employment Law* 186.

13 The operations of loading and unloading ships provide a number of illustrations of a safe or unsafe system of work. The following are examples of an unsafe system of work:

- (a) not to remove the ship's rail when using married gear (*Speed v Thomas Swift & Co Ltd* [1943] 1 KB 557, [1943] 1 All ER 539; *Wiggins v Caledonia Stevedoring* [1960] 1 Lloyd's Rep 18); or
- (b) slinging pig iron in nets (*Handley v Cunard White Star* (1944) 77 LILR 543); or
- (c) when wire leg is spliced to a rope fall (*Porter v Liverpool Stevedoring* [1944] 77 LILR 411). See *Martin v AB Dalzell & Co Ltd* [1956] 1 Lloyd's Rep 94 and *Flatman v J Fry* [1957] 1 Lloyd's Rep 73 for examples of a safe system of work.

14 *Newman v Harland & Wolff* [1953] 1 Lloyd's Rep 114; *Latimer v AEC Ltd* [1953] 2 All ER 449, [1952] 2 QB 701; *Smith v Baker & Sons* (supra) 325; *Hamilton v Nuroof* (1956) 96 CLR 18; *Retsas v Commonwealth* (1975) 50 ALJR 104.

The need to take precautions against a foreseeable hazard, in the form of providing a safe system of work, has arisen in cases involving:

- (a) regular, varying and isolated operations;
- (b) inexperienced or infirm employees;
- (c) experienced employees;
- (d) warnings;
- (e) instructions;
- (f) adequate supervision and organization of work; and
- (g) the enforcement of the system.

The employer's obligation under these different cases will be considered.

7.2.1 *Regular, Varying and Isolated Operations*

A system of work usually implies a repeated operation or process,¹⁵ namely, that the work consists of a series of similar or somewhat similar operations or processes.¹⁶ Where a potentially hazardous operation or process is constantly repeated, accidental errors may occur owing to wavering attention or the urgency of completing the work.¹⁷ Under these circumstances, the employer must establish a standard method of executing the operation or process which will, so far as is reasonably practicable, eliminate or minimize the hazard.¹⁸ Such a standard is necessary if the hazard, although it does not arise upon every occasion, does arise from time to time.¹⁹

15 Fridman 207; Munkman 134; Scott *Safety and the Standard of Care* 180.

16 *Winter v Cardiff Rural District Council* (supra) 825.

17 The employer must consider not only the careful employee but also the employee who is inattentive to such a degree as can normally be expected. *General Cleaning Contractors Ltd v Christmas* [1953] AC 180, [1952] 2 All ER 1110; *Smith (formerly Westwood) v National Coal Board* [1967] 3 KIR 1, [1967] 2 All ER 593.

18 In *Van Deventer v Workmen's Compensation Commissioner* (supra) 31 it was held that the lifting of a mould board was an operation which involved a risk but was not an operation of such frequency that it was the obligation of the employer to have evolved some proper and safe system of working in respect thereof.

19 In *Speed v Thomas Swift & Co Ltd* [1943] 1 KB 557, 563, [1943] 1 All ER 539, 541 it was said that "(w)here the work to be performed is regular and uniform ... provision of a safe system for the type or class of work and provision of a safe system for the individual job will in general be the same,

In an organization where the operations are of a varying nature, the employer must establish and enforce a safe system of work for each new operation.²⁰ Operations of a varying nature are those operations where there is no regularity or uniformity about the work involved.²¹ The loading and unloading of ships is a type of work which varies according to the cargo, the type of ship, and the equipment available. The system of work must therefore take into account these variable circumstances encountered by employees.

The employer may also be required to provide a safe system of work with regard to single, isolated operations.²² The provision of a safe system of work is not easily applied to a situation where only a single act of a particular kind is to be performed. However, where the operation is of a complicated or unusual character, the employer may be required to organize the operation before it commences.²³ This is not applicable in every case where there is danger when the operation is negligently performed.²⁴

7.2.2 Inexperienced or Infirm Employees

When establishing a safe system of work, the employer must take into account that an employee may, as a result of inexperience or over-confidence, be careless about the hazards involved in his work.²⁵ An employee should therefore not be

although a particular occurrence or emergency may call for special precautions." See also *General Cleaning Contractors Ltd v Christmas* [1953] AC 180, 194, [1952] 2 All ER 1110, 1117.

20 A safe system of work for each new operation could only be determined in the light of the actual situation at the relevant time. *Speed v Thomas Swift & Co Ltd* [1943] 1 KB 557, [1943] 1 All ER 539; *Colfar v Coggins & Griffith (Liverpool) Ltd* [1945] AC 197, [1945] 1 All ER 326.

21 Operations of a varying nature are commonly found in the building trade, constructional engineering, shipbuilding yards, and the loading and unloading of ships.

22 *Fridman* 127, *Keenan & Crabtree* 127, and *Munkman* 136 consider the application of a safe system of work to single, isolated operations as exceptional cases.

23 *Rees v Cambrian Wagon Works Ltd* (supra) 220; *Winter v Cardiff Rural District Council* (supra) 819.

24 *Winter v Cardiff Rural District Council* (supra) 825.

25 *General Cleaning Contractors Ltd v Christmas* [1953] AC 180, [1952] 2 All ER 1110; *Shanley v West Coast Stevedoring Co* [1957] 1 Lloyd's Rep 391; *Wilson v Tyneside Window Cleaning Co* [1958] 1 QB 110, [1958] 2 All ER 265; *Jenner v Allen West & Co Ltd* [1959] 2 All ER 115.

given a task to perform without supervision where it is beyond his competence.²⁶

Furthermore, in planning the method of implementing particular processes, the employer must take into account the individual physical characteristics of the employees involved,²⁷ especially if a risk of greater harm or a greater risk of harm exists with respect to a particular employee.²⁸

7.2.3 Experienced Employees

An experienced employee should be aware of the ordinary hazards of his work²⁹ and may not require warning and advice about hazards with which he is familiar.³⁰ The experienced employee, in performing his work, is expected to take the ordinary routine precautions common to it. The employer is not expected to advise him of every hazard which may arise and every step that should be taken to counteract that hazard.³¹ Although the employer may, in certain circumstances, act reasonably in delegating the system of work to an experienced employee, this may not be the case where the operation is one of known danger.³²

The criterion for determining whether the employer acted reasonably or negligently with regard to experienced employees, is whether the employee's own common sense and experience should have told him how to perform his work. If the employee was injured by working in a foolish and dangerous manner, the employer will not be liable.³³

26 *Byers v Head Wrightson & Co Ltd* [1961] 2 All ER 538.

27 *Supra* 149-50.

28 *Paris v Stepney Borough Council* (supra) 367; *Cork v Kirby Maclean* [1952] WN 399, [1952] 2 All ER 402; *Withers v Perry Chain Co Ltd* [1961] 3 All ER 676, [1961] 1 WLR 1314; *Jones v Lionite Specialties* (1961) 105 SJ 1082.

29 *Ferner v Kemp Bros* [1960] CA 176, 178.

30 Such a level of advice and assistance could lead to resentment and resistance by an experienced employee. *Qualcast (Wolverhampton) Ltd v Haynes* [1959] AC 743, [1959] 2 All ER 38; *Boyle v Kodak* (1967) KIR 28.

31 *Ferner v Kemp Bros* (supra) 178; *Quintas v National Smelting Co Ltd* [1961] 1 All ER 630.

32 *Prince v Carrier Engineering Co* [1955] 1 Lloyd's Rep 401; *Wilson v Tyneside Window Cleaning Co* [1958] 1 QB 110, [1958] 2 All ER 265.

33 In the following cases the employer was held not liable for failing to tell an employee:

An experienced employee may also, in some circumstances, be reasonably left to organize his own work,³⁴ such as selecting the equipment he usually requires. If the employee, in such circumstances, chooses to adopt a dangerous method, his employer will not be held liable.³⁵

7.2.4 Warnings

In some circumstances, a warning may be adequate for the occasion.³⁶ If a hazard exists which threatens the safety of an employee, or if predictable short-cuts may increase the hazard, then the employer is bound either to eliminate or minimize the hazard or, where the latter does not apply, to warn the employee against the hazard and the consequences of disobeying the warning.³⁷ A warning will be inadequate in circumstances where the employer is required to eliminate or minimize the hazard.

The employer may also, under certain circumstances, have to take reasonable steps to warn employees that the work

(a) not to hammer an unexploded shell (*O'Reilly v National Rail & Tramway Appliances* [1966] 1 All ER 499);

(b) not to put his weight on obviously rotten wood (*Wilson v Tyneside Window Cleaning Co* [1958] 1 QB 110, [1958] 2 All ER 265);

(c) not to pour naphtha on to a lighted fire (*Callan v Swan Hunter & Co* [1968] 2 Lloyd's Rep 75);

(d) how to get on a works bus (*Ramsay v Wimpey & Co Ltd* [1952] SLT 46, [1951] SC 692); and

(f) how to avoid a rush into the canteen (*Lazarus v Firestone Tyre & Rubber Co* [1963] CLY 2372).

34 The employer cannot escape liability by appealing that he delegated his responsibility to an experienced employee to devise his own safe system of work.

35 In *Brennan v Techno Constructions Ltd* (1962) The Guardian October 11 a skilled steel erector was told to erect a block and tackle on a roof truss 14 feet above the ground and fell because he climbed out along the truss instead of using a ladder. The employer was not liable for failing to advise him to use a ladder, or to suggest that a ladder might be safer. Cf *Martin v AB Dalzell & Co Ltd* (supra) 94; *Winstanley v Athel Line Ltd* [1956] 2 Lloyd's Rep 424; *Langan v W & C French* (1961) 105 SJ 912; *Woods v Power Gas Corp* (1969) 8 KIR 834; *Richardson v Stephenson Clarke Ltd* [1969] 3 All ER 705, [1969] 1 WLR 1695.

36 In *Ward v TE Hopkins & Sons Ltd* (supra) 229 it was known that carbon monoxide gas was present in a well. A warning given in the form: "Don't go down that bloody well until I come," was held to be insufficient. As gas had turned the well into a lethal chamber, reasonable care required that the nature of the peril should be explained and described.

37 James & Brown 106; Scott *Safety and the Standard of Care* 181; Whincup *Modern Employment Law* 187; *Baker v TE Hopkins & Son* [1959] 3 All ER 225, 255.

performed by one group of employees may be dangerous for fellow-employees.³⁸

7.2.5 Instructions

A system of work may not be safe unless it equips employees with instructions concerning safe methods of work which are properly interpreted and understood, and a means of ensuring that these instructions are implemented.³⁹

Where a system of work does not require elaborate planning or precise and detailed instructions, the employer will not be liable if an employee is injured as a result of a failure to use his own skill and discretion.⁴⁰ Similarly, if a particular hazard is obvious to common sense, instructions will not be required.⁴¹

For a skilled employee instructions will not ordinarily be required where the method of performing his work is within his competence. Where more than elementary knowledge is required to recognize a hazard, instructions may be required for a skilled employee.⁴²

The employer is required to give the necessary safety instructions in circumstances where a young or inexperienced employee is employed in a potentially dangerous condition,⁴³ or where the work entails some unusual risk,⁴⁴ or where the

38 *Dyer v Southern Ry* [1948] 1 KB 608; *Trznadel v BTC* [1957] 3 All ER 196.

39 *Scott Safety and the Standard of Care* 182; *General Cleaning Contractors Ltd v Christmas* [1953] AC 180, 189, [1952] 2 All ER 1110, 1114; *Lewis v High Duty Alloys Ltd* [1957] 1 All ER 740, [1957] 1 WLR 632; *Hawkins v I Ross (Castings)* [1970] 1 All ER 180.

40 *Winter v Cardiff Rural District Council* (supra) 819; *Langan v W & C French* (supra) 912; *Jones v AE Smith Coggins* [1955] 2 Lloyd's Rep 17.

41 *Rands v McNeil* [1955] 1 QB 253, [1954] 3 All ER 593.

42 *Payne v Peter Bennie Ltd* (1973) 14 KIR 395.

43 *Robinson v WH Smith & Son* [1901] 17 TLR 423; *Cribb v Kynoch Ltd* [1907] 2 KB 548; *Young v Hoffman Mfg Co Ltd* [1907] 2 KB 646; *Woods v Durable Suites Ltd* [1953] 1 WLR 857, [1953] 2 All ER 391; *Stringer v Automatic Woodturning Co* [1956] 1 WLR 138, [1956] 1 All ER 327; *Watts v Empire Transport Co Ltd* [1963] 1 Lloyd's Rep 263.

44 *Nicolson v Shaw Savill* [1957] 1 Lloyd's Rep 162; *White v Holbrook Precision Castings* [1985] IRLR 215.

employee is not able to recognize the full extent of the risk.⁴⁵

Where instructions are required, such instructions must be implemented by means of a positive act on the part of the employer.⁴⁶ The obligation of implementing safety instructions is not fulfilled merely by telling an employee to read the instructions.⁴⁷ It is therefore the employer's obligation to devise a safe system of work, warn employees of potential hazards, and instruct them how to protect themselves against such hazards.

7.2.6 Adequate Supervision and Organization of Work

The employer may be negligent if an employee's safety is endangered through the lack of proper supervision,⁴⁸ or an organized system of work. A system of work may be inadequately supervised or organized if the employer:

- (a) confers upon an employee a task beyond his competence;⁴⁹
- (b) fails to supervise such an employee to ensure that he understands the safety requirements;⁵⁰
- (c) permits an inexperienced employee to operate dangerous machinery without instruction and supervision;⁵¹ or
- (d) fails to provide sufficient employees to supervise the plant or equipment.⁵²

45 *Baker v TE Hopkins & Son* [1959] 3 All ER 225, [1959] 1 WLR 966; *Ward v TE Hopkins & Sons Ltd* (supra) 225; *Burgess v Thorn Consumer Electronics (Newhaven) Ltd* (1983) The Times May 16; *James v Durkin (Civil Engineering Contractors)* (1983) The Times May 25.

46 *Lewis v High Duty Alloys Ltd* [1957] 1 All ER 740, [1957] 1 WLR 632; *Baker v TE Hopkins & Son* [1959] 3 All ER 225, [1959] 1 WLR 966.

47 *Barcock v Brighton Corporation* [1949] 1 KB 339, [1949] 1 All ER 251.

48 In *Nolan v Dental Mfg Co Ltd* [1958] 2 All ER 449, [1958] 1 WLR 936 it was held that the employer should have given strict orders to his employees to wear safety goggles and enforced these orders by supervision. Cf *Crookall v Vickers Armstrong Ltd* [1955] 2 All ER 12; *James v Hepworth & Grandage Ltd* [1968] 1 QB 94, [1967] 2 All ER 829; *Bux v Slough Metals Ltd* [1974] 1 All ER 262.

49 *Byers v Head Wrightson & Co Ltd* (supra) 538.

50 *Jenner v Allen West & Co Ltd* (supra) 115.

51 *Kerry v Carter* [1969] 1 WLR 1372, [1969] 3 All ER 723.

52 *Skipp v Eastern Counties Ry Co* (1853) 9 EX 223; *Saxton v Hawkesworth* [1872] 26 LT 851.

Where an unsafe practice has originated, such as oiling machines in motion, the employer will be negligent if, when he knows or ought to have known of the practice, he takes no measures to stop or prevent the practice.⁵³

An important factor which the employer should consider is the pressure under which employees are expected to work. Their duties are not performed in the calm atmosphere of a boardroom with the advice of experts;⁵⁴ on the contrary, employees may in many instances have to make their own decisions in areas of danger and in circumstances in which such dangers are frequently obscured by repetition.⁵⁵ Piecework, in particular, is recognized as likely to encourage an employee to behave with less than normal caution.⁵⁶ Under these circumstances, the employer is required to improve his safety precautions accordingly and provide the necessary supervision.

7.2.7 Enforcing the System

Having established a safe system of work, the employer must exercise reasonable care to enforce the system.⁵⁷ The employer will not be liable if an employee is injured as a result of his departure from the system,⁵⁸ and will not be expected to supervise mature and experienced employees to ensure that they do as they are told.⁵⁹

53 *Lewis v High Duty Alloys Ltd* [1957] 1 All ER 740, [1957] 1 WLR 632.

54 *Baker v White's Window & General Cleaning Co* (1962) *The Times* March 1.

55 *General Cleaning Contractors Ltd v Christmas* [1953] AC 180, [1952] 2 All ER 1110; *Watson v Telecom* (1985) 40 SASR 221.

56 In *Broughton v Joseph Lucas Ltd* [1958] CA 330 certain new precautions for toolsetters were unpopular because they slowed work and reduced bonuses. The employer was held 75% to blame when a toolsetter was injured through ignoring these precautions, because he had taken no steps by disciplinary insistence, rearrangement of wages or time to make the new precautions more acceptable. Cf *Brown v John Mills & Co (Llanidloes) Ltd* (1970) 114 SJ 149, (1970) 8 KIR 702.

57 *Clifford v Charles H Challen & Son Ltd* [1951] 1 KB 495, [1951] 1 All ER 72 was a case where the employer provided a protective cream to be used by his employees for the prevention of dermatitis, but kept it locked in a store. Since the foreman did nothing to encourage the employees to use the cream, it was held that the employer had failed in his obligation to provide a safe system of work. See also *Barcock v Brighton Corporation* [1949] 1 KB 339, [1949] 1 All ER 251; *Winter v Cardiff Rural District Council* (supra) 819; *General Cleaning Contractors Ltd v Christmas* [1953] AC 180, [1952] 2 All ER 1110; *Woods v Durable Suites Ltd* [1953] 1 WLR 857, [1953] 2 All ER 391; *Nolan v Dental Mfg Co Ltd* [1958] 2 All ER 449, [1958] 1 WLR 936; *Qualcast (Wolverhampton) Ltd v Haynes* [1959] AC 743, [1959] 2 All ER 38; *James v Hepworth & Grandage Ltd* [1968] 1 QB 94, [1967] 2 All ER 829.

58 *Qualcast (Wolverhampton) Ltd v Haynes* [1959] AC 743, [1959] 2 All ER 38.

59 *Woods v Durable Suites Ltd* [1953] 1 WLR 857, [1953] 2 All ER 391.

The employer would be negligent if he failed to provide a proper and safe system of work, if the circumstances demanded such a system, and if he knew or ought to have known of such a failure.⁶⁰ The employer may not be negligent for failing to provide a proper and safe system of work if it is found that there was no practicable alternative to the system which was operative at the time of the accident.⁶¹

7.3 COMPETENT STAFF OF EMPLOYEES

The employer is required to exercise reasonable care in the recruitment and provision of competent employees,⁶² although he need not warrant their competence. A competent employee refers to an employee "who has been approved as qualified by training or experience to perform a task or function or assume a responsibility in a manner that will prevent danger as far as is practicable."⁶³

The employer must provide education⁶⁴ and training⁶⁵ where necessary, and ensure that those employees selected to

60 *Van Deventer v Workmen's Compensation Commissioner* (supra) 28. Among examples of cases where the system of work was found to be unsafe are:

- (a) the faulty co-ordination of departments or branches of work, where one may endanger the other {*Sword v Cameron* (1839) 1 Dunl 493; *Smith v Baker & Sons* (supra) 325};
- (b) the faulty lay-out of the operation {*SAR & H v Cruywagen* (supra) 219; *Speed v Thomas Swift & Co Ltd* [1943] 1 KB 557, [1943] 1 All ER 539};
- (c) the handling of heavy loads {*Larmour v Belfast Corporation* (1945) NI 163 (CA); *Winter v Cardiff Rural District Council* (supra) 819};
- (d) insufficient employees for the operation {*Williams v BALM (NZ) Ltd* [1951] NZLR 893; *Johnson v Pressed Steel Co Ltd* (1963) *The Times* March 15}. Munkman 140-9 and Whincup *Modern Employment Law* 187-203 illustrate further cases of unsafe systems of work.

