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ALTERNATIVE FUNDING OPTIONS FOR OCCUPATIONAL DISEASES IN SOUTH AFRICAN MINES

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ABSTRACT

Provision of compensation to victims of occupational disease in the mining industry has been a key policy area in South Africa for decades. Yet in all those years, the common law never featured as a practical option for providing compensation. Workers' compensation has always been preferred and for good reason. Workers' compensation internalizes the cost of compensation and converts into a cost of production. In the process, compensation is expeditiously paid and at low cost. In return, there is a general exclusion of common law actions against employers. Accordingly, there is no record of successful litigation against an employer for an occupational disease in South Africa. The unexpected lacuna came in 2011 when the Constitutional Court ruled that mineworkers could sue their employers at common law for occupational disease. Various sections of South African society hailed the decision as a victory for mineworkers. Since then, courts have certified class actions against mining companies paving the way for mass-litigation in local and foreign courts by thousands of former miners. Anyone familiar with occupational diseases in South Africa and compensation thereof would find these developments perplexing. This study assesses the common law as a compensation mechanism and concludes that it is virtually impossible to apply its key elements of causation, fault, harm and wrongfulness to long latency diseases. Application of the common law to long latency disease requires the development of a new branch of jurisprudence as some cases in the UK have confirmed. Furthermore, the common is also associated with a wide range of other practical problems that further cement its unsuitability to deal with compensation for diseases contrary to popular belief. An assessment of alternative options for compensating victims of disease is therefore not only important but also necessary. Among the available options, workers' compensation is the most ideal for South Africa.

Key words: common law, occupational disease, silicosis, workers' compensation, externality

JEL Classification: G22, H55, I38, J28, K13, K32.

DECLARATION

I, Albert Mushai, declare that this thesis is my own unaided work. It is submitted in fulfilment of the requirements for the degree of Doctor of Philosophy at the University of the Witwatersrand, Johannesburg, South Africa. It has not been submitted wholly or partially for any degree or examination at this or any other university in or outside of South Africa.

SIGNED……..DATE…….

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ACCRONYMS AND ABBREVIATIONS

AISAM	Association Internationale des Societe's d'Assurance Mutuelle
Amcu	Association of Mineworkers and Construction Union
CERCLA	Comprehensive Environmental Response Compensation and Liability Act 1980 (US)
CGL	Comprehensive General Liability
Chapter 11 Law	Bankruptcy Reform Act 1978 (US)
COIDA	Compensation for Occupational Injuries and Diseases Act 130 of 1993
DG	Director-General
DTI	Department of Trade and Industry
EPA	Environmental Protection Agency
EU	European Union
FACT	Furthering Asbestos Claim Transparency Act
FAIR	Fairness in Asbestos Injury Resolution Act
FELA	Federal Employers' Liability Act 1908
FEM	Federated Employers' Mutual
GDP	Gross Domestic Product
ILO	International Labour Organisation
ISO	Insurance Services Office
LMX	London Market Excess of Loss
MHSA	Mine Health and Safety Act 29 of 1996
NAFTA	North American Free Trade Agreement
NEDLAC	National Economic Development Labour Council
NHS	National Health Service
NUM	National Union of Mineworkers
ODMWA	Occupational Diseases in Mines and Works Act 78 of 1973
PATHAUT	Pathology Automation System

RAF	Road Accident Fund
RITC	Reinsurance to Close
SANIOH	South African National Institute for Occupational Health
SCA	Supreme Court of Appeal
SDP	Social Democratic Party
SHEQ	Safety, Health, Environmental Issues Quality
UK	United Kingdom
USA	United States of America
WENELA	Witwatersrand Native Labour Association

1 CHAPTER 1: OVERVIEW OF THE THESIS

The problem of long latency occupational diseases is not new to South Africa. It has existed for decades. Between 1902 and 1996, many commissions of enquiry have investigated this problem. None of these commissions considered the common law and litigation as a viable way to fund compensation for occupational diseases. Statutory compensation has always been the preferred option. However, things took a dramatic turn in 2011 when the Constitutional Court ruled that mineworkers who contract occupational diseases could bring common law claims in delict against their employers. This ruling, although celebrated by many is both unprecedented and surprising. It is unprecedented because in the long legal history of South Africa, this is the first time that a court held that an employer could be liable for occupational disease. The ruling is also surprising because available historical evidence shows that the common law has a dismal record as a method for funding compensation for occupational accidents at first and later diseases. It is for this reason that many countries opted for statutory compensation, starting in the early 1880s in Germany.

Many institutions and administrative practices in countries with strong links to the British Empire, such as South Africa, have their origins in England and methods of funding compensation for occupational health and safety risks are no exception. During the industrial revolution, England and other western countries faced a problem of industrial accidents. Remedies available to injured workers were only available in the law of tort. However, the chances of an injured worker getting compensation against an employer were virtually none-existent because of the insurmountable defences of common employment, *volenti non-fit injuria* and contributory negligence. Because of these defences, many injured workers went uncompensated. A solution was therefore necessary and it came by way of attempts to reform the common law. It is for this reason that the Employer's Liability Act of 1880 came to being. Its primary purpose was to weaken the common law defences. This exercise was largely a failure and further illustrated the unsuitability of the common law to deal with industrial accidents.

Three years after the passing of the Employer's Liability Act in England, Germany under Otto von Bismarck pioneered a more radical solution to the problem of industrial accidents. It introduced a system of personal accident insurance through social insurance legislation that started in 1883. Under this approach, injured workers were entitled to compensation on a no-

fault basis and it was the responsibility of employers to finance the system. In return, no employee could sue the employer for damages. Thus workers' or statutory compensation was born. Therefore, unlike England, Germany did not attempt to reform the common law on employer's liability in order to address the problem of lack of access to compensation by workers injured in the course of employment. Workers' compensation quickly spread across the globe and by the early 1900s, most countries in Europe had adopted it.

In 1897, England also introduced workers' compensation, but the liability of the employer in tort remained. Nevertheless, adoption of workers' compensation signified the failure of efforts to reform the common. From 1900 onwards, many countries, including South Africa, adopted workers' compensation as the primary method for funding compensation for injured workers. However, the workers' compensation schemes that later evolved varied significantly in terms of their design. For example, while England opted for statutory compensation alongside employer's liability at common law as funding methods, South Africa eventually settled for a scheme that combines personal accident insurance (no-fault compensation) and employer's liability (increased compensation) under the statutory compensation framework. Because of this innovative design, suing the employer at common law became unnecessary.

Initial workers' compensation schemes sought to address the problem of occupational injuries, not diseases. Diseases started to filter into workers' compensation schemes much later, mainly because in many countries no cause of action existed for a disease at common law. In South Africa, the problem of diseases in the mines dates back to the end of the 19th century. Today, disease rates, particularly those for tuberculosis and silicosis in local mines, rank among the highest by world standards. This makes occupational diseases the most pressing problem to have confronted the mining industry for a long time.

Notwithstanding the foregoing, statutory compensation remained the preferred policy option for compensating victims of occupational disease. Workers' compensation was preferred for its simplicity and ability to offer guaranteed compensation at no cost to the injured workers. It also brought certainty and stability to the workplace. This position found expression in legislation prohibiting common law actions against employers. Perhaps most critically, workers' compensation internalizes the compensation for accidents and diseases by converting it into a cost of production. Therefore, when the Constitutional Court ruled in 2011 that mineworkers could sue their employer in delict for diseases, those familiar with the history of

the common law as a funding method for compensation to injured workers would have been left perplexed[1].

The Constitutional Court's decision is even more surprising when other factors are considered. One of these relates to the characteristics of long latency diseases like silicosis that render the common law an unsuitable method for funding compensation to those affected. Long latency periods, the difficulty of proving causation, fault and other elements of delict, problems associated with apportioning liability and damages among multiple wrongdoers, as well as the propensity for litigation make the common law an unsuitable method of funding compensation for diseases. An examination of United Kingdom (UK) jurisprudence on compensation for diseases at common law dating back to the 1950s provides a good illustration of the unsuitability of the common law to deal with the complexity of the issues that typify long latency diseases. It also confirms that without extensive redefinition of liability rules by the courts, the common law remains unresponsive to most of the evidentiary problems faced by claimants.

Secondly, long latency diseases as a risk have the potential to inflict costly institutional and economic damage as seen from the Lloyd's of London financial crisis of the early 1990s and the persistent asbestos litigation in America that began in the 1970s. Furthermore, the asbestos problem in America has also demonstrated litigation often produces other undesirable outcomes. For example, despite churning out billions of dollars in the form of awards to date, a greater proportion of that money has not found its way into the pockets of claimants, but has instead gone towards transaction costs. These two events serve as a further reminder that an understanding of long latency diseases as a risk is important in order to come up with appropriate policy responses to address issues of compensation. Otherwise costly mistakes as those seen at Lloyd's and in the United States of America (USA) become inevitable. Underwriters at Lloyd's simply did not appear to understand the impact of long latency diseases on firms and in the USA, policy inertia has allowed costly litigation to rage on for decades at immense economic cost, but without tangible benefits for most claimants. Silicosis has the potential to inflict the same institutional and economic damage witnessed in the UK and the USA from asbestos-related diseases.

Finally, the timing and logic of the decision to introduce claims in delict against mining companies are also surprising, not least because the problem of diseases has existed for decades

[1] *Thembekile Mankayi v Anglo Gold Ashanti Limited 2011 ZACC 3*

and that claims against employers remain banned outside of the mining industry. Reasons for adopting this measure now, given the long history of the problem, and why it should only apply to mineworkers, remain unknown.

Given the foregoing and other issues, this thesis argues that silicosis has the potential to develop into a mass-delict along the lines of asbestos litigation in America. In America, asbestos litigation has resulted in the bankruptcy of approximately a hundred companies to date and this number is still rising. Silicosis and other long latency disease claims authorised in 2011 can inflict worse damage to the mining industry and the South African economy, given its limited resilience capacity and the anchoring role that mining plays. Although many celebrated the decision of the Constitutional Court to open litigation floodgates against mining companies, this thesis shows that in theory, the common law cannot as a compensation mechanism for long latency diseases. Elements of delict cannot apply to diseases. The thesis also shows that using the common law to compensate victims of disease is equally problematic in practice unless courts are prepared to create a new branch of jurisprudence as UK courts have learnt. The Constitutional Court's 2011 decision makes the evaluation of alternative compensation options to the common law important and necessary in order to avoid making the same mistakes seen in other countries. The thesis concludes that the common law and its propensity for litigation is an unsuitable option for funding compensation for long latency occupational diseases. Workers' compensation remains the better option.

1.1 Objective of the Thesis

A central argument advanced in this thesis is that South Africa should examine the problem of funding compensation for occupational diseases holistically and from a variety of perspectives, taking into account several realities. Firstly, there is local and international empirical evidence showing that the common law which South Africa has now adopted, has previously failed and it eventually lost its place to workers' compensation as a mechanism for funding compensation for occupational injuries and diseases. Today, the same system continues to disappoint in countries where it is in use. Occupational diseases in mines are often characterised by long latency periods that can run into decades. This makes it virtually impossible to apply the elements of delict such as causation and fault to determine liability. Secondly, there is need to balance the interests of occupational disease sufferers on one hand and those of people on

whom the responsibility to pay compensation rests, as well as current workers, on the other. Claims filed against mining companies after 2011 do not only have an impact on shareholders of these companies, they also have negative impacts on current mineworkers as well. This fact appears to be missed by many in the current discourse on compensating victims of occupational diseases in mines. In the USA, asbestos litigation left dozens of companies bankrupt and led to many job losses between 1982 and 2001 (Tweedale & Warren, 2004; Stiglitz, Orszag & Orszag, 2002). Lastly, compensation for occupational diseases is an area where government should take an active lead to ensure the system minimises unnecessary waste to the economy. In South Africa, one cannot help but notice that a gradual process of regulatory capture is unfolding as happened in the USA where failure by the federal government to take charge of asbestos claims left that policy area in the hands of the courts and lawyers (Barnes, 2007). If the same were to happen in South Africa, it could turn out to be detrimental to the interests of mineworkers and the compensation system as a whole[2].

Given the foregoing, the objective of the thesis is two-fold. Firstly, it seeks argue and illustrate that in theory and practice it is virtually impossible to apply the common law elements of delict to resolve issues of liability and hence compensation for long latency diseases without developing a new branch of jurisprudence in the process. Secondly, the thesis evaluates various options available for funding compensation for long latency occupational diseases and concludes that when all is considered, workers' compensation is the most viable option from both a theoretical and practical standpoint.

1.2 Structure of the Thesis

Apart from this chapter, the structure of the rest of the thesis is as follows:

Chapter 2 presents an overview of occupational diseases, work accidents and the common law.

Chapter 3 provides an analysis of the common law as a compensation system up to the early 1900s. The chapter offers a restatement of the problems that confronted workers in their attempt to secure compensation for injuries and diseases in various jurisdictions culminating

[2] According to Garza-Zavaleta (1997) the US workers' compensation system was driven to unsustainability in the 1980s due to, among other factors, what he calls "over-lawyering" which saw costs escalating and benefits stagnating. This prompted major reforms in the early 1990s. Among the reforms was a systematic process to remove or reduce the need for lawyers in the system.

in the adoption of workers' compensation. The thesis relied on early 1900s archival reports digitized by Microsoft and other historical publications for this analysis.

Chapter 4 examines the workers' compensation principle as an alternative to the common law. It discusses the factors leading to the adoption of this principle in the early 1900s. The Chapter further highlights some of the approaches used to cover occupational accidents and diseases under workers' compensation systems of various countries, including South Africa. Finally, the Chapter highlights the strengths of workers' compensation over the common law especially in the sphere of compensating victims of disease.

Chapter 5 discusses the unique problems that arise in practice from the use of the common law to fund compensation for long latency diseases. Most of these have to do with proving the elements of delict. Drawing examples from UK jurisprudence on liability for diseases at common law, the Chapter makes the conclusion that without an overhaul of common law rules, it is impossible to secure compensation for long latency disease using this mechanism.

Chapter 6 presents an economic analysis of the common law and long latency disease using the theory of externalities, the Lloyd's financial crisis, the asbestos litigation crisis in America and Asbestos Relief Trust in South Africa.[3] The chapter illustrates the socio-economic and institutional impact of long latency disease that policymakers need to take into account when selecting methods to fund compensation. It argues that the common law is vulnerable to agency, regulatory capture and other problems that are more detrimental to the interests of sick workers than is popularly assumed.

Chapter 7 evaluates alternative options to fund compensation for occupational diseases in South Africa. Pure statutory funding systems, employer's liability insurance, funding diseases separately from accidental injuries, combining common law and statutory funding are some of the approaches discussed in this chapter. All factors considered the Chapter concludes that workers' compensation is the most suitable option for compensating victims of long latency disease. This is because, not only is this option cheaper, it also brings certainty by internalizing compensation costs.

[3] Asbestos Relief Trust first appeared in South Africa in 2003 following litigation against Cape Plc and Gencor (Pty) Ltd by South African asbestos miners. The ex-miners alleged that the two companies exposed them to asbestos starting in the 1970s, causing them to contract asbestos-related diseases. A settlement came when the two companies agreed to form the Asbestos Relief Trust to compensate the claimants.

Chapter 8 concludes the thesis and makes some recommendations of a theoretical and policy nature for improving funding of compensation for occupational diseases in the South African mining sector. The chapter also provides limitations of the research and potential areas for future research.

1.3 Contribution of the Thesis

Developments triggered by the *Mankayi* decision of 2011 are unprecedented. They also have huge implications for the mining industry, its current and former employees, as well as the broader economy. Even though mining has been described as a "dying industry" in terms of direct employment and gross domestic product (GDP) contribution compared to where it was in the 1980s, it remains a critical sector to the South African economy (McCulloch, 2009). Developments in the mining sector still exert significant influence across the broader South African economy. In 2012, the industry paid R21.4bn (or 14.1% of total revenue collected that year) in corporate tax and contributed nearly 50% of total exports (SA Chamber of Mines, 2012). Foreign exchange rates and country credit ratings by international rating agencies respond to developments in the mining industry. Therefore, any shock or uncertainty in the sector triggers other economy-wide negative effects. Claims currently facing the mining industry by an indeterminate number of claimants, whose quantum is also indeterminate, have the potential to threaten the viability of the industry in ways that many do not seem to appreciate.

Given the foregoing, this thesis is important for several reasons. Firstly, it contributes to the understanding theoretical and practical shortcomings of the common law as well as the problems that can arise if the use of the common law as a mechanism for funding compensation for occupational diseases. Secondly, the thesis challenges contemporary thinking in South Africa on the question of funding compensation for occupational diseases in the mining industry that saw the introduction of the common law by the courts. The thesis shows that it is impossible to apply the common law elements of delict to long latency diseases. Since 2011, there has been growing uncertainty over the actual number of claims mining companies will face and their final cost. Uncertainty of this nature carries the added risk of producing deleterious effects on employment and investment. Finally, the thesis covers a new topic that has not attention in the past in South Africa because of the prevailing view that no employee

could sue an employer in delict. Soon after the court decision in 2011 organised labour, civic groups and other sections of South African society applauded the decision and equated it with justice for mineworkers. This thesis provides some theoretical and practical perspectives that challenge this notion. It shows that the common law is not only unsuitable for dealing with long latency diseases, but also that workers' compensation if administered correctly and in line with its theoretical dictates is the best option for South Africa.

2 CHAPTER 2: OVERVIEW OF OCCUPATIONAL DISEASE, WORK ACCIDENTS AND THE COMMON LAW

2.1 Introduction

The problem of occupational diseases in the South African mining industry is not new. It has been around since the 1890s. Since then, many investigations have taken place in the UK and South Africa, and numerous Acts of Parliament emerged in a bid to regulate and resolve the problem. The seriousness of the problem was first realised shortly after the Anglo-Boer War of 1899 to 1902. According to Katz (1994), when the war broke out, mining operations were suspended and white miners, a majority of whom came from Cornwall in England, went back home. When mining operations resumed in 1901, it was realised that of the nearly 200 rock drillers employed before the war, many had died of a disease known as miners' phthisis at the time, a lung disease associated with working in dusty conditions. Later this disease was renamed silicosis. Arising out of this, occupational diseases in South African mines have been the subject of several commissions of enquiry and pieces of legislation.[4] This chapter provides the background to the problem of work accidents and later long latency occupational diseases as well as the transition from common law remedies to statutory ones. It introduces the problem of occupational accidents and diseases, the failures of the common law to address this problem in England, South Africa common law jurisdictions, and the advent of workers' compensation as an alternative mechanism.

2.2 The Common Law and Occupational Diseases

Occupational diseases present a wide range of socio-economic problems, of which designing an equitable and sustainable method to provide compensation to victims or their dependents is one. Compensating workers who contract occupational diseases involves balancing the competing objectives of ensuring that the method used to fund payouts is sustainable and the need for the payouts is fair and equitable. Therefore, designing an efficient system for

[4] According to Katz (1994) between 1902 and 1925, six commissions of enquiry and 10 parliamentary select committees were appointed to investigate the problem of silicosis in South African mines. In addition, nine pieces of legislation were enacted on the same subject over the same period.

compensating occupational disease sufferers is a pressing challenge facing policy and lawmakers in many countries today. Occupational diseases have been described, with good reason as the 'Achilles heel' of the compensation systems worldwide (Parsons, 2002). Unlike occupational injuries where the event causing the injury and the manifestation of consequences of the event happen contemporaneously, occupational diseases occur over a long period, sometimes over the entire working life of a worker. This presents unique problems that make it very difficult to meet the competing objectives of funding sustainability and fairness of compensation paid.

Basing funding of compensation for occupational diseases on a system that relies on establishing and apportioning blame, such as the common law, requires complex issues to be resolved before a victim can access compensation. To begin with, occupational diseases, especially in the mining sector, remain latent for many years and even decades (McCulloch, 2011). Proving causation as an element of delict is therefore usually very difficult (Stapleton, 1985; Schlesinger, Schmit & Venezian, 1993). Secondly, diseases often involve many causal factors, some of which may have nothing to do with employment. This further complicates proving causation and fault. Thirdly, due to long latency, it is often difficult, if not impossible, to determine conclusively where a workers contracted the disease. These factors alone meant until later into the 19th century, common law claims against employers were unknown and until recently, unknown in South Africa. Before any possible action under the common law could commence, the common law itself had to develop significantly. It did so through claims arising from accidents that developed rules that later applied to occupational diseases

2.3 Common Law Liability for Work Accidents

The workplace involves various actors and is characterised by an interaction of many factors. As a result, it is often not possible to attribute blame to a single party when things go wrong (Gaskins, 1990). Therefore, if the compensation system depends on establishment of blame, history shows that most injured workers would go uncompensated. This is precisely what happened before the early 1900s (Frankel & Dawson, 1910; Blanchard, 1917; Lester, 2001). In addition, from an accounting and reporting standpoint, it is difficult to account for liabilities

that can take decades to develop into claims, and can thereafter, take more decades to resolve.[5] This raises a further problem of how those on whom the responsibility to pay compensation is assigned are supposed to plan for these liabilities.

In order to understand the position of injured workers at common law in South Africa and other countries following an accident, it is helpful to look at developments in England first. This is because those developments influenced the situation in South Africa and in other territories linked to Britain as a colonial power. In the 1890s and early 1900s, workers in England failed to secure compensation at common law for injuries caused by an accident. This was because of three effective defences that were available to employers (Van Doren, 1918; Fleming, 1987). The three defences – common employment, *volenti non-fit injuria* and contributory negligence were so powerful that initially as things developed, virtually no claim brought against an employer succeeded (Willoughby, 1898; Bradbury, 1917; Lester, 2001). The common employment defence, also known as the fellow employee defence, originated in England where it was first judicially recognised in the case of *Priestly v Fowler*.[6] In this case, the court would not recognise that an employer could be vicariously liable for injury sustained by an employee if a fellow employee caused the injury. Since most workplace injuries involve fellow-employees, this defence had a profound effect on the prospects of injured workers obtaining compensation from employers. The contributory negligence defence held that an employer is not liable for injury suffered by an employee if that employee also negligently contributed to the same injury. This developed into the last-opportunity rule, which excluded liability for earlier acts of negligence of the employer. In most cases, the employee had the last opportunity to avoid the accident. Under the common law, at the time, this defence totally exonerated an

[5]One of the main problems that nearly caused the collapse of Lloyd's of London in the early 1990s was the apparent failure by underwriters to understand the nature of long tail risks such as occupational diseases. These risks produce claims decades after the commission of the acts to which the claims relate. Lloyd's did not seem to understand this feature of long tail risks and its implications from an insurance perspective. As a result, when claims emanating from insurance policies issued in the 1930s and 40s started to produce claims in the 1980s, insufficient financial provision was in place to cover them. The very nature of the way Lloyd's operated with individuals accepting liability precluded building up reserves for future claims. Financial disaster was only averted by the implementation of far-reaching institutional and regulatory changes which cost at least US$8bn (Bray, 1996). Even then, many Lloyd's investors (also called Names) were financially ruined and more than thirty committed suicide (McClintick, 2000). A full discussion of the problems posed by long tail risks and the financial disaster at Lloyd's is presented in Section 5 of this thesis.

[6] *(1837) 150 E.R. 1030*

employer from liability regardless of the degree of blameworthiness.[7] The harshness of this defence reduced following the adoption of the concept of apportionment of blame that replaced the Last Opportunity rule. Another defence that was just as effective in blocking access to compensation by injured workers was the *volenti non-fit injuria* defence that viewed the decision to take up employment as a tacit acceptance of the risks associated with that employment. Against this background, allowing an employee to sue the employer should a risk materialise became inconsistent with the idea that an employee implicitly assumes all risks associated with the work.

2.4 Ameliorating the Common Law Defences in England – Limited Reforms

One consequence of the Industrial Revolution was workplace accidents and their impact on workers and their dependents. Not surprisingly, these were a topic of interest in social and political circles across Europe, especially the UK. The first attempt to gain compensation was through common law actions as in the case of *Priestly v Fowler.*[8] The first response in England was to attempt to make these cases easier with the passing of the Employer's Liability Act 1880 which attempted, in an employment situation, to water down the fellow-employee defence by introducing vicarious liability for what was called the Vice-employer and the v*olenti non-fit injuria* defence. There was no attempt at that stage to tamper with the contributory negligence defence.

Before 1880, there were attempts to improve the lot of injured workers albeit without success between 1771 and 1818 (Willoughby, 1898). That notwithstanding, the plight of injured workers became a topic for public debate in an era when the welfare state was developing and it was only a question of time before reforms were implemented. This came in 1877 with the appointment of a select committee of the House of Commons to consider whether, among other measures, the abolition of the common employment defence. The committee recommended

[7] Today this defence is governed by legislation in most common law countries where the last opportunity rule was replaced by apportionment of fault. In South Africa, the relevant statute is the Apportionment of Damages Act 34 of 1956.

[8] (supra, note 6)

the extension of the doctrine of vicarious liability to fellow employees but fell far short of the total abolition of the common employment defence. The UK approach at that time was to tinker with the common law, unlike Germany where a different approach was preferred, that is, to provide compensation to injured workers through an insurance programme. British policymakers attempted to reform the common law without removing claims in tort. It is against this background that the Employer's Liability Act 1880 came into being. It attempted to reform the common law by limiting defences against liability for accidents caused by defective works, plant or machinery (limiting the *volenti* defence) as well as those arising from the negligence of senior persons (limiting the fellow employee defence by extending vicarious liability for acts of Vice–employers). These reforms arose because of the recommendations of the 1877 select committee on the limitation of the defences of common employment and voluntary assumption of risk that were included in the 1880 Act.

However, despite its noble objectives, the Employer's Liability Act 1880 yielded limited results for a variety of reasons. Firstly, the Act only applied to a limited number of industries (Van Doren, 1918). Secondly, even in the context of those industries to which it applied, the Act still produced disappointing results. According to Frankel and Dawson (1910), studies done in the aftermath of its enactment showed that only seven out of one hundred injured or killed workers received compensation. Lastly, the Act had loopholes that further limited its success. One of these loopholes was the ability of an employer to contract out of the provisions of the Act.[9] These limitations contributed to the failure of the Employer's Liability Act to have a meaningful impact on the plight of injured workers in England. The common law route, even with the reforms, was not the way to go. It introduces the shortcomings of the common law to deal with occupational accidents and diseases in England and South Africa as well as the advent of workers' compensation.

In 1897, under the leadership of Joseph Chamberlain and his conservative government, England followed the novel German approach by imposing an obligation on employers to pay compensation to injured workers. However, unlike in Germany, there was no state fund established to dispense compensation and the state did not play a central role in the running of

workers' compensation scheme. Furthermore, even though the 1897 Act made it easier for injured employees to access compensation, it did not outlaw common law actions against employers where negligence, including that involving patent defects on plant, premises and machinery could be proved (Weber, 1902). England thus ended up with a dual system of common-law actions based on negligence on one hand and the novel workers' compensation that operated on a no-fault basis on the other. Faced with the obligation to provide compensation, employers in the UK sought insurance against this risk and thus in England, the Worker's Compensation insurance market was born.

2.5 Origins of Workers' Compensation in Europe

While England was preoccupied with initial attempts to reform the common law, Germany, under Chancellor Otto von Bismarck, decided to take a completely different approach. The situation in England had shown that even under reform, the common law still produced unsatisfactory results. Bismarck decided to pass social insurance legislation, starting in 1883, which introduced compulsory personal accident insurance under a statutory framework.[10] Van Doren (1917:31) and Willoughby (1898: 29) describe the initiative as "the boldest experiment in social legislation" ever attempted in this era. Bismarck's social legislation had three main pillars – health (sickness) insurance (1883); accident insurance (workers' compensation) (1884); and old age and disability (1889). Before this Prussia, Germany's largest state, had passed legislation which required railroad companies to compensate their injured workers without the need to prove fault (Kleeberg, 2003). This eventually led to the enactment of the German Liability Act of 1871 that extended the employer's obligation to compensate injured

[10] Some have argued that Bismarck's real motive for taking this radical policy decision had more to do with self-preservation than concern over the plight of injured workers. According to Willoughby (1898), the introduction of workers' compensation or state insurance of workers had more to do with political conditions prevailing in Germany at the time. Bismarck took up the idea in order to curb the rapid growth in the popularity of the Social Democratic Party (the Socialists) to whom he was afraid of losing votes. While it was widely accepted in Germany that the state should play a role in the social and economic spheres, there was no consensus about the exact nature and scope.[10] Some have argued that Bismarck's real motive for taking this radical policy decision had more to do with self-preservation than concern over the plight of injured workers. According to Willoughby (1898), the introduction of workers' compensation or state insurance of workers had more to do with political conditions prevailing in Germany at the time. Bismarck took up the idea in order to curb the rapid growth in the popularity of the Social Democratic Party (the Socialists) to whom he was afraid of losing votes. While it was generally accepted in Germany that the state e of the state's role. Willoughby (1898) further submits that Bismarck envisaged the state as having a key role in correcting social ills while the socialists preferred a more radical role for the state along the lines of Marxist ideology.

workers to other industries, such as mining and manufacturing (Frankel & Dawson, 1910). These two statutes were the precursors to the Industrial Accidents Law of 1884 that introduced compulsory state insurance of workers. Coverage started with a limited category of workers. Between 1884 and 1887, it gradually broadened to include workers from most sectors of the economy (Willoughby, 1898). Why workers' compensation emerged in Germany first despite the problem of workplace accidents being common to all industrial countries at the time (including the United States of America) is a debatable question.

Elsewhere in continental Europe, many countries, such as Austria, Belgium, Denmark, Finland, France, Italy, Norway, Spain, Sweden, and The Netherlands, also adopted workers' compensation between 1887 and 1903 (Blanchard, 1917). In these countries, employers' liability fell under the Napoleonic Civil Code (the Civil Code). Principles of the code on industrial accidents were generally similar in most of these countries (Rubinow, 1913). Similar to common law countries, it was virtually impossible for an injured worker to get compensation under the Civil Code. For example, early 1900 studies on industrial accidents in France indicated that under the Civil Code only one in ten accidents resulted in compensation (Rubinow, 1913). This coupled with the influence of the English Workmen's Compensation Act of 1897, as well as the pending elections at the time, created the conditions for the adoption of workers' compensation in France in 1898. However, unlike in countries such as Italy, Germany, and Switzerland where insurance of workers by the employer was compulsory (Frankel and Dawson, 1910), the French workers' compensation law of 1898 did not provide for compulsory insurance; instead, the payment of workers' compensation benefits was guaranteed by the state (Weber, 1902).

2.6 Origins of Workers' Compensation in the USA

In the United States of America, as in Europe, the improvement of the legal position of injured workers was a major policy issue in the post-Industrial Revolution era when the labour movement was on the rise, due to the formalisation of the wage economy. According to Kleeberg (2003), railroad accident rates in America were significantly higher than in Germany

and other European countries.[11] For this reason, one would be entitled to think that the debate on improving the legal status of injured workers was more robust in America than in Europe. This was not the case. According to Weber (1902), the question of industrial accidents was less topical in the public domain in America compared to Europe. Despite this, policymakers were aware that the problem of accidents at work needed attention. As in England, reforming the common law, especially the three defences of common employment, contributory negligence and voluntary assumption of risk was, initially at least, the preferred option in America. Reform efforts were the prerogative of individual states. Secondly, the workers compensation debate took place in the so-called Progressive era. States such as Alabama, Geargia and Massachusetts introduced legislation to limit the common law defences (Rubinow, 1913). Most of the legislation enacted for this purpose sought to increase the scope of the employer's liability for injuries sustained by employees in the course of employment (Moore, 1905). However, as in England, attempts to reform the common law in America yielded disappointing results, leading to increased criticism of this solution (Blanchard, 1917).

Even in the face of evidence that reforming the common law had failed to improve the ability of injured workers to access compensation, American policymakers remained largely averse to the adoption of workers' compensation as a solution. America has a long history of distrust of anything resembling socialism and workers' compensation looked like a step in that direction. There was a mixture of scepticism and hostility to workers' compensation between 1884 and 1900. Some critics argued that it would lead to the insolvency of employers while others predicted capital flight from states with workers' compensation to those without it (Johnsen, 1922; Bradbury, 1917). After the introduction of workers' compensation in some states in the early 1900s, the resentment against the system filtered into the courts in the form of legal challenges to the constitutionality of the principle. Controversy centred on the notion of making employers liable without the need to establish fault. Accordingly, early workers' compensation statutes in America faced court challenges at state level for being unconstitutional. This occurred in Maryland, Montana, New York, Wisconsin, New Jersey, Illinois, Kentucky and Texas, among others (Anderson, 2000; Fishback & Kantor, 1998; Van Doren, 1918). Most of the legal challenges were successful because the judiciary was equally

[11] According to Henshaw, Gaffney, Madl and Paustenbach (2007), the problem was so serious that both Presidents Benjamin Harrison and Franklin Roosevelt made specific reference to it in their presidential addresses in 1889 and 1908 respectively.

uncomfortable with sanctioning payment of compensation in the absence of fault (Johnsen, 1922). Legal challenges were the primary reason why the adoption of workers' compensation in America was slow relative to Europe. However, from 1910 onwards, the adoption of workers' compensation accelerated across all American states.

2.7 Origins of Workers' Compensation in South Africa

Workers' compensation in South Africa dates back to 1894. It first emerged in the mining industry when it formed the Rand Mutual Assurance Company (Budlender, 1984:26; Lang 1986: 51). The original purpose of this company was to insure its members against the risk of occupational accidents on a voluntary basis. This followed the English model where private insurers carried workers' compensation risks. South Africa however, differed at that point because there was no legislation imposing worker's compensation obligations. Before the introduction of workers' compensation, injured workers in South Africa, as in the case of other common law jurisdictions, could only turn to the common law for a remedy where they had to overcome the similar hurdles encountered in other jurisdictions at the time with the exception of the fellow-employee defence. In *Lewis v The Salisbury Gold Mine*[12], the courts, in what would become the Transvaal decided that the fellow-employee defence did not apply because it never formed part of the Roman-Dutch law. However, in the Cape, the courts took the view that the fellow-employee defence was applicable.[13]

However, it soon became clear to mining houses that their biggest problem from an occupational health and safety perspective was not occupational injuries, but diseases. By the early 1900s, the problem of occupational diseases, especially silicosis, had already reached crisis proportions on the Witwatersrand (McCulloch, 2011; Katz, 1994). The problem first became noticeable among white rock-drillers, most of whom came from the Cornwall region in the southwest region of England.[14] Unlike their white counterparts, black miners were

[12] 1894 2 Official Reports

[13] Hilpert v Castle Mail Packets Co Ltd 1897-98 (12) EDC 38

[14] Historically, mining was the cornerstone of the Cornish economy. Miners from this part of England were attracted to the gold fields of the Witwatersrand in the 1900s mainly because of the attractive wages paid South African mining houses at the time.

migrants employed under short-term contracts and their short work spells reduced their vulnerability to silicosis, a progressive disease by nature (Katz, 1994).[15] After the so-called Boer War when mining operations resumed, it became apparent that a very high proportion of miners who had returned to Cornwall had died. This was a matter of serious concern in the UK and South Africa.

From the early 1900s, compensation for occupational diseases in the mines started to develop as a separate policy area distinct from general industry with its own legislation and institutions- a position that continues today.[16] The mining industry thus recognised and dealt with the question of occupational diseases long before general industry. Thus with respect to occupational diseases, two pieces of legislation existed- legislation for the mining industry and legislation for general industry. Dual legislation dealing with the same problem is recognised as being unsatisfactory and eighty years later, the Nieuwenhuizen Commission recommended the special mining legislation be repealed and the matter be governed by one system. However, despite this, the compensation legislation remained separate with one for occupational diseases in the mines and the other for general industry. Over the years, many pieces of legislation emerged to deal with occupational health, as well as compensation matters for occupational diseases in the mines. The first statute passed on silicosis was the Miners' Phthisis Act of 1911. Fifteen other silicosis statutes were passed between 1912 and 1946 (McCulloch, 2009). In addition, many commissions of enquiry were appointed in both England and South Africa to investigate this problem and make recommendations for its resolution. The first of these commissions was the Weldon Commission of 1902, formed to investigate the causes and extent of the problem of silicosis. Between 1902 and 1925, silicosis was the subject of six commissions of enquiry and investigation by ten Parliamentary Select Committees (Katz, 1994).

The aforementioned interventions had two broad objectives. One was to find a solution to the growing problem of silicosis and other diseases in mines, and the other was to provide for ways

[15] A disease is progressive if its development correlates with the level of exposure to the causal agent implying that the higher the degree of exposure, the more rapidly the disease develops.

[16] Workers' compensation claims for workers in general industry are governed by the Compensation for Occupational Injuries and Diseases Act 130 0f 1993 (COIDA), while compensation for occupational diseases in the mines is governed by the Occupational Diseases in Mines and Works Act 78 of 1973 (ODMWA).

to fund compensation payable to affected workers or their dependents. An interesting detail about the second objective is that despite these investigations and the understanding of the seriousness of the problem of occupational diseases, at no time was it ever thought that a possible way to fund compensation to affected workers is to allow them to sue their employers at common law for damages. This appears to suggest that failings of the common law in this regard are well known and understood over this period. In the legal history of South Africa, there is no record of a case where liability attached to an employer for an occupational disease arising out of employment (Vivian, 2000; Vivian 2008).

When first introduced nationally in 1914, worker's compensation applied only to accidents. This legislation applied to both general and the mining industry. Accidents fell under a single statute from the onset. Initially, there was no government fund and the legislation simply imposed workers' compensation obligation on the employer. The employer could then insure against these workers' compensation obligations. The mining industry had the Rand Mutual Assurance Company and thus the 1914 Act could have applied seamlessly to both the general and minding industry when it came to accidents. Later, when the 1934 worker's compensation legislation replaced the 1914 Act, it included occupational diseases. Occupational diseases were presumed to be accidents. However, as indicated above, by this time, the mining industry already had its own legislation dealing with occupational diseases. The dual system for occupational diseases was born. Workers in general industry who contracted occupational diseases were thereafter paid guaranteed statutory benefits on a no-fault basis and the right to sue the employer at common law fell away, in line with occupational accidents. Thus, workers in general industry and those in the mining industry looked to different workers' compensation legislation with respect to occupational diseases only.[17] Compensation for occupational diseases in the mining industry had its own legislation. For decades, the removal of the right to sue the employer applied to all workers. The possibility of an employee falling under both pieces of legislation was recognised and the mining legislation contains a prohibition against

[17] Today these Acts are the Compensation for Occupational Injuries and Diseases Act 130 of 1993 (COIDA) for the general industry and the Occupational Diseases in Mines and Works Act 78 of 1973 (ODMWA) for occupational diseases in mines. Of these two Acts, COIDA explicitly prohibits the suing of an employer for damages. This prohibition is contained in Section 35 (1) of the Act. ODMWA, on the other hand, does not have a similar prohibition. It contains s100 which prohibits double compensation, which was the subject of litigation in *Jiva*

obtaining double compensation, currently s100 of ODMWA. The courts confirmed this understanding over the years.[18]

Matters took a dramatic turn on 3 March 2011, when the Constitutional Court ruled in a landmark decision that mineworkers who contract occupational diseases are not prevented by Section 35 (1) of the Compensation for Occupational Injuries and Diseases Act 1993 (COIDA) from bringing common law actions against their employers.[19] However, outside of the mining industry, such claims remain precluded. It is only those workers whose workers' compensation claims are governed by the Occupational Diseases in Mines and Works Act 78 of 1973 (ODMWA) who can sue the employer for damages. Invariably, these workers are miners who contract occupational diseases.

2.8 Context of Occupational Disease Claims in South Africa

The genesis of the current occupational health litigation lies in earlier litigation against Thor Chemicals, RTZ and Cape plc, cases that involved forum shopping. Although the cause of actions arose in South Africa thus giving local courts jurisdiction, actions were filed against the British head office companies in London. This had a number of advantages, including that the British taxpayer would fund the litigation, via legal aid (Ward, 1999). Further, this move circumvented the statutory prohibition against an employee suing his employer. In terms of international law, the general rule is that the South African courts would have exclusive jurisdiction unless a good reason existed for the UK courts to hear the case.

In the 1980s, Thor operated a mercury-based plant in England that soon attracted severe criticism from the Health and Safety Executive (Weschka, 2006). The company then moved this operation to Cato Ridge in Natal. In 1992, three workers died of mercury poisoning and many others had different levels of the same condition. Although worker's compensation was available in South Africa, an action was filed in 1994 in England against the parent company.

[18] See for example: *Rand Mutual Assurance Company Ltd v Road Accident Fund (2008) ZASCA 114* and *Mankayi Mbini v Anglo American Corporation of South Africa Ltd Case No. 04/18272 (2004) (HC)*
[19] *Thembekile Mankayi v Anglo Gold Ashanti (Pty) Limited* (supra)

Thor tried to stay the proceedings on jurisdiction grounds but this was unsuccessful because Thor had acceded to the jurisdiction by entering a defence. The matter ended in 1997 following an out of court settlement for £1.3m without admission of liability (Weschka, 2006:632). A further claim was filed by twenty-one workers which was likewise settled in October 2000 for £240 000 (Frynas, 2004).

At about the same time in the matter of *Connelly v RTZ Corporation*[20], Mr. Connelly who worked in Namibia, decided to sue RTZ, the parent company, in the UK. The High Court decided to stay the proceedings on forum grounds holding "Namibia was the 'natural forum' for the case". On appeal to the House of Lords, it was pointed out there was no legal aid in Namibia, and accordingly, it was unlikely Connelly would ever access the courts. Finally, in 1997, the House of Lords allowed the case to proceed due to these practical obstacles (Wescha 2006: 632). In the end, Mr. Connelly did not receive compensation.

Cape plc mined asbestos in several locations in South Africa between 1893 and 1979, from where it later disinvested (Muchlinski, 2001; Weschka 2006: 633). In January 1999, actions began in England against the company. This was of course in the post-apartheid era and the matter proceeded to the House of Lords with the South African government intervening on behalf of the claimants (Meeran, 2003). In July 2000, the House of Lords ruled in favour of the claimants. Emboldened by this success, the number of claimants grew to 7 500. As the case progressed, Cape plc informed the claimants that it was in financial difficulties and it was unlikely it would be in a position to make a substantial payment in any event. A figure of £21m looked like a manageable figure. However, it became increasingly clear that Cape plc would not be able to pay anything as it faced imminent bankruptcy. The case against Cape plc unsurprisingly collapsed. The foray to the UK courts was therefore an expensive disaster. Quite seamlessly, Gencor became party to the proceedings as a co-defendant to the Cape plc case, in England. At about the same time, a separate case started in South Africa against Gencor that at the time was unbundling into Billiton. The lawsuit would hold up the formation of Billiton and Gencor decided to settle the matter. Two trusts were established in March 13,

[20] [1997] UKHL 30; {1999} CLC 533

2003 with Gencor settling the matter for £3m. The trusts are the Asbestos Relief Trust and the Kgalagadi Relief Trust.

What happened after the formation of these trusts is also significant. The Asbestos Relief Trust established in 2003 had initial assets of R411m. In England, Cape plc had agreed to pay six times that amount - R2.1bn and had 7 500 claimants registered. Although the Annual Financial Statements are published online, the annual reports are not. According to the 2005-6 annual financial statements, R296m in assets remains. A copy of the 2013 annual report discloses some interesting information. The report shows that 14 512 enquires had been received of which 10 109 were non-compensatable. Only 3 202 were compensatable. The number of enquires far exceeded compensatable claims. During that year, the fund approved and R23.87m in claims. The number of claims had decreased from a peak of 3 815 in 2007 to 70 in 2013. At the beginning of the year, the fund had assets of R314m and at the end of the year, the assets stood at R313m. In nominal terms, it means that a decade after the formation of the trust, 72 percent of the assets remain. The investment income on the assets could easily exceed the payments that the trust made. This almost certainly would have been the case had a fund of R2.1bn been established. Clearly, many of the 7 500 persons who joined the litigation against Cape plc and Gencor were not entitled to compensation.

Occupational diseases then moved from asbestos back to silicosis, the disease of the early 1900s with the *Mankayi* case. Since the decision, several unprecedented and, in many ways, confusing developments have appeared in the media. On 22 August 2012, legal papers initiating a class action against three mining giants – Anglo Gold Ashanti, Gold Fields and Harmony Gold - were filed in the South Gauteng High Court.[21] Then on 25 July 2013, in a forum shopping development, the High Court in London ruled that it had no jurisdiction to a hear another class action brought against Anglo American South Africa by ex-miners who alleged that they had contracted silicosis at one of the company's mines.[22] The UK legal establishment clearly had little appetite to repeat the Cape plc fiasco. Soon thereafter on 26 September 2013, it was reported that Anglo American South Africa had reached a settlement

[21] Wendell Roelf, 'S. Africa gold miners face lung disease lawsuit', Reuters, Tuesday 21 August 2012 available at http://za.news.yahoo.com (21 August 2012)
[22] *Vava & Others v Anglo American South Africa Ltd (2013) EWHC 2131 (QB)*

with 32 ex-miners suffering from silicosis after nine years of litigation. In the settlement, Anglo American did not admit any liability.[23] Over the nine years it took to reach this settlement, seven of the ex-miners originally included in the litigation died before the case could be finalised.

Yet another development came on 1 June 2015, when it emerged that the South African government planned to make a payout of R1.5bn to miners with lung disease.[24] Implicit in the report is that the payment is in terms of the existing statutory funding structures for the mining industry. On 7 March 2016, came yet another announcement of a settlement involving Anglo Gold Ashanti and Anglo American. The two companies agreed to pay a total of R464m into the *Qhubeka Trust* which would administer the fund on behalf of about 4 400 claimants.[25] This is an interesting development in that it is the outcome of the Cape plc saga. As a method, it is questionable if trusts are the best way to move forward for miners with silicosis. Finally, on 13 May 2016, the High Court in Johannesburg certified a class action by mineworkers against 30 gold mines (representing virtually the entire South African gold mining industry) paving the way for the largest class action in South African legal history.[26] Under South African law, a class action cannot begin unless it is certified by a court. In this particular lawsuit, the court pointed out that class members could range from 17 000 to 500 000 and are located across the sub-continent of Southern Africa. In June 2016, it came the news that gold mining companies would appeal the decision of the High Court.[27]

Anyone familiar with the history of the common law as a mechanism for funding compensation for workplace injuries and diseases would have found the decision reached in the *Mankayi* case and events which subsequently followed it not only surprising, but questionable in several respects. Firstly, after over a century of battling the problem of occupational diseases, it is unclear why this is the best time to take this measure. Secondly, the common law is notorious for denying many workers compensation, a feature that led to its replacement with workers' compensation worldwide, so it is incomprehensible to believe that the same mechanism would

[23] *Business Day,* 26 September 2013
[24] *The Star,* 1 June 2015
[25] *Business Review,* 7 March 2016
[26] *Sowetan,* 13 May 2016
[27] BDlive noreply@bdlive.co.za (Wednesday, 22 June 2016)

to produce desired results a hundred years later. This detail in particular, is missing in the current discourse on compensation for occupational diseases in South Africa with most commentators preferring to hail the Constitutional Court's decision as a victory for mineworkers against decades of injustice. Thirdly, a desirable method for funding compensation for occupational diseases must be efficient in terms of the compensation it yields and the sustainability of the entire system. It is highly questionable if the common law can meet this standard. Fourthly, the extent to which the common law claims against employers will benefit mineworkers also needs examining with reference to historical developments and experiences in other jurisdictions. Finally, the recent developments since the *Mankayi* ruling raise a number of fundamental issues with implications on the future viability of the mining industry. These range from the affordability of the claims to how the affected companies should plan for them from an accounting and reporting perspective.

Implications of current developments in the South African mining industry must be understood against the background of events that have occurred in other parts of the world over the past two to three decades. The first is the Lloyd's of London financial disaster of the early 1990s. Lessons from this crisis are particularly important, given what is currently happening in the South African mining industry because the underlying factors are comparable. Lloyd's of London is an insurance market with a long history dating back to the 17th century. Until the 1990s, Lloyd's had a proud history of financial soundness and innovation. Starting in the 1930s, Lloyd's insured long-tail liability risks such as pollution, environmental impairment and long latency occupational diseases, mainly in North America. In doing so, Lloyd's did not appear to appreciate the special problems that long-tail risks pose from a practical and insurance perspective. When it later emerged that asbestos is a carcinogenic product, a wave of litigation started in the 1970s in the USA against companies that used asbestos in manufacturing or other operations. Many of the companies filed for Chapter 11 protection. The claims were by people who alleged that they contracted asbestos-related diseases. Some of these claims could attach to policies issued by Lloyd's in the 1940s and 1950s (Chiafullo, 1995; McClinitick, 2000). As the potential number of claims escalated, Lloyd's faced an unprecedented situation that drove it to the brink of financial collapse. Many Names, the providers of capital, or investors, faced financial ruin with some committing suicide in the

process (Raphael, 1995).[28] It took a major institutional and regulatory restructuring exercise costing billions of pounds to rescue Lloyd's from collapse. The Lloyd's disaster can happen to the South African mining industry unless the problem of accounting for and funding of compensation for occupational diseases is handled in a sustainable manner. More crucially, there is need for a funding method that takes into account the unique long tail problems that occupational diseases pose for both claimants and institutions which may be required to pay compensation to impaired workers and environmentally exposed persons.

A second event linked to the Lloyd's financial crisis and from which lessons are available is the asbestos litigation crisis in the USA that dates back to the 1970s. After years of regarding asbestos as a wonder product because of its life-saving and other qualities, it became apparent in the 1940s and 1950s that asbestos dust was carcinogenic and could cause a range of fatal cancers (Tweedale & Warren, 2004). Most of the asbestos-related diseases have latency periods ranging from ten to forty years or more (Munich Re, 2009). The discovery that asbestos poses a serious threat to human health came when it was already widely used in most manufacturing sectors in both developed and developing countries alike. In America, problems began in 1973 when the US Court of Appeals for the Fifth Circuit sitting in Texas, found an asbestos manufacturer liable for failing to warn users of the dangers inherent in its asbestos products.[29] This landmark judgment triggered an avalanche of litigation in what was later to be known as the asbestos "bomb" which ranks as the costliest mass tort in US legal history (White, 2004). By 2001, over 500 000 cases were taken before US courts and most major asbestos companies had filed for bankruptcy under the Bankruptcy Reform Act (1978), also known as Chapter 11 law (Tweedale & Warren, 2004). The problem got so serious that even the courts started to call for some intervention at a legislative and policy level to contain the escalating number of lawsuits.[30] Documents generated in the litigation process filled warehouses the size of rugby fields. Eventually, legislation was enacted at both federal and state level to limit the number of claims and damages awarded in asbestos cases across the US. This again serves to illustrate what can happen when compensated for long latency occupational diseases is handled through the common law litigation system – things quickly

[28] Investors at Lloyd's are called Names. These people put their personal wealth at stake to support risks they choose to insure.
[29] *Borel v Fibreboard Paper Products Corporation et al 493 F.2nd 1076 (5th Cir. 1973)*
[30] *Ortiz et al v Fibreboard Corporation et al 119 S.Ct. 2295 (1999)*

tend to get out of control. The possibility of something similar happening in the South African mining industry is very real.

Finally, South Africa, having decided in the *Mankay*i case to use common law to compensated victims of occupational diseases, could also draw lessons from the development of jurisprudence on the subject in the UK, a country that has been struggling with the same problem for some time. In the UK, employees who are injured, or contract a disease at work can access compensation from two sources that make up the compensation system. They can claim no-fault social security benefits under the state industrial injuries compensation scheme. In addition, they can also claim damages from the employer in tort provided fault is proved. Employers will then look to their insurers for indemnification.[31] The UK's experience with the second pillar can provide vital lessons for South Africa.

UK jurisprudence on compensation for occupational diseases at common law started to formalise in the 1950s. Today, UK case law on this area is significant and well developed. By contrast, there is to date, no South African case law on compensation for occupational diseases at common law. No case of this nature brought before local courts has succeeded. This presents a serious problem of uncertainty for mining companies because they have no idea of what rules the courts will apply to determine lability in these cases or the general size of the awards. Nevertheless, of particular interest to this study is how UK jurisprudence on occupational disease claims has evolved over the years. On that note, UK case law on occupational diseases reveals three important insights. Firstly, common law rules when applied in their traditional legal sense make it virtually impossible for claims for long latency occupational diseases to be successful. Proving causation in occupational disease claims using traditional common law rules is particularly problematic and if applied in the traditional sense, almost invariably results in no compensation at all. Secondly, in order to overcome the apparent unresponsiveness of common law rules, UK courts have, on many occasions resorted to 'judicial engineering' and in some cases, a re-invention of liability rules to enable compensation to be obtainable in occupational disease claims (Porat & Stein, 2003). Finally,

[31] In terms of the Employer's Liability (Compulsory Insurance) Act 1969, every employer conducting business in the UK (with very few exceptions) must have employer's liability insurance.

in some cases, conflict between judicial decisions, public opinion, and political response is inevitable in occupational disease claims. On several occasions, legislation has been passed in England and Wales (2006), Scotland (2009) as well as in Northern Ireland (2011) to reverse court decisions on occupational disease claims deemed by lawmakers to be unacceptable.[32]

Developments in UK jurisprudence on occupational diseases though not decisive, are important for South Africa for several reasons. In the first instance, they provide some insight into the complex issues involved in using the common law as a mechanism for funding compensation for occupational diseases. In addition, the developments also provide some general perspectives on how South African courts might have to deal with those issues in the lawsuits against mining companies currently making their way to the courts, given the closeness between English and South African common law (Havenga, Garbers, Havenga, Schulze, Van der Linde & Van der Merwe, 2000). Lastly, they also show that when judicial developments start going in the wrong direction, government must be prepared to intervene legislatively. Given the lack of precedents in compensation for occupational disease claims at common law, it remains to be seen whether South African courts will be as bold as English courts when it comes to overcoming hurdles around imposing liability and dealing with the problem of causation.

That the South African mining industry faces a serious problem of occupational diseases is a reality backed by irrefutable empirical evidence. A cursory look at occupational disease statistics in this sector reveals the magnitude of the problem. Between 2004 and 2014, the silicosis rate among black gold miners has averaged 30.9%.[33] Notwithstanding the existence of comprehensive occupational health and safety legislation specifically directed at the mining sector, the scourge of occupational diseases has persisted. For example, the Mine Health and Safety Act 29 of 1996 (MHSA) imposes extensive occupational health risk management obligations with which mining companies are required to comply. Despite this, disease rates in the mining sector rank among the worst by world standards (Murray, Davies & Rees, 2011)

[32] The decision in the case of *Barker v Corus UK Ltd (2006) 2 AC 572* was reversed by the Compensation Act 2006 in Britain. Likewise, the court's decision in *Rothwell v Chemical & Insulating Co Ltd (2008) 1 AC 281* was reversed by the Damages (asbestos-related conditions) (Scotland) Act 2009 in Scotland and by the Asbestos-related conditions Act 2011 (Northern Ireland) in Northern Ireland.

[33] Source: South African Institute for Occupational Health Pathology Disease Surveillance Annual Reports.

and, as found by the Leon Commission, show no signs of improving. This reality is unquestionable. However, what is questionable is the decision to open litigation floodgates against mining companies a hundred years after the problem first surfaced. The reality is that litigation will not solve the problem. Litigation is merely a reminder that a better solution is required. If all the commissions of enquiry that have been appointed to investigate this problem and recommend solutions since 1902 have not managed to do so, what are the prospects that common law litigation could be the panacea to this perennial problem? After all, the introduction of workers' compensation in the 1900s represented a rejection of the common law as a mechanism for funding compensation for occupational injuries and diseases.

2.9 Conclusion

The workplace is a complex environment where multiple factors combine to produce outcomes. As far as occupational health and safety outcomes are concerned, one of the most important issues that arises is the compensation of victims of occupational accidents and diseases. The common law was the first remedy to emerge in response to rising accidents at work during the industrial revolution. However, its effectiveness as a compensation mechanism was marginal. Three defences in particular; *volenti non-fit injuria*, common employment and contributory negligence undermined the effectiveness of the common law as a compensation mechanism. Even under reform, the common law continued to disappoint culminating in its replacement by workers' compensation. Long latency diseases raise difficult issues that in aggregate make the common law a highly questionable system for compensating victims and events from elsewhere in the world provide some important insights to illustrate this. Of these, the Lloyd's crisis of the early 1990s and the on-going asbestos litigation in the United States of America are particularly illustrative.

3 CHAPTER 3: THE COMMON LAW AS A COMPENSATION SYSTEM UP TO 1900

3.1 Introduction

The Industrial Revolution was characterised by the rise in occupational accidents. By far the occupations with the worst accident record at the time included working in factories, railroad construction and mining. As early as the 1900s, accidents at work had reached crisis proportions in both Europe and the United States of America[34] (Kleeberg, 2003). Public reaction to the matters varied among countries- in some, the matter was of public concern while in others, it was not.

Before the introduction of workers' compensation, workers injured in the course of employment could only turn to the common law for compensation provided they could prove legal liability of the employer. This was anything but easy. A central requirement for liability to attach at common law is proof of fault or blameworthiness on the part of the defendant. During the industrialisation period, the common law was underdeveloped in many jurisdictions to deal with the complexities of the workplace (Parsons, 2003). If anything, the common law had a clear bias in favour of employers, making it virtually impossible for injured workers to discharge the burden of proof required to find the employer legally liable. Furthermore, traditional common law rules, because of the contributory negligence doctrine, recognised liability on an all or nothing basis implying that any proof of culpability no matter how small on the part of the claimant defeated the claim in its entirety. In the employment context, this legal position proved to be very detrimental to any attempt by an injured worker to get compensation. A major hurdle was the three fictitious but impenetrable defences available to employers that arguably were the main reason for many injured employees going uncompensated. The defences of common employment (also known as the fellow servant defence), *volenti non-fit injuria* (voluntary assumption of risk) and contributory negligence proved particularly problematic to overcome in practice. In aggregate, they accounted for the failure of a majority of injured employees to get compensation culminating in the introduction

[34] In the USA, the situation was particularly bad in railroad construction to the extent that both President Benjamin Harrison and Franklin Roosevelt made specific mention of it in their Presidential Addresses in 1889 and 1908 respectively (Henshaw, Gaffney, Madl & Paustenbach, 2007).

of workers' compensation by many countries in the early 1900s. In countries that have a common law such as Canada, England, South Africa[35] and the United States of America, the initial approach was to reform the common law, in an employment situation, with specific attention paid to the three defences, but when this failed to produce the desired results, adoption of workers' compensation became inevitable. The introduction of worker's compensation was therefore a rejection of reliance on the common law as a viable remedy.

3.2 Liability of the Employer in England

In order to understand the problems faced by injured workers in South Africa before the introduction of workers' compensation, it is important to understand the situation prevailing in England during the same period. This is because legal developments in England had a direct impact on those in other parts of the British Empire, including South Africa. England introduced workers' compensation for the first time towards the end of the nineteenth century. Before that, any remedy that injured workers had against the employer were in theory found in the common law. However, in practice, the remedies were very limited, if not non-existent. In an era when the formal economy was in its formative stages, employers enjoyed many legal privileges. Injured workers carried the burden of proving fault on the part of the employer. This in itself was an extremely difficult task because of the common law rule that held that employees have no claim against an employer simply because injury takes place at work since the employer was not a guarantor of their safety (Blanchard, 1917). In addition, three common law defences of common employment, voluntary assumption of risk and contributory negligence further restricted the liability of an employer. The effect of these defences was to remove liability of an employer even in those cases where fault existed (Smith, 1914). For example, where contributory negligence existed, an employer would escape liability even if the injured worker's blameworthiness was relatively negligible. Another avenue through which an employer could escape liability was the assumption of risk doctrine that held that an employee is presumed to know the dangers inherent in the work applied for. Before 1837, the tort of negligence of an employer was in its infancy and claims against employers were virtually

[35] During this period, developments in England in the occupational health and safety environment influenced those in South Africa. Therefore, any analysis of compensation for injured workers in South Africa during this period would be incomplete without a discussion of the position in England.

unknown; hence, no case law existed on the liability of an employer to an employee (Blanchard, 1917).

3.2.1 Common Law Defences: Common Employment

The establishment of the doctrine of *respondeat superior*: that held that a man is liable for his personal acts and those of his agents, represented a significant milestone in the development of common law rules on liability. By the reign of Charles II (1660 – 1685), the doctrine of r*espondeat superior* was entrenched as part of English common law (Willoughby, 1898). However, its progression into employer's liability received a major blow when courts introduced the fictitious defence of common employment. This defence held that an employer is not liable for injury to a worker sustained at the hands of a fellow employee. The exact origins and basis of the defence (also called the fellow employee defence in the USA and other countries) are rather unclear. There are two conflicting schools of thought on how the common employment defence came to be a part of English law. A commonly held view holds that the defence was introduced by the case of *Priestly v Fowler*[36], a decision which was later followed in *Hutchinson v The York, Newcastle and Berwick Railway Co Ltd*.[37] This view is shared by a number of early authors such as Willoughby (1898), Blanchard (1917), Bradbury (1917) and Winfield (1949). However, others argue that contrary to this popular view, the defence of common employment did not arise from the case of *Priestly v Fowler.* They instead cite the much later case of *Hutchinson* as the true source of this defence (Lester, 2001; Stein, 2003). Stein (2003) argues that although *Priestly v Fowler* is the first recorded case under English law where an employee sued an employer for an injury arising out of employment,[38] the actual sources of the common employment doctrine are the two later cases of *Hutchinson* and *Wigmore v Jay*[39] which were decided some thirteen years later. Stein (2003: 691) has attributed the notion that holds *Priestly v Fowler* as the source of the common employment doctrine instead of *Hutchinson* to "a revisionist interpretation" which developed over the years. Stein goes further to argue that very few Victorian era jurists cited the case of *Priestly* in connection

[36] supra
[37] (1850) 5 Exch. 343
[38] Before the development of employer's liability rules, the responsibility to look after workers disabled or impoverished by work-related injuries fell on religious institutions, especially parishes. Often an injury at work implied a slide into poverty and religious institutions had the moral duty to look after the indigent.
[39] (1850) 5 Exch. 354

with the common employment defence, instead they cited the case to support the proposition that as a general rule, a master had no duty of care towards his servant.

In *Priestly,* the common employment defence was not well articulated which perhaps helps explain why this decision was not followed in its immediate aftermath (Stein, 2003; Raw, 2013). Stein further submits that the common employment defence was eventually articulated clearly and precisely by the Supreme Court of Massachusetts in the case of *Farwell v Boston and Worcester Railroad.*[40] For this reason, perhaps a more enlightening view on the origin of the common employment defence is that presented by Raw (2013: 146) who submits that the defence was first 'suggested' by Lord Abinger in *Priestly v Fowler* and adopted in England, 'formulated' in South Carolina,[41] and 'bolstered' in Massachusetts. Raw is of the further view that the two 1850 cases of *Hutchinson* and *Wigmore* which some regard as the true sources of the common employment defence merely served to clarify, rather than create it.

Controversy of its exact origins aside, the defence of common employment also has a controversy as to its basis. Two views exist. The first holds that the defence is part of the *volenti* doctrine. The injured employee consented to run the risk of injury by a fellow employee and the second view that is closer to the actual words used by Lord Abinger, is that the basis of the defence lay in the doctrine of vicarious liability.[42] Reforms introduced by the Employers Liability Act of 1880, focused on introducing a limited form of vicarious liability as indicated below which suggests that the second view about the basis of the common employment defence is probably more accurate. The defence, essentially restricted the application of the doctrine of vicarious liability in situations where a worker was injured due to the negligence of a fellow employee. Common employment as a defence emerged at a time when the doctrine of vicarious liability itself was also still developing. In *Priestly,* the court refused to extend vicarious liability of an employer to cases where an employee sustained injury at work due to the actions of a fellow employee. The rationale for this conclusion, supplied in later cases, lay in the legal

[40] *(1842) 4 Metc. (Mass.) 49; 4 Metcalf 49* per Shaw C.J.

[41] In *Murray v South Carolina Railroad* (1838) 26 SCL (1 McMullen) 385, the court denied payment of compensation to an injured fireman pointing out that, by accepting employment with the railroad company, the fireman assumed all risks of injury he could sustain from the ignorance of the servants of the company who are employed with him.

[42] The doctrine of vicarious liability imposes liability on an employer for delicts committed by an employee that arise in the course and scope of employment.

fiction that a contract of employment contained an implied term holding that an employee agreed to assume the risks which are inherent and incidental to the job of which injury by a co-worker was one (Blanchard, 1917).[43] The defence appeared to be an illogical extension of the *res perit domino* doctrine that holds that losses lie where they fall. Successful application of the common employment defence rested on two preconditions. Firstly, the person injured and the one causing the injury needed to work for the same employer. Secondly, the two employees must have been engaged in common employment[44] at the time of the injury (Golding, 1922). What the term 'common employment' meant was not well defined and was subject to judicial interpretation. However, there were two specific instances where the defence of common employment did not apply. In the first place, it did not apply to breach of a statutory duty by an employer. Furthermore, the defence did not apply to cases where the injury to an employee was due to the personal negligence of the employer. For example, if an employer breached the duty to employ competent staff, the defence of common employment did not apply (Lester, 2001).

While the defence of common employment was firmly established in England, America and most parts of the British Empire such as Australia, Canada and New Zealand, this should not in any way be taken to mean that all jurists agreed with it or its logic. The defence was debated in Scotland where in a number of cases, judges tried as much as possible to avoid upholding it (Raw, 2013).[45] It is evident from Scottish case law that from the onset, the courts were uncomfortable with the common employment defence and were thus determined to limit and in some cases, totally avoid its application. As will be seen later in this Chapter, Scotland was not the only country to register its displeasure with the doctrine of common employment. In South Africa, opposition to the defence was even stronger, especially in the South African Republic (subsequently the Transvaal). Critics *inter alia* pointed to the fact that the defence did very little to ensure that incentives of employers are properly aligned. Instead of penalising employers where they would have failed to train workers so that they did not increase the risk

[43]According to Blanchard (1917), the decision in *Priestly v Fowler* was adopted in the USA for the first time in the case of *Murray v South Carolina Railroad Co Ltd*

[44] Common employment did not mean the two employees had to be engaged in the same work at the time of the injury. All that was required was for the tasks performed by the injured worker and the worker causing the injury to be connected or incidental to each other (Golding, 1922).

[45] See for example *McAulay v Brownlie (1860) 22 SC 975; Gemmils v Gourock Ropework* (1861) 23 SC 425 and *Darby v Duncan* (1861) 23 SC 529

of injury to their counterparts, the common employment defence actually did the opposite. By not making the employer responsible for injuries caused to a worker by a fellow worker, the common employment defence removed employer-incentives to provide adequate training to their employees or to take care when hiring workers.

Given the unpopularity of the common employment defence, it is surprising that it lasted as long as it did. Trade unions were particularly vocal in their calls for its abolition (Winfield, 1949). Despite these efforts, the common employment defence remained a part of English law for well over a hundred years until it was completely abolished by the British Parliament through the Law Reform (Personal Injuries) Act 1948 (Winfield, 1949). By the time of its abolition, courts too were showing increasing signs of frustration with the defence by placing restrictions on its scope and applicability.[46] For example, in *Radcliffe v Ribble Motor Services Ltd*[47], the scope of the common employment defence was put in the spotlight by the House of Lords when it laid down a test of what constitutes 'common employment' for the purposes of this defence. The court held that employment was common only if the employees were engaging in a task or tasks where there was a common object. In *Dorrington v L.P.T.B.*[48], Hilbery J in a damning assessment, referred to the common employment defence as "a highly artificial and now unfashionable legal fiction". Notwithstanding this, the damage caused by the defence to the welfare of injured workers cannot questioned.

3.2.2 Common Law Defences: *Volenti Non-fit Injuria*

A second common law defence that limited prospects of injured workers getting compensation was *volenti non-fit injuria.* Directly translated, *volent non-fit injuria* means "to one who volunteers, no harm is done". As a defence, *volenti non-fit injuria* or voluntary assumption of risk reinforced its counterpart, the defence of common employment insofar as it shared a

[46] Thus in *Wilsons & Clyde Coal Co v English* (1938) A.C. 57, the House of Lords held that an employer has a legal duty to take reasonable care to ensure the safety of employees. This broad duty entails the following specific tasks – (1) providing and selecting competent staff, (2) providing proper and safe plant, machinery and equipment, and (3) providing a proper system of work.
[47] (1939) A.C. 215
[48] *(*1947) 2 All ER 85

similar doctrinal basis.[49] The principle underlying the defence of voluntary assumption of risk originated from Aristotle who argued that harm suffered voluntarily does not give rise to a cause of action at law and equity (Raw, 2013). If a person is fully aware of and appreciates the nature and extent of the dangers and risks associated with a particular undertaking and freely chooses to engage in it, such person has no right of action if one of the risks materialises to his or her detriment. Some authors have suggested that *volenti* is not strictly a defence, but a legal principle that relies on the plaintiff's conduct to remove the right to sue.[50] In practice, *volenti* has often been confused with contributory negligence but the two are clearly distinct. As explained in the next section, contributory negligence is premised on the negligent conduct of the plaintiff (or failure to act reasonably in circumstances where a reasonable person would have acted differently) which contributes to the harm suffered, whereas *volenti* is based on the willful and conscious decision by a plaintiff to engage in an activity whose risks are apparent. In other words, the basis of contributory negligence is negligence of the plaintiff while that for *volenti* is intent.