61 *Colfar v Coggins & Griffith (Liverpool) Ltd* [1945] AC 197, [1945] 1 All ER 326; *General Cleaning Contractors Ltd v Christmas* [1953] AC 180, [1952] 2 All ER 1110; *Dixon v Cementation Co Ltd* [1960] 3 All ER 417; *Gilfillan v National Coal Board* 1972 SLT 39.

62 Carby-Hall 42; Fleming 483; Fridman 202; Keenan & Crabtree 129; Munkman 128; Whincup *Modern Employment Law* 183; *Smith v Crossley Brothers Ltd* (supra) 655.

63 ILO *Safety and Health in Dock Work* 1.

64 *Safety education* is the process of broadening and adding to an employee's safety knowledge for the purpose of developing an awareness of the importance of eliminating accidents, including a mental alertness in recognizing and correcting conditions and practices that may lead to an injury. WOSA *Safety Subjects* 98; Ross 11.

65 *Safety training* is the method of developing an employee's skill in the use of safe working techniques and practices {Blake 333; Schofield 42}. In *Olsen v Gravesend Aviation Ltd* [1936] 3 All ER 241 the employer was held to be negligent where he taught a trainee an unsafe method of working, with the result that the trainee was injured.

supervise and direct the work have the knowledge and experience to observe whether the work is performed safely.

7.3.1 *Recruitment of Competent Employees*

With regard to the recruitment of competent employees, the employer may be negligent under the following conditions:

- (a) if he fails to recruit a sufficient number of employees to perform a task; or
- (b) if he recruits an employee whom he knew or ought to have known was incompetent to perform the work in question.⁶⁶

It may not be sufficient for the employer to have recruited a skilled and qualified employee who acts with reasonable care, if the employee lacks experience to meet situations which the employer ought to have foreseen.⁶⁷

The employer's obligation is not discharged merely by recruiting competent employees; he must also ensure that the employees perform their duties with reasonable care.

7.3.2 *Habitual Conduct of Employees*

The employer is required to discipline an employee who, by his habitual conduct, may prove a source of danger to fellow-employees, as in the case of a known bully⁶⁸ or a reckless⁶⁹

66 *Hutchinson v York etc Ry Co* (1850) 5 Ex 343; *Feltham v England* [1866] LR 2 QB 33; *Tunney v Midland Ry Co* (1866) 1 LRPC 291; *Butler v Fife Coal Co Ltd* (supra) 149.

67 In *Butler v Fife Coal Co Ltd* (supra) 149-50 it was held that the employer was negligent in recruiting 2 officials with the necessary qualifications but who had no previous experience of carbon monoxide emanations in their pit which the employer knew to be a possible hazard. Cf *Birnie v Ford Motor Co Ltd* (1960) *The Times* November 22.

68 In *Veness v Dyson, Bell & Co* (1965) *The Times* May 25 the court pointed out that the employer might be liable if he knew an employee was persecuting a fellow-employee to the point of physical or mental breakdown. Cf *Ryan v Cambrian United Dairies* (1957) 101 SJ 493.

69 The words *reckless* or *recklessness* denote a high degree of carelessness. It is the doing of something which involves a grave risk to others, whether the doer realizes it or not.

practical joker.⁷⁰ Therefore, if the employer knows or ought to know of the reckless habitual conduct of an employee, but does not discipline the employee, by dismissal if necessary,⁷¹ the employer will be negligent should the employee injure or be the cause of injury to a fellow-employee.⁷²

The employer will not be held to be negligent if he unknowingly recruits an employee whose habitual conduct is dangerous,⁷³ or where he could not have anticipated the creation of a dangerous situation from the employment of such an employee.⁷⁴

7.3.3 Gangs

It is difficult to establish whether the employer is negligent if an employee is injured in the course of working in a gang. If a heavy object is dropped while being moved by a gang of which the injured employee is a member, the injured employee must show how the accident occurred, and must be able to point to some particular act of negligence.⁷⁵

Not all accidents which occur in the course of gang-work are due to negligence. In the English case of *O'Leary v Glen Line*,⁷⁶ two dock employees were swinging bales into a net, and one let go of his grip, with the result that the other employee was injured. The court held that there was no negligence on the part of the employer, as it was "just one of

70 *Hudson v Ridge Mfg Co Ltd* [1957] 2 QB 348, [1957] 2 All ER 229.

71 Reprimands, unaccompanied by threat of dismissal, may not be sufficient for the employer to escape liability. *Hudson v Ridge Mfg Co Ltd* [1957] 2 QB 348, [1957] 2 All ER 229.

72 In *Southern Insurance Association Ltd v Danneberg* 1976 (3) SA 253 (A) it was held that if an employer has reason to know that grossly negligent or reckless conduct on the part of an employee can be anticipated, he is required to adopt an appropriate standard of care to avoid the risk of harm. Cf *Coddington v International Harvestors Co of Great Britain Ltd* (supra) 146.

73 *Smith v Ocean SS Co Ltd* [1954] 2 Lloyd's Rep 482.

74 *Smith v Crossley Brothers Ltd* (supra) 655; *Antoniak v Commonwealth* (1962) 4 FLR 454; *Hefer v Rover Car Co* (1964) *The Guardian* November 25.

75 *Flaherty v AE Smith Coggins* [1951] 2 Lloyd's Rep 397. In *Stapley v Gypsum Mines Ltd* [1953] AC 663, [1953] 2 All ER 478 the injured employee and the fellow-employee were both to blame for not dismantling a dangerous part of a roof in a coal mine. The court held that the injured employee could recover against the employer in respect of the fault of the fellow-employee, subject to a proportionate reduction for his own contributory negligence.

76 *O'Leary v Glen Line* [1953] 1 Lloyd's Rep 601.

those things that will happen, no matter how careful people may be."⁷⁷

7.3.4 *Inexperienced or Untrained Employees*

It is the employer's obligation when recruiting employees that the new recruitments are properly trained and educated relative to the level of work to be performed. When an employee has to work with an inexperienced or untrained fellow-employee and is injured through the negligence of such fellow-employee, the employer will be liable if he should have foreseen the inexperience of that fellow-employee.⁷⁸

7.4 *SAFE PREMISES*

The employer must exercise reasonable care to ensure that his premises and the premises of a third party where his employees are employed,⁷⁹ are safe. The principles applicable to a safe system of work apply equally to the provision of safe premises.

7.4.1 *The Employer's Premises*

The employer must provide and maintain safe premises.⁸⁰ This obligation extends to all parts of the premises to which

77 *O'Leary v Glen Line* (supra) 603. Cf *Connor v Port of Liverpool Stevedoring* [1953] 2 Lloyd's Rep 604; *Schofield v Glen Line* [1955] 2 Lloyd's Rep 351; *Allar's v Glen Line* [1956] 1 Lloyd's Rep 51; *Alderton v Lamport & Holt Line* [1963] 2 Lloyd's Rep 541.

78 *Young v Hoffman Mfg Co Ltd* (supra) 646.

79 *Carnere v Board of Gravelbourg School District No. 2244 of Saskatchewan* [1977] 5 WWR 517.

80 *Nicholson v East Rand Mines* 1910 WLD 235; *Browning v Crumlin Valley Collieries* [1926] 1 KB 522; *SAR & H v Cruywagen* (supra) 229; *Van Deventer v Workmen's Compensation Commissioner* (supra) 31; *Ferrie v Western No 3 District Council* (1973) IRLR 162; *British Aircraft Corporation v Austin* (supra) 382; *National Union of Mineworkers & others v Driefontein Consolidated Ltd* (1984) 5 ILJ 101. The employer's obligation to provide safe premises may require, for example:

- (a) a safety fence or guard rail by a steep drop {*Bath v British Transport Commission* (supra) 542};
- (b) a handhold on a roof crawling ladder used for carrying buckets {*Cavanagh v Ulster Weaving Co Ltd* [1960] AC 145, [1959] 2 All ER 745};
- (c) moving a points lever likely to cause injury to an employee riding on the footplate of an engine {*Hicks v British Transport Commission* [1958] 2 All ER 39, [1958] 1 WLR 493};
- (d) warning of the presence of debris which blocks a route between a bank and railway track {*Smith (formerly Westwood) v National Coal Board* [1967] 3 KIR 1, [1967] 2 All ER 593};
- (e) giving cautionary advice to employees if the employer does not fence or otherwise guard a dangerous part of the premises {*Braithwaite v South Durham Steel Co Ltd* [1958] 3 All ER 161}; and

employees may reasonably have authorized entry or in which they may reasonably be expected to work, even during the performance of non-routine or exceptional operations,⁸¹ and also to those parts of the premises used for amenities, such as canteens and toilets.⁸² The employer may also be required to supervise the means by which employees enter or leave their place of work.⁸³

If an employee is aware or should be aware of a hazard in the premises, and the employer has taken such precautions to make the premises safe as is reasonable in the circumstances, the employer may not be negligent if an employee is injured as a consequence of such a hazard.⁸⁴

If the employer allows a known hazard to remain unchecked, as when, for example, the floor is frequently slippery or when some new hazard arises of which no warning is given, then the employer could be negligent.⁸⁵ However, if an employee is

(f) providing a line of demarcation on a roof over which a ropeway runs (*Quintas v National Smelting Co Ltd* (supra) 630).

(g) assuage employee's fear that the working place is unsafe (*National Union of Mineworkers & others v Driefontein Consolidated Ltd* (supra) 101).

81 Roadways, gateways, passages and stairs may be regarded as areas where an employee may reasonably be expected to work. *Davies v De Havilland Aircraft Co Ltd* [1951] 1 KB 50; *London Graving Dock Co v Horton* [1951] 2 All ER 1; *Light v Bourne & Hollingsworth* [1963] CLY 2412; *ACJ Metal v Boezulik* (1964) 110 CLR 372; *Stewart v West African Terminals Ltd* [1964] 1 Lloyd's Rep 409; *Hasley v South Bedford Council* (1983) *The Times* October 18.

82 *Davidson v Handley Page Ltd* [1945] 1 All ER 235; *Lee v J Dickinson & Co* (1960) 110 LJ 317, [1960] 5 CL 370; *Collier v Hall & Ham River Co* (1968) 112 SJ 723.

83 If an employee is injured through being pushed by an uncontrolled surge of employees leaving a workroom, the employer may be held liable. *Lee v J Dickinson & Co* [1960] 110 LJ 317, [1960] 5 CL 370; *Bell v Blackwood Morton & Sons* 1960 SC 11, 1960 SLT 145; *Lazarus v Firestone Tyre & Rubber Co* (supra) 2372.

84 In *Potts v Churchill Redman Ltd* [1952] CA 201 the court held that no liability was attached to the employer for one piece of sharp metal left on the floor after the employee had swept up. Cf *Braham v J Lyons & Co* [1962] 3 All ER 281.

85 Examples of conditions in terms of which premises have been held to be unsafe are the following:

(a) a static defect in the premises such as an unguarded hole (*McDonald v British Transport Commission* [1955] 3 All ER 789, [1955] 1 WLR 1323);

(b) a combustible material lying near a boiler (*D'Urso v Sanson* [1939] 4 All ER 26);

(c) a structural weakness, such as a roof or floor which is insufficiently supported (*Simmons v Bovis Ltd* [1956] 1 All ER 736); and

(d) a physical condition made dangerous by oil (*Latimer v AEC Ltd* [1953] 2 All ER 449, [1952] 2 QB 701), water (*Davidson v Handley Page Ltd* (supra) 235) or slippery ice (*McDonald v British Transport Commission* [1955] 3 All ER 789, [1955] 1 WLR 1323). See also *Graham v Distington Engineering Co* (1961) *The Guardian* December 1; *Smith (formerly Westwood) v National Coal Board* [1967] 3 KIR 1, [1967] 2 All ER 593; *Taylor v Gestetner* (1967) 2 KIR 133.

instructed to clean a slippery floor and such employee slips on the floor, the employer will not be liable because he has undertaken to solve the problem.⁸⁶

7.4.2 Premises of a Third Party

If an employee is instructed to work at premises which belong to or are controlled by a third party, then the employer may still be required to take the necessary precautions for the safety of that employee.⁸⁷

The structure of the premises of a third party is beyond the employer's control and he has no power to rectify any defects in them.⁸⁸ He is, however, obliged to exercise reasonable care to safeguard an employee against hazards which he could foresee and which he has the power to prevent or minimize.⁸⁹ Similarly, the employer must give adequate instructions to a third party working on his premises as to the potential hazards.⁹⁰ The employer is not required to foresee unexpected hazards, whether on his own premises or on the premises of a third party.⁹¹

The employer's obligation with regard to the premises of a third party varies with the circumstances. In some situations the custom of the trade or industry may, to a certain extent,

86 *Vinnyez v Star Paper Mills* [1965] 1 All ER 175; *Jenkins v Allied Ironfounders* [1969] 3 All ER 1609.

87 ILO *Judicial Decisions in the Field of Labour Law* (1983) 38-9; *General Cleaning Contractors Ltd v Christmas* [1953] AC 180, [1952] 2 All ER 1110; *Thomson v Cremin* [1953] 2 All ER 1185; *Wilson v Tyneside Window Cleaning Co* [1958] 1 QB 110, [1958] 2 All ER 265; *Smith v Austin Lifts Ltd* [1959] 1 All ER 81, [1959] 1 WLR 100.

88 *M'Quilter v Goulondris Bros Ltd* [1951] SLT 75; *Mace v R & H Green & Silley Weir Ltd* [1959] 2 QB 14, [1959] 1 All ER 655.

89 In the situation where an employee is employed to work on the premises of a third party, the employer may be required to:

- (a) provide a safe system of work notwithstanding the dangerous nature of the premises (*Drummond v British Building Cleaners Ltd* [1954] 3 All ER 507);
- (b) warn the employee of the hazards that exist on such premises (*Ashdown v Samuel Williams & Sons Ltd* [1957] 1 QB 409, [1957] 1 All ER 35); and
- (c) ensure that the third party provides safe premises (*Smith v Austin Lifts Ltd* [1959] 1 All ER 81, [1959] 1 WLR 100). See also *General Cleaning Contractors Ltd v Christmas* [1953] AC 180, [1952] 2 All ER 1110; *Knight v Demolition & Construction Co Ltd* [1954] 1 All ER 711; *McDowell v FMC (Meat) Ltd* [1968] 3 KIR 595; *Smith v Vange Scaffolding & Engineering Co Ltd* [1970] 1 All ER 249.

90 ILO *Judicial Decisions in the Field of Labour Law* (1983) 38.

91 *Cilia v HM James & Sons* [1954] 2 All ER 9.

allow the employer to rely upon the diligence of a third party,⁹² in others upon the experience and skill of the employee.⁹³

The obligation to provide safe premises is an aspect of the employer's wider obligation to observe reasonable care in the provision and maintenance of safe plant.

7.5 SAFE PLANT

The employer is required to provide and select safe plant,⁹⁴ and to maintain such plant in a proper condition.⁹⁵ The obligation extends to all those acts of an employee which are reasonably necessary and incidental to the performance of his work.⁹⁶

The word *plant* is a wide concept and includes "whatever apparatus is used by a businessman for carrying on his

92 Stevedores are in general entitled to rely upon the ship-owners for safety (*Thomson v Cremin* (supra) 1185), and ship-repairers are entitled to assume that a reputable ship will be reasonably safe (*Mace v R & H Green & Silley Weir Ltd* [1959] 2 QB 14, [1959] 1 All ER 655). See also *Hodgson v British Arc Welding Co Ltd & B & N Green & Silley Weir Ltd* [1946] KB 302, [1946] 1 All ER 95; *Szumczyk v Associated Tunnelling Co Ltd* [1956] 1 All ER 126.

93 The employer need not repeatedly warn an experienced employee against a hazard if the employee is aware of the hazard. *Wilson v Tyneside Window Cleaning Co* [1958] 1 QB 110, [1958] 2 All ER 265.

94 The obligation to provide safe plant will sometimes overlap with the obligation to provide a safe system of work, because a safe system of work may dictate the provision of, for example, a system of safety rails (*Barker v Union Government* (supra) 120), or safety clothing (*General Cleaning Contractors Ltd v Christmas* [1953] AC 180, [1952] 2 All ER 1110). The requirements for providing safe plant may vary from case to case, as the following instances illustrate:

(a) it may not be necessary for the employer to issue safety goggles to employees breaking concrete with a mechanical pick (*Walsh v Allweather Mechanical Grouting Co* [1959] 2 QB 300, [1959] 2 All ER 588), or for sweeping the wall of a dry dock (*Johnson v Cammell Laird & Co Ltd* [1963] 1 Lloyd's Rep 237); and

(b) safety goggles have been required for cutting steel piping (*Paling v A Marshall (Plumbers)* [1957] CLY 2420), chipping a brick wall (*Welsford v Lawford Asphalte Co* [1956] CLY 5984), or operating a carborundum wheel (*Nolan v Dental Mfg Co Ltd* [1958] 2 All ER 449, [1958] 1 WLR 936). See also *Clifford v Charles H Challen & Son Ltd* [1951] 1 KB 495, [1951] 1 All ER 72; *Watson v Ready Mixed Concrete* (1961) *The Times* January 18; *Berry v Stone Manganese & Marine Ltd* [1972] 1 Lloyd's Rep 182; *Pentney v Anglian Water Authority* [1983] ICR 464.

95 *Smith v Baker & Sons* (supra) 325; *Lahrs v SAR & H* (supra) 329; *Wilsons & Clyde Coal Co Ltd v English* [1938] AC 57, [1937] 3 All ER 628; *Kilgollan v William Cooke & Co Ltd* [1956] 1 WLR 527, [1956] 2 All ER 294; *Lewis v High Duty Alloys Ltd* [1957] 1 All ER 740, [1957] 1 WLR 632.

96 *Williams v Birmingham Battery & Metal Co* [1899] 2 QB 338; *Lovell v Blundells & Crompton & Co Ltd* [1944] 1 KB 502, [1944] 2 All ER 53; *Davidson v Handley Page Ltd* (supra) 235; *Bright v Thames Stevedoring Co* [1951] 1 Lloyd's Rep 116; *Garrard v Southey & Co & Standard Telephones & Cables Ltd* [1952] 2 QB 174, [1952] 1 All ER 597; *Davie v New Merton Board Mills Ltd* [1959] 1 All ER 346, [1959] AC 604; *Bradford v Robinson Rentals Ltd* [1967] 1 All ER 267.

business" such as "all goods and chattels, fixed or moveable, live or dead, which he keeps for permanent employment in his business."⁹⁷ *Plant* does not need to be physically fixed but may be any part of the permanent establishment which is replaced when worn out.⁹⁸

7.5.1 *Provision and Selection of Safe Plant*

There are five factors which need to be considered in establishing whether the employer is negligent in the provision and selection of safe plant.

7.5.1.1 *Provision of Plant*

It may not be adequate merely to provide the necessary safe plant without storing such plant at a point where it comes easily and obviously to hand.⁹⁹ Alternatively, an employee should be given clear directions where he can locate the plant.¹⁰⁰

The employer must not only provide the necessary plant but also ensure that such plant is used.¹⁰¹ There is, however, no presumption of negligence if the employer provides safety equipment but fails to pressurize an employee to make use of it.¹⁰²

97 *Yarmouth v France* (1887) 19 QBD 647, 658.

98 Keenan & Crabtree 124.

99 The employer may be negligent if an employee has to find or borrow the necessary safe plant. *Lovell v Blundells & Crompton & Co Ltd* [1944] 1 KB 502, [1944] 2 All ER 53; *Graves v J & E Hall* [1958] 2 Lloyd's Rep 100.

100 In the case of the provision of safety spats, it was held in *Qualcast (Wolverhampton) Ltd v Hayes* [1959] AC 743, [1959] 2 All ER 38 that it is sufficient if the employer, to the knowledge of an employee, has these spats available in a store for the asking. Cf *Finch v Telegraph Construction & Maintenance Co* [1949] 1 All ER 452, [1949] WN 57; *Clifford v Charles H Challen & Son Ltd* [1951] 1 KB 495, [1951] 1 All ER 72; *Norris v Syndie* [1952] 2 QB 135, [1952] 1 All ER 935.

101 *Clifford v Charles H Challen & Son Ltd* [1951] 1 KB 495, [1951] 1 All ER 72; *Norris v Syndie* [1952] 2 QB 135, [1952] 1 All ER 935; *Adsett v K & L Steel Sounders & Engineers Ltd* [1953] 1 All ER 97; *Crookall v Vickers Armstrong Ltd* (supra) 12.

102 In *Cummings v Sir William Arrol & Co Ltd* [1962] 1 All ER 623 it was held that the employer was not obliged to instruct an experienced steel erector to wear a safety belt when several steel erectors reasonably believe there are disadvantages in wearing a safety belt. This provision is based on the facts and follows no general rule of law. In *Qualcast (Wolverhampton) Ltd v Haynes* [1959] AC 743, 753, [1959] 2 All ER 38, 40 it was said: "Though indeed there may be cases in which an employer does not discharge his duty of care towards his workman merely by providing an article of safety equipment,

If the employer fails to provide the latest and safest plant available he is not necessarily negligent.¹⁰³ There may, however, be an obligation on the employer not only to take the necessary precautionary measures but also to take all steps necessary in the light of modern scientific and technical knowledge. He may further be obliged to improve and update these precautionary measures in line with subsequent scientific and technical discoveries.¹⁰⁴ Reasonable conduct may be justified if the employer implements the precautionary measures common in the industry or trade in which he participates.¹⁰⁵

In circumstances where a safety measure may result in increased safety, the employer exercising reasonable care may be required to implement the measure.¹⁰⁶ Certain safety measures do, however, bear both advantages and disadvantages. Where the disadvantages of a safety measure outweigh the risk involved, that precaution need not be taken.¹⁰⁷

7.5.1.2 Selection of Plant

The selection of suitable plant is the employer's responsibility.¹⁰⁸ However, if an employee selects unsuitable plant and is subsequently injured, the employer will not be liable provided the employee was, in the circumstances,

the courts should be circumspect in filling out that duty with the much vaguer obligation of encouraging, exhorting or instructing workmen or a particular workman to make regular use of what is provided."

103 *Dynen v Leach* (1857) 26 LJ Ex 221; *Young v Hoffman Mfg Co Ltd* (supra) 646; *Parkes v Smethwick Corporation* (1957) 121 JP 415, 55 LQR 438.

104 ILO *Judicial Decisions in the Field of Labour Law* (1979) 49; *Toronto Power Co Ltd v Paskwan* [1915] AC 734; *Drummond v British Building Cleaners Ltd* (supra) 507; *Graham v Co-operative Wholesale Society Ltd* [1957] 1 WLR 511, [1957] 1 All ER 654.

105 *Graham v Co-operative Wholesale Society Ltd* [1957] 1 WLR 511, [1957] 1 All ER 654.

106 *Reed v Ellis* (1916) 27 OWR 490.

107 The small risk to seamen engaged in erecting a rope around an open hatchway at sea may be outweighed by the risk to persons moving near the hatchway if it were left unguarded in poor light (*Morris v West Hartlepool Steam Navigation Co Ltd* [1956] AC 552, [1956] 1 All ER 385).

108 Carby-Hall 44; Keenan & Crabtree 127; Munkman 117.

sufficiently competent and experienced to make the selection.¹⁰⁹

In circumstances where the task to be performed is sufficiently urgent, it may be reasonable for the employer or an employee to select plant which is not entirely suitable.¹¹⁰ However, the employer or an employee may be expected not to take unnecessary risks.¹¹¹ Where there is a choice between two items of plant, one safer than the other, the wrong choice may be sufficient evidence of negligence in the absence of an explanation.¹¹²

7.5.1.3 *Failure to Provide Sufficient Plant*

The employer may be negligent if he fails to provide sufficient plant required for the job.¹¹³ Where there is equipment which cannot be replaced immediately, the employer is not necessarily negligent if he maintains some obsolete equipment in use, although it is not as safe as the later types.¹¹⁴

7.5.1.4 *Providing Defective or Dangerous Plant*

If the employer provides defective or dangerous plant,¹¹⁵ and fails to take adequate precautions to eliminate or minimize the defect or danger, he may be negligent. He is not liable for latent defects, provided such defects are not discoverable

109 In *Johnson v Croggan & Co Ltd* [1954] 1 All ER 121 the employer was not liable for the injury sustained by an experienced employee who chose a light fruit-picking ladder, which was not of adequate strength, for the erection of a steel roof. Cf *Woodman v Richardson & Concrete Ltd* [1937] 3 All ER 866; *O'Melia v Freight Conveyors Ltd & Rederiaktiebolaget Svenska Lloyd* [1940] 4 All ER 516; *Bristol Aeroplane Co v Franklin* (1948) WN 341; *Johnstone v Clyde Navigation Trustees* (1949) 82 LILR 187; *Richardson v Stephenson Clarke Ltd* [1969] 3 All ER 705, [1969] 1 WLR 1695.

110 *Watt v Hertfordshire County Council* [1954] 2 All ER 368, [1954] 1 WLR 835.

111 *Prince v Ministry of Defence, The Praia de Adrage* [1965] 1 Lloyd's Rep 354.

112 *Ralston v British Railways Board* [1967] SLT 105.

113 In *Vaughan v Ropner & Co Ltd* (supra) 119 it was held that a ship at sea should carry enough spares to last the voyage. Cf *Mackray v Stewarts & Lloyds Ltd* [1964] 3 All ER 716.

114 *O'Connor v British Transport Commission* [1958] 1 All ER 558.

115 The obligation to minimize hazards which are inherent in the plant is not confined to machinery. In *Neismith v London Film Productions Ltd* [1939] 1 All ER 794 the employee had to wear material which was highly flammable and caught fire with the result that the employer was held liable because he did not take reasonable care to ensure that the hazard was minimized.

by the exercise of reasonable care.¹¹⁶ He may be liable for harm caused by a patent defect which would have been evident on inspection.¹¹⁷

When designing plant, the employer must take reasonable care that the design is safe.¹¹⁸ If the plant is dangerous in its ordinary operation, the employer must install any necessary safety device with the plant.¹¹⁹

7.5.1.5 *Plant of a Third Party*

The principles relating to the premises of a third party¹²⁰ also apply to the use of plant belonging to a third party. Where an employee, in the course of his employment, uses plant belonging to a third party, the employer may not be negligent should the plant prove to be defective through lack of reasonable care on the part of the third party.¹²¹ The employer may be negligent if, in the circumstances, it was unreasonable for him to rely on the third party to exercise the necessary care and skill in the provision and selection of safe plant.

7.5.2 *Plant Maintenance*

The employer is required to take "reasonable care to provide proper appliances, and to maintain them in proper condition."¹²² The standard which the employer should apply in maintaining his plant should be based on the general and approved practice in the industry, which will vary according to the nature of the plant.

116 For example, when the connecting rod of a machine suddenly breaks. *Roberts v T Wallis* [1958] 1 Lloyd's Rep 29.

117 *Baxter v St Helena Group Hospital Management Committee* (1972) The Times February 15.

118 *McPhee v General Motors Ltd* (1970) 8 KIR 885.

119 *Watling v Oastler* (1871) 6 LR Exch 73; *Jones v Richards* [1955] 1 All ER 463; *Close v Steel Co of Wales Ltd* [1962] AC 367, [1961] 2 All ER 953.

120 Supra 183-4.

121 *Bott v Prothero Steel Tube Co Ltd* (1951) WN 595; *Gledhill v Liverpool Abattoir Utility Co Ltd* [1957] 3 All ER 117.

122 *Smith v Baker & Sons* (supra) 362. Cf *Toronto Power Co Ltd v Paskwan* (supra) 734; *Wilsons & Clyde Coal Co Ltd v English* [1938] AC 57, [1937] 3 All ER 628; *Davidson v Handley Page Ltd* (supra) 235; *Kilgollan v William Cooke & Co Ltd* [1956] 1 WLR 527, [1956] 2 All ER 294.

7.5.2.1 *Failure to Repair Known Defects*

The employer will be negligent if he fails to repair a known defect in plant.¹²³ Therefore, if the employer knows, or ought to know, that plant is inherently dangerous, as when a machine has a tendency to break or eject parts, then the employer must take adequate precautions to eliminate or minimize the hazard.¹²⁴

In some cases it may be reasonable for the employer to rely on an employee to repair a simple defect in plant.¹²⁵ However, the employer may be required to warn an employee or a third party of any known hazard that may arise when he is instructed to repair plant.¹²⁶

7.5.2.2 *Delay in Effecting Repairs*

The employer may not be negligent if he delays to repair plant when he does not have the time and opportunity to remedy the defect after it arises or ought to have come to his notice.¹²⁷ If the necessary repairs have been effected and the continued operation of the plant is dangerous,¹²⁸ or if the plant is unsuitable, it should be withdrawn from circulation by the employer.¹²⁹

123 *Clarke v Holmes* (1862) 7 H & N 937; *Monaghan v WH Rhodes & Son* [1920] 1 KB 487; *Abbott v Isham* (1920) 90 LJKB 309; *Baker v James Ltd* [1921] 2 KB 674.

124 *Naismith v London Film Productions Ltd* (supra) 794; *Close v Steel Co of Wales Ltd* [1962] AC 367, [1961] 2 All ER 953.

125 In *Pearce v Armitage* (1950) 83 LILR 361 it was held that an unskilled employee could be expected to tighten a slack rope on a safety device. Cf *Bristol Aeroplane Co v Franklin* (supra) 341.

126 *McPhee v General Motors Ltd* (supra) 885.

127 *Paterson v Wallace & Co* (1854) 1 Macq 748; *Wilsons & Clyde Coal Co Ltd v English* [1938] AC 57, [1937] 3 All ER 628.

128 *Johnstone v Clyde Navigation Trustees* (supra) 187; *Latimer v AEC Ltd* [1953] 2 All ER 449, [1952] 2 QB 701.

129 *Taylor v Rover Car Co* [1966] 2 All ER 181. When an employer replaces or removes plant he does not thereby admit liability for any previous accidents caused by it (*Vernon v British Transport Docks* [1963] 1 Lloyd's Rep 55).

7.5.2.3 Regular Inspection and Testing

There is an obligation on the employer to inspect and test plant regularly in order to discover any latent defects.¹³⁰ The frequency and method of inspection and testing is a matter to be decided according to the circumstances of the case.¹³¹ If the employer can show that a regular and thorough maintenance system is in operation, then it is unlikely that he would be held liable for any suddenly revealed defect.

Complex plant, such as the motors of an aircraft, should be subjected to frequent and planned inspection and testing. Less complex plant, such as ropes and chains, may be inspected and tested at regular but less frequent intervals. With some kinds of plant, such as a ladder, it may be reasonable to delay any inspection and testing until defects are reported.

A system of inspection and testing should also be supplemented by a system of defect reports,¹³² properly recorded in writing.¹³³

7.6 SUMMARY

The classification of the required standard of care in the management of safety may lead to the erroneous assumption that the need to provide a safe system of work, a competent staff of employees, safe premises and plant is the detailed description of the employer's obligation. This is not the case, because what is being formulated is the actual standard of care required in the circumstances in which the reasonable employer would have foreseen and guarded against the risk of harm by providing, for example, a safe system of work.

130 *Webb v Rennie* (1865) 4 F & F 608; *Murphy v Phillips* [1876] 35 LT 477; *Pearce v Armitage* (supra) 361; *Shotter v R & H Green & Silley Weir Ltd* [1951] 1 Lloyd's Rep 329; *Bell v Arnott & Harrison Ltd* (1967) 2 KIR 825.

131 *Scott Safety and the Standard of Care* 182; *Murphy v Phillips* (supra) 477; *Cole v De Trafford (No 2)* [1948] 2 KB 523; *Barkway v South Wales Transport Co Ltd* [1950] 1 All ER 392, [1950] AC 185; *O'Connor v Port Waratah* (1975) 13 SALR 119.

132 *Barkway v South Wales Transport Co Ltd* [1950] 1 All ER 392, [1950] AC 185.

133 *Franklin v Edmonton Corporation* (1965) 109 SJ 876.

The general practical guidelines consisting of the four criteria of the employer's obligation as determined by judicial decisions do not have the status of rules of law. The only relevant principle of law is the requirement that reasonable care should be exercised.

CHAPTER 8

STATUTORY REGULATION OF SAFETY MANAGEMENT

8.1 INTRODUCTION

In addition to his common law obligations, the employer has to observe the statutory provisions of MOSA. Therefore, in certain circumstances, the appropriate standard of care is prescribed by the legislature instead of being determined by the court.

If the employer breaches a statutory requirement¹ which causes harm to an employee, it indicates that a recognized right² of the employee has been infringed.³ The employer's conduct is wrongful because he has breached a legal right.⁴

Whether a breach of a statutory requirement is per se negligence,⁵ or merely evidence of negligence,⁶ is open to debate.⁷ The weight of authority seems to favour the more flexible opinion that a breach of a statutory requirement⁸

1 See in general Boberg *The Law of Delict* 212; Van der Merwe & Olivier 47-8; Van der Walt *Delict: Principles and Cases* 37-40; Van Heerden & Neethling 154-68.

2 The recognized right referred to is the employee's right to protection.

3 McKerron *The Law of Delict* 276; Neethling et al 59; *Patz v Green & Co* (supra) 436.

4 Supra 121-2.

5 In *Lochgelly Iron & Coal Co v M'Mullan* [1934] AC 1, 9 the House of Lords indicated that "if the particular care to be taken is prescribed by statute, and the duty to the injured person to take the care is likewise imposed by statute, and the breach is proved, all the essentials of negligence are present." Cf *Britannic Merthyr Coal Co v David* [1909] 2 KB 146, 164; *Martin v Herzog* (1920) 228 NY 164.

6 In *Blamires v Lancashire & Yorkshire Railways* (1873) LR Exch 283, 289 the court held that failure to provide means of communication as required by statute was merely evidence of negligence which caused or materially contributed to the accident. Cf *Joseph Eva Ltd v Reeves* [1939] 2 KB 393, 403, [1938] 2 All ER 115 (CA) 119.

7 *Morley v Wicks* 1925 WLD 13; *Good v Posner* 1934 OPD 90; *Bellstedt v SAR & H* 1936 CPD 399, 406-7; *Sand & Co Ltd v SAR & H* 1948 1 SA 230 (W) 234-44; *Clairwood Motor Transport Co (Pty) Ltd v Akal & Sons* 1959 (1) SA 183 (N); *De Jong v Industrial Merchandising Co (Pty) Ltd* 1972 (4) SA 441 (R); *S v Pula* 1972 (4) SA 258 (NC); *Becker v Du Toit* 1974 (3) SA 248 (O).

8 A breach of a statutory requirement may amount to an unfair labour practice if the breach or practice has or may have the effect that an employee's physical welfare is jeopardized or prejudiced thereby. Therefore, if an employee were to complain of the existence of an unsafe workplace, and if the employer were to refuse or fail to inspect the alleged unsafe workplace but instead compel the employee to work in such workplace, that would amount to an unfair labour practice. *National Union of Mineworkers & others v Driefontein Consolidated Ltd* (supra) 143A.

merely infers negligence.⁹ The strength of the inference will vary according to the circumstances of each case.¹⁰

An examination of MOSA is necessary because it prescribes minimum and fixed standards of reasonable conduct in the management of safety.

8.2 THE MACHINERY AND OCCUPATIONAL SAFETY ACT 6 OF 1983

MOSA, together with the General Administrative Regulations,¹¹ repealed, re-incorporated and amended the Factories, Machinery and Building Work Act (the *Factories Act*).¹² The minimum conditions of employment regulated by the Factories Act were repealed, re-incorporated and amended by the Basic Conditions of Employment Act.¹³

The Factories Act had proved to be out of date and inadequate to cope with the demands of maintaining occupational health and safety in the 1980s.¹⁴ According to the Wiehahn Commission,¹⁵ the Factories Act was restrictive in its scope because it offered protection only to persons employed in

9 *Franklin v The Gramophone Co Ltd* [1948] 1 KB 542, [1948] 1 All ER 353; *Sand & Co Ltd v SAR & H* (supra) 243; *Nolan v Dental Mfg Co Ltd* [1958] 2 All ER 449, [1958] 1 WLR 936; *Clairwood Motor Transport Co (Pty) Ltd v Akal & Sons* (supra) 184; *Geldenhuis v SAR & H* 1964 (2) SA 230 (C); *De Jong v Industrial Merchandising Co (Pty) Ltd* (supra) 445.

10 *Begemann v Cirota* 1923 TPD 270; *Rawles v Barnard* 1936 CPD 74; *Hodgson v Hauptfleisch* 1947 (2) SA 98 (C); *Sand & Co Ltd v SAR & H* (supra) 243; *Clairwood Motor Transport Co (Pty) Ltd v Akal & Sons* (supra) 183; *S v Pula* (supra) 258; *De Jong v Industrial Merchandising Co (Pty) Ltd* (supra) 441; *Becker v Du Toit* (supra) 248.

11 MOSA is an enabling legal instrument. It does not contain any details of the measures that consequent actions need to give effect to its objectives for the protection of the health and safety of employees. Therefore, provision has been made for the Minister of Manpower to establish Regulations in connection with any matter that may or must be prescribed in terms of s 35 of MOSA. The Regulations ensure the practical application of MOSA and form the statutory basis which places obligations on the employer and employees. It is the intention of the Department of Manpower gradually to revise all the Regulations which were in force under the Factories, Machinery and Building Work Act 22 of 1941 and to adapt these Regulations to MOSA. In the meantime, and until new Regulations pertaining to a specific matter are promulgated, the old Regulations instituted under the Factories Act still apply, though the Act itself is no longer in force.

12 Factories, Machinery and Building Work Act 22 of 1941.

13 Basic Conditions of Employment Act 3 of 1983. The Act deals with the terms and conditions of employment, ranging from basic standards on working hours to the manner in which employment contracts must be terminated.

14 Colvin & Kruger *A Pilot Study into the Implementation of MOSA and Management's Attitude to Worker and Union Participation* 2.

15 *The Complete Wiehahn Report* (Part 4) par 3.11.2.

factories, whereas those persons employed in industries such as commerce and agriculture, who were equally exposed to the same health and safety hazards, were excluded from the Act. It was as a result of the Commission's findings on this point that the Factories Act was consolidated in MOSA to provide health and safety protection for all people in employment.