Early English case law on *volenti* tended to interpret the defence on the assumption that employers and employees had equal bargaining power when it comes to negotiating the employment contract and its terms and conditions. Inevitably, the outcomes were clearly in favour of employers, leading to many injured workers going uncompensated. The implicit assumption that employers and employees had equal bargaining power and unfettered freedom to contract is evident in the case of *Seymour v Maddox*[51], one of the early English law cases on employer's liability where the *volenti* defence applied. Even though the injured worker was not aware of the existence of a hazardous state of affairs that existed at her workplace, her claim failed because of the *volenti* defence. Likewise in *Skipp v Eastern Counties Railway*[52], the court in denying the claimant compensation, expressed the view that if employees felt that their working environment was dangerous, they have the option not to accept the employment. A similar view is in *Lynch v Marchmont.*[53] Thus, the assumption that, employers and

[49] A key principle underlying both defences was that an employee who agrees to take up employment impliedly agrees to run all risks naturally incidental and inherent in that employment.
[50] See for example: Warren C (1895) '*Volenti Non fit Injuria* in Actions of Negligence' *Harvard Law Review* 8(8), 457 - 471
[51] (1851) 106 ER 674
[52] (1853) 156 ER 628
[53] (1865) 29 JP 375

employees have the same bargaining power is evident in early cases where the *volenti* defence featured. The assumption viewed employees as having the capacity to conduct an assessment of the dangers associated with a particular type of employment, and also the freedom to decline any employment they perceived to involve intolerable levels of danger. Needless to say this 'take it or leave it' approach was unrealistic in the employment context where more often than not, employees had no capacity to engage the employer on matters of job safety for fear of victimisation. Secondly, there was no clarity regarding what voluntarily assuming risk actually meant and how it was to be determined. Thus, in *Thomas v Quartermaine*[54], Lord Bowen, in a rather bizarre interpretation of this fine point of law, held that whether the assumption of risk is voluntary or not is a question of law. This view was subsequently strongly criticised in other cases, but was never overruled (Warren, 1895).[55]

After the passing of the Employer's Liability Act 1880, the defence of *volenti* received increased attention from the courts. However, there was no consensus even among judges on the correct interpretation of Section 1(1) of the Act. A key question was whether this section abolished the defence of *volenti* or not. In a dissenting judgment in *Thomas v Quartermaine,* Lord Esher held that the Act had indeed abolished the defence. However, Lord Bowen in a majority judgment held that the 1880 Act had not abolished the *volenti* defence. Notwithstanding this, a clear pattern on the scope of the *volenti* defence began to emerge after the Employer's Liability Act came into effect – courts were increasingly inclined towards circumscribing the defence rather than applying it wholesale. For example, courts began to accept that the fact that an employee was aware of the presence of a particular risk in an activity does not equate to him or her accepting to assume that risk. Furthermore, courts also started to demonstrate an awareness of the fact that in employment situations, the bargaining power of the employer and the employee is unequal. Accordingly, in *Thrussell v Handyside*[56], the court made it clear that often an employee may engage in an activity fraught with danger not because he accepts the risk, but more out of necessity and fear of losing the job.

[54] (1887) 18 QBD 685

[55] Lord Bowen's view was strongly questioned by Esher MR in *Yarmouth v France* (1887) 19 QBD 649 and by Lord Watson in *Smith v Baker* (1891) App. Cases 325

[56] (1888) 20 QBD 359

Nevertheless, like its common employment counterpart, the defence of voluntary assumption of risk was responsible for many injured employees going uncompensated in the early 1900s. It was a fictional defence at best whose application and logic were misplaced. The defence could have worked anywhere else except employment where, because of necessity, employees often undertake risky tasks and are usually in no position to question instructions of the employer. In the early years of its application, the fundamentals of the *volenti* defence were similar in England and most of the United States, as well as in many parts of the British Empire. Consequently, its outcomes were the same in these jurisdictions.

3.2.3 Defence of Contributory Negligence

A third and final defence enjoyed by employers at common law in the early 1900s was contributory negligence. It originated in England where it appeared for the first time in the case of *Butterfield v Forester*[57]. At common law, contributory negligence depended on the notion that the blameworthiness of a claimant, no matter how small in comparison to that of the defendant, was a complete bar to the recovery of compensation. In the nineteenth century, the idea that a claimant could recover for a loss caused by his or her own comparative fault was unknown, hence the common law did not extend the right to recover compensation in such cases. Before awarding any damages, courts looked closely at the conduct of the claimant just as much as that of the defendant. Where evidence of negligence on the claimant's part existed, no compensation was paid regardless of degree in relation to that of the defendant (Frankel & Dawson, 1910). The USA subsequently adopted contributory negligence as a legal defence in the 1820s and by 1859 where it applied to all American states (Smith, 1988).[58] It was not until 1945 that this position changed by legislation in England.[59] In South Africa, the position on the contributory negligence defence changed significantly following the passing of the Apportionment of Damages (Contributory Negligence) Act of 1956.

[57] (1809) 11 East 60

[58] In the US, the defence first appeared in Massachusetts and Vermont in 1824 in the cases of *Smith v Smith* and *Washburn v Tracy* respectively (Smith, 1988).

[59] In England, the legislation in question is the Law Reform (Contributory Negligence) Act 1945.

The exact doctrinal basis for denying any form of recovery to the plaintiff where the defendant also contributed to the harm is as unsound as it is illogical. On the face of it there seems to be little logic in denying the party who has suffered harm albeit partly due to his own fault, any form of compensation and letting the one who may have contributed much more to that harm go scot-free. In other words, why should the fault of the claimant exonerate the defendant completely from liability? A plaintiff who suffers loss in circumstances where comparative blameworthiness exists bears the full burden of that loss. Strangely, some attempted to justify this defence on grounds of the proximate cause maxim – *in jure non-remota sed proxima causa spectator*. The argument made was that, although the defendant was negligent, the plaintiff's own negligence broke the causal chain between the defendant's negligence and the accident, rendering the defendant not to be the actual proximate cause of the harm (Schofield, 1890). In the employment context, the underlying fallacy that employees and employers wielded equal bargaining power seen with *volenti* is also evident in the reasoning behind the contributory negligence defence.[60] The application of the defence in employment situations assumed a certain level of idealism that had no basis in reality. In a majority of cases, employees were simply not in a position to review the employer's system of working.

Interestingly, there was a clear distinction in the application of contributory negligence in England between the common law and maritime law (also known as admiralty law). At common law, the 'all or nothing' rule applied in cases where the plaintiff's own negligence contributed to the harm suffered. Lord Blackburn stated the rule as follows in *Cayzer, Irvine & Co v Carron Co*[61] when he said:

> The rule of common law is that if the blame causing the accident lies on both sides, however small that blame may be on one side, the loss lies where it falls.

On the other hand, the idea that a plaintiff can still recover damages, despite the existence of contributory negligence on his or her part, had been well established in admiralty law where case law to this effect first appeared in the seventeenth and early eighteenth century.[62] In *Raisin*

[60] Thus in *Williams v Clough* (1858) 157 ER 463, Baron Bramwell in justifying the defence of contributory negligence, said "A master cannot be held liable for an accident to his servant while using machinery in his employment simply because the master knows that such machinery is unsafe, if the servant has the same means of knowledge as the master". In other words if the servant is aware that the machine is unsafe he or she should not use it because doing so exonerates the master from liability.

[61] (1884) 9 AC 873

[62] See for example: *Beckham v Chapman* (1695) 167 ER 568 and *Noden v Ashton* (1706) 167 ER 577

v Mitchel[63], two vessels collided at sea, but despite the partial blame of the plaintiff for the harm suffered, the admiralty jury awarded half the damages claimed. The same approach applied in *Smith v Dobson.*[64] The position in admiralty law became clearer when England passed the Maritime Convention Act in 1911 that incorporated among other provisions, Article 4 of the Brussels Maritime Convention of 1910. On the question of apportioning liability and damages, the convention provided that damages shall be divided "in proportion to the degree in which each vessel was at fault" (Van Dongen & Verdam, 2016). Thus, in admiralty as opposed to the common law, comparative fault of the claimant was not a bar to the recovery of compensation. It took an Act of Parliament (the Law Reform (Contributory Negligence) Act of 1945) to bring the common law in line with admiralty law on this issue.

3.3 Practical Results of Common Law Liability

Common law defences of common employment, voluntary assumption of risk *(volenti)* and contributory negligence had a profound effect on the welfare of workers injured in the course of employment. In aggregate, they made it virtually impossible for injured workers to succeed in any action based on negligence of the employer. Because of *volenti,* an employer would always escape liability because the presumption that a worker knew the actual and incidental risks associated with the job. This reasoning became a justification for the common employment defence by incorporating negligence of a fellow employee into the range of risks regarded as ordinarily incidental to a job or profession. Thus, injury from negligence of a fellow employee became a risk incidental to employment and therefore nullified the application of the doctrine of vicarious liability against the employer. Finally, contributory negligence compounded the situation even further by totally ignoring the comparative fault of the employer in situations where the injured employee was also negligent, regardless of the degree of such negligence in comparison to that of the employer. Upon proof of negligence on the part of an injured worker, the negligence of the employer automatically became irrelevant. In the process, the loss became the sole and exclusive responsibility of the injured employee, even if the injury was predominantly due to the employer's fault.

[63] (1839) 173 ER 979
[64] (1841) 133 ER 1057

The three common law defences found support in a judiciary that was inclined to interpret them in their broadest sense with an unmistakable bias in favour of employers. It is evident from late nineteenth century case law that judges applied the common law defences from a standpoint that had little regard to the concrete realities of the workplace. Contrary to the simplistic assumptions that underpinned the application of the defences by the courts, the relationship between employers and employees is often complex. Most importantly, the relationship is characterised by a disproportionate imbalance in bargaining power between the parties. Thus, the view expressed by some judges in justifying the *volenti* defence that if a worker perceived risks associated with a particular job to be too high, he or she should refuse to do the job, epitomised the lack of realism with which the courts applied the defences. It was only after the enactment of the Employer's Liability Act in 1880 that the judiciary in England started to circumscribe the scope of the three defences to any significant and meaningful extent.

Prospects of injured workers to get compensation decreased further because of the mismatch between common law rules on employer's liability and the realities of workplace accidents. To succeed at common law, an injured employee had to prove fault on the part of the employer and exclude the applicability of the three defences of common employment, *volenti* and contributory negligence. This alone was no easy task. Furthermore, common law rules in their strict legal sense operate on the premise that occupational accidents and diseases are always a result of blameworthy and wrongful conduct on the part of an easily identifiable party. In addition, common law rules implicitly assume that it is always possible to prove blameworthiness and wrongfulness to the satisfaction of existing judicial standards. In practice, workplace accidents often occur in a complex environment where attribution of blame to a single party may not be possible in some cases (Gaskins, 1990). Work accidents and diseases can result from four primary sources – hazards of industry (also known as trade risks, where the accident is neither due to the fault of the employer or the employee), negligence of employers, negligence of employees and negligence of fellow employees. Common law rules do not respond to all of these causal factors in equal measure. Thus, a study of accidents in a large US iron and steel company over a six-year period showed the following accident distribution by cause – trade risk (60%); negligence of employees (7%); negligence of fellow employee (6%); negligence of employer (4%) and in the remainder (23%), the cause could not be ascertained from the available records (Blanchard, 1910). If the common law is applied to these results, prospects for recovering compensation would only be realistic in respect of

accidents caused by the negligence of the employer and perhaps that of fellow employees. In other words, contrary to the fundamental principles underpinning common law liability, not every accident at work results from blameworthy conduct on the part of the employer. On this evidence, it is easy to see why most injured workers went uncompensated.

Before the advent of workers' compensation, the common law governed the liability of the employer in England while in most of continental Europe, the principles of the Napoleonic Civil Code applied instead. In the late nineteenth and early twentieth century, the practical difference between these two systems of law in relation to industrial accidents was minimal.[65] The Principles of the Civil Code governing liability of the employer for industrial accidents were largely standardised in countries like Austria, Belgium, France, Italy, Germany, Holland, Switzerland, and others (Rubinow, 1913). The principles were general in nature, only alluding to legal liability for harm caused by one person to another without specifically mentioning occupational accidents or diseases. The view that principles of the Civil Code and those of English common law on industrial accidents were substantially similar is also evident if one considers the practical outcomes of the two legal systems. In France, for example, some early nineteenth century studies found that only one in ten accidents at work resulted in compensation to the injured employee (Rubinow, 1913). In Germany, similar studies at around the same time, showed that workers there fared slightly better compared to their French counterparts with one in five accidents yielding compensation (Wolff, 1898). These findings closely mirror those from similar studies conducted in the USA (Blanchard (1910).

In addition to the remoteness of injured workers' prospects to get compensation following an injury, the common law dealt an even more cruel and devastating blow to the family and dependents of the worker in cases where an accident at work resulted in death. In such cases the maxim was *actio personalis moritur cum persona* (personal actions die with the person). Because of this rule, even if the employer were negligent, liability would not attach if the accident resulted in death of the worker (Lester, 2001). The practical result of this rule was that dependents of a deceased worker who died from an accident at work were plunged into

[65] According to Rubinow (1913), the English common law of tort was substantially similar to the Civil Code with the only notable exception being the three defences recognized at common law that made the law on occupational accidents heavily biased in favour of employers.

destitution with no legal recourse at all. The Fatal Accidents Act passed in 1846 eventually abolished this rule gave dependents of victims of fatal accidents the right to claim compensation for loss of support where a breadwinner is negligently killed. The Act enabled a cause of action to be inherited. However, the deceased's dependents only inherited rights which the deceased worker would have had against the employer and any defences which could have been invoked against the worker could also be used to defeat the action by dependents (Golding, 1922). Hence, if a legal defence applied to defeat the worker's claim had he survived, it had the same effect on the claim by dependents. Consequently, the three defences outlived injured workers and literally followed them to their graves. If this is considered against a background of the wide protection the defences of contributory negligence, *volenti* and common employment accorded employers, it is unlikely that the abolition of the *personalis moritur cum persona* doctrine brought any significant relief to the plight of injured workers or their dependents. This is because, even though the cause of action accruing to a worker could pass on to dependents on death, the three defences could still defeat the dependents' claim for loss of support.

3.4 Attempts to Reform the Common Law in England

By the end of the nineteenth century, the plight of injured workers and their dependents had become a topic of public debate in England. In an era where the welfare state was developing, it was only a question of time before reforms started. Between 1771 and 1818, there were a number of attempts to engage the government as a solution to the problem of occupational injuries through insurance arrangements. The attempts were unsuccessful because British society simply did not have a lot of faith in the government's ability to manage social programmes successfully (Willoughby, 1898). Subsequent to this endeavour, attention shifted to reforming the common law.[66] The first steps in this direction took place in 1877 with the

[66] The same approach happened in the USA (Rubinow, 1913; Weber, 1902) and in Canada (Jennissen, Prince & Schwartz, 1999). However, literature is in disagreement on which US state followed the English model of reforming the common law first. According to Blanchard (1917), the first employer's liability statute modelled on the Employer's Liability Act of 1880 in England was passed in Alabama in 1885, followed by Massachusetts in 1887. Kleeberg (2003) contradicts this submission. Instead, he identifies Georgia as the first US state to pass an Employer's Liability Act in 1856, covering railroad companies only, in an attempt to reform the common law. If Kleeberg's submission is correct, developments in England leading to the 1880 Act could not have influenced the Georgian law of 1856. Later in 1908, the Federal Employer's Liability Act of 1908 sought to modify all common law defences such as *volenti non-fit injuria,* contributory negligence, common employment and

establishment of a select committee of the House of Commons to consider the possibility of abolishing the common employment defence. One of the recommendations of the committee was to extend the doctrine of vicarious liability so that liability could be imposed on employers for the negligence of certain persons (vice-masters) to whom they had delegated their rights as masters over their workmen. The committee did not go as far as recommending the total abolition of the common employment defence. Instead, it recommended a series of measures that sought to restrict the scope and application of the defence. Another and related recommendation by the select committee was for the scope of the defence of *volenti non-fit injuria* to be limited. These recommendations eventually found their way into the Employer's Liability Act of 1880.[67] This Act was to be the main instrument in the quest to reform the common law in England.

There is a bit of tension in literature regarding the actual effect of the Employer's Liability Act on the defences of common employment and *volenti*. On the one hand is the view that appears to suggest that the Act abolished the common employment defence. This is the view Parsons (2002) appears to advance when he submits that the Employer's Liability Act effectively abolished the common employment defence. Willoughby (1898: 268) and Van Doren (1918: 34) go a step further and state that the "main feature" of the Act was the abolition of the defence in those types of employment to which the Act applied.[68] Overall, this view appears to be no more than a broad generalisation. A different and more accurate view holds that the Act did not actually abolish the defence. Instead, it merely limited its scope by making the employer liable for injury to an employee due to defects in the system of work, machinery or plant used for the business of the employer or by negligence of a fellow employee whose orders the injured employee was bound to obey (Winfield, 1949). The accuracy of this view gains support if one considers that there is consensus among many other authors, among them Raw (2013), Frank (1953) and Winfield (1949), that the common employment defence was actually abolished in

contracting out of liability by employers. In Canada, the first attempt to modify the common law defences was made in 1886 when Ontario passed the Workmen's Compensation for Injuries Act that only weakened the common employment defence, leaving the other two defences virtually untouched (Jennissen, et al, 1999).

[67] Passage of this Act was not without difficulty. One of the first Employer's Liability Bill came in 1872 and it took nearly a decade of debate for the Bill to pass (Willoughby, 1898). There is some suggestion that the English Employer's Liability Act of 1880 borrowed from the German Liability Act of 1871 that made the employer liable for accidents caused by defective works, systems, plant or machinery or by the negligence of vice-masters (Frankel & Dawson, 1910).

[68] The Act only applied to a limited range of arbitrarily chosen occupations (Van Doren, 1918).

1948 by an Act of Parliament.[69] Whether the Act also affected the defence of *volenti* was a question the court had to consider in *Thomas v Quartermaine*[70] where Lord Esher M.R., in a dissenting voice, held that the Act indeed abolished the defence of *volenti*.

This small controversy aside, one point on which literature converges is that the employer's liability system introduced by the Act of 1880 had some fundamental limitations and its impact in improving the ability of injured workers to access compensation was therefore minimal. Wolff (1898) argues that one indicator of the Act's failure was that no other country outside of the British Empire followed its model. Even in England, the Act had its fair share of critics. For example, Herbert Asquith[71] had some particularly harsh words to say about the Act, once describing it as "an elaborate system of traps and pitfalls for the unwary litigant" and a "scandal and a reproach to the legislature" (Weber, 1902: 277). Other early writers who also gave the 1880 Act a damning assessment include Willoughby (1898) and Weber (1902). In particular, critics pointed to a number of weaknesses in the Act that contributed to its minimal impact and failure to improve the situation of injured workers in any significant way. Firstly, the Act introduced no new principle or basis for evaluating the liability of employers towards employees in respect of occupational accidents. Instead, the promoters of the Act were overly simplistic in assuming that by merely weakening some of the common law defences previously available to employers, the position of injured workers would automatically improve. As it turned out, this was not the case. Secondly, by retaining the need to prove fault, sponsors of the Act appeared to have underestimated the difficulty of discharging the burden of proof necessary for liability to attach, especially in occupational accident and disease claims. A number of studies conducted at the time provided consistent evidence showing that many workplace accidents arose from trade risk where rather than fault of the employer. However, the context in which these studies occurred is not clear. Consequently, even in the face of weakened common law defences, proving fault in these circumstances was bound to be an insurmountable task. Despite the reforms, many workers went uncompensated.

[69] Section 1 (1) of the Law reform (Personal Injuries) Act 1948
[70] supra
[71] Herbert H. Asquith (1852 – 1928) was the 1st Earl of Oxford and Liberal Prime Minister of the United Kingdom from 1908 to 1916.

However, one thing that the Employer's Liability Act managed to do was to increase the amount of litigation against employers by injured employees. However, for those few claims that were successful, the awards were invariably modest with a significant proportion going to solicitors (Rubinow, 1913). Finally, when some of the provisions of the Act were subjected to judicial interpretation, further weaknesses became evident. The decision in *Griffiths v Earl of Dudley*[72] is a classic case in point. In this case, the court decided that an employer could contract out of the provisions of the Employer's Liability Act. Employers could therefore make employees waive their right to compensation under the Act on taking up employment. Many employers exploited this avenue to escape the liability imposed by the Act.

The willingness by Parliament to recognise the liability of employers through the Employer's Liability Act triggered a shift in judicial thinking around the application and interpretation of the three historical common law defences. For example, in *Smith v Baker & Sons*[73], the claimant suffered injury in the course of employment and sued the employer. The employer raised the defence of *volenti* alleging that the employee knew and had previously complained about the dangerous system of work used to perform his job, but had continued to do it. At trial, the court found for the claimant and the employer appealed to the Appeal Court and succeeded. The claimant in turn appealed to the House of Lords where the court upheld his appeal. Lord Watson expressed the law on *volenti* as follows:

> In its application to questions between the employer and the employed, the maxim as now used imports that the workman had either expressly or by implication agreed to take upon himself the risks attendant upon the particular work which he was engaged to perform and from which he has suffered injury. The question which has most frequently to be considered is not whether he voluntarily and rashly exposed himself to injury, but whether he agreed that if the injury should befall him, the risk was to be his and not his master's. When as is commonly the case his acceptance or non-acceptance of the risk is left to implication the workman cannot reasonably be held to have undertaken it unless he knew of its existence and appreciated or had the means of appreciating its danger. But assuming that he did so, I am unable to accede to the suggestion that the mere fact of his continuing at his work with such knowledge and appreciation will in every case necessarily imply his acceptance. Whether it will have that effect or not depends in my opinion to a considerable extent upon the nature of the risk and the workman's connection with it as well as upon other considerations which must vary according to the circumstances of each case.

[72] (1882) 9 QBD 357
[73] supra

Given how widely and liberally the *volenti* defence had been applied in prior cases, such as *Seymour v Maddox* and *Skipp v Eastern Counties Railway*[74], Lord Watson's interpretation contains some profound restrictions. In particular, the point that the mere fact that an employee continued to work at a place he knew to be dangerous does not imply acceptance of the risk of injury.

Despite the legislative intervention and the shift in judicial interpretation of the liability of employers, the situation of injured workers remained unsatisfactory. Apart from the difficulty of proving fault even in the face of weakened defences, the common law on employer's liability had other defects too. Costs of litigation were often too high, forcing most workers not to even consider pursuing their claims, rendering the whole system wasteful. The process was also notoriously slow to produce results (Parsons, 2002). Finally, the prospect of damaging relations with the employer removed the incentive of workers to prosecute their claims in some cases (Blanchard, 1917). It was therefore clear that a more radical approach beyond merely seeking to weaken the traditional common law defences previously available to employers was necessary. Failure of the Employer's Liability Act led to the enactment of the Workmen's Compensation Act in 1897. This Act guaranteed compensation to all injured workers on a no-fault basis. Therefore, even under reform, the common law did not change the fortunes of injured workers in England. However, even though England adopted workers' compensation in 1897, employer's liability at common law remained.

3.5 Common Law Liability of the Employer in South Africa

South African common law contains significant English law influences (Havenga, et al, 2000). In the late eighteenth to early nineteenth century, most legal developments in South Africa were influenced by developments in England, not least of all because of the passing of the General Law Amendment Act 8 of 1879 (Cape) and General Law Amendment Ordinance 5 of 1902 (Orange Free State). As in England, employees injured at work in South Africa before the introduction of worker's compensation relied on the common law for a remedy. This required proof of fault and the prospects of getting compensation were remote because some

[74] supra

of the defences that were available to employers in England were also available to employers in South Africa. Two of these defences – contributory negligence and *volenti non-fit injuria* applied in South Africa. However, the defence of common employment never really found broad acceptance in Roman Dutch law.[75]

Several cases came before the courts between 1887 and 1904 where employers attempted to plead common employment as a defence. The first of these is *Hilpert v Castle Mail Packet Co Ltd*[76] heard in the Cape. This appears to be the only case where the defence of common employment succeeded in South Africa.[77] Subsequent to this decision, came a series of other cases where courts consistently rejected the defence. In *Lewis v The Salisbury Gold Mining Company*[78], a case heard in the old Republic of South Africa that became the Transvaal after the Union of South Africa in 1910 - a miner suffered injury during the process of lowering him into the mineshaft. The allegation was that the injury was due to the negligence of the engineman, a fellow employee. The employee lost his leg because of the injury. He sued the employer who raised the defence of common employment by way of an exception and won. Implicit in the decision of the trial court was the admission that the defence of common employment applied in South Africa. On appeal, in a judgement delivered by Kotze CJ, the court ruled that the principle that an employer is liable for accidents caused by his servants in the course and scope of their employment was an integral part of Roman Dutch law. Accordingly, he dismissed the employer's exception, reversed the decision of the trial court and found the employer vicariously liable. The court concluded that the defence of common employment was alien to South African law and its doctrinal basis was untenable.

Kotze CJ once again delivered the judgement in *Eagleson v The Argus Printing and Publishing Company Ltd*[79], where a 12-year old employee suffered injury while engaging in a task that was apparently outside the scope of his employment. However, the court found that two fellow

[75] The common law of South Africa is Roman Dutch law. It is a blend of Roman and native Dutch law. This system of law introduced at the Cape of Good Hope in 1652. However after South Africa became a colony of Britain, English common law principles gradually began to filter into Roman Dutch law.
[76] 1887 12 EDC 38
[77] Barry JP and Jones J ruled that this English law defence was applicable in South Africa but Maarsdorp J dissenting, held that the defence was invalid.
[78] supra
[79] 1894 1 Official Reports 259

employees had acted negligently, resulting in the boy's injury. The court refused to uphold the common employment defence and found the employer liable. This reasoning applied in *Waring and Gillow v Sherborne.*[80] Although in *Eyssen v Calder and Company Ltd*[81], the court avoided addressing the issue of whether or not the English defence of common employment had become part of South African law, the question was probably unnecessary by then, given the number of previous cases that had addressed it directly. In all these cases, courts relentlessly rejected the importation of the common employment defence into Roman Dutch law. They consistently held that it was an alien defence that flew in the face of the well-established doctrine of vicarious liability. However, the position regarding the other two defences – contributory negligence and *volenti non-fit injuria* was well-settled and clear– these were recognised as part of South African common law.

3.5.1 Common Law Reform in South Africa

Before the Union in 1910, developments in South Africa on employer's liability need to be understood in light of events in England at the same time. The previous section pointed out that the first strategy tried in England to improve the ability of injured workers to access compensation was to reform the common law through legislation. In South Africa, the Cape Colony was the first province to follow this path when it passed the Employer's Liability Act in 1886.[82] The Act was, based on the English Employer's Liability Act of 1880. In 1896, Natal followed suit and passed its own Employer's Liability Act[83] based on the 1880 Act in England as well.

Since the South African legal system on employer's liability at the turn of the nineteenth century depended heavily on developments in England, injured employees in South Africa, like in England, had very limited prospects of recovering compensation against employers. Despite efforts to improve the situation through legislation meant to make the common law more responsive to the plight of injured workers, things only improved marginally. While this was

[80] 1904 TS 340
[81] 1903 20 SC 435
[82] Act 35 of 1886
[83] Act 12 of 1896

going on, the South African gold mining industry already faced a serious problem of occupational accidents for which most workers went uncompensated. Consequently, gold mines were the first to take decisive steps to improve access to compensation by injured workers that went beyond merely reforming the common law. In 1894, directors of three mining companies – Simmer and Jack Gold Mining Company Limited, Geldenhuys Estate and Gold Mining Company Limited and Jumpers Gold Mining Company Limited decided to form the Rand Mutual Assurance Company to insure the workmen's compensation risks for their workers injured in the course of employment. Mutual insurance emerged as a solution after attempts to use private commercial insurance failed because of high premiums demanded by insurers. The initiative by the directors of the three gold mining companies marked the introduction of workers' compensation in South Africa.[84]

When England eventually abandoned the experiment of reforming the common law and passed the Workmen's Compensation Act in 1897, a similar trend occurred in South Africa. In 1905, the Cape Colony passed the Workmen's Compensation Act to abolish the Employer's Liability Act of 1886.[85] Then in 1907, Transvaal also passed her own Workmen's Compensation Act.[86] Both these Acts mirrored the British Workmen's Compensation Act of 1897. In England, the Workmen's Compensation Act 1906 eventually repealed and replaced the Workmen's Compensation Act of 1897. After the Union of South Africa in 1910, a consolidated Workmen's Compensation Act came into being in 1914.[87] This Act mirrored the British Act of 1906. It is therefore clear that an understanding of employer's liability developments in South Africa in the early 1900s is incomplete without an understanding of the developments in England on the same subject in the late eighteenth and early nineteenth century.

[84] Thus, adoption of workmen's compensation in South Africa by the mining industry predates the enactment of the Workmen's Compensation Act in England in 1897.
[85] Act 40 of 1905
[86] Act 36 of 1907
[87] Act 25 of 1914

3.6 Common Law Liability of the Employer in other Jurisdictions

As previously mentioned, in addition to England, South Africa and the USA, injured workers faced insurmountable difficulties in trying to get compensation in other common law and non-common law jurisdictions as well. In Australia, the defences of contributory negligence, common employment and *volenti* were all recognised and established. They applied with the same rigour as that seen with British judges (Cowan, 1997). Similarly, in Canada, when workers got injured at work, they and their dependents faced certain destitution (Jennissen et al, 1999). Apart from turning to religious institutions, such as parishes, or friends for assistance, the only other option was to sue the employer who in turn, could rely on the virtually impenetrable defences of contributory negligence, common employment and *volenti*.[88] As in England, these defences totally insulated employers from the obligation to pay compensation.

Attempts to reform the common law in England through the Employer's Liability Act in 1880 triggered a similar response in territories that formed part of the British Empire. Accordingly, the 1880 Act was replicated with varying degrees of modification in territories such as New Zealand (1882), New South Wales (1882), St. Vincent (1884), South Australia (1884) and Queensland (1886) (Clay, 1897).[89] When reforming the common law failed to produce the desired results, most of these territories followed the British lead and adopted workers' compensation. Accordingly, workmen's compensation statutes emerged in New Zealand (1900), South Australia (1900), Western Australia (1902), and Queensland (1905). Most European countries introduced workers' compensation between 1884 and 1905 (Blanchard, 1917). In America, the introduction of workers' compensation took longer because of a series of constitutional challenges in terms of which most statutes faced challenges in court for being unconstitutional. It was only after 1910, that the adoption of worker's compensation started to gain uninterrupted momentum. By 1948, all American states had workers' compensation (Henshaw et al, 2007). In Canada, the adoption of workers' compensation conforms to roughly the same time lines witnessed in its southern neighbour. It was only in 1914, that Ontario

[88] These three defences were recognised in a majority of Canadian jurisdictions except in Quebec where the defence of common employment was unknown (Clay, 1897).

[89] Other territories that adopted the British Employer's Liability Act are Victoria (1886), British Columbia (1891), Ontario (1892), Manitoba (1893), West Australia (1894) and Tasmania (1895).

became the first Canadian province to introduce workers' compensation and it was not until 1950 that the rest of Canada had workers' compensation legislation (Jennissen et al, 1999).

By the early 1900s, the limitations of the system of employer's liability based on the common law as a mechanism for compensating injured workers were widely recognised and acknowledged in many jurisdictions. The situation remained the same in both civil code and common law jurisdictions. In England and many parts of the British Empire, the common law's limitations found practical application in the three defences available to employers– contributory negligence, common employment and *volenti non fit injuria* which in aggregate, made it virtually impossible for injured employees to be compensated. Of the three, the defence of common employment was the most controversial because its doctrinal basis was untenable if not completely illogical. Not surprisingly, judges in a few common law jurisdictions had serious misgivings about the validity of the common employment defence. Consequently, some judges avoided applying it as much as possible as was the case in Scotland, while others flatly refused to recognise the defence, as happened in South Africa and Quebec.

As the failure of the system of employer's liability became undeniable, countries had one of two choices to make to mitigate the plight of injured workers, many of whom were plunged into destitution because of occupational injuries. On the one hand was the German solution of worker's compensation while on the other, was the British approach of reforming the common law by legislation. Most of continental Europe followed the German model and introduced workers' compensation statutes in terms of which injured workers regardless of fault. A full analysis of the evolution of this principle follows in Chapter 3. By contrast, in England and most of the territories forming part of the British Empire, the initial response was to reform the common law by legislation. The simple belief was that the main impediment to the payment of compensation to injured workers was the three common law defences. As it turned out, this strategy had flaws, primarily because it did not introduce any new principle or basis of liability for employers. Fault remained the fundamental premise on which an employer could be legally liable to an injured employee. Instead, the legislation enacted depended on the erroneous assumption that by weakening the three defences previously available to employers, the ability of injured workers to access compensation would improve. This approach was overly simplistic because it failed to recognise that the workplace is a complex environment where

most things that go wrong do not depend on attributing blame to one party. Proving fault therefore remained inherently problematic and the results from legislative intervention were marginal and disappointing. Ultimately, it became clear that the Germans were right – only through a more radical approach could the ability of injured workers to get compensation be improved.

3.7 Conclusion

In the period up to the early 1900s, injured workers could only look to the common law for compensation. Basic principles governing liability of an employer towards a worker were substantially similar in both common law and Napoleonic Civil Code countries. The defences of contributory negligence, common employment and *volenti non fit injuria* were all designed and applied in such a way that only in the most exceptional of circumstances could an injured workman succeed in claiming compensation from an employer. In common law countries, the epicenter for the development of these defences was England from where they found way to other parts of the British Empire, such as Australia, the United States of America and South Africa. In England, the defences were applied by the courts from the fundamental premise that a worker is presumed to have agreed to assume all the risks inherent in his or her work. Because of this, whenever a worker got injured in the course of employment, the odds were heavily stacked against any attempts to sue the employer for compensation. The same position endured in countries governed by the Napoleonic Civil Code where results from this legal system on employer's liability mirrored those from common law countries. Therefore, as mechanisms for funding compensation payable to injured worker, both the common law and the Napoleonic Civil Code have a rich and well-documented history of failure. As the plight of injured workers and their dependents attracted more attention, it was only a question of time before both the common law and the principles of the Napoleonic Civil Code on employer's liability gave way to a more responsive mechanism. The solution first emerged in Germany and eventually spread to virtually all parts of the globe.

4 CHAPTER 4: WORKERS' (STATUTORY) COMPENSATION

4.1 Introduction

As the shortcomings of the common law as a mechanism for compensating injured workers became widely acknowledged in the post-industrialisation era, the necessity for a new and radical solution to improve the situation became all too apparent. This view gained more traction after attempts by some countries, notably England and the United States of America, to reform the common law also failed to improve matters. The failure of attempts to reform the common law did not only signify the inadequacy of this policy measure but more crucially, it underlined the inappropriateness of the common law system as a whole in dealing with occupational accidents. As a result, workers' compensation or statutory compensation emerged following the realisation that it was virtually impossible for injured workers to get compensation by any other means. The main problem with the common law arose fundamentally from its requirement that blameworthiness or fault of the employer be proved as a precondition for compensation to be paid. This chapter discusses the introduction and evolution of workers' compensation in selected countries, notably Germany, England, the United States of America and South Africa. In doing so, the chapter also refers to specific developments in other countries. Additionally, the chapter touches on some of the social and political factors underpinning the adoption of workers' compensation in those countries.

4.2 Germany and the Origins of Workers' Compensation

It is a widely accepted fact that modern workers' compensation as a mechanism for compensating injured workers was pioneered and developed in Germany in 1884. While reforming the common law and reliance on the courts dominated in countries such as England and others that formed part of the British Empire, Germany opted for a more radical approach in the form of social insurance legislation and the introduction of compulsory state insurance for industrial accidents. Instead of waiting for the courts to open new avenues to enable injured workers to access compensation, Germany decided to introduce state-controlled social insurance programmes, backed by legislation to remedy social problems. One of the areas targeted was industrial accidents. The chief architect of the German social insurance

movement was its then Chancellor, Otto von Bismarck. He presided over a sustained effort to involve the state in the social welfare of its citizens from the early 1880s.[90] So radical was Bismarck's social insurance legislation programme that, during its time, it was described as the "boldest experiment in social legislation ever attempted" (Willoughby, 1898: 29; Van Doren, 1918:31). The social insurance legislation programme had three pillars – sickness insurance law passed in 1883; law providing for compulsory insurance against industrial accidents passed in 1884; and finally, the law providing for insurance against old age and invalidity passed in 1889. At inception, the law providing for compulsory insurance against industrial accidents covered workers employed in manufacturing and mechanical industries only (Frankel & Dawson, 1910). Then, between 1885 and 1887, the law expanded and eventually covered virtually all industries with the exception of fishing, domestic work, certain artisans and the self-employed (Willoughby, 1898). Thus, within a period of just three years the social insurance scheme transformed from a targeted to a comprehensive scheme.

The German system of compulsory insurance of workers paid compensation in the event of bodily injury or death of a worker in the course of employment. Strict liability applied meaning that it was not necessary for a worker to prove fault in order to get compensation (Weber, 1902). In other words, whether injury suffered by a worker came at his own hands, those of the employer or anyone else for that matter, it made no difference as far as the right of that worker to recover compensation is concerned. The only exception to this rule concerned injuries caused by the serious and willful misconduct of the worker. These did not result in compensation.[91] A further point of interest related to this is whether Germany was also the first country to develop the principle of liability of an employer without fault. Evidence on this is rather mixed.[92] Despite this, there is broad consensus on several aspects of the German

[90] Bismarck's view on the role of the state in the social lives of ordinary citizens was perhaps aptly summed up in one of his speeches in 1882 when he famously said "it is the tradition of the dynasty which I serve that it takes the part of the weaker ones in the economic struggle" (Dawson, 1915: 2).

[91] Today workers' compensation laws of most countries still contain this restriction with the modification that if the worker dies due to an accident caused by serious and wilful misconduct, compensation goes to dependents nonetheless.

[92] According to Van Doren (1918), Switzerland was the first country to introduce liability without fault on employers in certain occupations through its law of 1881 that made factory owners liable without fault for accidental injuries to their workers even though the German Industrial Insurance Act of 1884 is widely regarded as the first comprehensive compensation law. This is inconsistent with the submissions by Kleeberg (2003) that Prussia, Germany's largest state at the time, was the first to introduce strict liability on railroad companies for injuries sustained by a worker in the course of employment when it passed the Railroad Law of 1838. According

system of compulsory insurance of workers. Firstly, employers alone financed the system. Initially, Bismarck wanted the state to subsidise the cost of accident insurance but his plan did not support from the majority of members in the Reichstag (German Parliament) (Kleeberg, 2003). Secondly, from an operational perspective, the system was highly centralised under the direct supervision of the state. Thirdly, a network of mutual insurance associations formed by employers with the state exercising supervisory oversight over these entities provided the insurance to their members (Bradbury, 1917). The role that the state actually played is often misunderstood. Although the German system is often referred to in literature as state insurance, in reality, employers had a choice to either buy insurance from employer-organised mutual insurance associations or from a state insurance department (Kleeber, 2003). No private insurers could insure industrial accidents in line with the essential nature of social insurance where the profit motive is absent. In practice, the state never really assumed financial responsibility for industrial accidents as most employers opted to insure with mutual associations of their trade. Therefore, the state's main role consisted of enforcement and supervision of the entire system (Frankel & Dawson, 1910).[93] Finally, the German scheme only covered industrial accidents. Exclusion of occupational diseases from coverage was a common feature of virtually all early workers' compensation schemes seen in different parts of the world (Sherman, 1917).

Although most issues surrounding the development and organization of statutory compensation in Germany are clear and straightforward, there are two, on which there is considerable debate and lack of clarity. The first relates to the question why government social insurance for industrial accidents emerged in Germany first and not somewhere else. Related to this is the question why German society readily accepted social insurance unlike in other parts of the world, notably the USA, where there was strong resistance. A second issue on which there is significant debate and lack of clarity concerns the practical results or outcomes of the German workers' compensation system in its immediate aftermath. Of particular interest in this regard

to this submission, Germany, and not Switzerland, was the first country to introduce liability without fault for employers, albeit on a limited scale initially.

[93] In Europe, the first country to adopt the German model of compulsory state insurance for industrial accidents was Austria in 1887, when it adopted the model almost wholesale. As in Germany, employers in Austria were required to come together to form mutual assistance funds which acted as providers of insurance for their workers. After Austria, compulsory state insurance spread to Norway where it was adopted in 1894 followed by England (1897) and Denmark (1898) (Blanchard, 1917).

is whether the system contained sufficient and effective incentives to reduce the number of occupational accidents as any efficient compensation ought to do.

4.2.1 Reasons Why Workers' Compensation First Emerged in Germany

Why did social insurance as a solution to the problem of occupational accidents emerge in Germany first, notwithstanding that, work-related injuries were a common problem to all industrial countries at the time? To answer this question, it is important to refer to early literature for insights. Following the end of the Franco-German War[94], the main preoccupation for the German government was to improve the working conditions in factories and other industries, following years of rapid industrialisation (Frankel & Dawson, 1910). Sustained industrial growth recorded in Germany also brought with it rapid growth and development of the organized labour movement under socialist influences (Rubinow, 1913). In addition, German philosophers and other writers viewed the role of the state not from the *laissez-faire* perspective propagated by English classical economists, but from a perspective where the state was supposed to be more interventionist in all aspects of life. Most of these philosophers and writers were of a socialist persuasion. It was widely accepted that the state had a much wider responsibility not only to govern, but also to improve people's social and economic conditions. Therefore, by the time Bismarck introduced his social insurance proposals in the early 1880s, conditions on the ground were already conducive for its acceptance.

The development of the political philosophy that viewed the state as an instrument for social and economic transformation in Germany was largely the work of influential academic and philosophic writers such as Fichte, Hegel, Sismondi and Schaeffle. These writers had one thing in common – they were all advocates of socialism. Their work in turn, inspired other socialist thinkers like Marx, Lasalle and Winkelblech (Van Doren, 1918). Fichte was very active as a writer from 1796 to 1800 and his work largely focused on issues of equality, property and the responsibility of the state towards the working class in particular. He strongly advocated for an expanded role of the state beyond mere policing and enforcement. Instead, he was a strong

[94] Also known as the Franco-Prussian War, this was a very short war fought between 19 July 1870 and 10 May 1871.

advocate of the use of state power to improve the socio-economic conditions of people and in doing so he viewed socialism as a natural and logical consequence of this process (Willoughby, 1898). Sismondi echoed Fichte's beliefs about the role of the state in social change. However, Dr Schaeffle is the academic writer largely credited for developing concrete proposals on compulsory workers' compensation insurance. His work in this area started in 1867 and earned him the title "father of compulsory state insurance" (Willoughby, 1898: 32). Views of these socialist writers were very inspirational and instrumental in the eventual emergence of a breed of economists (the socialists) whose ideas converged around the socialist ideology. As industrial accidents continued to be a growing concern across Germany, critics of the capitalist system of production, notably Karl Marx and Frederick Engels, used this to further attack the capitalist system (Kleeberg, 2003). They pointed to the plight of injured workers and their dependents as further evidence of the insensitivity of capitalists to the interests of the working class and advocated for a working class-led revolution aimed at the eventual overthrow of capitalism.

That Bismarck was the chief architect of compulsory workers' compensation insurance in Germany is a well-known and widely reported historical fact. However, his motives for doing so are not well publicised. The adoption and implementation of the social insurance programmes covering sickness (health insurance), industrial accidents (workers' compensation) and old age and invalidity (pensions) had less to do with Bismarck's commitment to socialism or the desire to improve the socio-economic conditions of the working class, but had more to do with his quest for self-preservation. In other words, it was an opportunistic move with connotations of modern rent-seeking behaviour. In fact, Bismarck's personal interests had a direct influence on his policies (Kleeberg, 2003). To begin with, Bismarck himself was an industrialist with business interests in timber and paper manufacturing. Therefore, he was a capitalist and that makes his commitment to the working class cause highly questionable at a time when socialism was growing as an ideology across Germany. Bismarck was fully aware of this and therefore was fully aware of the need on his part to manage the situation carefully. In the end, he chose to adopt some socialist tendencies, particularly those that he perceived to have an appeal to the working class. He also realised that a lot could be done to transform German society through the instrumentality of the state, even though he genuinely hated the influence of the Social Democratic Party (the socialists), especially among the German working class (Kleeberg, 2003). In particular, Bismarck hated

the brand of socialism propagated by the socialists that sought to completely revolutionise and re-orient society towards Marxist socialism (Willoughby, 1898). Thus, although Bismarck was determined to destroy the socialists politically, he was also smart enough to realise that he could use some of their ideas to his own personal advantage. The only question he had to consider was how he was going to balance these seemingly conflicting goals.

After watching the growth of the socialists as a political force, especially after the Franco-German War, Bismarck had no choice but to push the social insurance legislation programme through the Reichstag in an attempt to weaken their growing influence to whom he was afraid of losing votes (Van Doren, 1918). Before the war, Bismarck had managed to keep the activities of the socialists in check through a series of anti-socialist laws, but socialism as a political ideology remained alive and influential. Bismarck therefore decided to adopt a "carrot and stick" approach to the problem – the carrot being the social insurance programme and the stick were the repressive laws targeted at the political activities of the socialists (Kleeberg, 2003). On the one hand, repressive laws were enacted which sought to suppress the political activities of the socialists while on the other, the social insurance legislation programme was used to define the nature and chart the course of socialism in Germany by limiting the appeal of the brand of socialism advocated by socialists to the working class.[95] Thus in a move that perhaps underscored the importance Bismarck attached to the working class vote, the law on industrial accidents insurance was the first of the three social insurance pieces of legislation presented to the Reichstag on 15 January 1881 (Frankel &Dawson, 1910). However, there was a setback when the legislation was rejected twice, *inter alia* because it contained a provision that would have seen the state subsidising the industrial accident scheme (Kleeberg, 2003). It was only in 1884 that the law finally passed and was in the process preceded by the health insurance law that sailed smoothly through the Reichstag in 1883.

Therefore, the question why Germany came to lead the world in pioneering workers' compensation, as a solution to the perennial problem of lack of access to compensation by injured workers must answered in light of two critical insights discussed in this section. Firstly,

[95] The socialists were fully aware of Bismarck's political strategy to buy the vote of the working class using social insurance legislation as the currency. For this reason and others, the socialists actually opposed Bismarck's social insurance initiatives (Kleeberg, 2003).

the socio-economic and political conditions prevailing in the country at the time, especially the tendency towards socialism as an ideology placed increased focus on the role of the state. It was widely expected that the state needed to be more interventionist in its search for solutions to social problems facing the citizenry. Academics and socialist economic thinkers promoted the idea long before Bismarck decided to operationalise it. Obligatory state insurance of industrial accidents was an idea conceived by the socialists. Bismarck only hijacked it from them because its time had arrived. Furthermore, and perhaps more crucially, using the state as an instrument for socio-economic transformation appealed strongly to the working class that was in the ascendency as a political constituency at the time (Kleeberg, 2003). A second insight closely linked to the first is the extent to which Bismarck's personal interests influenced his policy choices. The rise in the political fortunes of the Social Democratic Party (SDP) after the Franco-German War left him with no choice except to use the social insurance programme as an instrument for weakening the growing support of the socialists among the working class. While repressive laws had an impact in slowing down the socialists, socialism itself as a political ideology survived virtually unscathed, forcing Bismarck to hijack the idea of social insurance to further his political interests. Whether things could have taken a different course had the socialists not gained significant political ground after the war is difficult to say.

4.2.2 Practical Results of Workers' Compensation in Germany

As previously indicated in this chapter, the German social insurance programme for industrial accidents was highly centralised under the direct supervision of the state and mutual associations provided insurance to their members. Employers belonged to different risk categories depending on the industry in which they operated, for example, iron and steel, railroad, coal mining, and so on.[96] Contributions or premiums paid by employers were risk-determined.[97] The employer trade associations had a number of powers, one of which was the promulgation of accident-prevention and safety regulations (Willoughby, 1898). Each of the

[96] In German, these industry groups of employers or trade associations were called *Berufsgenossenschaften.*

[97] Premiums are risk-determined if insureds pay different rates depending on the level of risk each represents. In the final analysis, those employers engaged in high-risk occupations which at that time were mining and railroad construction, paid higher premiums. From an economic standpoint, this approach to insurance provision (also known as experience rating) is regarded as more effective as it creates an incentive among buyers of insurance to prevent accidents with the knowledge that any success in that regard would reduce the premium they are supposed to pay. However, while experience rating may create the right incentives amongst employers, it may not necessarily have the same effect on employees.

risk groups would form its own mutual insurer to insure workers against industrial accidents. That said, it is important to pose the following questions at this stage – what were the practical results of Bismarck's social insurance law on industrial accidents? Alternatively, to what extent did the introduction of social insurance for industrial accidents succeed in accomplishing Bismarck's personal as well as other socio-economic objectives. Furthermore, how did the state-sponsored system of insurance against industrial accidents fare in terms of efficiency and impact on overall accident rates? Available evidence that can help answer these questions is rather mixed. However, before examining this evidence, it is important to point out that although the introduction of social insurance features in literature as one of Bismarck's biggest achievements, it is highly questionable if he personally felt the same way. One school of thought has it that when his plan to introduce a tobacco monopoly failed to get the necessary support in the Reichstag, Bismarck lost interest in social insurance and did not even refer to this subject in his memoirs (Kleeberg, 2003). This further strengthens the argument that from the very beginning, the social insurance project was not born out of Bismarck's firm commitment to the workers' cause but was instead more of a strategic political maneuver whose objectives were more sinister than noble.

Notwithstanding the foregoing, what then were the practical results of Bismarck's social insurance programme? As previously pointed out, one of the main objectives behind the introduction and timing of Bismarck's social insurance for industrial accidents was his desire to curb the political threat posed by the socialists by buying into the working class vote. Realising that anti-socialist laws alone were not enough, Bismarck decided to hijack and implement some of the ideas developed by the socialists in order to weaken their political influence. In this regard, Bismarck was not successful. There is evidence that suggests that the accident insurance scheme was not successful as a vote-buying tool. On the contrary, support for the SDP actually increased to the extent that by 1912, one in three voters in Germany supported the socialists (Kleeberg, 2003). However, social insurance for industrial accidents appeared to have paid off because it helped in the pacification of the working class, thereby bridging the gap between it and the state.[98] In other words, the programme succeeded

[98] In support of this view, Kleeberg (2003) cites German emigration statistics to support this viewpoint. He argues that Germany emigration to the United States of America before the introduction of state accident insurance peaked at 250 630 in 1882 but by 1898 the figure had dropped dramatically to 17 111. However, it is not clear whether emigration from Germany to the United States of America resulted from hostility against the state only or there were other factors involved.

in averting the radicalisation of the working class. In the end, the fear that the working class was going to turn against the state and create another layer of opposition in the process did not become reality.

In terms of efficiency, the German industrial accident scheme does not appear to have fared any better either, especially in its early years. Several early writers who focused on this aspect of the scheme found extensive evidence of fraud and abuse of the system by workers. Villard (1913) assessed the scheme and found that the workers' compensation scheme suffered from high cases of moral hazard with clear tendencies on the part of employees to be more careless. The language used in the legislation was overstretched with a clear view to accommodating all claims lodged, even those that did not warrant compensation. As a result, accident rates due to employee fault shot up from 26.56% in 1887 to 41.26% in 1907.[99] In a rather damning verdict on the early German workers' compensation system, Villard (1913: 19-20) states that the system was "over-glorified and exaggerated" in its accomplishments, yet the reality is that it operated inefficiently conferring rewards on indolent and fraudulent workers. He concludes that in many respects, poor draftsmanship of the law and administration served as a model of what to avoid when implementing a social insurance programme for industrial accidents. Friedensburg (1911) also wrote on the practical results of Germany's workers' compensation system. Citing various examples, he observes that the system had many loopholes that rendered it vulnerable to abuse and it contained virtually no incentives on the employee side to minimise claims.[100] Consequently, statistics of reported accidents soared from 100 159 in 1886 to 662 321 by 1908. Kleeberg (2003) gives further insight into the performance of the German workers' compensation programme. His findings largely correspond with those of Villard and Friedensburg. For example, he observes that while Bismarck's accident insurance scheme

[99]This suggests that even though the German system was risk rated, incentives to prevent accidents only existed on the employer side with nothing on the employee side. The system did not contain sufficient incentives for workers to prevent accidents or to return to work quickly following an injury. The system created a mentality of compensation entitlement in terms of which any form of injury, serious or not had to be compensated.

[100] One area where abuse was widespread was in claims payment where even frivolous and vexatious claims were paid. Friedensburg cites one particularly bizarre case where a farmer injured on his way to church submitted a workers' compensation claim arguing that the injury occurred in the course of employment. Being a farmer, he argued that he was going to church to pray for rain and this qualified his accident as arising in the course of employment as the trip to church was for the purpose of his profession. There was a clear effort at the time to overstretch the boundaries of the phrase "in the course of employment" in order to accommodate every claim lodged. Part of the liberal approach to claims payment was born out of fear of the socialists. The belief was that by making every effort to pacify workers, it would weaken the socialists and in the process, the workers would be bought off the idea of a revolution.

succeeded in spreading losses (as any insurance scheme should), it was however, not successful in reducing the overall number of accidents, mainly due to a poor incentive structure on the employee side.[101] It is also possible that the high expectation to get compensation also pushed the number of reported accidents up.

From the foregoing, two main conclusions on the practical results of the social insurance scheme against industrial accidents in Germany are possible. Firstly, when measured against the objective to weaken support for the socialists, the scheme was a failure. Its introduction did not erode the gains of the socialists among working class voters. It would even appear that fear of the socialists continued to dog the administration of the scheme leading to over-generous claim settlements just to appease the working class. However, some early authors partly attribute the lack of outright hostility against the state to the adoption of the accident insurance scheme and to the extent that this argument is valid, then there was some measure of success in that regard[102]. Secondly, on the question of efficiency, results are rather mixed. The scheme managed to spread the cost of accidents and in rehabilitating injured workers by significantly reducing the rate of accidents that resulted in fatalities and total disability. However, when it comes to the issue of reducing overall accident rates, the scheme had serious incentive problems, especially on the workers' side and this may have induced moral hazard behaviour. That notwithstanding, developments in Germany on industrial accident compensation were revolutionary in as far as they were replicated albeit with various modifications, worldwide[103].

[101] However, Kleeberg further argues that the scheme was successful in reducing fatality rates, citing that when industrial accident insurance started in 1886 24.91% of all accidents resulted in death, 15.92% in total disablement, 38.88% in partial disablement and 20.29% resulted in temporary disablement. By 1911, the situation had changed to 8.28%, 0.59%, 32.49% and 58.64% respectively.

[102] However, this argument remains questionable in as far as there is no evidence showing the extent to which the adoption of social insurance prevented total alienation of workers from the state.

[103] Willoughby (1898) identifies four broad categories of workers' compensation systems that emerged from 1884 namely: (1) Systems where the state was a dominant player and insurance against industrial accidents was compulsory. This approach featured in Germany, Austria and Norway. (2) Systems where state insurance against industrial accidents was voluntary. This system existed in Belgium, Italy, France and Holland. Under this approach, instead of making insurance mandatory, employers had incentives to insure their workers through a state agency. One of the incentives provided was to absolve employers of liability if they purchased insurance from the state entity. This was the case in Holland and Belgium (Frankel & Dawson, 1910). (3) System where insurance was available from privately owned institutions controlled and assisted by the state. The private institutions originally provided various types of social assistance on a mutual basis at a community level and as their popularity grew, states felt compelled to introduce regulatory frameworks to control their activities. Examples of these social institutions include the Friendly Societies in Britain and the *Societes de Secours Mutuels* of France, Belgium, Italy, Switzerland and other continental European countries. (4) Systems of compensation where there was no state interference of any kind used in specific industries such as railway, mining and others

4.3 Workers' Compensation in England

In England, the development of rules for compensating injured workers passed through three distinct phases (Parsons, 2002). The first was the common law phase when compensation depended on proof of fault. During this era, it was virtually impossible for injured workers to get compensation. A second phase was that of employer's liability law that involved various attempts to modify the common law through the incorporation of rules governing the liability of an employer. This era was characterised by an increase in litigation against employers, but very little changed insofar as injured workers getting compensation was concerned. A third and final phase is the workers' compensation era that saw the removal of fault as a precondition to compensation. Inhibitions of the common law and employer's liability discussed in Chapter 2 saw many injured workers in England go uncompensated. As a result, most injured workers relied on mutual assistance before the formal adoption of workers' compensation. This assistance was provided through Friendly Societies which were voluntary mutual insurance institutions organised by the middle and working classes to assist their members in times of hardship (Willoughby, 1898). There was no state involvement in the organisation and operation of these institutions. Nowhere in the world were these institutions more organised and widely used than in England.[104] As the number of Friendly Societies increased, it soon became clear that the state needed to regulate their activities given that they handled and managed the public's money. In pursuance of this objective, the Rose Act became law in 1793 to confer legal personality status on Friendly Societies on registration.

Between 1771 and 1818, there were more attempts to get government involved in the provision of insurance without success – unlike in Germany, people in England were generally wary of the state's intentions. In particular, they resented the prospect of the state capturing social institutions for purposes of introducing state socialism (Willoughby, 1898).[105] It is also possible that the success of Friendly Societies strengthened the resolve to resist any form of state

in countries such as France, Belgium and England. In some countries, notably France, mixed systems existed, comprising state insurance institutions, mutual aid societies and private insurance.

[104] By 1874, Friendly Societies in England and Wales were estimated to be around 32 000 with a total membership of more than 4 million (Willoughby, 1898: 241).

[105] Fear of state socialism was also evident in Norway soon after it adopted compulsory workers' compensation insurance in 1894. The decision to have a state monopoly as provider of insurance turned out to be very unpopular because people were fearful of state socialism (Frankel & Dawson, 1910).

interference. Unlike in Germany where socialist philosophers did most of the work that paved the way for the smooth acceptance of state institutions, the opposite was the case in England where classical economists were spreading the doctrine of *laissez-faire* that favoured limited state intervention. On this basis, it is not surprising that the adoption of workers' compensation in England was a controversial process compared to Germany.

As the plight of injured workers became a topic for public debate, it was only a question of time before government acted on the matter. The first decisive action taken by government was the enactment of the Employer's Liability Act in 1880 whose main purpose was to reform the common law. The expectation was that this would make compensation more accessible to injured workers. While this was going on, Germany introduced its radical social insurance programme that immediately appealed to the rest of Europe and beyond. On the other hand, attempts to reform the common law by legislation in England, and other parts of the British Empire, were in large part a failure.[106] This made the adoption of workers' compensation inevitable. Consequently, England passed the Workmen's Compensation Act in 1897. Passage of this Act was largely due to the efforts of Prime Minister Joseph Chamberlain, and his conservative government. This development was not without its critics though. Some argued that the Act would undermine Friendly Societies and burden employers, making them less competitive (Barlow, 1901). As will be seen later, the same argument emerged in the United States of America when the adoption of workers' compensation started to dominate debates on occupational health and safety.

The Workmen's Compensation Act of 1897 applied to specific industries only, notably manufacturing, mining, quarries, railways, engineering works, as well as some types of construction projects (Frank, 1953). These industries had one thing in common – they were hazardous as judged from accident high rates associated with them. In 1900, agriculture made the list of occupations covered and by 1906; virtually all occupations fell under the workers'

[106] Under the Employer's Liability Act of 1880 which was the main instrument used to reform the common law, it was found by some studies that only seven out of hundred injured or killed workers were compensated (Frankel & Dawson, 1910).

compensation system.[107] The 1897 Act imposed a duty was imposed on employers to pay compensation to injured employees regardless of fault.[108] However, in order for compensation to be paid, the injury needed to be by accident.[109] A notable difference between the workers' compensation introduced in England and that seen in Germany was that in England, it was not compulsory for an employer to buy insurance.[110] However, in the majority of cases employers did buy insurance from insurers of their choice provided they could afford the premiums.

Another important feature of the Workmen's Compensation Act of 1897 is that it never outlawed common law claims against employers (Weber, 1902). The option to sue the employer at common law continued to co-exist alongside workers' compensation. Thus, where an employee got injured in the course of employment, three remedies were available, Firstly, the employee could bring an action against the employer at common law if the accident was due to the personal negligence of the employer or negligence of anyone to whom the doctrine of vicarious liability applied (vice-employers). Secondly, the employee could sue such employer under the Employer's Liability Act of 1880. Finally, the employee could claim statutory compensation under the Workmen's Compensation Act (Van Doren, 1918). There was a clear inclination towards ensuring that injured employees received compensation if one considers how these options were structured. In the event that an employee chose to sue the employer and was unsuccessful, the employee had the option to ask the court to assess compensation in terms of the Workmen's Compensation Act instead. Hence, failure of the common law action was not a bar to the recovery of compensation under the Workmen's Compensation Act. However, where the employee opted for worker's compensation, the right to sue the employer at common law fell away (Frank, 1953).

[107] Compared to Germany, the expansion of the workers compensation system to cover the rest of the workforce was rather slow. It took Germany only three years from the date of its introduction for her scheme to cover virtually all workers, while in England the same process took nearly ten years.

[108] The conceptualization of this duty was so broad that the only defences available to employers were either to show that the accident did not arise out of and in the course of employment, or that it was due to serious and willful misconduct on the part of the injured employee. Outside of these two defences, the employer was liable to pay compensation.

[109] In *Fenton v J. Thorley & Co Ltd [1903] A.C. 443 at 448,* Lord Macnaghten defined an accident as "an unlooked for mishap or an untoward event which is not expected or designed". Implicit in this definition is the fact that an accident must be a fortuitous occurrence where it is possible to ascertain a specific time and place.

[110] However, when the Workmen's Compensation (Coal Mines) Act 1934 replaced the 1914 Act, it made it compulsory for employers in this industry to buy insurance for their workmen's compensation risks.

Unlike the German social insurance system that gave employers virtually no choice on issues of whether or not to buy insurance, the British Act of 1897 gave both employers and employees several options. The Act gave employers the option to insure or not to insure their workmen's compensation risks and employees could also choose whether to claim under the Act or to sue the employer at common law. Of course, where the employer chose not to insure at all, the security of workers in the employ of that employer was questionable to the extent that an obligation to compensate could arise but the employer would fail to fulfil it due to insolvency or other financial constraints. In addition, it was also possible for an employer to contract out of the Workmen's Compensation Act if it planned to join another scheme certified by the Registrar of Friendly Societies as being "on the whole not less favourable to the general body of workmen and their dependents" than provisions of the Act (Wilson, 1901:23). Thus, an employer could contract out of the Workmen's Compensation Act as long as the regulatory authorities were satisfied that an alternative scheme the employer sought to join was comparable in operation and benefits to the system under the Act. Hence, there was considerable choice and flexibility under the British system compared to its German counterpart.

The adoption of statutory compensation in England triggered similar developments in other parts of the British Empire along the same lines seen after the enactment of the Employer's Liability Act in 1880. Workers' compensation schemes along the lines of England's 1897 scheme started to appear in territories with historical ties with England. For example, the New Zealand and South Australian Workmen's Compensation Acts of 1900 were essentially modelled on the English Act of 1897 (Weber, 1902). Other workmen's compensation laws enacted elsewhere which were patterned on the English Act include Western Australia (1902), British Columbia (1902), Cape of Good Hope (1905) and Transvaal (1907) (Blanchard, 1917). The US initially followed the British model of statutory compensation (i.e. compensation without the obligation to insure), but later most states passed laws making it compulsory for employers to buy insurance against their workmen's compensation risks (Bradbury, 1917). In France, it has been argued that a combination of the English Workmen's Compensation Act

and a pending general election acted as catalysts to the adoption of workers' compensation in 1898 (Weber, 1902).[111]

A new Act passed in 1906 replaced the Act of 1897. The new Act extended coverage to virtually all occupations, including domestic workers (Frankel & Dawson, 1910). Additionally, the 1906 Act extended coverage for the first time to a limited number of occupational diseases. The diseases covered happened to be those that, by virtue of their direct connection with work, created a reasonable presumption of being accidents (Golding, 1922). Some of the diseases covered were anthrax, lead, mercury, phosphorous and arsenic poisoning (Van Doren, 1918). This was an unusual step in view of the fact that most of the workmen's compensation statutes existing in various countries at the time (inclusive of Germany) made no provision for coverage of occupational diseases. At this time, actions against employers for occupational diseases were virtually unknown. Occupational diseases emerged as a problem much later and for this reason, there is considerable variation among countries on how they incorporated diseases into their workmen's compensation schemes.

4.3.1 Comparison of the German and British Workers' Compensation Models

By the early 1900s, there were two main workers' compensation models that started emerge around the world – the German model, on the one hand, with centralisation and state involvement as its central features, and the British model built around choice and flexibility, on the other. Between them, they largely shaped the development of statutory compensation in Europe and beyond (Van Doren, 1918). These two systems also had several fundamental features in common. To begin with, they both placed a legal duty on employers to compensate their employees for accidents occurring in the course of employment.[112] In addition,

[111] However, the French workmen's compensation law had an unusual feature in that, instead of compelling employers to insure their employees against industrial accidents, the state guaranteed the payment of benefits (Weber, 1902). The state guarantee eliminated the risk of failure to pay accident benefits by an employer on such grounds as insolvency.

[112] The question whether an accident occurred in the course of employment came before English courts on many occasions in the early 1900s. In *Moore v Manchester Liners Ltd [1910] A.C. 498;* Lord Loreburn held that an accident occurs in the course of employment if it happens while the employee is doing what a person employed in that job may reasonably do within the time during which he or she is employed and at a place where the employee may reasonably be expected to be during working hours. It was also held in *Gane v Norton Hill Colliery*

compensation under both systems was payable regardless of fault on the part of the injured employee. The only instances where an injured employee could be denied compensation was when injury was due to the serious and willful misconduct of the employee or where the accident causing the injury did not arise out of and in the course of employment. Another common feature of the two systems was that employers provided the funding.[113] Lastly, both systems at first covered work-related injuries only. Even though the German system emerged first, the British system was first to extend coverage to diseases in 1906. By as late as 1911, the Germany compensation system still did not cover occupational diseases (Sherman, 1917).

Beyond these similarities, the German and British statutory compensation systems had some important and notable differences. Firstly, the German industrial accident insurance law of 1884 made it compulsory for all employers to join an accident insurance scheme of the trade to which they belonged. Mutual insurance was the hallmark of the German system. By contrast, the British system did not make it mandatory for employers to carry insurance. Instead, employers had a choice to either bear the risk or insure against it. Furthermore, where an employer chose to insure, it could do so through the private market or by approaching a mutual association. As pointed out previously, private insurers had no role in insuring industrial accidents in Germany. Secondly, the government directly supervised workers' compensation in German unlike the British system where government involvement was very limited. Although commonly referred to as state insurance, this characterisation of the German system can be misleading because the role of the state was more of control and supervision rather than as insurance supplier. Thirdly, in terms of scope, the German compensation system was by far the most comprehensive comprising accident insurance, sickness and later, old age and invalidity. This partly explains why the scheme was administratively complex in its early

Co Ltd [1909] 2 K.B. 539 that where an injury and its cause or causes have been ascertained, the question whether such cause or causes amount to an accident within the meaning of workmen's compensation legislation is a question of law. In *Pope v Hill's Plymouth Company Ltd [1911] 5 B.W.C.C. 175,* an employee on his way home attempted to jump onto a moving truck in direct contravention of standing regulations. He slipped and died in the process. The House of Lords held that although what happened was an accident, the accident did not arise out of the employment since the risk that the deceased ran had no connection to his employment in any way, shape and form. Since the employee's death did not arise out of employment, his dependents were also not entitled to recover compensation.

[113] However, the operational mechanics of the German system were rather complex. For example, following an industrial accident, care for the injured worker first thirteen weeks of disability did not come from the accident insurance scheme but from a fund known as the Sickness Fund financed by workers and employers on a 2: 1 ratio respectively. It was when disability extended beyond thirteen weeks that the accident insurance fund started to be involved (Bradbury, 1917).

years because there was a clear imperative to ensure that the three pillars of the system are properly integrated and coordinated to avoid overlaps. Fourthly, the systems differed on the key question of whether an injured employee could sue the employer. Under the British system, injured employees had the choice to sue the employer at common law; sue the employer in terms of the Employer's Liability Act of 1880; or to claim statutory benefits and forfeit the right to sue the employer.[114] These options did not exist under the German system.

England operated under a workers' compensation system for nearly fifty years until its replacement by the current system introduced in 1946. Over this period, the workers' compensation system attracted several criticisms, notably its failure to reduce the amount of litigation between employers and employees; lack of incentives to promote safety and cost of the scheme- some considered the scheme as too expensive vis-a-vis the benefits it paid to injured workers, among others (Frank, 1953). As regards the first criticism, it important to note that, to the extent that the right to sue the employer remained, it was inevitable that litigation would remain high. As regards the last criticism, some studies of the British system found that for every £100 received by insurers in premium, they paid £53 in benefits to injured workers, which was significantly less than the £78 paid by mutual insurance associations for the same level of premium (Frank, 1953).[115] The current system under the National Insurance (Industrial Injuries) Act of 1946 that came into operation on 5 July 1948 replaced the workers' compensation system. This Act was a product of the post-World War II William Beveridge reforms.[116] The current British system for compensating injured workers is a product of these reforms. Today an employee who gets injured at work in the United Kingdom has access to two types of benefits. The employee can claim a no-fault social security benefit from the state under the industrial injuries compensation scheme and in addition, the employee can claim damages from the employer provided liability in tort is proved. In turn, the employer looks for

[114] The same approach existed in Holland, Italy, Sweden and Switzerland. These countries allowed the purchase of insurance from private insurers but this did not relieve the employer from liability. However, in Belgium, Denmark, Finland, France, Italy, Russia and Switzerland if insurance came from a government-approved mutual society the employer was relieved of further liability towards injured employees (Frankel & Dawson, 1910).

[115] Under the British workmen's compensation system, employers who chose to buy insurance obtained it from private insurers or mutual associations. The only incentive that matters the most to private insurers is profit. Part of the reason behind the increase in litigation was the practice by some insurers to pressurise injured workers into accepting unfair settlements. When the Workmen's Compensation Act of 1897 was passed, it was followed by a dramatic fall in tort claims but by the 1930s, these claims were on the rise (Parsons, 1999).

[116] The Beveridge Report published in 1942 played a key part in the development of the welfare state in Britain. Titled *Social Insurance and Allied Services,* the report contained a series of policy recommendations, some of which led to implementation of National Insurance and the creation of the National Health Service (NHS).

indemnification from its employer's liability insurer.[117] These two systems of redress are not exclusive, hence an employee can claim under both. A further point of interest is the proportion to which the two remedies contribute to the total compensation paid to injured workers. By the early 2000s, estimates indicated that about 48% of all benefits paid to injured workers came from the industrial injuries scheme while employer's liability insurers contribute 52% (Parsons, 2002). In this regard, the UK is rather unique because, in most countries where workers' compensation exists alongside common law liability, workers' compensation accounts for a greater proportion of benefits paid to injured workers.

4.4 Origins of Workers' Compensation in the USA

The controversy surrounding the adoption of workers' compensation in England pales in comparison to the situation that unfolded in the United States of America. In most states, workers' compensation statutes passed in the early 1900s faced challenges in the courts on grounds that they were unconstitutional. Two key factors led to the fierce resistance to the statutory compensation principle witnessed across the US. The first draws from the central tenet of the workers' compensation principle itself in terms of which liability is regardless of fault. American legal convictions were totally against the imposition of liability on any person in the absence of proof of fault. The principle of liability without fault found further support in the judiciary whose attitude towards statutory compensation was nothing short of reactionary and hypocritical (Van Doren, 1918).[118] A second reason that contributed to resentment of statutory compensation in the USA was its association with compulsory participation and involvement of the state as insurance-provider.[119] A cursory look at case law that emerged around this time shows a clear pattern – any workers' compensation statute passed that included the principle of compulsory participation had a very high probability of failing the constitutionality challenge in the courts. On the other hand, if the statute gave workers the

[117] In terms of the Employer's Liability (Compulsory Insurance) Act of 1969, all employers (with few exceptions) conducting business in in the United Kingdom are required to have employer's liability insurance.

[118] The idea of liability without fault was not new to American jurisprudence since it already existed in areas such as libel and slander, trespass and vicarious liability of employers (Van Doren supra).

[119] Sentiments against compulsory participation in schemes of any kind were very strong during this period. For example, the first US railway companies to arrange an insurance scheme for the benefit of its workers was the Baltimore and Ohio Railroad Company in 1880. It was compulsory for all company workers to join the scheme. Unsurprisingly, the arrangement attracted a lot of criticism, forcing the state of Maryland to revoke the company's charter in 1888 (Willoughby, 1898).

freedom to choose, its chances of avoiding a constitutional challenge were significantly enhanced (Van Doren, 1918). At this time, state involvement was seen as a hallmark and manifestation of socialism, something that many in America viewed as a societal evil. Therefore, even in the face of escalating and often shocking accident rates, especially in railroad construction[120], which yielded no compensation in a majority of cases, there was a mixture of scepticism, hostility and paranoia against workers' compensation across America between 1884 and 1900. Some critics predicted that forcing employers to pay compensation without fault would drive them to bankruptcy while others predicted that adoption of workers' compensation would lead to capital flight from states which adopted this to those without it (Van Doren, 1918). Given this background, it is hardly surprising that America was the slowest country in the western hemisphere to adopt workers' compensation.

So strong was the opposition to statutory compensation in America that even trade unions were initially opposed to the idea, preferring instead the experiment to reform the common law (Fishback & Kantor, 1998). In particular, unions wanted the removal of the three defences of common employment, contributory negligence and *volenti non-fit injuria* from the sphere of employment accidents. However, this did not stop some industries from adopting the compensation principle. Railroad Employees' Relief departments were some of the early

[120] The situation on occupational accident in railroad construction was so bad across the US that both President Benjamin Harrison and Franklin Roosevelt made specific reference to it in their 1889 and 1908 Presidential Addresses respectively (Henshaw et al, 2007). Some studies found that railroad accidents in the US produced four times as many fatalities per year than in Britain (Weber, 1902). Nevertheless, no incident illustrates how dangerous railroad construction was in the US than that of young men from Ireland. In June 1832, 57 young Irishmen arrived in the US looking for work. The men were hired by Phillip Duffy, a railroad contractor to build what later became the Philadelphia-Pittsburg railroad. At the time, railroad construction was so dangerous that no native-born American wanted to take it up as an occupation. The only people prepared to risk it were migrants from Ireland, and other countries. They were a source of cheap labour and were looked-down upon as second-class humans. Their desperation meant they could be under-paid and be subjected to numerous other unfair labour practices by railroad construction bosses. In 1832, America was at the height of the industrial revolution and railroad construction was an integral part of it. Within eight weeks of taking up employment, all the 57 Irishmen were dead, but only eight of these deaths appear in official reports with cholera cited as the cause. After the discovery of an ancient file in the National Archives in Philadelphia suggesting that the 57 Irishmen probably died of sinister causes and were buried in a mass grave, a team of academics from the University of Philadelphia sought to find out what actually happened. They were joined by other experts, among them Dr. Janet Monge, an anthropologist and geo-physicist, Dr. Tim Bechtel. The research started in 2009 and ended in 2012. Among other findings, the study found that some of the remains showed signs of gunshots to the head and other forms of trauma, suggesting that they died at work or at the hands of vigilantes. The research team managed to identify only one of the 57 men as John Rudy. His remains were exhumed and taken to Ireland where they were reburied in 2012 (This narrative was adopted from a TV documentary titled "Death on the Railroad" televised on Wednesday 28 September 2016 from 19:55 to 20:55 on the Education Channel 190 of South Africa's Digital Satellite TV. The channel has since ceased programming).

pioneers of the compensation principle in the US (Willoughby, 1898). These organisations provided insurance for injured workers. The first Railroad Employee Relief department to provide compulsory insurance for its injured members came into being through efforts of the Baltimore and Ohio Railroad Company in 1880. Later, the Pennsylvania Railroad Company followed suit in 1886, but participation was not compulsory. In 1889, the Chicago, Burlington and Quincy Company joined with four other companies to form a common voluntary employee relief department along the lines of the Pennsylvania Railroad Company initiative (Willoughby, 1898). These schemes were largely voluntary and only a small proportion of the total railroad industry workforce chose to participate in them.[121] This low uptake should, however, be understood in its proper context. During this time, most people who worked in the railroad construction industry across America were migrants whose rights were limited and may therefore have had little incentive to join these schemes as a result. These workers were a source of cheap labour and most could be fired at any time without any recourse for redress. It was only in 1909 when the American Federation of Labour shifted its position and started warming up to the idea of workers' compensation that a significant turning point arrived.

Even though America's occupational accidents record was in some industries, especially railroad construction, alarming, this was a less topical issue in the public domain compared to Europe. Why this was so is debatable. Weber (1902) provides two possible reasons for this – firstly, he argues that because of differences in workers' economic conditions in America and Europe in terms of which wages were significantly higher in the former compared to the latter, it implied that an injury at work had far-reaching socio-economic consequences on workers in Europe compared to those in the USA. Secondly, he explains the apparent lack of public interest in the subject of industrial accidents in the US compared to Europe by citing the differences in the legal philosophies between the two regions. In the US, the philosophy that employees assume responsibility for risks associated with the work they choose to do had stronger appeal than in Europe. None of these possible explanations is entirely satisfactory. That the topic of high accident rates did not capture the public's attention is not surprising. It is possible that since railroad construction mostly relied on migrant labour, few people cared

[121] By 1895 the railroad industry in the US employed 785 034 people of whom only 102 270 (or 13%) belonged to an employee relief scheme (Willoughby, 1898).

about the plight of these workers anyway since they were second-class residents. What would have been surprising is if their plight had become a topic of public debate.

As indicated at the beginning of this section, the fight against the introduction of compulsory compensation of injured workers by employers independent of fault in America took the form of constitutional challenges. The first state to pass a law that incorporated the workers' compensation principle was Maryland in 1902 (Blanchard, 1917). Application of the Act was limited to mining, quarrying, steam, rail and some selected municipal services only. A commissioner was responsible for administering the compensation process. Compensation was only payable from the scheme created by the Act and the employer got protection from liability. Undoubtedly, the most contentious aspect of the Maryland law was the provision that purported to oust the jurisdiction of the courts on matters falling under its scope. Consequently, the law did not last for long – it was declared unconstitutional in 1904 (Rubinow, 1913). Other states that passed compensation laws that were held to be unconstitutional include Montana (1909), New York (1910), Wisconsin (1911), Illinois (1914), Kentucky (1914), Texas (1915), among others (Johnsen, 1922; Van Doren, 1918). Even the Federal Employer's Liability Act of 1906 suffered the same fate. Eventually, the adoption of statutory compensation across America accelerated from 1911 onwards and by 1930, all states, except Arkansas, Florida, Mississippi and South Carolina, had passed workmen's compensation legislation (Fishback & Kantor, 1998). **Appendix 1** shows the dates of the introduction of workers' compensation in each American state between 1902 and 1948, compared to other regions of the world.

Academic opinion is divided on the factors behind the shift in attitude towards statutory compensation across America, especially after 1910. Some argue that it was the enactment of the Workmen's Compensation Act of 1897 in England that marked the turning point in America inso faras the acceptance of state insurance against industrial accidents was concerned (Kleeberg, 2003). Others point to the change in legal thought, especially the acceptance of the notion that not all accidents at work have a basis in fault as the main factor that contributed to the adoption of the compensation principle (Rubinow, 1913). Yet another school of thought holds that the adoption of statutory compensation had more to do with changes in social and industrial conditions of the American working class, especially its increasing significance as a political force (Moore, 1901; Friedman & Ladinsky, 1967). In addition, some authors have

suggested that workers' compensation eventually became acceptable in America because there was a "unity of expectation" among all its key stakeholders – employers, employees and insurers - all of whom expected to gain something from the abolition of negligence liability (Fishback & Kantor, 1998: 309). Employers anticipated gains from workmen's compensation in the form of reduced uncertainty about the cost of accident payouts and overall industrial peace. Insurers supported the idea because it guaranteed them a large market provided government did not enter the fray as a supplier of insurance. Lastly, workers viewed statutory compensation as a better option to the common law rules on employer's liability that placed upon them the burden of proving that the employer was liable before they could qualify for compensation. Since this onus had historically proved intractable to discharge, workers saw in statutory compensation a more economical and risk-free avenue towards getting compensation.

Reasons for the eventual acceptance of statutory compensation aside, the schemes that emerged in the US were structurally and administratively diverse. A distinction exists between compulsory insurance of workers' compensation risks with a specific type of insurer on the one hand and compulsory participation of employers in a specific statutory compensation scheme on the other. Only a few states, namely, Nevada, Oregon, Ohio, Washington and Wyoming, had workers' compensation statutes that made it mandatory for employers to insure their workers' compensation risks with a monopolistic state fund (Johnsen, 1922). In a majority of states, the schemes that emerged allowed employers the freedom to insure with a state fund, private insurers, mutual insurers or even to self-insure.[122] Thus, very few statutory compensation laws passed at this time made it compulsory for employers to participate.[123] The schemes also varied in scope with a minority of states notably, Alaska and Kansas, opting to restrict coverage to occupations deemed to be too hazardous only, while a majority of states chose to cover all occupations with few exceptions. By far the widest scheme in terms of occupations covered emerged in New Jersey in 1911. In addition to commonly covered occupations, it also covered the otherwise commonly excluded occupations of domestic and farm work (Van Doren, 1918).

[122] Today the only US state where employers can elect to buy workmen's compensation insurance or to self-insure is Texas (Fortson, 2005).

[123] Some of the few state which had compulsory workmen's compensation Acts include Maryland, Idaho, Utah and Ohio (Van Doren, supra)

From the foregoing, it is evident that the development of workers' compensation in the USA was an acrimonious, slow and difficult process on a scale not seen anywhere in the world. Three distinct phases that make up this period are identifiable. Firstly, there was the era of total hostility and paranoia against everything to do with compulsory statutory compensation from state involvement to the notion of imposing a duty on employers to pay compensation even for accidents for which they were not to blame. There was resentment of state involvement in the affairs of business. Critics argued that such interference constituted an unnecessary interference with people's lives and choices, bordering on socialism. Notwithstanding the existence of liability without fault in other areas of American law, extension of the same principles to workplace accidents was somehow fiercely resented (Friedman & Ladinsky, 1967). Next came the era of constitutional challenges to all workers' compensation laws that embodied the principle of compulsory participation. Opposition to this idea found a willing ally in the form of the American judiciary- it too did a lot to frustrate most of the early attempts to introduce statutory compensation in line with developments elsewhere in the world, including Europe. Lastly, came the era of rapid adoption of statutory compensation across all American states starting in 1910 that saw most states passing a statutory compensation law by 1948. Once American legal thought shifted and started to accept the idea that occupational accidents are a cost of production that must be internalised, the adoption of workers' compensation accelerated and constitutional challenges suddenly gave way to broad acceptance of the principle.

4.5 Origins of Workers' Compensation in South Africa

The mining industry pioneered compensation in South Africa when it decided to form the Rand Mutual Assurance Company in 1894. The company was the brainchild of the directors of three mining companies – Simmer and Jack Gold Mining Company Limited, Geldenhuys Estate and Gold Mining Company Limited, and Jumpers Gold Mining Company Limited who decided to establish a mutual insurer to compensate their workers injured in the course of employment. What motivated these directors to adopt this measure is unclear. One view has it that the boards of the three companies decided to implement mutual insurance after they realised that the premiums charged by commercial insurers to provide cover for occupational injuries sustained by their workers in the course of employment were rather excessive (Lang, 1986). Another

has it that the mining industry was by this time already struggling with the problem of occupational accidents and was not satisfied with the common law results which saw many injured workers going uncompensated (Garzarelli, Keaton-Stolk & Shoer, 2008). Whatever the reasons, an important aspect to note about the adoption of workers' compensation in South Africa is that it predates the passing of the first Workmen's Compensation Act in Britain in 1897. The measure taken by the mining industry in 1894 meant that it was largely uninvolved in developments that eventually followed to develop a statutory compensation scheme for other industries since it already had its own separate arrangement. However, legislation that came after 1894 took into account the existence of the Rand Mutual by following the UK example and treating the Rand Mutual as a workers' compensation insurer in the 1900s. The UK had passed legislation imposing workers' compensation obligations on employers who then had the choice to buy insurance against these risks. Mine owners were "employers individually liable" and thus had freedom to arrange their own insurance or to retain the risk.

Before the Union of South Africa in 1910, each of the four South African provinces had its own legislation and arrangement for compensating workers injured from industrial accidents. In the Cape Province, there was the Workmen's Compensation Act 40 of 1905 patterned along the lines of the British Workmen's Compensation Act of 1897, Transvaal had the Workmen's Compensation Act 36 of 1907 and Natal had the Employer's Liability Act 12 of 1896. With the formation of the Union of South Africa, the passing of legislation at national level became inevitable. After the Anglo-Boer War, it was realised that a number of miners had died of silicosis that brought occupational diseases to the fore. In 1911, an important development took place. From the time commercial gold mining began in the Witwatersrand region, it soon became clear that the biggest challenge facing the mining industry was not that of occupational injuries, but occupational diseases especially those which impaired the lungs such as silicosis (formerly phthisis), and later referred to as pneumoconiosis. By the early 1900s, the problem had reached crisis proportions (McCulloch, 2011). It was therefore only a question of time before legislation on this problem came into being. This eventually came in 1911 when the first Miners' Phthisis Act 34 was passed. The enactment of this Act was significant in that it marked the emergence of compensation for occupational diseases in the mining industry as a separate legislative and policy area from the generality of other economic sectors, a position that endures today. Since 1911, it has been a feature of the South African compensation system that occupational diseases in the mines are the subject of separate legislation and funding

arrangements from the general industry. No serious attempt has ever been made to alter this position even though it is fraught with administrative and coordination difficulties.

Three years after the enactment of the Miners' Phthisis Act, another milestone arrived in 1914 with the promulgation of the first national Workmen's Compensation Act after the 1910 Union of South Africa.[124] This Act followed the footprint of the British Workmen's Compensation Act of 1906. It provided for the payment of compensation for all occupational accidents arising out of and in the course of employment provided the accident be not due to the serious and willful misconduct of the employee. A key feature of the 1914 Act was that it gave the injured employee the right to choose between suing the employer at common law and claiming statutory benefits from the same employer but the employee could not avail himself or herself of both options (Nathan, 1935). In terms of Section 38 of the Act, courts held that the same position applied in cases where a third party caused the injury to an employee– acceptance of statutory benefits extinguished the common law action against the third party.[125] In addition, and in line with its British origins, the 1914 Act did not make it mandatory for employers to insure their workers against occupational accidents. It merely created an obligation to pay compensation and placed it on the employer. Each employer had the discretion to purchase insurance or to retain the risk. For the mining industry that had already formed a mutual insurance company, this became the approved insurer.

The Workmen's Compensation Act of 1914 governed compensation for occupational injuries in all industries except those specifically excluded. In 1917, the Act saw an amendment to incorporate coverage of certain industrial diseases. It is worth pointing out that, legislation providing for the payment of compensation for industrial diseases in mining was already in existence. This meant that henceforth, two separate frameworks of compensation for industrial diseases emerged – one for the mining industry beginning with the Miners' Phthisis Act of 1911 and the other for the general industry introduced by the 1917 amendment to the Workmen's Compensation Act of 1914. Thus, the 1914 Act was broader in its scope to the extent that it provided for compensation of both industrial injuries and diseases while the

[124] Workmen's Compensation Act 25 of 1914
[125] *Wagenaar v Thomas 1930 AD 465*

legislation targeting mining specifically focused on industrial diseases. Since occupational injuries in mining did not have their own separate legislation like diseases, they fell under the general industry legislation. The focus of the Workmen's Compensation Act was accidents not diseases. Thus, in order for a disease to yield compensation, it first had to pass the test whether it was an accident or not. Only when a disease passed this test in terms of the Act was compensation paid. However, a major weakness of the 1914 Act was its failure to make it compulsory for employers to purchase insurance for their workers' compensation risks. This meant that the position of injured workers under the Act, as was the case in England, remained insecure because an employer could become insolvent and fail to honour its statutory obligations in the process, leaving injured workers without any recourse.

By 1930, the need to make insurance of workers' compensation risks compulsory was widely acknowledged by all stakeholders. When the Workmen's Compensation Act of 1934 repealed and replaced the Workmen's Compensation Act of 1914, the purchase of insurance through the private market became compulsory. Only employers who entered into approved alternative schemes were exempted from the requirement to buy insurance (Nathan, 1935). The 1934 Act introduced other important changes in addition to making insurance compulsory. One of these was the total abolition of the employee's right to sue the employer under the common law in respect of injuries or diseases sustained in the course of employment. In terms of this change, workers' compensation under the Act became the sole and exclusive remedy for all injured workers.[126] Unlike England where there was a separate Employer's Liability Act, in South Africa the decision taken was to incorporate employer's liability into the Workmen's Compensation Act. The Act made provision for the payment of increased compensation in circumstances where the accident gave rise to common law liability. It incorporated the Employer's Liability reforms of 1880 in England into its provisions. Thus, if the accident was due to the personal negligence of the employer or vice-employers which included senior managers (reforming the common-employee defence) or where the injury resulted from a patent defect on plant, machinery or premises (reforming the *volenti* defence) increased compensation could be claimed. It is important to note that the common law notion of the

[126] This is referred to as the exclusive remedy principle and is a common feature of workmen's compensation systems in many countries today. One such country is the United States of America where workmen's compensation laws of virtually all states generally do not allow workers to sue employers for injuries or diseases contracted in the course of employment (Leigh & Robbins, 2004).

contributory negligence defence remained for claims for increased compensation. The net result of this addition is that the South African workers' compensation system has two components. The first deals with normal compensation that is payable regardless of fault on the part of anyone. Under this component, compensation only becomes unavailable when the accident causing the injury to the employee did not arise out of and in the course of employment or was due to the serious and willful misconduct of the employee.[127]

At face value, this component has all the hallmarks of a social welfare arrangement, but when stripped of semantics, it is nothing but compulsory personal accident insurance of workers paid for by the employer. Although the employer pays the contributions, it does not necessarily follow that the ultimate cost falls on the employer as well. Instead, the contributions are internalized as a cost of production through the employer's pricing policy and other mechanisms such as liability insurance. The second component of the South African workers' compensation system is that providing for payment of increased compensation. This component uses principles of employer's liability insurance.[128] Thus, the payment of increased compensation was and remains premised on proof of fault on the part of certain individuals specified in the Act. Therefore, in aggregate, the South African workers compensation system for the general industry combines no-fault compensation (personal accident insurance) and increased compensation paid on proof of fault (employer's liability insurance).

A further change introduced by the 1934 Act concerned injuries caused by third parties. Under the Act, an employee injured in the course of employment due to the conduct of a third party; (not the employer) could claim workers' benefits and in addition, pursue a common law claim against such third party. By implication, this change also reversed the decision reached in

[127] The 1934 Act defined "serious and willful misconduct" to include conduct such as drunkenness; contravention of any law or statutory regulation aimed to promote health and safety or preventing accidents which contravention is deliberate or done with reckless disregard of the terms of such law or regulation; or any other misdemeanor which the Commissioner having regard to all surrounding circumstances may regard as serious and willful misconduct' (Nathan, 1935).

[128] Typically, employer's liability insurance is designed to pay where an employer is legally liable to an employee who is injured, killed or contracts a disease in the course of employment. Claims for increased compensation depend on the same principle – the injured employee must prove that the injury suffered was due to the personal negligence of the employer or a member of the senior management or that the injury was due to patent defects in plant, machinery or premises to be successful. Unlike claims for normal compensation that paid on a no-fault basis, claims for increased compensation require proof of fault on the part of the employer of vice-employers. Such claims can be defeated by contributory negligence on the part of the injured employee.

Wagenaar v Thomas[129] where it was held that if an employee was injured in an accident caused by a third party, the acceptance of compensation under the then Workmen's Compensation Act of 1914 removed the right to sue the third party under the common law. Under the 1934 Act, the injured employee could activate both remedies. This is also the position today. The provision allowing common law claims against third parties only applies to cases where the injured employee does not qualify for increased compensation since, logically, any person whose negligence may have caused the payment of increased compensation was, by definition, an employer and faced no liability at common law. In other words, any person who qualifies for increased compensation is not a third party under Act. The South African workers' compensation system ushered in by the 1934 Act had features borrowed from the British model.

Critics of the 1934 Act, especially trade unions, were particularly dissatisfied with the involvement of the private insurance market in the insurance of industrial accident risks. Instead, they preferred a public state fund to play the role of insurance provider (Garzarelliet al, 2008). When a new coalition government that included the Labour Party came to power in 1941, one of its immediate tasks was to pass a new Workmen's Compensation Act.[130] This Act rid the South African statutory compensation system of most of its British features and replaced them with those borrowed from the German model. The Act abolished the system whereby employers were required to buy compulsory insurance from the private market. In its place, a state-owned and administered Accident Fund headed by a Workmen's Compensation Commissioner came into being and its function was to provide insurance to all employers against industrial injuries and diseases. This entity became the sole and exclusive agency for the payment of benefits to injured employees. Accordingly, every covered employer was required to pay contributions to the Accident Fund unless the employer exempted from doing so under the Act.[131] The contributions depended on each employer's payroll and were in turn, adjusted according to the risk posed by each trade and previous claims record of the employer (Schaefer & Heyne, 1972). Furthermore, the abolition of common law actions against employers remained as was the provision allowing increased compensation in cases where

[129] supra

[130] Act 30 of 1941

[131] For example, mining companies who had formed their own mutual insurance company in 1894 to insure their workmen's compensation liabilities were exempted from paying contributions to the Accident Fund. The same applied to the construction industry after it formed its own mutual insurer, the Federated Employers' Mutual in 1936.

injury to an employee was due to patent defects or negligence of the employer or vice-employer.[132] The Act covered most employees except those in military service, seamen, airmen, the self-employed and domestic workers.

The 1941 Act was repealed and replaced by the current Compensation for Occupational Injuries and Diseases Act 130 of 1993 (COIDA) which retained most of the key elements of the 1941 Act, including barring common law actions against employers and the provision for increased compensation.[133] Further to this, the Accident Fund was renamed the Compensation Fund. Overall, most the key provisions in COIDA were in the Workmen's Compensation Act of 1941.

However, the situation regarding claims for increased compensation warrants further comment in light of recent empirical evidence. These claims require the injured employee to prove fault on the part of parties mentioned in the Act. A random examination of the annual reports of the Accident and Compensation Funds where claims for increased compensation are reported shows that only a negligible number of these claims have actually been successful.[134] In the 1984/5 and 1986/7 annual reports of the Accident Fund, a total of 27 and 26 claims for increased compensation were filed and only two and five, respectively, resulted in a payout. The situation is no better under the Compensation Fund era where of the 69 claims for increased compensation made in 2010, only two, or less than three percent, resulted in compensation. Likewise in 2011, only three such claims yielded compensation. This begs the question - why are there so few claims for increased compensation which are successful? The answer lies in something history has already taught us. Since these claims require proof of fault, invariably

[132] It was held in *Looyen v Simmer & Jack Mines 1952 (4) SA 547 (AD)* that the provision allowing increased compensation to be paid in certain circumstance should be viewed as being remedial in character and must be therefore construed liberally in order to extend the scope of the remedy as much as the language used by the legislature would allow. However, while contributory negligence on the part of the injured employee was irrelevant for claims for normal compensation, it was relevant in claims for increased compensation where if proved it was a total bar to the recovery of additional compensation – *S.A.R & Harbours v Stoltz 1951 (2) SA 344 (AD)*. Also, it was held in *Grace v Workmen's Compensation Commissioner 1967 (4) SA 137* that the Apportionment of Damages Act 34 of 1956 does not apply to claims for increased compensation under the Workmen's Compensation Act 1941. This means claims for increased compensation are assessed on pure common law principles of negligence that do not recognise apportionment of blame and damages between a plaintiff and a defendant.

[133] Section 35 (1) of COIDA prohibits common law actions against employers by employees who are injured or those who contract diseases in the course of employment.

[134] Compensation Fund Annual Reports, Department of Labour, Republic of South Africa

negligence on the part of the employer or his senior personnel, history has shown that it is an inherently problematic proposition to discharge the burden of proof required to establish negligence in the context of occupational injuries and diseases. As discussed in Chapter 2, it is because of this reason that statutory compensation was widely adopted worldwide in the early 1900s. Clearly, there is something wrong with how this section is being applied and administered. It is difficult to envisage that it could have been the intention of the legislature when it designed the provision that it should yield such an insignificant number of payouts.

The introduction of statutory compensation was a direct response to a pressing need to provide compensation to injured workers at a time when they could not get compensation from any other source. Common law rules that rely on attribution of blameworthiness had proved to be inappropriate as a basis for funding compensation for industrial accidents. Even after subjecting them to a number of reforms in countries such as England and the United States of America, common law rules still fell short of expectations. Germany introduced statutory compensation to the world that was a new insight into the problem of funding compensation for industrial accidents. Workers' compensation brought a completely different doctrinal basis for analysing and understanding industrial accidents, compared to that under the common law. It acknowledges that accidents and subsequently, diseases, were incidental to the industrial process. Therefore, the only effective way to manage them is by internalizing and converting their associated costs into a cost of production in the same way as wear and tear or depreciation of other production assets like plant and machinery (Johnsen, 1922). The soundness of this insight is indisputable as evidenced by the fact that virtually all countries adopted workers' compensation as a principle and then adapted it to suit their individual idiosyncrasies.

4.6 Early Workers' Compensation Systems and Occupational Diseases

A common feature of workers' compensation schemes introduced in different parts of the world in the early 1900s was the exclusion of occupational diseases from coverage (Bowden & Tweedale, 2002). Most early writers on workers' compensation hardly mention occupational diseases at all suggesting that this was not a serious concern within the contemplation of early policymakers on statutory compensation. Accordingly, the British Workmen's Compensation

Act of 1897 only covered accidental injuries (Bradbury, 1917). It was only after the repeal and replacement of this Act by the Act of 1906, that a limited number of occupational diseases was included (Van Doren, 1918). By 1911, the German workers' compensation system was still restricted to industrial injuries only (Sherman, 1917). Perhaps the reason for this could be that since the German social insurance programme included a health insurance law passed in 1883, the imperative to include occupational diseases in the industrial accident insurance scheme was not as pressing as it probably was in other countries. In South Africa, outside of the mining industry, occupational diseases were only included for the first time in the workers' compensation system for the general industry in 1917. Inclusion of occupational diseases was a gradual process that gathered momentum after the passing of the Workmen's Compensation Act of 1934. By this time, developments on statutory compensation for diseases in the mining industry were at a very advanced stage.

One plausible explanation for the late coverage of industrial diseases under workers' compensation systems introduced in the early 1900s is that at the time the most pressing problem in many countries was that of industrial accidents. Most countries encountered occupational diseases as an occupational health issue much later.[135] Even before the introduction of workers' compensation, actions against the employer for occupational diseases at common law were virtually unknown. It was therefore logical that early workers' compensation laws did not provide for a problem that did not exist at that time. Even if the problem existed, it is doubtful that the common law could have yielded compensation. If occupational injuries by accident hardly resulted in compensation then actions for diseases would have had virtually no chance of success. After the introduction of statutory compensation, occupational diseases gradually began to gain recognition. With this, came the problem of interpretation of existing statutes to see whether diseases were actually covered. Most statutes provided coverage for injury caused by accident arising out of and in the course of employment. In addition, the word "accident" generally carried the meaning ascribed to it by Lord Macnaghten in *Fenton v Thorley & Company Ltd*[136] who interpreted it to mean an event or mishap which is not expected or designed. Implicit in this definition is that in addition to being something fortuitous, an accident must occur at a definite time and place, both of

[135] A notable exception to this rule is South Africa where occupational diseases associated with mining operations had reached crisis proportions by 1900.
[136] Supra

which must be verifiable (Van Doren, 1918). An accident is therefore an event whose distinct characteristics are suddenness and unexpectedness and where these are lacking, such event cannot be an accident. Only when a disease satisfied these conditions could it be regarded as an accident and therefore compensatable. Thus, where something happens as expected, courts in the early years of workers" compensation held that such an occurrence cannot be construed as an accident.[137] Occupational diseases, particularly those of a gradually occurring nature, do not conform to the profile of an accident originally as conceptualised under early workers' compensation statutes.

Not surprisingly, early case law supported the general view that diseases were not accidents. In *Eke v Hart-Dyke*[138], it was held that a disease is not a personal injury by accident within the meaning of the then Workmen's Compensation Act of 1906 unless it could be proved that such disease was contracted at a particular place and time or unless the disease was listed as automatically compensable in the Act. Cozens-Hardy MR put the law as follows:

> This Court and the House of Lords have been engaged again and again in discussing that word "accident" and so far as I am aware neither this Court nor the House of Lords has ever attempted to say or ventured to say that a mere disease without an accident nor attributable to something which may properly be called an accident, entitles a workman to compensation under the Act……..But I think all judges carefully abstained from lending colour to the suggestion that a mere disease which you could not say was contracted at a particular time, and at a particular place, by a particular accident was an accident which entitled a man to compensation.

Likewise, in the South African case of *Briesch v Geduld Mines*[139], it was held that an accident must be an occurrence capable of definite ascertainment as to its nature, time and place but it need not be due to an agency external to the injured workman. The same logic applied in US courts that denied compensation for diseases under statutory compensation arrangements, holding that a disease cannot be an accident.[140]

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[137] In *Pyper v Manchester Liners Ltd [1916] 2 K.B. 691,* a seaman employed as a stoker died from heat stroke, after being exposed to excessive heat for five days while sailing in the Red Sea. The sailor had had previously complained about the heat but was urged to continue working in order to help his co-workers. When his dependents tried to claim compensation, the court held that the seaman's death was not due to an accident since what happened to him is what might have been expected as opposed to a sudden and unexpected event.

[138] [1910] 2 K.B. 677

[139] 1911 T.P.D 707

[140] *Adams v Acme White Lead and Color Works [1914], 182 Mich. 157*; *Miller v American Steel & Wire Company [1916], 90 Conn. 349* and *Industrial Commission v Brown [1915], 92 Ohio St. 309*

As occupational diseases rose in recognition and significance, the problem of fitting them into the definition of accident as required by existing workers' compensation laws needed a solution. The solution came in the form of presuming employment as the cause of certain diseases to enable workers suffering from them to get compensation. This solution saw many workers' compensation laws being amended to incorporate a list of scheduled diseases which when contracted by workers were automatically compensable regardless of their actual cause. This approach solved the fundamental problem of having to resort to litigation in two ways. Firstly, the need to determine whether a particular disease arose out of employment fell away. Secondly, the need to adjudicate whether the disease arose from an accident also fell away. However, outside the scheduled diseases, the claimant only received compensation if he discharged the burden of proving that the disease arose in the course of employment. As time went by, lists of scheduled diseases got longer and longer to incorporate most common diseases. Thus, early workers' compensation arrangements designed to cover accidents not diseases; correctly excluded diseases from coverage.

4.7 History of Occupational Diseases in South African Mines

Mining started to emerge as an important industry following the discovery of diamonds first near Hopetown in 1867 and four years later an even larger discovery was made at Colesberg Kopje (later to become Kimberley) in 1871 (Lang, 1986). Next came the discovery of gold on the Witwatersrand, starting in 1885. These developments started a mining revolution in South Africa. Proceeds from the sale of diamonds financed the development of gold mines on the Witwatersrand (Lang, 1986). Lang further submits that from the very beginning, the evolution of the gold mining industry was characterised by several important factors that would continue to shape its development and fortunes in future decades. Firstly, the industry was heavily reliant on both skilled and unskilled migrant labour.[141] Secondly, gold mining was a capital as well as labour-intensive process. As the demand for labour increased, mining houses relied on

[141] Skilled labour mainly came from abroad, especially from England, while unskilled labour came through the migrant labour system. Unskilled labourers came from all over the Southern Africa region. By 1897, about fifty-percent of the unskilled workers on the Rand mines came from Mozambique, twenty-percent from the northern territories (Nyasaland (now Malawi), Southern Rhodesia (now Zimbabwe) among others) and the rest were from Bechuanaland (now Botswana), Swaziland, Natal, Transkei and the Cape Colony (Lang, 1886).

both domestic and foreign sources to meet this demand. Finally, the industry was highly cost-driven. So critical to the viability of the industry was the issue of keeping production costs in check that it was the main reason behind resuscitation of the Chamber of Mines in 1889 following its collapse in 1888 due to lack of support soon thereafter it became clear that among other problems facing the Chamber was that of occupational health. In the broader scheme of things, this was a blow to mining houses to the extent that all efforts to contain the problem of diseases also entailed incurring more production costs. By far the main occupational health issue to confront mine owners was a lung disease called miners' phthisis. After some debate and uncertainty within the medical fraternity, this disease was later renamed silicosis, a name that it retains today.[142]

Silicosis is an incurable disease. After diagnosis, the only option is to manage the disease through medical treatment and removal of the affected person from further exposure. There are three types of silicosis – chronic silicosis, accelerated silicosis and acute silicosis (Katz, 1994). The main difference among these types of silicosis lies in their latency periods.[143] Chronic silicosis has a latency period of at least ten years and in some cases, the latency period can be as long as forty years. Accelerated silicosis, on the other hand, has a latency period of between five and ten years. Finally, acute silicosis has the shortest latency period that ranges from a few weeks to five years. Whether a miner ends up developing chronic, accelerated or acute silicosis is a function of the level of exposure the miner faces – exposure to low concentrations of silica dust produces chronic silicosis while exposure to high concentrations of silica dust increases the risk of developing acute silicosis. Katz (1994) also submits that of these three types, chronic silicosis is the most frequently encountered and it is also the most difficult to detect as it can remain hidden for fifteen to twenty years before an X-ray can detect it. Its symptoms include shortness of breath, severe coughing, fatigue, loss of appetite, chest pains and fever. Silicosis is common in mining and construction industries.

[142] Today silicosis is a disease that is synonymous with gold mining where its rates are without parallel anywhere in the world.

[143] Latency period is defined to mean the time that elapses between exposure to causal agents of a disease and its manifestation.

The connection between silicosis and silica dust generated by drilling and blasting was quickly established and to solve the problem, water jets and sprays came into use in underground operations to improve ventilation (Burke & Richardson, 1978). However, these technologies had implications on production costs. It has been argued that the preoccupation by mining houses with keeping production costs low caused many of them to cut corners and downplay the magnitude of the silicosis problem in the early 1900s (Katz, 1994). In the same connection, in 1994, the Leon Commission of Inquiry into mine health and safety reported that concentrations of dust in gold mines were dangerous and had probably remained so for over fifty years. This finding cannot be reconciled with most of the reports of the Miners' Phthisis Boards between 1912 and 1940 that showed that mining companies were making consistent progress in the fight against silicosis (McCulloch, 2011). How committed mining houses were to improving health and safety is an issue at the centre of the current lawsuits against the whole industry. There is a long-held perception, especially within the organized labour movement, that mining companies have historically placed profits ahead of occupational health (Burke & Richardson, 1978).

By the end of the nineteenth century, the silicosis problem had started to receive increased attention from policymakers. The scale of the problem became apparent soon after the Anglo-Boer War of 1899 to 1902 (Katz, 1994).[144] Lang (1986), in his narrative of the History of the South African Chamber of Mines, also confirms this and indicates that by 1898, the Chamber was confronted by a new problem, that of miners' phthisis which was rapidly affecting underground rock drillers, in particular, a majority of whom were white men of Cornish origin.[145] The prevalence of the disease among white miners earned it the nickname "white death" (Katz, 1994). There is also evidence suggesting that the emergence of silicosis also coincided with the adoption of mining technologies such as steam-driven pumping engines, dynamite and machine drilling all of which incidentally increased the level of dust in

[144] According to Katz (1994), when war broke out, mining operations on South Africa's Witwatersrand were suspended, and resumed towards the end of hostilities in 1901. During the suspension, most rock drillers (a majority of whom came from Cornwall in England) went home. When mining resumed, it was discovered that over 200 rock drillers had died from silicosis. This led to the appointment of the Weldon Commission of Inquiry in 1902 to investigate the causes and scale of the problem of silicosis.

[145] Miners from Cornwall were also involved in early mining of gold, silver and copper in the US state of Montana. Other countries that employed miners from Cornwall include; Australia, India, Mexico, Canada (Burke & Richardson, 1978). These miners were in high demand because Cornwall itself had a long history of mining and the experience of these miners was invaluable.

underground operations (Burke & Richardson, 1978). The seriousness of the problem persuaded the High Commissioner to appoint the Weldon Miners' Phthisis Commission in 1902 to examine its causes and make appropriate recommendations. Among other findings, the commission discovered that the prevalence and mortality of the disease among white rock drillers was particularly high and most of those affected were dying at a young age. According to official records, incidence of the diseases were low among African miners. This was mainly because, unlike their white counterparts who worked for longer periods, most African miners were general migrant workers on short-term contracts and this reduced their period of continuous exposure to silica dust and in the process, reduced their risk of contracting silicosis (Katz, 1994).[146] By nature, silicosis is a progressive disease where the period of exposure to dust and the level of silica concentration in that dust affects the development and progression of the disease. Hence the more continuous and sustained the exposure to silica dust, the faster the disease develops.

Perhaps one of the most telling indicators of the seriousness of the silicosis problem is the number of commissions of enquiry appointed to investigate it, the Acts of Parliament passed to regulate health and safety in mines, and other investigations starting from 1902 onwards on the same subject. The first commission of enquiry was the Weldon Commission of 1902 and it found that one in four white underground miners had silicosis. As the problem persisted, another commission, the Van Niekerk Commission of 1912 came into being and it too had worrying findings to report, one of which was that rock drillers were dying at an average age of thirty-three.[147] Between 1902 and 1925, silicosis was a subject of six commissions of enquiry, ten parliamentary select committees, four industry reports and nine pieces of legislation (Katz, 1994). These developments speak volumes about the scale and magnitude of the problem. By 1946, the number of Acts of Parliament on silicosis had reached fifteen (McCulloch, 2009). One of the earliest instruments enacted by government was the Mines,

[146] However, the short contracts issued to black labourers created a problem of a different kind, especially soon after the end of the Anglo-Boer War. As indicated previously, when war broke out, most mines were shut down and white miners who were predominantly British went home, and so too did black labourers. After the end of the war, mine houses through the Chamber of Mines faced a problem when they tried to re-hire black labourers who had gone back to their rural homes. A solution came through the resuscitation of the Rand Native Labour Association, later re-named the Witwatersrand Native Labour Association or "Wenela" as it was known among African migrant workers and their dependents (Lang, 1986).

[147] This was far lower than in other regions at the same time. For example, at Bendigo in Australia, the life expectancy of underground miners was fifty (Katz, 1994).

Works and Machinery Regulations Ordinance of August 1903 that provided a framework for managing underground ventilation (Lang, 1986). Eight years later, the first Miners' Phthisis Act came into being in 1911. By this time, the problem was so widespread that in 1912, South Africa became the first country to include silicosis as a compensable disease under statutory compensation arrangements (McCulloch, 2011). This is remarkable if one considers that the International Labour Organisation (ILO) only added silicosis on its list of compensable diseases in 1934. After 1925, other commissions of enquiry appointed to investigate silicosis include the Young Commission of 1930, the Stratford Commission of 1943, the Allan Commission of 1950, the Beyers Commission of 1952, and the more recent, Leon Commission of 1994.

Therefore, by the beginning of the twentieth century, the South African mining industry was already facing a crisis of silicosis. However, silicosis was not a disease unique to South Africa. By the mid-19th century, silicosis was already a well-known occupational disease in the US, the UK, Italy, Japan and France where it was common in quarrying, construction, glass and steel industries. So prevalent was silicosis that it was the first occupational disease to trigger litigation against employers in the USA (McCulloch, 2011).[148] What soon became unique to South Africa is the scale of the disease in terms of rates and mortality compared to other countries where it existed. This forced mine owners and the government to devote more attention to silicosis compared to these other countries. As a result, by the 1930s, South Africa was far ahead of the rest of the world in terms of research and regulation of occupational health and safety in the mines. To underscore this status, South Africa hosted a silicosis conference in 1930 in Johannesburg sponsored by the ILO and the Transvaal Chamber of Mines. The conference drew researchers and policymakers from, Australia, Belgium, France, Germany, Italy, Japan, the UK and the US among other countries. The conference focused in particular on three aspects to silicosis namely; prevention, prognosis and compensation of affected employees. At the end of the conference, delegates adopted and endorsed the South African model on occupational health and safety in mines (McCulloch, 2011). It is therefore safe to

[148] The same author goes further to state that from as early as the 1920s, courts in the US were facing an avalanche of silicosis compensation claims. For example, in 1933 silicosis claims worth over US$30m came before the courts in New York State alone. This is a staggering amount, given that this was more than eight decades ago.

say that evidence and experiences from South Africa shaped legislative and policy debates as well as medical research on silicosis in countries represented at the conference and beyond.[149]

The 1911 Miners' Phthisis Act focused on two main aspects of silicosis – surveillance of the disease among current employees and compensation of silicosis sufferers. These features typified subsequent legislation on silicosis. The two legislative features applied along racial lines. Thus, even though legislation provided for the payment of compensation to all mineworkers, there was a huge disparity between benefits paid to skilled white miners and those paid to black labourers. To give a frame of reference – between May 1911 and September 1929, slightly over £11.2m worth of compensation benefits was paid to white miners and their dependents compared to £702 036.00 paid to black miners (McCulloch, 2011). McCulloch further submits that this disparity is even more staggering given that over the same period, the ratio of black to white miners was ten to one. Disease surveillance standards also depended on race. An advanced and thorough system applied to white miners compared to that used for their black counterparts, a factor which, in all likelihood, led to serious under-reporting of silicosis among this section of the labour force between 1900 and 1930.[150] Screening of white miners took place at the Miners' Phthisis Bureau overseen by highly qualified personnel. By contrast, screening of black miners took place on site by mine medical officers or at the Witwatersrand Native Labour Association Centre in Johannesburg (McCulloch, 2011). Screening of black miners was rudimentary at best and its results were therefore highly questionable and unreliable.

Thus, since 1911, legislation governing compensation for occupational diseases in South Africa has evolved along two parallel lines. On the one hand is legislation governing a combination of occupational injuries and diseases in general industry, and on the other, is exclusive legislation governing compensation for occupational diseases in the mining industry. Because legislation targeting the mining industry only relates to diseases, compensation for

[149] Another country where evidence from South Africa on silicosis was relied on to shape policy and legislation is Chile. Studies conducted in South Africa were instrumental in shaping compensation policy and legislation in that country starting in the early 1920s. Work done by British and South African scientists on silicosis was instrumental in changing perceptions around the disease in Chile (Vergara, 2005).

[150] McCulloch (2011) discusses the unsophisticated disease screening methods used on black miners at length and questions the reliability of early silicosis statistics among this group.

injuries in mines falls under the general industry legislation as well. Implicit in this arrangement is that occupational injuries in South African mines, unlike occupational diseases, have never been regarded as warranting the enactment of separate legislation or the adoption of additional measures beyond the 1894 initiative by the industry when it formed the Rand Mutual Assurance Company. In 1973, all legislation governing compensation for diseases in mines came under one Act – the Occupational Diseases in Mines and Works Act 78 of 1973 (ODMWA). At the time, this Act stood alongside the Workmen's Compensation Act 30 of 1941 that governed compensation for injuries and diseases in general industry. Apart from applying to different industries, these two Acts differed in several other respects, but one in particular is noteworthy for purposes of this study. The Workmen's Compensation Act 1941 contained an explicit and uncircumscribed prohibition of common law actions against employers by employees injured in the course of employment. In other words, the Act envisaged no other remedy available to injured employees other than benefits payable in terms of its provisions. The same provision appears in 1993 that repealed and replaced the 1941 Act.[151] By contrast, ODMWA does not contain such a prohibition. This technical difference proved decisive in 2011 when the liability profile of the mining industry changed fundamentally.[152] However, over the years the approach of the courts was to interpret the prohibition in COIDA as applicable to all employees regardless of the industry in which they work.[153]

The prohibition of common law actions against employers has been a feature of the South African occupational health and safety landscape for decades. In *Rand Mutual Assurance Company Ltd v Road Accident Fund*[154] Harms ADP summarised the law on common law actions against employers as follows:

> It is difficult to conceptualize the liability of the employer towards the employee which could be insured against. This is because even an uninsured employer or one who had failed to pay contributions to the commissioner had no potential liability towards the employee under the Act. An employer who had failed

[151] Section 35 (1) thereof
[152] Chapter 4 discusses this point in detail.
[153] *Petterson v Irwin & Johnson Ltd 1963 (3) SA 255; Mphosi v Central Board for Co-operative Insurance Ltd 1974 (2) SA 19; Mlomzale v Mizpha Boerdery (Pty) Ltd 1997 (1) SA 790; Mankayi Mbini v Anglo American Corporation of South Africa* (supra)*;* and *Sanan v Eskom Holding Ltd 2010 SA 638.*
[154] supra paragraph 5

> to pay the required contributions may have had to pay a penalty but even then no common law or statutory liability towards the employee arose.

Before 2011, there is no record of any serious effort to change or challenge this interpretation of the law adopted by the courts.

To avoid overlap between the two Acts, people whose claims fall under ODMWA cannot claim under COIDA.[155] These people are invariably mineworkers. However, since ODMWA only comes into play when the cause of disablement is a "compensatable disease" as defined in the legislation, the interaction between the two Acts is rather complex, if not confusing. Suppose a mineworker gets injured at work. The Act that governs the resultant claim for workers' compensation is COIDA since ODMWA only applies to diseases not injuries. The same worker cannot sue the employer since COIDA prohibits common law actions against employers. In addition, ODMWA only applies to specific diseases designated as "compensatable" in the Act. Suppose again a mineworker theoretically contracts a disease not specified in ODMWA as compensatable. The worker may still qualify for compensation by claiming in terms of COIDA. However, the claim can only succeed if the worker can prove to the satisfaction of the Compensation Commissioner that the disease arose out of and in the course of employment.[156] Under COIDA, occupational diseases fall into two main categories. The first category comprises diseases presumed to arise in the course of employment.[157] Diseases falling under this category appear in the Third Schedule of the Act. Employees who contract scheduled diseases are relieved of the burden to prove that the disease arose out of and in the course of employment. A statutory presumption of employment as the cause applies. For any other disease not listed in the Act, compensation may still be paid but the employee concerned bears the onus of proving that the disease arose out of and in the course of employment. In the case of a mineworker who contracts a disease not covered by ODMWA, compensation is claimable under COIDA, but the onus of proving the connection between the disease and employment rests with the employee. Although in practice this possibility is largely academic given that ODMWA covers most diseases associated with mining, its

[155] Section 100 (2) of ODMWA
[156] COIDA - Section 65 (1) (b)
[157] COIDA - Section 65 (1) (a)

theoretical existence serves to illustrate the disharmony that typifies the South African compensation system.

In 1981, the Government of South Africa appointed the Nieuwenhuizen Commission of Enquiry to investigate the whole question of compensation for occupational diseases in the mining industry. Among other things, the commission noted the many differences between compensation paid under ODMWA and that paid under the then Workmen's Compensation Act. Other differences highlighted by the commission include firstly, the fact that the Workmen's Compensation Act provided for medical treatment during periods of temporary disablement due to an occupational disease, whereas under ODMWA, no such provision exists. The Act only responds to pathological conditions of a permanent, irreversible and incurable nature. Secondly, the 1941 Act provided that where disablement was assessed to be less than 30%, a lump sum was payable but where disablement was more than 30%, a monthly pension was paid. By contrast, ODMWA only makese provision for lump sum payouts depending on the degree of the disease. Thirdly, under the 1941 Workmen's Compensation Act, compensation was paid regardless of race, whereas under ODMWA benefits paid differed depending on whether one was white, coloured or black. Fourthly, the two Acts also differed in terms of how they catered for dependents of a deceased employee. The commission emphasised the need for harmonising the two compensation regimes provided for by the two Acts. According to the commission, this could be achieved in one of two ways – retain the two Acts and use amendments to one or both of them until uniformity was achieved or consolidating the two Acts into a single workmen's compensation Act. The commission favoured the second option, but the government did not implement any of these two recommendations, a decision which would prove to be pivotal in the development of the South African compensation system some three decades later when the Constitutional Court that section 35 (1) of COIDA does not apply to mining companies sued for occupational disease.[158] Had the two compensation Acts been consolidated as recommended, this decision by the court would not have been possible.

[158] In 2011, differences in the two Acts were at the heart of the landmark litigation in *Thembekile Mankayi v Anglo Gold Ashanti.* Chief among these was the fact that unlike COIDA, ODMWA does not have a provision barring civil actions against employers by employees.

4.8 The Turning Point

There is no case recorded in South African legal history- before or after the introduction of workers' compensation - where an employee successfully sued an employer for an occupational disease. Courts were steadfastly consistent in their interpretation of workers' compensation legislation holding that common law actions against employers by employees did not exist under South African law. A turning point came in March 2011 when the Constitutional Court ruled on whether Section 35(1) of COIDA applied to mineworkers whose statutory claims fall under ODMWA, a statute that does not specifically bar common law actions against employers. In a landmark decision in *Thembekile Mankayi v Anglo Gold Ashanti*[159], the court ruled that Section 35 (1) only applied to employees with claims that fall under COIDA and since mineworkers that contract occupational diseases cannot claim under COIDA by virtue of Section 100 (2) of ODMWA, they can sue their employers for damages. Litigation in this matter started in the South Gauteng High Court in 2006, before moving to the Supreme Court of Appeal and finally ending up in the Constitutional Court.

By way of factual background, Thembekile Mankayi worked for Anglo Gold Ashanti for sixteen years as an underground rock driller from 1979 to 1995. He alleged that during this period his employer breached its duties to him by negligently exposing him to harmful agents, including silica dust. Specifically, Mankayi alleged that Anglo Gold Ashanti failed to ensure his health and safety through the provision of a safe and healthy working environment. Consequently, Mankayi further alleged that he eventually contracted silicosis, pulmonary tuberculosis and obstructive airways. Because of these medical conditions, Mankayi lost his job in 2004 and became unemployable in any other capacity. Under existing statutory compensation arrangements, Mankayi received a lump sum of R16 320 in terms of ODMWA. He sued his employer in the High Court seeking to recover R2.6m in damages. His claim lay in the common law, specifically the law of delict. In terms of this law, an employer owes a range of duties to its employees, most of which have to do with ensuring the health and safety of the workplace.[160] Mankayi justified his claim against the employer on the basis that since

[159] supra

[160] Most of the common law duties are also contained in the Mine Health and Safety Act 29 of 1996. Sections 2 and 5 of this Act require a mine employer to take all reasonably practicable steps to ensure that the working environment is safe and healthy without risk to employees.

his workers' compensation claim fell under ODMWA he, unlike workers in general industry, did not belong to the category of workers barred from suing his employer in delict. Mankayi further submitted that since Section 100 (2) of ODMWA prevented him from claiming under COIDA, the prohibition against suing the employer contained in Section 35(1) did not apply to him.[161] Anglo Gold Ashanti defended the claim by way of an exception arguing that since Section 35 (1) prohibits all common law actions against employers, and therefore Mankayi's claim did not exist at law.

Two main issues came before the courts in the *Mankayi* case. Firstly, courts had to determine whether the word "employee" in Section 35 (1) of COIDA includes employees whose statutory compensation claims fall under ODMWA even though they cannot claim benefits under COIDA. Invariably these employees are mineworkers who contract compensatable diseases. Secondly, the courts had to determine whether the abolition of the common law right to sue the employer enshrined in Section 35 (1) also applied to people like Mankayi even though they can only claim statutory compensation benefits under ODMWA. Stated differently the court was asked to decide whether it is necessary for every Act which governs the payment of compensation to have a section stating that the employee has no right to sue the employer or it suffices that this prohibition appears in only one Act. Both the High Court and the Supreme Court of Appeal could not find anything in the language of Section 35 (1) to suggest that the legislature intended the word "employee" in that section to exclude employees whose claims for workers' compensation fall under ODMWA. Secondly, the two courts also found that the prohibition of common law actions against the employer applied to all employees without exception. Both the High Court and the Supreme Court of Appeal interpreted Section 35 (1) as applicable to Mankayi's case and accordingly dismissed his claim against his previous employer. Both courts, in what were very detailed and comprehensive judgments could not find anything in the Act to support a finding that the scope of Section 35 (1) was limited to people eligible to claim statutory benefits under COIDA only.[162]

[161] Section 35 (1) of COIDA reads: "No action shall lie by an employee or any dependent of an employee for the recovery of damages in respect of any occupational injury or disease resulting in the disablement or death of such employee against such employee's employer, and no liability for compensation on the part of such employer shall arise save under the provisions of this Act in respect of such disablement or death".

[162] The High Court judgment was delivered on 26 June 2008 while that of the Supreme Court of Appeal was handed down on 31 March 2010. On March 3, 2011, the Constitutional Court handed down its landmark

Mankayi decided to take his matter to the Constitutional Court where the same issues once again came before the court albeit from a constitutional perspective. Those who had been following the case from inception would have found the decision to approach the Constitutional Court surprising given that this court only has jurisdiction on cases involving a constitutional issue and at face value, there was nothing to suggest that such an issue existed in this case. However, as is fast becoming a norm in South Africa, extensive reference was made to the Constitution to justify that a much broader interpretation of legislation was necessary. The Constitutional Court devoted a significant portion of its judgment to justifying why it had jurisdiction to hear the case. It observed that the scope of constitutional matters be broadened rather than narrowed. That said, the court went further to hold that under Section 38 of the South African Constitution, the common law right to claim damages for negligently-caused harm is a legally recognised right and to the extent that Section 35 (1) of COIDA purported to take away this right, it raises a constitutional issue.[163] Having gone to great lengths to assert its jurisdiction over the case, the Constitutional Court in the end found the answer to the issues placed before it not in what COIDA says, but in what it does not say. It concluded that Section 35 (1) refers to only those employees covered by COIDA and does not include those employees who cannot claim benefits under that Act. It reasoned that since Section 100 (2) of ODMWA removes mineworkers from the ambit of COIDA, it automatically meant that any other provision of the same Act including Section 35 (1) does not apply to mineworkers as well.

The court went further to say that, Section 35 (1) does not refer to ODMWA and if the legislature had intended it to cover people whose claims fall under this Act, it could easily have said so. This reasoning is problematic for two reasons. Firstly, it misses the fundamental essence of law. Law is nothing but a command given by a sovereign authority that is supposed to be of general application unless the same authority provides otherwise. Therefore, the law does not necessarily have to specify the different types of employees covered, especially if what it says is as clear as the provision in COIDA is. To say that because Section 35 (1) does not mention mineworkers and therefore does not apply to them, seeks to reduce the law to a

judgment. However, in a sad turn of events, Thembekile Mankayi died at the end of February 2011, just a week before the Constitutional Court delivered its judgment.

[163] It is important to stress at this point that the question before the court was not whether Section 35 (1) itself was constitutional. This question had long been settled in *Jooste v Score Supermarket Trading (Pty) Ltd (Minister of Labour Intervening) 1999 (2) SA 1 (CC)* where the Constitutional Court held that the section was constitutional.

series of meaningless repetitions.[164] Secondly, one could equally argue that the unqualified language used in the section means exactly what it says and if the legislature wanted it to exclude people whose claims fall under ODMWA, it could equally have said so. Therefore, in the absence of anything specific to the contrary, Section 35 (1) is of general application. If the application of the law is to be circumscribed in any way, that must come from the law itself. Thus, it can be argued that when Section 35 (1) says the employer cannot be sued, nothing further should be read into it as its meaning is clear. If this section is to be limited to people whose claims fall under COIDA only, then that limitation should have be in the wording of the section. For any limitation to Section 35 (1) to be justified, there should have been clear indication in the language used in the section itself that the legislature intended it not to be of general application. No such limitation exists in the section so the basis on which the Constitutional Court imported the limitation is highly contestable. Both the High Court and the Supreme Court of Appeal could not find any reason to justify such a restriction.

Most importantly, on reading all three judgments, that of the High Court, the Supreme Court of Appeal and the Constitutional Court, tone cannot help but notice that the Constitutional Court judgment does not provide any new legal insight. All it does is represent a different opinion or conclusion[165]. There are sections in the judgment where there is a clear attempt to frame the argument around considerations of equity – that since the existing compensation is inadequate, it represents injustice to impaired employees, therefore justifying a finding that the employer who is in fact, not liable at law, should be liable. This is as troubling as it is illogical because courts have since ruled that restricting impaired employees to statutory remedies only is constitutional. Therefore, to suggest that suing the employer is the solution to the problem of inadequate compensation hardly solves the problem since only those who can afford to sue can pursue this avenue of recovery.

[164] John Stuart Mill (1848) pointed out that the law cannot prohibit the means of bringing about the consequences without repeating itself an infinite number of times. It thus need only prohibit the consequences. For example the law can say, "Thou shalt do no murder" It cannot say, "Thou shalt not take a life by stabbing". If it did this, it would have to list every conceivable form of bringing about the death of a person.

[165] Mushai, A & Vivian, R.W (2011) Constitutional Court and Damages for Occupational Diseases, *SHEQ Management,* March/April 2011, 10-11

The *Mankayi* decision raises several important issues with a bearing on policy and practice. To begin with, the judgment appears to pay little regard to how insurance in general, and workers' compensation in particular, is supposed to operate. The preoccupation appears to have been with the notion that Section 35 (1) removes the common law right of the employee to sue the employer and to the extent that it does so, it is unjust. This misses the critical issue as well as the bigger picture on how insurance generally, and workers' compensation schemes in particular, operate. Workers' compensation is an administrative process created by legislation to allow injured employees to claim no-fault compensation from a statutory fund instead of from employers. Employers finance the process as part of a broader arrangement to internalise the cost of accidents and diseases arising in the course of employment. It is supposed to pay compensation swiftly and at virtually no cost to the affected employees. In return, employers face no further lawsuits by employees based on the same accidents or diseases for which compensation comes from a statutory fund. This brings certainty. If suing the employer were to be a general practice then the whole purpose of making the employer fund the statutory benefits is defeated. To prevent this, legislation then provides that an employee cannot sue the employer. In many countries today, the employer can only be sued in exceptional circumstances (for example where gross negligence or worse are found) while others do not allow such actions at all. Thus, the essence of this prohibition is not to remove the common law right of an employee as may appear to be the case at face value. Instead, it plays the more critical role of preventing double compensation. When these fundamental principles are misunderstood, it is easy for things to get distorted and in the process; the commercial and economic sense of the whole situation is lost. It is difficult to see how the legislature could have intended the outcome created by the *Mankayi* case – that mineworkers can be compensated twice, once from workers' compensation and then from suing the employer for damages. If this was the intention of the legislature all along, then one is inclined to ask why it waited for over hundred years for this to happen.

A further point of interest raised by the judgment is why mineworkers should be the only ones allowed to bring common law actions against their employers while this right remains unavailable to all other workers. The Constitutional Court attempted to address this point, but

in attempting to do so, the court's reasoning raises more questions than answers.[166] In the judgment, the court states that the special statutory treatment of mineworkers is historical, and its foundation lies in the special position that mining occupied in the South African economy as well as the sacrifice that mineworkers made over the years to the economic progress of the country. Again, with all due respect, this argument is questionable as it does not instill much confidence as a basis for justifying the court's decision. If people working in sectors which have historically made a higher contribution, whether actual or perceived to the wealth of a country should be accorded more rights than their counterparts in other economic sectors then what should happen when that sector's contribution starts to diminish, should some of the rights be taken away? Even under the assumption that mining deserves this special treatment because of its historical economic contribution, surely it would have made more sense if this privilege had been bestowed on mineworkers long ago during the 1970s and 1980s, when the contribution of the mining industry, both in terms of direct employment and Gross Domestic Product (GDP), was at its peak. If ever there was a time when it could have made sense to reward the industry for this contribution to the economy, it should have been then not now. To do so now when presumably many former miners have already succumbed to occupational diseases is hard to comprehend. Furthermore, gold mining in particular is in decline. Some submit that it is a "dying industry" due to its significantly reduced contribution to direct employment and GDP (McCulloch, 2009: 221). For example, gold mines employ approximately 160 000 people today which is a far cry from the more than 500 000 they employed in the early 1980s (Murray, Davies & Rees, 2011). This aside, the reasoning by the court raises an even more fundamental question – is it sound practice socially and economically for workers deemed to have contributed the most to the economic development of the country using some vague and highly questionable criteria to enjoy rights which other workers do not have?

[166] In paragraphs 83-84 of the judgment Khampepe J who delivered the unanimous judgment observes correctly that statutory benefits paid under COIDA are comparatively better than those under ODMWA. Then in paragraph 108 the honourable judge further states that it is neither anomalous nor surprising that mineworkers are treated separately. In paragraph 109 the judge states: "The reason for the special statutory treatment is historical. These diseases have been treated distinctly because they merited distinct treatment. They exact their toll on not only the health of mineworkers and their families but have posed and continue to pose a danger to the health and welfare of the public……Our singular history of mining, with the massive contribution of this sector to the country's wealth and the corresponding massive toll on mineworkers' health justifies the distinct treatment. This history explains why Section 35 (1) does not apply to mineworkers with compensatable diseases under ODMWA". Finally, in paragraph 111 the honourable judge further states: "Given the singular risks of mining and its unique historical role in our country's wealth, there is nothing irrational in preserving employees' common law claims against their employers". It is submitted that many will find this reasoning troubling and unconvincing.

Lastly, the problem of occupational diseases in the South African mining industry is not new. It has existed since the 1890s and has been the subject of many commissions of enquiry and numerous pieces of legislation in the past. However, the common law and litigation never featured as viable options over this period and for good reason. As indicated in Chapter 2, anyone familiar with the history of the common law as a mechanism for compensating workers would have the Constitutional Court's decision astounding. The primary reason for the introduction of workers' compensation was the failure of the common law to address the problem of lack of compensation adequately. In South Africa, workers' compensation has always been preferred which begs the question – if the common law has historically proved problematic over the years, what reason is there to believe that some hundred years later the situation would be any different? This sudden faith placed on the common law to address compensation problems in the mining sector is therefore a highly questionable option.

A large proportion of the blame for the current compensation climate in the mining sector lies in the failure by various stakeholders in the whole compensation system that culminated in matters ending up before the courts. Workers' compensation worldwide has three main stakeholders – the government, employers and workers usually represented by trade unions. In this case, there are sound reasons for laying blame squarely at the doorsteps of government and trade unions. When the workers' compensation scheme first came into being, the fundamental aim was to provide workers with swift access to compensation at a time when it was practically impossible to secure it by any other means. In the early years, the scheme paid competitive benefits and was partly the reason why South African mines managed to attract skilled personnel from countries like England and Australia. Over time, with government running the scheme, it fell significantly behind in terms of the benefits it paid. Neither the government nor trade unions made any serious effort to ensure that benefits paid were fair and realistic. This created resentment and disillusionment with the system. That Mankayi ended up turning to the courts is in many ways a manifestation of the unsatisfactory state of the whole system.[167] In the end, a problem that was largely of government's making got transferred to mining companies by the courts. This only complicates things even further as lawyers try to push for

[167] Mankayi worked for 16 years as an underground rock driller. When he was diagnosed with silicosis, pulmonary tuberculosis and obstructive airways, he received a lump sum pay out of R16 320 or just over R1 000 for each of the years he served. At the time, neither the government nor trade unions said anything about this until Mankayi decided to seek redress through the courts.

larger and larger awards bringing the sustainability of the whole approach into question. A better approach would have been to fix the current workers' compensation system so that it pays fair and realistic benefits instead of shifting the problem from one party who has failed to pay realistic benefits to another perceived to be better able to do so. From this whole debacle, there are vital lessons can be learnt from experiences of other countries. Undesirable as it sounds, the Constitutional Court's judgment amounts to no more than shifting responsibility from one party to the other with the hope that things will turn out for the best. It amounts to no more than placing faith in other parties where government has failed. As will be explained in Chapter 5, the situation that unfolded in the USA with asbestos claims can be very informative in this respect.

4.9 Mining Companies under Siege

Subsequent to the Constitutional Court's verdict, a number of unprecedented, uncoordinated and in some cases, confusing developments linked to the case were widely reported in the local media. The first came on 22 August 2012 when it was announced that a class action had been initiated in the South Gauteng High Court in Johannesburg against mining giants – Anglo Gold Ashanti, Gold Fields and Harmony Gold by an unspecified number of current and ex-miners suffering from silicosis. Lawyers representing the miners intended to use the case as a pilot to determine if courts were prepared to sanction class actions against mining companies and, if successful, would pave the way for many others to follow. Then, on 25 July 2013, the High Court in London declined to hear another class action filed by a group of ex-miners from South Africa against Anglo American South Africa. The class action concerned silicosis. In that case, the court ruled that there was no reason that it could find why South African courts could not hear the case.[168] The miners were suing their former employer, Anglo American South Africa, alleging that they contracted silicosis while working at one of the defendant's mines. Soon thereafter, on 26 September 2013, came the report that Anglo American South Africa had reached a settlement with yet another group comprising thirty-two ex-miners suffering from silicosis who had initiated the litigation some nine years back in 2004. Anglo American

[168] *Vava & Others v Anglo American South Africa* supra. See also: Mushai, A & Vivian, R.W (2011) Liability for Occupational Disease- Suing via London, *SHEQ Management,* September/October 2011, 14-17

reportedly agreed to the settlement without any admission of liability on its part.[169] Over the nine years it took for settlement to be reached seven ex-miners who were part of the claimant group died.

On 1 June 2015, another development linked to the *Mankayi* case appeared in the media when the Minister of Health announced that the South African Government plans to pay R1.5bn to miners suffering from lung diseases.[170] The report suggested that the payout will be made in terms of the existing workers' compensation arrangements for the mining industry. This further underlines the chaotic manner in which the whole question of compensation for diseases in the mining industry has become. On the one hand, government is announcing payouts through workers' compensation structures while on the other, multi-billion Rand lawsuits against the industry are going before the courts. Nothing could be more confusing. Nevertheless, another major announcement came on 7 March 2016 when the High Court certified that class actions against thirty gold mining companies representing almost the entire gold mining industry could proceed to trial. Under South African law, a class action requires certification by the High Court before it can proceed. Evidence placed before the court indicated that the number of claimants represented in the class actions could be anything between 17 000 and 500 000. Class actions are a new phenomenon in the South African legal system and little is known about how the courts will actually proceed with them.

Finally, in February 2018 came yet another announcement to the effect that a class action for silicosis and tuberculosis filed against six gold mining companies is to be finalised in six months.[171] According to this announcement, the out of court settlement will see mining companies setting aside R5bn to top up the R3.5bn set aside by government. Whether this arrangement will cover all class actions announced before then is not clear. Another question is- if this settlement involves six gold mining companies only, what will happen to the rest that are also facing class actions? More tellingly, is the fact that this development could be an

[169] Max Gebhardt "Anglo American SA reaches settlement with silicosis-stricken miners" *Business Day,* 26 September 2013
[170] *The Star,* 1 June 2015
[171] Dineo Faku, "Silicosis, TB class action is set to be concluded in the next six months", *Business Report,* 8 February 2018

acknowledgement that litigation may not produce the desired results for all concerned. Nevertheless, the approach is peace-meal and not holistic and this only adds to more confusion.

4.10 Conclusion

This chapter analysed the historical evolution of statutory compensation in Germany, England, the United States of America and South Africa. A common thread in the emergence of this system of compensation was the failure of the common law as a compensation mechanism. While the strategies followed by various countries differed, the problem they were targeting was the same. Germany relied on the instrumentality of the state to change the position of injured workers. Britain and the USA at first sought to modify the common law rules on employer's liability, but when this failed, workers' compensation principle replaced the common law. However, in the USA the adoption of statutory compensation was at first impeded by constitutional challenges that significantly slowed down the process. In South Africa, the evolution of statutory compensation was two-pronged. The first to emerge were legislative and institutional developments dealing with compensation for diseases in the mining industry only. With regard to these, silicosis was the focal point. Later, a separate legislative and institutional framework for the general industry also emerged. Over the years, South Africa relied on these arrangements to compensate injured workers and those who contracted occupational diseases and at no time, was the common law revisited.

A turning point came in 2011 with the ruling of the Constitutional Court in the *Mankayi* case. The case opened the possibility for mining companies to face common law actions by their employees who contract occupational diseases in the course of employment. The court ruled that Section 35 (1) of COIDA that historically applied to remove the right by all employees to sue the employer excluded mineworkers. Because of this judgment, mineworkers who contract diseases because of work are the only employees allowed by law to sue their employers. Outside of the mining industry, such claims remain barred.

5 CHAPTER 5: OCCUPATIONAL DISEASES AND THE COMPENSATION PROBLEM

5.1 Introduction

By current standards, occupational disease rates in South African mines rank amongst the highest in the world. Silicosis and tuberculosis rates seen in South Africa in recent years are particularly worrisome and without parallel anywhere else in the world. This chapter discusses the scale of the problem of occupational diseases in contemporary South Africa. The chapter also discusses the special compensation problems that occupational diseases present both under the common law and workers' compensation arrangements, drawing from experiences documented in other countries. Furthermore, the chapter develops and advances an important thesis - it is virtually impossible to obtain compensation for long latency occupational diseases by applying common law principles in their traditional sense. The process involves a multiplicity of complex and contentious issues. A majority of these issues have the potential to filter into the courts through litigation. These issues can only be resolved under the common law if courts are prepared to develop new rules that in some cases are at variance with original common law ones.