An important feature of MOSA is that it establishes a framework for the setting and enforcement of occupational health and safety standards which is comparable with recent health and safety legislation in the United States¹⁶ and United Kingdom.¹⁷ It is, however, generally accepted that MOSA is modelled on the British *Health and Safety at Work etc. Act*.¹⁸

MOSA does not comply with all the recommendations of the Wiehahn Commission. The Commission saw developing labour relations in terms of negotiations between the State,¹⁹ the employer and the employees (and their respective organizations). MOSA, however, makes no provision for direct negotiations or employee or trade union participation²⁰ in health and safety matters.²¹ Instead, the management of safety is placed in the hands of the employer, with employees only playing an advisory role.

16 Myers et al 80.

17 Pennington 5-13, however, believes that MOSA is an adaption of the West German *Berufsgenossenschaften* system where both the State, the employer and employees have a responsibility for monitoring safety.

18 Health and Safety at Work etc. Act of 1974. Myers et al *Health and Safety Organisation: A Perspective on the Machinery and Occupational Safety Act* 80-1.

19 The State was seen as playing a minimal role in this process as a third party.

20 The word *participation* is referred to by Wall & Lischeron 38 as the "influence in decision-making exerted through a process of interaction between workers and managers and based upon information-sharing." Employee participation is an essential requirement of sound safety management. Directly exposed to hazardous working conditions, employees are in the best position to improve work practices and monitor the situation on the shop floor. In the present circumstances, this would imply adopting a response to MOSA which requires flexibility on the part of the employer and watchful participation on the part of the trade unions.

21 MOSA regards employees only as passive participants in health and safety matters and excludes them from any form of real control over their working conditions. The majority of companies interviewed by the Industrial Health Research Group between 1986 and 1987 regard health and safety as an area for co-operation between the employer and his employees, because it involves mutual interests. In reviewing the debate on MOSA in Parliament, the Minister of Manpower clearly supported this view: "For the first time there will be co-operation between employers and employees in the many factories of South Africa ... this meaningful co-operation will be established in the interests of safety on our factory floors." Cited in Macun *Safety Management - Yes Sir, MOSA, No Sir?* 69.

8.2.1 Objectives of MOSA

The main object of MOSA is to "provide for the safety of persons at a workplace or in the course of their employment or in connection with the use of machinery;²² to establish an advisory council for occupational safety; and to provide for incidental matters."²³ A further manifested aim is to provide the structure and mechanisms whereby the employer can regulate and control health and safety affairs.²⁴

Through the Regulations, MOSA establishes the minimum procedural requirements with which the employer and his employees must comply.²⁵ The employer is required to take all reasonable measures to ensure that MOSA and the Regulations are observed by employees.²⁶ The employer must, so far as is reasonably practicable, perform the following functions:

- (a) identify the hazards inherent in the workplace;²⁷
- (b) determine the precautionary measures necessary to eliminate the hazards;²⁸

22 s 1. In *Richards v Highway Ironfounders (West Bromwich) Ltd* [1955] 3 All ER 205 (CA) 210A-B the Court of Appeal had to consider the obligation of the employer, under a statute similar to MOSA, and expressed the nature of the obligation as the taking of a measure that is "possible in the light of current knowledge and according to known means and resources."

23 Preamble to MOSA.

24 It is submitted that the effect of MOSA on several organizations has been to increase the employer's awareness of health and safety matters. Some employers have, however, provided more protective equipment to employees rather than addressing the source of the problem. *Macun Safety Management - Yes Sir, MOSA, No Sir?* 68.

25 The Regulations deal, in the main, with the following:

- (a) the employer's obligation if he is not physically present at the workplace, to designate a responsible person and charge him with the duty of ensuring that the provisions of MOSA are complied with (r 4);
- (b) the general obligations of the employer and a user of machinery (r 5);
- (c) the general obligations of an employee (r 6);
- (d) the obligations of the employer in appointing safety representatives (r 7), in establishing safety committees (r 8), and ensuring that they perform their functions satisfactorily;
- (e) the reporting of incidents (r 9);
- (f) the recording and investigation of incidents (r 10);
- (g) the witnesses at an inquiry (r 11);
- (h) the admittance of persons to unsafe premises (r 13); and
- (i) the offences and penalties (r 16).

26 r 5(b).

27 r 5(f).

28 r 5(f).

- (c) inform all employees of the hazards;²⁹ and
- (d) remove or minimize the hazards.³⁰

The general statutory obligations of an employee require him to:

- (i) perform any lawful order;
- (ii) obey the employer's safety rules and procedures; and
- (iii) report as soon as possible any unsafe condition that comes to his notice at or near the workplace.³¹

MOSA does not impose a statutory obligation on an employee to act with reasonable care for his own safety and that of others in the workplace.

8.2.2 *Application of MOSA*

Unlike the Factories Act, MOSA applies not only to persons engaged or employed in factories, buildings and certain other work, but extends that protection to all employees who, under the wide definition of *employee*,³² are employed, inter alia, in the public sector, agriculture, commerce, local Government and domestic service.³³ It excludes persons present in or on the following premises, factory or magazine:³⁴

- (a) premises in respect of which the Mines and Works Act³⁵ applies; and
- (b) an *explosives factory* and an *explosives magazine* within the meaning of the Explosives Act.³⁶

²⁹ r 5(h).

³⁰ r 5(g).

³¹ r 6.

³² s 1.

³³ The Minister may, by notice in the Gazette, extend the range of persons falling within the definition of *employee*. s 1(3).

³⁴ s 1(4).

³⁵ Mines and Works Act 27 of 1956.

³⁶ Explosives Act 26 of 1956.

8.2.3 *Setting of Standards*

The underlying principle of MOSA is that the State, employers and employees should jointly deliberate on the drafting of the Regulations. However, healthy and safe working conditions cannot be ensured solely through legislation. Ideally, health and safety should be a self-regulatory process achieved through collaboration between the employer and his employees.³⁷

Since MOSA is dependent for its implementation on the principle of tripartism, it provides for the establishment of an Advisory Council³⁸ consisting of representatives of the State, employers and employees.³⁹ The Council's functions are mainly to advise and make recommendations to the Minister of Manpower on any matter to which MOSA applies.⁴⁰ The Council may, with the approval of the Minister, establish one or more technical committees consisting of people with special knowledge to assist it in this task.⁴¹

The Minister may promulgate standards recommended by the Council, but may also draw on standards that have been set by local, foreign, public or private bodies.⁴² The employer may not appeal against the decision of the Minister when setting or enforcing standards. The Minister is therefore given unfettered powers when setting standards. In the realm of unfair labour practice, the possibility does exist that the ruling of the industrial court can influence the decision of the Minister.

37 Department of Manpower *Annual Report 1989* 46.

38 ss 2-8.

39 Reddy & Sing 17.

40 s 3.

41 s 8.

42 s 36.

8.2.4 Enforcement of MOSA

The factory inspectorate of the Department of Manpower is responsible for the enforcement of the provisions of MOSA.⁴³ The Department of Manpower regards the employee's right to protection as inalienable and therefore as one of its most important responsibilities.⁴⁴

A factory inspector must ensure that safety standards are observed.⁴⁵ For this purpose an inspector has extensive statutory powers which include the following functions:

- (a) entering and inspecting workplaces;⁴⁶
- (b) questioning any person on or in such workplace;
- (c) requiring the production of books or other documentation; and
- (d) requiring persons to appear before him for cross-examination.⁴⁷

An inspector may stop a process or prohibit the use of machinery where he considers that it "threatens or is likely to threaten the safety of any person at a workplace or in the course of his employment."⁴⁸ He need revoke the prohibition only when satisfied that the threat to safety has been eliminated.⁴⁹ An inspector may also, by written notice, order an employer to take the necessary steps to remedy an unsafe

⁴³ ss 19-26. The Erasmus Commission of Enquiry into Occupational Health recorded in 1976 that the factory inspectorate was highly understaffed because there were only 29 inspectors for a total of 30097 factories employing 1,5 million employees in South Africa. Although more inspectors are available today, the situation is still unsatisfactory.

⁴⁴ Department of Manpower *Annual Report 1989* 50.

⁴⁵ s 22.

⁴⁶ The inspection of a workplace is the main function of an inspector. The aim of these inspections is to prevent accidents by providing information and education in the field of occupational safety. In 1989 approximately 17881 inspections were carried out at nearly 50000 workplaces. Department of Manpower *Annual Report 1989* 52.

⁴⁷ s 22(1).

⁴⁸ s 23(1)(a).

⁴⁹ s 23(1)(c).

working condition,⁵⁰ or to comply with a Regulation binding on him.⁵¹

An inspector can, at his discretion, conduct an inquiry⁵² into any incident⁵³ referred to in s 17 of MOSA, or any other incident which he considers could have resulted in the death, injury or illness of any person.⁵⁴

Any person aggrieved by the decision of an inspector can appeal against the decision to the chief inspector, who may confirm, vary or set it aside.⁵⁵ The chief inspector's decision can be taken on appeal to the industrial court.⁵⁶ The employee who feels that the decision does not extend far enough has as much right to appeal as does the employer who feels that it extends too far.⁵⁷

8.2.5 *Safety Representatives*

MOSA makes provision for the designation of employee safety representatives.⁵⁸ The participation of employees in safety matters is to be found in British⁵⁹ and American legislation

50 ss 23(2) and (3).

51 s 23(4). No provision, however, is made for the publication of these notices either at the workplace, to the affected employees, or to their safety representatives. It is only when an inspector prohibits the employer from allowing a specific employee or class of employees to be exposed to any article or condition for longer than a specified period, that the employer is required to notify the employees concerned of the contents of the notice {s 23(6)(b)}.

52 s 24.

53 The investigation of an incident in which an employee is injured or killed is important not only to broaden empirical knowledge, but also to prevent a recurrence of such an incident.

54 s 24 provides an inspector with the power to summon persons to give evidence, and produce books, documents and other items which have a bearing on the subject of the inquiry. It makes provision for the equitable protection of witnesses in relation to incriminatory or privileged statements, including the right to cross-examine witnesses and request the summoning of other witnesses.

55 s 26.

56 MOSA does not specify whether the industrial court's decision is final. s 17(21)(a) of the LRA is wide enough to permit an appeal on a point of law to the Appellate Division.

57 The appeal mechanism is illustrated in *SAISAIU v Chief Inspector* (1987) 8 ILJ 303.

58 s 9.

59 Compare the position in Britain in terms of the *Health and Safety at Work etc. Act of 1974* as discussed in Davies & Freedland *Labour Law - Text and Materials* 230 et seq. s 2(4) of the *Health and Safety at Work etc. Act of 1974*, which provisions with regard to safety representatives and safety committees are fairly similar to MOSA, recognizes the role of trade unions in the establishment and enforcement of safety standards. It determines, for example, that the appointment of safety representatives is the exclusive preserve of a recognized trade union. For an evaluation of the effectiveness of the provision of s 2(4) see Barrett & James 26.

in terms of which the employees put forward the names of fellow-employees they would like as their safety representatives, from among whom the employer nominates the required number of safety representatives. The employer may make the nominations without consulting the employees or their trade union. Conversely, in terms of MOSA, the employer is responsible for the election of safety representatives, but no provision is made for the election or nomination of safety representatives by employees.⁶⁰

MOSA requires the employer to designate at least one safety representative for each 50 employees employed at a workplace,⁶¹ or such representatives as may be required by an inspector.⁶² The appointment of a safety representative must be in writing and for a definite period of time.⁶³ If there are fewer than 20 employees at a workplace, the employer is not obliged to appoint a safety representative, although he may, by an inspector's written notice, be ordered to do so.⁶⁴

A safety representative may only be nominated from the ranks of an *employee* as defined.⁶⁵ The definition of *employee*⁶⁶ in MOSA makes no distinction as to race or sex. All persons employed in an organization, including executive directors, are for the purpose of MOSA classified as *employees*. The common perceived distinction between management and employees is not appropriate. A safety representative is therefore not exclusively designated from a specific class of employees, such as skilled or non-skilled employees.⁶⁷ The only

60 This negates the principle that employees should participate in the attainment of safe working conditions. It would be conducive to collective bargaining to change these conditions. Employers and employees may agree that the employer designate only those employees who have been elected by their fellow-employees or nominated by their trade union. MOSA fails to locate health and safety issues firmly within the framework of collective bargaining.

61 s 9(2)(a)(ii). In respect of any workplace defined as a *shop* or *office* in terms of the Basic Conditions of Employment Act 3 of 1983, there must be at least one safety representative for every 100 employees or part thereof {s 9(2)(a)(i)}.

62 s 9(2)(b).

63 s 9(1).

64 s 9(3).

65 s 9(1).

66 s 1.

67 MOSA encourages employers to appoint supervisors and employees further up in the managerial hierarchy as safety representatives, especially those with a detailed knowledge of the workforce who can make a

qualification for the designation of a safety representative is that he must be in the full-time employment of the employer.⁶⁸

There is no provision in MOSA which stipulates that employees cannot elect their own safety representatives. Employees, especially if organized, could possibly use this provision to their advantage by ensuring that the employer designates their elected safety representatives, but they cannot enforce it.⁶⁹

A safety representative is required to inspect his workplace at least once a month,⁷⁰ including the machinery and safety equipment which is placed there for the purpose of maintaining a safe operation.⁷¹ He must also report to the employer or a safety committee on any foreseeable hazard.⁷² The employer must sign the reports and keep a record of them.⁷³

Should an incident occur that results in a person becoming unconscious, dying, losing a limb or a part of a limb, or otherwise incurring serious injury as referred in s 17 of MOSA, the safety representative may, but is not obliged to, report in writing to the safety committee or, in the absence of such a committee, to an inspector, on the circumstances surrounding the incident and its possible cause.⁷⁴ A safety representative must carry out his functions during working

meaningful contribution to the management of safety. NOSA *The Machinery and Occupational Safety Act*, No. 6/1983 1985 3.

68 s 9(1).

69 The most controversial provisions of MOSA are those pertaining to the appointment of safety representatives and safety committees. It has been argued that the employer's control over the designation of safety representatives and the composition of safety committees would allow the employer to dominate these structures and operate them solely in pursuit of his own interests. Furthermore, these aspects of MOSA were seen as an attempt to pre-empt trade union involvement in the area of health and safety. Macun *The Implementation of the Machinery and Occupational Safety Act 2*; Maller & Steinberg 64.

70 In respect of any workplace defined as a *shop* or *office* in terms of the Basic Conditions of Employment Act 3 of 1983, a safety representative is required to inspect the workplace once every three months.

71 s 10(1)(a).

72 s 10(1)(b).

73 r 7(2)(e) and r 7(f).

74 s 10(1)(c). A safety representative who is acquainted with the conditions of a workplace can make a significant contribution towards establishing the cause of the incident, 'especially if his inspection takes place immediately after the incident.

hours and the time so spent is regarded as ordinary working time.⁷⁵

The designation, functions and training of a safety representative may be incorporated in the Regulations.⁷⁶ There may be certain minimum standards implicit in MOSA precluding the designation of an employee as a safety representative, if he lacks:

- (a) literacy and communication skills;
- (b) an understanding of machinery and safety equipment; and
- (c) a working knowledge of MOSA and its Regulations.

A safety representative may, through lack of knowledge or skill, omit to recognize a hazard, or fail to act as required in terms of MOSA. Such an omission or failure will not incur any civil liability on the safety representative.⁷⁷ Without this immunity, an employee would be reluctant to undertake the responsibilities of a safety representative.

8.2.6 *Safety Committees*

In certain circumstances, the employer must appoint both safety representatives and a safety committee.⁷⁸ Where two or more safety representatives are appointed to oversee a particular workplace, then the employer must also appoint one or more safety committees for that workplace.⁷⁹ MOSA provides the employer with the necessary discretion to decide on the

75 s 10(2). If a safety representative's task must be carried out after working hours due to an incident, then it would seem feasible that overtime would have to be paid for the task as the time thus spent will be regarded as time spent in the service of the employer.

76 s 35(1)(i).

77 s 10(3).

78 s 11. The rationale behind the introduction of safety representatives and safety committees is that each workplace has its own peculiarities regarding hazards, and these hazards can best be identified by the employees who work there. Such a practice aims to bring about self-regulation and self-discipline. Reddy & Sing 17.

79 s 11(1). A safety committee must be established for every 100 employees employed.

structure⁸⁰ a committee may take.⁸¹

A safety committee must incorporate all the safety representatives for a particular workplace,⁸² while professional people such as doctors or nurses nominated by the employer may be co-opted to the committee.⁸³ The members of the committee must be designated in writing by the employer for such period as determined by him.⁸⁴ The committee is allowed to decide on the frequency with which it will hold meetings, provided that this is not less than once every three months.⁸⁵ Each committee may also establish its own procedure for meetings.⁸⁶ The employer must submit records of all inspections and incidents to the committee.⁸⁷

If an inspector is of the opinion that the number of safety committees established for any particular workplace is inadequate, he may, by notice in writing, direct the employer to establish such number of committees as he deems desirable in the circumstances.⁸⁸

A safety committee may make recommendations to the employer or an inspector regarding any matter affecting the safety of employees at the workplace for which it has been appointed.⁸⁹

80 See Macun *Safety Management - Yes Sir, MOSA, No Sir?* 67-8 for an analysis of various safety committee structures.

81 s 11(2). As a result of the employer's right to establish a safety committee, this committee could be very one-sided and unrepresentative of employees. This means that unless employees may choose, with the employer's consent, who will be on the committee, the committee may only represent the employer's interests. A research conducted by the Industrial Health Research Group between 1986 and 1987 indicated a lack of trade union and employee participation in the creation of safety representative and safety committee structures. Macun *Safety Management - Yes Sir, MOSA, No Sir?* 67.

82 s 11(2).

83 s 11(6)(a).

84 s 11(3).

85 s 11(4). Presumably these meetings are to be held during working hours. The safety committee must write minutes of their meetings {r 8(2)(c)}, and the employer must sign them {r 8(2)(e)}.

86 s 11(5).

87 r 8(1)(a). These records are important for employees as they provide information that could help improve working conditions. If employees could disclose the hazards of a work area or machine, the employer might be more willing to take employees' complaints and demands into account.

88 s 11(7).

89 s 12(1)(a). Although the employer is not obliged to adhere to the recommendations of a safety committee, he must acknowledge receipt of every recommendation. The employer must retain a written report on the action taken to improve safety recommended by the committee {r 8(2)(e)}. Should the employer ignore any recommendation, and the hazardous situation is aggravated, it could be evidence of

A record of each recommendation so made must be kept by the committee concerned.⁹⁰ The committee may also report in writing to an inspector on any incident referred to in s 17 of MOSA.⁹¹ Safety representatives and safety committees may be assigned specific functions under the Regulations.⁹²

The employer must ensure that a safety committee and its representatives carry out their duties.⁹³ The committee and its representatives are protected from civil liability for failing to perform any obligation under MOSA.⁹⁴ Although the employer is not obliged to consult with a committee, failure to so consult will be contrary to good labour relations.

8.2.7 *Prohibitions*

8.2.7.1 *General Prohibitions*

The Minister may, by notice in the Gazette, prohibit or control:

- (a) the employment of certain categories of employees in certain workplaces;⁹⁵
- (b) the work of certain specified processes;⁹⁶
- (c) the use of certain substances;⁹⁷ and
- (d) smoking, eating or drinking on or in premises where a specified activity is carried out.⁹⁸

Ninety days before publication of the notice, the Minister must publish a notice, in the Gazette, of his intention to exercise his powers, and allow interested parties an opportunity to submit objections and representations.⁹⁹

an unsound safety management practice. A safety representative could disclose such failure of the employer to an inspector.

90 s 12(2).

91 s 12(1)(b).

92 s 12(1)(c).

93 s 12(4).

94 s 12(3).

95 s 13(1)(a).

96 s 13(1)(b).

97 s 13(1)(c).

98 s 13(1)(d).

99 s 13(2).

Similar notices published in terms of the repealed Factories Act are deemed to have been issued under s 13 of MOSA.¹⁰⁰

8.2.7.2 *Sale of Certain Machinery and Equipment Prohibited*

The sale of machinery and safety equipment which do not comply with prescribed safety and performance standards is prohibited.¹⁰¹ The word *sell*¹⁰² is widely defined to include offering or exhibiting for sale, importing into the Republic for sale, exchanging, donating, leasing, or offering or displaying for lease.¹⁰³ There is a criminal sanction for a breach of this prohibition,¹⁰⁴ and it may be possible for any person injured as a consequence of such breach to found an action in damages.¹⁰⁵

8.2.7.3 *Certain Deductions Prohibited*

The cost of complying with MOSA must be borne by the employer. To this end, the employer is prohibited from making any deduction from an employee's salary towards the funding of safety equipment, or any other expense incurred in the course of the management of safety.¹⁰⁶

In the event of the employer being convicted for making any deductions from an employee's salary which is prohibited, the court hearing the case is empowered to determine as best it may the amount which the employee has been underpaid as a consequence of the deduction.¹⁰⁷

100 s 13(5).

101 s 14.

102 s 1.

103 This provision should largely eliminate that equipment which is sold inadequately guarded or not meeting, for example, pressure vessel standards.

104 s 28(1).

105 Scott *Machinery and Occupational Safety Act* 30.

106 s 15. A problem may arise where an employee abuses safety equipment by either selling, losing or wilfully damaging such equipment.

107 If the deduction was made without the employee's knowledge, or if he was naive about his right to receive this service at his employer's expense, the court is bound to return the whole amount underpaid to him. Conversely, if the employee was aware that the deduction was being made, the purpose for which it was made, and was also fully aware of his rights in the matter, he runs the risk that the court will allow no portion of the underpaid amount to be returned to him. Swanepoel *Introduction to Labour Law* 254.

8.2.7.4 Prohibition on the Locking of Entrances to Certain Premises

The employer or user of machinery is, without good reason, prohibited from locking entrances to certain premises where an employee is working, or where machinery is being used, or otherwise rendering it incapable of being opened either from the inside or the outside.¹⁰⁸ The object of this provision is to provide unrestricted access to an inspector, to ensure a precautionary measure against flood and fire hazards, and to facilitate escape.

8.2.7.5 Victimization Prohibited

An employee is protected against victimization in the following instances:

- (a) for providing any relevant safety information to the Minister, or anyone charged with the administration of MOSA;
- (b) for doing anything that he is entitled or required to do in terms of MOSA;
- (c) for refusing to do anything which he is prohibited from doing under MOSA or in terms of an inspector's notice; or
- (d) for giving evidence before the industrial court or any court of law.¹⁰⁹

Victimization will include the dismissal of an employee, the reduction in the rate of remuneration, demotion, or any general alteration of an employee's conditions of service to those of a less favourable nature, without a justifiable reason.¹¹⁰

108 s 16.

109 s 18.

110 s 18.

8.2.7.6 *Preservation of Secrecy*

The secrecy provision¹¹¹ requires that no person shall disclose any information obtained by him in carrying out his functions under MOSA concerning the affairs of any other person, except under the following conditions:

- (a) where it is necessary for the purpose of the administration of MOSA;
- (b) in criminal proceedings, inquests and civil proceedings; and
- (c) in communications to the Wage Board, the Board of Trade and Industries, and the industrial court.

Literally interpreted, this provision would prevent a safety representative from reporting back on an issue to the employees he is meant to represent. It is, however, arguable that the intention of this provision is to prevent the disclosure of confidential information, such as trade secrets, that may affect the economic viability of the employer's organization. The phrase *the affairs of any other person* must receive a restrictive interpretation.

8.2.8 *Reporting of Incidents*

An important provision of MOSA is the function of an inspector to investigate an incident under the condition where an employee is killed, injured or becomes ill as a result of the exposure to an occupational or machinery hazard. The purpose of the investigation is to reveal whether the cause of the incident is:

- (a) a contravention of MOSA or its Regulations; or
- (b) the negligence of any person; and
- (c) whether or not it was avoidable.

¹¹¹ s 27.

To ensure that an inspector is informed of certain specified incidents, provision is made in s 17, which requires that such incidents be reported to an inspector within a stated period and in a prescribed manner.¹¹² Such incidents include those resulting in the death, loss of consciousness, loss of a limb or part of a limb of any person. They also include injuries or illnesses of such a degree that the injured or sick person is likely to die, to suffer a permanent physical defect, or to be unable to work or to continue with the activity with which he was busy at the time of the incident for a period of at least 14 days.¹¹³ These incidents must be reported to an inspector if they occur consequent upon the following factors:

- (a) the use of machinery;
- (b) hazardous working conditions, heat stroke or exhaustion suffered in the course of employment;
- (c) any incident occurring at a workplace; or
- (d) exposure to any hazardous article.¹¹⁴

All stoppages of machinery, or breakdowns in machinery, or part thereof which endangers or could endanger the safety of an employee must also be reported to the inspector.

8.2.9 *Criminal Provisions and Evidence*

The employer who fails to comply with the provisions of MOSA may be fined up to the amount of R10000, or sentenced to 12 months imprisonment, or both.¹¹⁵ An employee can also be fined up to the amount of R1000 if he disobeys orders or the safety policy of the employer.¹¹⁶

112 s 17(1). During 1989 a total of 9061 incidents of a serious nature were reported in terms of s 17, of which 460 (380 in 1988) proved to be fatal. This indicates a decrease of 615 incidents or 6% compared with the 1988 figures. Department of Manpower *Annual Report 1989* 56.

113 s 17(1). The employer must ensure that all incidents are investigated together with those incidents which resulted in medical treatment other than first aid. The investigation must be undertaken either by someone nominated by the employer, a safety representative, or by a safety committee member. A record of the investigation must be retained by the employer {r 10(1) and r (2)}.

114 s 17(1).

115 s 28(1).

116 r 16.

Section 28(2) of MOSA¹¹⁷ provides that in the case of an incident which does not prove fatal to an employee, the employer may still be guilty of an offence if it can be shown that by his actions or omissions the employer or user of machinery would have been guilty of *culpable homicide* had the employee been killed. Hunt et al¹¹⁸ define *culpable homicide* as the "unlawful negligent killing of another person." A similar definition was given in *R v Matomann*¹¹⁹ as the "wrongful and unlawful causing of the death of another in circumstances which do not amount to murder" and in *R v Koning*¹²⁰ as the "unintentional unlawful killing of a human being."

If *culpable homicide* is established, the employer may be fined up to the amount of R20000, or imprisoned for up to 2 years, or both.¹²¹

8.3 SUMMARY

MOSA establishes a framework for the creation and maintenance of structures and institutions which serve to implement, utilize and enforce various aspects of safety management. Together with its General Administrative Regulations, MOSA provides an objective source of standards by which to assess the employer's conduct.

It is unclear whether conduct in conflict with MOSA's requirements is per se negligent or whether it merely affords proof of negligence. The test of the reasonable employer therefore still applies.

117 s 28(2) read with s 30(2) provides that an employee, agent or mandatory of an employer may be prosecuted if the injury was due to the negligence of such an employee, agent or mandatory.

118 Hunt et al 401.

119 *R v Matomann* 1938 EDL 128, 130.

120 *R v Koning* 1953 (3) SA 220 (T) 231G.

121 *Culpable homicide* is a common law crime. However, s 28(2) introduced a statutory offence, the elements of which are not restricted to the killing of another person but do include *negligence* and *injury* not only to an employee but also to any person at a workplace, or in connection with the use of machinery. The definitions of the words *machinery*, *user* and *workplace* are important in this connection. Hunt et al 421 provide a detailed explanation as to the necessary allegations in a charge of *culpable homicide*.

As stated earlier, the employer's failure to comply with a provision of MOSA may only infer negligence. In some cases, however, where it might be presumed that the reasonable employer would have foreseen and guarded against harm of a kind which MOSA's specific requirement was designed to eliminate, the employer's failure to comply with the requirement may be regarded as negligence. Similarly, it would be difficult to prove that the employer who has complied with MOSA is negligent at common law.

CHAPTER 9

THE PARAMETERS OF THE EMPLOYER'S OBLIGATION

9.1 INTRODUCTION

The analysis of both the legal requirements and management's function in safety predicates the nature of the common, yet not exhaustive parameters of the employer's obligation for sound safety management. The appropriate alignment of these parameters should provide practical guidelines for determining whether or not the employer's conduct, following good labour relations practice, would be reasonable in the circumstances of the case, and therefore reasonable in its operation or effect.

9.2 THE NATURE OF THE PARAMETERS

The complex nature of the practice of safety management does not allow for rigid regulation of what is reasonable or unreasonable in any particular case. In the light of what has been discussed in the preceding chapters, it is possible to identify parameters which the employer should adhere to for sound safety management. These parameters may be arranged as follows:

9.2.1 *Reasonably Foreseeing the Likelihood of Harm*

The employer is required to reasonably foresee the likelihood of harm. This implies reasonable foresight of *unsafe human acts* and *unsafe working conditions* which are incidental to the work performed. Foresight of *acts of God* and *chance occurrences* would be excluded since they are beyond the ability to prevent or correct.

The element of foreseeability depends on the employer's knowledge at the time of the accident. In addition to having the relevant professional knowledge and skills, the employer

should be reasonably acquainted with the hazards of modern production processes, though he would not be expected to have expert knowledge of specialist fields. If, possessing such knowledge, he can foresee no hazard, he is under no obligation to take the necessary safety precautions. Within the limits of what is foreseeable, the probability that a hazard may be brought on or magnified by the negligence of another person must be taken into account.

Only the general nature of the harm must be reasonably foreseeable. Whether the nature of the foreseeable harm should include only pecuniary, or both pecuniary and non-pecuniary loss, should be a matter for determination according to the circumstances of the case with no fixed rules. The foreseeable harm may include harm in the form of emotional shock if such shock is a reasonably foreseeable outcome of the employer's conduct.

The foreseeability of harm is restricted to the *foreseeable plaintiff*. This implies that the employer must be able to foresee the identity of the person who would suffer the harm. He need not foresee the likelihood of harm to any other person.

Having foreseen or otherwise determined possible harm, the employer would of necessity be required to take the necessary precautionary measures.

9.2.2 *Implementing the Necessary Precautionary Measures*

The employer must, according to the common law and MOSA, exercise reasonable care in implementing the necessary precautionary measures to guard against the occurrence of foreseeable harm. The employer is therefore required to:

- (a) Establish, enforce and maintain a safe system of work

which may include the following obligations:

- (i) considering the inexperience or infirmities of employees;
- (ii) warning employees against foreseeable hazards;
- (iii) eliminating or minimizing a hazard in circumstances where a warning is inappropriate;
- (iv) properly communicating and implementing instructions concerning safe methods of work; and
- (v) adequately supervising and organizing the system of work.

(b) Recruit and provide a competent staff of employees. In this regard the employer is required to:

- (i) recruit competent and a sufficient number of employees to perform a task;
- (ii) provide safety education and training where necessary;
- (iii) ensure that those employees selected to supervise and direct the work have the knowledge and experience to recognize whether the work is performed safely;
- (iv) ensure that employees perform their duties with reasonable care; and
- (v) discipline an employee who acts dangerously or negligently.

(c) Provide and maintain safe premises. This obligation extends to:

- (i) all parts of the premises to which employees may reasonably be authorized or expected to work, including non-routine operations, those parts of the premises used for amenities, and the premises of a third party; and
- (ii) the provision of a safe means of access to and from the place of work.

(d) Provide and select safe, suitable and sufficient plant which entails the following:

- (i) storing plant at an accessible point;
- (ii) providing clear directions as to where an employee can locate the necessary safe plant;
- (iii) ensuring that the necessary safe plant is used;
- (iv) updating plant, where practical, in line with scientific and technical discoveries; and
- (v) implementing, where practical, precautionary measures which may improve safety.

(e) Maintain safe plant based on the minimum of the general and approved practice in the industry. In addition, the employer is required to:

- (i) repair a foreseeable defect in plant;
- (ii) withdraw dangerous or unsuitable plant from operation; and
- (iii) conduct regular inspection and testing of plant, supplemented by a system of defect reports.

Notwithstanding preventive measures taken against foreseeable harm, an unforeseeable incident may require subsequent preventive and corrective action.

9.2.3 *Preventive and Corrective Action*

If an incident occurs the employer must take the necessary preventive and corrective action to prevent a recurrence of the incident. Such action is required even if the incident did not result in injury or death to an employee.

Should a similar incident recur, causing injury or death, and the employer had taken no preventive and corrective measures to prevent the incident, then the accident may be evidence of

the employer's failure to exercise reasonable care in the circumstances.

9.2.4 *Conduct Warranted in the Circumstances*

The breach or omission of any aspect of the employer's obligation infers the existence of an unsound safety management practice. The strength of the inference will depend on the standard of the reasonable employer which will vary according to factors such as:

- (a) the degree of care required in the circumstances which is in direct proportion to the risk involved;
- (b) the seriousness of the harm if the risk materializes;
- (c) the cost and difficulty of taking precautionary measures;
- (d) a justifiable error of judgement in a situation of sudden emergency; and
- (e) conformity with standard practices and safety standards operating at the relevant time and place.

The employer is not required to guarantee an employee absolute safety under all circumstances of employment, and need therefore not take every possible precaution to avoid causing him harm. The only obligation on the employer is to reasonably ensure the safety of an employee in the course of his employment. The employer cannot delegate his obligation to another person, but can expect an employee to exercise reasonable care and skill in the performance of his duties.

The parameters of the employer's obligation with regard to sound safety management are, by reason of their nature, flexibility and dependence on circumstances, difficult to apply. To provide guidelines for eliminating or minimizing the consequences of an incident where negligent conduct may be a factor, a model flow-chart is proposed as a directive to sound safety practices. Furthermore, the model facilitates the determination of the statutory and common law liability of the Workmen's Compensation Commissioner and the employer, and

the common law liability of the employee and independent contractor.

9.3 APPLICATION OF THE MODEL FLOW-CHART

A central issue related to safety management is the employer's possible liability for negligent conduct in spite of the fact that the WCA places responsibility for compensation on the Workmen's Compensation Commissioner. Furthermore, in certain circumstances, an employee or independent contractor may also be held liable for negligent conduct. The model flow-chart provided in Appendix 9.1 schematically illustrates the various factors at play in establishing which of these parties carries liability in the case of an incident.

In applying the model, it is necessary first to establish whether an incident in fact took place, and, if so, whether it caused harm and whether such harm occurred in the course of employment. If the finding of this preliminary investigation shows that an incident did occur but no harm was caused, then, as the model indicates, the employer is required to take preventive and corrective measures to avoid a recurrence of the incident. However, if the incident did cause harm but such harm did not arise in the course of the employee's employment, then the employee is liable for his own injury.

In addition, if the finding of the preliminary investigation is affirmative, then the model can be consulted to determine the onus of liability in specific circumstances and the implications thereof for the employer. This latter finding directs the investigation into two stages, namely:

- (a) by following the procedural route indicated by *block 6* on the model, the presence or absence of negligent conduct on the part of the employer, independent contractor, fellow-employee or injured employee, and the implications thereof for the employer can be established; or

(b) by following the procedural route indicated by *block 7*, the party responsible for the payment of compensation can be determined.

The table below sets out some of the possible appropriate routes that may arise from the investigation of an incident and the resultant finding.

<i>PROCEDURAL ROUTE FROM BLOCK 6</i>	<i>FINDING</i>
6 - 24 - 27	The reasonable likelihood of the harm could not have been foreseen. The employer is therefore not negligent.
6 - 24 - 25 - 28 - 31 - 27	The reasonable likelihood of the harm could not have been foreseen. The employer is therefore not negligent.
6 - 24 - 25 - 28 - 31 - 32 - 34 - 27	The general nature of the harm was foreseeable. However, since the nature and extent of the risk was small, and there was a valid reason for eliminating such risk, the employer is not negligent.
6 - 24 - 25 - 28 - 32 - 35 - 37 - 27	The general nature of the harm was foreseeable, but the cost and difficulty of taking precautionary measures to eliminate such risk of harm was considerable. Since the risk to life or serious injury was not substantial, the employer is not negligent.
6 - 24 - 25 - 28 - 32 - 35 - 38 - 39 - 27	The employer's conduct resulted in harm, but the employer was confronted by a situation of sudden emergency. Since the conduct was justifiable, the employer is not negligent.
Each block on the model flow-chart is numbered and contains a page reference referring to the appropriate section of the text.	

<i>PROCEDURAL ROUTE FROM BLOCK 6</i>	<i>FINDING</i>
6 - 24 - 25 - 28 - 32 - 35 - 38 - 40 - 45 - 46 - 47 - 48	The employer did not conform to standard practices or safety standards to prevent the incident. The injured employee can therefore apply for the enforcement of an interdict against the employer for an unsafe management practice. The employer's conduct is negligent.
6 - 24 - 25 - 28 - 31 - 32 - 35 - 38 - 40 - 41 - 45 - 46 - 47 - 48	The employer did not provide a safe system of work, a competent staff of employees, a safe premises or plant. The injured employee can therefore apply for the enforcement of an interdict against the employer for an unsafe management practice. The employer's conduct is negligent.
6 - 24 - 25 - 28 - 31 - 32 - 35 - 38 - 40 - 41 - 42 - 44 - 45 - 46 - 47 - 48	The employer did not adhere to the requirements of MOSA. The employer acted contrary to the standard of the reasonable employer. The employer can be fined and/or be imprisoned in terms of s 28(1) of MOSA. The employer's conduct is negligent.
6 - 24 - 25 - 28 - 32 - 35 - 38 - 40 - 41 - 42 - 43 - 47 - 27	The employer adhered to the requirements of MOSA and acted according to the standard of the reasonable employer. The employer's conduct is reasonable.
6 - 24 - 25 - 50 - 51 - 53	The employer is vicariously liable for the unsafe act of the independent contractor. For each vicarious liability case, it is necessary to establish whether the harm was reasonably foreseeable and preventable. To establish the latter, follow the procedural route from block 28.
6 - 24 - 25 - 50 - 51 - 52	The independent contractor is liable for the harm caused to the injured employee. The employer is not vicariously liable for the unsafe act of the contractor.
Each block on the model flow-chart is numbered and contains a page reference referring to the appropriate section of the text.	

<i>PROCEDURAL ROUTE FROM BLOCK 6</i>	<i>FINDING</i>
6 - 24 - 25 - 50 - 54 - 55 - 53	The employee was injured as a result of the unsafe act of a fellow-employee. No misconduct on the part of the fellow-employee was present. The employer is vicariously liable for the harm.
6 - 24 - 25 - 50 - 54 - 55 - 57 - 53	The misconduct of an employee resulted in injury to a fellow-employee. Although the employer is vicariously liable for such negligent conduct, the negligent employee is required to indemnify the employer for any damages suffered.
6 - 24 - 25 - 50 - 54 - 58 - 61 - 5	The unsafe act of the employee led to his own injury. The employer was reasonable in expecting the injured employee to execute his task within the scope of his own skill and experience. The employer's conduct was reasonable.
6 - 24 - 25 - 50 - 54 - 58 - 59 - 28	The unsafe act of the employee led to his own injury. Since the employer could not reasonably have relied on the employee's own skill and experience, and since the employee did not act in a negligent manner, the employer may have been negligent in preventing the incident. To establish the employer's reasonable or negligent conduct, follow the procedural route from block 28.
<i>PROCEDURAL ROUTE FROM BLOCK 7</i>	<i>FINDING</i>
7 - 8 - 24	The employer is not an <i>employer</i> as defined in the WCA. The Workmen's Compensation Commissioner will therefore not pay compensation to the injured employee. To establish the onus of liability for the payment of compensation, follow the procedural route of block 6.
Each block on the model flow-chart is numbered and contains a page reference referring to the appropriate section of the text.	