South African courts have virtually no experience when it comes to handling compensation claims for long latency diseases under the common law. Therefore, there is a lot of uncertainty about the rules that the courts will adopt in the adjudication of the claims resulting from the *Mankayi* ruling and the extent to which they are prepared to re-invent new ones. The chapter then proceeds to examine some of the intractable issues involved with using the common law as a method for compensating victims of occupational diseases. In doing so, the chapter draws mainly from experiences of the UK which is perhaps the country with the most developed jurisprudence on compensation for diseases using the common law and whose courts have vast experience in that regard. In addition, English common law is the closest in terms of traditions and concepts to the common law of South Africa making it an ideal point of reference. The chapter concludes by examining the coverage rules and other issues relating to diseases under the workers' compensation principle illustrating how these avoid most of the problems that the common law presents.

5.2 Mining and Occupational Diseases in South Africa

In the discourse on occupational health and safety, it is safe to say that occupational diseases are the 'Achilles heel' of the South African mining industry. To begin with, no solution appears to be in sight to eliminate the problem, if anything, things appear to be getting worse. Lung disease rates among South African miners remain among the highest in the world and it is difficult to see where a lasting solution to the problem is likely to come from at this stage.[172] In particular, silicosis among gold miners is proving to be very problematic to contain. The plight of mineworkers affected by this disease represents a sad legacy of gold mining in South Africa (Ledwaba & Sadiki, 2016). Furthermore, and as is often said, when a problem persists for too long it tends to breed other problems. This holds true for the mining industry and occupational diseases – they now face multi-billion Rand liabilities in the form of potential compensation payable to current and former miners affected by occupational diseases following the 2011 decision in the *Mankayi* case. Overnight, mining companies now face potentially ruinous lawsuits from thousands of former miners from across the Southern Africa region who used to work in the industry under the migrant labour system. To compound the problem, the exact number of potential claimants remains unknown, further increasing the degree of uncertainty on how much the eventual payouts will cost. Some experts estimate that the overall cost of the *Mankayi* claims could be well above the trillion Rand mark.[173] Others have predicted that the sheer magnitude of the claims could ruin the industry.[174] Notwithstanding all this, perhaps the most worrisome aspect of the whole situation is that the magnitude of the liabilities and their implications for the mining industry and the broader economy appear to be unquantifiable.

Having said that, one important fact about occupational diseases in the South African mining industry is that disease rates remain high. Evidence from the Pathology Disease Surveillance reports compiled by the South African National Institute for Occupational Health (SANIOH)

[172] Mushai, A (2014) Sick System – Is occupational disease in South African mines a problem without a solution? *SHEQ Management,* November/December 2014, 10-12

[173] Gold groups may face US$100bn liability for sick miners', *Pretoria News,* 30 May 2011. See also; Susan Njanji, 'Silicosis suit could sink SA's gold mining sector', *Business Day Live,* 28 January 2013 available at <http://www.bdlive.co.za> (28 January 2013).

[174] Susan Njanji, 'Silicosis suit could sink SA's gold mining sector' 28 January 2013 available <http//:www.bdlive.co.za> (28 January 2013)

paint a grim picture.[175] For example in 2014, the silicosis rate among gold miners was 37.4% while that for pulmonary tuberculosis among the same group of miners was just over 30%. In fact, between 2009 and 2016, the recorded silicosis rate among gold miners hovered above 35%. More or less the same pattern obtained for pulmonary tuberculosis for the same category of miners over the same period. On the other hand, pulmonary tuberculosis rates among platinum miners, though not as high as those for silicosis, are equally worrisome. These have averaged around 30% between 2004 and 2014. The Leon Commission reported that over a 20-year period, a total of 128 575 mineworkers had been certified as having an occupational disease and yet the figure may well be a gross understatement, given the fact that there are many other workers who cannot be traced inside and outside of South Africa due to the migrant labour system.[176] **Appendix 2** and **3** shows the rates for silicosis and pulmonary tuberculosis among gold and platinum miners respectively from 2002 to 2016. Since the early 2000s, there is virtually no evidence from the SANIOH Pathology Disease Surveillance Reports apart from the occasional fluctuation yearly to suggest that the disease rates are improving.

Other studies have also found similar evidence of a worsening problem. According to Murray et al. (2011), the proportion of black miners found to have silicosis at autopsy increased from three percent in 1975 to 32% in 2007. The same authors further submit that the highest rates for tuberculosis worldwide relate to the South African gold mining industry. In addition, incidence of tuberculosis among miners are far higher in comparison to the general population (Roberts, 2009). However, this is not surprising given that medical science has long established that a strong link exists between exposure to dust generally and the risk of contracting

[175] Section 34 of ODMWA requires that the cardio-respiratory organs of a deceased person who has worked at a controlled mine or controlled works be removed and examined for the presence of a compensatable disease in terms of that Act regardless of the actual clinical cause of death subject to the consent of the widow or next of kin. Examinations are conducted at the South African National Institute for Occupational Health (SANIOH) and any diseases detected are recorded in the Pathology Automation System (PATHAUT). SANIOH has maintained the PATHAUT database since 1975. Diseases covered by this exercise and reported in the Pathology Disease Surveillance reports are pulmonary tuberculosis, emphysema, silicosis, primary lung cancer, asbestosis, mesothelioma, massive fibrosis, coal workers' pneumoconiosis and mixed dust pneumoconiosis.

[176] Leon Commission Report (1995) paragraph 4.5.10. Some people argue that this is an understatement of the actual figure but in previous instances where estimates were believed to be an understatement investigations revealed this not to be the case. So, in the early 1900s, when it was realised the main victims of silicosis were white, the argument was put forward that the black victims existed but went home to die. Investigations were launched to identify the black victims in their respective homelands but it did not appear as if these in fact existed. More recently, thousands of "victims" added their names to the London litigation against Cape plc, but afterwards it emerged that they did not exist. The number of victims who qualify for compensation has become a mere trickle.

tuberculosis. If working conditions of miners are considered in the context of other health-threatening social habits like smoking, the risk of suffering serious disablement from some diseases increases exponentially. In this regard, studies have shown that workers exposed to crystalline silica dust (which is generally associated with gold mining) and who happen to also smoke face a much higher risk of dying from chronic obstructive lung disease (Hnizdo, 1990). Thus, tobacco smoking and exposure to silica dust operate synergistically to multiply not only the risk of contracting chronic obstructive lung disease, but also the risk of dying from the disease.

Part of the explanation behind the high disease rates witnessed among mineworkers lies in the geological and current structure of South African mines. Mines on the Witwatersrand, in particular, are the deepest in the world and this presents a big challenge when it comes to improving ventilation (McCulloch, 2009). When this feature combines with the generation of concentrated crystalline silica dust, the consequences on the health of those who work underground can be devastating. What is even more perplexing about current disease rates in mines is that the situation has remained dire despite the existence of comprehensive legislation to regulate health and safety in the sector. If one considers the provisions of legislation like the MHSA of 1996, a product of the 1994 Leon Commission, it becomes difficult to comprehend why there appears to be no significant progress towards reducing disease rates over 20 years after the legislation first came into being. The Act imposes a wide range of duties on mine owners aimed at regulating the health and safety of mineworkers and third parties. The obligations include; the duty to provide employees with adequate health and safety equipment, the duty to establish a health and safety policy, duty to provide health and safety training, duty to assess and respond to risk, duty to have a risk management policy, as well as the duty to establish a system of medical surveillance, among others. One would therefore want to believe that a law of this scope and significance targeting an industry that has historically battled diseases as an occupational health problem for over a century has a strong enforcement, monitoring and evaluation system. The possibility that there could be laxity in the enforcement of this law is difficult to conceive given the scale of the problem the law intends to address.

Tshoose (2014:289) submits that the MHSA is one of the few occupational health and safety statutes "with substance when it comes to enforcement of the law regarding occupational health and safety". Bold as it sounds, this assertion raises an obvious question. If one assumes that provisions of the MHSA are enforced and that mining companies are complying with them, then why have disease rates in the mining industry remained so high and showing no sign of improvement? Alternatively, why are efforts to eradicate occupational diseases in the mines, especially silicosis and tuberculosis failing to produce the desired results, despite the existence of comprehensive legislation targeted at addressing this problem? Can the mining industry ever rid itself of the scourge of disease? If the answer to the last question is yes, then a collateral question is; why did it take so long for this to be realized. There are no easy answers to these difficult questions. But, and perhaps more importantly, these questions have important public policy implications with regards to how compensation payable to victims of occupational diseases should be handled, among others.

Notwithstanding the numerous important questions arising from the current state of affairs regarding diseases in local mines, a more critical issue, especially for purposes of this study, relates to financing compensation payable to victims of long latency occupational diseases in the industry. Various funding models exist, but as things stand, courts have decided to depart from a century-old tradition and changed the basis on which the industry should fund compensation. Historically, the industry has always been responsible for funding compensation payable to victims of occupational diseases using the workers' compensation principle. However, and as explained previously, both the courts and with what appears to be the tacit approval by government, have decided that the basis upon which compensation is paid by the industry needs to be expanded to include common law liability of employers. This decision ignores the appalling record of the common law as a method for funding compensation for occupational injuries and diseases. As shown in the following sections of this chapter, elements of delict are virtually impossible to apply to long latency diseases. It is surprising that some lessons that history has done well to document and deliver appear to be misunderstood. The next section discusses funding of compensation payable to victims of disease using the common law, and the issues and problems involved in doing so. In order for common law principles to yield compensation when applied to long latency disease, courts have to bold enough to develop new rules.

5.3 Compensation for Diseases at Common Law

Financing compensation for long latency occupational diseases via the common law is a process fraught with legal, medical and procedural difficulties. A problem arises with all five of the elements of delict. These problems are much more intractable compared to those associated with compensation for industrial injuries. In highly dynamic environments like the workplace, the associated problems are constantly changing and evolving which raises serious questions about the ability of the common law to adapt quickly in order to effectively deal with them. First, there is the problem of proving causation. In other words, it is difficult and virtually impossible in some cases to prove that the wrongful act (or wrongful omission) on the part of the employer caused the employee to contract the occupational disease. From a legal standpoint, proving causation is perhaps the most fundamental problem facing claimants of compensation for diseases at common law. Proof of causation is an integral part of liability at common law that must be resolved in one way or another even if it means devising artificial rules in the process. A second problem relates to the requirement to prove fault or blameworthiness. It is a requirement of delict that in order for liability to attach, there must be fault or blameworthiness in the defendant's conduct. In some circumstances, even the question of whether or not the employee suffered harm is not always straightforward in long latency disease claims as it is in accidental injuries.

Thirdly, the common law is also associated with high transaction costs and lengthy delays before compensation is availed to claimants. Often, as in the case of *Mankayi,* the claimant dies long before he gets compensation. In addition, the costs of litigation increase the size of awards without any corresponding increase in the amount that actually goes into the pocket of claimants. Fourthly, there is the problem of the uncertainty that surrounds common law claims. This affects both plaintiffs and defendants alike. Finally, the common law has problems in cases where several employers contribute to a disease contracted by an employee. This becomes an even harder issue to overcome where long latency periods that characterise most occupational diseases found in mines are involved. Should liability and damages be apportioned and if so, how? These problems in aggregate render funding of compensation using the common law a long, tedious and costly process. The following sections discuss these and other problems associated with applying the elements of delict to long latency diseases.

5.3.1 The Problem of Proving the Elements of Delict: Causation

Proving causation is a function of legal and medical considerations. Firstly, a claimant must produce evidence of such quality as is required to meet the legal standard before liability attaches to an employer. Where there are multiple occupational hazards or sources from which a disease could have arisen, there is often no objective mechanism to establish the precise contribution made by each causal factor to the development of a disease. Secondly, most of the evidence required to meet the legal standard of proof is invariably of a medical and scientific nature which also happens to be the most expensive to assemble. The evidence is evaluated today to determine liability for exposure that occurred years and in some cases, decades ago. It is therefore not uncommon to find that some of the occupational hazards which a court is supposed to evaluate for purposes of determining whether the employer is liable, may no longer exist due to advances in technology or because the responsible employer has ceased trading (MunichRe, 2004). Medical evidence, in particular, is inherently expensive to compile and present in court. Effluxion of time further complicates proof of causation in occupational disease claims. It is difficult with most diseases to assign an exact time when a disease was contracted (Stapleton, 1985). Incomplete employment history of most workers makes it impossible in a majority of cases to establish the precise place and time where exposure could have taken place. For example, in the mining industry, short-term contracts are commonly used. This implies that workers are highly mobile making it difficult to trace sources of exposure over time.

Diseases usually occur gradually over a long period spanning the entire working life of a worker which could be decades in some cases. For example, the latency period for silicosis can be anything between five to forty years, depending on the concentration of noxious substances in the inhaled dust while that for mesothelioma can be well over thirty years (Munich Re, 2004). In a majority of situations, it is virtually impossible to trace the employer who is responsible for the employee's condition using traditional common law rules due to passage of time. In fact, application of pure common law rules hardly results in payment of any compensation to affected employees. Therefore, courts often find themselves with a hard choice to make – apply common law rules in their pure sense and leave the claimant without compensation or creatively bend the rules (a process often referred to as judicial engineering)

and adapt them to fit particular situations, thereby ensuring that claimants receive compensation. Long latency periods also increase default risk. This can occur when the responsible employer may have ceased trading by the time the disease becomes ascertainable, a prospect that can see a claimant go with nothing. For example, assume an employee who works for three employers over a period of thirty years. On retirement, he develops silicosis and decides to sue all the employers who exposed him to unsafe working conditions. This may look clear and straightforward but if one of the employers has gone out of business, the scenario raises some complex legal questions. Does the employee sue the remaining two employers for the full amount or for a proportion representing their degree of contribution to the disease? If so, how should the relative contribution of each employer be assessed? The principle of joint and several liability if applicable, can resolve both questions because it allows the employee to sue one or more employers for the full amount. Even then, questions remain because the employer who may end up facing the claim could turn out to be the least culpable.

Table 1 below shows the latency periods of various diseases commonly encountered in employment situations.

Table 1: Latency periods of selected occupational diseases

Cause of the disease	**Age at start of exposure**	**Age at end of exposure**	**Age at start of illness**	**Age at death**	**Latency period**
Halogenated hydro-carbons	32.1	52.9	55.2	58.3	23.1
Chrome	33.2	50.6	59.7	62.2	26.5
Benzene	29.6	53.2	57.9	59.7	28.3
Ironizing Radiation	30.5	42.2	60.4	61.8	29.9
Asbestosis	30.2	49.1	61.5	63.4	31.3
Arsenic	29.3	50.2	62.4	63.9	33.1
Aromatic amines	29.1	46.7	63.2	67.6	34.1
Silica-tuberculosis	25.6	48.6	60.0	64.0	34.4
Mesothelioma	26.2	43.9	59.8	61.0	33.7
Silicosis	22.6	47.3	64.9	67.3	42.3

[Source: Munich Re, 2004]

A further and perhaps most critical causation problem encountered in common law claims for diseases is what Stapleton (1985: 250) refers to as “medical causation”. For instance, the question whether smoking causes cancer is a scientific and medical question, but whether

companies manufacturing cigarettes should be liable to people who contract cancer related to smoking is a question of law (Muir, 1995). Because of long latency periods, the ability to determine that a particular agent influences the development of a given disease may be severely undermined.[177] The situation gets even more complicated where other non-work factors operating independently or synergistically with employment factors can influence the development of a particular disease. A classic example is the association between silicosis, a recognised work-related disease and smoking, a social and purely voluntary habit. Studies have shown that smoking increases the risk of contracting and even dying from silicosis by people exposed to silica dust (Hnizdo, 1990). For purposes of assigning liability, how should these two factors, silica dust inhalation that is work-related, and tobacco smoking which is not work-related, be treated? Should the court ignore smoking completely despite medical evidence showing that it has an influence on the development and scale of a particular disease, or should the court consider tobacco smoking when assessing liability? If the court decides to take tobacco smoking into account, should it be to mitigate the liability of the employer or to reduce compensation payable to the disease sufferer or both? Often the respective contributions of the two factors, dust inhalation and smoking may never be quantifiable implying that it is impossible to be precise about the exact manner in which they influence each other. This leaves the court with the task of deciding where it must place greater weight between the two factors.

The complications associated with proving causation go beyond identifying and quantifying the contributions of multiple potential causal factors. Some diseases, like tuberculosis, exist outside of employment situations and occur in the general population. In such cases, how does one prove on a balance of probabilities that employment caused the disease to the exclusion of other epidemiological factors? At issue is determining the association between work and tuberculosis or the work-relatedness of the disease. In the hard sciences, an association

[177] Long latency in occupational diseases creates a phenomenon which insurers call *long tail*, a term used to describe liability risks where there is a long period between the happening of a wrongful act causing harm and the manifestation of the harm itself. The long tail phenomenon causes a number of problems for insurers, one of which is the inability to quantify exposure and optimally price risks. It is difficult to estimate what a potential loss from a wrongful act perpetrated today would be worth after forty years. Another problem arising from long tail risks is an accounting one – how should the insurer go about creating provisions for potential claims that may materialise after decades? Furthermore, to the extent that claims may take such a long time to materialise, it also raises questions about how the profitability of an insurer with a sizeable portfolio of long tail risks should be measured. When claims from risks accepted today take decades to be paid, there is a big mismatch between information used to underwrite the risk and the information used to quantify the claim.

between an activity or action and an outcome is recognised if it is statistically significant (Mengersen, Moynihan & Tweedie, 2007). With specific reference to occupational diseases, the statistically significant level at which a disease can be regarded as more probably related to work than other non-work causes is when incidence of the disease among people doing a particular type of work is more than two times the incidence of the same disease among the general population (Stapleton, 1985). To the extent that liability at common law can only attach where there is causation, a question arises about what a court should do where data to measure statistical significance is not readily available. The reality of the situation is that with certain diseases, the evidentiary gaps may be unbridgeable and the actual wrongdoer may never be conclusively identifiable or known. In such situations, courts have to resort to judicial engineering and device rules of operational convenience rather than rely on real proof in order to impose liability. In other words, the common law often becomes a victim of its own rules, making it virtually impossible for causation to be determinable.

In contemporary South Africa, it also turns out that most of the mineworkers who have silicosis also have tuberculosis, a disease prevalent in the general population as well. This raises a complex causation problem – is tuberculosis an occupational disease? The question is important because the disease exists in the general population. This brings into play the problem of separating the two sources of exposure casting doubt about the appropriateness of the common law that relies on proof of a cause in order to pay compensation to deal with these issues. In the end, people who contracted tuberculosis not from work, but from elsewhere will seek to claim compensation from the employer alleging that they contracted the disease from work and in the process, the actual source of their exposure remains unknown.

5.3.2 The Problem of Proving the Elements of Delict: Fault

Yet another problem with using the common law to fund compensation for occupational diseases is the requirement to prove the key delictual element of fault or negligence on the part of the employer. The requirement to prove fault seeks to help the court evaluate conduct of the alleged wrongdoer with a view to determine whether it warrants sanction. In other words, fault is concerned with establishing whether the conduct of the defendant is legally blameworthy.

In Roman Dutch law, fault has the following components; firstly, a reasonable man in the position of the defendant would have foreseen the possibility that his conduct would cause harm to the plaintiff. Secondly, the reasonable man would have taken precautions to guard against the foreseeable harm. Finally, the defendant failed to take such precautions and the plaintiff suffered harm as a result.[178] In theory, this test for negligence looks clear and straightforward enough but in practice, especially when applied to long latency diseases occurring in the workplace, things are not always as straightforward as the test suggests. The workplace is a complex environment characterised by an interaction of multiple factors, some of which are only be fully understood in the future (Gaskins, 1990). This renders use of the common law, a system that preconditions the award of compensation on proof of foreseeability and apportionment of blame questionable.

Proving fault becomes even more problematic in industries where employers may be required by legislation to put certain occupational health and safety measures in place and meet specified standards in that regard in order to be allowed to operate. There could also be bodies established in terms of the legislation that, from time to time, inspect and certify that employers are in compliance. When such inspections are conducted and the employer is certified as compliant with prescribed occupational health and safety standards, it may be difficult to turn round years later and allege that the same employer was negligent. Since the early 1900s, mining business in South Africa occurs under the direct supervision of regulatory authorities. Today, the MHSA contains provisions that establishes a range of advisory and regulatory structures to oversee that employers conduct their business in a safe manner and in terms of the provisions of the Act.[179] For example, the said Act provides for the establishment of a Mine Health and Safety Inspectorate headed by a Chief Inspector of Mines.[180] The Inspectorate has

[178] The test for negligence was set out by Holmes JA in *Kruger v Kotze 1966 (2) SA 428* at 430 where he said fault or negligence is proved if it is established that:

(a) A *diligens paterfamilias* in the position of the defendant – (i) would foresee the reasonable possibility of his conduct injuring another in his person or property and causing him patrimonial loss; and (ii) would take reasonable steps to guard against such occurrence; and

(b) The defendant failed to take such steps.

[179] For example, Section 41 (1) of the Mine Health and Safety Act provides for the establishment of tripartite institutions, one of which is the Mine Health and Safety Council whose role is to advise the Minister on health and safety issues at mines. The Council comprises three permanent committees namely; the Mining Regulation Advisory Committee, the Mining Occupational Health Advisory Committee, and the Safety in Mines Research Advisory Committee.

[180] Section 47(1)

extensive functions of a general and specific nature ranging from determining and implementing policies to promote health and safety at mines to performing any duties relating to health and safety as determined and directed by the Minister.[181] Furthermore, the Chief Inspector has powers to deal with dangerous conditions at mines and to order compliance with the Act whenever he feels employers are in violation. Given these conditions, it would be very difficult to allege and let alone prove negligence on the part of a mine owner years later. Any employer would be inclined to raise the defence that everything they did then complied with and satisfied regulatory requirements.

By its very nature, the common law is a fault and cause-based system of compensation where blameworthiness of an employer needs to be of a scale deemed by law to warrant compensation. Furthermore, proving fault in relation to a long latency disease is a much more complicated task compared to occupational injuries mainly because often risk is not easily discernible and what needs to be done to mitigate the risk may not be understood today but in hindsight (Stapleton, 1985). In some cases, appreciation of risk may be impossible because of the state of the art problem where the level of scientific and technical knowledge may lag behind the development of certain risks posed by some industrial processes. Additionally, proving fault in occupational disease claims may also require placement of scientific evidence before a court through expert witnesses. This causes transaction costs associated with these claims to escalate. Consequences of failure to prove fault are dire, no compensation is paid and unsuccessful claimants must fend for themselves.

In certain countries, notably the UK and certain US states, the law recognises the common law concept of negligence and breach of a duty imposed by statute or legislation as distinct causes of action. Therefore, claimants can plead one or the other. By contrast, in countries like South Africa and Canada, negligence and breach of statutory duty are not separate causes of action. Instead, breach of a statutory duty constitutes further evidence of negligence. However, where negligence and breach of statutory duty are distinct causes of action, the actual wording of the legislation is crucial. It may well be that the language used in the legislation makes it explicitly clear that proof of fault is unnecessary, in which case, liability contemplated by the legislature

[181] Section 49 (1)

will be of a strict nature. Even then, proof of medical causation may still be required. However, the use of strict liability in the occupational health and safety domain is not a common occurrence. Even those countries with health and safety legislation based on strict liability have lately been reviewing this position.[182]

In certain circumstances, liability based on the common law may result in misplaced and confused priorities. In relation to compensation for occupational diseases, sometimes the preoccupation with sanctioning employers becomes an obsession and clouds the more important goal of prioritising the payment of compensation to employees affected by disease. In South Africa, there is a strong and common public view that mining companies have historically not cared for the welfare of their workers, especially health and safety, as well as they should. This view also appears in literature Burke and Richardson (1978: 163) submit that the "unwillingness" of mine management to provide adequate safety measures in order to cut operating costs worsened the problem of miners' phthisis on South African mines. McCulloch (2013) reiterates the same point. Ledwaba and Sadiki (2016) posit that mining companies prioritized profits over the lives and health of workers. There have also been studies suggesting that the South African mine owners could have been involved in manipulating data on the seriousness of the silicosis problem in the early 1900s (McCulloch, 2011). There is also a veiled endorsement of this point in the *Mankayi* judgment delivered by Khampepe J.[183] Hence, when the *Mankayi* ruling came in 2011, some people saw this as an opportunity to make the mining industry pay for its previous sins.

There may well be merit in the view calling for sanctions on mining companies because they have profited at the expense of the welfare of their workers. However, it misses a fundamental point about the need to prioritise access to compensation for workers impaired by occupational diseases – obsessing with retribution makes the compensation system highly adversarial and costly causing delays in the payment of compensation to those entitled to it. On top of this, it

[182] In late 2012, the UK House of Commons voted in favour of the Enterprises and Regulatory Reform Bill that contains a clause to amend the Health and Safety at Work Act of 1974 to remove strict liability for breach of a statutory duty. On 22 April 2013, the House of Lords passed the Bill having rejected it before and on 25 April of the same year, the Bill received Royal Assent and thus became law. For a discussion of this development and the position in South Africa see: Mushai, A & Hutcheson, H.D (2013) UK moves to abolish strict liability for statutory breaches, *SHEQ Management,* May/June 2013, 12-14

[183] Paragraph 108 - 111

undermines the efficiency of the entire system.[184] While a preoccupation with sanctioning employers could have some deterrent effect, it significantly weakens the optimal compensation dimension of efficiency. It is because of these concerns that some countries notably, Denmark, New Zealand, Norway, Finland, Iceland and Sweden have virtually abandoned negligence as a basis for compensation for personal injury (Kachalia, Mello, Brennan & Studdert, 2008). Nordic countries in particular - Denmark, Finland, Iceland, Norway and Sweden, have managed to separate the compensation function from the processes of finding fault and sanctioning wrongdoers. Sweden pioneered this approach. It operates a compensation system for economic loss due to accidental injury, disease or death that is completely separate for the tort system since 1975 (Hellner, 1986). Finland followed in 1987, then Norway – 1988, Denmark – 1992 and finally, Iceland in 2001.

5.3.3 The Problem of High Transaction Costs and Delay

The common law has other problems too. One of these is high transaction costs, mostly due to litigation. Given that liability under the common law is subject to availability of evidence and proof of the elements of delict, litigation is an inevitable consequence of the system. The common law also results in the transfer of disproportionately large amounts of potential awards to third parties who invariably are lawyers in the form of legal fees and other administrative expenses.[185] For example, in the USA, there is a wide body of literature showing that a greater proportion of awards for asbestos claims under the tort system never reach the pockets of claimants. One study by the US Chamber of Commerce (2005) indicates that at least US$0.54 of every dollar awarded by the courts never reach plaintiffs who suffer damage or injury. This finding corresponds to other findings on the same subject. For example, up to 2004, asbestos litigation alone had cost the US economy in excess of US$70bn in court awards, of which a staggering US$41bn (or 59%) went to lawyers (White, 2004). A Rand Corporation study on asbestos claims also in the USA found that by the end of 1982, about US$1bn had gone into asbestos litigation of which less than a third went to victims (Raphael, 1995). The same study found that the average cost of an asbestos claim either to the defendant company or its insurers

[184] A compensation system is efficient if it achieves optimal deterrence and optimal compensation (Schlesinger et al., 1993; Danzon, 1987).
[185] Mushai, A & Hutcheson, H.D (2013) Civil Law and the Cost of Litigation, *SHEQ Management,* January/February 2013, 8-11

was US$95 000 and of that US$60 000 went to legal fees. Studies in other jurisdictions roughly confirm a similar pattern; a greater proportion of civil awards go towards legal fees. Yet another study by the Institute for Civil Justice – RAND Corporation estimated that for every dollar paid to a claimant nearly two dollars was spent on litigation expenses (Anderson, 1987). Elsewhere, litigation costs make up as much as 50% of total common law awards in the Australian state of Victoria and in Hong Kong, the costs can range between 20% and 90% (Munich Re, 2002). It is highly questionable whether a system of compensation that leaks a large proportion of the awards to third parties who did not suffer any harm like this is beneficial, especially in countries where awards are unlikely to be very large in the first place. In such cases, it may well be that transaction costs alone would exceed actual awards. While the cost of litigation in America perhaps lies at the extreme end of the scale and is probably the highest in the world, this should not derogate from the general problem with using the common law to fund compensation for occupational diseases. It remains an expensive system.

So serious is the issue of litigation costs and general escalation of court awards in America that in recent years, state governments have started to be concerned that it is beginning to have deleterious effects on growth and investment. In 2011, Texas Governor Rick Perry proposed a "loser pays bill" whose primary objective is to create incentives for not resorting to litigation by making those who lose lawsuits to bear the legal fees of their adversaries.[186] In other words, the Bill seeks to adjust incentives by making it less attractive to sue. The Bill is a response to the growing concern that trial lawyers under the tort system have every incentive to file exorbitant claims for damages that in turn, imposes extra costs on the overall cost of doing business, promoting a culture of litigiousness and stunting the economy. Other states have also implemented various reforms to the tort system to curb spiraling costs, a large proportion of which are lawyer-driven (US Chamber of Commerce, 2005). Similar concerns about suing at common law arose in the UK where civil litigation costs in England and Wales have escalated in recent years. This prompted the British government to commission a review of civil litigation costs (Jackson, 2010). Subsequent to the release of the commission's report, the British government tabled a series of proposals aimed at making litigation an option of last resort in civil disputes by changing the incentives for lawyers. As in the US, the UK has also witnessed huge financial transfers to lawyers because of escalating civil litigation costs. For

[186] "Tort reform – Sorry, losers" *The Economist* 19 May 2011

example, in 2009-10, the National Health Service (NHS) reportedly paid £297m in damages and a further £121m in claimants' legal costs.[187] These examples highlight how cost-intensive the common law can be as a mechanism for funding compensation. When the common law applies to determine liability for long latency occupational diseases, costs are bound to be even higher, given the medical and scientific nature of the evidence that a court may be required to consider and evaluate.

Gaskins (1990: 269) submits that the huge financial transfers from accident and personal injury cases partly explains why the legal profession in the USA usually "jealously protects" this area from government interference. In South Africa, a similar trend is evident if one considers the troubling story of the Road Accident Fund (RAF). For years, the RAF used to apply common law principles of delict to pay damages to victims of road accidents. In the process, the fund accumulated a huge deficit reported to be over R140bn today.[188] The fund is officially insolvent, at least in a technical sense and therefore struggling to pay claims. Realising that remedial measures are inevitable, government has sought to reform the fund in terms of how its liability is determined and capping awards. One of the proposed reforms is to change the basis of the RAF's liability from fault to no-fault. Implementation of this reform measure implies that the need for personal accident lawyers in road accident claims drops dramatically if not eliminated. As could have been expected, some lawyers have been fiercely opposed to these attempts to reform the RAF, arguing that the proposal by government is unconstitutional and unjust to victims of road accidents. However, given how financially rewarding road accident claims have been to some lawyers over the years, there are many who strongly believe that the true motives for fiercely resisting the proposed reforms have more related to do with preserving the niche market than interests of victims. In any event, if, as has been generally acknowledged, the RAF is struggling to pay claims, the wisdom of persistently filing claims against an entity that cannot pay them is also questionable.

[187] "Legal reform – No fee lunch" *The Economist* 31 March 2011. According to this report, litigation costs exceed damages awarded in some cases.
[188] Fatima Schroeder "Road fund crashes and burns – RAF declared insolvent by R145bn" *The Star,* October 22, 2016

Apart from the problem of costs, the common law is also associated with long delays before compensation is accessible to claimants. Compensation at common law is normally a product of litigation. A classic illustration of how lengthy and tedious the process can be is evident in the *Mankayi* litigation itself. The litigation started in 2006 in the South Gauteng High Court, then went to the Supreme Court of Appeal and some five years later the Constitutional Court ruled not on the merits of the claim, but on a collateral issue of whether such claim existed at law. This meant that after the 2011 Constitutional Court ruling, the matter was supposed to go back to the High Court for a hearing on its merits. How long this process could have taken before a result came out is hard to say. Tragically, Mankayi died a few days before the Constitutional Court handed down its judgment and at the time of his death, he was nowhere near to having the merits of his claims argued in court. Such is the tragic nature of the common law as a compensation mechanism for victims of occupational disease that it can take years for a case to wind up the judicial system before producing an outcome. While this may be not be a bad thing for the revenue streams of some lawyers, it is bad for justice and even worse for claimants who have to fend for themselves for years waiting for the process to unwind. During this period of waiting victims rely on family for support hence the occupational disease becomes an externality to those on whom the burden of supporting the victim falls. As often happens, some die before receiving any compensation.

Delays can also be due to the sheer complexity of the case itself. Class actions are particularly notorious in this regard. Take the US asbestos litigation class action suit of *Cimino v Raymark Industries Ltd*[189] as an example. In that case, the court signed 373 pre-trial and trial orders; over 3 000 depositions (out of court sworn statements by witnesses) were obtained; the trial itself lasted for a hundred and thirty-three days; involved 563 witnesses and the case transcript was 25 348 pages long (Raphael, 1995). On top of that, is the possibility that whatever decision the court reaches may not be acceptable to one of the parties implying that the case may go on appeal. In order to cope with such complexities involved in class actions, US courts have devised innovative procedures in order to cope with such complexities involving class actions. These include, firstly, consolidation. This is the simultaneous hearing of multiple claims before the same jury. A second innovation is bifurcation, a process of splitting trials into distinct phases and then attempt to negotiate a settlement after each phase. If settlement fails the trial

[189] 739 F.Supp. 328 (E.D. Tex. 1990)

proceeds to the next phase and so on. The third innovation are bouquet trials which involves the hearing of a small sample of claims from an otherwise large group with the hope that a verdict from the sample trial will serve as a guide to a negotiated settlement by the majority of parties in a similar position (White, 2006). All these innovations seek to minimise delay in the finalisation of mass tort trials.

For victims of occupational diseases, delay in accessing compensation can be particularly devastating. On average, the life expectancy of a worker on diagnosis with most long latency diseases of the lung is very short. This from the latency figures in **Table 1 on** page 98. Consider a disease such as mesothelioma for example; a person who contracts the disease at age 59.8 dies on average at age 61, a mere fourteen months later. Mesothelioma is therefore a lethal disease and victims usually have very little time to live after discovery of the disease. Silicosis, with a life expectancy of approximately thirty months from diagnosis also hardly allows for any delays in accessing compensation. It is therefore highly questionable whether an adversarial system such as the common law with its propensity for protracted litigation is the right mechanism for compensating victims of long latency occupational diseases. Often people get too preoccupied with what sanctions should be imposed on alleged wrongdoers and forget that the critical need of victims is compensation. In a study focusing on the US state of Texas, Fortson (2005) compared awards paid under workers' compensation and those under the tort system. He found that while awards paid for verdicts under the tort system net of attorneys' fees are on average higher than benefits paid under workers' compensation, benefits paid under workers' compensation have substantially lower variance and are accessible immediately. On the other hand, it took 2-3 years on average for a majority of tort awards to be paid. Thus, common law awards are both associated with a high risk of uncertainty (higher variance) and delay.

Sometimes the delays arise from dubious litigation strategies employed by some lawyers ostensibly for the benefit of their clients, yet the real motives could be more sinister. US personal injury lawyers in particular would like to pick a forum that they believe to be most favourable for their client's case and more often to themselves personally. One way to achieve this is through a system commonly referred to as forum shopping. Forum shopping is a term used to describe a practice by lawyers in terms of which litigation occurs in a different

jurisdiction from where the actual cause of action took place. Use of forum shopping involves two conflict of law questions. Firstly, namely, which court has jurisdiction, and secondly, what law should that court apply to resolve the case? A case must be heard where the cause of action arose. This is the general rule.

Nowhere in the world has forum shopping gained more notoriety than in the USA. During the asbestos litigation crisis, US lawyers exploited forum shopping to the fullest extent possible and in the process caused the cost of liability awards to skyrocket. Until the mid-2000s, a majority of asbestos class action lawsuits took place in states known to be pro-plaintiff (US Chamber of Commerce, 2005). In this regard, Stiglitz, et al. (2002), provide two insights that are of particular interest. Firstly, they submit that the state of Mississippi has roughly one percent of the population of the USA yet about twenty percent of pending asbestos claims as of 2002 were in that state. Secondly, the authors cite a study conducted by the RAND Corporation which found that a mere five states accounted for two-thirds of the most recent asbestos claims filed at the time and eighty-four percent of all asbestos claims were filed in only ten states. Thus, forum shopping resulted in a concentration of asbestos class actions in a handful of states creating a serious backlog for courts in those states in the process. Consequently, the cases took much longer to finalise.

South Africa has also had its fair share of forum shopping. There have been attempts by ex-miners to file claims for occupational diseases in London. This practice started with claims against Thor Chemicals where twenty employees claimed to have suffered from mercury poisoning and sued their employer in London. Thor Chemicals was a subsidiary of Thor Holdings, a British company with its headquarters in London. In 1997, Thor Holdings made an offer of R9.42m to settle the case. Interestingly, this decision was informed by one of the problems with common law liability - the problem of high litigation costs. Thor holdings had worked out that its legal fees alone would have been in excess of R36m if it won the case while the fees for the claimants would have been borne by the British taxpayer through legal aid. Had Thor Holdings decided to fight the case and lost, its legal fees would have been in the

region of R70m.[190] In the end, the company took a common sense but pragmatic decision to settle out of court.

The second case about forum shopping by South African lawyers is the famous asbestosis litigation involving Cape Plc settled in 2003. In 2013, the High Court in London dismissed another attempt by former South African miners to sue Anglo American South Africa in London.[191] None of the former miners involved in this lawsuit worked for Anglo American Plc, the London headquartered holding company. It was argued on behalf of the miners that the South African subsidiary's administration is governed by policies formulated by the Group Management Committee whose responsibilities included *inter alia* the formulation of safety management policies. The argument went further to say this was enough to give British courts jurisdiction over the matter. In the end, the court rejected this argument and dismissed the lawsuit, holding that there was no valid reason why South African courts could not deal with the matter. Pursuit of this avenue was puzzling given that in 2011 the Constitutional Court had ruled to allow ex-miners to sue their employers for damages.[192] By attempting to switch to London, it created the impression that the lawyers for the claimants did not have confidence in local courts. More crucially, the time that elapsed while pursuing this avenue actually harmed rather than enhanced the interests of the claimants involved.

5.4 The Problem of Uncertainty

Funding compensation for occupational diseases under the common law involves uncertainty on both the employee and the employer's side. This is arguably the least understood yet important negative aspect of using the common law from a business and employer's perspective. In a commercial environment, uncertainty complicates decision-making by economic agents, but the actual damage it causes is unquantifiable. The employer is uncertain about several things when faced with a contestable claim for compensation at common law. To begin with, there is uncertainty regarding the outcome of the case – will the finding by the

[190] *The Star,* 9 April 1997
[191] *Vava & Another v Anglo American South Africa Limited* supra
[192] Mushai, A & Hutcheson, H.D (2013) Mining for Justice, *SHEQ Management,* October/November 2013, 12-15

court be favourable or otherwise? Employees also share the same concern. Then there is uncertainty surrounding the quantum of damages if the court finds against the employer. This too is a source of worry for claimants, especially in view of the fact that high legal fees, for which the common law is notorious, erode any potential awards. To the extent that it is the responsibility of the courts to determine the level of damages awarded in any given case, financial planning becomes problematic. In the case of South African mining companies, perhaps the most important layer of uncertainty relates to the rules that courts will employ to determine the claims in the process of being filed by ex-miners. Since common law claims for diseases are a new phenomenon in local jurisprudence, the rules and procedures that courts will follow to evaluate these claims are anybody's guess. The dearth of local precedents makes it difficult to predict how courts will handle the claims and what the outcome will eventually be. This makes it difficult for mining houses to attract investment because no rational investor would be prepared to put money into an industry facing such potentially large and ruinous liabilities. Any would-be investor would be nervous and may prefer to wait and see how the whole situation unfolds before making any commitment. Lack of precedents makes it more likely that a majority of the verdicts that will come out of trial courts will be subject to appeal something that will see the payment of compensation to impaired workers and their dependents delayed even further.

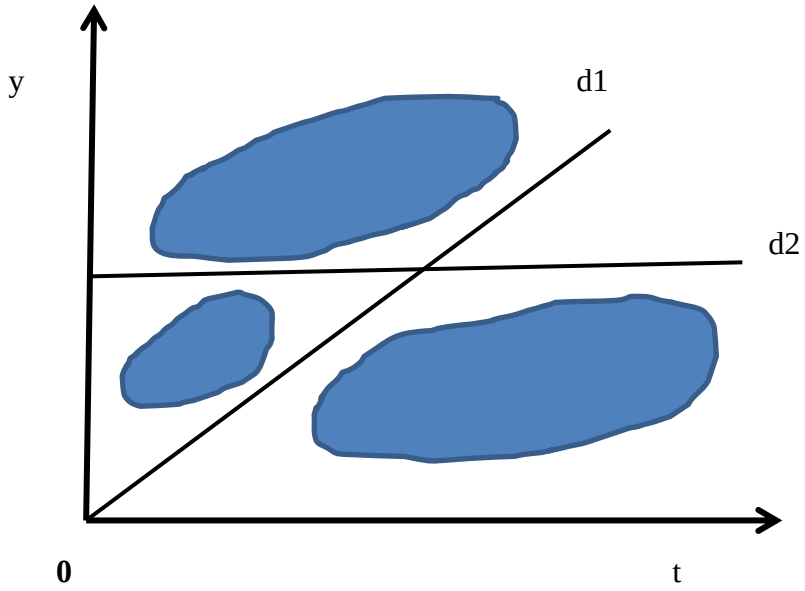
5.4.1 The Problem of Determining the Date and Time of Occurrence of a Disease

For liability to attach on any party at common law, it is necessary to ascertain the date of occurrence of the wrongful act. In most cases involving diseases with a long latency period, it is virtually impossible to determine with certainty the date of contracting the disease. A logical consequence of not knowing this important piece of information is failure to identify the party responsible. To appreciate the implications of this difficulty, it is important to understand the distinction between two categories of long latency diseases often found in mining environments. On the one hand, are diseases of a progressive nature while on the other, are diseases known as non-progressive. With progressive diseases, there is a direct or positive correlation between the exposure of the employee to known and noxious causal agents and the development of the disease. In other words, the effect of any causal agent to which an employee is exposed, is incremental – the more sustained the degree of exposure, the more

likely and faster the disease develops. Take silicosis for example, the chances of contracting this disease is a function of exposure to crystalline silica dust. Furthermore, the likelihood of contracting a particular variant of silicosis; chronic, accelerated or acute silicosis, depends on the level of silica concentration in the dust inhaled. It is for this reason that once a miner develops silicosis, his immediate removal from all sources of potential exposure to the harmful agent becomes paramount. Other diseases that are progressive in nature apart from silicosis are asbestosis, lead poisoning and loss of hearing. With these diseases, it rational to say that any employer who exposes the employee to the agent known to cause a particular disease materially contributes to its development. With this characterisation, a court can then decide on the fairest way to assign liability in situations where the employee in question could have worked for more than one employer doing the same job.

Non-progressive diseases on the other hand, have a completely different developmental profile. Here each element of exposure to harmful agents is neither additive nor does it materially contribute to the development of the disease. Instead, each dose of exposure contributes to the risk of the disease occurring (Porat & Stein, 2003). In other words, each point of exposure constitutes a separate potential factor in the causation of the disease. Take mesothelioma, for example, a type of cancer caused by exposure to asbestos. Once a mesothelioma tumour has started to develop, any subsequent exposure to asbestos, no matter how intense, makes no difference whatsoever to the development of the disease as is the case with progressive diseases. It is therefore even more problematic to identify the party responsible for a non-progressive disease because it is not possible to determine the exact point at which the fatal exposure leading to the development of the tumour occurred. The fatal exposure occurs at a specific point in time and any subsequent or prior exposure does not have a bearing on the development of the tumour. In turn, this makes it also impossible to prove causation in its traditional and pure legal sense. In both progressive and non-progressive diseases, causation is virtually impossible to prove by applying elements of delict. There are significant evidentiary gaps that the common law cannot overcome. As will become clear in subsequent discussion, UK courts have managed to overcome these evidentiary gaps by developing new rules and in some cases new jurisprudence. This process started in the 1950s, is still evolving today.

Figure 1 illustrates the distinction between progressive and non-progressive diseases from a causation perspective from a causation perspective.



[Source: Author]

Figure 1: Progressive versus Non-progressive diseases

In the above graphical illustration, the vertical axis *(y)* measures the development or progress of the disease and the horizontal axis *(t)* measures the period of exposure to a noxious substance such as asbestos or silica dust. The line denominated *d1* represents the development pattern of a progressive disease and *d2* tracks the development of a non-progressive disease. Shaded areas in the graph represent evidentiary gaps that no degree of evidence, based on common law rules, may be able to fill. What then does the graph tell us about the developmental pattern of the two diseases? Firstly, for progressive diseases (*d1*), it is evident that there is a linear or positive correlation between exposure to harmful agents as measured only by time and the development of the disease (*y*).[193] Therefore, the longer the time of exposure, the more the disease develops. In the same connection, Nelson et al (2010) found that silicosis rates among South African gold miners correlate with age and length of service. As indicated before, it is for this very reason that upon diagnosis, employees with a progress disease like silicosis ought to be removed from environments known or suspected to contain silica dust. Failure to do this worsens the condition of the employees with every subsequent exposure to silica dust.

[193] Although the concentration of toxins also influences the development of a progressive disease, this illustration does not consider that aspect in the interests of simplicity.

In South Africa, the system of disease surveillance that mine owners are required to perform in terms of the MHSA of 1996 seeks to facilitate the removal of affected employees from further sources of exposure.[194] However, where the employee has worked for several employers, all of whom exposed him to harmful substances, it remains virtually impossible under pure common law rules to be certain how each of those employers contributed to the development of the disease. To overcome this evidentiary gap, courts in jurisdictions such as the UK and Canada among others, have developed the *material contribution* principle that holds that any employer who may have exposed the employee to harmful substance up to the point of diagnosis of the disease and thus materially contributed to the development of the disease, is liable.[195] The British Columbia Court of Appeal explained the nature of this principle when Smith JA said:

> Material contribution does not signify a test of causation at all; rather it is a policy-driven rule of law designed to permit plaintiffs to recover in such cases despite their failure to prove causation. In such cases plaintiffs are allowed to jump the "evidentiary gap".....That is because to deny liability would offend basic notions of fairness and justice.

Therefore, the common law is fraught with practical difficulties and often becomes a victim of its own rules. On the one hand, it has proof of causation as one of its fundamental requirements yet on the other, it cannot meet that very requirement. When the common law fails to yield compensation, it is common for courts to devise rules that depart from common law doctrines in order to facilitate the recovery of compensation. Often such rules are justified on grounds of vaguely defined terms like policy, fairness and justice. When semantics are removed, the logical conclusion is that it is impossible to apply pure common law principles to long latency diseases. Otherwise, in the absence of creative intervention by the courts the common law in its strict and pure sense does not yield compensation in claims for diseases where multiple

[194] Sec. 13 (1) of the Act

[195] The material contribution principle emerged in the 1950s in the UK when it appeared for the first time in *Bonnington Castings Ltd v Wardlaw [1956] AC 613.* The principle has also been adopted in Canada where the Supreme Court confirmed it in *Clements v Clements [2012] SCC 32.* In some US states, courts have also developed principles that are substantially similar to the material contribution principle. Thus, in *Manske v Workforce Safety & Insurance 748 N.W. 2d 394 [2008],* the Supreme Court of North Dakota held that; the correct test to determine if a disease arises from work is not whether the disease is a direct result of the work that the employee was doing but rather whether work was a "substantial contributing factor" to the development of the disease.

defendants may be responsible for the employee's condition. For compensation to be paid, a lot depends on the extent to which courts are prepared to be creative.

As far as non-progressive diseases are concerned, their developmental pattern as seen from **Figure 1** is completely different. Line (*d2*) is horizontal suggesting that the development of such diseases is independent of the length of time exposure to a harmful agent such as asbestos takes place. Therefore, an employee may be exposed to harmful asbestos fibres for a short period and develop a mesothelioma tumour or it can take a number of years of exposure for the cancerous tumour to develop. Furthermore, once the tumour has started to develop, any subsequent exposure to asbestos becomes irrelevant and does not influence the progress of the disease. Even if the employee concerned continues to be in contact with harmful asbestos after the tumour has developed, this has no relevance on how the disease progresses from there onwards. The impact of this developmental pattern on proof of causation is therefore different from that seen under progressive diseases where it is possible to say with some semblance of justification that every employer who materially contributed to the development of the disease ought to be liable. With non-progressive diseases, this reasoning becomes inherently flawed. In non-progressive diseases, each point of exposure does not materially contribute to the development of the disease. Instead, exposure contributes to the risk of the disease occurring. In other words, each exposure is a separate factor of causation that in itself has the potential to cause the disease to the exclusion of other prior or subsequent exposures. In progressive diseases, continuous exposure is additive, making the position of the affected worker worse and worse as time passes by unless the worker ceases to be exposed.

It is therefore impossible in a non-progressive disease claim involving multiple potential employers to identify where and when contraction of the disease occurs using the common law. How then should causation for purposes of assigning liability be determined in such a complex situation? UK jurisprudence provides some insights. The first insight emerged in the 1970s when the House of Lords held that, from a causation standpoint, a factor making a material contribution to the development of a disease, and a factor that increase the risk of contracting a disease means the same thing.[196] Later the same court held that in a non-progressive disease

[196] *McGhee v National Coal Board [1973] 1 WLR 1*

claim involving several defendants, if the state of medical and scientific knowledge is such that no practical and realistic prospect exists for a claimant to prove causation in its traditional and pure legal sense, a non-traditional approach to causation ought to apply.[197] This in all probability is tacit confirmation that the common is not capable of application to long latency diseases. Their Lordships went further to say that as long as, on the evidence available, shows that the defendant negligently increased the risk of injury, liability must attach and compensation be awarded. Once again, the court had to bridge the evidentiary gap by developing a new principle called *negligently increasing the risk of injury.* In the process, the court actually created a new tort that did not exist in British jurisprudence before then called 'negligently increasing the risk of injury'. [198]

The decision in *Fairchild* illustrates once again the unsuitability of common law principles to deal with long latency disease claims. It shows that courts have to circumvent the evidentiary hurdles associated with proving causation in non-progressive disease claims by developing new rules. That in itself amounts to developing new jurisprudence for long latency diseases specifically. The case involved an employee who worked for several employers and later developed mesothelioma, a non-progressive disease. The issue before the court was; how should causation be determined in such a case where it is impossible to say which of the employers caused the mesothelioma? Realising that it is impossible to answer this question applying pure common law principles, the court the devised a new rule or tort holding that any breach by an employer that materially increased the risk of contracting the disease constitutes causation. Once again, the court justified its decision in *Fairchild* on grounds that it is in the interest of justice. Nevertheless, the reality of the matter is that pure common law principles could not work in this instance and if applied, the claimant's case faced imminent collapse.

[197] *Fairchild v Glenhaven Funeral Services Ltd [2001] 1 WLR 1052*

[198] In *Sienkiewicz (Administratrix of the Estate of Enid Costello deceased) v Greif (UK) Ltd [2010] QB 370,* the court observed that the *Fairchild* case created a new tort in British law called *negligently increasing the risk of injury.* The facts in *Sienkiewicz* were that Mrs Costello worked for the defendant company from 1966 to 1984. She later died of mesothelioma in 2006. It was not in dispute that exposure to asbestos occurred during the time she worked for the defendant. However, the defendant argued that they were not liable because Mrs. Costello's exposure to asbestos over the course of her employment was modest and she also failed to prove on a balance of probabilities that her exposure to asbestos at work was in any way different from the exposure that the general population was subjected to. The court rejected this argument and ruled that all that was needed for liability to attach is proof that exposure during work had materially increased the risk of the plaintiff contracting the disease.

From a liability insurance perspective, the approach adopted in *Fairchild* poses additional difficulties. Some of these are illustrated by the much latter case of *Zurich Insurance Company Plc UK v International Energy Group Ltd.*[199] Like *Fairchild*, this case also involved a mesothelioma claim. Unlike asbestosis or silicosis, mesothelioma is a causally indivisible disease. Thus, in *Zurich*, an employee had worked for an employer, International Energy Group for a period of 27 years during which he was exposed to asbestos and subsequently contracted mesothelioma. His employer had employer's liability insurance with Zurich Insurance Company for six of the 27 years that he worked. In addition to this, the employer had two additional years of insurance cover with another insurance company and for the remainder of the employee's employment, the employer operated without insurance coverage. Effectively, this meant that insurance covered the employee for eight of the 27 years that he worked. International Energy Group (the employer) settled the employee's claim just before he died and turned to their insurer, Zurich Insurance Plc for indemnification of the full amount paid to the employee. The insurer disputed the quantum of the claim arguing that since it provided insurance to International Energy Group for only six of the 27 years that the employee worked for the company, it was only liable for a fraction of the settlement amount representing the period that it was on risk. In other words, the insurer argued that it was only liable for 6/27 (or 2/9ths) of the settlement amount. The insurer further argued that it would be unfair to make them liable for things that could have happened during a period that they did not collect any premium.

The trial court accepted the insurer's argument and ruled in their favour but the Court of Appeal later reversed the decision. The matter was then taken to the UK Supreme Court which held that the insurer must pay the claim in its entirety notwithstanding that some of the exposure to asbestos in all probability took place during times that the insurer was not on risk. However, the court pointed out that the insurer was free to seek contribution from other insurers who may have provided coverage during the exposure period as well as from the employer if no insurance was in place during some periods that exposure to asbestos took place. Justifying the need for constantly adapting liability rules in such cases, Lord Mance, who delivered the majority judgment, put the position as follows at paragraph 53 of the judgment:

[199] [2015] UKSC 33

> But the court would be abrogating its role to achieve a just solution consistent with what any sensible commercial party would have contemplated if it does not adapt and develop conventional principles to meet an unconventional, indeed unique, challenge.

Yet again, evidence from UK courts confirms that new rules and jurisprudence are necessary to make up for the shortcomings of common law principles when applied to long latency disease claims. Nevertheless, the clarity of his Lordship's statement does not derogate from the fact that this approach by the courts while solving the plight of the claimant creates insurmountable problems for other parties. In this case, the court transferred a problem that should have been borne by the insured to the insurer because, according to the court, it was in the interest of justice to do so. Where the injured worker's exposure period comprises periods when the employer or employers had insurance and others when no insurance was in place and given the long latency period that characterises diseases like mesothelioma, it is a realistic prospect that some of the liable parties may have gone out of business. This implies that the solvent and available insurer or employer bears the full burden of any resultant claim. Even worse is the reality that most of the rules created by the courts fuel rather than curb the need for litigation. Hence, Lords Sumption, Neuberger and Reed, who disagreed with the majority view in *Zurich* argued correctly that insurance contracts are designed and should therefore be construed to cover a proportion of the loss that occurs during the period that such insurance is in place. It does not seek to cover things that occur outside the insurance period, but perhaps more crucially, the three dissenting judges make the telling point that the majority view promotes rather than discourage further secondary litigation between insurers and/or between insurers and employers under the insurance principle of contribution.

US courts have also considered the issue of when actionable injury occurs for purposes of compensation in long latency disease claims and how liability of insurers attaches. It is worth pointing that, although the USA uses workers' compensation to cover personal injury claims arising out of and in the course of employment, this question is still relevant since employers buy workers' compensation insurance from private insurers. Long latency disease imply that over the latency period, an employee could change jobs several times. In the process, the insurers covering the same employee also change. Therefore by the time the disease becomes manifest, it usually becomes necessary to determine when the injury occurred in order to determine which workers' compensation insurer is liable. In addressing this issue, US courts

have toyed around with four scenarios or theories that represent the date of occurrence in various American jurisdictions (Anderson, 1987). Virtually all the theories emerged at a time when the asbestos litigation crisis was beginning to engulf America in the 1980s. The first theory to emerge is the exposure or initial exposure theory. It holds that the insurer on risk when exposure first occurs is liable to pay compensation.[200] Another theory that emerged is the manifestation theory. This theory holds that the insurer on risk when the disease manifests is liable for the claim. Yet another theory that emerged is the injury-in-fact theory. It holds that the insurer on risk when the cancerous tumor develops must pay the claim.[201] Finally, there is the continuous trigger theory (also known as the triple trigger theory) which makes all insurers who were on risk from initial exposure to manifestation liable for the claim.[202] The continuous trigger theory raises a collateral question of apportioning liability among the liable insurers.

The question of apportioning liability came before the intermediate appellate court in the state of Connecticut in *R.T. Vanderbilt Company, Inc. v Hartford Accident and Indemnity Co Ltd*[203], a case that involved a claim for long-latency asbestos injury. In that case, the court unanimously endorsed the continuous trigger theory as the correct basis for determining when injury from long latency asbestos exposure occurred. The court also pointed out that this represented the majority view across US jurisdictions (Pitblado, 2017). Pitblado further submits that regarding the question of apportioning liability among liable insurers, the court ruled in favour of apportioning liability *pro rata* according to the time each insurer provided coverage without necessarily discounting any period for which the insured may have operated without insurance. Insurers argued that making them liable for exposure that could have occurred during periods when the insured had no insurance is inequitable to the extent that they did not receive any premium but the court, as seen in the UK, dismissed this argument on the basis that public policy issues involved outweighed the insurers' objections (Pitblado, 2017). This outcome serves as a reminder of the perversity of the problem of legal risk within

[200] *Insurance Company of North America v Forty-Eight Insulations 633 F.2d 1212 (6th Cir. 1980)*
[201] Anderson (1987) credits the development of the manifestation and injury-in-fact theories to the cases of *Eagle-Picher Industries Ltd v Liberty Mutual Insurance Co Ltd 523 F. Supp. 110 (D. Mass. 1982; 682 F. 2d 12 (1st Cir. 1982)* and *America Home Products Corporation Ltd v Liberty Mutual Insurance Co Ltd 80 Civ. 5653 (S.D.N.Y. 1983)* respectively.
[202] *Keene Corporation Ltd v Insurance Company of North America Ltd 667 F.2d 1034, 1054 (D.C. Cir. 1981)*
[203] 171 Conn. App. 61 (2017)

American judgments on asbestos-related injury. No insurer could have foreseen at the time of providing coverage the possibility that they could be forced to assume liability for exposure that occurred during a time that the insured had no insurance. Ordinarily, it should not be difficult to understand why the insured cannot expect to recover for something that took place when there was no insurance coverage. However and as often the case, once the argument involves a concept like public policy that invariably lacks firm boundaries, the law of unintended consequences usually takes over. In the process, courts are prepared to disregard the basic notions of insurance as a risk-shifting device. Insurance is the transfer of risk for a price. When this basic model is abandoned, and insurers are forced to assume risk for no price, it complicates the risk-shifting role of insurance.

Once more, the cases discussed in this section serve to illustrate further the point made earlier that the common law, if applied correctly and in its pure legal sense, hardly results in compensation. For any compensation to be paid, courts have to be prepared to intervene to adapt and modify liability rules and in the process of doing so, create new jurisprudence disguised as the common law. Common concepts used to justify adapting and introducing new rules include public policy, fairness, equity and justice. In most cases, judges cite public policy as the critical imperative behind constant rule changes.

5.4.2 The Problem of Apportioning Liability and Damages

A final problem often encountered with respect to common law claims for compensation is whether injury and liability are causally divisible. In occupational disease claims, this issue can be particularly problematic. The issue of apportionment arises when occupational and non-occupational risk factors combine in the development of a disease. It can also arise in cases where several employers allegedly caused the employee's injury. In other words, the question of apportionment arises where causation is indeterminate. In terms of the common law, if a claimant alleges that several wrongdoers caused the injury, then, the claimant bears the onus of proving the contribution of each wrongdoer to that injury. If the claimant fails to do so, there is no recovery. One way to deal with cases involving multiple causal factors is to use the principle of apportionment by cause. Apportionment by cause attempts to estimate the

contribution to a particular outcome of several risk factors or potential causal factors known to be associated with that particular outcome. However, apportionment may not be possible in certain circumstances without assistance from epidemiological data to estimate the relative contribution of a particular risk factor (Guidotti, 2002).

UK courts have considered the question whether injury is causally divisible. At first, the position taken by these courts was that causation must be determined using pure common law principles rather than policy considerations. Accordingly, where a claimant failed to prove causation in a claim involving multiple defendants or causal factors, compensation was denied.[204] This rule of common law the *all or nothing* rule (Porat & Stein, 2003). It is important to stress that harsh as it may sound, the *all or nothing* rule represents the common law in its true and traditional sense. Later UK courts shifted from this position and replaced the all or nothing rule with the proportionate recovery principle. The principle holds that in a claim allegedly caused by several defendants, a defendant compensates the claimant for a proportion of the injury that represents that defendant's fair statistical share of the injury.[205] This marked a major shift in English law that previously had consistently held that personal injury was causally indivisible and therefore could only be resolved using the all or nothing principle. Once again, when confronted by situations where the common law would result in denial of recovery, UK courts have not shied away from using creativity to formulate new rules intended to avoid the harsh consequences of the common law.

A clear and unavoidable conclusion one can make from the foregoing discussion is that virtually all the problems associated with compensation for long latency diseases under the common law are rooted in causation. Liability at common law rests on two key requirements, both of which are the responsibility of the claimant. The first requirement is that the claimant must prove legal blameworthiness or fault on the part of the wrongdoer. Invariably, this takes the form of negligence. Then the claimant must demonstrate that a sufficiently strong causal connection exists between the harm suffered and the conduct of the wrongdoer. As regards occupational health and safety, these two requirements are straightforward when one is dealing

[204] *Wilsher v Essex Area Health Authority [1988] All ER 871*

[205] The proportionate recovery principle was established in the cases of *Holtby v Brigham & Cowan (Hull) Ltd [2000] 3 All ER 421* and *Allen v British Rail Engineering Ltd [2001] EWCA 242*

with injuries from occupational accidents. There are several reasons why this is so. The first is that as far as injuries are concerned, the wrongful conduct of the employer causing the accident and the consequences or outcomes of the accident are largely instantaneous. Therefore, there is no latency period associated with injuries, making it much simpler to prove causation. A second reason why occupational accidents pose fewer problems than diseases is that the risk of an accident occurring is often easily discernible making it easier to attribute blame or fault when things go wrong. Lastly, evidence required to prove occurrence of an accident and its consequences is usually clear-cut and conclusive. Occupational diseases do not share these features, making the funding of compensation to victims using the common law highly problematic.

5.5 Other Practical and Legal Issues on Common Law Liability for Diseases

Funding compensation for occupational diseases using the common law as a forum is also associated with a wide range of other practical difficulties that warrant further comment. Courts have considered some of them and as pointed out previously, UK jurisprudence on the common law as a mechanism for funding compensation for occupational diseases ranks among the most advanced in common law jurisdictions. This is because, at no point did in the UK ever ban resorting to the common law for purposes of getting compensation for occupational injuries and diseases. Even during the workers' compensation era, suing the employer, either under the Employers' Liability Act of 1880 or in terms of the common law, were options that were always open to injured workers. However, it was only after the introduction of the Beveridge social security reforms in the 1940s that UK jurisprudence on compensation for occupational diseases at common law started to develop in a formalised manner. Today, it is difficult to think of any common law country whose jurisprudence on funding compensation for diseases at common law rivals that of the UK.

In most countries, workers' compensation replaced the common law as a mechanism for funding compensation or the common law got relegated to apply in exceptional circumstances.

For example, New Zealand does not allow employees to sue employers in tort for damages.[206] The only situation where this rule does not apply is in relation to claims falling outside the scope of compensation legislation. In New Zealand, this is very rare because of the comprehensive nature of the statutory compensation system. In the Netherlands, compensation for most occupational injuries and diseases comes from a social insurance system, but employees can still sue their employers in tort even though such claims are rare in practice (Parsons, 2002). Actual reasons why common law claims are rare differ from country to country. In New Zealand, the scope of existing compensation legislation is wide, leaving virtually no room for common law claims. In the Netherlands, common law claims, although recognised, are rare simply because benefits under the statutory system are quite generous, thereby removing any incentive to further sue the employer (Parsons, 2002).

In the UK, although common law liability of employers exists alongside the no-fault industrial injuries scheme, in the early 2000s claims under the tort system were marginally higher than claims brought under the statutory compensation system in terms of the value of total payouts (Parsons, 2002). It is therefore safe to say that the system of tort liability of employers in the UK is highly developed, compared to other countries where workers' compensation is the dominant method of funding occupational accidents and diseases. This makes the UK a useful frame of reference when it comes to practical issues that often arise when compensating victims of long latency disease through the common law. In the context of South Africa, there is an even more compelling reason why a study of UK jurisprudence on compensation for diseases could be highly informative. South African common law evolved from a combination of different sources, notably, Roman law that in turn, blended with Dutch customary law during the time that Holland was part of the Roman Empire. This blended system became part of South African common law when Jan van Riebeeck landed at the Cape of Good Hope in 1652 (Havenga, et al., 2000). Havenga et al (2000) further submit that in the aftermath of the Napoleonic wars, British settlers running away from economic and other hardships at home, started to arrive in the Cape area of South Africa from 1820 onwards, in search new economic opportunities. In the process, they imported English law into South Africa. As the country

[206]This is by virtue of the Injury prevention, Rehabilitation and Compensation Act, 2001. The New Zealand compensation scheme is perhaps the only one of its kind in the world in terms of comprehensiveness. It provides compensation for personal injury (including diseases) regardless of where the injury takes place implying that coverage extends to domestic and work environments (Tobin & Schoeman, 2005).

increasingly came under British control, the influence of English law in the development of South African common law also increased. Consequently, contemporary South African common law has strong English law influences. This in turn, makes English law an informative and useful reference point in the study of practical issues often encountered when funding compensation for diseases through the common law at a time when local courts have never dealt with such claims in the entire legal history of South Africa. There is no other system of law capable of performing this exercise apart from English law in terms of closeness and scope. This also partially explains why a number of cases on occupational disease ended up in UK courts in the past - local lawyers are relatively familiar with English common law and its rules.

What follows in the next section is a synopsis of some leading cases on compensation for diseases in tort that have come before British courts, starting in the 1950s. These cases can shed light on the nature and complexity of the issues that can arise from using the common law to compensate victims of long latency disease even though they have no binding effect in South Africa.

5.5.1 Proving Causation in Claims involving Multiple Wrongdoers

In *Bonnington Castings Ltd v Wardlaw*[207], the plaintiff employee sued the employer alleging breach of statutory duty causing him to develop pneumoconiosis, a progressive disease of the lungs caused by inhaling noxious dust. Previously, the plaintiff had worked for two other employers where exposure to noxious dust also occurred. The employee could not prove which of the employers had breached his common law and statutory obligations on occupational health leading to the employee contracting pneumoconiosis. The House of Lords had to decide whether the employee's claim for damages could succeed notwithstanding the inability by the employee to prove the employer responsible for his disease. In the end, the court held that liability should attach to any employer as long as evidence led shows that such employer had materially contributed to the development of the disease. Even though other employers could have exposed the employee to noxious dust before he worked for the defendant, the court was prepared to disregard this realistic possibility in order to ensure that the employee got

[207] supra

compensated by basing liability on the notion that any employer who could have materially contributed to the risk of such disease developing was liable. Had the court not resorted to this creativity and applied pure common law rules, the employee would have gone uncompensated. Once again, the common law in its proper state proved inappropriate in this case. The material contribution principle created in *Bonnington* has nothing to do with identifying the responsible wrongdoer or proving which one actually caused the disease. Instead, all that the principle seeks to do is increase the chances of a claimant to succeed. Ironically, even though the main issue in *Bonnington* was causation, in the end the decision of the court had nothing to do with causation, instead, the idea of materially contributing to the risk of injury proved to be the justification for imposing liability.

The material contribution principle was also confirmed and used by the Privy Council in the case of *Williams v The Bermuda Hospitals Board.*[208] In that case, the Council went further to hold that in situations where a progressive disease is attributable to two or more factors, the claimant should still recover damages regardless of whether the contributory factors to the development of the disease operated synergistically (cumulatively) or in sequence. All that matters for a claimant to recover damages is proof that negligence of the defendant employer materially contributed to the risk of the disease concerned developing. Where that is the case, the claimant discharges the burden that rests on him or her to prove causation. Yet again, if pure common law principles applied to cases such as this, the claimant would probably have failed in his attempt to recover damages because causation would be virtually impossible to prove. Hence, courts in the UK have been prepared to intervene in such cases to plug any evidentiary gaps that may stand between a claimant and compensation by developing new rules some of which are at variance with original common law ones.

As previously explained, diseases differ in terms of their developmental characteristics. Some diseases develop in a linear or progressive manner while others are non-linear. With progressive diseases, liability can arise if a claimant shows that the conduct of the defendant materially contributed to the development of the disease even though the precise contribution may be indeterminate. This was the basis of the decision in the *Bonnington* case. By contrast,

[208] [2016] UKPC 4

non-progressive diseases do not develop incrementally, therefore, as pointed out in *Fairchild*[209], the main issue lies not in identifying factors that materially contributed to the development of the disease, but those that materially increased the risk of contracting such disease. Thus, in progressive diseases, UK courts circumvent proving causation by applying the material contribution principle while in non-progressive diseases this principle is inappropriate and in its place courts use that of materially increasing the risk of contracting a disease. The question is – what, is the difference between materially contributing to the development of a disease and materially increasing the risk of contracting a disease? This was the question placed before the House of Lords in *McGhee v National Coal Board.*[210] In answering this question, their Lordships held that there is no juristic distinction between the two concepts or principles. Lord Bingham went so far as to say that in the context of injuries or diseases occurring in the course of employment, employers rather than employees ought to bear the risk of insufficient evidence to demarcate the specific boundaries, if any, of their respective contributions to the development of a disease. Clearly, such a ground for imposing liability has nothing to do with blameworthiness, but points towards the 'deep pocket' theory whereby liability attaches on the employer because he is perceived to better placed to pay. In fact, based on this view by the honourable judge, employers find themselves damned if sufficient evidence to prove causation is presented before the court, and they are also damned if such evidence cannot be found, because liability will still be imposed regardless. The only difference would be in the basis on which the liability attaches. Once again, British courts managed to justify the award of compensation in a case where causation was impossible to prove.

The material contribution principle was the main instrument for resolving causation-related issues in occupational disease claims in the UK from the 1950s right up to the 1970s. A major objection against this principle is that it potentially could impute total liability to an employer regardless of that employer's actual contribution to the harm suffered by the injured employee. Under the material contribution principle, if the injured employee is able to prove that a particular employer was a material contributor to the harm, the employee is entitled to recover

[209] supra, note 177
[210] [1973] 1 WLR 1

in full from that employer. As a result, an employer may bear the burden of harm it did not actually cause as long as the employer fits the definition of a material contributor.

When outcomes of the material contribution principle are evaluated in the context of the fundamental objectives of the law of tort and delict namely, compensation, deterrence and corrective justice, some inconsistencies become immediately obvious. The material contribution principle employed in *Bonnington*, *McGhee* and other cases, while succeeding in maximising the chances of injured employees getting compensation, it also results in excessive deterrence (Porat & Stein, 2003). An employer may find himself with liability that had nothing to do with his actual wrongdoing as long as the loose test of materially contributing to the development of harm is met. In addition, when potential wrongdoers know that regardless of what they actually do, liability attaches nonetheless, it is unlikely that liability rules would have a deterrent effect in such circumstances. It is for this reason that some of the judicially engineered liability rules that place less emphasis on the actual role an alleged injurer played in an attempt to ensure compensation to the injured party started to be a source of concern. If potential injurers know that whether they take precautions or not they may still end up being liable, it is unlikely that they would have incentives to take care. These concerns became stronger in the 1980s, leading to a shift in judicial thinking in the UK around the question of causation in cases involving multiple potential defendants. During this time, the view that advances in scientific and medical knowledge had sufficiently developed to enable apportionment of liability between wrongdoers started to gain traction in judicial circles. Hence, the apportionment approach applied in *Thompson v Smiths Shiprepairers (North Shields) Ltd*[211], a case involving a claim by an employee against his employer for loss of hearing.

5.5.2 Assigning Liability in Claims with Multiple Causal Factors

It is not in every situation that apportionment of liability is possible. Where apportionment is not possible, another complex issue arises – should causation depend on policy grounds as implied in *McGhee* or on pure legal principles. Having endorsed the material contribution

[211] [1984] QB 405

principle earlier that is a policy-based principle, the House of Lords appeared to backtrack in *Wilsher v Essex Area Health Authority*[212] when it held that the issue of pure legal principles rather policy considerations should decide causation. Application of pure common law principles to cases involving indeterminate causation almost always result in no recovery. The decision in *Wilsher* was rather surprising, given that, since *Bonnington*, courts in the UK were always inclined towards interpreting the law in such a way that the injured employee could recover compensation as opposed to no recovery. A possible reason for this is the existence of compulsory employer's liability insurance.

The determination of causation at common is problematic when work and non-work or compensable and non-compensable causal factors operate synergistically to produce a particular outcome, such as a disease. A typical case is when an employee is exposed to asbestos or silica dust who also happens to be a smoker. It has been medically confirmed that exposure to asbestos when combined with smoking increases the risk of lung disease far more than would be the case for non-smokers (Mengersen, 2007). Likewise, workers exposed to silica dust who are also smokers are at significantly higher risk of developing and dying from chronic obstructive lung disease than would otherwise be the case (Hnizdo, 1990). Legal issues arising from the association of work and non-work factors in occupational disease claims were considered in *Hotson v East Berkshire Area Health Authority*[213] where the court was asked to decide how causation and liability should be determined in a situation where other factors unrelated to work could have contributed to or increased the risk of a disease occurring. In the court of first instance, it was held that damages awarded to the claimant should be prorated, taking into account the respective contributions of all the causal factors involved. The decision was overturned on appeal. It therefore still remains unclear under English law whether an employer can be liable for only a proportion of the harm suffered by an employee because other non-occupational factors could, based on medical and epidemiological evidence, have contributed to the risk of the disease developing.

[212] supra, note 178
[213] [1987] AC 750

5.5.3 Meaning of 'Occurrence' in Long Latency Disease Claims

Another issue that has come before British courts for determination relates to when a disease with a long latency period is to be taken as having occurred. The issue could be of critical importance in situations where an employee suffering from an occupational disease may have worked for several employers before suffering from a particular disease. In the UK, the issue is also important as it helps to determine which employer's liability insurer would be liable for the resultant claim. In indemnity insurance policies, insurers typically promise to indemnify the insured for things like 'injury' or 'damage' occurring in the period of insurance. Courts in the UK have held that these words do not refer to injury or damage that may happen in twenty or thirty years' time.[214] In a string of other unreported judgments, UK courts have held that a cause of action in a claim for occupational disease does not arise at the time of first exposure since at that point the claimant would not have suffered any injury.[215] In other words, injury occurs at the point at which a cause of action accrues to the injured party. Today, the leading case in the UK on this matter is *Bolton Metropolitan Borough Council v Municipal Mutual Insurance Company Ltd*[216] where the court held that in claims for diseases with long latency periods, injury does not occur at the point of initial exposure to hazardous substances since at that point, no injury would have occurred. Injury only occurs at the point when an employee can sue the employer for the personal injury. In long latency diseases, this would be years and in some cases, decades later.

It is, however, important to add a cautionary note about the decision in *Bolton.* The case involved a mesothelioma claim and as pointed out before, mesothelioma is a non-progressive, as opposed to a progressive, disease. Whether the same logic used in *Bolton* applies to all claims for diseases with long latency periods, including those of a progressive nature, remains unclear. This notwithstanding, *Bolton* is a landmark decision in two main ways. Firstly, the case changed insurance practice in the UK. Before *Bolton*, insurance practice was that in mesothelioma claims covered by employer's liability policies occurrence equated to first

[214] *Promet Engineering (Singapore) Ltd v Sturge [1997] 2 Lloyds Rep 146*
[215] *Keenen v Miller Insulation and Engineering Ltd [Unreported 8 December 1987]; Guidera v NEI Projects (India) Ltd [Unreported 17 November 1988]; McCaul v Elias Wild [Unreported 14 September 1989]* and *Jameson v Central Electricity Generation Board [Unreported 10 March 1995]*
[216] [2006] 1 WLR 1492

exposure to asbestos. Consequently, the policy that was in force on the date the employee was first exposed was liable for the claim regardless of when a disease becomes ascertainable. This practice was synonymous with the *first exposure rule* used in some American jurisdictions. Secondly, the decision in *Bolton* triggered complex civil litigation dubbed the" trigger litigation" that started in the High Court in 2008.[217] It then went to the Court of Appeal in 2010[218] and ending up in the Supreme Court in 2012.[219] The litigation started when, because of the *Bolton* decision, many insurers who had agreed to settle mesothelioma claims based on the old practice (first exposure rule) sought to avoid those claims so that they could attach to insurers on risk when the disease becomes ascertainable. Following the *Bolton* decision, the court in the trigger litigation had to decide what constitutes the policy trigger under employer's liability policies (issued using different wordings) as part of the requirements of the Employer's Liability (Compulsory Insurance) Act of 1969. Is it the tortious exposure to asbestos causing mesothelioma that must occur in the period of insurance or it is the diagnosis and onset of mesothelioma itself that must occur in the period of insurance?[220]

In total the *BAI* litigation combined nine cases and involved forty-five barristers (also known as advocates in South Africa), twenty-five of whom were Queen's Counsel (the equivalent of senior counsel in South Africa) and was heard before five judges. Several factors made the litigation particularly complex. To begin with, the policies in question were worded differently and in addition, insurers involved had used different in the past. A further complication was that over time some of the employers who would have been involved in the claims had gone insolvent, as had some insurers. Yet another complication was that in 2006 the UK Parliament had passed legislation to deal with compensation for diseases such as asbestosis and mesothelioma in the form of the Compensation Act of 2006. Therefore, the court had the difficult task of considering all these factors. In the end, the court decided to adopt a pragmatic approach and attempted to interpret all the different wordings in light of the broader objectives

[217] *Durham v BAI Limited [2008] EWHC 2692*
[218] *Durham v BAI (Run-off) Ltd [2010] EWCA 1096*
[219] *BAI (Run-off) Ltd v Durham and others [2012] UKSC 14*
[220] A similar question came before the US Court of Appeals in the District of Columbia in *Keene Corporation v Insurance Company of North America* (supra). The court had to answer the question – who should pay compensation where various insurers (and potentially various employers) are involved between the date of first exposure to asbestos and the date of diagnosis of asbestosis? Introducing what later came to be known as the multiple trigger theory, the court ruled that in a claim involving a disease with a long latency period, all insurers who were on risk from the date of first exposure to the date of diagnosis of the disease are liable.

of the Employer's Liability (Compulsory Insurance) Act of 1969. The Act makes it mandatory for every employer conducting business in the UK to purchase employer's liability insurance. Regardless of the wording used, the court interpreted it in such a way that it provided the sort of cover contemplated by the legislation. In other words, the court interpreted the different words used in the operative clauses of the policies concerned in such a way that the objectives of the Employers' Liability (Compulsory Insurance) Act is not frustrated. Thus, words such as 'contracted' or 'sustained' used in the operative clauses of the various policies available in reference to diseases were held to bear no special legal significance other than causation of the disease. Using this causation approach, the court found that liability attached to the policy in place at the time of exposing the employee to asbestos no matter the wording actually used. Thus, any policy in place when exposure takes place could be liable.

Insurers involved in the *BAI* litigation argued that the policy in place when the disease developed ought to be liable in line with the reasoning adopted in *Bolton*. However, the court distinguished the circumstances in *Bolton* and found otherwise. If the court accepted the argument by the insurers, some claims were not going to be paid since some insurers were no longer in business. This would have defeated the purpose of compulsory employer's liability legislation. Therefore, the court emphasised the fact that interpretation of the policy wordings in the *BAI* litigation had to be consistent with the general nature and purpose of compulsory insurance legislation. However, it is important to avoid confusing the decision reached in *BAI (Run-off)* and that arrived at in *Bolton.* The central issue in *Bolton* was; when is injury in a mesothelioma claim to be regarded as having 'occurred'? In *BAI,* insurers argued that their policies written on 'sustained' or 'contracted' basis be interpreted in line with the *Bolton* ruling.

A further aspect of interest about the *BAI (Run-off)* case was the decision by the British government to intervene in the litigation against the insurers. Government's reason for joining the litigation was to protect its interests that stood to be harmed by any finding in favour of the insurers. The government urged the court to find the insurers liable because failure to do so entailed that the taxpayer was going to foot the bill of the claims in question. The government's argument failed to convince the court but in the end, this turned out to be academic since the court had already held that the insurers were liable.

5.5.4 Indeterminate Causation and Apportionment of Liability

The question of indeterminate causation was the central issue in *Holtby v Brigham & Cowan (Hull) Ltd* and *Allen v British Rail Engineering Ltd.*[221] *Holtby* concerned an employee who had developed asbestosis following exposure to asbestos dust during his employment as a marine fitter and turner by several employers. He decided to sue one of the employers for whom he had worked for twelve years, nearly half of his total employment working with asbestos. The employee alleged that the employer was negligent and breached statutory duties. Causation was obviously indeterminate since the employee could not conclusively rule out the possible liability of the other employers for whom he had worked. Furthermore, it was impossible to divide the illness into separate parts and causally assign each part of the illness to a separate employer (Porat & Stein, 2003). In *Allen,* the employee developed a condition called vibrating white finger (VWF) which is associated with using vibrating tools such as jackhammers and ground compactors. The employee alleged that his condition arose from his employer's negligence. However, he had also worked for another employer where he had worked with the same vibrating tools. Thus, as in *Holtby,* causation was also indeterminate. If the common law was applied in its pure and strict sense both claims would not have succeeded since the claimants were unable to prove that the employers they targeted were indeed the ones who were responsible. In the end, the Court of Appeal decided to apportion damages in order to avoid making the defendant employers responsible for the damage they did not cause. Apportionment also avoided the possibility of the claimants going uncompensated. Thus, in terms of the principle developed in *Holtby* and *Allen*, a wrongdoer is responsible for the claimant's injury in proportion to the risk of injury to which each wrongdoer exposed the claimant (Porat & Stein, 2003). It must however be said that the apportionment formula is more subjective than scientific to the extent that there is no objective instrument with which to measure risk presented by the concerned employers.

Another case where the question of apportionment of liability was at issue is *Barker v Corus UK Ltd.*[222] The case involved several employers who were alleged to have exposed an employee to asbestos thereby causing him to develop mesothelioma. A key question the court

[221] supra note 179
[222] [2006] 2 AC 572

had to answer was; should liability in such a case be joint and several or should it be apportioned. The House of Lords ruled that it would be unfair to hold one employer liable for damage for which other employers may be liable. Accordingly, in the interest of fairness, the court held that in a situation where several employers are alleged to be responsible for the claimant's harm, each employer should only be liable on apportioned (or severally) liability basis. However, government was not happy with this decision because it was inconsistent with government policy. Consequently, in the aftermath of the House of Lords' ruling, the British government amended Section 3 of the Compensation Act 2006 in order to reverse the decision in *Barker*. This Act regulates compensation issues relating to asbestos-related conditions. Following the amendment, any employer found to have negligently exposed an employee to asbestos and thus increasing the risk of such employee developing mesothelioma, is liable in full for the employee's damages or jointly with any other employers similarly liable. Thus, it is possible for some judicial outcomes where the common law applies to be inconsistent with government policy, necessitates government to intervene legislatively.

5.5.5 Meaning of 'Actionable Injury': The Question of Harm

Arguably, the most controversial issue on claims for occupational diseases in contemporary UK jurisprudence arose in *Rothwell v Chemical & Insulating Co Ltd and others.*[223] In that case, the House of Lords had to answer the question – what constitutes actionable injury from the perspective of an occupational disease? The claimants had sued, alleging that they developed pleural plaques because of exposure to and inhaling of asbestos dusts at work.[224] On their own, pleural plaques do not cause health complications as they are benign (not cancerous) and their development does not necessarily mean that a person will develop an asbestos-related disease in future. However, people with pleural plaques face a higher risk of developing asbestos-related diseases, such as asbestosis or mesothelioma. In *Rothwell*, the claimants argued that although the pleural plaques they developed may not constitute injury on their own, the fact that they pleural plaques indicated the presence of the risk of developing a more serious

[223] [2008] 1 AC 281; [2007] UKHL 39

[224] Pleural plaques are by far the most widely encountered indication that a person faced exposure to asbestos. They cause the lining of the lungs or diaphragm (pleura) to thicken and have a latency period of 20 – 30 years. According to the British Lung Foundation, chances of a person with pleural plaques developing a more serious asbestos-related disease, like asbestosis or mesothelioma, could be increased by smoking (https://www.blf.org.uk visited on 27 October 2016)

asbestos-related disease in future. This, the claimants alleged, caused them anxiety. The claim involved the *aggregation theory* of injury or damage. Under the aggregation theory, the argument is that people exposed to asbestos and who develop pleural plaques live in fear of developing a more serious asbestos-related disease. Because of this, such people deserve compensation (Boggio, 2016). Indeed, before 2007, such people qualified for provisional damages.[225] In dismissing the aggregation theory and indeed the whole claim, Lord Hoffman pointed out that in principle neither the risk of future injury nor the anxiety associated with the prospect of that future injury is actionable at law. Thus, according to the *Rothwell* decision, liability cannot attach to a defendant merely because of exposure alone – where exposure to noxious substances has not developed into a disease, there is no actionable injury or compensable damage. In other words, the development of pleural plaques *per se* does not create a cause of action and is therefore not actionable.

Rothwell is the case that divided the UK on the subject of compensation for long latency diseases in tort. Before the decision, courts in Northern Ireland had shown a clear inclination towards considering pleural plaques as constituting compensable injury under the tort of negligence. Accordingly, in *Bittles v Harland & Wolff*[226] Girvan J expressed the law at paragraph 12 of the judgment as follows:

> In a case such as the present where the plaintiff has been exposed to and has inhaled asbestos dust as a result of the defendant's negligence and has in consequence developed pleural plaques, the development of the pleural plaques even if asymptomatic represents bodily damage and a personal injury which when combined with the defendant's breach of a duty of care brings about the establishment of a cause of action against the defendant. It is trite law that for a plaintiff to succeed in an action for negligence he must establish a duty of care, a breach of that duty and consequent damage. Once the plaintiff has suffered the physical bodily damage represented by the pleural plaques his cause of action has accrued and the plaintiff's claim will relate to all the physical consequences and risks which flow from the negligence. Thus, the plaintiff is entitled to recover damages both for the pleural plaques and for the risks of developing more dangerous medical conditions such as asbestosis and mesothelioma.

[225] The Supreme Court Act of 1981 was amended when Parliament passed the Administration of Justice Act of 1982. This allowed courts to award provisional damages for the first time in the UK. In terms of this change, where there is a possibility that a claimant's condition might get worse in future, the court can award provisional damages. If the condition does deteriorate, the claimant can return to court and apply for additional damages.
[226] [2000] NIQB 13

Therefore, in Northern Ireland, even before the decision in *Rothwell*, courts were prepared to allow recovery not only for the pleural plaques, but also for all the risks associated with the prospect of developing a more serious asbestos-related disease. Whether those risks include anxiety as pleaded in *Rothwell* is an open question.

Likewise, in Scotland, courts had long accepted that pleural plaques constitute actionable injury entitling a claimant to damages.[227] Even though the decision in *Rothwell* really did not a have a binding effect on Scottish courts, some were afraid that it was almost certain that it would be followed since there is no material difference between the law in England, Wales and Scotland on the subject of compensation, generally. To prevent this from happening, and as a matter of policy, Scottish legislators decided to pass the Damages (Asbestos-related Conditions) (Scotland) Act 2009. The purpose of this Act that came into force on 17 June 2009 was to reverse the *Rothwell* decision in Scotland. Following the enactment of this Act, insurers in Scotland became understandably concerned as they henceforth faced considerable uncertainty and exposure estimated to run into billions of pounds following the legislative recognition of pleural plaques as compensable injury. The insurers further feared that, because of the 2009 Act, insurance premiums in Scotland were bound to rise significantly. They therefore decided to challenge the validity of the Act through a judicial review process. More specifically, the insurers based their request for a judicial review on two main points. Firstly, they argued that the Act infringed their rights under Article 1 of Protocol 1 of the European Convention on Human Rights. The Protocol grants protection against interference with property. Secondly, the insurers also alleged that the Act was irrational and thus bringing it under the purview of the judicial review process. Unlike in South Africa where the courts are constitutionally empowered to review legislation, English and Scottish courts have no such powers. In January 2011, a Scottish court rejected the insurers' petition. A further appeal in April of the same year was also unsuccessful.[228] Insurers then decided to take the matter to the Supreme Court but this court also declined to declare the Damages (Asbestos-related Conditions) Act unlawful.[229] Henceforth, *Rothwell* ceased to be law in Scotland.

[227] Damages were awarded for pleural plaques in cases such as; *Gibson v McAndrew Wormald & Co Ltd 1998 SLT 562* and *Nicol v Scottish Power plc 1998 SLT 822*

[228] Vivian, R.W & Mushai, A (2011) Scottish Occupational Disease Claims: UK court rules! *SHEQ Management,* November/December 2011, 12-13

[229] *Axa General Insurance Company Ltd & others v the Lord Advocate & others (Scotland) [2011] UKSC 46*

As seen earlier, in Northern Ireland courts accepted that pleural plaques constitute compensable injury. However, following the decision in *Rothwell* lawmakers, as in Scotland, were also concerned about the possibility that the courts may abandon this stance and start denying claimants recovery by following the House of Lords' decision in *Rothwell*. Therefore, in 2011, Northern Ireland followed Scotland and passed the Asbestos-related Conditions Act (Northern Ireland) which came into force on 14 December 2011. The purpose of the Act was to overturn the *Rothwell* decision. Despite attempts in the House of Commons towards the end of 2007 to reverse the *Rothwell* decision through legislation as had happened in Scotland, the proposal gained little support. From then on *Rothwell* also ceased to be law in Northern Ireland. Therefore, as things stand today, *Rothwell* is law in England and Wales, but not in Northern Ireland and Scotland.[230]

Courts in Australia and the USA have also considered the question whether development of pleural plaques creates a cause of action in tort. In Australia, the position in a number of states where the issue has come up appears to be that neither the development of asymptomatic pleural plaques nor the associated fear or risk of developing a more serious asbestos-related disease in the future creates a cause of action for damages. In *Wardley Australia Ltd v State of Western Australia*[231], the High Court of Australia held that merely being vulnerable to injury or the potential for harm whether present or in future does not amount to actionable injury. Similarly, in *Martindale v Burrows*[232], a case heard in the Supreme Court of Queensland, Derrington J put the legal position on the compensability of pleural plaques as follows:

> There is authority on the point. It has been held that where there has been an inhalation of asbestos that has led to pleural thickening of the lung which by the time of trial has caused no physical discomfort or disability and has only the potential for more serious developments, the physiological changes wrought to that stage could not be said to have amounted to an injury

[230] Another country where the compensability of pleural plaques has been considered by policymakers is Canada, albeit in the context of workers' compensation. Policymakers had to address a familiar question – when a worker has developed pleural plaques but has no other disease, are pleural plaques on their own compensable? In Alberta, British Columbia and Newfoundland, pleural plaques qualify the employee for healthcare benefits only; in Quebec, no compensation or benefit is paid for pleural plaques and in Ontario, pleural plaques on their own do not give rise to compensation without evidence of permanent impairment (Lippel, 2010).

[231] [1992] 175bCLR 514

[232] [1997] 1 Qd R 243 at 246

> because of lack of any established harm, and the potential for more harmful developments could not alter that situation.[233]

In *American Home Assurance v Saunders*[234], the New South Wales Court of Appeal summarised the complex interface between inhalation of asbestos fibres, the development of pleural plaques and escalation of the situation to a more serious condition like mesothelioma as follows:

> …….that the physiological process may be seen as involving three steps: inhalation of the relevant fibres into the lungs; after a considerable time, the penetration of the lungs by the fibres and their lodgment in the pleura; and the development of mesothelioma. If the fibres are inhaled into the lungs, they do not always penetrate the lung or lodge in the pleura. And if they are lodged in the pleura, mesothelioma does not always develop; fibres may either produce no condition or produce merely pleural plaques.[235]

Implicit in the above statement is that if the inhalation of asbestos fibres merely produces pleural plaques, it does not create a cause of action for bodily injury. Thus, the reasoning by Australian courts appears to be consistent with that adopted by the House of Lords in the UK in *Rothwell.*

In the US, the question of what constitutes compensable injury in the context of employment has also filtered into the courts. Most of the cases where this question has arisen relate to the Federal Employers' Liability Act of 1908 (FELA) and asbestos claims. Section 1 of FELA imposes liability for damages on every carrier by railroad engaged in interstate commerce for injuries negligently caused in the course of employment. The Supreme Court has previously provided guidance on what constitutes compensable injury in the context of FELA. Thus, in *Metro-North Commuter Railroad Company Ltd v Buckley*[236], the court held that no damages for emotional distress are available under FELA to disease-free asbestos-exposed workers. Only when a worker suffers from an asbestos disease such as asbestosis can they claim damages for incidental or related emotional distress. On the basis of this reasoning, it is safe to say that in the US, at least in the context of claims falling under FELA, development of pleural plaques

[233] See also *Nixon v Philip Morris [1999] FCA 1107*
[234] [1987] 11 NSWLR 363
[235] Per Mahoney JA at 379 with McHugh concurring
[236] 521 US 424 [1997]

without evidence of further impairment which qualifies as a disease linked to asbestos, does not entitle one to recover damages.

The Supreme Court was asked to depart from the *Metro-North* position in *Norfolk & Railways Company Ltd v Freeman Ayers & others*[237] but it refused to do so. Instead, the court restated the reasoning adopted in the *Metro-North* ruling that only employees who could prove that they had suffered physical injury because of exposure to asbestos could recover related damages for pain and suffering as well as mental anguish arising out of fear of developing a more serious asbestos condition. Ginsburg J, who delivered the majority view, stressed that damages for mental anguish are only available to those workers who can demonstrate that they suffer from an asbestos-related disease. Workers with asymptomatic conditions or unimpaired lives, such as those with pleural thickening, cannot recover.[238] Naturally, the position in the US is prone to vary from state to state. However, even though rulings of the Supreme Court on matters designated as falling under state jurisdiction are not binding, views of the Supreme Court are highly respected and get adopted by most states.

Courts in the USA have also looked at the issue of liability without damage in the context of asbestos and silica dust claims. From the late 1990s, a large number of asbestos claims came from people who were actually not suffering from any asbestos disease at all, also known as unimpaired claimants. The problem of escalating claims by unimpaired people led most US states to pass legislation starting in 2004 setting medical criteria for asbestos and silica claimants to meet before getting compensation (Behrens, 2009). Some of the many states where this legislation has been passed include Ohio (2004), Texas and Florida (2005), Kansas and South Carolina (2006) and Georgia (2007). Courts in various states also started to reject the so-called *any exposure* theory (also known as the *any fibre* theory) which holds that any exposure to asbestos is actionable regardless of whether actual injury occurs or not.[239] Since

[237] 538 US 135 [2003]

[238] At the height of the asbestos litigation crisis in the US, most of the claims that were filed against asbestos companies were by unimpaired lives or people who suffered no harm at all. As much as 50% (some later studies put the figure as high as 75%) of the asbestos claims were being filed by people with little or no physical impairment (Stiglitz, et al, 2002).

[239] Some of the states where the 'any exposure' theory was rejected include Texas (*Borg-Warner Corporation v Flores [2007]);* and Pennsylvania (*Gregg v V-J Auto Parts Inc [2007]* and *Summers v Certainteed Corporation [886 A.2d 240, 244 Pa Superior Ct, [2005]*

2004, there has been a steady growth in US case law in which courts have maintained the stance that there is no cause of action in tort unless the plaintiff has suffered identifiable injury.

Thus, the question raised in *Rothwell* relates to what may be termed liability without damage. When people who have suffered no harm at all sue, claiming damages, it literally amounts to entitlement without cause. Reasons behind the growth of this phenomenon are open to speculation and conjecture, but one can hypothesise with good reason that the American legal system has something to do with it. Personal injury lawyers in the US get a substantial proportion of any award they win on behalf of their clients. In fact, personal injury litigation is one of the most lucrative segments of the litigation market in contemporary America. Although there has been significant progress at Federal and state level to curb the practice of awarding damages to people who have suffered no harm, this came rather too late. Significant damage had long been done by allowing these claims (US Chamber of Commerce, 2005). With specific reference to pleural plaques, Scotland and Northern Ireland took the policy decision to allow recovery while in England and Wales the legal-based decision holding that this condition is not actionable injury remains. Across Australia, most states do not recognize pleural plaques as not constituting actionable injury. Likewise, in the US, pleural plaques on their own are not a basis for the recovery of damages, certainly in the context of FELA.

The cases reviewed in this section serve to highlight some of the intricate and complex issues related to funding compensation for occupational diseases in tort (common law) that have come before UK and other courts. They also serve to illustrate the unsuitability of traditional common law rules to resolve them without adaptation. Some of the decisions seem confusing and inconsistent, serving to illustrate the fine line dividing some of the legal points at issue in the cases concerned. Virtually all the issues in the cases reviewed have causation as their epicenter. In a majority of them, compensation no compensation would have been paid if common law rules had been applied in their strict and pure sense. Therefore, UK courts have been heavily involved in finding ways to enable common law rules to produce compensation. This boldness on the part of the courts in some cases shows clear evidence of what Parsons (2003) terms jurisprudential moral hazard, which is the tendency to allow recovery because of factors that have nothing to do with legal principles. During the asbestos litigation crisis in the

US, insurers were left astounded by some of the judicial interpretations made by the courts on their policies that left many insurers liable for claims that they never intended to cover.

UK jurisprudence on compensation for long latency disease in tort started to formalize in the 1950s and is still developing. New issues continue to emerge and courts must adapt and adjust tort rules constantly to ensure that claimants receive compensation. Without this interventionist approach, most common law rules in their pure sense appear to be inconsistent with the general nature and characteristics of long latency diseases. UK case law reviewed in this chapter demonstrates this incompatibility. Hood (2005) submits that, but for the no-fault industrial injuries scheme in the UK, the tort-based system of employers' liability would have collapsed by now. Likewise, most of the elements of delict also appear to be incompatible with long latency diseases implying that, without an inclination by the courts to be creative, the law of delict is unlikely to fare any better. Developments in the UK on tort as a mechanism for compensating victims of disease have also shown that in some cases, the law and public policy may clash compelling government to act. This response-by-legislation approach happened in Scotland and Northern Ireland following the decision in *Rothwell* and in the UK, following the House of Lords' ruling in *Barker*. Such is the antagonistic nature of the common law as a funding mechanism that its outcomes are often offensive to public policy. This in itself is not necessarily objectionable. What is objectionable is for court decisions to distort the operation of public institutions established to meet clear social objectives and nothing gets done to correct those distortions. It is safe to say that the *Mankayi* ruling of 2011 falls into that category – it turned the compensation system for the mining industry on its head and yet there was no serious attempt to correct the distortion. If anything, there has been a tacit endorsement of it. Problems and issues discussed in this section are largely absent under workers' compensation.

5.6 Compensation for Diseases under Workers' Compensation

Workers' compensation is an administrative process created by statute designed to deal with occupational health and safety compensation issues on a no-fault basis. Usually partial, but final benefits are paid. This means only pecuniary benefits are paid while those of a non-pecuniary nature, such as pain and suffering, are excluded. A framework created by legislation

is responsible for adjudicating and administering claims. The manner, procedure and process used to assess compensation for occupational diseases as well as the size of the awards are dependent on several factors, all of which relate to the design and policy objectives of the scheme in question. To begin with, the operational mechanics of a workers' compensation scheme and its outcomes depend on whether it is a public or a private scheme. A second factor that influences the coverage for diseases is whether the scheme coexists alongside any other mechanism of compensation, such as the common law, or whether it is the sole and exclusive remedy available to affected workers. Schemes that exist alongside the common law invariably involve litigation and in turn, this significantly increases transaction costs to the whole system. Yet another factor influencing how a scheme responds to claims for diseases is how an occupational disease is defined under the relevant legislation and the nature and scope of any special rules put in place to overcome problems of proving causation. Even under workers' compensation, claims are only valid if they arise from, or are associated with work. Actual proof of causation is generally not a requirement, unlike under the common law. Finally, coverage of diseases also depends on the socio-economic and ideological disposition of the scheme. After all, workers' compensation schemes are a product of a country's general economic, social and political environment so their design features vary significantly (Munich Re, 2000). When South Africa switched from the British to the German model of workers' compensation in 1941, political and ideological factors played a significant part in that process (Garzarelli et al, 2008).

5.6.1 Work-related Diseases and Occupational Diseases

According to the ILO[240], the interface between work and disease can occur under one of three variants. The first results in the designation of certain diseases as occupational, either by law, or as a matter of practice. An occupational disease is any disease contracted from exposure to risk factors or noxious substances arising from work or an occupation.[241] Thus, according to the ILO, a disease is occupational if it has a direct, specific and strong linkage to a particular

[240] 'Work-related Diseases and Occupational Diseases: The ILO International List' available at: http://www.iloencyclopaedia.org (retrieved on 3 November 2016)

[241] ILO (2010) *List of Occupational Diseases: Identification and recognition of occupational diseases – Criteria for incorporating diseases in the ILO List of occupational diseases,* ILO Occupational Safety and Health Series 74, Geneva, Switzerland

occupation or work. Often occupational diseases have one causal agent that is widely acknowledged and when such agent is associated with a particular occupation, the disease is more likely than not regarded as occupational. A second variant of the relationship between work and disease is that which produces work-related diseases. These are diseases whose development is influenced by multiple causal factors (work and non-work) operating synergistically. A natural consequence of this interface is that such diseases invariably have complex aetiological characteristics. According to this formulation, work-related diseases have no single causal factor. The last variant of the work and disease relationship relates to those diseases which are regarded as affecting working populations and may be aggravated by occupational hazards but have no causal relationship with work. For purposes of coverage under workers' compensation, the distinction between these three classes of diseases is largely academic since, in practice, schemes tend to cover all three with perhaps diseases deemed to affect working populations attracting special rules. From a workers' compensation standpoint, it is however difficult to see any material difference from the standpoint of coverage between an occupational disease and a work-related one. This is because most statutory schemes tend to cover both types, sometimes to the same degree.

Workers' compensation acknowledges as a matter of principle that it is problematic and unnecessary to insist on the actual cause of a disease. Instead, workers' compensation systems use a number of factors as proxies to the question of causation to determine the compensability of a particular disease.[242] These factors do not seek to establish the cause of a disease. However, they must be considered in aggregate in order to help decision-makers to make an informed judgment about whether or not it is rational to associate a particular type of work or occupation with a given disease. The ILO identifies several factors identified for this purpose. The first one is s*trength of association* – there must be a strong enough association of the work and exposure to noxious substances known to contribute to the development of the disease. A second factor is c*onsistency* – any scientific research conducted on the disease and factors contributing to it must generally draw substantially similar conclusions on the association of work and the disease. Thus, if there is consistent evidence that inhalation of silica dust commonly generated by drilling rock in gold mines is strongly associated with the development of silicosis, that should be sufficient to make a determination that silicosis is an occupational

[242] ILO Encyclopaedia of Occupational Health and Safety (supra, note 211)

disease for people in the mining industry, notwithstanding that other aggravating factors may exist. The third factor is s*pecificity* – the risk exposure from work must produce a well delineated pattern of the disease as opposed to being one in an otherwise increasing number of potential causal factors. A fourth factor is a*ppropriate time interval* – the disease must become manifest after the exposure and within the latency period ordinarily associated with that disease. The fifth factor is b*iological gradient* – there must be some correlation between the level of exposure and the development of the disease or the level of exposure and the severity of the disease. A final factor is b*iological plausibility* – based on the current body of biological and medical knowledge, it is reasonable and logical to conclude that exposure leads to the disease in question. In aggregate, these factors guide decision-makers in their classification of diseases listed as compensable under workers' compensation. In countries whose workers' compensation systems rely on general clauses rather than lists, the ILO factors can guide the court in deciding whether to award compensation.

5.6.2 Private and Public Workers' Compensation Schemes

Chapter 3 discussed the historical origins of workers' compensation. It pointed out that the system pioneered by Germany depended on direct state involvement. Since then, workers' compensation models that have evolved fall into three broad categories, even though each has significant internal variations. Firstly, there are systems where private insurance companies and other private risk carriers such as mutual insurance arrangements, are the dominant players in a privatised market environment where workers' compensation insurance is compulsory. The USA typifies this category. Other countries falling under this category are Argentina, Belgium, Denmark (for occupational accidents only), Finland, Hong Kong (China), Norway and Singapore. It is uncommon for workers' compensation to be voluntary.[243] Then there are systems where the public sector is dominant either, as supervisor of designated workers' compensation insurers like in Germany, or where a state entity or quasi-state fund operating as a monopoly has the responsibility of insuring workers' compensation risks. In the latter

[243] Some of the rare places where workers' compensation is optional are the US states of Texas and New Jersey. In these states, an employer is free to buy workers' compensation insurance or to retain the risk of injury to employees or of contracting a disease in the course of employment and bearing the financial responsibility of paying compensation. In Wyoming, insurance with a state fund is only compulsory for extra hazardous occupations as defined in the workers' compensation legislation. Otherwise, employers engaged in non-hazardous trades are free to insure with the state entity or to retain the risk.

category are countries like South Africa, a few US states (e.g. North Dakota, Ohio and Washington), a majority of Canadian jurisdictions and most of the European Union (EU) (Parsons, 2002). A final category comprises countries with mixed systems where private risk carriers operate alongside and in competition with state-run entities. In this group are countries such as Colombia, Switzerland and the US states of Arizona, California, Colorado, Idaho, Kentucky, Maryland, Minnesota, Montana, New York, Oklahoma, Oregon, Pennsylvania, Texas and Utah.

Whenever private and public systems are the subject of analysis, it is often difficult to resist the temptation to compare the desirability of the two systems. More often than not, this can be a somewhat unhelpful exercise if one does not have a good understanding of the policy objectives of the schemes concerned. However, even though it is not an objective of this discussion to compare private and public workers' compensation systems, some general comments are still necessary. Any workers' compensation scheme, regardless of type, seeks to achieve several inalienable goals. Two of these oft cited as being particularly fundamental. In the first instance, a scheme must deliver rights and benefits to injured workers or those who contract work-related diseases in a fair and equitable manner. These rights include prevention of workplace injuries and diseases, provision of fair benefits, rehabilitation of impaired workers and ensuring an acceptable standard of living for the workers or their dependents. Secondly, the system must be efficient and sustainable. In this regard, minimising costs to the scheme and the broader economy is paramount. Allowing costs to overburden a workers' compensation scheme, whether public or private, undermines its ability to deliver rights and benefits to the intended beneficiaries and jeopardises its sustainability.[244] The analogy of costs and their impact on sustainability holds true whether one is talking about state institutions or private companies.

[244] Garza-Zavaleta (1997) provides an interesting empirical analysis of the US workers' compensation system and what can happen if costs are not managed. In the early 1980s, the US workers' compensation system was in crisis due to skyrocketing costs with benefits growing at 11% annually and medical costs at 15%, notwithstanding that general inflation was averaging 4% per year. This 'social inflation' of the 1980s was primarily due to rampant growth in 'social inflation', mainly fueled by what Garza-Zavaleta calls 'over-doctoring', 'over-lawyering', underpinned by a widespread sense of entitlement broadly supported by the courts. A further reason contributing to the escalation of costs was political paralysis caused by vested interests of various stakeholders notably lawyers, doctors, trade unions, insurance companies and employer associations who could not agree on anything to remedy the situation. Garza-Zavaleta advises that decision-makers in charge of the workers' compensation system must avoid these pitfalls. It was only after the US system underwent reforms in the early 1990s that the situation was stopped from deteriorating further.

To the extent that public systems rely on a government-owned bureaucratic agency to collect contributions, adjudicate claims, pay benefits and run the scheme, incentives could be misaligned. For example, some state-run compensation funds do not promote deterrence since, in a majority of cases, contributions paid by employers do not reflect actual claims. Furthermore, if the scheme experiences viability problems, government usually comes to its rescue by way of bailout, using tax revenues. The deterrence argument holds that a threat of sanctions or some other disadvantage creates an incentive for employers to operate with due regard to occupational health and safety. A possibility for sanctions also creates further incentives for employers to invest in practices and technologies that reduce injuries and diseases. Therefore, even though both public and private schemes lay claim to the recognition of the need to prevent accidents and diseases at the workplace, empirical evidence suggests that private schemes which are experience-rated such as those predominantly found in the US tend to offer stronger incentives in that regard and are associated with deterrence and fewer accidents (Philipsen, 2009).

Additionally, private schemes are more adaptable than public one and are therefore in a position to respond faster to changes in the working environment and judicial developments. To their credit, public schemes face less risk of bankruptcy and total failure to meet their obligations compared to private schemes. The assumption is that government is usually at hand to bail out the scheme in the event of financial distress. A further point of interest in the discourse on private and public workers' compensation schemes is the role played by competition. In private schemes, competition among insurers can be a powerful agent for good practice, efficiency and improvement of benefits as well as the ability to offer clients value for money. Competition also generates what Alfred Marshall[245] calls 'consumer's surplus' in that its existence leads to many consumers in a competitive market paying a price for a good or service which is less than they are prepared to pay. Overall evidence of which scheme is preferable is rather mixed. There are credible arguments for and against each scheme type and empirically, good schemes exist under both types (Munich Re, 2000).

[245] Alfred Marshall was a British economist who served as Professor of Economics at Cambridge University. He was born in1842 and died in 1924. His book, *Principles of Economics* published in 1890 ranks as his most noteworthy contribution to the discipline of economics. The contribution introduced a number of new concepts to the world, such as elasticity of demand and consumer's surplus among others.

One area where there is a big difference between public and private workers' compensation systems is claims administration. Since public systems usually operate as monopolies, it is rare to encounter most of the technical problems related to coverage such as when a particular injury or disease occurred, was caused or sustained as the case may be. Whether the cause of a disease occurred yesterday or ten years ago, ultimately compensation under a public workers' compensation scheme comes from the same source. By contrast, private workers' compensation schemes use different insurers to pay benefits. Naturally, wherever possible each employer through its insurer would try as much as possible to push the claim to someone else. Consequently, some of the coverage problems that could potentially arise can be highly complex and often involve protracted litigation. Usually the task of designing rules governing coverage for diseases is left to the courts. Most of the rules formulated by the courts in this respect have less to do with whether a disease falls under the system as this is clarified in the legislation. Instead, the rules focus more on how a particular disease is covered.

However, even though it is generally true that public workers' compensation systems are not particularly sensitive to legal technicalities aimed at identifying the party who must pay any benefits due, this does not mean that public workers' compensation schemes are immune from some of the complex problems like those seen in private systems. A common practice under workers' compensation is to consider diseases as accidents, yet the reality is different. An accident has an identifiable place and time of occurrence. Diseases on the other hand occur over an extended period of time and sometimes, over the entire working life of a worker. This characteristic can be problematic even for a state-run compensation agency operating as a monopoly. When a disease occurring over time is equivalent to an accident, the question of when the accident occurred gives rise to a number of legal problems. The question was considered in the South African case of *Workmen's Compensation Commissioner v Van Zyl*[246] where Van Zyl was exposed to chrome dust. Chrome dust is noxious to the respiratory system and causes ulceration. It was not in dispute that this disease appeared in the Second Schedule of the Workmen's Compensation Act of 1941. In 1972, Van Zyl developed with an ulcer that caused permanent damage. His condition deteriorated from 1972 to 1985. In 1985, he was promoted to another position where he was no longer exposed to chrome dust. Even though the South African compensation system was by then already a public one, the question the

[246] 1995 (1) SA 708 (N) and on appeal 1996 (3) SA 757

court had to answer was – what was the date of Van Zyl's disablement? Was it the date when he was first exposed or the date he ceased to be exposed? This question was important for purposes of determining which Act was applicable to the claim. The court ruled that the date of disablement was 1 January 1985, the date he was promoted and was no longer exposed to noxious substances.

Since the 1980s, the World Bank has been calling for countries with public workers' compensation systems to consider privatisation as a policy option (Munich Re, 2000). Several countries are on record as having implemented this recommendation. For example, in 1987, workers' compensation in Belgium was privatised with government restricting its role to regulation and supervision of insurers. Likewise, in 1996, the benefit programme for sick workers under the Dutch Disability Insurance scheme established in 1967 was privatised with employers assuming full responsibility for sick workers; a risk they could either insure with private insurers or retain (Koning & Lindeboom, 2015). Insurers in Sweden have also called for privatisation of the country's compensation system but only in respect of industrial accidents with industrial diseases remaining outside the private system, as is the case in Denmark (AISAM, 2004). Calls for privatisation have also been made in Norway. Among developing countries, there does not appear to be any significant movement towards privatisation. In South Africa, it is highly unlikely that privatisation of the workers' compensation system will get the support of trade unions which prefer to see more state intervention in the broader economy and certainly in the area of compensation for occupational risks which has a direct bearing on the welfare of workers. In any event, one of the reasons why South Africa changed from a private workers' compensation system under the Workmen's Compensation Act of 1934 to a public system starting with the Workmen's Compensation Act 1941 was partly due to pressure from trade unions who were not happy with the involvement of private insurers (Garzarelli et al, 2008).

5.6.3 Global Approaches to Disease Coverage under Workers' Compensation

Given the different variations in the design of workers' compensation schemes, what are some of the common approaches used to cover occupational diseases under these systems? One

school of thought holds that occupational diseases represent one of the costs society has to pay in exchange for modernity and technological progress (Munich Re, 2002). For many years, the South African economy depended on mining and in return, the country faces one of the most severe scourges of silicosis by global standards. What workers' compensation systems must do for workers impaired by occupational diseases like silicosis is clear and well understood - impaired workers must be paid fair and expeditious compensation. However, when it comes to how to achieve this objective, things suddenly become less clear and highly contestable issues begin to emerge. In some cases, issues often get so confused that even something as fundamental as why workers' compensation was introduced in the first place appears to be forgotten in the process. Take the case of South Africa, for example. For decades, policy makers never recognised that making employers liable to employees at common law was a viable policy option for funding compensation for occupational risks. Workers' compensation has always been the preferred option. One would want to believe that this preference was, among other factors, informed by the poor record of common law liability in the context of work-related injuries and diseases. Then suddenly and completely without expectation, the seemingly clear and well-documented lessons from history appear forgotten or unknown and the 2011 pronouncement by the Constitutional Court allowing claims in delict for diseases appears accepted without question. No explanation exists for this dramatic about turn after nearly hundred years since the emergence of silicosis as a pressing occupational health issue in the mining industry. Even all the problems associated with using the common law as a mechanism for funding compensation suddenly appear insignificant.

Virtually all workers' compensation systems require proof that an injury or disease arose out of, and in the course of employment as a precondition for the payment of compensation. For industrial injuries, the application of this requirement is generally straightforward and without complication. However, in compensation for long latency diseases, this requirement can be difficult to conceptualise and apply. Unlike accidents, long latency diseases have no specific time and place of occurrence. Instead, they occur gradually over a long time. As a result, the exposure to noxious substances and manifestation of the symptoms of the disease are usually not instantaneous. In addition, some diseases have multiple causal factors, not all of which are always associated with work. Lastly, some diseases, like tuberculosis, are found in the general population making it virtually impossible to separate sufferers who contracted the disease in the course and scope of employment from those who contracted it outside work. To overcome

this problem, workers' compensation systems usually assume that diseases are occupational accidents even though in reality they are not. In order to operationalise this assumption, statutory compensation systems cover diseases under special rules and presumptions designed to make it more likely than not for compensation to be payable. Therefore, there is a big difference between how workers' compensation handles diseases and industrial injuries.

That said, in order to understand how occupational diseases are covered under workers' compensation systems, one must start from the simple premise of seeking to understand what constitutes an occupational disease for the purposes of coverage. In practice, the conceptualisation of an occupational disease can take one of three variants (Munich Re, 2000). A disease is occupational and compensable under workers' compensation if it falls within the general clauses in the legislation as further illuminated and developed by the courts through case law. This method of defining an occupational disease is not prescriptive. Lawmakers simply provide a broad framework into which various conditions that can arise in the course of employment fall, subject to any further criteria contained in the legislation or developed by the courts. It is the most dominant method used in the USA. Many US states have adopted the general definition of occupational diseases provided in the ILO Employment Injury Benefits Convention[247] (Munich Re, 2002). A practical result of the US approach is that virtually any disease can be occupational provided a causal link between the disease and work exists on a balance of probabilities. One of the most attractive features of this conceptualisation of occupational disease is its flexibility that in turn, enables it to respond quickly when new diseases emerge. However, the approach's reliance on interpretation makes it vulnerable to too many disputes arising from differences of opinion.

US courts have held that in order for a disease to fall under the purview of workers' compensation it is not necessary to provide proof of a cause-effect relationship between work and the disease. Instead, mere evidence that work was a contributor to the development of the disease suffices. Thus, in *Manske v Workforce Safety & Insurance*[248], the Supreme Court of North Dakota held that the correct test for determining if a disease is occupational is not

[247] No. 121 of 1964
[248] supra

whether the disease in question is a direct result of the work that the employee was doing, but rather whether work was a substantial contributing factor to the development of the disease. In this case, an employee who was a smoker got exposed to asbestos at work. He later died of cancer. His widow alleged that the exposure to asbestos endured at work was a significant contributor to the deceased's cancer. On the other hand, the employer argued that smoking was the primary cause. On appeal, the Supreme Court held that even though smoking might have been a significant factor, asbestos exposure might also have been a substantial contributing cause. In Mississippi, courts have long held that where an employee had a pre-existing medical condition or disease that was aggravated by exposure to toxins during employment, the fact that there was a pre-existing condition or disease does not derogate from the employee's right to recover under workers' compensation.[249]

A second approach used to determine whether a disease is occupational is the list or schedule system. Under this system, the legislature produces a list of diseases presumed to be work-related, sometimes complemented by the specific occupations to which each disease in the list relates. Only those diseases that appear on the list are work-related and are therefore compensable. A presumption that work is the cause of the disease applies. The role of presumptions in occupational disease compensation is two-fold. Firstly, they relieve the employee of the burden of gathering evidence to prove causality. Secondly, presumptions also play the role of providing guidance in the face of scientific and evidentiary uncertainty about who ought to bear the cost of that uncertainty (Lippel, 2010). Some of the countries that use the list approach are Denmark, Germany, Sweden, France, India, the Philippines, Malaysia, Cameroon, South Africa, the UK (social security scheme), Zambia and Zimbabwe. In most of these countries, government lists the diseases covered by the workers' compensation system and the list is up-dated on a regular basis. In Canada, if a worker is exposed to asbestos and goes on to develop asbestosis it is automatically presumed that the disease arose out of and in the course of employment. This is the position in the five Canadian provinces of Alberta, British Columbia, Newfoundland, Ontario and Quebec (Lippel, 2010). Mesothelioma gets the same treatment as asbestosis in all the provinces except Alberta.

[249] *Cardillo v Liberty Mutual Insurance Co Ltd 330 US 469 [1947]*

In South Africa, the presumption that a disease arose out of and in the course of employment applies for the general industry under COIDA. By contrast, a pure list approach applies only for the mining industry under ODMWA. ODMWA provides that only those mineworkers who contract a disease designated in the Act as "compensatable" shall qualify for compensation.[250] Any other disease falling outside the scope of the list contained in the Act does not entitle the employee to compensation under the Act. The Act further provides that the Minister can revise the list from time to time, as and when necessary. Diseases falling outside the list contained in ODMWA may however, still be considered for compensation in terms of COIDA, but the employee will have to prove that employment more than any other factor is the probable cause.[251] An obvious advantage of using the list approach to define compensable occupational diseases is that there is unlikely to be many disputes since the need to prove a causal connection between work and the disease does not arise; a presumption of causality applies instead. There is also little prospect for disputes of an interpretation nature to arise as is more likely to be the case with the general clauses approach used in the US. However, the list approach is questionable when it comes to its ability to identify and incorporate newly emerging work-related medical conditions, such as stress and other psychological diseases, as compensable.

The last approach used to define compensable occupational diseases is what one might call the mixed approach. This combines lists and general clauses. It recognises that some diseases are as a matter of policy are work-related and these appear in a formalised list. For these, the

[250] Section 1 of ODMWA-in terms of this section a compensatable disease is defined to mean:

(a) Pneumoconiosis
(b) The joint condition of pneumoconiosis and tuberculosis;
(c) Tuberculosis which in the opinion of the certification committee was contracted while the person concerned was performing risk work or which the person concerned was in the opinion of the certification committee already affected at any time within the twelve months immediately following the date on which that person performed such work for the last time;
(d) Permanent obstruction of the airways which in the opinion of the certification committee is attributable to the performance of risk work;
(e) Any other permanent disease of the cardio-respiratory organs which in the opinion of the certification committee is attributable to the performance of risk work; or
(f) Progressive systemic sclerosis which in the opinion of the certification committee is attributable to the performance of risk work; or
(g) Any other disease which the Minister, acting on the advice of a committee consisting of the director and no fewer than three other medical practitioners designated by the Minister, has, subject to the provision of subsection (2), by notice in the *Gazette* declared to be a compensatable disease and which, in the opinion of the certification committee is attributable to the performance of risk work at a mine or works;

[251] Section 65 (1) (b) of COIDA

employee does not need to prove any causal connection between the disease and work. Further to this, there are diseases that are covered in general clauses and in respect of these, the employee has the onus of proving that work, as opposed to any other cause, is the most likely source of the disease. This conceptualisation of occupational disease is widely used in Europe. This is the approach applicable to the general industry in South Africa under COIDA. Diseases fall into two categories for purposes of compensation. The first category comprises diseases listed in the Third Schedule of the Act and provided for under Section 65(1) (a) of the Act. This section defines an occupational disease to mean any disease mentioned in the first column of Schedule 3 arising out of and contracted in the course of employment. In respect of those diseases, statutory notion or presumption that they arise out of and in the course of employment automatically applies to them. Furthermore, workplace exposure more than any other source is regarded as being the contributor to the employee's illness.

An employee who contracts any other disease not appearing in the Schedule may still qualify for compensation in terms of Section 65(1) (b), provided the employee can discharge the burden of proof imposed by that section. The main condition is that the claiming employee must prove, on a balance of probabilities that, the disease arose out of and in the course of employment. Alternatively, the employee must prove that it is more likely than not that workplace exposure was a significant contributing factor in the development of the disease. There is no case to date that the author is aware of where an employee has sought to claim compensation for a disease in terms of Section 65 (1) (b) of COIDA. However, one can surmise that the view expressed by Friedman JP in *Davis v Workmen's Compensation Commissioner*[252] could be a useful guide in claims where an employee has the onus to prove the work-relatedness of a disease. In that case the honourable judge at 694F-G said:

> The policy of the Act is to assist the workman as far as possible……The Act should therefore not be interpreted restrictively so as to prejudice a workman if it is capable of being interpreted in a manner more favourable to him.

Thus, even though the employee may bear the onus to prove that work more than any other source of exposure is the more likely source of the disease, it is more likely that courts will assess the evidence available liberally.

[252] 1995 (3) SA 689

When workers' compensation coverage for diseases is through private insurers or other private agents, the question is; what principles or rules apply to assign responsibility for the payment of benefits? The answer to this question becomes complicated due to several factors that typify diseases as an occupational health risk. These include the date when exposure to noxious materials began, factors which influenced the development of the disease (work and non-work factors), where the worker was employed at the time of exposure and the identification of the responsible insurer (Munich Re, 2000). This notwithstanding, four principles of coverage for diseases under statutory compensation systems have emerged in different regions of the world, each with its own strengths and weaknesses.

The first of these holds that the workers' compensation insurer who is on risk when the disease is first ascertained is responsible for paying the full benefits to the employee notwithstanding that causation or exposure may have occurred much earlier. In the event that the employee is no longer working at the time the disease develops, the insurer of the employee's last employer becomes liable for the claim.[253] While this disease coverage rule is creditable for its clarity, simplicity of operation, and limited vulnerability to disputes which may lead to litigation, it is objectionable in a number of respects. Firstly, the rule has a weak deterrence effect as it potentially transfers financial responsibility for harm from the employer or insurer who ought to bear it, based on causation, to one who may be innocent. A simple hypothetical example can illustrate the potential inequity that this approach can produce: Suppose A worked for employer X for the past 35 years. He resigns and joins employer Z for whom he works for two further years doing exactly the same work before he retires. Soon after retirement, A develops asbestosis. In terms of this coverage rule the workmen's compensation insurer for employer Z is liable for the compensation due to A, notwithstanding that A only worked for Z for a mere two years, and in all probability most of his exposure to asbestos occurred while he was employed by X. Another potential inequity that can arise from this rule is seen from this example adapted from Munich Re (2000): Suppose A works for B and C who both expose him

[253] Section 5 of Norway's Workmen's Compensation Act of 1991 provides:
The insurer of the employer that the injured person has when the injury or disease has been ascertained is liable to pay compensation pursuant to this Act. This applies even though the injury must be regarded as caused while the employee was in the service of another employer. An injury is regarded as ascertained at the earliest when the person injured either died of the injury or disease without having sought medical aid, first sought medical aid for the injury or disease, or first notified the insurer of his claim on the grounds of the injury or disease. If the employee is no longer at work, the insurer of the employee's last employer is liable.

to asbestos. A then decides to take a new job with D as an office administrator where faces no exposure to asbestos at all. Subsequent to this, A develops asbestosis. In terms of this rule, D or his insurer is liable. The insurer providing workers' compensation coverage to D picks the claim even though he is completely helpless from a risk assessment standpoint. In addition, the insurer also faces other practical difficulties when pricing workers' compensation risks and creating reserves for future claims.

The coverage rule that assigns responsibility based on the time a disease develops is also associated with other potentially undesirable labour market outcomes. When employers know that they might be liable for a disease contracted by an employee due to exposure that may have occurred years ago while the employee was working for someone else, it may prompt them to shun hiring certain categories of workers. Older workers could face discrimination for posing a higher risk of prior exposure to noxious substances and an employer may be reluctant to hire such workers. In other words, the rule that assigns financial responsibility for a disease based on its ascertainment could result in discriminatory hiring practices by employers against workers they perceive to be high risk. This is likely to be the case if the workers' compensation scheme to which a potential employer belongs is experience-rated. An empirical study by Harcourt, Lam and Harcourt (2007) on the relationship between experience rating and hiring discrimination by employers using New Zealand data found evidence of a direct relationship between experience-rated workers' compensation schemes and discriminatory hiring practices by employers belonging to those schemes. Simply stated, no employer would be willing to hire an employee who might develop a disease shortly thereafter due to exposure that occurred previously while the employee was working for somebody else.

A second disease coverage rule used in private statutory compensation systems holds that the insurer who is on risk at the time when the disease is ascertained is responsible for paying the full costs of the claim, but such insurer has a right of recourse against any previous insurers who could also have exposed the employee to toxins. This approach once applied in New Zealand during the period when statutory compensation was privatised.[254] A substantially similar approach is used in Germany where the insurer of every employer who contributed to

[254]Sections 110/2 and 111/2 of the Accident Insurance Act of 1998

the exposure of the employee to harmful substances may be liable to contribute to the loss. Another country that uses this method is Colombia.[255] The main advantage of this approach is that it results in effective deterrence to the extent that it attempts to make all employers responsible for exposing the employee to toxins bear the financial consequences of their actions. At the same time, the rule ensures that corrective justice to the employee is not hindered by any dispute among those employers by making one of them liable in full who subsequently can exercise recourse against the others similarly liable. Finally, the rule is also equitable because it attempts to make all potential injurers share in the harm caused. However, for the workers' compensation insurers involved, the rule can result in protracted procedures seeking to determine apportionment of liability. The rule is also prone to attract litigation among insurers leading to delay in the finalisation of claims. On top of that, there is no guarantee that all insurers who should be participating in the claim will be in existence at the time of discovering the disease – some may have ceased trading due to a variety of factors.

The rule allowing the insurer on risk at the time of ascertaining a disease to pay the claim in full and then turn to others similarly liable to share in the claim also presents the problem of determining the optimum formula for apportioning financial responsibility among the insurers concerned. To resolve this problem, a number of options exist. In order to appreciate how some of these options apply in practice it is perhaps helpful to pose a simple frame of reference. Suppose A worked for two companies - X and Y before developing a compensable disease while now working for company Z, his third employer. It is assumed that each of these employers had workers' compensation insurance with different insurers over the course of A's employment. Furthermore, assume that all employers exposed A to a noxious substance. A worked continuously for company X for 3 years, 5 years for company Y and he had worked for company Z for a further 2 years when his disease was ascertained. One option by which the claim could be shared is to ignore the duration that A worked for each employer or the respective contribution of each employer to the development of the disease and apportion the

[255] Section 736 of Colombia's D.R. 1771/94 law provides:
Benefits resulting from an occupational disease shall be paid in full by the workmen's compensation carrier of which the worker was a member at the time the application for financial support was made or at the time the worker acquired the right to financial support. The workers' compensation carrier in charge of financial benefits resulting from occupational diseases may claim such benefits from the authorities which had previously assumed this risk. This shall be done on a pro-rata basis for the period during which the carrier provided protection and if possible, on the basis of the cause of the illness.

claim *pro rata* among the three insurers involved. Of course, this approach is objectionable to the extent that it assumes that the contributions of the three employers to A's disablement is equal. An alternative would be to apportion the claim *pro rata temporis* where each insurer contributes to the claim according to the duration that each employer exposed the employee to the harmful agent. This apportionment method uses time of employment as a proxy for proof of causation. According to this basis of apportionment, the insurer of company Y where the employee spent 5 years would bear the largest share of the claim. If the disease contracted by A is assumed to be progressive, as described in section 4.2.5, then this option would perhaps be the most equitable. A final option is to apportion the claim *pro rata* based on cause, implying that each insurer contributes, based on the actual contribution of each employer to the development of the disease. Unpacking the complex issues related to causation is an obvious objectionable aspect of this apportionment option and is bound to result in many disputes due to its complexity.

A third rule for assigning responsibility to pay compensation for a disease claim in a private workers' compensation market holds that the insurer who was on risk during the last exposure period is liable for the full costs of the disease. This rule is also called the *last exposure* rule and is used in most US jurisdictions (Munich Re, 2000).[256] Just like the first rule, the last exposure rule is objectionable on deterrence grounds. The deterrence argument holds that the threat of sanctions or liability helps in the alignment of incentives of economic agents. By only focusing on the last injurer and ignoring prior ones, the last exposure rule does not achieve optimum deterrence. In addition, the last exposure rule does not avoid litigation. For example, if the last employer disputes that exposure of the employee to injurious materials occurred during the time that the employee was in his employ, litigation becomes a distinct possibility that could delay the payment of compensation. However, this rule is creditable in that by targeting the employer or insurer closest in time to the occurrence of the disease, the last exposure rule reduces the risk of bankruptcy by an otherwise liable employer or insurer. In

[256] Section 440.151 of Florida's Workers' Compensation law states:
Where compensation is payable for an occupational disease, the employer in whose employment the employee was last injuriously exposed to the hazards of such disease, and the insurance carrier if any on the risk when such employee was last so exposed under such employer shall alone be liable therefore, without right to contribution from any prior employer or insurance carrier and the notice of injury and claim for compensation as hereinafter required shall be given and made to such employer; provided however that in the case of disability from any dust disease, the only employer and insurance carrier liable shall be the last employer in whose employment the employee was last injuriously exposed to the hazards of the disease for a period of at least 60 days.

other words, it reduces the likelihood that at the time a claim is filed, the liable employer or insurer may no longer be in business.

The last option for dealing with claims for occupational diseases under workers' compensation is to remove diseases from the private workers' compensation insurance market and assign their compensation to a separate pool formed solely for that purpose. A pool is an institutional arrangement where a number of members come together to share risk. Pools are an alternative to formal insurance. It is common to find pools that are under the direct supervision of the government. Pools normally handle unique risks or risks where insurability is an issue. Today, pools handle environmental impairment liability, pollution risks and terrorism. Pools afford several advantages to their members. These include flexibility and adaptability of coverage rules and the fact that members themselves control the policies of the pool. The pool approach solves most of the problems arising from long latency periods as well as those related to identifying by whom and where exposure could have taken place. In addition, the pool solution virtually eliminates any possibility of litigation. Although insurance coverage exists for diseases, questions remain on their insurability (Munich Re, 2004). Their gradual-occurring nature, long latency periods and the difficulty of identifying causation all militate against the use of orthodox insurance to cover diseases. One of the key requirements for insurance coverage is proof of proximate cause. This requires that before a loss is recoverable under a contract of insurance its proximate cause must fall within the scope of the contract. In a majority of cases, it is impossible to be certain of the cause of a disease. Causes are easier to establish where the event causing the harm and the manifestation of the harm are instantaneous. The jury is still out on the question of insurability of diseases and it therefore makes sense to provide compensation for them under a scheme of arrangement protected from all the problems linked to insurability. To a significant extent, the pool approach manages to overcome most of the problems involved with using formal insurance to cover diseases. Countries that have adopted the pool method to pay compensation for occupational diseases include Argentina, Belgium, Denmark and Portugal (Munich Re, 2000). It is therefore plausible to say that in the light of all the problems that can arise in providing compensation for diseases, the pool arrangement offers a lot of promise.

5.7 Interaction between Workers' Compensation and Common Law Liability

In order to assess the level of interaction between statutory compensation and the common law, it is perhaps helpful to classify work injury compensation systems along the lines suggested by Parsons (2002). According to this classification, work injury compensation systems fall into three categories. Firstly, there are injury compensation systems where the principle of employers' liability or the common law is the sole and exclusive remedy for compensating injured workers or those who contract diseases in the course of employment. In the second category are compensation systems where statutory compensation is the sole and exclusive remedy for injured workers and finally, there are compensation systems where workers' compensation co-exists alongside common law liability. In Europe, and indeed elsewhere in the world, countries with systems falling under the first category are very few. Only a handful of countries, among them Bangladesh, Nigeria and Thailand, rely on employer's liability as the sole and exclusive remedy for workers who succumb to occupational injuries and diseases. However, there is a large group of countries falling under the second and third categories (Klein & Krohm, 2006).

Problems associated with common law claims led government in a number of countries to abolish the right of employees to sue their employers for damages, leaving workers' compensation as the sole and exclusive remedy. Claims by employees are possible in rare and exceptional circumstances. Included in this category are a majority of industrialised countries, among them Belgium, Germany, France, Austria, New Zealand, and Switzerland, as well as the three North American Free Trade Agreement (NAFTA) countries of Canada, Mexico and the USA. In France and Switzerland, an employee can only sue an employer under civil law where there is *faute inexcusable* (inexcusable and deliberate fault) (Munich Re, 2000). Under the German statutory compensation system, civil liability of the employer is excluded except in cases where there is intent to injure the employee (Parsons, 2002). In Germany, claims against employers for damages rare because it is hard to see how an employer can intentionally injure or expose its employees to the risk of contracting a disease. In the USA, there is a general ban of claims by employees against employers. Exceptions allowed to this rule vary from state to state. However, there are exceptions to the principle that workers' compensation shall be

the sole and exclusive remedy for injured workers in the US. These are: (1) third party over-suits; (2) dual capacity suits; (3) loss of consortium suits; (4) suits for consequential bodily injury to certain relatives of an injured employee (Bratton & Avila, 1998); and bad faith claims (Gabel, Klein & Mansfield, 1999).

Third party over-actions are essentially claims brought by injured employees against other employers who are regarded as third parties. An employee injured in the course of employment may sue another party who is not his or her employer whose negligence may have caused the injury. In turn, the employer sued as a third party sues the employer of the injured employee for a proportion of the claim, alleging contributory negligence or wrongdoing. Suppose X is employed by Y and gets injured in the course of employment due to the negligence of Z, another employer. In this case, X can claim workers' compensation and sue Z as a third party. When sued, Z seeks a contribution from Y alleging that he too was negligent and contributed to X's injury. In the US, Z's claim is typically termed a third party over-action. Even though many states do not allow these types of claims, holding that an employer cannot be jointly liable to his employee with another party, a few states such as Illinois, Minnesota, North Carolina and California allow them, albeit with varying degrees of limitation (Bratton & Avila, 1998). For example, in Minnesota, North Carolina and California, recovery is limited to amounts paid under statutory compensation while in Illinois no limitation applies to the amount recoverable. Strictly speaking, third party over actions are not direct actions by an employee against an employer.

Loss of consortium suits are independent claims for damages brought against an employer of an injured employee for loss of services or companionship if the injury to the employee arose from the employer's negligence. Several states do not recognize these actions for example, Massachusetts, Missouri, New York, Tennessee, Texas and West Virginia. It is debatable whether loss of consortium suits ought to seen as an exception to rule that an employee cannot sue the employer. Dual capacity suits are claims brought against an employer on the basis that he occupied some other capacity usually occupied by a third party, in addition to being an employer (Gabel et al, 1999). This can *inter alia,* take the form of an employer being a property owner, producer of a product which turns out to be defective causing injury or disease to an employee, or an employer acting as a medical care provider. These claims are recognised in

California and Ohio. Finally, consequential bodily injury claims rise when a worker becomes a carrier of a noxious substance or carrier of an infectious disease. For example, an employee could face exposure to noxious materials at work and some of the materials transmitted through clothing cause injury to members of his family through secondary exposure. This type of exposure is analogous to an externality. It is recognised in some US states such as Alabama, Georgia, Indiana, Louisiana and Pennsylvania. Victims of the externality or secondary exposure cannot sue the employer of the person who exposed them.

Bad faith claims have grown rapidly across the USA in the past two decades and represent one of the grounds upon which breach of the exclusive remedy doctrine can occur (Richmond, 2010). A bad faith claim is any claim for damages framed on the basis that an institution acted in bad faith towards a client, employee or other stakeholder. The term 'bad faith' does not lend itself to a static definition and therefore lacks firm boundaries. Instead, it is a fluid term where a lot depends on the view of the court. For example, a policyholder can bring a bad faith claim against an insurer for unreasonably withholding indemnity for an otherwise valid claim. In workers' compensation, if an injured worker is able to convince a court that an employer handled his claim in bad faith or that he was denied benefits in bad faith, the employer can be liable in damages, notwithstanding the existence of the general rule that an employee cannot sue the employer. Depending on the gravity of the transgression, bad faith claims attract punitive damages in some US and Canadian jurisdictions (Feinman, 2012).

New Zealand has arguably the most impenetrable rule against common law actions by employees against their employers. No employee can sue the employer for damages in respect of claims falling within the scope of the Injury Prevention, Rehabilitation and Compensation Act of 2001. The common law can only apply to those claims falling outside the scope of the Act (Tobin & Schoeman, 2005). However, given the comprehensive definition of personal injury in the Act, the common law is virtually an insignificant source of compensation for personal injuries and diseases in New Zealand.[257] Circumstances of the injury such as where it occurs are irrelevant considerations since no distinction exists between personal injuries

[257] The Act covers personal injury arising from any one of five sources, namely; accident, treatment injury, work-related gradual processes, diseases or infections and treatment given to a person for personal injury covered by the Act (Tobin & Schoeman, 2005).

happening at work and those that take place outside work. New Zealand's rule banning common claims applies even to claims brought in a foreign jurisdiction.[258] Thus, attempts to circumvent the prohibition against common law actions by filing such claims in foreign jurisdictions have not been successful in the past.

In South Africa, the widely accepted view up to 2011 was that an employee who is injured or who contracts a disease in the course of employment could not sue the employer. Today, things are not as straightforward as they were before. Whether an employee can sue an employer now depends on a number of factors. One of these is whether the employee in question was injured or whether he/she contracted a disease. If the worker was injured, then no action for damages exists against an employer – the exclusive remedy principle applies since claims for accidental injuries fall under COIDA. This Act bans civil actions against employers. If the worker contracted a disease, then the sector in which the employee was working at the time of contracting the disease also becomes a relevant consideration. Mineworkers can bring common law actions against employers for diseases, but outside of the mining industry, such claims remain barred, again the exclusive remedy principle applies. Finally, whether a mineworker who contracted a disease can sue an employer also depends on whether the disease in question is 'compensatable' in terms of Section 1 of ODMWA. If it is not, the employee cannot sue the

[258] In *Bennett v Entsrom Helicopter Corporation 679 F.2d 630 [1982]* Bennett was a resident of New Zealand whose husband died in a helicopter accident in New Zealand. The manufacturer of the helicopter was a US-based company called Entsrom Pty Ltd, located in the state of Michigan. Although Bennett was covered under New Zealand's now repealed Accident Compensation Act of 1982, she sued Entsrom in Michigan under that state's Wrongful Death statute. Conflict of law rules in Michigan provide that the substantive law of the country where the cause of action occurred shall apply to tort claims filed in the state. In this case, it meant that since the cause of action took place in New Zealand, the bar to recovery imposed by the Accident Compensation Act of 1982 would be upheld in Michigan if the court found that it formed part of substantive law of that country. In the end, the court held that the prohibition of recovery outside the framework of the 1982 Act was substantive. On appeal, the decision of the trial court was confirmed and Bennett's claim was dismissed, the court holding that in terms of New Zealand substantive law, common law actions are barred for persons covered by the Accident Compensation Act. Another case where the rule banning common law actions was tested is *James Hardie & Co Pty Ltd v Hall (as Administrator of Estate of Putt) [1998] 43 NSWLR 554* which was heard in the Australian state of New South Wales. In that case, Putt contracted mesothelioma after he was exposed to asbestos while working for James Hardie Industries Pty Ltd in Auckland, New Zealand. He filed a claim for damages in New South Wales, Australia against the holding company (James Hardie Industries) and one of its subsidiaries. The court ruled that the cause of action took place in New Zealand and the statutory bar to recovery was substantive law, therefore Putt's common law right to recover damages was removed by the Act. It is therefore safe to say that based on these two decisions handed down by courts in different jurisdictions, a New Zealander injured in New Zealand and who qualifies for compensation under the existing legislation cannot engage in forum shopping with a view to circumventing the statutory bar to recovery at home.

employer since presumably if workers' compensation is available; it will be in terms of COIDA that bars common law actions against employers.