PROCEDURAL ROUTE FROM BLOCK 7	FINDING
7 - 8 - 9 - 24	The injured employee does not fall within the scope of the WCA definition of <i>workman</i> . Similarly, the consequences of the latter finding applies.
7 - 8 - 11 - 12 - 13	The accident is caused as a result of the serious and wilful misconduct of the injured employee, but does not result in serious disablement or death. The employee is therefore liable for his own injury.
7 - 8 - 11 - 12 - 18 - 20 - 22	The accident is caused as a result of the serious and wilful misconduct of the injured employee, but the injury results in serious disablement or death. The Commissioner will therefore compensate the injured employee or his dependants.
7 - 8 - 11 - 14 - 15 - 16 - 17 - 18 - 20 - 21	The employee is injured due to the employer's negligent conduct. The injured employee may apply to the Commissioner for an increase in the compensation ordinarily payable to him. The employer's conduct was contrary to the provisions of MQSA. The employer may therefore be fined or be imprisoned, or both. The injured employee can also apply for the enforcement of an interdict against the employer for an unsafe management practice.
Each block on the model flow-chart is numbered and contains a page reference referring to the appropriate section of the text.	

Concluding the investigation of an incident in terms of the model will always lead to the finding that the employer is obliged to take preventive and corrective measures to avoid a recurrence of the incident. The model reflects the relief for the payment of compensation provided by the WCA to the negligent employer, employee or independent contractor,

subject to the following conditions:

- (a) that the employer is an *employer* as defined in the WCA;
- (b) that the injured employee is a *workman* as defined in the WCA;
- (c) that the accident falls within the scope of the WCA definition of *accident*;
- (d) that the accident cannot be attributed to the serious and wilful misconduct of the injured employee. However, if the accident is so caused but resulted in serious disablement or death, the Workmen's Compensation Commissioner will provide compensation.

In order to give adequate effect to and to cater for changes affecting the parameters established and the viability of the model, it would be desirable and necessary to incorporate the parameters into an objectively-based safety policy. Such a policy may assist in providing:

- (a) guidelines by which the employer should manage safety activities in accordance with the parameters; and
- (b) a means of communication to and consulting with employees.

Suggestions for the formulation and implementation of an objectively-based safety policy will be discussed below.

9.4 THE NEED FOR A SAFETY POLICY

The ILO¹ expressed the significance of a safety policy when stating that "corporate policy statements are in part the manifestation of the principle of self-regulation which if properly and honestly managed within a flexible legal framework provides a dynamic and business-like approach to the solution of occupational safety and health problems."

A safety policy could serve as a means of monitoring safety standards. Actual safety results could be compared with the

¹ ILO *Success with Occupational Safety Programmes* 19.

policy in order to establish whether or not the safety objectives are being accomplished. Corrective action must be taken in cases where performance does not meet those objectives.

A safety policy is not only sound labour relations management, but could also serve a purpose similar to that prescribed by statute in the United Kingdom. The United Kingdom statute² requires all employers with more than five employees to formulate and implement a written health and safety policy. Section 2(3) of that Act reads as follows:

"(I)t shall be the duty of every employer to prepare and as often as may be appropriate revise a written statement of his general policy with respect to the health and safety at work of his employees and the organization and arrangements for the time being in force for carrying out that policy and to bring the statement and any revision of it to the notice of all of his employees."

This statutory provision requires the employer not only to define a health and safety policy, but also to indicate clearly the organizational arrangements by which the policy objectives are to be achieved. By contrast, MOSA at present does not require the employer to establish a written health and safety policy, although nothing prevents the employer from voluntarily negotiating such a policy with his employees or their trade union, as sound management practice.

A safety policy may prevent or minimize the prejudicial effects of a failure to adequately implement the standard of care. While such a policy could not guarantee safety, its absence may imply a poor standard of care. For this reason, guidelines for the formulation and implementation of an objectively-based safety policy will be proposed as a means of providing objectives and procedures that will aim to ensure a

² The Health and Safety at Work etc. Act of 1974.

safe workplace, free of known hazards, or where such hazards are under adequate and continuous control.

For the purposes of clarity, it may be appropriate to distinguish between the words *policy*, *strategy*, *procedure*, *practice* and *rule*.

9.4.1 *Distinguishing between 'Policy', 'Strategy', 'Procedure', 'Practice' and 'Rule'*

The words *policy* and *strategy* are frequently used synonymously in the literature on general management.³ The word *policy* is also indiscriminately interchanged with *procedure*, *practice*, and *rule*.⁴ Although there appears to be no agreement on the meaning of the word *policy*,⁵ there are a number of factors that do distinguish *policy* from those other words.

A *policy* is generally considered to be a guideline for specific courses of action⁶ to govern the operations of the employer.⁷ It also serves as a declaration of intent concerning the employer's obligations and responsibilities towards employees.

According to Higginson,⁸ a policy "expresses the philosophy, principles, and purposes of the organization, as well as its values." Mockler⁹ adapts the definition of Higginson and states that a policy is "basically a statement, either expressed or implied, of those principles and rules that are set up by executive leadership as guides and constraints for the organisation's thought and action." Mockler¹⁰ indicates that the principle purpose of a policy is to enable the

3 Horwitz *Espoused and Operational Industrial Relations Policies: A Review of Research Findings* 3-4; McNichols 185.

4 Petersen *Techniques of Safety Management* 33.

5 Steiner & Miner 24.

6 Tate and Taylor 3 state that a policy is a guide to action in areas of repetitive activity. They point out that unless an event or activity occurs with significant frequency, there is no justification for the establishment of a policy.

7 Steiner & Miner 24.

8 Higginson 21-2.

9 Mockler 91.

10 Mockler 91.

employer to relate the organizational functions to its objectives. Thompson and Strickland¹¹ further point out that a policy involves the organizational methods, procedures and practices associated with implementing and executing strategy.

Strategy concerns the employer's long-term objectives and the means by which he aims to achieve them. Christensen et al¹² define the word *strategy* as "the pattern of objectives, purposes, or goals and major policies and plans for achieving these goals, stated in such a way as to define what business the company is in or is to be in and the kind of company it is or is to be." Thurley and Wood¹³ express the opinion that the employer's *strategy* refers to his long-term policy which is developed to preserve or change the procedures, practices or results of labour relations activities.

The major distinction between *strategy* and *policy* is that *strategic decisions* are concerned with the long-term objectives, whereas *policy decisions* are of a more short-term nature and deal with the day-to-day activities necessary for efficient and smooth operations.¹⁴ Prasad¹⁵ states that the intermediate goal of a policy is the uniform resolution of problems, and its ultimate goal is efficiency, such as the efficient resolution of safety problems. He further points out that the intermediate goal of a strategy is a competitive advantage, and its ultimate goal is effective performance. A statement of strategy is therefore more extensive than a policy statement, because it interrelates various goals and policies within a single, unified approach to a task.¹⁶

A *procedure* may also be distinguished from a *policy*. The word *procedure* is defined by Salamon¹⁷ as an "operational mechanism

11 Thompson & Strickland 15.

12 Christensen et al cited in McCarthy et al 17.

13 Thurley & Wood cited in Horwitz *Espoused and Operational Industrial Relations Policies: A Review of Research Findings* 3-4.

14 Chandler 11.

15 Prasad 8.

16 Mockler 92.

17 Salamon 387.

which details and regulates the manner in which a specified issue is to be handled." A *procedure* is usually considered to be a series of related steps or tasks expressed in chronological order and sequence to achieve a specific objective.¹⁸ When a sequence of actions becomes well established and is, to a certain extent, a basic rule of conduct,¹⁹ it is referred to as a *standard operating procedure*.²⁰ A *procedure* is therefore a method, technique and a detailed manner by and through which a *policy* is implemented and its objectives achieved.²¹

The interpretation and application of a policy is instituted through the *practices*²² of management.²³ It is the application of a policy through the practices of management which provides positive evidence of the precise meaning and effect of the policy, and the employer's intention both to implement and be constrained by that policy.

The word *rule* implies the designation of particular action that should either be performed or disregarded under specified circumstances, and should leave no doubt as to what is to be accomplished.²⁴ A *rule* is a specific requirement which permits a minimum of flexibility and freedom of interpretation. A *rule* is narrower and more specific than a *policy*²⁵ and is established when the need for uniformity and dependability of action is greater than that for good judgement.²⁶

18 Steiner & Miner 25.

19 A series of steps in investigating an accident may be considered as a basic rule of conduct.

20 Steiner & Miner 25-6.

21 Salamon 387-8; Steiner & Miner 26.

22 The meaning of the word *practice* is examined supra 32-4.

23 Salamon 388.

24 Mockler 180; Steiner & Miner 26.

25 Mockler 180.

26 Mockler 180.

9.4.2 *The Formulation of a Safety Policy*

The formulation of a safety policy involves the exercise of the human resources function of the employer.²⁷ That function is considered as an integral but distinctive part of management, concerned with employees and their relations with the employer. It seeks to unite employees, enabling each employee to contribute to the employer's objectives. It also aims to provide for relations within the organization that are conducive both to effective work and human satisfaction.

The formulation of a safety policy requires careful and comprehensive analysis of safety matters. Such an analysis should be conducted by a safety committee with the necessary expertise.

9.4.2.1 *The Role of the Safety Committee*

The formulation, implementation, evaluation and revision of a safety policy should be the role of the safety committee. The committee structure should comply with the requirements of MOSA, but should ideally consist of at least a managerial representative, a safety representative and a safety advisor.²⁸ Supervisors may also assist the committee because of their day-to-day involvement with safety matters, which may contribute to the clarification of the policy.²⁹

Employees are directly affected by a safety policy, and are usually familiar with its workplace environment of application. They may therefore make a valuable contribution to policy formulation and offer suggestions for additions to or changes in existing policy. Employee participation may favourably influence the employees' acceptance of the policy.³⁰

27 ILO *Labour Management Relations Series* (1968) 54.

28 Cf Bendix *The Implementation of the Machinery and Occupational Safety Act* 64.

29 Broom 36; Thompson & Strickland 16.

30 Bryant, M in ILO *Success with Occupational Safety Programmes* 19; Smith 448.

9.4.2.2 *Factors to Consider in the Formulation Process*

A safety policy must be flexible and consistent with the following factors:

- (a) the employer's safety objectives;
- (b) common law and statutory requirements;
- (c) industry standards;
- (d) international labour standards; and
- (e) national labour policy.³¹

An analysis of these factors provides the basis for the formulation of the policy, since it indicates the policy required to meet safety objectives and the requirements of society.³² Although aspects (a) to (d) have been considered as determinative of the parameters of the employer's obligation in safety management, further guidance may be forthcoming from aspect (e).

9.4.2.2.1 *NATIONAL LABOUR POLICY*

The reasonableness of a labour practice suggests a measure of guidance from national labour policy.³³ Such a policy could act as a normative guideline for the employer when formulating a safety policy.³⁴ An important principle of national labour policy is to "promote conditions in factories which will be conducive to the comfort, health and safety of all employed therein."³⁵

National labour policy includes the objectives of Government's manpower policy. Those objectives comprise the optimum utilization of the country's economic potential, the provision of sufficient employment opportunities, and improved standards

31 Cf ILO *Labour Management Relations Series* (1972) 23.

32 Mockler 94.

33 Poolman *Guidelines for the Decision Making Process of Labour Relations: The Role of Public Interest and Public Policy* 19.

34 Poolman *Guidelines for the Decision Making Process of Labour Relations: The Role of Public Interest and Public Policy* 19; Rideout & Dyson 225.

35 De Kock *In Defence of the Industrial Council System* 80-1.

of living.³⁶ In this regard, the manpower policy objectives are the optimum development, utilization and conservation³⁷ of the country's manpower, irrespective of race, sex or creed.³⁸ Fundamental to the achievement of these policy objectives is the proper recognition of the principles of occupational safety.³⁹

The objectives of Government's manpower policy were supplemented by the Minister of Manpower by means of practical guidelines for employers and employees, which include the following:

- (a) maintaining fair employment practices at all levels and towards all employees;
- (b) providing high-level and specialized attention to labour relations matters;
- (c) facilitating and encouraging the training and retraining of all employees;
- (d) acting in good faith, imaginatively, dynamically and enterprisingly within the broad official policy framework in dealing with labour matters, all of which are essential to sustained progress, labour stability and industrial peace in the face of rapidly evolving and changing circumstances and events; and
- (e) adopting universally accepted labour standards and taking cognizance of national and international trends in the labour field.⁴⁰

In the light of these considerations, a safety policy should be formulated.

36 National Manpower Commission *Annual Report* (1984) 16; Slabbert et al par 3.1.2.

37 Manpower conservation involves matters relating to occupational safety, such as the prevention and compensation of accidents. National Manpower Commission *Annual Report* (1987) 12.

38 These objectives must be assimilated into a labour relations system within the broad framework of a free market system, but with proper consideration for the following:

- (a) the national objectives;
 - (b) the particular circumstances in South Africa; and
 - (c) events and developments which necessitate the influencing of the system by the Government.
- Slabbert et al par 3.1.2.

39 National Manpower Commission *Annual Report* (1984) 19-25; National Manpower Commission *Annual Report* (1987) 12.

40 Cf National Manpower Commission *Annual Report* (1981) 3-4.

9.4.2.3 *The Content of a Safety Policy*

A safety policy should:

- (a) reflect the employer's safety objectives;
- (b) prescribe criteria for current and future safety action;
- (c) establish acceptable and unacceptable behavioural standards;
- (d) offer a pre-determined solution to routine safety problems;⁴¹
- (e) define the safety responsibility of each employee, and help motivate employees individually and collectively to achieve the desired safety objectives;⁴²
- (f) delineate the organizational arrangements that are necessary to accomplish the policy objectives;⁴³
- (g) provide means of measuring safety progress in the expected direction; and
- (h) be consistent yet flexible to societal changes and organizational requirements.⁴⁴

To contribute effectively to sound safety management,⁴⁵ the policy should not only accommodate the above criteria, but

41 In this manner preventive decisions pertaining to both ordinary and extraordinary problems should be greatly expedited, the former by referring to established practices, and the latter by determining alternative solutions.

42 The successful implementation of the policy will be facilitated if every employee understands his safety responsibility.

43 Reference should be made to those systems of work, procedures, rules and facilities that exist to promote safety. Par IV(10) of ILO Recommendation 164/1981 points out that an employer should institute organizational arrangements regarding occupational health and safety, adapted to the size of the organization and the nature of its activities.

44 Armstrong 258; Broom 38; Haynes & Massie 45; Horwitz *Espoused and Operational Industrial Relations Policies: A Review of Research Findings* 1; Horwitz *Training and the Implementation of an Industrial Relations Policy* 85; Slabbert et al par 16.3; Stanford 9; Thompson & Strickland 22.

45 According to the National Safety Council 50, an effective safety policy could make it easier:

- (a) to enforce safe practices and conditions;
- (b) for supervisors to implement the policy;
- (c) for employees to comply with safety rules and instructions; and
- (d) to obtain good preventive maintenance of equipment or selection of proper equipment when purchased.

also provide for the following:

- (i) the initiation of safety engineering to eliminate or minimize hazards, such as safe plant design to ensure the structural reliability of machinery and equipment in cases where its failure may give rise to an accident;⁴⁶
- (ii) the grading of employees in the jobs for which they are physically and mentally suited.⁴⁷ Such an examination should be aimed at discovering latent physical or mental defects, such as defective vision, hearing, or alcoholism, and may assist in keeping employees away from jobs where they would be particularly susceptible to accidents;
- (iii) the education⁴⁸ and training⁴⁹ of employees to promote interest, understanding and active participation in safety matters;⁵⁰
- (iv) the conducting of safety inspections to locate and identify hazards;⁵¹
- (v) the investigation of an accident and the institution of preventive and corrective action so that a recurrence of the accident, or the occurrence of a similar accident, may be avoided;⁵²
- (vi) the establishment of an accident reporting system to provide essential accident data in such a manner that its interpretation and recording will accomplish the objectives of the safety policy;⁵³

⁴⁶ Arscoff & Armstrong 181; Beach 535; Flippo 442; NOSA *Safety Subjects* 175; Ringrose 135.

⁴⁷ Ringrose 134 recommends that this could be achieved by implementing a pre-employment medical examination. Aptitude tests may also be necessary in some cases.

⁴⁸ *Safety education* is the process of broadening and adding to an employee's safety knowledge for the purpose of developing an awareness of the importance of eliminating accidents, including a mental alertness in recognizing and correcting conditions and practices that may lead to injury. NOSA *Safety Subjects* 98.

⁴⁹ *Safety training* is the process of developing an employee's skill in the use of safe work techniques and practices. Blake 333.

⁵⁰ Heinrich et al 277; ILO *Education and Training Policies in Occupational Safety and Health and Ergonomics - Intermediate Symposium* 53; ILO *Encyclopaedia of Occupational Health and Safety* 1537.

⁵¹ Armstrong 265; Hammer 162; Harris & Chaney 599.

⁵² Blake 128; Handley 440; Matives & Matives 40.

⁵³ Blake 352; De Reamer 280; Hammer 194.

- (vii) the establishment of a system for recording accidents to facilitate accident prevention procedures;⁵⁴
- (viii) the prompt analyzing of accidents to expedite the identification of hazards;⁵⁵ and
- (ix) the provision of medical facilities and trained first aid attendants to assist an injured employee.⁵⁶

These organizational guidelines should be extended or adapted to the employer's particular safety requirements.

9.4.3 *The Implementation of a Safety Policy*

When implementing a safety policy, the assistance of supervisors may be required to provide a communication channel between the safety committee and employees.⁵⁷ A continuing two-way communication should be maintained for effective implementation because employees are directly exposed to actual operations and are therefore attentive as to whether the policy is being followed.⁵⁸

The policy should be presented and communicated at meetings or seminars, or through written memorandums and bulletin boards.⁵⁹ An efficient means of implementing the policy is to present it in written form⁶⁰ in a policy manual.⁶¹

⁵⁴ National Safety Council 122-3.

⁵⁵ Heinrich et al 133-4; National Safety Council 151-2; Simonds & Grimaldi 212.

⁵⁶ NIOSH *Plant First Aid* 1; r 3 of MOSA.

⁵⁷ A survey conducted by Planek et al 60-3 was designed to evaluate factors considered most important for the effective implementation of a safety policy. Results indicated that the main emphasis fell on senior management and supervisory participation, and that optimal policy operation must go beyond, but should include middle management. This was considered necessary to create the chain of communication and command without which optimal functioning of the policy is not possible.

⁵⁸ Horwitz *Espoused and Operational Industrial Relations Policies: A Review of Research Findings* 7; Mockler 95.

⁵⁹ Thierauf et al 212; Yoder 710.

⁶⁰ Par 14 of ILO Recommendation 164/1981 states that employers should, where the nature of the operation in their organization warrants it, set out their safety policy and arrangements, including the various responsibilities exercised under these arrangements, in writing. Such information must be brought to the notice of every employee in a language or medium that is readily understood. See Salamon 394 and Schwartz 139 for the importance of a written safety policy.