A number of general propositions are possible about compensation systems where common law actions against employers are barred. One is that such systems require the state to be more involved in terms of looking out for potential areas that could distort the essence of the whole system and taking *ex ante* remedial measures where necessary. The essence of systems using the exclusive remedy principle lies in the payment of competitive and fair compensation and when this is achieved, there is little likelihood that the banning of common law actions could breed resentment. Countries like The Netherlands allow common law actions alongside workers' compensation, but historically, few people have resorted to common law actions because statutory compensation has always managed to offer competitive benefits (Parsons, 2002; Koning & Lindeboon, 2015). When government allows benefits to erode to unrealistic levels, then there is bound to be an increase in attempts to perforate the exclusive remedy principle as people seek more compensation. This is what appears to have happened in South Africa, ultimately leading to the *Mankayi* litigation. Another proposition about compensation systems that are subject to the exclusive remedy principle is that these schemes tend to face much less litigation. Litigation costs constitute a significant proportion of awards, although the scales vary among jurisdictions. One school of thought holds that efficient workers' compensation systems are those that avoid litigation and the involvement of lawyers (Garza-Zavaleta, 1997).

In a significant number of countries, statutory compensation is not the sole and exclusive remedy for injured workers, instead workers' compensation exists alongside employers' liability at common law. However, there is wide variation in these mixed systems in the levels of contribution to compensation paid between statutory compensation on the one hand, and the common law-based system of employers' liability on the other, as well as in the degree of importance attached to the two types of systems. In most of continental European countries whose compensation systems can be characterised as mixed, liability of the employer in tort is of little practical significance compared to workers' compensation (Parsons, 2002). Countries which have mixed systems include Italy, The Netherlands, Spain, South Africa (but only

limited to the mining industry) and Zimbabwe.[259] Exceptions to this general observation are countries like the UK and Ireland, where the contributions to total awards paid to workers between the no-fault component of the system and tort liability mirror each other. For example, in 2001, the state-provided no-fault system in the UK paid a total of £708m in compensation compared to £1.1bn paid from the tort-based employers' liability system (Hood, 2005). However, due to changes in legislation, judicial decisions and policy, this balance can change over time. For example, in Scotland and Northern Ireland, where lawmakers decided to pass legislation to reverse the decision in *Rothwell* in 2009 and 2011 respectively, there should be a significant impact on the size of awards channelled through the employers' liability side of the compensation system. A different impact is possible in England and Wales where *Rothwell* remains law. It is because of the fear of an increase in claims that motivated insurers in Scotland to go all the way to the Supreme Court in an attempt to have the legislation recognising pleural plaques as a compensable condition declared null and void. Likewise, the proposed review of civil litigation rules proposed by the British government in 2011 is likely to have an impact on the balance between claims filed through the no-fault industrial injuries scheme and those filed under the tort system.[260]

Another point worth making is that mixed systems where statutory compensation co-exists with employers' liability at common law or under some other legislation are quite common. However, in a majority of countries, the exact conditions under which common law actions against employers are possible are clear. What is undesirable is the open-ended approach seemingly be unfolding in South Africa where the belief seems to be that every former miner who is sick should sue his former employer. There must be a clear way to manage the process. Failure to do this could make problems seen in other jurisdictions that have faced a similar problem of mass torts a real possibility in South Africa. Furthermore, there also seems to be a widely held view in South Africa that mining companies have unlimited financial resources and are therefore able to pay anything that is demanded from them. Nothing could be further from the truth and in this is another important aspect about liability at common law that appears to be ignored. Suing someone is perhaps the easiest part of the whole puzzle. Anyone can sue

[259] Zimbabwe's workers' compensation scheme was introduced in 1928. Under the current Accident Prevention and Workers' Compensation scheme, an employee who is injured or contracts a disease at work and receives statutory compensation, is not prevented from further suing the employer for negligence.
[260] Note 174

someone if they feel they have a reason to do so. Lawyers would be up for it and the courts are always there to listen. However, what is much harder, especially in circumstances where the welfare of workers or their families is at stake ensuring that employers found liable are in a position to satisfy the judgments made against them. Appropriate measures must be taken to ensure that this is the case otherwise it is quite possible that claimants will be left clinging to judgments which are no more valuable than the paper they are printed on when some of the defendants fail to pay. It is therefore important that policymakers understand the full implications of the *Mankayi* judgment and put the necessary measures in place to prevent other undesirable outcomes.[261] Merely pronouncing that employees can sue their employers on its own does not strengthen the position of claimants in the absence of other supporting measures to ensure that compensation actually gets to those who deserve it.

5.8 Workers' Compensation and Subrogation

In certain circumstances, claims filed against statutory compensation funds may arise from the negligence or wrongdoing of third parties. This constitutes another potential area of interaction between workers' compensation and the common law. Generally, a third party is any party who is not the employer. This raises the issue of equitable subrogation. Subrogation is particularly important for private workers' compensation systems where an insurer who has paid a claim arising from the negligence of a third party has an incentive to recover the payment made to the employee from the actual party who caused the harm. Whether such incentive exists in equal measure in public workers' compensation systems is an open question. However, from a logical and commonsense standpoint, there is no reason why such incentive should not exist in a public scheme since the purpose of subrogation is the same regardless of the type of insurance involved. Subrogation is an insurance principle that allows an insurer who has paid indemnity under a contract of insurance to recover the money so paid from the person primarily liable for the loss. The principle has long existed at common law. It seeks to prevent a situation whereby people who cause harm to others may avoid sanctions on the basis

[261] It is precisely because of the fear that some employers found liable may not be in a position to meet their obligations that the UK passed the Employers' Liability (Compulsory Insurance) Act of 1969 after the implementation of the Beveridge reforms of 1942 which introduced the industrial injuries scheme in 1946 and retained the common law liability of employers. To prioritise payment of compensation, policymakers felt that imposition of common law liability on its own does little to protect the position of injured workers.

that their victims happen to have insurance – a type of free-rider problem. Workers' compensation schemes operate along similar lines as ordinary insurance so, in theory, subrogation ought to apply to claims caused by the negligence of third parties.

The Supreme Court in the US state of Connecticut confirmed the application of subrogation in workers' compensation claims caused by the negligence of a third party in *Pacific Insurance Company Ltd v Champion Steel LLC No.*.[262] It was argued in this case, that since Connecticut's workers' compensation legislation does not provide for claims to be made by insurers against third parties, it implied that insurers are barred from seeking recovery of claims paid from third parties. The court of first instance found against the insurer but the Supreme Court of Connecticut overturned the trial court's decision and held that subrogation was allowable under statutory compensation, both as a matter of principle and public policy. With regard to public policy supporting subrogation, the court cited two reasons. Firstly, allowing insurers to subrogate against third party wrongdoers is in the public interest because it helps in the containment of statutory compensation costs. Secondly, the court also said that allowing subrogation in statutory compensation is in the interests of public policy since it prevents the unjust enrichment of wrongdoers in situations where neither the employee nor the employer institutes action to recover damages caused by the third party.

In the UK, an employee who is injured or who contracts an occupational disease out of and in the course of employment has two options for the recovery of compensation that are not exclusive. The employee can claim no-fault compensation from the state in terms of the industrial injuries (statutory compensation) scheme[263] and in addition, the employee can claim damages from the employer in tort, if they meet the requirements of such liability. In terms of financing, the no-fault system is financed by the state and no direct right of recourse exists in respect of claims paid under the system (Lewis, 2012). However, where a tort claim against an employer is successful, the employers' liability insurer is legally obligated to deduct any compensation paid under the no-fault state system and reimburse this to the state (Hood, 2005).

[262] SC 19402 (Conn. 2016)

[263] The industrial injuries scheme forms part of the general social security and is administered by the Department for Work and Pensions (Lewis, 2010). The UK does not have separate workers' compensation schemes as those seen in continental Europe.

If no claim is brought against the employer in tort, benefits paid under the state social security system cannot be recovered even if it may appear that the employer was to blame for the employee's injury or disease (Lewis, 2012). Therefore, the state's right to reimbursement is depends on a successful tort claim (if any) lodged against the employer. Finally, it may happen that an injury at work arises from the negligence of a fellow worker. In some jurisdictions, the injured employee is allowed to claim workers' compensation benefits as well as sue the fellow worker for damages.[264] Such claims, although commonly recognised under continental European workers' compensation systems, are virtually unheard of in the UK. In Austria, Germany and Switzerland, the right of subrogation exists, but only in cases where there is gross negligence by the employer. In Spain, Italy, and Hungary subrogation is recognised, based on the ordinary rules of negligence (Schinzler, 2004).

In South Africa, workers' compensation legislation allows an injured employee, the Director-General (DG) or an employer individually liable to sue any third party who caused an injury or disease in delict for damages.[265] COIDA further allows the DG who is the person in charge of the workers' compensation system in South Africa to recover compensation paid in terms of the Act from third parties. The same right to recover extends to employers individually liable or by implication, their insurers. An employer is defined in the Act to mean an employer who is exempted from paying contributions to the Compensation Fund in terms of Section 84 (1) (a).[266] Therefore, mining companies who are members of the Rand Mutual do not pay contributions to the Compensation Fund since they are employers individually liable. The Rand Mutual insures their workers' compensation claims. The same applies to the construction industry whose workers' compensation claims are insured with the Federated Employers' Mutual (FEM).

[264] For example, Section 36 (1) of South Africa's COIDA allows such claims.

[265] Section 36 (1) of COIDA states:

If an occupational injury or disease in respect of which compensation is payable was caused in circumstances resulting in some person other than the employer of the employee concerned (in this section referred to as the 'third party') being liable for damages in respect of such injury or disease-

(a) The employee may claim compensation in terms of this Act and may also institute action for damages in a court of law against the third party; and

(b) The Director-General or the employer by whom compensation is payable may institute action in a court of law against the third party for the recovery of compensation that he is obliged to pay in terms of this Act.

[266] Section 1 of COIDA

The question whether a workers' compensation insurer such as the Rand Mutual, can enforce subrogation against a third party or the insurer of such third party in terms of Section 36 (1) was considered by the Supreme Court of Appeal in *Rand Mutual Assurance Co Ltd v Road Accident Fund.*[267] In that case, the Rand Mutual was the statutory compensation insurer for Harmony Gold Mining Company Ltd. An employee of Harmony while acting in the course of employment was injured in a motor vehicle accident negligently caused by another driver (the third party). Harmony's employee received workers' compensation benefits in the sum of R191 078.85 as determined by the Compensation Commissioner in terms of COIDA. The Rand Mutual paid the benefits in its capacity as Harmony's insurer. On the other hand, the RAF is a statutory fund that insures bodily injury or death claims negligently caused by drivers to third parties anywhere in South Africa. There was no disputing that the RAF was liable to Harmony's employee. On that basis, the Rand Mutual sought to recover the R191 078.85 it paid to Harmony's employee from the RAF. The High Court dismissed the Rand Mutual's claim and the matter went to the Supreme Court of Appeal where the High Court's order was reversed and the appeal upheld thereby allowing the Rand Mutual to recover money paid to the injured worker from the RAF through subrogation.

With reference to claims for industrial injuries, it can be argued that the application of subrogation or claims against third parties contemplated by Section 36 (1) of COIDA in South Africa is operationally less problematic compared to claims involving industrial diseases. Subrogation assumes that the person who caused the harm is identifiable and it is possible to prove liability from a causation standpoint. Often diseases do not fit this assumption, hence the existence of rules such as the material contribution principle, materially increasing the risk of injury and statutory presumptions designed to overcome evidentiary gaps. This raises a number of questions as far as subrogation is concerned. For example, can an employee pursue subrogation against an employer (or insurer) whose liability for a disease depends on a statutory presumption? Suppose X is sent by his employer to work at premises owned by Y. Because of Y's negligence, X suffers exposure to harmful substances and develops a compensable disease ten years later. The disease falls under the statutory presumption of causality because its development depends on work and non-work factors. X was acting in the course of employment when exposure occurred and is eligible for compensation by his employer's

[267] supra

workers' compensation insurer. After paying the benefits to X, can the insurer sue Y in subrogation to recover the compensation paid to X? Alternatively, does the statutory presumption of causality used to assign responsibility for the payment of workers' compensation to the insurer of X's employer suffice to trigger subrogation rights by that insurer against the third party? These may sound like complex questions, but their practical significance may be largely academic if, as is likely to be the case, workers' compensation legislation provides guidance.

5.9 Conclusion

The purpose of this chapter was to review occupational diseases and the problems as well as the issues they pose under both the common law and workers' compensation. At common law, compensation for diseases is a highly problematic area. Proving causation and other elements of delict using pure common law rules is virtually impossible if the case in question involves; a disease with a long latency period, multiple employers who all could have contributed to the injury, and multiple causal factors (work and non-work). The complexity of the issues involved are also compounded by the different developmental profiles of various diseases – some are progressive or linear, implying that continued exposure to noxious materials increases the development and intensity of the disease. Other diseases are non-linear in their development and therefore pose different problems when it comes to assigning blame and pinpointing the cause. The common law is also associated with other problems including high transaction costs and uncertainty. Some of the practical problems encountered when the common law applies to fund compensation for diseases exist in a number of cases heard before British courts starting from the 1950s. In aggregate the problems and issues involved point towards the unsuitability of elements of the common law to apply to long latency disease claims unless courts are prepared to disregard some of them and develop new ones instead.

Compensation for diseases under the workers' compensation involves completely different issues and considerations. The issues must be viewed in light of the various workers' compensation systems that exist worldwide. The systems are distinguishable depending on whether they are public or private. Private systems in particular, are sensitive to most of the

complex issues encountered in the provision of compensation for diseases. Furthermore, the systems distinguishable in terms of the extent to which the exclusive remedy principle applies. Some systems remove civil liability of employers while others are mixed. In addition, different workers' compensation systems define occupational diseases differently and in addition, there different rules for providing cover. Some use general clauses, others use pure lists while some use a mixture of lists and general clauses. Finally, different systems also use different rules to cover diseases. Systems range from those that link compensation to the date of ascertaining a disease to the pool arrangement. When all factors are considered, the pool arrangement offers a lot of promise compared to the other coverage options. In the final analysis, workers' compensation avoids most of the problems to do with application of common law rules to diseases.

As far as South Africa is concerned, the *Mankayi* case deepened the historical distinction between compensation for workers in general industry, and those in the mining industry who contract diseases. For the general industry workers whose workers' compensation falls under COIDA, the exclusive remedy principle applies – an employee who is injured or who contracts an occupational disease in the course of employment cannot bring a common law action against the employer. There are no legislative or judicially imposed exceptions to this rule for the general industry. As far as the mining industry is concerned, the compensation system is now mixed – an employee who contracts an occupational disease recognised as such under ODMWA can, in addition to claiming workers' compensation, also sue the employer in delict for damages. A further point of interest that is rather confusing is that for occupational injuries, the exclusive remedy rule applies to all South African workers without exception since the legislation governing these claims is COIDA. Only in connection with occupational diseases is where variations in the compensation options start to emerge.

6 CHAPTER 6: ECONOMIC AND FINANCIAL CONSIDERATIONS OF COMPENSATION FOR DISEASES

6.1 Introduction

The desirability of any method chosen to fund compensation for occupational diseases has to be examined in terms of its economic and financial implications for all the parties involved, as well as the broader economy as well. Any funding method chosen has economic, financial and social implications, not only on the workers who must be compensated, but also for those on whom the responsibility to finance the payments rests. In addition, funding methods also affect the institutions involved in the administration of compensation payments, society in general, as well as the broader economy. Most of the analyses of methods of funding compensation for occupational risks which have been undertaken focus on claimants and do not take into account the issues that may confront the institutions and those on whom the responsibility to pay rests. In the process, little is said about the desirability of systems of funding compensation from the perspective of those who are supposed to pay. Failure to do this makes the analysis incomplete. The assumption is that those who are supposed to pay will always be in a position do so without any difficulty. However, empirical evidence suggests otherwise. With regards to compensation for long latency occupational diseases, the tendency to downplay problems that may confront those responsible for paying compensation is partly due to lack of understanding of the issues surrounding diseases as an occupational health issue. In many respects, occupational diseases are not like any other occupational risk. They have unique characteristics that pose complex legal, economic and financial problems exacerbated by the use of certain funding methods.

When funding of compensation for occupational diseases is done through the common law, the economic and financial problems that may face employers or institutions through which payment is made are multiple and complex. There are a number of developments drawn from other parts of the world providing useful insights into the nature and complexity of some of these problems. Chapter 4 examined the issues and problems associated with using various methods to fund compensation for occupational diseases from a claimant's perspective. This chapter discusses the issues and problems associated with occupational diseases from the

perspective of those who are supposed to finance payments to victims. In doing so, the chapter discusses compensation for occupational diseases in South Africa, using a number of events and developments that have occurred in other countries of which the Lloyd's financial crisis in the UK and the asbestos litigation in the USA are the primary reference points. The chapter demonstrates the range of problems that arise when the common law and litigation are the primary avenues to access compensation. In many respects, the characteristics of long latency occupational diseases are misaligned with common law principles, leaving a lot of room for courts and lawyers to capture the whole process and design new rules in order to increase the chances of paying compensation to claimants. The economic and financial consequences of these judicial innovations on employers and their insurers have been nothing short of devastating.

6.2 Occupational Diseases as an Externality

One of the hardest things to do in the discourse on occupational diseases is to assess and measure their social cost. Occupational diseases, apart from impacting the stricken workers in such ways as lost wages (which are not recoverable through existing compensation arrangements), pain and suffering, as well as anxiety, they also impact on family members, co-workers, medical care providers and various other parties (Dembe, 2001).

Diseases also impose costs (externalities) on third parties who have nothing to do with the economic activities leading to those diseases. An externality is a cost (or benefit) imposed on a third party outside the voluntary mechanism of the market place (Greenwald and Stigler 1986; Busani, Palmer & Parisi, 2003). An effective way to deal with an externality is to internalise its costs. The common example that illustrates the problem of externalities is pollution. Assume there are two factories, A and B, which require clean water for production purposes. A is upstream of B. Assume also that A pollutes the water. If A does not clean the water, then B would have to do so before using it. The cost of pollution is thus not borne by A, but shifted to B. A imposes an externality on B. The cost of pollution is a cost of production passed on to consumers. Therefore, the consumers of A get products that do not include the cost of pollution because A does not bear these costs. This cost passes on to the consumers of B. A

gets an unfair advantage over its competitors like B who is clearly disadvantaged. The way to solve this problem is to ensure that the polluter pays. All costs of production, including pollution are internalised. Obviously, if occupational accidents and diseases do not attract compensated, this would result in an externality being imposed on those who do bear the costs. The injured employee would have to bear the cost, or it would have to be borne by his family, friends or the taxpayer. If he or she cannot work, loss of income arising from this would result again in the cost of supporting the injured person being borne by others; the injured person imposes an externality on society. In theory, the correct way to deal with occupational accidents and diseases is simply to internalise these costs. Workers' compensation achieves this, and premiums paid by each employer are the cost of internalisation. The existence of workers' compensation can thus be justified in terms of the theory of externalities. Jurists anticipated this economic argument, for example, Pound (1914) correctly understood what worker's compensation was achieving when he wrote:

> "Today there is a strong and growing tendency to revive the idea of liability without fault, not only in the form of wide responsibility for agencies employed, but in placing upon an enterprise the burden of repairing injuries without fault of him who conducts it, which are incident to the undertaking. There is a strong and growing tendency, where there is no blame on either side, to ask, in view of the exigencies of social justice who can best bear the loss, and hence to shift the loss by creating liability where there has been no fault. The whole matter of workmen's compensation and employer's liability, as dealt with in modern legislation, illustrates this."

Workers' compensation costs are simply part of the cost of production as it should be. Uncertainty of the risk changes to certainty through the premiums paid to cover the risk. The uncertainty reduces for both the employer and the employee. This is what workers' compensation achieves.

As always, there can be doubt as to what costs should be internalised, or in this case, what should workers' compensation cover. The direct and indirect consequences of occupational diseases are difficult to measure. Some studies have found evidence supporting the hypothesis that occupational diseases with long latency periods induce a change in the hiring practices of employers participating in experience-rated workers' compensation schemes (Harcourt et al, 2007). In other words, workers who have worked at a place where exposure to noxious substances could have taken place may find themselves facing discriminatory hiring practices by employers fearful of picking up a claim in the near future when a latent disease could become manifest, even if those workers may be completely healthy. Consequently, it may be

difficult for these workers to change jobs, since any prospective employer may be afraid to hire an already exposed worker. Invariably, workers facing this risk are older. To workers who may be discriminated against this way, occupational diseases are an externality. This cost would be difficult to internalise.

In South Africa, most miners stricken by occupational disease rely on the public healthcare system that in turn, relies on taxpayers for funding. In this case, these costs have not been internalised. In this regard, Roberts (2009: 57) argues that the government is "underwriting the costs of ill-health caused by the private sector". Roberts goes further to argue that the system of compensation provided under ODMWA is cheap, subsidises the mining industry and enables the industry to externalise costs of occupational diseases by placing this burden on mineworkers and the public health system. It is important to add that in South Africa, the public healthcare system supports the majority of the population. At face value, Roberts' argument has merit but when taken in context, it becomes less convincing. Firstly, it is worth noting that the very reason why compensation under ODMWA is undesirable is government failure to manage the system adequately. Previous sections of this thesis pointed out that failure by government to ensure that benefits paid are competitive and fair is the primary reason behind the deterioration of the system. The government has failed to internalise some costs from diseases in particular. There is no logical reason why government cannot bring all the ODMWA stakeholders together and work out a plan to improve benefits paid under that system. Therefore, it is irrational to argue that government deserves protection from the consequences of its own failures. Historically, the ODMWA scheme used to pay attractive benefits, believed to be at the time the best in the world, albeit on a racial basis. It is partly because of this reason that the industry managed to attract skilled personnel from countries such as England and Australia, among others. Over the years, the scheme gradually lost its comparative edge and nothing concrete happened to arrest the slide. Therefore, even if one makes a concession on the contention that government is underwriting the costs of ill health caused by the private sector, the key question is – who bears the blame for this and what needs to be done about it.

A second reason why blame for the current state of affairs regarding the ODMWA system should be apportioned, is that in 1981, the Nieuwenhuizen Commission found that while most

trade unions preferred the method for computing under the now repealed Workmen's Compensation Act of 1941, mineworkers came out "strongly in favour of lump sum payments".[268] The only attractive feature about lump sum payments is their tax-exempt status, but the risks associated with lump sums outweigh this advantage. In most cases, the money dries up in a short time and hardly fulfils its intended purpose. One therefore wonders whether unions could have done more to educate their members on the desirability of receiving pensions instead of lump sums. After all, since a pension is paid for life it offers better scope for recipients to fight for improved benefits than lump sums that are a once-off payment. It is therefore difficult to understand why payment of lump sums under the ODMWA scheme has escaped scrutiny. It is because of the same reason that not all costs have been internalised; the failure of the state, organized labour and the private sector to remain vigilant with regard to worker's compensation issues.

Finally, the argument that the state is bankrolling the burden of disease generated by the private sector fails to acknowledge that the current workers' compensation benefits, though inadequate, are financed by the mining industry, and that is not all. Mining companies are also a major contributor to government coffers in the form of taxes and foreign exchange. For example, in 2010 the industry paid a total of R21.4bn in corporate tax, the equivalent of 14.1% of all taxes collected in that year. In addition, close to 50% of South African exports have links to economic activities conducted in the mining sector.[269] Therefore, whether government is subsidising the mining sector on occupational diseases or not might be a moot point where the answer depends on the perspective from which one is looking at the issue. From a narrow perspective, it is true that occupational diseases in the mining sector burden the public health system and could be compromising better service delivery by the health sector. In the end, other patients who rely on the public healthcare system may have to settle for inferior service because budgets are overstretched. In this sense, occupational diseases are an externality. However, when the overall contribution of the mining sector to the government purse is considered, the debate becomes more complicated. Unfortunately, the discourse on mining companies and occupational diseases in South Africa is often confused because the issue is an emotive one. Some of the parties responsible for drumming up emotions have self-serving

[268] Nieuwenhuizen Commission (1981)
[269] South African Chamber of Mines *Bulletin*, (November 2012). Available at http://www.anglogoldashanti.co.za (12 August 2013)

motives, but hide behind the claim that they are seeking justice for stricken miners. In the design of policy, especially that relating to financing of compensation to victims of occupational disease, it is vital to avoid issues confusing the issues.

To the extent that some diseases are communicable, risk associated with such diseases spreads beyond the workplace. For example, people with silicosis are more susceptible to contracting tuberculosis, a communicable disease capable of spreading to family members. Diseases are also associated with a lot of anxiety among family members of sick persons due to inability to know whether a loved one will recover. These side effects, if one may call them are impossible to quantify.

In South Africa, even though mining's contribution to GDP has declined significantly over the past three decades, the industry still exerts a lot of influence in the broader economy due to its multiple downstream linkages. Therefore, when there is tension or uncertainty in the mining industry, it affects other industries linked to mining as well. Sometimes rating agencies take into account developments in the mining sector when reviewing the country's credit rating.[270] The real cost of something such as a credit rating downgrade to the economy and society in general is unquantifiable. Likewise, when the Constitutional Court ruled in 2011 that mineworkers with occupational diseases have a right to sue their employers for damages, the ruling created large liabilities for the industry almost overnight. Therefore, other companies linked to mining could also feel the effects of tensions in the sector, but the actual cost of these negative developments (such as the 2011 *Mankayi* ruling) to other industries linked to mining remains an unquantifiable externality. It is impossible for liabilities of the magnitude created by this ruling not to have other negative effects further down the economy.

Arguably, the externality nature of occupational diseases becomes clearer if one considers their latency periods. Chapter 4 showed that diseases like asbestosis, mesothelioma and silicosis

[270] For example, at the beginning of 2013 Fitch downgraded South Africa's credit rating to BBB. This came in the wake of a similar downgrade by Moody's and Standard & Poor's at the end of 2012. All the agencies cited among other factors, the violent wave of strikes in the crucial mining sector as having informed their decision (Andrew England 'Fitch downgrades S. Africa's rating to BBB' *Financial Times* January 10, 2013).

have long latency periods that can span decades in some cases. Diseases therefore are risks of a gradual-occurring nature. The long latency periods have the effect of separating causes of injury from consequences, implying that the people who may have caused the injury are not necessarily the ones who will be liable for the consequences, if injury takes decades to become ascertainable. Take silicosis, for instance, which can have a latency period of up to forty years; it is quite possible that when the disease becomes manifest, the employer in place may be someone different and shareholders may have changed, not to mention the directors. Consequently, the people that are liable today are not necessarily the ones who caused the harm and may not even have a way of knowing what transpired decades before they got involved.[271] Viewed in light of one of the oft-cited objectives of tort or delictual rules, namely deterrence, a clear anomaly emerges. Liability rules in delict seek to ensure that those who cause harm to others in a wrongful and culpable manner are responsible for compensating those that they harm. When this happens, deterrence becomes a natural consequence since imposition of liability creates incentives for care at least in theory. Occupational diseases do not fit this analogy if, because of long latency periods those who actually cause the harm can escape the consequences of their actions through effluxion of time. For those who eventually made pay for wrongs committed in the past by other people, occupational diseases represent an externality that they may be powerless to protect themselves against.[272]

If occupational diseases represent an externality to society, the critical question is; how can policy and lawmakers structure liability rules and the compensation system in general in order to deal with this externality problem effectively? Economists argue that if employers and workers could perfectly quantify risks of industrial accidents and diseases *ex ante*, they could efficiently allocate these risks by incorporating a risk premium in wages paid to workers (Philipsen, 2009). This would imply that employers would have a direct incentive to reduce

[271] Vivian, R.W & Mushai, A (2012) Decades later, who pays occupational disease claims? *SHEQ Management,* July/August 2012, 12-13

[272] Another risk that produces a similar type of externality is liability for environmental impairment and pollution. Pollution occurs gradually hence, damage can take decades to be visible. Consider a situation where a polluting company comes under the ownership of new owners who have no idea of the prior misdemeanors of those in charge. Years later, the consequences of the pollution become visible and liability will not attach to the previous owners (who by then may no longer be identifiable) but to the current owners even though they are not to blame. To make matters worse, most countries today use the 'polluter pays' principle which imposes liability on enterprises regardless of fault. Naturally, under the corporate personality principle, the company is regarded as the polluter, but the ultimate cost is borne by shareholders and other innocent parties like employees who may lose their jobs in the process. The company may also decide to shelve any plans to hire more workers until it clears its pollution liabilities.

the risk of accidents and diseases in order to lower their risk premium built into wages. However, in practice it is impossible to quantify occupational risks due to cost and information problems. Because of these problems, the structure of the compensation system, the rules governing that system and the application of those rules are applied are crucial considerations.

Philipsen (2009) submits that there is tension between economists and lawyers when it comes to which objective of liability rules deserves priority. Economists argue that liability rules should target deterring wrongful and injurious conduct. According to this argument, the threat of sanctions that comes with being found liable is a powerful agent for aligning the incentives of potential wrongdoers. Therefore, economists further argue that social security and no-fault systems are weak on deterrence unless they have effective and enforceable regulations or a system where contributions to compensation funds are experience-based (Philipsen, 2009).[273] Lawyers on the other hand, view compensation as the main goal that liability rules should try to optimise. However, the assertion that lawyers favour the compensation objective of liability rules should not be taken wholesale and out of context. Lawyers would only be inclined to prioritise compensation if liability rules are adversarial in nature. The more adversarial the rules are, the more the prospects for lawyers to earn large fees through litigation. Removal of the adversarial element, for example by introducing a no-fault system, is unlikely to get much support from lawyers as it deprives them of a market regardless of the fact that liability without fault enhances the ability of claimants to access compensation.[274]

Whether liability rules denominated in tort or delict achieve deterrence is a highly contested issue and available empirical studies have produced mixed results. Some authors argue that the deterrence power of tort liability exists in theory but remains unproved empirically. For

[273] Experience-based contributions imply that those firms whose accident rates are above the average are penalised by having their contributions (or premiums) revised upwards to reflect their worsening accident record. Premiums paid by employers under private worker's compensation systems depend on this system and economists argue that this creates incentives for employers to reduce accidents.

[274] This is evident in South Africa in connection with attempts to reform and restructure the Road Accidents Fund (RAF). One of the proposals that put forward is to change the current fault-based system and replace it with a no-fault benefit system. This would also result in the removal of the system's adversarial element. Personal accident lawyers have been the most vocal critics of this proposal. Even though it is general knowledge that the RAF is insolvent, only lawyers seem to think otherwise. Thus, when the RAF announced in October 2016 that it is insolvent and struggling to pay claims, lawyers strongly disputed this, arguing that the whole announcement was a ploy to push through the no-fault reforms that would see a huge reduction in the need for lawyers in road accident personal injury claims – *The Star,* 22 October 2016.

example, Trebilcock (1989) submits that critics of the deterrent effect of the tort system argue that the system has not significantly influenced behavioural incentives of economic agents. Therefore, its ability to deter does not outweigh its deficiency as a compensation mechanism. Dewees, Duff and Trebilcock (1996: 414) contend that the ability of tort law to have a deterrent effect is not "generalizable and is not ascertainable from existing empirical studies". On the other hand, there is a wide body of literature, most of it from North America, suggesting that there is a strong correlation between exposure of employers to adverse financial outcomes and fewer accidents. For example, Chelius (1982) found that inbuilt incentive-based devices, such as greater benefits payable by employers in workers' compensation schemes, might cause employers to spend more on prevention of accidents. A study by Harcourt et al. (2007) found that experience rating of workers' compensation reduced fatalities in Canada and lowered reported accident rates in both Canada and the USA. However, when the same is examined from the perspective of employees, the outcomes are in direct competition with those from the employers' perspective. Thus, an increase in benefits payable is associated with an increase in accidents and injuries (Kaestner & Carroll, 1997; Bolduc, Fortin, Labrecque & Lanoie, 2002). Whether the same conclusion is valid about occupational diseases is an open question.

A further aspect of liability based on fault that is of interest to this discussion is that in certain circumstances, the fault requirement can hinder the effective tackling of externalities arising from occupational diseases. Liability based on fault can create incentives among employers to avoid production of useful and accurate information due to fear that the information may be used against them (Schlesinger et al., 1993). Thus, even though the information could be vital for the common good if it is made available to policymakers and regulators, an employer may not have an incentive to provide it due to fear of self-incrimination. Nevertheless, when liability rules used in the adjudication of occupational disease claims impose financial responsibility on a party not because there is conclusive evidence that the party caused the harm, but because the imperative is to ensure that someone compensates the injured party; those rules still create an externality to the extent that the party targeted may be innocent. Take the rule that says that an insurer on risk when a disease is ascertainable is liable for the whole claim discussed in Chapter 4 as an illustration. There is a high likelihood that the rule is a hit and miss one when it comes to ensuring that actual injurers bear responsibility for their wrongful conduct. The company that insures the employer for whom the employee is working when the disease is ascertainable is liable, yet that employer could be completely free of blame,

especially in cases involving long latency diseases. All that has happened is that the employer happened to be the one in whose employ the injured worker is when harm becomes manifest. Thus, occupational diseases are an externality both in terms of the burden they may create for innocent third parties, as well as in terms of the rules applied to assign financial responsibility to wrongdoers.

Challenges faced in addressing externality problems caused by funding compensation for occupational diseases through the common law are two-fold. The first relates to finding ways and means of separating externalities that socially relevant from those that are not. Busani, et al (2003) argue that liability rules should aim to address socially relevant externalities and ignore socially irrelevant ones. A second challenge lies in finding a way to design compensation rules such that they only respond to and compensate socially relevant externalities and leave those that are socially irrelevant uncompensated. If occupational diseases are a form of private harm that in turn, generates loss to society (social loss) then there must be an optimum way to compensate those private parties who incur this type of harm. One of the oft-cited objections to the common law is that it is a hit and miss mechanism which often leaves some people without compensation. If it is accepted that occupational diseases are a socially relevant externality that should be addressed by liability rules then by potentially leaving some occupational disease sufferers uncompensated, the common law is therefore objectionable on efficiency grounds. An acceptable situation would be one where costs (externalities) are indirectly borne by third parties through the market price mechanism (Bishop, 1982). Workers' compensation to the extent that it internalises costs of occupational injuries and diseases by converting them into production costs manages the externality aspect better than the common law. Under workers' compensation, there are very limited grounds for denying compensation to a worker who contracts a compensable disease in the course of employment since proof of fault is not a prerequisite for recovery. In addition, workers' compensation is far less adversarial in that it generates few contestable issues requiring litigation.

Common law rules are also objectionable for violating the doctrine of horizontal equity that requires that people with equivalent needs and by implication, equivalent disabilities should receive equivalent compensation. The fragmented South African compensation system undermines horizontal equity to the extent that it pays different levels and types of

compensation for the same injuries or diseases. Mineworkers get different benefits from those available to people in general industry even if the injury or disease is the same. The introduction of common law liability through the *Mankayi* decision makes the situation even worse. According to Trebilcock (1989), the doctrine of horizontal equity formed the central thesis of the Beveridge Report on social insurance and allied services published in November 1942 in the UK. The report also informed the welfare policies of other countries, such as Australia and New Zealand.[275] As indicated in Chapter 2, the common law can only yield compensation in cases where one person injures another and evidence to meet legal standards is available to the court. The problem with this is that most of the harm sustained at the workplace is not a direct result of one person's wrongful conduct towards another. Most harm results from trade risk or current methods of production where there is no conclusive evidence to attribute blame solely to one party. For victims of trade risk, the common law has no answer hence they go uncompensated. If workers whose injuries or diseases arise from trade risk go uncompensated, it implies that the externalities generated in the process remain uncorrected. Thus, on the one hand, injured workers or those with diseases go without compensation and on the other; the social cost created by their injury cannot spread through the market price mechanism.

This section can thus be succinctly summarised. Occupational accidents and diseases, if not funded, impose externalities on others. A solution to this is to internalise the costs via workers' compensation. If done correctly, the costs will be internalised and uncertainty ceases to be a concern for both employer and employee. The costs then become part of the current cost of production.

[275] Sir William Beveridge once famously stated: *If the matter were now being considered in a clear field, it might well be argued that the general principle of a flat rate of compensation for interruption of earnings adopted for all other forms of interruption should be applied also without reserve or qualification to the results of industrial accident and disease, leaving those who felt the need for greater security, by voluntary insurance to provide an addition to the flat subsistence guaranteed by the State. If a workman loses his leg in an accident, his needs are the same whether the accident occurred in a factory or in the street; if he is killed, the needs of his widow and other dependents are the same however the death occurred. Acceptance of this argument and adoption of a flat rate of compensation for disability however caused would avoid the anomaly of treating equal needs differently and the administrative and legal difficulties of defining just what injuries were to be treated as arising out of and in the course of employment. Interpretation of these words has been a fruitful cause of disputes in the past, whatever words are chosen, difficulties and anomalies are bound to arise. A complete solution is to be found only in a completely unified scheme for disability without demarcation by cause of disability* (Quoted in Trebilcock, 1989: 21).

6.3 Long Latency Disease and the Accounting Problem

Long tail risks present the affected firms, including insurers if they are on risk, with complex accounting problems. The key question in this regard is- How should defendant firms or their insurers account for the cost of these long tail liabilities? Alternatively, where is the money needed to settle silicosis claims filed today, but arising from exposure that took place in the 1980s and 90s or even the 1970s supposed to come from? This question is neither abstract nor purely academic because this is the problem now confronting South African mining companies because of the Constitutional Court's decision in the *Mankayi* case.[276] Since 2012, former miners have started to file potentially ruinous class action suits against virtually all mining houses. The courts have since certified that these class actions can go ahead. Given the unprecedented and unexpected nature of the court's decision to allow common law claims against mining companies, it is safe to say that the defendant companies had neither the money nor appropriate insurance to cover these claims. Before 2011, the possibility that an employer could be sued for an occupational disease was so remote that any rational person would not have arranged insurance, assuming it could be obtained, for such a risk as doing so amounted to imprudent expenditure. Employers had more than a hundred years to look at where no such liability had ever arisen or been sanctioned by a court. One does not buy insurance for a risk that in all probability is unlikely to arise. Given how Section 35 (1) of COIDA had until 2011 been interpreted by the courts no one could have foreseen the possibility of courts reaching the conclusion that the Constitutional Court arrived at in 2011. Nevertheless, now that mining companies can be liable in delict for occupational diseases, the question regarding where the money to settle the claims will come from and issues of accounting for the liabilities in the books of defendant companies becomes relevant. As shall be seen later, failure to account for long latency diseases contributed to the near-disaster at Lloyd's of London.

Even under the assumption that one is expecting them, long tail claims from long latency disease are difficult to account for because of the high level of uncertainty that is associated with them. Firstly, there is uncertainty about the number of latent claims that in any given financial year. Then there is uncertainty about how much those claims will cost in aggregate.

[276] Mushai, A & Hutcheson, H.D (2012) "Accounting for the cost" *SHEQ Management, (*November/December 2012), 10-12

Further to this is uncertainty about the timing of filing the claims. There is also uncertainty about the impact of inflation, how liability rules could change over time as well as the impact of the change on the cost of claims. Thus, even under the best of circumstances, these and other uncertainties complicate the accounting process for long tail claims. Mining companies are in an even worse position because they did not expect such claims in the first place hence they do not have money stashed around somewhere to pay for them. They had worked correctly with the assumption that these risks had been internalised and having paid the worker's compensation premiums, there was no additional risk. That is what internalisation is supposed to achieve.

The extent of the liabilities facing mining companies is unknown. One can only account for a liability if one has a reasonable basis for estimating it. This is not the case with silicosis liabilities confronting mining houses. What is clear from the various press reports is that lawyers are in the process of compiling lists of potential claimants, a process that has spread to neighbouring countries that used to supply migrant labour to South African mines, such as Botswana, Lesotho, Swaziland, and others. Against this background, the extent of the silicosis liabilities is difficult to quantify. Because of the dearth in information, the defendant companies will have to work with mere estimates that may be under or over-stated. Then there is need to project when that money will be required. Again, this is an unknown factor. It is now nearly ten years since the *Mankayi* judgment, yet not a single claim has been finalised one way or the other. There has been an out of court settlement. In fact, it could be years before courts start to hear formal evidence on silicosis claims. This begs another difficult accounting question: For how long should mining companies continue to hold the money set aside to pay silicosis claims? To this, one could probably say that they should hold on to the money for as long as the possibility of claims against the company remains. To expect a company to hold money in perpetuity just in case it may be required in future is unrealistic and inefficient. Workers' compensation eliminates this problem by removing the need for holding funds on a precautionary basis. Employers finance the system on a going concern basis and this represents the cost of internalising compensation for diseases.

Regarding the actual modalities of how mining companies are supposed to account for the claims, it is also hard to say, not least because each company that expects a lawsuit is supposed to perform this task. As indicated previously, if insurance covered the claims, most of these

issues would become an insurers' problem. However, since no insurance is in place for the *Mankayi* liabilities, each company would have to find its own accounting solution. However, if the company were to show the expected claims (which are virtually unknown, but are expected to be very large) in its financial statements, the company will in all probability, appear to be insolvent. This will have serious implications on tax revenues to the state and the future viability of the companies with similar liabilities. One wonders where the wisdom of persisting with the common law system with all these problems is when workers' compensation can eliminate virtually all of them. For example, insolvency undermines the ability of a company to attract investment and hire more workers. As subsequent discussions in this chapter will show, failure to account for long latency liabilities correctly was one of the main problems that contributed to the near-disaster at Lloyd's of London in the early 1990s averted by the establishment of a new institution to separate the old Lloyd's from the new one. This came at immense human and financial cost.

6.4 The Principal-Agent Problem and the Common Law

Adam Smith (1776: 13-14) famously wrote:

> It is not from the benevolence of the butcher, the brewer, or the baker that we expect our dinner, but from their regard to their interest. We address ourselves not to their humanity but to their self-love, and never talk to them of our own necessities but of their advantages.

This statement aptly summarises the context and pervasive nature of the principal-agent problem. A principal appoints an agent, but the agent may well act in his own interest and not that of the principal. In an economic context, the principal agent relationship is much broader than understood in a legal context. Thus, in economics, managers are the agents of the shareholders. In law, the position is that management are the agents of the company. The principal agent problem is a creature of the division of labour. Some tasks are either too complicated or costly for the principal to perform on his own. Where this is the case, those who are unable to act for themselves (the principals) must hire agents who possess the requisite knowledge and skill to act on their behalf. This places the principals in a vulnerable position – the agent can engage in objectionable conduct that is harmful to the interests of the principal. The principal can protect himself by monitoring the conduct of the agent and tracking his or her motives. Neither of these risk mitigation measures are practically feasible in all situations

where the problem exists. In a majority of situations, including that for personal injury, the principal lacks information, is unable to measure the agent's performance and has no bargaining power to structure the contract in such a way that incentives of the agent are not misaligned (Sappington, 1991). A consequence, of this is that the agent must abide by a wide range of legal duties arising from this trust-relationship. One of these duties requires the agent to act in the best interest of the principal. Another is that the agent must act in good faith towards that principal and must not allow his own personal interests to conflict with those of the principal. All these rules seek to protect the principal against consequences of misaligned incentives between himself and the agent. However, it does not always mean that the rules are effective and in some cases, the *bona fides* of the agent may be anything but noble.[277] For example in the context of forum shopping, it can be very difficult to determine the true motives behind a decision by a lawyer to file a claim in another jurisdiction. This is because at face value any gains accruing to the lawyer (the agent) derive from the potential gains accruing to the claimant (the principal). Thus, in such a situation, it is easy for the agent to pursue personal interests disguised as those of the principal.

By nature, common law rules for determining liability are adversarial - parties appear as injurers (wrongdoers) or claimants (victims). This is particularly so in the personal injury sphere. Therefore, the entire common law system of compensation is vulnerable to the principal-agent problem. Claimants (principals) rely on the advice, expertise and skill of attorneys (agents) for the prosecution of their claims. As long as the actions of the agent remain unobservable to the principal or the motive of the agent remains unknown, the principal's position remains insecure. The principal can improve his position by reducing asymmetric information between the principal and the agent or by structuring their relationship in such a way that the scope for opportunistic behaviour by the agent disappears or reduces (Dionne & Harrington, 1992). If the principal can monitor what the agent does, then the motives of the agent cease to be an issue. In the personal injuries market, the existence of information asymmetries implies that agents (predominantly lawyers) could be motivated in their actions

[277] The US Chamber of Commerce (2005) cites a case where a class action was filed in Alabama on behalf of 700 000 claimants who had mortgage escrow accounts held at a large bank. A settlement was agreed which earned the lawyers US$8.5m in fees and a small amount for the claimants. In order to pay for the fees each claimant had a deduction from their bank accounts of between US$80 and US$100. One claimant got an award of US$2.19 but had his account debited by US$91.33 for attorneys' fees implying that he made a net loss of US$89.14 by agreeing to join the class action!

by personal interest while purporting to act in the best interest of the principal. In the process, the agent may take a decision that does little to further the interests of the principal.

One way the principal-agent problem manifests itself in personal injury claims is through forum shopping. Forum shopping is a practice whereby plaintiffs' lawyers choose to file claims in jurisdictions that have favourable legal rules, generous judges and juries, as well as potentially large awards, regardless of where the cause of action actually occurred. Naturally, forum shopping brings into play the question of conflict of laws. This in turn, raises the collateral question of deciding the court to hear the case. Forum shopping also raises another question about enforcement of the judgement (Baggs & Cannar, 1990). This question involves issues of sovereignty and private international law. Sovereignty holds that, generally speaking, courts only have jurisdiction over the country of their domicile, not anywhere else. Thus, as a general principle, a court in country A should not entertain a matter that occurred in country B. Private international law holds that a case that occurs in country A cannot come before a court in country B unless the plaintiff will not get justice in country B. The orthodox argument in support of the practice of forum shopping in personal injury claims is that since it is nothing but an attempt to get the best form of compensation for the claimant, there ought to be nothing objectionable about it. The argument therefore views lawyers who make the decision as people who are rational, objective and immune from any self-interest motivations. It assumes further that the actions of lawyers (the agents) solely depend on what is best for their clients only. After all, lawyers are supposed to act ethically and for the benefit of their clients. However, empirical evidence suggests otherwise.

Developments in the USA where forum shopping has gained worldwide notoriety over the past two decades are particularly illustrative (Swiss Re, 2001; US Chamber of Commerce, 2005). In the USA, plaintiff lawyers receive payment on a contingency fee basis. Typically, they get between 33% and 40% of any award or out of court settlement (White, 2006). In this system, the lawyer (agent) has a direct financial interest in the plaintiff's (principal) outcome. The principal-agent problem arises when these two outcomes become misaligned. Devoid of context, it is difficult to be critical of forum shopping if a claimant gets to keep 60 – 67% of a potentially large award. It is also easy to see why lawyers would choose to file a lawsuit in a state where the potential award is large - the larger the potential award to the plaintiff, the larger

the fees lawyers also stand to earn. However, when the context of the American tort system comes into focus, it becomes clear that, in most cases forum shopping benefits lawyers more than claimants (Swiss Re, 2001). Studies which have been conducted on the American tort system lament the fact that when all is said and done, perhaps the strangest feature of this system is that a greater proportion (on average 54%) of awards paid never reach the pockets of claimants (Harris, 1991; White, 2004; US Chamber of Commerce, 2005). When this is considered, the justificatory power of the argument that forum shopping is for the benefit of the claimants becomes significantly weak.

Over the years, the questionable use of the forum shopping facility by lawyers has attracted the attention of US lawmakers. Since 2004, there has been a number of measures taken at federal and state level in an attempt to contain spiraling litigation costs and awards, according to the US Chamber of Commerce (2005). These include enactment of wide-ranging tort reform legislation in many states that *inter alia* seeks to cap non-economic damages, abolished joint and several liability, limit punitive damages and curb forum shopping by plaintiff lawyers. Another measure was the signing into law of the Class Action Fairness Act by President George W. Bush in 2005. Under this Act, large inter-state lawsuits can go to federal courts, a development expected to reduce forum shopping by plaintiff lawyers. Some of the states that have adopted tort law reforms since the early 2000s are Colorado, Oklahoma, Georgia, Missouri, and South Carolina. These measures appear to validate the argument that while forum shopping may, at face value appear to be done in the best interests of claimants, it has the potential to be abused for the benefit of agents.

In South Africa, a number of examples of the principal-agent problem also exist in the Road Accident litigation. In 2012 disciplinary action was taken against 12 advocates, who boasted to be members of what the press called the million-rand club.[278] The defendants had established a practice of holding multiple briefs on the same day with the understanding that most if not all of the cases would not proceed. In that way, they could bill out to a number of cases that would never take place. Clearly, in each case, the advocates could argue they were acting in the interests of their clients (their principals) when in reality, they were acting in their own

[278] The General Council of the Bar of South Africa v Geach & Others {2012] ZASCA 175 (29 November 2012)

interests. They argued that their conduct did not prejudice their clients, since their clients would not be paying; the Road Accident Fund would. The SCA noted [27]: "To summarise what occurred, the manner in which the affairs of the Fund were being conducted made it ripe for plundering, and the advocates concerned set about doing just that." They had found a way to plunder the system.

Another example is what the press and TV dubbed as the million rand pinky case.[279] A so-called victim of a motor accident purported to claim a substantial sum for his injury. More correctly, the amount claimed was in the name of the client. However, the victim was largely unaware of what was going on. It turned out the injury was a minor injury to his little finger. The case saw the compilation of expensive reports for the purpose of which the judge pointed out was [19]:

> "It is therefore clear that the only purpose these reports could ever serve was to churn the money machine for the attorneys and the experts whose reports were obtained at an average cost - so the court was informed during the postponed argument on the order the court should make in regard to costs - of R20 000,00 each. Their contents unanimously supported the defendant's case"

When the matter came to court, the lawyers had run up substantial costs. The lawyers then agreed to settle for a very moderate figure. There was never any meaningful injury or as the court put it, "the injury suffered by the plaintiff … could by no stretch of the imagination be described as serious as defined by the Road Accident Fund Act and regulations. Common sense dictates that a stabilized fracture of the little finger that healed without significant complications is a minor mishap." The extent of the damage was inflated merely for the lawyers to run up costs including payments to other professionals who could all claim to be acting in the interests of their principal, which then be paid by the Road Accident Fund. This case reached the attention of the public only because the judge detected anomalies and voiced his displeasure. The important point is that the client, the principal, was unaware of what was going on. The agents, the lawyers and other professionals, while holding out they were acting in the interests of their principal were in fact, acting in their own interests. In this case, the judge expressed the hope that once the Road Accident Fund changed to a no-fault system this type of conduct would be minimal.

[279] Ketsekele v Road Accident Fund (32492/12) [2015] ZAGPPHC 308; 2015 (4) SA 178 (GP) (8 May 2015)

Economic theory recognises that the principal-agent problem is pervasive but the problem has received little attention in the context of the legal system. The principal-agent problem can also exist in no-fault systems such as a workers' compensation system, but its relevance to occupational disease situations is rather unclear. However, in the context of the common law and litigation, application of the principal-agent problem is clearer. Chances of winning a lawsuit with legal representation are significantly higher than without representation (Rakoff, 2017). Nevertheless, the agents may pursue personal interests in the name of their clients.

A similar problem to the principal-agent problem involving occupational injuries is moral hazard. Moral hazard is a reflection of rational behaviour in terms of which individuals when faced with clearly defined options, choose the option that is best for them, taking into account the costs and benefits involved (Garzarelli, Keeton-Stolk, Schoer & Sitoe, 2011). For example, as benefits under workers' compensation increase, employees have an incentive to take more risks at work or to report injuries they would probably not have reported under a lower benefit regime (Aiuppa & Treischmann, 1998). Sometimes it is difficult to identify sources of injury or exposure causing workers to file claims relating to events that did not occur at work (Bolduc, Fortin, Labrecque & Lanoie, 2002). Some studies have even found evidence of the "Monday Effect" in workers' compensation claiming patterns in terms of which claims are more likely to be filed on Monday than on any other day of the week (Campolieti & Hyatt, 2006). Garzarelli et al. (2011) argue that there is scope for moral hazard in the South African statutory compensation system in view of the significant differences between benefits payable for permanent disability under COIDA and minimum wages paid in some sectors such as manufacturing. COIDA benefits are significantly higher than the minimum wages paid in the wood manufacturing and construction sectors. This distortion may induce workers to delay returning to work following an injury. In addition to paying fair and realistic benefits, a good workers' compensation system needs to ensure that impaired workers return to work as quickly as possible. Otherwise, moral hazards becomes a reality when employees see more benefit in remaining on the injury list than going back to work.

6.5 Regulatory Capture and the Common Law

A similar problem to that of principal-agent and moral hazard is regulatory capture identified by Stigler (1971). Various theories exist in the public policy domain that attempt to explain the relationship between government (including government agencies) and economic agents, especially answering the question; why does legislation or regulation exist? Some theories attempt to explain what ideal regulation should be (normative theories) while others try to provide insights on how regulators actually behave in the real world when confronted by real life issues (positive theories) (Klein, 1995). None of these theories offer complete answers and none have survived without question. Naturally, some theories raise more questions than others; others are more persuasive to the extent that they are able to predict what is normally observed. For example, the public interest theory, the oldest of the theories, holds that regulation exists because it is in the public interest. This theory raises questions for its failure to convince on such issues as the definition of public interest and the lack of congruence between measures ostensibly adopted in the public interest and market outcomes. The theory has also been criticised for its unrealistic assumptions like the neutrality of government or regulators and the non-acknowledgement of the fact that regulation is not costless (Posner, 1971). To its credit, the Public Interest theory arguably has the most persuasive attributes when it comes to justifying the need for regulation, largely because of its consumer protection connotations. Thus, by holding that markets if left to their own devices can operate inequitably and to the detriment of the public good, the public interest theory has justificatory persuasion.

Then there is the political science-derived Capture theory (also known as Private Interest theory) which states that regulation is a partisan political process that rewards politically influential groups in society who then capture and dominate the regulatory process (Adams & Tower, 1994). The Capture theory has two variants – on the one hand, is the radical Marxist/Muckraker paradigm views regulation as an instrument in the hands of capitalists which they use to further alienate labour. Then there is the more moderate political scientist paradigm that regards regulatory processes and procedures as "the outcome of opportunistic capture" by dominant and elite groups (Adams & Tower, 1994: 168). Adams and Tower then provide an example of the actuarial profession. They argue that this profession has managed to cement its relevance to the operations of life insurance companies to the extent that it is

almost inconceivable today to talk of regulation of life offices without reference to the role played by actuaries. A similar development is now extending to the non-life side of insurance where actuaries have almost succeeded in fostering their relevance. If they succeed in convincing regulators of the indispensability of their services to the non-life insurance industry as they have done on the life side, it will represent a major turning point in the fortunes of the profession in terms of market development.

The other theory, is strangely called the Economic Theory of Regulation was developed by Stigler (1971). It holds that generally speaking, the regulated industry is able to capture regulation and operate it primarily for its benefit. Whether Stigler intended his theory that is about regulatory capture by those regulated to have a name similar to the title of his paper is hard to say. Nevertheless, the theory holds that like any other good regulation, is subject to laws of supply and demand and usually the chains of control are in the hands of the very industry that is supposed to be regulated – it will demand more regulation or resist it as the case may be if it is in its best interest to do. The theory refutes most of the claims and assumptions underpinning the Public Interest theory. It argues instead that most of the empirical observations in markets do not confirm that regulation is for the public interest. Citing various examples of regulation introduced in various industries in America from the 1960s, Stigler could not find any persuasive evidence that any of the regulation introduced conferred meaningful benefits on the public as claimed by the Public Interest theory. On the contrary, most of the regulatory interventions studied were for the benefit of the regulated industries themselves.

How then can these insights help inform the developments seen in the South African mining industry leading to the Constitutional case in 2011 and beyond? Before 2011, the workers' compensation sphere enjoyed protection from litigation. This was primarily because of the courts that were steadfast and consistent in their interpretation of Section 35 (1) of COIDA, holding that the section bars common law actions by employees against employers without exception, thereby making workers' compensation the sole and exclusive remedy for injuries and diseases arising from employment. This position endured for decades, such that to date, there is no case on record pronouncing an employer liable for an occupational disease claim in the legal history of the country. Lawyers have therefore not been very active in this arena

compared to that for motor third party liability, for example. Their non-involvement was not due to lack of interest in the occupational injury market. On the contrary, it had more to do with the steadfastness of the judiciary. As indicated in Chapter 3, an attempt to have the exclusive remedy principle enshrined in Section 35 (1) of COIDA declared unconstitutional dates back to 1999.[280] Therefore, there is reason to believe that government intended things to operate that way – with no possibility that employers could face common law claims. The cost of occupational accidents and diseases has, for a century always been internalised.

Building on the success from the asbestos settlement in the late 1990s, lawyers took the silicosis matter to the Constitutional Court. Once the Constitutional Court handed down judgment allowing claims for damages against mine employers, lawyers active in this field (agents) have been particularly vocal in support of this development, describing it as the culmination of a long fight for justice by mineworkers (principals). Interestingly, even though occupational diseases, especially silicosis, have a long history in South Africa, there is no record of a concerted fight for compensation on behalf of those affected. Indeed, there is no record of fighting for improvements of the statutory arrangement. There is no record, for example, to increase the lump sums or to change the lump sum payment to a pension. On the contrary, it has been reported that both government and the National Union of Mineworkers (NUM) were at first not in favour of the *Mankayi* litigation as they were afraid that it could lead to job losses if it succeeded (McCulloch, 2011). If suing mine owners represented justice for mineworkers all along, one is inclined to ask why the fight took so long in coming. For example, the first lawsuit against mine owners could have come soon after the Anglo-Boer War when mining operations resumed after a temporary suspension because of the war, only for authorities to discover that nearly 17% of the pre-war rock drillers had succumbed to silicosis (Katz, 1994).

Some lawyers have been quite relentless in an attempt to force multi-million Rand offers of settlement from mining companies or to make litigation against those that refuse to settle an integral part of the new era in South African mining. This has parallels to what happened in the USA during the asbestos litigation when lawyers literally launched a campaign to recruit asbestos plaintiffs through extensive advertising and offering free chest X-ray examinations to

[280] *Jooste v Score Supermarket Trading (Pty) Ltd (Minister of Labour Intervening)* (supra)

potential plaintiffs (White, 2006). In doing so, they sought to file class actions purporting represent as many claimants as possible. Barnes, (2007) submits that lawyers and judges managed to capture the asbestos litigation process in America partly because of the failure by the federal government to take decisive remedial measures. This left individual states with the task of passing legislation in order to bring normalcy to the situation which, to date, has cost the US economy billions of dollars. There is a realistic prospect for South Africa to go the same way unless the litigation process is formalised under some clear legislative guidelines or a more sustainable method of funding compensation to disease-stricken miners comes into being. The litigation frenzy that was ushered by the *Mankayi* decision begs the question - is litigation against employers the best solution to solve the plight of mineworkers? This thesis argues that mineworkers may in the end turn out not to be the actual winners in all this especially if the common law is the basis of claims against mining companies. Class actions hardly produce the handsome rewards to claimants that many are hoping for if evidence from the US where their use is widespread, is anything to go by; instead it is their complexity and time-consuming nature which make them a guaranteed jackpot for lawyers.

6.6 Occupational Diseases and the Lloyd's Crisis

6.6.1 Brief History of Lloyd's of London

The near disaster at Lloyd's of London of the early 1990s provides arguably the most powerful and persuasive illustration of the damage that long-tail risks, especially long latency disease, can cause if their characteristics and impact on institutions are not well understood. Losses from long-tail risks brought Lloyd's, an institution with over three centuries of existence, and a colourful history, to the brink of collapse in the early 1990s. Long-tail risks such as diseases and pollution were at the centre of this near tragedy. These risks produce losses that develop slowly and they (especially latent disease) affect many people at the same time thereby producing a phenomenon which insurers call accumulation of losses. In addition, because they develop gradually, long-tail risks produce claims susceptible to complex legal and medical issues, making litigation inevitable. Where insurance is present, litigation tends to bring with it legal risk for insurers. Courts can import into contracts of insurance interpretations and meanings that produce results that insurers neither anticipated nor intended at the time of issuing the policies. This is precisely the problem that Lloyd's encountered in the USA in

connection with its liability insurance policies covering latent disease and pollution liability, some of which had been issued in the 1930s and 1940s. US courts interpreted these policies liberally, which resulted in insurers paying more than they had originally intended or paying claims they had not intended to cover at all.

Lloyd's of London is two things in one – on the one hand, it is a Society (known as the Corporation of Lloyd's) incorporated under a Parliamentary statute of 1871 and on the other, Lloyd's is an insurance market which historically has prided itself on being globally unique, innovative and able to insure virtually any risk. Risks are placed not with the Corporation of Lloyd's, but with individual members of the Society called Names. The Corporation of Lloyd's does not underwrite insurance but provides the premises, administrative, regulatory and other supporting services to enable Names and syndicates to trade. Historically, Lloyd's was left to regulate itself hence it was exempted from complying with most of the regulations applicable to other insurance companies. At first, Lloyd's members accepted risk individually, but later they joined together to form groups known as syndicates such that resources of a number of members were combined into a single unit thereby enabling members to deal with much larger risks than before.

Although the liability of syndicate members was several and not joint, it was unlimited, implying that members put their personal wealth up to support the risks they accepted. Unlimited liability faced by members defined the pool of people who could apply to become members – they had to be people with sufficient means. The Rota Committee interviewed prospective members and if approved, their applications went to the Council of Lloyd's for final adjudication. Therefore, membership at Lloyd's was something associated with three "Ps" – prestige, pride and privilege (Raphael, 1995). Names accepted risks backed by their personal wealth. In other words, if regulation requires an insurance company to have capital to support risks it agrees to insure, Names put their personal wealth at stake for the same purpose. Yet the reality of the situation was that the people who applied to be Names did not really have to hand over assets or cash to Lloyd's as capital, all they needed to do was to convince and show the Rota Committee that they were people of means. Hence, many prospective Names relied on bank guarantees to facilitate their applications for membership (Raphael, 1995).

Lloyd's as an institution started by accident rather than by design. In the seventeenth century, wealthy merchants willing to accept risk on a voyage in return for a premium provided insurance of ships and their cargo. A common practice at the time was for merchants to meet at coffee scattered around the City of London to discuss business (Raphael, 1995). One of them belonged to Edward Lloyd and it was already in existence by 1688, but the exact date of its opening is unknown. His coffee house situated near the River Thames and was popular with merchants, ship owners and other people with interest in maritime affairs. Raphael submits that there is nothing to suggest that Edward Lloyd's association with merchants and ship owners went beyond the fact that he saw them as a source of business for his coffee house. However, in order to encourage them to continue patronising his business, he supplied the merchants with shipping information that was eventually published in 1696 in a news sheet called *Lloyds News* later to become the *Lloyd's List*. Eventually and largely due to the efforts of Cuthbert Health in the 1880s, Lloyd's expanded from marine insurance to other classes. After January 1994, Lloyd's introduced corporate capital for the first time in its history ushering in a new era of corporate names or more popularly 'corporate vehicles', most of whom tend to be based in offshore locations such as Bermuda, Guernsey and the Isle of Man.

Historically, several actors have defined operations at Lloyd's, apart from the Names. The first of these are the underwriting agents divided into Members' Agents (who represented individual members) and Managing Agents. Managing Agents remit and allocate Names to underwriting syndicates. Another group of key actors are underwriters who head the syndicates and are responsible for risk assessment and acceptance on behalf of syndicate members. In the past, it was not necessary for one to be professionally qualified in order to become an underwriter. Names and syndicates accepted decisions of underwriters without question and this blind faith was to prove fateful decades later when shortcomings of many underwriters became apparent in the face of long-tail liability risks, especially asbestos-related diseases and pollution. However, today things have changed significantly and underwriters receive training. Yet another important group of people defining the operations of Lloyd's is the Lloyd's brokers. Only a few classes of business, for example, motor and personal lines insurance are capable of direct placement with underwriters at Lloyd's without going through a broker. Otherwise, most business inflow into Lloyd's has been through Lloyd's brokers. In the late 1990s, there were some concerns raised about the practice of using exclusively Lloyd's brokers with some

arguing that it was costing Lloyd's significant business from continental Europe (Bannister, 1995).

Until the 1980s, Lloyd's generally coped well with risks it agreed to insure. As a matter of fact, during the era of the Napoleonic Wars (around 1812), there was a lot of uncertainty in the marine market which Lloyd's was able to exploit to its fullest advantage. Premium rates were highly inflated and went as high as 40% on some Baltic Sea routes - hence Names made a lot of money during this period such that by the time of the 1906 San Francisco earthquake which saw many insurance companies collapsing, Lloyd's was able to meet its financial commitments in full (Raphael, 1995). That insurers were able to hike rates during the Napoleonic Wars conforms to the normal pattern seen in insurance markets. Insurance is a business that tends to reward and thrive during periods of high anxiety and uncertainty, mainly because insurers have adequate room to overload the premiums they charge by playing on the uncertainty circulating in the market. As Raphael (1995: 43) puts it, in insurance "bad news is usually followed by large profits". For example, in the aftermath of the September 11, 2001 terror attacks in the USA, the insurance industry showed strong evidence of growth.[281] However, for Lloyd's, things took a turn for the worse in the 1980s when large losses from risks insured in previous decades started to emerge. Specifically, underwriters of years gone by did not appear to understand the nature and developmental characteristics of long-tail risks, especially asbestos-related diseases and pollution. This lack of understanding was to prove catastrophic and ruinous for many Lloyd's Names.

6.6.2 Lloyd's and Asbestos Litigation in the USA

On discovery, the potential uses of asbestos were diverse and its fire-resistant properties made it a highly sought-after product, especially in shipyard industries, construction and brake lining manufacturing. Asbestos comes mainly in three types – (1) Chrysotile asbestos which is by far the most commonly produced; (2) Amosite asbestos which was mined mainly in South Africa

[281] John W. Schoen "Insurance Industry thriving post-9/11" (available at http://www.nbcnews.com/id/3073483, visited on 23 November 2016)

and Zimbabwe[282]; and (3) Blue Crocidolite asbestos whose tensile strength is only inferior to steel and is the most noxious to human health (Raphael, 1995). Asbestos was widely used in many countries in a variety of ways before its harmful effects on human health became irrefutable. For example, it has been estimated that by the 1990s, over 33 million tonnes of asbestos had been used in the USA alone in over 3 000 different products (Bannister, 1995). Not surprisingly, the USA became the epicenter for the financial crisis at Lloyd's following years of asbestos use. After decades of use, it turned out that asbestos, far from being the wonder mineral that many thought it was, has mortal impact on human health. From the 1960s, the link between asbestos exposure and lethal diseases such as asbestosis, mesothelioma, bronchogenic carcinoma and other types of lung cancer began to be widely publicised (Raphael, 1995). By then, an unknown number of people were already at risk.

When Lloyd's started to diversify its risk-taking activities from marine to other classes of insurance from 1911 onwards, one of its key strategic objectives was to increase its presence in the North American market (Raphael, 1995). Raphael further submits that two factors helped Lloyd's to achieve this objective. Firstly, it increased its market share for high-risk excess liability coverage on US policies, in addition to being a reinsurer in the same market. This also multiplied the exposure of Lloyd's in North America. Under normal circumstances, Lloyd's would not have been involved in writing direct primary US liability business, in addition to being a reinsurer. However, from 1945 onwards, London brokers innovatively introduced umbrella and excess liability policies to complement cover provided under primary policies (Bannister, 1995).[283] Lloyd's saw these products as an opportunity to increase its

[282] In Zimbabwe, asbestos mining started in 1915 at Shabanie and Mashaba mines located in the southwestern part of the country. These mines belonged to a British conglomerate, Turner & Newall. Shabanie mine eventually developed to be the largest asbestos mine in the world (McCulloch, 2003). The mines stopped operating in 2004 after government took them over from African Resources Limited which had taken them over from Turner & Newall. Attempts to find new investors to resuscitate operations have proved unsuccessful over the years. Apart from Zimbabwe and South Africa, another Southern African country where asbestos was mined is Swaziland where the mineral was mined at Havelock Mine that was also owned by Turner & Newall. Havelock Mine closed in 2001 and Turner & Newall filed for bankruptcy in 2002 in the wake of mounting lawsuits by former miners and their dependents who alleged that the company negligently exposed them to asbestos causing them to contract a range of asbestos-related diseases (McCulloch, 2005).

[283] Excess and umbrella liability policies are two fundamentally similar products. They both provide extra coverage beyond what is available under primary liability policies. Unlike property insurance, it is impossible in liability insurance to know the exact size of a future claim an insured. Therefore, there is always the possibility that cover under primary policies (e.g. employer's liability, public liability and products liability) may be inadequate. Excess and umbrella covers mitigate this risk. Some primary liability policies like products liability are subject to aggregate limits on any one period of insurance. A random increase in claims frequency can deplete the aggregate limit leaving a firm without cover. Again, excess and umbrella covers provide extra

penetration into the US market where it was already participating as a reinsurer. By the early 1990s, Lloyd's had a 31% market share for excess liability and reinsurance coverage in the USA (Fields, Klein & Myskowski, 1998). A second factor that helped to bolster the presence of Lloyd's in the US liability (casualty) insurance market was the use of liberally worded policies that provided very broad coverage. As it later turned out, these policies became a deadly curse when courts started to interpret them in ways that left Lloyd's no room to defend itself and its policyholders against an avalanche of asbestos claims, especially in the 1970s and 1980s. By that time, Lloyd's had a big presence in the US market with a significant market share when storm clouds started to gather on the horizon. In addition, when the avalanche of asbestos claims started, Lloyd's had very little room to take defensive measures since its liability was based on policies it had issued in previous years that were on occurrence basis. Use of liberally worded policies on long latency risks, such as occupational diseases, also makes the judgment and understanding of these risks by Lloyd's underwriters highly questionable.

The exact date that manufacturing companies, and insurers, including Lloyd's, came to know of the dangers of asbestos to human health is rather unclear. However, there are several indicators suggesting that Lloyd's and asbestos manufacturers knew of the dangers of the product much earlier, but for unknown reasons they did not heed the warning. In support of this argument, Raphael (1995) provides three interesting insights. The first is that as far back as 1918, the United States Bureau of Labour published a report compiled by Frederick Hoffman, a consulting statistician employed by the Prudential Insurance Company of America revealing that many workers using asbestos were dying prematurely. As a result, some life insurance companies in the USA and Canada stopped selling their products to asbestos workers as they deemed their mortality risk to be too high (White, 2004). Secondly, Raphael further posits that by 1930, there was already a wide body of medical literature circulating in Britain about how noxious asbestos was to human health. Finally, Raphael also submits that in the 1950s, South African researcher, Dr. J.C. Wagner, conducted a study and found that health risks posed by asbestos were not only confined to miners, but extended to anyone who coming into contact with the product, also known as secondary exposure. Lloyd's did not heed these

coverage in such cases. However, although excess and umbrella policies play a similar role, they remain different products. Excess policies usually provide the same cover as that provided under primary policies, whereas umbrella cover can be narrower or wider than that under primary insurances.

warnings. The institution actually persisted with its strategy to increase its market presence in North America. In fact, when this evidence later came before US courts when asbestos claims started to flood in, most judges and juries had little sympathy for Lloyd's. One must therefore question the judgment of Lloyd's underwriters, given that typically an underwriter is supposed to assess risk and determine the most appropriate way of insuring it should he decide to do so. Long-tail risks can create a false sense of security, something that Lloyd's underwriters failed to appreciate. Most Names even under the Lloyd's three-year accounting system failed to realise that typical of long latency disease, claims could take much longer to emerge.

The first ominous sign of trouble from asbestos in the USA followed the decision in the landmark case of *Borel v Fibreboard Paper Products Corporation Ltd.*[284] Litigation in this matter stared in 1969 when Clarence Borel, who worked as an insulation installer, filed a lawsuit in the Federal District Court in Beaumont, Texas against eleven asbestos manufacturing companies. He alleged that these companies had long known of the dangers involved with working with asbestos, but negligently failed to warn him about it. In 1973, the Federal Appeals Court ruled that the defendant companies were liable and awarded Borel's widow US$79 000 in damages. The *Borel* case triggered other landmark decisions that further confirmed that a new era of asbestos litigation against companies that manufactured or worked with asbestos products had started.[285] In these and many other cases, the cause for the asbestos manufacturing companies got worse because of evidence showing that they were well aware of the health hazards posed by asbestos, but they chose not to disclose that information to their workers.[286] The response by juries to this damning revelation of bad faith conduct on the part of asbestos companies was to increase compensatory damages payable to plaintiffs and to award punitive damages in some cases (Raphael, 1995). Most of the problems faced by Lloyd's emanated from the way American courts interpreted the liability insurance policies issued by underwriters from the 1930s up to the 1960s.

[284] supra

[285] These cases include: *Insurance Company of North America v Forty-Eight Insulations Inc. (657 F. 2d 814 (6th Cir. (1981))* and *Keene Corporation v Insurance Company of North America597 F. Supp. 946 (1984)*

[286] It would appear that most liability for primary and secondary asbestos firms in the US rested on that they had long known of the dangers of their products but deliberately or negligently failed to notify their employees of the same.

6.6.3 Liability Insurance Policy Triggers

Soon after the opening of asbestos litigation floodgates by cases such as *Borel* and *Keene*, asbestos manufacturing companies turned to their liability insurers for indemnification and protection.[287] Most of those companies had liability insurance policies with Lloyd's of London acting either, as excess liability insurer or reinsurer. Some of the policies dated back to the 1930s and 1940s. The insurance contracts used by Lloyd's were on the occurrence basis of coverage. In order to have a full appreciation of how these contracts affected Lloyd's, it is important to understand the various bases of cover or policy triggers used on liability insurance contracts generally. Liability insurance contracts use different bases of cover (also known as policy triggers) which could be causation basis, manifestation basis, occurrence basis or claims-made basis. The basis of cover or policy trigger defines how the policy responds to a claim. Each basis of coverage has different implications for the insurer and the insured. The basis of coverage determines issues like the claims that the insurer becomes liable for, how liability attaches and the length of time liability can last after the insurer has stopped providing cover.

Typically, the development of a liability insurance claim falls into three distinct phases namely; (1) the *run-in* period (period before the start of insurance coverage), (2) the period of insurance, and (3) the *run-off* period (period after the expiration of the insurance contract) (Swiss Re, 2001). The *run-in* period is concerned with activities of the insured that happened before the existence of insurance that may result in harm or damage happening, manifesting or occurring, as the case may be, in the period of insurance. For liability insurers, focus on the *run-in* period predominantly seeks to identify past activities of the insured capable of producing a claim falling or occurring in the period of insurance or beyond. Depending on which policy trigger is used, the insurer can either assume or avoid responsibility for these past activities of the insured. On the other hand, the *run-off* is concerned with the possibility that a claim could have arisen from events which took place during the *run-in* period and then occurred in the period of insurance but only becomes manifest after the period of insurance has expired. Again,

[287] Typically, liability insurance policies such as employer's liability and product liability promise to do two things – firstly, they undertakes to indemnify the insured firm for claims it becomes legally liable to pay in respect of bodily injury, death, illness or property damage. Secondly, the policies also undertake to defend the insured against claims filed against it in respect of the same.

depending on the policy trigger used, whether causation, manifestation, occurrence or claims-made, the implications for the insurer can be very different. **Figures 2-5** illustrates the risk exposure to the insurer under different liability insurance policy triggers used by insurers using the three-phase timeframe described above. The analysis also shows how the different bases of cover have different repercussions for liability insurers.

Causation Trigger

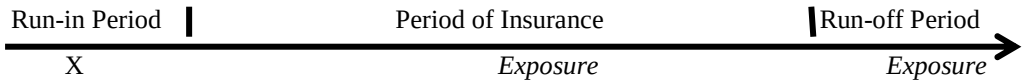


Figure 2: Causation Trigger

The causation trigger holds that events that cause the loss suffered by the claimant must occur in the period of insurance. Even if the actual manifestation of the harm or damage takes place during the *run-off* period, the insurer covering the risk when causation takes place is responsible for the full cost of the claim. Consequently, this basis of providing coverage is vulnerable to long-tail risks such as long latency disease and gradually occurring pollution because, by nature, these risks separate causes from consequences by time. Under the causation trigger, the insurer is particularly vulnerable during the period of insurance and the *run-off* period since coverage is premised on causation happening during the period of insurance even if actual discovery of the harm takes place after the policy has expired. However, as shown in Chapter 4, identifying and proving causation can be a highly problematic endeavour under adversarial compensation systems like the common law, particularly where harm can lie latent for decades. To overcome this difficulty, courts in some jurisdictions have often developed innovative ways to justify the award of compensation even where it is not possible to prove causation in its traditional legal sense.

In the USA, the original wording under Comprehensive General Liability (CGL) policies provided cover for injury caused by accident. Courts have held the word accident to denote an event that is specific in terms of time and location.[288] This implies that long latency diseases are not accidents because they do not have an identifiable time of occurrence or a specific

[288] *Fenton v Thorley & Company Ltd* (supra); *Briesch v Geduld Mines* (supra)

location of origin. In the early years of statutory compensation, the general view held by courts in most jurisdictions was that long latency disease was not an accident because it lacks specificity in terms of time and location. However, a majority of US courts eventually side-stepped this difficulty by holding that an accident need not be confined in time and space hence could be an event which produces injury over a long time-frame (Stempel, 2006). This reformulated definition of 'accident' adopted by the courts meant that use of this word in CGL policies did little to shield insurers against liability from gradually developing risks.

Manifestation Trigger

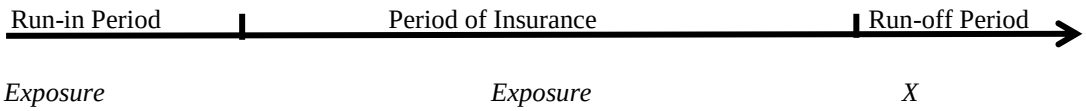


Figure 3: Manifestation Trigger

In the USA, the leading case which developed the manifestation trigger is *Eagle-Picher Industries Ltd v Liberty Mutual Insurance Company Ltd*.[289] Under the manifestation basis of cover, the liability insurer assumes responsibility for claims that become manifest, ascertained or discovered during the period of insurance regardless of when the actual cause could have taken place. The harm or damage must become manifest or ascertainable in the period of insurance – cause and date of occurrence of the harm are irrelevant. Therefore, in terms of this trigger, the insurer is not exposed to claims that are ascertained after the period of insurance (run-off period) even if these could have been caused or occurred at a time when it was on risk. However, the insurer faces exposure to claims relating to events which took place before the period of insurance (run-in period) which might produce claims that become manifest or ascertainable during the period of insurance. For long latency disease, harm is more likely to become manifest or ascertainable when the worker develops visible symptoms of illness. Invariably ascertainment of disease coincides with diagnosis. The manifestation trigger is simple to conceptualise and apply since it places liability on the insurer who is closest in time to the claim. Despite its apparent simplicity of operation, the manifestation trigger has not featured as prominently as the other triggers in liability policies.

[289] supra

Occurrence Trigger

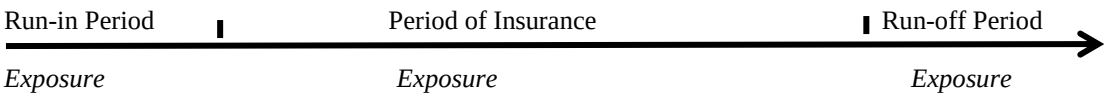


Figure 4: Occurrence Trigger

In 1966, insurers in the USA removed the word 'accident' from the CGL policy and replaced it with 'occurrence' (Stempel, 2006). From an interpretation standpoint, the term 'occurrence' unlike 'accident' leaves no scope for the accommodation of the view that slowly developing injury or damage is not covered - injury or damage can occur suddenly or gradually.[290] The occurrence basis of cover provides that the insurance policy that is covering the risk when harm or damage occurs pays the claim regardless of when the harm or damage is actually caused, ascertained, discovered or becomes manifest. In long latency risks, the wrongful act typically produces damage years later. Consequently, the occurrence trigger provides retrospective coverage because an insurer may assume liability for claims that occur in the period of insurance, but arising from negligent acts committed in the *run-in* period before the insurer was on risk. Damage occurring after the insurance period is excluded even if the negligent act producing such damage was committed during the period of insurance. However, the insurer also faces exposure to claims becoming manifest or discovered or ascertained, after the expiration of the policy even if this happens years or decades later provided occurrence took place during the policy period.

To that extent, the occurrence basis of coverage exposes the insurer to risk during the *run-off* period and it may not be possible to determine how long this exposure can last. It is in relation to this later aspect that the occurrence trigger can be a source of serious problems for insurers. To begin with, the term 'occurrence' has proved difficult to conceptualise and define. Consequently, the term has been a subject of extensive litigation in such jurisdictions as the USA, the UK[291] and Canada (McGuire, McCullough & Flanigan, 2004; Stempel, 2006). Take a person exposed to asbestos who then develops asbestosis after twenty years for example -

[290] Thus, in *Koikos v Traveller's Insurance Co Ltd 849 So.2d 263 (Fla. 2003)* the Florida Supreme Court interpreted the term 'occurrence' in the CGL policy to include continuous or repeated exposure to substantially similar harmful conditions over a period of time.

[291] See for example - *Sharp v Sweeting and Son Ltd [1963] 2 All ER 455* and *Bolton Metropolitan Borough Council v Municipal Mutual* (supra)

how should occurrence be determined? It could be the exposure to asbestos or the development of asbestosis or development of mere pleural plaques. Furthermore, for long latency and gradually occurring risks, it can be extremely difficult to pinpoint the exact date when harm occurred, no matter how defined.

When used on insurance contracts covering long latency risks like occupational diseases, the occurrence trigger is by far the most problematic from an insurance provider's standpoint. It exposes the insurer at all three levels of the risk scale as shown in **Figure 4,** making it by far the riskiest trigger available. It can potentially dump consequences of events taking place outside the period of insurance into the period of insurance. If these consequences are 'occurrences', the insurer is liable. The net result of this is that by default, the insurer provides partial retrospective cover under the occurrence trigger for which it may be uncompensated through the premium. In addition, the occurrence trigger also exposes the insurer to occurrences which take place during the period of insurance even if their consequences become manifest years later. When insurers speak of risks such as long latency disease and pollution as producing long-tail losses, the occurrence trigger most associated with that characterisation.

Problems posed by this trigger go even further. The long delay between the acceptance of the risk by the insurer and the settling of claims creates a layer of uncertainty for the insurer about the final cost of the claim. Furthermore, when insurers accept risk, they use available information to estimate the cost of claims on those risks. However, this only works well if the information used for underwriting and risk assessment purposes is accurate. When risks produce claims decades later as is the case with long latency diseases, the disaggregation of underwriting information and claims quantification information becomes too big, leaving the insurer exposed to pricing risk. Pricing risk refers to the fact that due to information constraints, an insurer may charge a premium that is inadequate for the risk assumed. It is difficult to find all the necessary information to price a risk today that can potentially produce losses decades later.

Another problem faced by insurers arising from the occurrence trigger is an accounting one. The nature of insurance is that at the end of each financial year, there may be some claims that

could have occurred, but are still to be finalised. In respect of these, insurers create provisions for outstanding claims in their accounts. However, when current policies produce losses years later, the science of provisioning is becomes more difficult. Finally, by prolonging the claims tail, the occurrence trigger can significantly increase the final cost of claims due to normal and super-imposed inflation. Apart from the effects of normal inflation caused by economic factors, liability claims can also increase significantly because of super-imposed inflation that refers to the increase in the cost of liability claims due to such factors as legal changes, changes in medical technology, increase in the cost of living as well as improvements in living standards and incomes of people. The assessment of damages for personal injury takes into account the personal circumstances of the claimant. Courts try as much as possible to place the claimant in the position he or she occupied before the injury occurred. An improvement in living standards as well as an increase in personal income exerts upward pressure on the level of damages sought in the event of injury or disease.

Claims-Made Trigger

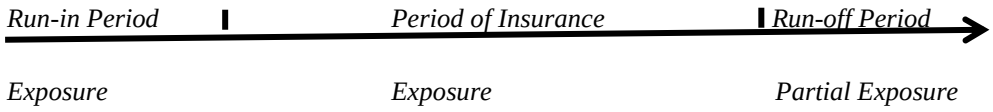


Figure 5: Claims Made Trigger

The exact origins of the claims-made trigger are rather unclear, but its use increased in the 1980s, starting in the USA. Furthermore, it is widely believed that the introduction of the claims-made trigger had a lot to do with the problems that confronted insurers arising from the occurrence trigger. According to McGuire, et al. (2004) the claims-made wording developed in the USA between 1984 and 1985 through the Insurance Services Office (ISO) following years of protracted and costly litigation regarding the question: When did injury occur? The expectation around the introduction of the claims-made trigger was to reduce the long-tail phenomenon associated with long-latency risks by using the making of the claim by the injured

party against the insured as a proxy for hard-to-prove concepts like causation or occurrence.[292] In this regard, the claims-made trigger has not attracted as much litigation of an interpretation nature as the causation and occurrence triggers. There is nothing potentially arguable about the meaning of the phrase 'claims-made in the period of insurance' compared to terms like 'caused in the period of insurance' or 'occurring in the period of insurance'.

Claims-made wordings essentially have two points serving as locations where the liability of the insurer to cover a claim. The first point, the primary trigger provides that the insurer who is covering the risk at the time a claim is made by an injured third party against the insured, is liable no matter when the injury was caused or occurred. Here, the making of a claim by a third party against the insured triggers coverage.[293] A secondary trigger is the circumstance notification requirement that obligates the insured to notify the insurer of any circumstance occurring in the period of insurance and is likely to result in a claim in future. The meaning and scope of the circumstance notification requirement has been a subject for litigation in jurisdictions such as Australia and the United Kingdom.[294] Therefore, under the claims-made basis of coverage, the insurer is only liable for claims made against the insured during the period of insurance. Claims made after the expiry of the insurance period fall outside the scope of cover. An exception to this is when the claim falls within the scope of the circumstance notification requirement and the insured complies with the requirements of the policy regarding circumstance notification. Outside of the, a claims made insurance contract does not pay claims made after the policy has expired.

[292] However, the introduction of the claims-made wording was not as smooth sailing in other jurisdictions as it perhaps was in the United States of America. In the early 1990s, the wording was not well-received in Belgium, France, Spain and Switzerland. French courts, including the Supreme Court, held that claims-made wordings were invalid and policies which purported to use the claims-made were simply interpreted them as if they were written on occurrence basis. The wording only gained acceptance in France and other countries that initially resisted it after legislative intervention.

[293] Making of a claim by a third party could include things like a demand for money or compensation, the institution of civil proceedings by a third party against the insured where the expected remedy is likely to be financial compensation or notification by the third party to the insured of intention to institute such a claim.

[294] Australian cases where this issue was considered include: *East End Real Estate Pty Ltd v CE Health Casualty & General Insurance Ltd [1992] 7 ANZIC 61; QBE v Moltoni Corporation Pty Ltd [2001] 205 CLR 149;* and *FAI v Australian Hospital Care Pty Ltd [2001] HCA 38.* In the UK, the same issue was also considered in a number of cases including: *HBL Kidsons v Lloyd's Underwriters & Others [2009] Lloyd's Rep. IR 178* and *European Risk Insurance Company HF v McManus & Others [2014] Lloyd's Rep. IR 169*

In terms of the three-phase exposure analysis scale in **Figure 5**, the claims-made trigger exposes the insurer to risk from events taking place during the *run-in* period that produce claims in the period of insurance. However, claims which are made in the period of insurance but relate to circumstances which occurred in the *run-in* period are excluded because liability for these attaches to the insurer who was on risk during that period. If the insured did not notify the previous insurer about that circumstance, then both the previous insurer and the current one can repudiate that claim. The claims-made wording provides partial cover during the *run-off* period for claims arising from circumstances happening during the period of insurance that produce claims after the period of insurance provided these the insurer is notified. Consequently, even if the claim finally arises after the policy has expired, the insurer is liable if the circumstance notification requirement was complied with. Thus, the claims-made trigger provides only a partial solution to the long tail phenomenon that characterises claims for long latency diseases. It is only successful in shortening the tail of liability claims under the primary trigger, but not under the secondary trigger (circumstance notification requirement) which can still dump claims into the *run-off* period.

The problems that befell Lloyd's in the late 1980s and early 1990s had many contributory factors, but one of the most dominant ones was the policy trigger used on its liability insurance policies issued in the North American market. Most of these policies were on occurrence basis (Raphael, 1995). This turned out to be one of the biggest sources of the problems faced by Lloyd's in the years that followed, especially with regard to asbestos claims in the US. As indicated earlier, the occurrence basis of coverage is by far the most vulnerable to the problems caused by long-latency risks. US courts compounded problems arising from the use of this basis of coverage by interpreting occurrence policies as providing cover for future claims arising from past exposures.

When asbestos litigation floodgates opened in the 1970s, Lloyd's and asbestos manufactures suffered a further blow when US courts extended the doctrine of strict liability to asbestos manufacturers through products liability. Having already declared asbestos a dangerous product, by implication any other product that contained traces of this hazardous mineral automatically became defective and therefore dangerous to human health. Consequently, claims against asbestos companies spiraled. The claims did not only come from people were

directly exposed, like employees and mineworkers (primary exposure), but also from secondary exposure through casual contact with products which contained asbestos. In the process, complex and costly legal battles arose on the meaning of the term 'occurrence' alone. Lloyd's underwriters and Names, most of whom acted as reinsurers and excess liability insurers, attempted to persuade US courts to interpret the term 'occurrence' to mean manifestation of disease which would have shifted liability to the insurer who is on risk when the disease is ascertained or diagnosed. On the other hand, asbestos manufacturers and their insurers advocated for the exposure theory introduced in *Insurance Company of North America v Forty-Eight Insulations*[295] to be the guiding principle in the definition of occurrence. In terms of this theory, all insurance policies in force during the period of exposure are liable for the future damage. Although this theory did not allow limits to be aggregated or stacked, it still produced costly claims for insurers. After protracted litigation, the view represented by asbestos manufacturers and their insurers prevailed, piling further pressure on Lloyd's (Anderson, 1987). This theory meant that insurers could still incur liability on policies that lapsed years ago as long as exposure occurred when they were still in force.

6.6.4 Lloyd's Financial Results

Given all the problems associated with the occurrence trigger, insurers need to apply their minds carefully about future claims arising from policies issued today. The main question is – how should future claims on policies issued today be quantified? This question has implications for the pricing, provisioning and reserving practices of the insurer. Lloyd's did not appear to appreciate the complexity of the issues surrounding future liabilities arising from long tail risks and the consequences were ruinous for a majority of Names and the institution as a whole. On the other hand, policymakers must also consider the possibility that by the time the claims are made some of the insurers who were on risk when exposure took place may no longer be available. In such cases, the obvious question is who becomes responsible for compensating the claimant? In the case of Lloyd's, liability claims relating to policies issued in the 1940s and 1950s started to peak in the 1980s. The magnitude of the problem at Lloyd's becomes evident if one looks at its trading results from 1988 to 2001. **Figure 6** shows losses

[295] Supra, note 263

posted by Lloyd's from 1988 to 2001. The blue line tracks yearly losses while the red line tracks cumulative losses.

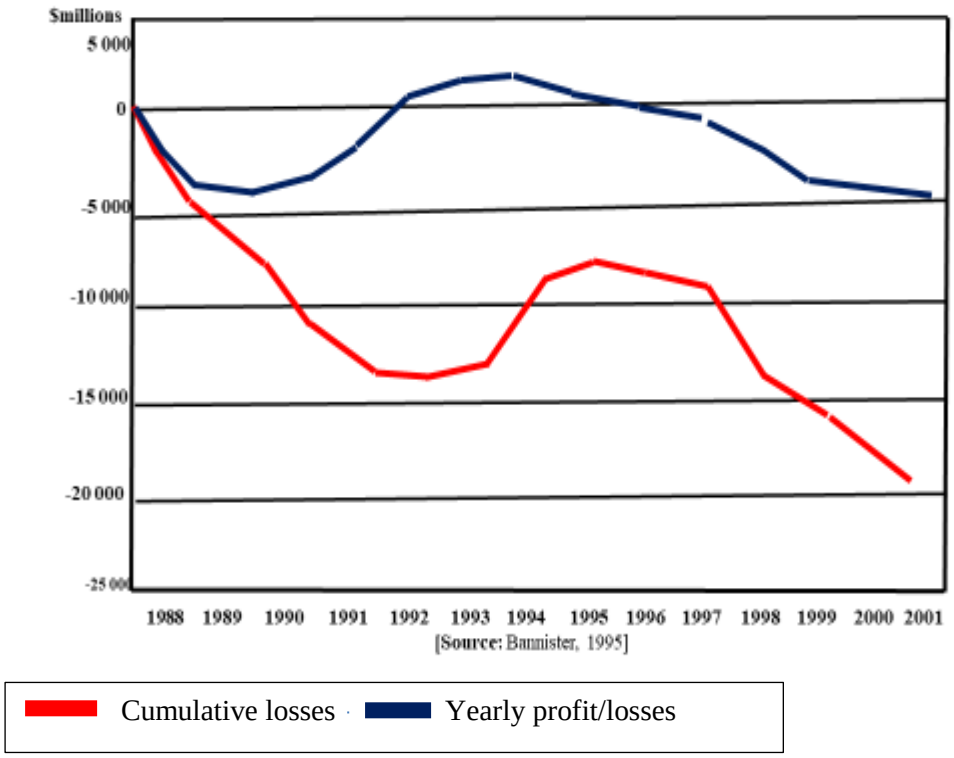


Figure 6: Lloyd's operating results 1988-2001

Klein and Myskowski (1998) vividly portray the seriousness of the problem when they submit that between 1988 and 1993, Lloyd's reported losses amounting to over US$12bn and these losses wiped out the institution's declared profits of the previous twenty years. Despite the presence of warning signs on the harmful effects of asbestos and their potential implications for liability insurers, which if heeded, could have allowed Lloyd's ample time to implement exposure limitation measures on their policies, no such measure were taken. On the contrary, the appetite of Lloyd's Names for US liability business continued to grow. It was only in 1985 that Lloyd's underwriters started to take decisive steps to limit their exposure on general liability policies they issued, but by then it was too little too late – the horse had already bolted out of the stable (Raphael, 1995). Thus, Lloyd's Names fell into a typical trap that long-tail risks, especially long latency diseases are famous for – for a significant time after the receipt

of the premium, there are virtually no losses thereby creating an illusion of security. Losses only start to appear much later.

Even the three-year accounting system employed by Lloyd's did little to rescue Names from the scourge of asbestos claims. Historically, Lloyd's used a three-year accounting system instead of the conventional one year system. This means if a Name writes business in year one, profit or loss from that business will only be determined at the end of year three. Raphael (1995) submits that this accounting system dates back to medieval times when merchants used a system called Voyage Accounting whose rationale was that since assets and liabilities of a voyage could only be ascertained after a ship had safely returned to port, no surplus or shortfall could be distributed until then. It was an attempt to accommodate the run-off pattern of some claims, especially those arising from long-tail risks. Nevertheless, the Lloyd's three-year accounting system proved inadequate and could not perfectly match the run-off pattern of claims from long-tail risks like long-latency disease and pollution. If losses can take decades to develop, it implies that the insurer remains uncertain of the actual liability it faces at any given time since liability can remain in the books of an insurer for an indeterminate time.

To further solve the run-off problem, Lloyd's complemented the three-year accounting system by a further accounting technique called Reinsurance to Close (RITC). In terms of this accounting technique, future liability from current policies is estimated and reinsured separately. This enabled the accounting year to close and any surplus or shortfall to be determined. Only after the closure of an underwriting year could a Name resign from Lloyd's – even death did not relieve a Name of its obligations since liabilities of a syndicate whose underwriting year was still open could be charged against the estate of a deceased Name (Raphael, 1995). There is no evidence to suggest that the method of estimating run-off liabilities under the reinsurance to close system was any more scientific and prudent than the other systems and procedures employed by Lloyd's at the time. If anything, this system of running-off unexpired liabilities was flawed. Reinsurance to close schemes were not properly designed and some of them posted unsustainable loss ratios of much as 2 500% (Raphael, 1995).

A closer look at the Lloyd's results from 1983 to 1991 makes one thing unmistakably clear – the major source of loss is liability business including long latency disease and pollution risks. Another source of Lloyd's problems was the London Market Excess of Loss spiral, commonly known as the LMX spiral.[296] When the results are analysed by class of business, they confirm the damage that long-tail risks can cause to institutions, even those reputed to be financially strong, like Lloyd's. The role of insurers is to assess and price risk. The disastrous results posted by Lloyd's beg the question – how could such a reputable insurer get it so wrong? A further point of interest is the impact that asbestos disease claims had on asbestos manufacturing and other companies whose products contained asbestos. When US courts ruled that companies whose products contained asbestos might be liable under product liability, that development per se was not the primary source of worry for the companies concerned. A more worrying development came when courts allowed those claims to be governed by the strict liability (or liability without fault) doctrine. In the 1960s, the scope of this doctrine expanded to cover any product that turned out to be dangerous to the user (Raphael, 1995). The next section discusses the impact of asbestos claims on defendant companies. **Appendix 4** shows the Lloyd's underwriting results for non-marine business from 1983 to 1991.

The underwriting result of an insurance company per class of business derives from expressing claims incurred as a percentage of net premiums written after accounting for the price of any reinsurance purchased.[297] From 1983 to 1991, the liability class of business did not register an underwriting profit in any single year and was by far the worst performing of all the non-marine classes. This is not all – the underwriting losses are quite large and do not take into account operating expenses of the insurer such as commissions paid to agents or brokers and salaries.[298]

[296] The LMX spiral was simply a phenomenon whereby Lloyd's syndicates would reinsure each other on an excess of loss basis. Conventional wisdom holds that reinsurance plays the primary function of helping insurers to spread risk globally. Lloyd's syndicates defied this wisdom and started internalising risk by cross-reinsuring each other with disastrous consequences.

[297] The underwriting result (also known as the Claims or Loss Ratio) simply measures the percentage of an insurer's net earned premiums that go towards settling claims. It is denoted by the formula: *Claims Incurred/Net Premium Earned.* If this ratio is greater than 1 or 100% it means not only that the insurer's earned premium was inadequate to meet incurred claims, but also that the insurer had to draw extra financial resources from elsewhere (usually from investment income or reserves) to make up the deficit.

[298] Although the Motor book of Lloyd's performed poorly over the same period, it pales in comparison with the liability insurance portfolio. Poor performance of motor business is normal. In most markets, motor business is hardly profitable. One possible explanation for this is competition. Competition for motor business tends to be stiff in most markets because of the ease with which any insurer can write the business. Another possible reason is that it is rare for motor business to be associated with high uncertainty that usually helps insurers to increase

If these are taken into consideration, the situation deteriorates even further. Since Lloyd's participated in the US market at two levels – first as excess liability insurer and then as reinsurer, many Names were hit twice by the toxic liability business they had written in previous years.

In addition to liability for asbestos-related diseases, Lloyd's liability policies also picked up exposure to pollution and environmental liability claims that, like occupational diseases, are also long-tail in nature.[299] Although asbestos liabilities have produced a comparatively higher frequency of claims, when it comes to quantum, they pale in comparison with those for pollution and environmental damage (Bannister, 1995). To make matters worse for insurers, liability for pollution is invariably strict and retrospective. The enactment by the US Congress of the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) in 1980 further sealed the fate of Lloyd's. CERCLA imposes onerous and costly environmental clean-up obligations on polluters, regardless of cost. Its main features are retroactive liability, joint and several liability. The Act also grants permission to the US government to do reclamation work and recover costs thereof from the polluter, and the empowerment of government to issue administrative orders for immediate remedial work to commence immediately if there is risk that the pollution could pose a danger to public health (Raphael, 1995).[300] Failure to comply with an administrative order attracts steep fines levied on a daily basis. Since CERCLA is crafted on strict liability, it leaves polluters with virtually no defence and operates on the 'polluter pays' principle.

Once again, poor policy draftsmanship on the part of Lloyd's rooted in lack of understanding of the developmental characteristics of long-tail risks, proved a costly miscalculation. Apart from being liberally worded, early Lloyd's liability policies did not say anything about environmental and pollution damage (Raphael, 1995). This left room for the courts to impute

premiums without meeting with resistance from consumers. Uncertainty creates scope for insurance to be profitable because insurers benefit from jitters in the market.

[299] This was particularly bad for Lloyd's since pollution and other environmental impairment liability claims can affect large geographical areas and are often not well-defined, leaving a lot of room for courts to define them in ways that are detrimental to insurers. Consequently, these claims can be very costly to settle.

[300] Soon after the enactment of CERCLA, the US federal government set up a US$1.6bn trust fund called the Superfund to finance remedial work which government may deem necessary. The fund is replenished by recoveries from polluters.

coverage of these risks into Lloyd's policies. It was not until the 1970s that pollution and environmental impairment liability started to appear in Lloyd's policy wordings as a specific source of exposure. Consequently, the policies had virtually no exposure limitation devices directly related to pollution and environmental impairment liability which could come into play in the face of escalating claims. Just like with asbestos-related liabilities, issues involving pollution and environmental impairment were also complicated and required protracted litigation in order to streamline and resolve them. A typical liability claim comprises of several variables, one of which is the legal cost of prosecuting or defending the claim. Therefore, when claims are by nature prone to protracted litigation, they tend to be very costly when they are eventually settled. Hence, if the compensation system is able to control or eliminate legal costs, it significantly reduces the final cost of claims. It is for this reason that litigation as a component of any system of funding compensation for injured workers is generally objectionable.

As losses from asbestos liabilities and pollution mounted at all levels, many Names whose liability was unlimited in line with Lloyd's tradition were financially ruined. In the process, many committed suicide. Although the exact number of Names who committed suicide as a result of financial ruin is not really known, estimates range from twelve to over thirty (McClintick, 2000). Some shot themselves, others overdosed with prescription pills and a significant number decided to die by hanging themselves. As pressure to settle claims increased against a background of frequent suicides by their counterparts, many Names eventually agreed to a financial settlement plan proposed by Lloyd's called Reconstruction and Renewal. The purpose of the plan was two-fold. Firstly, it proposed to separate the old Lloyd's from the new one. This was achieved through the establishment of a company called *Equitas* to assume responsibility for pre-1993 Lloyd's Names' liabilities including those for asbestos and pollution. Secondly, the Reconstruction and Renewal plan sought to reduce and cap the pre-1993 liabilities on condition that Names agreed to pay their reduced liabilities and waive all lawsuits against Lloyd's.[301] At around the same time, asbestos claims also triggered a mass

[301] When the avalanche of claims started to suffocate Lloyd's in the 1980s, different groups of Names initiated litigation against their underwriters or syndicates as they felt they were victims of massive fraud perpetrated on them by Lloyd's institutions (Raphael, 1995). One group of Names sued their underwriters alleging that they were negligent when they accepted unlimited reinsurance business when they were not competent to write that business in the first place. Another group of Names who took to the courts were members of syndicates who had posted huge losses through the LMX spiral phenomenon. A final group of Names who also took legal

exodus of Names from Lloyd's forcing the institution to introduce corporate capital in 1994 for the first time in its history. Since then about eighty-percent of Lloyd's capital was corporate-supplied (McClintick, 2000). Notwithstanding all these developments, Lloyd's has never managed to recover fully from the unprecedented losses that it incurred between 1985 and 2001. It came within a whisker of bankruptcy, mainly due to American claims by workers suffering from asbestosis and other lung cancers.

6.6.5 Institutional analysis of the Lloyd's Crisis

Most Names at Lloyd's who shouldered the full weight of asbestos losses from the USA felt that they were victims of fraud, conflict of interest, negligence and incompetence. It is for this reason that many of them resorted to litigation against the Lloyd's establishment. Serious questions arise from the roles that certain institutional arrangements played in the whole Lloyd's saga. Vivian, Hutcheson, Mushai, MacGregor and Britten, (2013) argue that Lloyd's was a victim of flawed institutions notably, the judiciary, Names and Syndicates and the two professions of accounting and actuarial science. These institutions contributed to the crisis at Lloyd's in various ways. Some merely failed to do their job while others failed to adapt their practices and procedures and in the process, could not cope with the dynamics of risk in the liability sphere. However, it is submitted that a glaring omission on the Vivian et al (2013) list of flawed institutions is the Society of Lloyd's which had the primary responsibility of regulating the institution. The primary purpose of regulation is to create an environment where institutional failure is minimised by promoting sound and sustainable business practices tailor-made for the industry concerned. When a whole institution or market which Lloyd's was, is brought to the brink of collapse because its portfolio of risk is toxic, questions must be asked of those whose responsibility it was to ensure that this does not happen. Some have argued that poor regulation by UK authorities who accepted the model of self-regulation at Lloyd's blindly was at the heart of the financial crisis that bedeviled this institution (Kelley, 1995). However, it was not only in the UK where there was a failure of regulation, but in the USA as

action targeted their syndicates and underwriters alleging that they were negligent in the way they handled risk-taking in North America. Some Names even alleged that Lloyd's authorities went on a member-recruitment drive when they already knew that many claims were coming. These Names argued that they were merely recruited to help pay claims which the authorities at Lloyd's already knew were in the pipeline. This, they argued was fraudulent and bad faith conduct on the part of the authorities.

well. If unequivocal information on the dangers of asbestos was already in the public domain by the 1920s, why did US regulators allow continued exposure of people to asbestos for decades without taking it upon themselves to warn the public? According to White (2004), part of the answer lies in the institutional power that asbestos producers wielded at the time. These companies were very powerful such that they were capable of what Stigler (1971) calls regulatory capture, that is the ability of the regulated industry to appropriate regulation for its own benefit and dictate its scope and content.

After the collapse of the South Sea Company, an event commonly known as the South Sea Bubble, in 1720, which ruined many investors financially, there was a ban on the formation of new insurance companies in England. The prohibition stopped over a century later in 1844 when the Joint Stock Companies Act came into being. By this time, Lloyd's had already clocked one hundred and fifty-six years of self-regulation. Following a series of scandals and cases of indiscipline involving brokers in the 1970s, the Committee of Lloyd's felt that its powers to sanction transgressors were inadequate under the Lloyd's Act of 1871. In 1979, the Committee appointed a working party to look into the question of self-regulation at Lloyd's. Sir Henry Fisher, President of Oxford University's Wolfson College and former judge of the High Court chaired the committee. Among other recommendations, the Fisher Report came out strongly in favour of preserving the system of self-regulation at Lloyd's, but was very critical of the pervasive and growing problem of conflict of interest (Raphael, 1995). Self-regulation and most of the recommendations contained in the Fisher Report published in 1980 went on to form the basis of the Lloyd's Act of 1982 (Gwilliam, Macve & Meeks, 2000).

Another committee appointed in 1986 had the responsibility to look into the question of regulation at Lloyd's. This committee was headed by Patrick Neill, the then Vice Chancellor of Oxford University. The committee came into being following the decision by the Thatcher administration to exempt Lloyd's from the provisions of the Financial Services Act of 1986. Just like the Fisher Report before it, the Neill Report drew further attention to the problem of conflict of interest at Lloyd's, but surprisingly supported the continuation of self-regulation. Despite widespread opposition in the House of Commons to the business as usual approach at Lloyd's, self-regulation persisted (Raphael, 1995). Members of the House of Commons were increasingly concerned about the frequency of scandals at Lloyd's yet there was nothing

concrete done to change the institution's regulatory culture. Therefore, Lloyd's continued to be the sacred cow which no one really wanted to touch despite the existence of a number of indicators or warning signs (mostly of a scandalous nature) pointing towards the need to change its regulatory environment. Instead, the system of self-regulation received endorsement repeatedly despite evidence that it was not working as well as it should. In fact, the very nature of Lloyd's favoured self-regulation.

Some of the problems that contributed to the financial crisis of the late 1980s could have been detected early if an objective system of regulation was in place. Regulators at Lloyd's were not accountable to the body politic and the assumption was that the Committee knew best. Consequently, rampant conflict of interest went unchecked and unquestioned, culminating the LMX spiral. In addition, any objective regulator would also have realised that the accounting and audit procedures used at Lloyd's had flaws, as they were not sufficiently adapted to match the institution's unique structure (Gwilliam et al., 2000). For example, formal audit procedures were introduced at Lloyd's in 1908 but even then, the measures adopted did not go far enough. Lloyd's operated as a closed club where a lot of trust was placed in people who, as it later turned out, were ill-qualified to handle the tasks entrusted on them. The exposure faced by syndicates writing liability business from long-latency disease also raises serious questions about the adequacy of regulatory oversight used at Lloyd's. All indications from the near disaster that ensued point towards limited understanding of the nature and characteristics of long-tail risks by regulatory authorities who continued to preside over excessive and uncontrolled risk-taking by many Names and syndicates.

Insurance is a trade where people invest in prudent risk-taking in return for adequate premiums within the framework of regulatory oversight. The idea is to ensure that at all material times the insurer is in a position to fulfil its obligations to policyholders. When the risk-taking practices of insurers threaten to undermine their ability to meet their contractual obligations, regulators must take *ex ante* measures to protect policyholders from the consequences of potential failure by those insurers. To the extent that many Names accepted excessive risks and ended up failing to meet their obligations, the regulatory model at Lloyd's failed in its most basic task – to ensure that a sustainable insurance business model was in place. In the process, Lloyd's regulators even failed to preserve the motto of their organisation which at the time was

fidentia (or confidence) (McClintick, 2000). In 1996, Lloyd's officially abandoned its three hundred year-flirtation with self-regulation and accepted external regulation by the British Securities and Investments Board as well as by the Department of Trade and Industry (DTI) (Fields et al., 1998). In view of the damage that had been done up to that point, this change by Lloyd's came rather too late.

A second flawed institution to compound the problems at Lloyd's was the judiciary (Vivian et al., 2013). The contribution of the judiciary to the problems at Lloyd's was arguably the most direct and potent – courts interpreted the law, insurance policies and determined the nature and type of claims brought against Lloyd's policyholders. In doing so, courts seemed to be guided by the view that insurers had unlimited financial resources. They therefore developed liability rules and theories intended to give effect to this erroneous belief. Confronted by ever increasing asbestos claims, most asbestos manufacturers and employers in the US turned to their insurers, a many of which were at Lloyd's. Naturally, Lloyd's attempted to use policy wordings to defend itself against some claims it felt were not covered. However, due to judicial creativity and engineering, new theories for triggering coverage under those liability policies started to emerge in order to give maximum cover. One way to achieve this was to construe policies in such a way that cover was retrospective. Likewise, the expiration of the period of insurance did not relieve insurers of liability in future – in this regard the occurrence wording proved to be particularly damaging to Lloyd's Names, all of whom had provided coverage on this basis.

A natural consequence of theories such the triple trigger and injury in fact has been to increase the cost of claims paid by insurers. In addition, new rules of liability with no justification in the substantive law of tort but were justified on the grounds of social policy were also introduced by the courts. The social policy rules started to dislodge pure and substantive tort rules as the main basis for determining liability at increasing cost to insurers. These rules not only created an environment for the multiplicity of claims, but as will be seen in the next section, also allowed thousands of claims by people who alleged exposure to asbestos but had not contracted any disease at all. The rise in the number of claims was also attributable to structural features of the US legal system. Lawyers took centre stage and recruited thousands of potential claimants under the contingency fee system. In the end, the frequency of claims

proved to be unsustainable not only to Lloyd's but to the US economy as well. Most of the asbestos defendant companies were in the US and by far the highest number of asbestos-induced firm bankruptcies occurred there. Insurance does not provide answers to all problems posed by risk. Excessive claims have a mortal impact on both insurers and those that they insure. It was certainly a misconception on the part of some US judges and lawyers to think that because most of the asbestos defendants had insurance, every claim had to be paid.

Vivian et al. (2013) also identify Lloyd's Names and Syndicates as another flawed institution. They argue that the institution of Names and syndicates was inappropriate for long-tail risks. Lloyd's has its origins in marine insurance and for that class of business, the institution of Names worked well, mainly because losses associated with that class of insurance are short-tail in nature. In other words, the happening of the loss-producing event and the manifestation of the loss are virtually instantaneous. The belief that the same system of Names was suitable for long-tail risks was fundamentally flawed. Long-tail liability risks produce losses in which time separates the wrongful acts producing the losses and the consequences of those acts implying that the Names accepting liability today may no longer exist by the time losses become payable. Even under the assumption that the Names which accepted the risk twenty or thirty years ago may still exist, there is no guarantee that they will be in a position to settle the claim. Lloyd's had reinsurance to close as a solution to this problem, but it too proved inadequate to deal with the length of the tail on long-latency disease risks. As it turned out, new Names bore the full weight of claims on policies written in years gone by and not surprisingly many of them felt aggrieved and defrauded.

Finally, flaws within the two professions of accounting and actuarial science also contributed to the financial problems at Lloyd's. To manage the run-off problem created by long-tail risks, Lloyd's used a three-year accounting system in conjunction with the reinsurance-to-close system, as explained previously. Both proved inadequate to effectively deal with long-tail risks. One thing is therefore clear - Lloyd's had no solution to the accounting problem created by unknown future claims. An obvious question in this regard is- are the future costs normal provisions for outstanding losses or they are different. Clearly, the approach used by Lloyd's to treat them as provisions for outstanding claims under the reinsurance-to-close system did not work. Inadequate data on asbestos risks and claims development compromised efforts by

the actuarial profession. The long-tail nature of these risks meant that by the time liability is determined and imposed, the event to which it relates is not precisely known or remembered because the people who were there are no longer available. Thus, some observers viewed the information relied upon to structure rescue schemes such as Equitas with suspicion. The rating agency, Standard & Poor's, predicted at the time that without further financial interventions, Equitas would become insolvent (McClintick, 2000). Until now, this prediction has not materialised because of reinsurance and other financial arrangements that Equitas has put in place since its formation.[302]

Thus, the story of Lloyd's represents a vivid illustration of what can happen to insurers when they long-tail risks without a perfect understanding of their nature and characteristics or if those characteristics are not taken into account when structuring contractual and institutional arrangements to handle these risks. Unlike first party insurance claims which involve little danger of insurers having to pay amounts in excess of those they anticipated to pay, in liability insurance often the courts are at the forefront in determining not only liability but its quantum as well. This adds another layer of risk for insurers to the extent that other factors could motivate courts could in their application of liability rules. As discussed in Chapter 3, there is clear evidence of jurisprudential moral hazard among some US judges and how they handled liability for asbestos. It is impossible to quantify the actual cost of the near-disaster at Lloyd's. What is discussed in this section is only the insurance half of the asbestos liability story. The other half relates to the economic consequences and implications of asbestos claims on asbestos manufacturers, employers and employees of defendant companies. The next section discusses this aspect. As that section shows, the consequences of asbestos disease claims on defendant companies and the broader economy in the US have been nothing short of devastating. Mass-delicts like silicosis have the potential to cause macro and micro damage across the economy in ways that are difficult to quantify.

[302] A report prepared by Alan Kaufman, an actuary and independent expert, looking into a proposed transfer of Equitas business to Speyford Limited in 2009 put the probability of an Equitas insolvency at between 3.1 and 4.5% - see: Kaufman, A (2009) "Proposed Transfer of Lloyd's 1992 and Prior Business from Lloyd's Names to Speyford Limited", 8 April 2009, London, UK. The view that Equitas is unlikely to go insolvent is supported by the company's annual financial statements from 1996 to 2015 in which the statement "The risk that assets will not be sufficient to meet the liabilities as they fall due has become extremely remote….." is recurrent.

6.7 Asbestos Litigation Crisis and its Impact on US Firms

Apart from nearly sinking Lloyd's of London, asbestos has had a devastating toll in terms of deaths from asbestos-related disease[303], financial and economic impact on asbestos manufacturers in the USA and other parts of the world. Asbestos litigation is the longest running mass tort in US legal history (Behrens, 2009). The number of individuals who have filed asbestos claims is without parallel in America and anywhere else in the world. In terms of aggregate cost of claims, asbestos litigation ranks second to pollution and environmental impairment. However, unlike asbestos, pollution rarely produces mass claims. It has been suggested that at least 27million people had been exposed to asbestos by the early 2000s and between 1982 and 2002, the total number of asbestos claimants shot from 1 000 to 730 000 while that for defendant companies rose from 300 to 8 400 firms (White, 2006). Some studies have found that claims against the five largest asbestos companies were being filed at a rate of 15 000 to 20 000 a year and by the 2000s, the claims filing rate had shot up to around 50 000 a year (Stiglitz, et al., 2002). These figures are staggering by any standard. In line with the time-sensitive nature of liability claims, the average cost of claims rose steadily over time due to a combination of factors. One is ordinary inflation and super-imposed inflation. Another is that as juries became aware that asbestos producers had probably long known of the dangers posed by their product but did not do much to warn their workers and consumers, they became increasingly inclined to award higher damages. In addition, some asbestos claims started to attract punitive damages.[304] Thus in a decade from 1979 to 1989 the average cost of an asbestos claim doubled from US$21 000 to US$42 000 (Raphael, 1995). By the early 1980s, ominous

[303] According to Munich Re (2009), asbestos-related diseases were the most common work-place cause of death in industrialised economies by the mid-2000s and are expected to remain so for another decade or longer in some countries. To this, one may add the fact that the situation in poorer countries is unknown due to problems such as poor recording methods and lack of accurate monitoring systems.

[304] About one in six jury awards made between 1987 and 2002 in asbestos claims included punitive damages (White, 2004). Punitive damages are extra-compensatory awarded over and above damages necessary to compensate the plaintiff. Their conceptualisation and application varies from state to state. For example, in Alabama, mere negligence suffices for punitive damages to be awarded while in Alaska the conduct of the defendant must be outrageous for punitive damages to be awarded. In Arizona, it must be shown that the defendant intended to injure the plaintiff for punitive damages to be awarded – *Rawlings v Apocada 151 Ariz. 149, 726 P.2d 565 (1986).* Whether punitive damages are insurable also varies from state to state. For example, in Alabama punitive damages can be insured – *Northwestern National Casualty Company Ltd v McNulty 307 F. 2d 432 (5th Cir. 1962).* This is also the position in Arizona unless the insurer specifically excludes coverage – *State Farm, Mutual & Auto Insurance Company Ltd v Wilson 782 P. 2d 727, 733-34 (Ariz. 1989).* By contrast, in California and Illinois punitive damages are generally uninsurable. See: *PPG Industries Inc v Transamerica Insurance Company Ltd 975 P. 2d 652 (Cal. 1999)* and *International Surplus Lines Insurance Company Ltd v Pioneer Life Insurance Company Ltd 111 App. 3d 144, 148 (1990)* respectively. However, in Illinois, an employer can insure himself against punitive damages imposed vicariously due to the wrongdoing of an employee.

signs started to appear suggesting that future asbestos claims were going to be anything but cheap.

Often courts awarded punitive damages that far exceeded compensatory damages. In the 1982 case of *Cavett v Johns-Manville*[305]- the plaintiff, James Cavett, worked as a boilermaker for forty years, starting in 1939. As part of his work he handled asbestos through products manufactured by Johns-Manville and other asbestos producers. He later developed asbestosis from which he eventually died. Proceedings passed on to his wife who took over as plaintiff. The jury in the US district court in the state of Tennessee awarded Cavett US$800 000 as compensatory damages and US$1.5m in punitive damages bringing the total award to US$2.3m. Asbestos claims filed through the product liability route invariably attracted awards for punitive damages in addition to being subject to the doctrine of strict liability. Under the strict liability doctrine, the exercise of prudence or taking reasonable precautions to prevent harm does not relieve the defendant from liability. A natural consequence of strict liability is the general inability by defendants to contest a majority of claims filed against them since most defences tend to revolve around the question of fault. By rendering fault irrelevant, strict liability neutralises most of the common law defences available to a defendant. It also is worth mentioning that in the USA, unlike in other parts of the world, the courts developed special rules governing product liability, including the doctrine of strict liability (Stapleton, 1999). In a majority of countries, product liability rules and any defences applicable thereto arise from legislation.[306]

6.7.1 Impact of Litigation on Asbestos Producers and other Firms

The impact of asbestos claims on firms that either produced or used the product in the manufacture of other products across the USA has been nothing short of ruinous. Paradoxically, even though use of asbestos in the country generally ceased in the 1970s,

[305] 776 F. 2d 1565 (6th Cir. 1985)

[306] In the European Union, product liability rules of member states derive from the EU Council Directive 85/374 issued on 25 July 1985. Under this Directive, each member state usually enacts legislation to implement it. For example, the UK passed the Consumer Protection Act of 1987 to give effect to the Directive. Since the UK resolved in 2016 to leave the EU, it remains an open question whether this law will continue to exist in its current form.

asbestos litigation was still on an upward trajectory by the early 2000s.[307] In addition, by 2009 at least, mortality trends from asbestos in the USA were still increasing (dos Santos Antao, Pinheiro & Wassell, 2009). This suggests more future claims. The final cost of asbestos litigation will only become clear when all claims finally cease to be paid. This is not set to happen to be anytime soon. Some predictions posit that asbestos litigation will eventually breach the US$200bn mark leaving utter devastation in its wake, the most notable of which being corporate bankruptcies (White, 2006). By 2002, and just under thirty years after the landmark decision in *Borel v Fibreboard Paper Products Corporation,* liability insurers had spent in excess of US$70bn to settle asbestos claims (White, 2004).

At an institutional level, the first confirmation of the crippling impact of asbestos litigation was the bankruptcy of Johns-Manville Corporation in August 1982. This development had a seismic effect considering the profile of Johns-Manville Corporation. At the time of its filing for bankruptcy under Chapter 11 of the Bankruptcy Reform Act of 1978, Johns-Manville was the world's largest miner, manufacturer and supplier of asbestos and asbestos-containing products (Bernstein, 1997). The company had its headquarters in Denver, Colorado and manufactured a wide range of asbestos products, including asbestos pipe insulation, shingles, roofing material and asbestos cement pipes. When the courts sanctioned asbestos claims, Johns-Manville was an obvious target for litigation given its status, diversity of its operations and the widespread use of asbestos at the time. At the time of filing for bankruptcy, the company faced 16 500 pending asbestos claims at a cost of around US$12.5bn after the company had already paid another US$50m in claims (White, 2006). In total, the future claims that Manville Corporation faced exceeded the company's net worth of US$1.1bn at the time. In 2001, the leading UK asbestos producer, Turner and Newall, also went bankrupt due to asbestos liabilities the company had incurred, mainly from the USA.

[307] The Environmental Protection Agency's (EPA) Clean Air Act of 1963 underwent major amendments in 1970 that saw use of most asbestos products banned in the US. This was followed by the EPA's Asbestos Ban and Phase Out Rule which was issued in 1989. This rule sought to impose a total ban on the use of asbestos. However, the rule was successfully challenged in court in *Corrosion Proof Fittings v The Environmental Protection Agency 947 F.2d 1201 (5th Cir. 1991).* Therefore, in terms of this ruling the EPA failed in its bid to impose a total ban on asbestos use in America.

Johns-Manville Corporation was not the only company in the US to sink from asbestos-related liabilities. Between 1982 and 2003, sixty-three asbestos companies filed for bankruptcy in the US because of asbestos liabilities (Tweedale & Warren, 2004). **Appendix 5** shows the list of US asbestos firms that filed for bankruptcy between 1982 and 2003. By the end of 2004, the number of companies which had been bankrupted by asbestos rose to over seventy (Barnes, 2007). As of 2016, nearly a hundred companies had filed for bankruptcy because of asbestos litigation.[308] Between 1982 and 2004, asbestos companies were filing for bankruptcy at an average rate of three per year. Just over ten years after Manville Corporation filed for bankruptcy, Keene Corporation did the same in 1993. The company was incorporated first in Delaware and then in New York in 1979. Originally, the company was not into asbestos products. Its original business was the manufacture of heat-sealed plastic packaging. However, the company started to diversify in the late 1960s and that is when it ventured into asbestos-laden products such as fireproofing, industrial and insulation products. When asbestos litigation started, the company faced an avalanche of lawsuits which had swelled to 100 000 and were increasing at a rate of 2 000 a month at the time of the bankruptcy filing, with another US$500m worth of claims having already been settled (Bernstein, 1997). After nearly twenty years of litigation against Keene Corporation that yielded nothing by way of a solution, a breakthrough came in 1996 with the creation of the Keene Creditors Trust. These and many other similar developments had profound macro and micro impacts whose economic costs are hard to quantify. When over seventy companies file for bankruptcy in just over two decades, the economic costs are bound to be far reaching.

An unknown variable in all these bankruptcies is the cost to the broader economy in terms of lost or reduced investment and production opportunities while the companies concerned focused on working out plans of reorganisation and modalities of paying their liabilities. However, a direct consequence of the bankruptcy of firms on such a large scale is that payment of all the claims pending against the bankrupt companies stops until a new settlement structure is agreed. In some cases, claims are never paid. Therefore, under the best of circumstances companies that sought shelter under Chapter 11 would only meet some of the claims filed against them but not all of them. This confirms some of the objections against the common law and litigation discussed in Chapter 2. It also confirms the oft ignored, but important point

[308] Insurance Information Institute available at: http://www.iii.org/issue-update/asbestos-liability

that it is one thing to file hundreds or thousands of claims against an alleged wrongdoer, but actually getting the compensation is quite another. Even though the asbestos producing companies had insurance, most of it proved inadequate because of the unprecedented number of claims. Where punitive damages arise, insurance in some states did not cover them hence the responsibility for paying these fell on the asbestos companies themselves. More often than not, the claims simply proved to be unsustainable for most companies, who then sought refuge under the Chapter 11 bankruptcy law.

In 2002, the American Insurance Association commissioned assembled a team to study the impact of asbestos liabilities on workers in bankrupt firms. The study, headed by American Nobel Prize-winner and professor of economics at Columbia University, Joseph Stiglitz made some interesting findings. One of the findings that appears to be less understood especially in the midst of a litigation frenzy as that witnessed against US asbestos producers, is that if left unmanaged, mass tort litigation can drive many companies into bankruptcy at immense economic cost not only to the affected firms but to other firms too (Stiglitz, et al., 2002). Ligation focuses on claimants who have claims against the offending company at any given time. Usually, there is little or no regard paid to people currently working for the defendant company who naturally stand affected by the outcome from the litigation process. If the lawsuit in question is as ruinous as those witnessed in America in connection with asbestos, the implications for current employees in defendant companies can be dire. For example, the twenty-three companies that went bankrupt in 2002 alone employed 135 000 people, a significant number of whom lost their jobs. From 1982, when filing for bankruptcy started to emerge as the preferred option to escape asbestos litigation, it estimated that between 52 000 and 60 000 jobs were lost in the process (Stiglitz, et al., 2002). These estimates relate to direct job losses in the bankrupt companies only and do not take into account what may be termed collateral or indirect job losses in other entities through interdependency and other commercial arrangements.

According to Stiglitz, et al. (2002), bankruptcies witnessed across America also imposed other economic costs that are hard to conceptualise and quantify apart from direct job losses. These include job displacements, reduction in the market value of the firm as stock markets respond to the uncertainty brought about by bad news associated with the bankruptcy and increased

costs to the taxpayer through, for example, payment of unemployment benefits to retrenched workers. In addition, shareholders in the company may also lose their investment in the event of a bankruptcy. When bad news concerning an entire industry filters into stock markets, it compounds losses in ways that are hard to quantify. Some of the largest institutional investors on stock markets are pension funds who hold stocks in various industries as part of their diversification strategy. They too, and ultimately their members, are negatively affected when firms start to file for bankruptcy in order to benefit from an automatic moratorium on litigation. These losses are externalities by nature and therefore difficult to control and value.

In the final analysis, the fact remains that the total cost of asbestos litigation remains unknown but continues to rise. Some have estimated that the cost would eventually surpass the US$200bn mark (White, 2006). Another study has found that injuries and diseases imposed a cost of US$250bn on US society in 2007 (Leigh, 2011). Estimates of asbestos claims far exceeded the net worth of US asbestos companies and nearly equalled the net worth of US liability insurers (Raphael, 1995). These staggering projections had one ominous implication - asbestos manufacturers and a significant number of their insurers were teetering on the brink of bankruptcy, threatening to leave many present and future claimants uncompensated. There are strong reasons to believe that silicosis class actions currently being prepared against mining companies have the potential to develop into a local version of a mass delict along the lines of asbestos litigation in America. Firstly, just like asbestos litigation, the number of potential claimants is large yet unknown. Secondly, litigation as a process in itself will in all likelihood push transaction and settlement costs even higher. Just like in America, lawyers are using aggressive tactics to get as many claimants as possible to join the class actions.[309] Thirdly, like asbestos claims, silicosis is a long latency disease and this would see claims drag on for years before they are finalised. Finally, the silicosis situation has reached where it is today against a background of unwillingness or inability by government to intervene. However, amidst these similarities are some notable differences. For example, asbestos companies in the US had some

[309] In the US, plaintiff lawyers went flat out to recruit asbestos claimants to their client stables. They used aggressive advertising and offered free chest X-rays to potential claimants who would then be asked to sign retainer contracts with the law firms (White, 2006). Many people signed up for these free X-rays, many of whom had never suffered symptoms of any asbestos disease. Estimates say that over one million workers have undergone lawyer-sponsored X-ray examinations (Behrens, 2009). Another technique used by lawyers to recruit clients that resulted in the proliferation of claims was to send direct mail to workers in asbestos firms alerting them of the possibility of suing their employers or third party firms who may have exposed them to asbestos without warning of its dangers (Raphael, 1995).

form of liability insurance at the time the asbestos claims started to flow in while mining companies in South Africa do not.[310] Furthermore, US judges have dealt with claims for asbestos disease in tort for decades while their South African counterparts have never considered cases of this nature before. Notwithstanding all this, the main question is: Does South Africa have the capacity to absorb the socio-economic impacts that come with litigation on a mass scale as that witnessed in America from asbestos liabilities, such as company bankruptcies and mass job losses,?

6.7.2 Asbestos Litigation and the US Federal Government

In the previous section, it was explained how devastating asbestos liabilities have been to asbestos and other firms, starting in the 1980s. There unprecedented number of claims and the size of awards imposed against asbestos producers and employers are products of structural features of the US legal system. The main drivers of the asbestos litigation crisis were firmly rooted in US institutions that aided the process by their action or inaction. It was also not predestined that asbestos litigation would produce some of the most expensive claims witnessed in American legal history. Instead, structural features of the US legal system and the inability of the federal government to take decisive measures to find alternative ways to fund compensation to asbestos victims played a large part in shaping outcomes of the asbestos litigation crisis. The initial attitude of judges, the role of lawyers, the culture of fault, the deep pocket syndrome, and class action abuse through practices, such as forum shopping, all played a part in fueling the crisis (US Chamber of Commerce, 2005). This failure to act occurred against a background of strong evidence that the tort system was ill equipped to handle claims on such a scale as those brought against asbestos companies. In addition, the *laissez faire* approach adopted by policymakers, especially the failure by Congress to act since the 1970s when the litigation floodgates opened also contributed to the undesirable outcomes witnessed in connection with asbestos litigation. The inaction on the part of Congress in particular, allowed an important public policy area to be captured, and in some cases abused, by lawyers

[310] Since the law has, until 2011, been understood to hold that no employer can be sued, insurance of employers against occupational risks like injuries and diseases has largely been irrelevant in South Africa.

to the detriment not only of the asbestos producers, but claimants and other stakeholders as well.[311] Various US institutions contributed to fueling the asbestos litigation crisis.

One of the institutions that played a pivotal role in shaping outcomes of asbestos litigation in America, albeit through inaction, is the US federal government. For over three decades, the US Congress failed repeatedly to pass any significant legislation to change or regulate the funding of compensation to asbestos claimants, notwithstanding the availability of strong and persuasive evidence showing that the system of tort litigation was grossly inefficient on many accounts (Barnes, 2007). For example, many studies have been conducted which, with striking consistency, all confirmed that despite the billions of dollars that asbestos litigation has churned out since the 1970s, less than half of every dollar awarded actually makes its way into the pockets of claimants. A 1983 RAND Corporation study found that asbestos claimants received a mere US$0.37 out of every dollar awarded by the courts (Barnes, 2007). This figure is lower than the average proportion pocketed by claimants in other tort awards confirmed by other studies to be just above forty percent (US Chamber of Commerce, 2005). Another objectionable aspect of the tort system, which could have motivated Congress to act, is the lack of horizontal equity that has seen claimants with the same injuries receiving vastly different awards.[312] Despite growing voices of dissatisfaction with the tort system, Congress has failed to take any decisive steps to address the asbestos litigation issue specifically.[313]

Pennsylvania Republican Senator, Arlen Specter, who chaired the Judiciary Committee in the mid-2000s, battled to find a lasting national solution to the problem of asbestos litigation without success. He proposed a plan to set up a US$140bn privately funded national asbestos trust to compensate asbestos victims on a no-fault basis based on set medical criteria (Nell, 2006). To achieve this, Specter sponsored the Fairness in Asbestos Injury Resolution Act

[311] For example, US judges have bemoaned the manner in which some lawyers have used bankruptcy trusts to fleece defendant firms. Section 5.7 discusses this issue further.

[312] This can be understandable if the claimants in question filed their claims in different states. In one bizarre case, cited by Barnes (2007), five juries in the state of Texas worked with the same evidence in a claim involving the same class of claimants but reached different conclusions on the key issues of liability and causation.

[313] One notable development came in 2005 when President George W. Bush signed the Class Action Fairness Act which managed to reduce forum shopping by transferring large inter-state class actions from district courts which are widely regarded as pro-plaintiff to federal courts which are viewed as providing more protection to defendants (Stiglitz et al, 2002; US Chamber of Commerce, 2005). However, this Act is of general application and is not specifically targeted at asbestos litigation.

(FAIR) that sought to replace litigation as a method of funding compensation to asbestos victims. On 13 April 2005, Specter announced that agreement on the FAIR Act was imminent implying that its enactment was imminent (Barnes, 2007). However, no sooner had this announcement been made than fierce opposition to the proposed Act started to emerge, culminating in its failure to survive a procedural vote in February 2006. To date, there has been no meaningful progress made to resuscitate the FAIR Act. One can see both cultural and sectarian factors having played a part in this outcome. As seen in In Chapter 3, one of the reasons why America was slow to embrace workers' compensation was its entrenched distrust of anything reminiscent of centralisation of power in the hands of the state or any attempt to tamper with the freedom to choose. For this reason, most attempts to pass state-controlled workers' compensation schemes in the early 1900s faced challenges in court on constitutional grounds. The same fate befell the FAIR Act. Barnes (2007: 160) posits that culturally, American society is generally suspicious of centralised power, preferring instead to use "private solutions to solve public problems". Thus, despite a large body of evidence on the inefficiency of the tort system to deal with a mass tort like asbestos, the US government has largely been a peripheral player in the search for a lasting and sustainable solution to the litigation problem.

However, efforts to manage the asbestos liabilities problem at state level have been relatively successful, albeit only in managing and streamlining the process of litigation. No state has however managed to come up with an alternative to litigation. From 2004 onwards, a number of states introduced wide-ranging legislative reforms to the tort system mainly because of asbestos litigation. The reforms primarily focused on five main headings namely: (1) capping punitive damages; (2) capping non-economic damages; (3) limiting the application and scope of the joint and several liability principle; (4) restricting the parameters of product liability; and (5) streamlining the handling of class actions and curbing forum shopping (Barnes, 2007). Although the composition and scope of the reforms vary from state to state, Mississippi's 2004 reforms are widely regarded as among the most comprehensive in scope. They included capping non-economic damages, abolishing joint and several liability, limiting punitive damages and curbing forum shopping (US Chamber of Commerce, 2005). According to Barnes (2007), the three reforms witnessed in a majority of states were: (1) limiting the scope of joint and several liability (adopted by 40 states), capping punitive damages (adopted by 31 states), and reforming product liability rules (adopted by 18 states). As pointed out in Chapter

4, class action and forum shopping was only a problem in a handful of states viewed by plaintiff lawyers as pro-plaintiff.[314] The essence of forum shopping lies in the transfer of lawsuits from jurisdictions where the cause of action took place to another jurisdiction perceived to be advantageous to the plaintiff's case. It is therefore logical that only the few states regarded as sympathetic to plaintiffs, such as, Alabama, Mississippi, Texas and West Virginia, passed legislation to manage the problem.

6.7.3 Role of the US Judiciary in Asbestos Litigation

Arguably, the courts played most decisive role in the evolution and outcomes of asbestos litigation in contemporary America. The inaction on the part of the federal government to find a comprehensive solution created a void the judiciary was more than eager and prepared to fill. Courts filled this void by developing and implementing what Barnes (2007: 158) calls "court-based tort reforms", a term that refers to the adaptation of liability rules and court procedures by judges and lawyers in civil trials. From the 1960s to the 1980s, US courts were by far the most influential agents in the broadening of liability rules applicable to asbestos claims through a variety of innovative legal devices and other procedural changes leading to US tort law becoming more pro-plaintiff. For purposes of this study, two of these changes are particularly noteworthy given their telling impact on asbestos litigation. The first was the landmark ruling in *Borel v Fibreboard Paper Products* that paved the way for third party suppliers of asbestos products to the workplace to be strictly liable for harm caused by their products. This decision is regarded by many who have studied the asbestos litigation crisis in America as the precursor to the floodgates of claims that later followed. A second court-based change was the granting of permission by judges allowing lawyers to combine claims into large and profitable class actions (Barnes, 2007). The use of class actions culminated in the proliferation of independent trust funds formed by defendant firms (many against their will), at immense financial benefit to lawyers. These two developments, in particular, contributed by far to the evolution of asbestos litigation into an amorphous mass tort of crisis proportions. It is highly unlikely that asbestos litigation could have developed into the crisis that it became in the absence of these judicial developments.

[314] Chapter Four section 4.2.3

As the litigation crisis escalated, it soon became apparent to the very judiciary that had played a decisive role in fueling it, that the situation was getting out of hand and therefore needed urgent remediation. Starting in the early 1990s and in what is as a profound irony, the judiciary started advocating for federal government intervention to arrest the litigation tide it had helped to escalate. The US Supreme Court was at the forefront of appeals for federal legislative intervention. In *Amchem Products Inc and Others v Windsor and Others*[315] Ginsburg J, who delivered the majority opinion and quoting directly from a US Judicial Conference Ad Hoc Committee on Asbestos Litigation Report of 2 -3 March 1991, said at page 598:

> The most objectionable aspects of asbestos litigation can be briefly summarized: dockets in both federal and state courts continue to grow; long delays are routine; trials are too long; the same issues are litigated over and over; transaction costs exceed the victims' recovery by nearly two to one; exhaustion of assets threatens and distorts the process; and future claimants may lose altogether.

Although this aptly sums up the problems associated with using the common law system of liability to fund compensation payable to victims of a mass tort, it was not something new. What was new is the fact that it came from the judiciary. The actual victims invariably are the ultimate losers as the above passage confirms. Transaction costs associated with tort claims are too high, leaving claimants at a huge disadvantage. Instead, the bulk of the money accrues to third parties. The US Judicial Committee Report on Asbestos Litigation then went on to call for legislation creating an asbestos dispute resolution scheme to arrest the problem. Similarly, in *Ortiz and Others v Fibreboard and Others*[316], the US Supreme Court once again reiterated the need for the federal government to do something about asbestos litigation. At page 821 Souter J remarked:

> The elephantine mass of asbestos cases ……defies customary judicial administration and calls for national legislation.

The US Supreme Court made a similar call in *Norfolk and Western Railway Company Ltd v Ayers.*[317] Anyone familiar with basic notions of both American society and legal thought would find these calls by US judges rather surprising. This is because historically, American society

[315] 521 US 591 (1997)
[316] supra
[317] supra

is generally averse to centralisation of power, especially in the hands of the government and instead prefers using private solutions to resolve public problems (Barnes, 2007). Notwithstanding the persistent pleas for intervention by the judiciary, the US Congress has virtually failed to take any decisive measures to deal with the problem of asbestos litigation. In 2005, there was growing optimism that Congress was finally going to act by passing the FAIR Act which sought to replace tort litigation with a US$140bn no-fault national trust fund which would compensate asbestos victims based on predetermined medical criteria. However, nothing eventually came out of this initiative due to divergent sectarian interests that converged and started to oppose the idea, albeit for different motives. Since then, there has not been any meaningful initiative at federal level aimed at resolving the problems associated with asbestos litigation, despite the fact that their negative impact across American society are well documented.