⁶¹ Mockler 95-8 and Smith 446-8 outline the significance of a policy manual.

In monitoring the implementation of the policy, the following should be kept under regular review:

- (a) accident records;
- (b) compliance with statutory requirements and adherence to codes of safety practices; and
- (c) progress towards the accomplishment of the safety objectives.⁶²

Once the policy is implemented, it is necessary to establish whether employees are adhering to it. An adequate control system which encourages and promotes adherence to the policy is therefore necessary.

9.4.4 *The Control System*

An adequate control system should be established which will enable safety performance to be measured against the safety objectives. This can be accomplished by providing feedback on the progress of the policy and the degree of its successful implementation.⁶³ The control system should therefore perform an integrative function, since the measurement of performance as related to objective accomplishment co-ordinates activity.⁶⁴ Higgins et al⁶⁵ depict the following control system as a six-step feed-back model:

- (a) safety standards must be established against which actual performance can be measured;⁶⁶
- (b) a deviation from a standard is acceptable within certain controlled limits, since it is not always necessary or desirable to perform in exact accordance with a specific standard;⁶⁷

⁶² Ridley 138.

⁶³ McCarthy et al 471.

⁶⁴ Higgins & Vincze 222.

⁶⁵ Higgins & Vincze 222-3.

⁶⁶ These standards are detailed expressions of policy objectives and are the bases of role prescriptions.

⁶⁷ A standard is only a single point on a continuum of possible behaviours.

- (c) the actual safety performance is measured, a process which involves the identification of role behaviour;⁶⁸
- (d) standards and performance should be compared, a difficult task in view of the fact that neither standards or performance can be quantified;
- (e) where performance corresponds with standards, no action is necessary, but where performance fails to achieve the desired standards, corrective action must be instituted; and
- (f) preventive action should be taken to stop unsatisfactory performance, because it is inadequate simply to correct problems.

The feed-back model focuses on results or outputs. Often, the consequence of utilizing a feed-back control system is that the unsatisfactory performance continues until the hazard is discovered.⁶⁹ A technique for reducing the unsatisfactory performance associated with feed-back control systems is feed-forward control. First suggested by Koontz et al,⁷⁰ feed-forward control focuses on inputs to the system and attempts to anticipate potential problems with outputs. The feed-forward principle underlies the concept of simulation modelling. Simulations of performance are made in any number of strategic situations to test for changes in basic assumptions. Any situation with identifiable inputs which can be modelled should utilize the feed-forward approach.

The feed-back and feed-forward models are mainly applicable to formal control systems which are appropriate for the larger employer. Informal control systems may, however, suffice for the smaller employer, especially where personal observation is possible.

It is also necessary, from time to time, to evaluate the effectiveness of the safety policy. The policy will be

⁶⁸ Measurement techniques vary from situation to situation and are often imprecise.

⁶⁹ Higgins & Vincze 223.

⁷⁰ Koontz & Bradspies 25-36.

effective to the extent that it efficiently and effectively guides action towards stated objectives.

9.4.5 *Policy Evaluation*

The evaluation of the policy should be undertaken periodically after its implementation.⁷¹ A questionnaire⁷² compiled by the Accident Prevention Advisory Unit of the United Kingdom⁷³ could be used as a guideline for evaluating a safety policy.⁷⁴ Its questions, when considered in totality, comprise a checklist to determine whether a safety policy is successful in accomplishing the desired objectives. Response to these questions and any decision or recommendation that follows must be preceded by diligent and selective analytical work and study.

In the evaluation procedure, statistics may be required to establish the extent to which the policy is accomplishing the safety objectives. These statistics must confirm the validity of successful safety measures and ensure that unsatisfactory techniques are discarded. The statistical data most commonly applied in the evaluation procedure is the DIFR and the ISR.⁷⁵

9.4.5.1 *The Disabling Injury Frequency Rate*

A disabling injury is one involving absenteeism the day following the occurrence of the accident, and includes the permanent disability or death of an employee.⁷⁶ If, for example, an employee is injured but returns to work the following day, he will not have suffered a disabling injury.

The DIFR illustrates how often, on the average, disabling injuries occur in any particular organization, or the number

71 Higgins & Vincze 224; Mockler 97.

72 The questionnaire is reproduced in Appendix 9.2.

73 Stow 39.

74 Stanford 23-4 also developed a series of factors for evaluation which could be used as a test to any policy approach.

75 Workmen's Compensation Commissioner *Workmen's Compensation Act 1941, Report on the 1988 Statistics* 13.

76 Miner & Miner 474; Ringrose 124; s 2 of the WCA.

of disabling injuries per million man-hours of work exposure. The mathematical formula for the DIFR is as follows:

$$\text{DIFR} = \frac{\text{Number of Disabling Injuries} \times 1000\ 000^{77}}{\text{Number of Man-hours of Work Exposure}}$$

Assuming, as an illustrative example, that 500 employees work 50 weeks of 48 hours each, and during this period 60 disabling injuries occurred, and, further, that due to illnesses, incidents or some other reason, a number of employees were absent during 5% of the aggregate working time, then the total number of man-hours of work exposure ($500 \times 50 \times 48 = 1200000$) has to be reduced by 5% ($1200000 \times 5\% = 60000$). The number of man-hours of work exposure is therefore 1140000 ($1200000 - 60000$). The DIFR is therefore 52,63 ($60 \times 1000000/1140000$). According to this example, the DIFR indicates that, in one year, approximately 53 disabling injuries occurred per million man-hours of work exposure.⁷⁸

Statistics for minor injuries may, if desired, be determined separately. These statistics may include those injuries that do not meet the preceding criteria, but that do require first aid or medical treatment.⁷⁹ Although the DIFR is the commonly used formula in South Africa, the IR is applied in the United Kingdom.

9.4.5.1.1 THE INCIDENCE RATE

The IR calculates the number of reportable injuries, involving absence for more than three days, per thousand manual

⁷⁷ Workmen's Compensation Commissioner *Workmen's Compensation Act 1941, Report on the 1988 Statistics* 13.

⁷⁸ A comparison of the South African industry DIFR, as illustrated in Appendix 9.3, reveals that the highest DIFR was found in the fishing industry with 31,3 disabling injuries per million man-hours of work exposure for 1988 (34,8 for 1987). This rate is more than twice as high as that for the next highest industry, namely, the wood industry with a DIFR of 13,7 (15,3 for 1987).

⁷⁹ Miner & Miner 474.

employees. The mathematical formula for the IR is as follows:

$$\text{IR} = \frac{\text{Number of Reportable Injuries in Period} \times 1000^{80}}{\text{Average Number of Manual Employees in Period}}$$

The major difference between the IR and the DIFR is that in the case of the former the number of reportable injuries involves absence for more than three days, as opposed to absence the day after the occurrence of the accident in the case of the latter. A further difference is that the base for reporting injury frequency rates is one thousand manual employees, as opposed to one million man-hours of exposure in terms of the DIFR.

Frequency rates are generally more adequate if applied to the larger employer. For the smaller employer they are of little value if applied on a week-to-week or month-to-month basis, because so few disabling injuries may occur that the statistics will not provide a reliable indication of trends.

Frequency rates will be of more value for the small employer if applied on an annual basis. In order to provide a reliable indication of trends, the small employer may benefit more by adapting the frequency rate to incidents causing injuries, instead of only to disabling cases. Heinrich et al⁸¹ suggest that the frequency rate could be modified in this way by decreasing the numerator of one million to thirty thousand, which approximately represents the comparative frequency between minor and major injuries.

80 Armstrong 255.

81 Heinrich et al 203.

9.4.5.2 *The Injury Severity Rate*

The ISR indicates the number of working days lost as a result of accidents per thousand man-hours of work exposure.⁸² The ISR is determined by the following mathematical formula:

$$\text{ISR} = \frac{\text{Total Time Charges in Days} \times 1000^{83}}{\text{Number of Man-hours of Work Exposure}}$$

If, in the example given for calculating the DIFR, it is assumed that 1200 days are lost as a result of the 60 accidents, then the ISR would be 1,053 (1200 x 1000/1140000). In terms of this example, the ISR indicates that, in one year, approximately one day was lost per thousand man-hours of work exposure. Alternatively, on the basis of 2400 hours of work per year, 2,4 days per employee.⁸⁴

In calculating the severity rate, standard time charges are used in the case of death and permanent disability,⁸⁵ and actual days lost for temporary disability. The average number of days charged per disabling injury may be determined by means of the following mathematical formula:

$$\text{Average Days Charged per Disabling Injury} = \frac{\text{ISR}^{86}}{\text{DIFR}}$$

82 The Sixth International Conference of Labour Statisticians recommend that the severity rate should be taken as time loss in days per thousand man-hours of work exposure. On the other hand, the American Standards Association recommend that the rate should be calculated per million man-hours of work exposure. International Occupational Safety and Health Information Centre 4.

83 Workmen's Compensation Commissioner *Workmen's Compensation Act 1941, Report on the 1988 Statistics* 13.

84 Appendix 9.3 compares the ISR amongst South African industries and illustrates that the fishing industry has the highest ISR of 3,19 per thousand man-hours of work exposure for 1988 (5,48 for 1987). The transport industry shows the second highest ISR for 1988 (2,53), followed by mining (2,48), and building and construction (1,69).

85 In terms of the American Standards Institute, the total days charged in the case of death or permanent total disability is set at 6000. Other scheduled charges are used for certain permanent partial disabilities. McCormick & Tiffin 513.

86 McCormick & Tiffin 513.

A disadvantage of the ISR is that, as a measure of the effectiveness of a safety policy, it attaches significance to the mere occurrence of an accident. The severity of the accident may be largely fortuitous,⁸⁷ as shown by instances where an employee may lose an eye when struck by a flying object, while another in identical circumstances may sustain only a glancing blow on the forehead. The ISR must therefore be used with discretion. In combination with the DIFR, the ISR is of value over long periods of exposure as a means of evaluating the hazards of varying occupations.⁸⁸

The DIFR and ISR measure only the end results of accident prevention methods and as such do not fully qualify as evaluation or appraisal methods. A complete appraisal should attempt not only to evaluate the DIFR and the ISR, but should consider all safety matters, such as safety inspections, accident investigations, accident reports and accident records.⁸⁹

9.4.5.3 *Other Available Statistics*

A further statistic which may be used to evaluate the effectiveness of a safety policy is the FSI, which is a combination of the DIFR and ISR:

$$FSI = \sqrt{\frac{DIFR \times ISR^{90}}{1000}}$$

If the object of the statistic is to measure the monetary cost of accidents, which could prove difficult, it may be useful to

87 Ringrose 125.

88 Heinrich et al 204.

89 Heinrich et al 204.

90 Heinrich et al 205.

make use of the CSR:

$$\text{CSR} = \frac{\text{Total Cost of Accidents over a Period} \times 1000\ 000^{91}}{\text{Total Man-hours of Production \& Maintenance during Period}}$$

The CSR measures the total cost of accidents per million man-hours worked. This cost should include all direct and indirect items, such as damaged equipment, loss of production time, cost of training replacements, and investigation costs.⁹²

9.4.5.4 *Objectives, Advantages and Disadvantages of a Statistical Evaluation*

The primary objective of a statistical evaluation is to provide guidance for reducing accident rates, the reduction of which is a measure of the policy's success. Accident rates may be calculated for the organization as a whole, or by department, workshop, trade, age-group, or per worker. Statistical tables and graphs are useful in stimulating safety consciousness amongst the employer and employees. Such tables and graphs should be well designed and self-explanatory. Complicated presentations should be avoided.

The advantage of using statistics such as the DIFR and the ISR is that they permit comparison against national and industry figures, as provided by the Workmen's Compensation Commissioner.⁹³ An employer can, therefore, establish his safety position relative to other employers, and make improvements where necessary.⁹⁴ In addition, where accident rates are determined separately for various work units, it is possible to locate hazardous areas and concentrate preventive efforts in these areas. Statistics assist to identify

91 Armstrong 271.

92 Ringrose 125.

93 See Appendix 9.3.

94 An employer can only determine his safety position relative to other employers if most employers use the same rates.

undesirable safety trends which may not be fully revealed by the normal inspection procedures.

A disadvantage of a statistical evaluation is that several sources of error may not reveal the true state of affairs. Thygerson⁹⁵ classifies those errors into the following three groups:

- (a) *Sources of error in collection:* Accident statistical errors in collection may result from distortions introduced negligently or deliberately to maintain a satisfactory accident record.
- (b) *Sources of error in the presentation of accident statistics:* Accident statistics are not meaningful until they are transformed into percentages or ratios based on the total workforce under consideration. The fact that Organization A may record 50 disabling injuries as compared with 100 reported by Organization B does not necessarily mean that Organization B is twice as accident-prone as Organization A. If Organization B has four times the workforce of Organization A, the reverse is true.
- (c) *Sources of error in the interpretation of accident statistics:* The use of statistics may mislead and confuse an employee when he does not know how to interpret them. Huff⁹⁶ characterizes the unfortunate acceptance and utilization of statistical information as "employed to sensationalize, inflate, confuse, and oversimplify ... without writers who use the words with honesty and understanding and readers who know what they mean, the result can only be semantic nonsense."

The ability to evaluate the effectiveness of a safety policy depends not only on available statistics but also upon a reporting system which ensures that all incidents and accidents are recorded.⁹⁷ The conclusions derived from the evaluation procedure should be used to improve the policy.

⁹⁵ Thygerson *Safety - Concepts and Instruction* 14-20.

⁹⁶ Huff 8-9.

⁹⁷ Mondy & Noe 365.

9.4.6 *Policy Revision*

After a period of time, it may be necessary to revise the policy in order to adapt it to changed organizational or societal conditions. Factors which may signal a need for revision are:

- (a) a negative reaction from employees;
- (b) audits of policy application; and
- (c) a review of the results obtained in areas in which the policy is designed to be of assistance.⁹⁸

When revising the policy, provision should be made for those employees who are directly affected by the policy to criticize the policy and to suggest revisions they think will improve it.

The policy should not be revised partially, but should be based on a complete review. Reasonableness may require that the policy be revised every three years,⁹⁹ or after some other reasonable period.

The safety policy formulation and implementation process is illustrated in Appendix 9.4. Once a safety policy has been enforced, it may further assist the employer to utilize a management by objectives system of safety control.

9.5 *THE MANAGEMENT BY OBJECTIVES SYSTEM OF SAFETY CONTROL*

The criteria applicable to an MBO system of safety control is similar, but not equivalent, to that of a safety policy. Although the criteria may overlap, it may be appropriate to examine the MBO concept as a means of further promoting safety.

⁹⁸ Gray 274.

⁹⁹ Gray 274.

Odiorne¹⁰⁰ defines MBO as:

"(A) management process whereby the supervisor and the subordinate, operating under a clear definition of the common goals and priorities of the organization established by top management, jointly identify the individuals (sic) major areas of responsibility in terms of the results expected of him or her, and use these measures as guides for operating the unit and assessing the contributions of each of its members."

The *management process* consists of a series of inter-dependent and inter-related steps. These steps include the following:

- (a) the formulation of a clear and concise statement of objectives;
- (b) the development of a realistic action plan for the attainment of the planned objectives;
- (c) the systematic monitoring and measuring of performance and achievement; and
- (d) the implementation of corrective action necessary to achieve the planned results.¹⁰¹

MBO is recognized as an important tool for sound management practices. Allen¹⁰² points out that an organization can grow and change in an orderly and progressive manner only if well-defined goals have been established to guide its progress. He further points out that objectives must be established if logical action is expected to be taken. In the MBO system, the process of joint objective setting by the employer and employees is important in obtaining the employees' full cooperation and acceptance. MBO encourages the contribution of every employee to the employer's objectives, measures each contribution, and provides the basis for the proportionate distribution of rewards.¹⁰³

100 Odiorne 55-6.

101 Raia 11.

102 Allen cited in NOSA *The NOSA MBO System Leading to a Five Star Grading 2*.

103 Giegold 3-5.

The MBO system of safety control involves establishing a list of key areas for safety, such as building cleanliness, safety organization, personal safeguarding, and the determination of a standard of performance for each area. Periodically the performance actually achieved in each area may be evaluated and publicity given to the results. In this manner a degree of competitiveness may be introduced. Improved performance may be encouraged by specifying the areas where there are deficiencies and describing how these deficiencies could be corrected.

A South African system based on the MBO concept is the NOSA Safety System,¹⁰⁴ which was developed on the basis that most safety arrangements, irrespective of the type of employer, consist of certain pre-determined elements from which a checklist of key items can be established. At present the checklist in the NOSA safety system consists of 76 items under five categories, namely:

- (i) premises and housekeeping;
- (ii) mechanical, electrical and personal safeguarding;
- (iii) fire protection and prevention;
- (iv) accident recording and investigation; and
- (v) safety organization.¹⁰⁵

The NOSA Safety System is based on the principle that objectives are set for the employer to achieve certain safety standards. The efforts of the employer to reach the optimum standards are evaluated and quantified according to a five star grading system.¹⁰⁶ A one star grading would indicate that weak safety management practices are in operation, whereas a five star grading would indicate that the practices are of the safest in the country.

104 NOSA *The NOSA MBO System Leading to a Five Star Grading* 13.

105 See Appendix 9.5.

106 NOSA *Annual Report 1989-1990* 19.

According to the NIOSH Safety System, the mark allocation for a safety policy must correlate with the drop in the DIIR.¹⁰⁷ The DIIR for an employer with a five star grading must be no higher than 1%, that for a four star grading no higher than 2%, that for a three star grading no higher than 3%, that for a two star grading no higher than 4%, and that for a one star grading no higher than 5%.¹⁰⁸ It may be deduced that if ineffective safety management practices are in operation, it would be reflected in the DIIR.

A survey conducted on the NIOSH Safety System indicates that the adoption of the system could lead to a significant reduction in accidents, and a 10% to 30% increase in productivity.¹⁰⁹ The importance of the System is that the employer and his employees are given recognition for their safety efforts in the form of star grading, and the public is made aware of the effectiveness of the employer's safety practices.

9.6 SUMMARY

The parameters of the employer's obligation in safety management having been established, the model flow-chart developed for the purposes of the research offers a guide to sound safety practices and the determination of liability relative to the Workmen's Compensation Commissioner, and the negligent employer, employee and independent contractor.

By means of the defined parameters and model, the research pinpoints the need for an objectively-based safety policy and control system whereby a working environment is created which promotes economic, efficient and safe operations. The absence of a comprehensive safety policy may result in an accident constituting a breach of the employer's obligation to act according to reasonable standards in the management of safety.

107 The DIIR is similar to the DIFR except that the number of disabling injuries is multiplied by 200000 and not 1000000. NIOSH *MBO 5 Star Safety & Health Management System* 12.

108 NIOSH *MBO 5 Star Safety & Health Management System* 12-4.

109 NIOSH *Occupational Safety* 12.

THE MODEL FLOW-CHART



BLOCK	PAGES	BLOCK	PAGES	BLOCK	PAGES	BLOCK	PAGES	BLOCK	PAGES	BLOCK	PAGES	BLOCK	PAGES	BLOCK	PAGES
1	13	8	46-7	17	56	25	12-4 34 71-83 211	33	146-7 215	41	168-91 212-4	48	114-5 124-5 132-4	56	166
2	11 13 114 129-31	9	44-6	18	54-5	26	14 34 61 85 145	34	147 215	42	113 192-210 212	49	14 34 81 85 146	57	185
3	14 34 81 86 146	10	49-53	19	54-5	27	214-5 230 232-3	35	147-8 215	43	124-5 134 192-3	50	214-5 230 232-3	58	163-4
4	214-5 230 232-3	11	54 163-6	20	59-60	27	114-5 124-5 132-4	36	147-8 215	50	209-10	51	21-5 127-8	59	163-6
4	49-63 50 140 196	12	51 54	21	59-60	28	140-1 150-1 215-5	37	147-8 215	44	208-9	61	127-8 162-3	60	166
	215	13	163-6 215-20	22	54-6	29	140-1 150-1	38	134-5 137-9 149-5	45	127-8 162-3	62	14 34 81 86 146	61	163-6
5	163-6 215-20	14	32-4 91-105 112	23	14 34 81 86 146	30	136 151-2 212			46	124-5 134 192-3	63	125-8		
6	216-7	15	113 182-210 212		214-5 230 232-3	31	139-44 211-2	39	162 215		209-10	54	163-6		
7	216-7	16	218-7	24	14 71 211	32	146-7 215	40	162-4 215	47	133-9 166-7	55	163-6		

ABBREVIATIONS

NA .. NOT APPLICABLE
WCA .. WORKMEN'S COMPENSATION ACT 30 OF 1941
WOC .. WORKMEN'S COMPENSATION ACT 30 OF 1941

APPENDIX 9.2

TESTING A SAFETY POLICY

POLICY STATEMENT

Does it give a clear unequivocal commitment to safety? Is it authoritative? Is it signed and dated by a director? Has it been agreed by the board? Is the policy to be regularly reviewed? If so by whom and how often? Has it been agreed with by the trade union representatives? Are there effective arrangements to draw it to the attention of employees? Does it state that its operation will be monitored at workplace, divisional and group level?

ORGANIZATION FOR HEALTH AND SAFETY

Is the delegation of duties logical and successive throughout the organization? Is final responsibility placed on the relevant director? Are the responsibilities of senior managers written into the policy or specified in job descriptions? Is the safety performance of managers an ingredient of their annual review? Are the qualifications of managers where relevant to health and safety considered when making appointments? Do managers understand the nature of their health and safety duties? Have they accepted them? Are key functional managers such as the safety manager, hygiene manager, radiation officer, engineering manager, electrical manager and training manager identified? Are their duties clearly understood? Do managers understand the extent of their discretion to vary from systems and procedures? Do they understand the consequences of failure to implement the policy in their area of responsibility? Are there adequate arrangements for liaison with contractors, managers and others who come onto the site? Are there adequate arrangements for consultation with the workforce?

ARRANGEMENTS FOR HEALTH AND SAFETY TRAINING

Is there a system for the identification of training needs? Does training cover all levels from senior manager to new entrant? Are special risk situations analyzed for training requirements? Are refresher courses arranged?

SAFE SYSTEMS OF WORK

Are those tasks for which a system of work is required identified? Are identified systems properly catalogued? Are the systems monitored? Are there systems to deal with temporary changes in the work? Are there proper systems of work for maintenance staff?

ENVIRONMENTAL CONTROL

Is the work environment made as comfortable as is reasonably practicable? Does it meet statutory requirements? Is sufficient expertise available to identify the problems and reach solutions? Is sufficient instrumentation available? Are there arrangements to monitor the ventilation systems? Are temperature/humidity levels controlled? Is there adequate lighting provided? Are there satisfactory arrangements for replacement and maintenance?

SAFE PLACE OF WORK

Are there arrangements to keep workplaces clean, orderly and safe? Are walkways, gangways, paths and roadways clearly marked? Are there arrangements for clearing hazards, for example, substances likely to cause slipping from the floors? Is safe means of access provided to all working areas? Are staircases, landings, and openings in the floor protected? Is storage orderly, safe and provided with easy access? Are flammable, toxic and corrosive substances used safely and without hazard to health? Are permits to work systems operated and monitored?

APPENDIX 9.2 (CONTINUED)

MACHINERY AND PLANT

Is new machinery and plant tested for health and safety prior to being brought onto site? Is there a system of inspection to identify and safeguard dangerous machinery? Is there a system for testing plant and machinery after modifications? Is there a routine check on interlocking devices? Is pressurized plant subject to inspection and test? Are monitoring systems and alarms tested at regular intervals? Are lifting machines and tackle subject to regular inspection and test?

NOISE

Are noise risks assessed and danger areas notified? Is there a programme of noise reduction/control? Is personal protection provided/worn? Is there a risk from vibration?

DUST

Do the arrangements for the control of dust meet statutory requirements?

RADIATION

Is a competent person nominated to oversee use of equipment/materials which may pose a radiation hazard? Is adequate monitoring equipment available? Are records kept in accordance with statutory regulations?

TOXIC MATERIALS

Are there adequate arrangements in the purchasing, stores, safety, medical and production departments for the identification of toxic chemicals and specifying necessary precautions? Are storage areas adequately protected? Are emergency procedures for handling spillage/escape laid down, known and tested? Are there proper instructions for labelling? Are there adequate arrangements for the issue, maintenance and use of respiratory protection where necessary?

INTERNAL COMMUNICATION

Is the role of safety representatives agreed? Is there a properly constituted safety committee? Is the level of management participation appropriate? Is there a system for stimulating and maintaining interest in health and safety? What arrangements are there to advise workers about the organization's performance in health and safety? Are there adequate means of communication from shop floor to management on safety and health? Is there scope for joint management/shop floor inspection? Are there efficient arrangements to process action on communication from the enforcing authorities?

FIRE

Who is nominated to co-ordinate fire prevention activities? Does he/she have sufficient authority? What arrangements are there for fire fighting? Is there an adequate fire warning system? Is it regularly checked? Are fire drills held and checked for effectiveness?

What arrangements are there to check compliance with the statutory fire certificate? Are means of escape regularly checked and properly maintained? Are they clearly marked? Is there a proper system of account for staff and visitors in the event of an evacuation of the buildings being required? Are flammable and explosive materials stored and used in compliance with statutory requirements?

MEDICAL FACILITIES AND WELFARE

Are there adequate facilities for first aid and treatment? Are sufficient persons trained in first aid? What arrangements are there for medical advice? Are there adequate facilities to admit proper medical supervision particularly where this is a statutory requirement? What medical records are needed and are they properly kept? Are the washing and sanitary facilities, cloakrooms and messrooms adequate?

APPENDIX 9.2 (CONTINUED)

RECORDS

Are there adequate arrangements for the keeping of statutory records? Are the records tested for efficiency and accuracy? Is sufficient use made of the information in the records to identify areas of strength and weakness, for example, accident and ill health experience or training needs? Is there access to records of performance by those with a legitimate interest? Are copies of all the relevant statutory requirements and Codes of Practice available on site?

EMERGENCY PROCEDURES

Are the areas of major hazard identified and assessed by qualified staff? Are there procedures for dealing with the worst foreseeable contingency? Have these procedures been promulgated and tested? Are there adequate arrangements for liaison with other parties affected or whose help may be required? Are there arrangements to protect sensitive installations from malicious damage or hoax threats? Do the above arrangements cover weekend/holiday periods?

MONITORING AT THE WORKPLACE

Is it understood that monitoring will be carried out? Are there sufficient staff with adequate facilities to carry out the monitoring? Are the standards expected, known and understood? Is there a system for remedying deficiencies within a given timescale? Is the monitoring scheme sufficiently flexible to meet changes in conditions? Are all serious mishaps investigated? In the event of mishap is the performance of individuals or groups measured against the extent of their compliance with the safety policy objectives? Is monitoring carried out within the spirit as well as the letter of the written policy document?

Source - Stow, D 'Are Managers Safe Enough?' *Personnel Management* 39.

APPENDIX 9.3

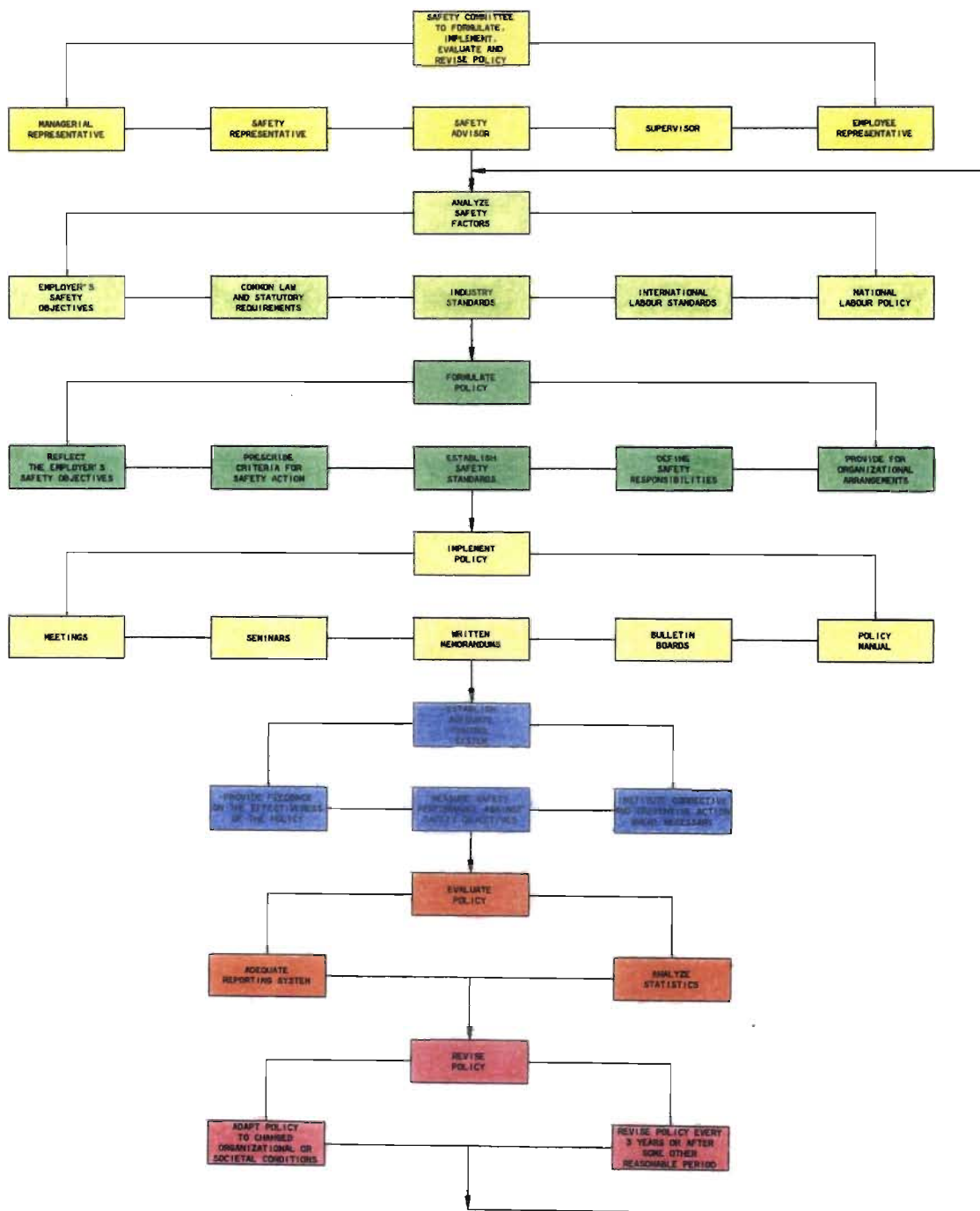
INDUSTRY DIFR AND ISR IN SOUTH AFRICA FOR 1987 AND 1988

INDUSTRY	DIFR 1988	DIFR 1987	ISR 1988	ISR 1987
Fishing	31,3	34,8	3,19	5,48
Wood Industry	13,7	15,3	1,75	2,07
Mining	10,7	15,1	2,48	3,62
Transport	10,4	13,8	2,53	2,93
Building & Construction	10,2	11,3	1,69	2,24
Glass, Bricks & Tiles	9,9	10,7	1,55	1,42
Iron & Steel	9,1	10,2	1,10	1,12
Food, Drinks & Tobacco	8,5	10,2	0,87	1,19
Local Authorities	7,6	9,3	1,18	1,41
Printing & Paper Industry	6,9	7,9	0,54	1,38
Agriculture & Forestry	6,3	6,9	1,32	1,38
Chemical Industry	6,3	6,8	0,81	0,85
Trade & Commerce	4,8	5,0	0,68	0,65
Textiles	3,7	4,1	0,27	0,27
Leather Industry	3,6	3,5	0,27	0,29
Diamonds, Asbestos, Bitumen	3,5	4,0	0,81	1,14
Entertainment & Sport	3,3	1,6	0,38	0,12
Educational Services	2,9	3,6	0,31	0,23
Medical Services	2,6	2,6	0,27	0,32
Personal Services, Hotels	2,6	3,0	0,31	0,41
Charitable, Religious, Political & Trade Organizations	2,4	2,5	0,20	0,26
Banking, Finance, Insurance	1,4	1,5	0,22	0,16
Professional Services	1,0	0,8	0,22	0,23

Source - Workmen's Compensation Commissioner *Workmen's Compensation Act 1941, Report on the 1988 Statistics.*

APPENDIX 9.4

THE SAFETY POLICY FORMULATION AND IMPLEMENTATION PROCESS



SAFETY EFFORT AUDIT/STAR GRADING

The Action column could be used to indicate who should take steps to rectify e.g. Engineer, Production Manager or to determine priorities.

Max. Actual Action

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| 20 | | |
| 30 | | |
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| 30 | | |
| 30 | | |
| 40 | | |
| 20 | | |
| 30 | | |
| 310 | | |

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| 10 | | | |
| 30 | | | |
| 710 | | | |
| 2000 | | | |

[illegible]

NO. OF STARS	POINTS	GRADING %	DIFR/10 ⁶	DIIR%
★★★★★ Excellent	91-100	5	1	
★★★★ Very good	75-90	10	2	
★★★ Good	61-74	15	3	
★★ Average	51-60	20	4	
★ Fair	40-50	25	5	

CONCLUSIONS AND RECOMMENDATIONS

CONCLUSIONS

Safety management reflects the conscious value that society accords the rights, dignity and safety of employees in labour relations practices. The underlying principles of safety management stem from the employee's right to protection, which is one of the basic elements of labour relations and a fundamental labour law right.

In order to comply with the humanitarian, social, economic and legal considerations that are integral to the practice of safety management, the employer is required to foresee, control, prevent and correct occupational hazards to ensure as far as reasonably possible the safety of employees in the course of their employment.

Section 7(a) of the WCA has a significant influence upon the practice of safety management since it excludes the employee's common law action for delictual damages against the employer. This research reveals, however, that the employer may be held personally liable for the payment of compensation in circumstances where:

- (a) the employer or employee is excluded from the provisions of the WCA;
- (b) the employee's injury originates from causes other than those falling within the statutory definition of *accident* in the WCA; and
- (c) the accident is the result of the deliberate wrongdoing of the employer.

The immunity provided by s 7(a) of the WCA does not exempt the employer from the general duty to act fairly and reasonably in the management of safety. This duty is an inherent principle of sound labour relations and underlies the conduct of the employment relationship.

If the employer acts unreasonably in the management of safety, his conduct is both wrongful and negligent, because of his failure to exercise the standard of care required by the common law. In order to establish reasonable or negligent conduct, the subjective conduct of the employer must be tested against an objective standard. This test will achieve the greatest possible measure of accuracy and certainty. The test adopted for this purpose is the *reasonable employer* test which is based on the objective standard of the reasonable employer having regard to the merits and circumstances of the case. Recognizing the merits and circumstances of the case implies taking the demands of good labour relations practice into consideration, judged in the light of the circumstances actually known or implicitly known at the appropriate time, as expected of the reasonable employer.

South African case studies reveal that the courts have on occasion not adopted the *reasonable employer* test but applied the English *duty of care* doctrine for the determination of negligence. Since the doctrine is alien to our common law and may be cumbersome, confusing and ambiguous, the appropriate test for safety matters in South Africa is the *reasonable employer* test.

Despite the presence of sound safety management practices, the employer may still be vicariously liable for the negligence of an employee, although such an employee may be required to reimburse the employer if he performs contrary to his employment contract. The employer is not vicariously liable for the negligence of an independent contractor, provided the services of the contractor are not in fulfilment of the employer's non-delegable safety management obligations. These effects of the employer's vicarious liability suggest the exercise of diligent control over the conduct of both an employee and an independent contractor.

Recognizing that the employer's role in safety management is as complex as it is crucial, this research has concentrated on

the parameters of the employer's obligation as a means of promoting sound safety practices. These parameters embody three basic criteria, namely, the reasonable foreseeability of the likelihood of harm, the implementation of the necessary precautionary measures, and the possible need for additional preventive and corrective action should existing safety measures prove inadequate. To assess the employer's conduct in terms of those criteria, the circumstances of the particular case and the standard of reasonableness must be taken into account.

To ensure that employers adopt a more pro-active approach with regard to sound safety management, certain statutory, attitudinal and policy changes are required. These are outlined in the following recommendations:

RECOMMENDATIONS

- (1) It is recommended, with reference to the parameters established, that the employer should promote occupational safety by ensuring that safety is an integral part of general management. Within the sphere of the employer's strategic policy objectives, adequate provision should be made for:
 - (a) the recruitment and provision of a competent and sufficient number of employees to perform a task; and
 - (b) the establishment, enforcement and maintenance of a safe system of work, premises and plant.
- (2) Within the framework of a comprehensive safety management system, constructive co-operation should exist between the employer and his employees in preventing accidents. The potential should therefore arise for useful discussion, joint inspection and participation in regulating safety activities.

- (3) The practice of safety management should incorporate a system of consultation in order to promote the implementation of effective collective bargaining for improved safety. A collective bargaining forum may be necessary because employees will be more committed to objectives that they themselves have played a part in setting than to those imposed by the employer.
- (4) The statutory changes within MOSA should include mechanisms for proper consultation and communication with employees, directly and through trade union representatives, in order to ensure the greater involvement of the workforce in safety matters.
- (5) It is further recommended that s 7 of the WCA, which prohibits civil claims for damages against the employer, should be suitably amended to allow for such claims in cases where there has been an unjustifiable failure to act reasonably in the management of safety. The regulated award for additional compensatory damages may stimulate the employer's involvement in safety management, and thereby promote safer working conditions.
- (6) Following sound labour relations practice, it may be necessary to formulate and implement an objectively-based safety policy to assist in the effective application of the parameters established. Although the employer is not obliged to adhere to this requirement, it is recommended that through the practices of collective bargaining and trade union influence, such a policy should be adopted. To alleviate the problems that may be experienced through a bargaining process, MOSA should instruct an employer, with more than a specified number of employees, to formulate and implement a safety policy.
- (7) A safety policy should make provision for objectives, procedures and organizational arrangements that will facilitate the prevention or effective control of

occupational hazards. The policy should therefore clearly define:

- (a) the employer's safety objectives;
- (b) the safety responsibilities of employees;
- (c) the organizational arrangements by which the objectives are to be achieved.

A properly executed safety policy may assist to achieve consistency and flexibility of safety management functions, a safe working environment, and fairness and objectivity in the realm of labour relations.

Since no work activity can be made entirely hazard-free, and perfect employee behaviour cannot be achieved, sound safety management will only be accomplished by:

- (a) reducing unsafe working conditions to a minimum; and
- (b) developing safe employee behaviour to the maximum degree of excellence.

In this regard, the parameters of the employer's obligation as formulated, the model flow-chart provided, and the guidelines proposed for the formulation and implementation of an objectively-based safety policy constitute possible solutions to existing problems in the sphere of safety management.