It is only at state level where there have been attempts to manage the problem through legislation and the courts do not appear to have interfered with this process. Instead, the judiciary has also weighed in with reforms of its own to manage the problem of escalating claims. They include reforms aimed at shortening the duration of tort trials such as consolidation, bifurcation and bouquet trials (White, 2006). Consolidated trials, bifurcation and bouquet trails are by-products of asbestos litigation and involve the hearing of multiple asbestos claims by the same jury. Bifurcation is a procedure of dividing a trial into several phases and upon completion of each phase, parties have an opportunity to try to reach a settlement based on the evidence heard in the concluded phase or phases. It may be that at a certain point during the trial, one side may realise that their case is getting weaker and weaker, and may therefore, be prepared to consider a settlement at that point. This saves the court time by not continuing with trial. Finally, bouquet trials are essentially a form of sampling technique where a small group of claimants selected from among a larger group of asbestos claimants is used and decisions reached with that small sample serve to guide settlement with the rest of the claimants in the group. However, none of these judicial reforms introduces a new system of funding asbestos claims, hence they have no impact on the number of claimants who file claims. They are simply an attempt to manage the process. According to Barnes (2007), asbestos compensation in contemporary America represents a typical example of how lawyers and judges captured an important policy area due to failure by Congress to take decisive remedial measures.

There are also strong reasons to support the view that most of the problems surrounding the asbestos question in America have either originated from the approaches sanctioned by the judiciary or been exacerbated by it and lawyers. To begin with, the introduction of strict liability for asbestos products in the 1970s came through the courts not legislators. A natural consequence of strict liability is multiplicity of claims. Furthermore, it was the US judiciary which presided over the filing of claims by people who were not even impaired by asbestos at all (the so-called unimpaired victims) when they allowed questionable arguments by lawyers that anxiety arising from fear of developing an asbestos disease in future was a legitimate basis for claiming compensation. It is difficult to conceptualise a situation where a person who has suffered no injury and has no functional impairment can claim compensation in the first place. Even the common law, with all its weaknesses, does not recognise a situation where a person with no physical disablement can recover damages. Studies conducted in the early 2000s revealed that about fifty percent of asbestos claims filed were by people who had little or no physical impairment from asbestos (Stiglitz et al., 2002). Finally, the judiciary also promoted the deep pocket syndrome in the 1980s by adopting liability rules seeking to make it easier to recover compensation in cases where insurance was available. To achieve this, the courts developed various trigger theories applicable to liability policies. The main policy triggers developed through the courts are the exposure theory, the manifestation theory, the triple trigger theory and the injury in-fact theory (Anderson, 1987). Courts also introduced the doctrine of market share liability.[318]

[318] The exposure theory holds that the insurer on risk when exposure to noxious substances first took place is liable to the claimant. It first from the case of *Insurance Company of North America v Forty-Eight Insulations* (supra). Then there is the manifestation theory which holds that the insurer on risk when the asbestos-related disease (or any other disease) becomes manifest is liable to provide coverage – this theory was developed in the leading case of *Eagle-Picher Industries Ltd v Liberty Mutual Insurance Co Ltd* (supra). The triple trigger theory provides that all insurers who issued policies from the date of first exposure right through to manifestation of the disease are liable – as pointed out earlier this theory was born out of the case of *Keene Corporation Ltd v Insurance Company of North America (supra).* A few years later, courts developed the injury-in-fact theory in *America Home Products Corporation Ltd v Liberty Mutual Insurance Company Ltd.* The theory holds that cover under a liability insurance policy attaches when injury or disease is diagnosable or compensable (injury in fact) provided it occurred during the policy period. Finally, the courts also introduced the doctrine of market share liability in product liability claims involving multiple defendants. This was introduced by the Supreme Court of California in *Sindell v Abbott Laboratories Ltd 26 Cal. 3d 588 (S.Ct. 1980).* Under the doctrine, a rebuttable presumption in favour of a plaintiff who has proved actual damage arises and each defendant is liable for a percentage of the damages equal to its market share at the time of using the product unless it can rebut the presumption by proving that its product could not possibly have injured the plaintiff. In practice, the presumption reversed the normal tort rule of liability in civil cases which states that he who alleges must prove. Most of these liability theories and doctrines manufactured by the courts had profound and devastating effect on insurers by increasing the number of claims and their costs as well as making it much harder to defend most claims.

In view of the foregoing, it is justifiable to argue that as far as asbestos claims are concerned, US courts have exerted considerable legal risk on both asbestos firms and their insurers. To date, nearly bankruptcy because of asbestos liabilities has claimed 100 firms across the US.[319] On many occasions, courts have interpreted liability policies in ways that have left insurers and their clients baffled (Abraham, 2010). In some cases, courts simply disregarded the otherwise clear language used in insurance policies just to create opportunities for liability to attach on defendant firms and their insurers. The 1980s, in particular, marked the beginning of a revolution in legal rules on personal injury claims in America with the courts sitting at its epicenter (Raphael, 1995). Thus, under a different judicial system, outcomes of asbestos litigation in America may well have been different. The strangest aspect of all the judicial innovations that took place around asbestos claims since the 1970s is that most of them had no positive impact on the financial well-being of claimants judged by the actual payouts that ended up in their pockets. Some of the solutions that were agreed were outright detrimental to the interests of future claimants since no one assumed the responsibility of negotiating on their behalf in Chapter 11 bankruptcy settlements that became an obvious solution of choice for asbestos class action litigants and their lawyers. Often current claimants enforce their claims with no regard to the interests of future claimants even though it is known that asbestos diseases were of a long latency nature (Bernstein, 1997). Thus, US courts are right in calling for a national and government-backed solution to the asbestos problem, but rather insincere in their failure to acknowledge their role in the creation of the problem.

6.8 Litigation and the South African Asbestos Relief Trust

Mounting asbestos liabilities forced many American firms to file for bankruptcy in terms of the Chapter 11 law. In addition, many of the firms that opted for bankruptcy did so under pressure from plaintiff lawyers to agree to schemes of settlement, most of which involved the creation of independent trust funds. Today there are over forty asbestos liability trusts in the US holding assets worth US$37bn.[320] Formation of independent trust funds is a growing option for companies facing high uncertainty about their future claims and there is nowhere where

[319] Insurance Information Institute available at: http://www.iii.org/issue-update/asbestos-liability (Accessed on 31 January 2017)
[320] Insurance Information Institute (supra)

this uncertainty is greater than for long latency liabilities. Its main architects are plaintiff lawyers who have found the practice to be highly lucrative financially because, not only does the system generate huge fees, it also ensures more work for lawyers since they are often the ones appointed to run those trusts as well. The rationale and logic behind the formation of these trusts are quite straightforward. A defendant company facing a potentially ruinous class action or actions is usually easier to pressure into agreeing to settle instead of going to trial. Fearful of potentially losing the lawsuit and further reputational damage, many firms have little choice but to agree to settle. Once this position is reached, lawyers invariably propose the establishment of a trust into which the defendant firm is required to deposit a large sum of money to be used for settling current and, at least in theory, future claims. Once everything is in place, the lawyers get a sizeable amount in fees and often act as administrators of the trust, ensuring that they continue to earn fees for the duration of the process. This method of resolving mass torts is fast gaining traction in South Africa as well, with a number of firms having already agreed to set up independent trusts.[321] Given the pending silicosis class action suits against mining companies, the use of this method of resolving mass claims is likely to increase even further in future.

Trusts as a method for settling mass claims started to appear on the South African legal landscape in the early 2000s, but the process culminating in this development had started a bit earlier. In 1997, a rather complex asbestos lawsuit began against Cape Plc on behalf of South African ex-miners and their dependents who claimed to have contracted asbestos-related diseases while working for the company.[322] The claimants who represented in the litigation called themselves The Asbestos Interest Group. Subsequent to the beginning of litigation, Cape Plc's financial position deteriorated rapidly and by October 2001, its share price had fallen to a paltry £0.11 per share. Against this background, it was a distinct possibility that even if the company was found liable, it would not be in a position to satisfy the judgment and would in all probability file for bankruptcy as a result. Once this became a real possibility, litigation also joined in the South African company, Gencor Limited, which at the time was in the middle of a restructuring exercise. This eventually culminated in the formation of BHP Billiton. Given

[321] The most recent firms to do so are Anglo Gold Ashanti and Anglo American South Africa which in 2016, agreed to establish the *Qhubeka* Trust covering about 4 400 claimants suffering from silicosis and other lung diseases allegedly contracted when employed by the two conglomerates. The two companies agreed to pay R464m into the trust formed to pay the claims.

[322] Mushai, A (2014), "For Law or Money", *SHEQ Management,* September/October 2014, 11-12

this background, Gencor had no appetite for a protracted legal battle that carried with it the added risk of derailing its restructuring exercise. Thus in 2003, both Cape Plc and Gencor decided to settle, resulting in the formation of trusts for the benefit of the asbestos claimants. The Gencor settlement resulted in the formation of the Asbestos Relief Trust. Gencor made an initial payment of R381m into the trust and an additional R20m was later paid bringing the total to just over R400m (teWaterNaude, 2014). The Cape Plc trust fund started with five claimants in 1997 and by 2001, the list of claimants had swelled to 7 500.[323] Yet another asbestos settlement came in 2006 by the Swiss Eternit Group leading to the establishment of the *Kgalagadi* Relief Trust that started with a capital amount of R136m. However, it is the Asbestos Relief Trust that is the primary focus of this discussion. The question is – are independent firm-level trusts a desirable and efficient way to fund compensation for occupational diseases?

If this process is allowed to take its natural course, it is possible that all mining companies would end up belonging to a trust to which they contribute substantial amounts of money which will be used to pay claims for occupational diseases by ex-miners. teWaterNaude (2014: 4) submits that the Asbestos Relief Trust is "seen as a model of efficient occupational disease compensation in South Africa". The lack of evidence backing this claim aside, there are other reasons to question the efficiency of a system which seeks to promote the proliferation of independent institutions (trusts) whose processes and procedures are often loosely regulated and not transparent to fund compensation for occupational diseases. Compensation for occupational diseases is an important public policy area where government should be in firm control to see how much is paid and the processes and procedures involved. Placing blind faith in independent trusts may also not be a good idea for several reasons. Firstly, the companies who expected to finance these trusts do not possess the same level of resources, implying that some trusts will be well-funded, while others may not. The highest payment under the Asbestos Relief Trust goes to mesothelioma and asbestos cancer sufferers who get around R71 500 each (teWaterNaude, 2014). However, another asbestos trust could pay higher or lower amounts for the same diseases. Therefore, despite the fact that the claimants may all have contracted the

[323] There was one fundamental difference between the Cape Plc settlement and the Asbestos Relief Trust settlement. The former was a closed settlement while the later was open. Under a closed settlement, only people admitted onto the list qualify for compensation whereas under an open settlement anyone who meets the criteria stipulated in the trust is eligible for payment (teWaterNaude, 2014).

same variant of silicosis, there is no mechanism to ensure that they get the same or comparable compensation from each of the trusts to which they may belong. Such an outcome undermines the principle of horizontal equity that requires that people with the same injury or condition should receive the same compensation.

Secondly, not every employer who faces liability now and in future can afford to set up a cash-rich trust as is often assumed. For example, litigation that would undoubtedly have resulted in the formation of another trust on behalf of ex-Havelock mine asbestos victims in Swaziland collapsed in 2003 after Turner and Newall, the UK-based mining giant that owned the mine, filed for bankruptcy in 2001. Therefore, like liability at common law that operates like a lottery and is therefore highly uncertain, the trust solution is equally uncertain if it turns out the targeted company is incapable of meeting its financial commitments to the trust. Likewise, in the USA, not every company that faced asbestos claims was able to form a trust – some were went into liquidation leaving current and future claimants uncompensated. The same can happen with some of the mining companies currently facing class actions. Some will afford to fund their occupational disease liabilities through trusts, but others may not afford to do so. For those who may not afford to inject cash into trusts and presumably face liquidation, their claimants face a real prospect of going uncompensated. This possibility does not receive serious thought in the current compensation discourse. The assumption appears to be that every company targeted in the class action suits will be able to pay any amount asked. There is no guarantee that this will be the case. On the contrary, and if evidence from other jurisdictions where a comparable situation has been faced is anything to go by, there is good reason to believe that some defendant companies will be unable to meet all their liabilities. It is therefore questionable whether a system that potentially leaves some occupational disease sufferers without compensation is efficient.

Thirdly, if one looks at the 2013 Annual Report of the Asbestos Relief Trust, an interesting but worrisome development is clearly noticeable. In order to understand this development, it is necessary to use the principal-agent problem analogy as it relates to trusts as a tool for analysis. Trusts exist for the benefit of a passive group of people who cannot act on their own. For purposes of this analysis, the passive group comprises the asbestos disease sufferers. In the context of the principal-agent relationship, the asbestos disease sufferers are the principals.

Trustees (the agents) manage the trust for the benefit of these principals. Beneficiaries are then required to apply to the trustees for compensation and if they meet the set criteria, compensation is paid. By April 2013, the Asbestos Relief Trust had received thousands of enquiries for compensation from potential beneficiaries, many of whom did not qualify. Trustees accordingly rejected applications from people who did not qualify. However, the essence of the principal-agent problem rests on the fundamental insight that agents could and often do deviate from their mandate to protect the interests of the principal and in the process, trust property can be used for purposes which are totally at variance with the interests of those for whose benefit the trust was originally created. Reasons that may prompt such deviation by the agents include personal gain or external pressure by third parties such as politicians who may see opportunities for maximising rents for themselves. Recent developments within the Asbestos Relief Trust illustrate this point well.

For some time, the trustees of the Asbestos Relief Trust rightfully rejected attempts by people who did not qualify for compensation to be paid. However, in May 2012 the trustees were summoned to a meeting with the Deputy Minister of Mineral Resources in Pretoria where it was suggested that an amount of R30m be paid to claimants who apparently did not meet the payment criteria as an *ex gratia* payment.[324] This suggestion also had the support of the Premier of the Northern Cape Province. To their credit, the trustees refused to accede to this proposal.

In October 2012, the trustees were summoned to yet another meeting at the Offices of the Master of the North Gauteng High Court also in Pretoria. Officials from the offices of the Deputy Minister of Mineral Resources and the Premier of Northern Cape Province were also present. The Chief Master of the High Court chaired this meeting once again the trustees were asked to make payments to people who did not meet the criteria for compensation. At this point, the Chief Master informed the meeting that he was going to appoint two additional trustees. Neither the trustees nor the beneficiaries sanctioned the proposal to appoint additional trustees and neither of these two parties were consulted – it was a unilateral decision on the part of the Chief Master with backing of the politicians. Just under a year later, on 5 August

[324] Asbestos Relief Trust Annual Report, 2013

2013, the Chief Master appointed the two trustees and presumably gave them a mandate to see to it that the suggestion to pay compensation to people who did not qualify in terms of the trust deed becomes reality. At the time of writing this thesis, it was still unclear whether the trust had eventually acceded to the deputy minister's demands and started to make payments to people who do not qualify. Motives behind this interference by politicians are not hard to discern – rent seeking. It is difficult to imagine any other valid reason why politicians would want to interfere in the affairs of a privately administered trust acting in accordance with its mandate and cause it to contravene its own constitution. This brings us back to the claim that the Asbestos Relief Trust and by implication, the trust solution in general, is an efficient model for funding compensation payable to victims of occupational diseases. On the evidence of the recent developments within the Asbestos Relief Trust, it is again highly questionable if a system that is apparently vulnerable to rent-seeking behaviour by politicians qualifies as efficient. This behavior by politicians compromises the chances of future claimants with valid claims to receive compensation. If money can go to people who do not qualify simply because politicians want it to be so, what stops them from coming back in future with other illegitimate demands?

A further point of interest is that the Asbestos Relief Trust came into being about fourteen years ago with a capital amount of R401m. As at 28 February 2013, the trust had received 14 512 claims of which 10 109 were invalid and therefore rejected. The number of new claims filed with the trust started to decline in 2008 and this trend continued in all the subsequent years to 2013 and most probably beyond. In addition, the trust's annual report for 2013 (some ten years since its formation) indicates that the funds available for distribution stood at R305 443 879 which is equivalent to seventy-six percent of the capital amount paid into the trust when it was established.[325] This raises further questions about the efficiency of independent trusts as a method of funding compensation for long tail liabilities such as long latency diseases. The fact of the matter is that the trust is created and financed today for claims that are likely to arise in future hence everything is based on estimates. The main problem associated with estimates, especially of long tail liabilities, and for which creation of a trust provides no adequate solution is uncertainty regarding a number of critical factors that ultimately have a bearing on the efficiency of the system. There is uncertainty regarding the number of future claims against

[325] Asbestos Relief Trust Annual Report, 2013

the defendant and the number that will be valid. The entire process depends on guesswork. Then there is uncertainty about the accuracy of the capital amount paid into the trust – this can be over or under-stated. Furthermore, there is uncertainty regarding the date when all the claims will be finalised. This level of uncertainty does not support the argument that the use of independent firm-level trusts is an efficient way to fund compensation for occupational diseases. The only thing that this method does is remove the need by individual claimants to litigate against the defendant company, but insofar as uncertainty is concerned, it is no better than the common law.

Finally, there are two additional points to consider about the efficacy of using independent trusts to fund compensation for diseases. In the first instance, there is need to verify the information submitted to justify the establishment of a trust in order to ensure that it is accurate and devoid of misrepresentation and even fraudulent proclamations. Sometimes the number of claimants is overstated to justify the demand for more money payable into the trust by defendant companies. This will in turn, ensure that the lawyers pocket more money in fees since the greater the capital amount, the larger the amount payable to lawyers as fees is likely to be. A second point worth considering is that as the trusts increase in number, especially those intended to provide compensation to victims of occupational disease, it also becomes imperative for a regulatory framework to be in place to monitor and supervise their activities in order to ensure that these remain transparent. Monitoring and supervision comes at additional cost but the question is who should finance this process? The need to monitor trusts arises from the possibility that of some of them may engage in conduct that is inconsistent with their original mandate. In respect of both these issues, developments from the United States of America on asbestos liability-induced firm bankruptcies are once again illustrative.

In January 2014, a US judge for the Western District of North Carolina slashed the amount plaintiff lawyers were demanding to be put into a trust for asbestos claimants that they were representing. The lawyers argued that the defendant company, Garlock Sealing Technologies Limited, owed present and future asbestos disease victims US$1.4bn. The lawyers further called for the creation of a trust with a capital amount of US41.4bn on behalf of these claimants. As it later turned out during the trial, the court found that plaintiff lawyers had engaged in what the presiding judge, George Hodges, called a “startling pattern of misrepresentation” and

suppression of evidence made available to the court. Among other things, the court found that lawyers suppressed the evidence that many of the plaintiffs had been exposed to asbestos through products made by other firms and instead sought to place the entirety of the blame on Garlock Sealing Technologies.

A further finding made by the court in the Garlock case was that, in some cases, lawyers had actually coached their clients to deny that exposure to asbestos by other firms, as well as the fact that they had lodged claims in other cases.[326] In a scathing condemnation of the lawyers' conduct, the judge came very close to calling their behaviour during the whole process fraudulent. The case epitomises most of the vices of common law litigation in general and asbestos litigation in contemporary America in particular. The court referred to a statement made by one of the plaintiff lawyers who said:

> My duty to these clients is to maximize their recovery, okay, and the best way for me to maximize their recovery is to proceed against solvent, viable and non-bankrupt defendants first, and then if appropriate to proceed against bankrupt companies.

The above statement aptly sums up the deep pocket syndrome that has characterised asbestos litigation in the US. It would appear from the above statement that it is not the degree of culpability of the defendant firm which determines whether it will be targeted by plaintiff lawyers or not but rather its perceived net worth. In the end, the court in the Garlock Sealing Technologies case reduced the company's liability from the US$1.4bn the lawyers were pushing for to US$125m. What is unclear is where the US$1.275bn difference would have gone if the court had granted the initial figure that the lawyers had asked for. Clearly, in this case, the lawyers had sought to use unethical tactics, misrepresentation and even fraud to inflate

[326] In the US, lawyers run bankruptcy trusts and in many cases, these trusts refuse to share information on claims to prevent the same plaintiffs from claiming from more than one company for the same injury, also known as 'double-dipping'. Double dipping is a widespread practice in the US especially in connection with asbestos claims due to the wide range of potential defendants. Where more than one employer exposes an employee to asbestos, she or he can file claims against all the companies where exposure took place and there is no accurate and foolproof mechanism to rationalise the awards potentially payable in such a situation. According to one article in *Forbes* in one case, a navy machinist got US$9m from a California jury after claiming that his exposure occurred exclusively aboard a nuclear submarine. Soon after the award, he filed 14 claims with different trusts claiming that he was exposed at other different places. What is even more startling about this case is that the very lawyers who claimed in the US$9m verdict that the machinist suffered no exposure elsewhere were the very ones representing him in the other 14 claims! There are many similar cases of double-dipping by asbestos claimants in the US (see: Daniel Fisher "Judge Slashes Asbestos Liability In Garlock Bankruptcy To $125 Million", *Forbes* January 10, 2014 available at http://www.forbes.com/sites/danielfisher accessed on 3 February 2017)

the amount they wanted the defendant company to put into a trust fund of which they knew they would eventually be in charge.

In March 2013, the Furthering Asbestos Claim Transparency (FACT) bill came before the US Congress and was eventually passed by the House of Representatives in November of the same year. In terms of this law, asbestos trusts are required to lodge comprehensive quarterly reports with the Executive Office of US Trusts on claims handled and how these are resolved. Trusts will therefore be required to make public disclosures on claims from receipt to resolution. Current federal and state laws regard information on payments made by trusts as private and confidential.[327] The bill eventually expanded and was renamed Fairness in Class Action Litigation and Furthering Asbestos Claim Transparency Act 2016. Supporters of the law argue that it is necessary in order to protect asbestos trusts against fraudulent claims by making sure that payments are made to genuine victims and preventing other undesirable practices, such as double-dipping by claimants. However, the law is not without opponents. Its critics (including former President Barack Obama who threatened to veto it) argue that the law unfairly targets military veterans. The politics behind the bill aside, the mere fact that such a law is possible underscores the concerns that are beginning to emerge around the use of trusts, especially lack of transparency.

The issues discussed in this section cast serious doubt on the claim that forcing defendant companies to form trusts to compensate victims of occupational diseases is an efficient way to fund these liabilities. Trusts are not a panacea for the problems associated with compensation that come out of litigation. If anything, trusts bring their own problems and in some cases, they perpetuate some of the problems encountered when the common law is a mechanism for funding compensation. Chief among these problems is the principal-agent problem. Greedy agents hide behind the claim of representing the interests of claimants, yet the reality may be that they turn out to be the main beneficiaries from the whole process. Often the liabilities allegedly owed by defendant firms are inflated but the money actually going into the pockets of claimants does not warrant all the trouble that precedes the eventual creation of those trusts.

[327] Tim Povtak "Senate Considers FACT Act, Asbestos Claims" February 3, 2016 available at: https://www.asbestos.com/news (accessed on 8 February 2017)

Usually trusts usually come from lengthy and costly litigation between plaintiff lawyers and defendant firms. In the process, the interests of current employees of the sued firms are never considered.

6.9 Conclusion

This chapter discussed the economic and financial by-products of compensation for occupational diseases derived through the common law and litigation. The Lloyd's financial crisis in the UK and the asbestos litigation crisis in America serve to illustrate firstly, the problems that can arise when the nature and development of long latency diseases is misunderstood and secondly, to demonstrate the microeconomic damage that litigation around long-tail liabilities can cause. Occupational diseases represent an externality to society and common law litigation is not an appropriate mechanism for dealing with this type of externality. On the one hand, occupational diseases impose costs on the public healthcare system that invariably supports a majority of sufferers in South Africa. Then at household level, diseases also put the health of the family members who care for those affected at risk. At the same time, funding compensation to victims using the common law always results in people who were not even there when the wrongful act took place having to pay for the misdeeds of others, due to the long latency periods between exposure to noxious materials and the development of most occupational diseases.

In the UK, Lloyd's underwriters misunderstood the characteristics of long latency asbestos diseases with disastrous consequences. Underwriters allowed greed to overshadow prudent judgment in their risk-taking practices, and when this combined with poor regulation, the results were tragic. Many investors were ruined financially in the process, Lloyd's itself came perilously close to collapse. Along with these developments are other losses that are impossible to quantify.

In the USA, government inaction on the question of asbestos liabilities and compensation of victims, created room for this critical policy area to driven by the courts and lawyers with

undesirable consequences. The results have been anything but satisfactory. Eventually, the principal–agent problem took over, causing asbestos to be the most expensive mass tort in American legal history. In the process, many primary and secondary asbestos companies went into bankruptcy as liabilities continued to mount. A common solution to asbestos-induced firm bankruptcies in America has been to pressure the firms concerned into creating trusts responsible for evaluating claims and paying compensation to successful claimants. However, the trust solution has not been without its own problems. Evidence drawn from the US on this subject shows a wide range of problems associated with asbestos trust funds, ranging from inflation of liabilities to double dipping and lack of transparency.

Issues discussed in this chapter bear striking parallels to the events unfolding in South Africa on the silicosis liabilities now facing mining companies following the landmark judgment in the *Mankayi* case. Like asbestos-related diseases, silicosis has a long latency period so liabilities arising from it are of a long-tail nature. This feature raises the complex question about funding such liabilities. If Lloyd's of London, an insurance market whose business is to accept risk and pay claims nearly collapsed due to long-latency disease liabilities then there is every reason to fear that local mining companies who are not insured against silicosis liabilities will not fare any better under an avalanche of claims. In addition, thousands of potential silicosis claimants who are currently joining the class actions suggesting that these lawsuits are going to be the largest mass delict in South African legal history, just like what asbestos has been to America.[328] The parallels do not end there. In America, the whole asbestos claims process has been captured by the courts and lawyers with some very objectionable outcomes – claims take ages to finalise, transaction costs outstrip awards paid to victims and there is no guarantee that future claimants will be able to recover. There are signs that a similar trend of regulatory capture is fast becoming reality in South Africa. Finally, in America, the companies found liable eventually agreed to establish trusts and likewise this phenomenon is fast establishing itself in South Africa too. It is therefore safe to say that the Lloyd's financial crisis and the asbestos litigation problem contain vital lessons on liability for long-latency diseases which policy and lawmakers in South Africa can do well to learn from. If the lessons are

[328] At the time of writing this chapter, the May 2016 judgment of the High Court granting permission for class action lawsuits against mining companies to go ahead was under appeal to the Supreme Court of Appeal.

unheeded, South Africa may well be on course to replicating the same mistakes witnessed in the UK and America with arguably even more devastating consequences.

7 CHAPTER 7: AN EVALUATION OF ALTERNATIVE COMPENSATION OPTIONS FOR OCCUPATIONAL DISEASES IN SOUTH AFRICA

7.1 Introduction

In South Africa, the problem of occupational diseases is synonymous with the mining industry. The current system for compensating workers for occupational diseases in the mining industry has two pillars that are not necessarily exclusive. On the one hand, is the workers' compensation scheme under ODMWA, and administered by the Department of Health, where occupational disease sufferers get statutory benefits on a no-fault basis. In addition to this, is the recently introduced system of employer's liability whereby mineworkers who contract occupational diseases can, in addition to claiming statutory benefits, also sue the responsible employers in delict for damages, provided all the elements of delict can be proved. The 2011 *Mankayi* judgment ended the notion of workers' compensation as the sole and exclusive remedy for workers who contract occupational diseases in the mining industry.[329] For mine owners, it also means that those who will be found liable, usually in delict and ordered to pay damages will compensate the same workers twice for the same injury – first through the workers' compensation route and then by way of damages under the recently recognized system of employer's liability. None of these avenues for recovery is satisfactory in their current form. Chapters 4 and 5 discussed problems associated with the liability of the employer at common law and litigation. Furthermore, the workers' compensation system for occupational diseases in the mining industry currently faces a number of problems ranging from uncompetitive benefits to poor administration, causing serious delays in the processing of claims.[330]

[329] Outside of the mining industry, workers' compensation is still the sole and exclusive remedy for injured workers or those who contract an occupational disease.

[330] See: Tamar Kahn "Fund has 106 000 mine workers that need to be paid out", *Business Day* 8 September 2016. In this report, the Compensation Commissioner for Occupational Diseases is quoted as telling members of the South African Parliament that at the current rate of processing claims, it will take 19 years to clear the backlog at the Compensation Commission for Occupational Diseases. The 106 000 claims backlog relates to those claims already approved for compensation by the Medical Bureau for Occupational Diseases. In the same report, the Minister of Health describes the current situation at the Compensation Commission for Occupational Diseases as "untenable".

Until now, no worker has received damages for an occupational disease, under the employer's liability pillar except for instances where some mining companies have decided to settle out court by paying negotiated sums of money into trusts. In other words, there is yet to be a case where a court pronounced a company legally liable for a disease or for negligently exposing an employee to hazardous working conditions and breaching its common law duties towards the health of an employee, leading to the development of an occupational disease. It is actually going to take several years at least, before lawsuits brought under the auspices of the *Mankayi* judgment are finalised by the courts, if not longer.

Given the problems surrounding the common law and litigation discussed in Chapters 4 and 5. A logical question to pose is; what are the options available for funding compensation for occupational diseases? This chapter attempts to provide some insights on this question. It begins by briefly discussing the primary functions of liability rules, whether under workers' compensation, or employer's liability. Then the chapter evaluates alternative funding options for diseases in terms of their potential for adoption and use in South Africa. In doing so, the chapter draws from the systems of other countries and their experience. The funding options that discussed in this chapter include pure workers' systems where statutory compensation is generally the sole and exclusive remedy for injured or sick workers, employer's liability insurance, public and private compensation systems that assign separate funding approaches for occupational injuries and diseases, as well as those that combine common law liability and workers' compensation. As the ensuing discussion shows, a perfect compensation system does not exist anywhere in the world. Designing a funding system involves balancing many competing interests, making trade-offs unavoidable. Despite this limitation, it is critical for policymakers to select a compensation system with regard to cost-effectiveness, affordability to the economy, competitiveness, efficiency and macroeconomic impacts. Where long latency occupational diseases are included in the compensation system in question, there is the additional need for policymakers to have the necessary understanding of the general nature of these risks and their place in a modern economy. In other words, it is important to have clear objectives that the compensation system seeks to achieve and then select an ideal compensation system that is best suited to meet achieve that goal. Also important is the need to ensure that there is integration between the compensation structures for occupational diseases and other social security components available in the country. Furthermore, good results are more likely

to come from good cooperation between policymakers and those who actually fund the compensation system.

7.2 Function of Liability Rules

Economists argue that liability rules, whether these are fault-based or framed on strict liability, generally perform two main functions, namely assigning the responsibility to pay compensation and aligning incentives of economic actors so that potential injurers find it disadvantageous to injure others (deterrence) to the extent that they will bear the financial consequences of their conduct (Danzon, 1987; Shavel, 2000). Danzon (1987) makes two further submissions in respect of each of these functions. One is that the first function involves issues of public policy in order to ensure that issues of equity and reducing the deadweight costs of litigation receive primary consideration. The conceptualisation of what constitutes equity can be problematic as the term has paradigmatic connotations and can therefore mean different things to different people. In ordinary parlance, equity generally means fairness, but different people perceive fairness differently (Klein, 2014). Another important insight that Danzon provides is that the deterrence function of liability rules should prioritise prevention of harm and incentives that should be integrated into those prevention efforts. However, the attainment of this goal depends on the preferred definition of equity. In workers' compensation, for example, if equity means employers paying the same contributions or premium regardless of the degree of risk they represent, the deterrence objective may suffer, since high-risk employers may not have the incentive to prevent accidents and diseases at their workplace (Klein, 2014).

Although the oft-cited functions of liability rules are compensation and deterrence, commonly cited as the primary functions of liability rules, in practice it is often difficult for liability rules used in compensation systems to prioritise both functions in equal measure. Some degree of trade-off is usually evident in most compensation systems between the two functions – some rules tend to prioritise compensation over deterrence and vice versa. In some jurisdictions, the courts have also complicated the balance between compensation and deterrence through judicial engineering whereby they design new rules of liability beyond the conventional ones resulting in in excessive deterrence or inequitable compensation in certain circumstances. As discussed in Chapters 4 and 5, this problem has been evident in the UK (in connection with

liability rules for diseases) and the USA (in connection with asbestos litigation), respectively. For example, the material contribution principle that designed by British courts in the mid-1950s provides that a claimant can recover full compensation even if he/she fails to prove causation in its traditional sense as long as the claimant can show that on a balance of probabilities, the defendant materially contributed to the development of a disease or injury. Porat and Stein (2003) argue that this liability rule prioritises compensation and results in excessive deterrence to the extent that it potentially imposes a compensation burden on a defendant for harm that in reality someone else could have caused. In the 1980s, US courts developed many liability rules and theories primarily to deal with asbestos claims. Among these is strict liability for defective products, joint and several liability, rules allowing unimpaired lives to qualify for compensation and the injury in fact theory, discussed in Chapter 5, among others. A majority of these rules sought to maximise the potential for claimants to get compensation. However, as the whole experience with asbestos litigation in America has shown, the rules not only failed to fulfil the compensation function, but the deterrence one as well (RAND Institute for Civil Justice, 2002).

Occupational diseases, especially those with long latency periods, raise serious questions about the adequacy of most liability rules from both a compensation and deterrence perspective. This is hardly surprising. Long latency periods complicate the task of identifying the party who may have contributed the most to the claimant's disease where multiple parties are involved. This is partly because evidence gets weaker and the number of wrongdoers increases with the effluxion of time (Danzon, 1987). Even under the assumption that the injurer is identifiable, by the time the disease is ascertainable, that party may have gone out of business. Liability rules such as joint and several liability, and the last exposure rule, have the potential to solve this problem to the extent that they are able to attribute liability to a party who is closest in time to the ascertainment of the disease. However, the risk that this party may not be able to pay the claim remains intact. Furthermore, long latency diseases make it virtually impossible to isolate the contribution made by work from the contribution made by normal environmental factors in the development of the disease. How liability rules respond to this handicap has important implications for compensation and deterrence. For instance, if the duty to compensate sick workers rests on employers without regard to fault as is the case under worker's compensation, it enhances occupational health and safety as well as compensation provided attention is paid to the incentive structure within the system (Danzon, 1987). In

addition, it is necessary to manage the system proactively to ensure that benefits paid remain fair otherwise; the compensation objective to avoid undermining the whole system over time. Often workers resort to litigation against employers because benefits under workers' compensation whittle over time such that they start raising equity concerns about the whole system.[331]

7.3 Pure Workers' (Statutory) Compensation Systems

The main features of what is termed a pure workers' compensation system in this discussion are that benefits paid to workers are statutorily defined, quantified and are paid on a no-fault basis. In addition, and perhaps most importantly, a pure workers' compensation system makes compensation under the system the only source of compensation for workers to the general exclusion of other sources of compensation, such as suing the employer for damages. A further characteristic of a pure workers' system for purposes of this discussion is that a state agency provides coverage. Among countries with statutory systems that generally prohibit employees to sue the employer for damages for occupational injury or disease are Austria, Germany, France, New Zealand, the USA and Switzerland (Parsons, 2002). In the USA, workers' compensation laws of all states except Texas, place a general ban on suing the employer and provide that workers' compensation shall be the sole and exclusive remedy for injuries and diseases arising out of and in the course of employment (Query, 2014). However, the American system does not meet the last characteristic of a pure workers' compensation system because coverage in most states is through private insurers and not through a state agency. To that extent, it is not a pure workers' compensation system as defined in this section. Nevertheless, to the extent that it meets other characteristics, the US system features constantly in this discussion. Other countries with pure workers' compensation systems are Belgium, Canada and Mexico (Munich Re, 2000). In South Africa, there is a dual compensation system, one for diseases in mines and the other for diseases and injuries in general industry. The latter qualifies as a pure workers' compensation system as it is subject to a prohibition of civil claims against employers and falls under a state agency. Compensation for diseases in mines now envisages

[331] It plausible to say that if workers' compensation benefits paid under South Africa's ODMWA system were competitive, the *Mankayi* would not have happened.

co-existence of workers' compensation and liability in delict. However, the co-existence is yet to be operationally tested.

However, the scope of the prohibition to sue the employer varies among countries. In the USA for example, if an injury or disease falls within the scope of workers' compensation, an employee cannot sue the employer in respect of that injury or disease (McNamara & Kratzke, 1997; Klein & Krohm, 2006; Query, 2014). Garza-Zavaleta (1997) argues that one of the lessons learnt from the poor performance of the American statutory compensation system of the early 1980s is the need to reduce the potential for litigation by incorporating a general rule to the effect that statutory benefits shall be the sole and exclusive remedy for all injured workers. Under the American system, suing the employer is permissible if an employer commits defined types of wrong only or, where the injury or disease in question is not within the scope of workers' compensation.[332] Most of the wrongs falling under the exceptions to the exclusive remedy rule in the USA do not relate directly to employment. In Belgium, civil liability of the employer does not exist except for claims involving intentionally inflicted harm, property damage and accidents while commuting to and from work (Philipsen, 2009).

In Germany, if an employee is injured or contracts a disease at work there is virtually no chance of suing the employer. The only exception to this rule is when there is evidence to the effect that the employer intended to inflict harm on the employee or where gross negligence is involved (Philipsen, 2009; Sokoll, 1997). Gross negligence is exceptionally difficult to prove because the burden of proof set by courts is usually very high. Likewise, in France, employees cannot sue the employer for diseases or injuries arising out of and in the course of employment. The only situation where civil action against an employer is permissible is when there is evidence of *faute inexcusable* (inexcusable fault) as defined by Article L452-1 of the Social Security Code. In the context of compensation for occupational diseases, it is inexcusable fault under the French Social Security Code if an employer fails to take reasonable measures to ensure the health and safety of his employees. It can be argued that there is a better scope for suing an employer in France compared to Germany because the term 'inexcusable fault' as defined, has a less stringent burden of proof compared to intention and gross negligence used

[332] See Chapter 3.

in Germany. For example, there is greater scope for differences of opinion on what constitutes inexcusable conduct in any given situation. By contrast, in Germany, the only way an employee can sue an employer is if there is evidence showing that there was gross negligence or intention to inflict harm. It is difficult to envisage a practical situation where an employer would deliberately set out to inflict harm on employees.

The workers' compensation scheme of New Zealand first came into being in 1972. This scheme warrants separate comment given its radical nature. It lies at the extreme end of countries which use the exclusive remedy doctrine in that it is by far the most radical scheme of its kind to emerge anywhere in the world in recent times. The scheme falls under the Injury Prevention, Rehabilitation and Compensation Act of 2001. Three features typify the radical nature of the New Zealand compensation scheme. Firstly, the scheme is by far the most comprehensive compared to those seen in other parts of the world. Claims covered by the scheme fall into five categories, namely; (1) Accidents, (2) Treatment injury, (3) Work-related gradual processes, (4) Diseases or infections, and (5) Treatment given to a person for personal injury covered under the scheme (Tobin & Schoeman, 2005). A second radical feature of the New Zealand scheme is the immateriality or irrelevance of the distinction between work-related and non-work injuries and diseases (Parsons, 2002). New Zealand is unique in this regard. In most countries, this distinction is important because typically workers' compensation laws are supposed to apply to work-related injuries and diseases only. Disease and injuries that arise outside of work are excluded. Finally, the New Zealand scheme is also distinguishable from other schemes regarding the extent of the exclusive remedy doctrine. Under the scheme, no common law actions for damages are possible in respect of the five categories of claims specified in the enabling legislation. The ban applies even when one attempts to sue in another jurisdiction.[333] Although common law actions are in theory possible for claims falling outside the scope of the Injury Prevention, Rehabilitation and Compensation Act, in reality such claims are unlikely, given the wide scope of the Act.

[333] See: *Bennett v Entstrom Helicopter Corporation Ltd* (Michigan, US) and *James Hardie & Co Pty Ltd v Hall as Administrator of Estate of Putt* (New South Wales, Australia) discussed in Chapter 4. The two cases relate to an attempt by citizens of New Zealand to sue in another country for a cause of action that arose in New Zealand. Both attempts did not succeed. In both cases, a court in the US state of Michigan and another in the Australian state of New South Wales reached the same conclusion that New Zealand law does not allow common law actions to be brought against anyone in respect of an event covered by that country's statutory compensation scheme.

Outside the area of motor third party liability, no other country in the world has adopted a statutory compensation scheme for personal injury that is as wide-ranging as the one currently in place in New Zealand (Wagner, 2006). Parsons (2002) and Desseille (1997) identify the Netherlands and possibly Greece respectively, as perhaps the few countries that have come closest to implementing a compensation system of comparable scope to New Zealand's. Under the Dutch system, as is the case in New Zealand, the distinction between work-related injuries or diseases and non-work-related ones is of no consequence in determining whether one gets compensation or not under the country's social insurance system. In Europe, the Netherlands is the only country whose compensation system does not incorporate this distinction (Koning & Lindeboom, 2015). However, in the Netherlands, unlike in New Zealand, an employee can still sue the employer for damages although this avenue for recovery has not been popular in the past possibly because the benefits paid under the statutory pillar have historically been generous (Koning & Lindeboom, 2015). The comprehensive nature of the New Zealand system raises questions about the sustainability of its sources of funding. Funding for the scheme comes from multiple sources including levies paid by employers as well as levies for motor vehicle registration, trade licences and fuel (Tobin & Schoeman, 2005). However, Wagner (2006) submits that the scheme has been struggling to generate sufficient funding to cover claims (Wagner, 2006). Questions around financing such a comprehensive system perhaps partly explain why other countries have not been keen on replicating the New Zealand system.

Until 2011, the South African workers' compensation system had all the features of a pure system as defined for purposes of this discussion. Since inception, suing the employer was not an option available to any worker. However, with the passing of the *Mankayi* judgment, common law actions against the employer remain banned for the general industry but are permissible for mineworkers negligently exposed to the risk of contracting an occupational disease by the employer. To that extent, the system is now partially pure. However, there is a lot of uncertainty regarding the rules upon which liability for an occupational disease attaches to an employer in South Africa because this is a new source of liability without any precedent. It is therefore impossible to say with any degree of confidence how courts will determine the liability of mining companies that face common law claims. At the beginning of 2016,

government announced plans to review of the two statutes that govern compensation for work-related injuries and diseases in South Africa namely: COIDA and ODMWA, with a view of bringing the two workers' compensation schemes under one statute.[334] Reportedly, this plan has the support of all the major stakeholders in the compensation system, notably, the Chamber of Mines, the National Union of Mineworkers (NUM) and the Association of Mineworkers and Construction Union (Amcu). Whether this recommendation will yield any concrete results this time around, given that it is not the first time that it has entered the occupational injury policy arena is an open question.[335] This is not a new proposal. It dates back to 1981, when it first emerged from the Nieuwenhuizen commission.

Notwithstanding the foregoing, there is another aspect of the South African compensation system for the general industry that is of further interest. As pointed out earlier, the general industry component of the compensation system is pure to the extent that statutory benefits are the sole and exclusive compensation available to workers whether the cause of their disability is injury or disease. However, the system is such that when it comes to the determination of the benefits payable, it combines principles of personal accident insurance with those of employers' liability while still preserving the exclusive remedy principle. Under COIDA, two types of compensation are payable. First, there is normal compensation paid on a no-fault basis and essentially operates along the lines of personal accident insurance.[336] The only way a worker may fail to get normal compensation is when the injury or disease for which compensation is sought falls outside the scope of the Act or was due to 'serious and willful misconduct'. Even then, if the worker dies, compensation is still payable to dependents under the Act regardless of the deceased's misconduct.

The second type of compensation that payable under COIDA is increased compensation.[337] This type of compensation is available over and above normal compensation but its determination follows the rules of employers' liability insofar as it requires proof of personal fault by the employer or any of the senior people hired by the employer (vice-employers) as

[334] Xolani Mbanjwa "R.5bn payout on the cards for mineworkers" *City Press* (23 February 2016)
[335] A similar proposal made by the Nieuwenhuizen Commission of Inquiry in 1981 did not receive government approval.
[336] Section 22 of the Act
[337] Section 56 of the Act

specified in the Act. In that sense, increased compensation rests on limited vicarious liability of the employer. Increased compensation is also payable where the injury or disease suffered by a worker is due to patent defects on premises, works, material used, plant or machinery. This aspect of increased compensation rests on the fault of the employer. Since claims for increased compensation are based on the concept of employers' liability, they can be defeated if the employer or vice-employer can successfully plead a legal defence such as contributory negligence or lack of fault.[338] The combination of personal accident (strict liability) and employers' liability into one system while preserving the exclusive remedy principle represents perhaps the best compromise between the need for workers to get compensation with minimum inconvenience on one hand, and ensuring that where employers are at fault, the system does not ignore their misconduct, on the other.

Two further issues regarding the South African compensation system for the general industry also warrant further consideration. The first relates to whether employers whose negligence may have resulted in the payment of additional compensation should be required to reimburse the Compensation Fund. In other words, should the DG or the Compensation Commissioner have a right of recourse against employers whose negligence result in the payment of additional compensation? A collateral question linked to this is whether such a course of action is desirable. The search for the answer to the first question must begin in COIDA itself. The other issue that deserves consideration relates to the purpose of the increased compensation provision in COIDA.

Concerning the question of whether the DG or the Compensation Commissioner having a right of recourse against negligent employers, it must be noted that nowhere in the Act are these officials authorised to recover money paid as additional compensation from a negligent employer. If the compensation fund is an insurer of workers' compensation risks of all

[338] Negligence of the worker is an irrelevant consideration for claims for normal compensation governed by strict liability. However, claims for increased compensation can be defeated in their entirety if the worker was contributorily negligent – *S.A.R & Harbours v Stoltz* (supra). Even the Apportionment of Damages Act 34 of 1956 that introduced the notion of apportionment of damages where contributory negligence is present does not apply to claims for increased compensation. These must be decided purely on common law rules. Those rules as discussed in Chapter 3 regard contributory negligence as a complete defence, hence once a worker is partly to blame, a claim for increased compensation fails in its entirety. See- *Grace v Workmen's Compensation Commissioner* cited in Chapter 3.

employers, the unavailability of a right of recourse by the Compensation Commissioner or DG against negligent employers is understandable. It would be illogical for an insurer to have the right of recourse against the insured for the same claims that the insurer would have agreed to cover. The only remedy an insurer has in such a situation would be to look at the claims experience of the insured and adjust the premium accordingly. In other words, if the insured's claims experience is worse than average the insurer can adjust the premium upwards and vice versa. Economists argue that such an approach ensures that the compensation system is equitable since insured members of the pool pay premiums related to their relative risk and assists in aligning incentives of insured members with those of the insurer (Klein, 2014). The main goal of every insurer is to pay as few claims as possible. Therefore, by charging more to those who claim more and *vice versa*, the insurer can at least in theory ensure that the incentives of its insureds are aligned with the overall goal of reducing claims. The same logic applies for workers' compensation schemes. Furthermore, for public workers' compensation systems, adjusting contributions paid to reflect the claims experience of each employer reduces the chances of the fund going insolvent.

However, within workers' compensation systems, this alignment is often weak even under the best of circumstances because these systems often lack effective mechanisms to ensure that contributions paid by employers relate to their claims experience (Klein & Krohm, 2006). Thus, COIDA gives the Director-General (DG) the discretion to adjust the assessment paid by an employer if he is of the opinion that the adverse claims experience of that particular employer is set to continue.[339] How the DG is supposed to make such a determination in practice is not clear. On the other hand, if the claims experience of an employer is more favourable than normal, the DG may offer such employer a rebate on contributions payable. Leaving such a critical issue that may help shape incentives of employers to prevent accidents to the sole discretion of the DG without any specific guidelines on how the discretion is exercisable, represents a major weakness of the system. Furthermore, there is need for more scientific criteria for adjusting assessments paid by employers based on claims experience to be in place as opposed to the current loose arrangement where everything is down to the discretion of a single individual. Incentives are a critical determinant of efficiency but the

[339] Section 85 (2)

current system under COIDA and ODMWA does not accord this issue the seriousness it deserves.

As regards the increased compensation provision in COIDA that applies to the general industry, there are two issues to consider. What is the purpose of this provision and is current practice meeting this purpose? The purpose of the provision is to provide an employee with an additional avenue for recovery if the injury or disease for which compensation is required arises from the fault of the employer, vice-employer or patent defects on plant, machinery or premises. As indicated above, this is the incorporation of employer's liability into a single system. If separated, this will result in two compensation schemes being involved: worker's compensation and employer's liability. Even though the increased compensation option depends on employers' liability, it is also worth reiterating that overall the compensation system remains a social security programme and should apply as such. This means it should, as much as possible, facilitate rather than hinder the access to compensation by workers who suffer disablement at the hands of their employers' negligence. Accordingly, courts have held that the provision allowing increased compensation is remedial in nature and should therefore benefit as many workers as possible.[340]

Accurate as this characterisation of the provision sounds, it brings to the fore an apparent contradiction between principle and practice. By allowing common law principles to govern, the application of contributory negligence in claims for increased compensation, there is little chance that many of these claims will be successful, especially in view of the historical record of this defence. Chapter 2 showed how the common law defence of contributory negligence, together with common employment and *volenti non-fit injuria,* accounted for a majority of failed attempts to secure compensation by injured workers. By allowing the common law notion of contributory negligence that operates on an 'all or nothing' basis and other defences, it represents an objectionable aspect of the increased compensation provision of COIDA to the extent that it may actually hinder rather than facilitate access to compensation. Why contributory negligence is a complete defence only to claims for increased compensation under COIDA, and not a partial defence as is the case in all other cases, is not clear. Making it a complete defence is also inconsistent with the broader social security orientation of COIDA. Empirical evidence appears to validate this argument because from the Compensation Fund

[340] Looyen v Simmer & Jack Mines (supra Chapter 3)

annual reports it appears that there are very few claims for increased compensation that actually succeed.[341] Regarding long latency disease claims, it is even harder to conceptualise a situation where such claims can yield increased compensation. It may therefore be desirable to re-examine the current provision for increased compensation under COIDA to determine whether it is indeed performing the remedial role while retaining its broad social security character at the same time. Although the idea of incorporating increased compensation under the employers' liability principle is an interesting good innovation, there are cogent reasons to believe that its broader social security objective is hampered by the way it is currently applied.

Some compensation systems have features of a pure workers' compensation system such as prohibiting civil actions against employers and having all compensation statutorily defined with the only point of departure being on the carrier of the risk. In some systems, typically that of the USA, a state agency does not carry workers' compensation risk. Instead, the risk passes on to private insurers. Compensation systems that rely on private insurers to carry the workers' compensation risks are private systems distinguishable from pure statutory ones administered by the public sector. Public workers' compensation systems are underpinned by the principle of social insurance hence they generally place no significance on the need to make profit but prioritise the attainment of certain socially desirable goals instead. However, the mere fact that the compensation system is public does not make it a pure workers' compensation statutory system. To qualify as a pure workers' compensation system, the additional feature of banning further civil actions against employers is necessary.

Operationally, public workers' compensation systems rely on a state bureaucracy to provide occupational health and safety insurance. Their supporters point to the absence of the profit motive as an indicator that these schemes are likely to operate more equitably than private ones (Shin, Oh & Yi, 2011). The social insurance approach from which public systems derive discourages the formation of risk pools and therefore removes the possibility that insurers may withhold or supply insurance to employers perceived to be high risk at an unaffordable price (also known as 'cherry-picking') which in turn, could have a deleterious effect on employment

[341] Mushai A and Hutcheson HD (2013) "Injuries, compensation, myths and realities – Is increased compensation under the South African workmen's compensation system a myth or reality?" *SHEQ Management* March/April 2013, page 10-12

creation. Some of the concerns about private workers' compensation systems said to be absent from public systems are largely academic because workers' compensation insurance is one of the most regulated classes of insurance even among countries traditionally regarded as having open economies. Premiums paid to insurers are often regulated, hence private insurers have no free hand to hike rates or restrict coverage as they deem fit. For example, in the USA where private workers' compensation insurance is dominant, premium rates and policy wordings are subject to regulatory approval in all fifty states and the laws further provide that rates should be adequate, affordable and non-discriminatory (Klein, 1995; Query, 2014). Therefore, some of the oft-cited advantages of social insurance over private workers' compensation insurance are purely theoretical and may not accurately reflect what happens in practice. Even under privatisation, workers' compensation retains most of its social insurance features.

Private workers' compensation systems rely on private insurers to insure occupational health and safety risks defined by legislation. Those who support this approach, point to two main benefits normally associated with private insurance. Firstly, insurers use risk rating (also known as experience rating) to derive the premium. Conventional wisdom holds that when firms pay premiums that reflect their expected losses (injuries and diseases) it induces them to invest in occupational health and safety risk management. Such a method of deriving premium achieves horizontal equity to the extent that it ensures that firms posing a comparatively similar level of occupational health and safety risk pay the same premium, something that public systems do not seem to prioritise (Klein & Krohm, 2006). Klein and Krohm further submit that experience rating ensures that an appropriate balance exists between premium inflows to insurers and claims payments. Implicit in these insights is the intuition that private statutory compensation is more efficient than public workers' compensation since it effectively structures the incentives of firms to lower injuries and diseases (Klein, 2014; Shin et al, 2011). While the theoretical persuasion of the benefit of experience rating is indisputable, the reality in practice is that most countries, especially those in the developing world and some in the developed world, simply lack the administrative capacity to develop actuarially sound risk classification frameworks that assign contributions or premiums based on the risk that each employer poses (Klein & Krohm, 2006). Because of this limitation, most workers' compensation schemes touted as being experience-rated, hardly derive optimum benefits from this feature.

Another rallying point for proponents of private workers' compensation relates to the potential benefits of competition. The desirability of competition many spheres of economic endeavour is widely acknowledged. Competition is beneficial to society because it ensures optimum use of resources (Klein, 2014). A further argument in favour of competition is that it benefits society by forcing firms to provide products of high quality at a competitive price (Shin, et al., 2011). In the context of statutory compensation, this argument has another dimension. There is a potentially powerful community of interest between employers and insurers in private statutory compensation. Firstly, under experience rating, employers who report more accidents and diseases pay more in premiums, all things being equal. Therefore, employers have the incentive to prevent injuries and diseases to reduce their premiums bill. Secondly, private insurers have every incentive to ensure that firms to whom they supply insurance sustain as few work-related injuries and diseases as possible since the profitability of insurance primarily depends on the number of claims filed. Insurers are therefore more likely to be actively involved in helping employers prevent injuries and diseases at work.

Since the early 2000s, the preponderance of evidence in developed countries suggests an increasing appetite for privatisation of workers' compensation systems by policymakers (Munich Re, 2012). Reasons behind the movement towards reform are diverse but the main ones are: (1) the need to rationalise social security budgets and keep costs down; (2) the need to have efficient pricing structures for statutory compensation risks; and (3) the need to devolve some government functions to the private sector. One of the chief advocates for reform and privatisation of public statutory compensation systems over the years is the World Bank (Munich Re, 2000). In July 1999, New Zealand privatised its statutory compensation system (Gorman, 2000). In 1996, the pillar covering sick workers under the Dutch Disability Insurance scheme was privatised by making employers fully responsible for costs under this pillar and in turn, the employers can choose between retaining the risk and buying insurance from the private market (Koning & Lindeboom, 2015). Klein and Krohm (2006) further submit that the movement towards privatisation of workers' compensation also occurred in Argentina, Norway, a few US states and in Australia. However, some have emphasised the need for caution on the issue of privatisation of workers' compensation programmes. Referring to the privatisation of New Zealand's compensation scheme, Gorman (2000) argues that no evidence from a comparable system has been adduced to support the argument that privatisation has a positive impact on scheme costs. Gorman further argues that if privatisation is ill conceived,

the expected benefits move from workers and employers to insurance companies and the legal profession.

As regards public workers' compensation systems, perhaps the most serious concern about them relates to their governance, especially the need to ensure that benefits paid are equitable and in general conformity with national macroeconomic trends. To the extent that pure workers' compensation systems provide compensation for economic losses only compared to tort or delict, they generally are not *ex post* efficient in that they do not pay compensation that is comparable to the actual damages that may otherwise be claimable by the injured worker (Schlesinger et al., 1993). *Ex post* inefficiency is compounded when there is no systematic mechanism for adjusting economic benefits in line with changes in the standard of living. Most developing countries, including South Africa, face this problem. Over time, the benefits lag behind to the extent that they not only become woefully inequitable but unhelpful as well. Even though the scheme may have started as a pure statutory one, (by barring civil liability suits against employers) the inadequacy of benefits paid due to poor governance ultimately forces workers to approach the courts for alternative remedies. This is precisely the fate that befell the South African mining industry's workers compensation system. For over one hundred years, mine owners faced no common law claims by employees. Over this period, there was never a point when workers or trade unions seriously challenged the notion that workers' compensation was the sole and exclusive remedy for miners who either were injured or contracted work-related diseases.[342] However, with neither a consistent nor a systematic approach to review and adjust workers' compensation benefits, it was only a question of time before the issue drew attention to the exclusive remedy principle once again. This happened in the *Mankayi* litigation. Any rational person would agree that something is seriously wrong with a system paying R16 320 (or approximately US$1 360 at the ruling exchange rate at the time of writing) as full and final compensation to a worker afflicted by an incurable occupational disease after nearly two decades of service to the employer.

[342] The only point when the exclusive remedy principle faced a challenge was in 1999 when the Constitutional Court was asked to rule on the constitutionality of Section 35 (1) of COIDA. See *Jooste v Score Supermarket Trading (Pty) Ltd* discussed in Chapter 3. As pointed out in that Chapter, the court affirmed the constitutionality of the principle and the position remained unchanged until 2011, when the *Mankayi* judgment was handed down.

Proponents of pure workers' systems that bar civil lawsuits against employers argue that one particularly important advantage they have is that by having statutorily defined benefits and eligibility criteria, pure statutory systems have less contestable issues which in turn, reduces litigation and other overhead costs (Danzon, 1987). In other words, these systems bring certainty. Other studies have also shown that when a workers' compensation system has a provision limiting the scope of litigation, costs to the system are significantly reduced (Garza-Zavaleta, 1997). Garza-Zavaleta chronicles the problems that dogged workers' compensation in the 1980s when the system experienced high transaction costs largely of a legal and medical nature. The system underwent reforms in the 1990s including limiting the need for litigation to rectify these problems.

Sometimes, there is avoidance of important questions when litigation becomes an integral part of the workers' compensation system, as has recently happened in South Africa. Among these questions, two are particularly critical. The first relates to how much litigation actually costs the economy and the other concerns the allocation of the proceeds from litigation (RAND Institute for Civil Justice, 2002). America's experience with asbestos litigation has provided useful insights to these two key questions. In respect of both, the asbestos experience in America has shown that mass tort litigation can impose huge costs on the economy, and produce socially undesirable outcomes when it comes to the allocation of the proceeds from litigation. The desirability of reducing litigation is particularly important when dealing with compensation for long latency diseases, given the range of causation and other problems with which they are associated.[343] Some of the problems, such as the potential insolvency of employers or insurers, have macroeconomic implications (Schlesinger et al., 1993). The complexity of these problems has led some to question whether adversarial systems that are litigation-intensive by nature are the best way to determine compensation payable to workers suffering from occupational diseases (Danzon, 1987; Gaskins, 1990; RAND Institute for Civil Justice, 2002). Silicosis litigation in the South African mining industry has all the hallmarks of a mass delict with the potential to impose huge costs on the economy, yet there are strong reasons backed by empirical evidence suggesting that the benefits, if any, which will reach the victims will be anything but significant.

[343] For a detailed discussion of these problems, refer to Chapter 4.

Pure workers' compensation offers several important advantages. The main ones are; it can facilitate investment by employers in the prevention of work-related diseases, victims access compensation quickly, litigation is limited which in turn, reduces overall costs to the system, it promotes industrial peace between employers and employees since compensation is paid on an non-adversarial basis and in theory, it should be administratively simple to run the system. Above all else, pure workers' compensation internalises the cost of long latency diseases thereby reducing their externality potential.

However, for these advantages to be realised in practice, pure workers' compensation systems need to be *ex ante* efficient (Schlesinger, et al, 1993). This means the compensation system must be backed by well-structured incentives to prevent diseases which are binding on all employers (Danzon, 1987) or safety regulation which seeks to link premiums or contributions paid by employers to disease rates (Philipsen, 2009). Experience rating used under private statutory compensation schemes is one way of structuring incentives of employers in favour of disease prevention. A precondition for the incorporation of effective incentives into any compensation system is good administration and governance. Therefore, the efficacy of pure workers' systems is critically dependent on how they are run. In this regard, cooperation between the three key stakeholders of government, employers and organisations representing workers, such as trade unions, is particularly vital. Nowhere is this cooperation more important than in the area of compensation for occupational diseases, due to their economic and political dimensions (Rosenberg, Levenstein & Spangler, 2005). If the relationship between government, employers and workers is neither cordial nor based on mutual trust, pure statutory systems deliver diminishing returns.

Evidence of governance problems exists in the South African compensation system for the mining industry. For example, government has not been very proactive in ensuring that compensation paid remains fair and realistic, otherwise the *Mankayi* litigation would not have taken place in the first place. When statutory benefits fall behind to unrealistic levels over time, it is possible that occupational disease victims disregard the exclusive remedy principle and turn to the courts for other avenues to secure compensation. When this happens, courts are

always ready to listen, and legal risk becomes a possibility.[344] This is precisely what happened in the *Mankayi* litigation – the court reached an unexpected conclusion taking many by surprise. Mining companies did not expect this decision and overnight, multi-billion rand claims, dating back many years were in their books.

Further signs of administrative problems within the South African workers' compensation system for the mining industry are also evident when one looks at the issue of financing the system. The Commissioner for the Mines and Works Compensation Fund assesses and pays claims by mineworkers who contract 'compensatable' diseases in terms of ODMWA. The fund is rather complex from a structural and operational perspective. For example, the fund operates four separate accounts – the State Account, the Mines Account, the Works Account and the Research Account. Each of these accounts caters for different types of claim or claimant. This structure has proved problematic before. Like any other public fund of this nature, the Mines and Works Compensation Fund is required to be actuarially valued on a periodic basis to determine its financial soundness or solvency. One such valuation, dated 31 December 2003, revealed that the fund, specifically the Mines Account had an actuarial deficit of R610m. The Commissioner for Occupational Diseases, acting on advice from the actuaries, decided to increase levies paid by mining companies in order to write off the deficit over a period of fifteen years. However, the Chamber of Mines acting as representative of mining companies, disputed this proposal arguing that its members alone could not be solely liable for the deficit, but instead government should also be involved. In 2011, the Chamber approached the High Court seeking a declaratory order on this matter but lost. The matter went on appeal to the Supreme Court of Appeal. It too ruled against the Chamber.[345] Thus, in addition to contributing to the fund, paying potential damages to ex-miners under the auspices of the *Mankayi* judgment, mining companies must also contend with having to fund deficits on the

[344] Legal risk means failure to operate within the law or any unexpected or unwelcome judicial decision affecting the functioning of an otherwise well-established compensation system. As pointed out previously, there is no case on record in the legal history of South Africa holding an employer legally liable for an occupational disease. Courts have always upheld the exclusive remedy principle as being an integral feature of the country's compensation system for occupational injuries and diseases. It must therefore follow that in the business planning of mining companies, they would not have expected this position to change overnight but it did.

[345] See *Chamber of Mines SA v The Compensation Commissioner for Occupational Diseases [2012] ZASCA 87* – the case involved multiple parties cited as respondents apart from the commissioner. Other parties cited in the lawsuit are the Minister of Health (as overall authority responsible for administering the Mines and Works Compensation Fund), the Director-General of the Department of Health, and three trade unions who supported the commissioner's decision namely; the National Union of Mineworkers (NUM), United Association of South Africa and Solidarity.

various accounts operated by the Mines and Works Compensation Fund. It is submitted that this structure is not only cumbersome administratively, it is unnecessary too.

Yet another potential governance problem area for pure workers' compensation systems relates to the professional competence of the people running those schemes. An employee injured or who contracts occupational disease in the course of employment should get compensation subject to meeting minimum conditions stipulated in the Act. A presumption in favour of compensation should apply in the absence of anything to the contrary. Public officials evaluate workers' compensation claims and in doing so must apply the law governing that administrative process. Decisions made by this official are neither published nor available for public scrutiny as is often the case with judicial decisions that are often subject to review by a higher court. The assumption is that administrative officials who assess and evaluate claims are competent in their roles and understand the law that governs that process as well as its broader policy context. Posner (1974) summarised this potential problem with regulatory systems aptly when he argued that often these systems fail not because there is anything wrong with their goals or the process itself, but because of bureaucratic incompetence, poor capacity or the sheer complexity of the tasks that administrators are expected to execute. In the context of workers' compensation systems, the individuals tasked with administering these systems must understand the law and the public policy goals of the system they administer. Often this is not the case. Two court cases on the South African workers' compensation system are illustrative of the problems that can arise when those responsible for administering the system appear not to understand the law governing the system and its policy objectives.

The first of these cases is *Molefe v Compensation Commissioner and Another*[346], where the claimant, Molefe, worked as a truck driver. On 15 February 1996, while acting in the course and scope of his employment, he was shot in the upper arm in a hijacking attempt. He was therefore entitled to compensation in terms of COIDA. After receiving medical treatment, he returned to work, but it soon became clear that he was no longer capable to drive a truck and thus became unemployable as a driver. Molefe submitted a worker's compensation claim for temporary total disability. The Compensation Commissioner rejected the claim for two

[346] [2007] ZAGPHC 365

reasons. Firstly, Molefe's own employer for reasons unknown submitted that he was not in the course of employment at the time of the shooting. Evidence made available to the Commissioner did not support this view. Secondly, the Commissioner argued in rejecting the claim that compensation for temporary total disability is only available when the injured employee is receiving "active medical treatment". Molefe sought legal assistance and following a meeting, the Commissioner conceded that the restriction of claims for temporary total disability to periods when the injured worker is receiving active medical treatment was indeed unlawful. Molefe's claim finally succeeded in October 2001, some five years after he was injured. Without the assistance of lawyers, it is highly unlikely Molefe's claim would have been paid. However, it turned out that the Commissioner continued to apply the restriction and the matter went to court. The court correctly said that COIDA is a social security law and must be interpreted and applied in a manner that facilitates and promotes the spirit and goals of social security. In other words, the law requires a liberal interpretation as much as the language used by the legislature can allow. More importantly, the court could not find any provision in the legislation that restricts the right of workers to receive temporary total disability compensation to periods when they are receiving active medical treatment as alleged by the Commissioner. The court found the Commissioner's conduct unlawful. It is an open question how many workers in Molefe's position had their claims unlawfully rejected by the Commissioner but could not afford legal assistance.

A second case of interest that illustrates how things can go wrong when those tasked with running regulatory systems, such as workers' compensation funds, do not understand the law they are supposed to apply is that of *Compensation Solutions (Pty) Ltd v The Compensation Commissioner*.[347] This case is particularly interesting in that the highest court in South Africa actually took the unusual step of finding the Compensation Commissioner to be in contempt of court and sentenced him to a three-month prison term suspended for five years on condition he is not convicted of contempt of court within that period. In this case, Compensation Solutions is a company specializing in the provision of services to medical practitioners who offer services to COIDA patients. The company buys rights in medical account claims against the Compensation Commissioner in respect of services rendered to COIDA patients by medical practitioners at a discount. Therefore, instead of medical practitioners pursuing those claims

[347] [2016] ZASCA 59

against the Commissioner, Compensation Solutions does that after paying off the doctors. After operating this system for a while without any problems, Compensation Solutions started to experience delays in the processing and settlement of claims by the Commissioner. The situation deteriorated to a point where in 2009, Compensation Solutions decided to sue the Commissioner, but the parties agreed on a settlement arrangement later converted into a court order. Shortly thereafter, the Commissioner was in breach of that order and Compensation Solutions sued the Commissioner for contempt of court. The trial court found in favour of the Commissioner but on appeal, the Supreme Court of Appeal held that the obligations in the court order were *ad factum praestandum*[348] and accordingly held him to be in contempt of court. The court sentenced him to a term of imprisonment of three months suspended for five years on condition he is not convicted of the same offence within that period.

Workers' compensation or regulatory systems seek to provide injured workers with speedy and cost-effective compensation. A liberal interpretation and application of the laws governing these systems is necessary in order to enhance their social security orientation. However, as the two cases above, and many others, have shown[349], it is possible for the systems to fail at various levels. When those who are supposed to administer the law governing these systems are neither knowledgeable in the law they apply, nor the social policy objects of the whole system, two undesirable outcomes are inevitable. Firstly, more cases end up in court thus defeating one of the fundamental objects of the system, to provide compensation quickly and cost-effectively. Efficiency of regulatory systems, especially workers' compensation, depends among other factors, on their ability to limit or eliminate the need for litigation (Garza-Zavaleta, 1997). Litigation increases transaction costs associated with getting compensation without providing any guarantees of compensation at the end of the process. Another undesirable outcome from failure to interpret and apply administrative law correctly is the unlawful rejection of valid claims. Some workers whose claims are so-rejected may not have the resources to pursue the matter further, for example, by approaching the courts. This undermines the no-fault nature of statutory compensation systems to the extent that administrators of these systems may unlawfully attempt to use errors and omissions by injured

[348] An order is *factum praestandum* if it imposes obligations to perform or desist from performing certain specified acts on the person on whom it is binding.

[349] For example, in *Roberts v Workmen's Compensation Commissioner Case No. P412/08 ZALC (6 June 2013)* an injured worker who sustained an injury at work in 1967 and has been attempting to secure compensation since then, only had his case finalised in 2013.

workers to reject claims as happened in the *Molefe* case. The mistake made by the Commissioner in the *Molefe* case could very well have been institutionalised had the matter not been taken to court.

Compensation for occupational diseases in the mining industry in South Africa operated on pure workers' compensation lines for decades, but diseases remain a perennial problem until today.[350] This begs the critical but all too familiar question – why is this so? At face value, the persistence of high rates of occupational disease in South African mines would suggest that the pure workers' compensation system on which the country relied over the years to fund compensation payable to disease victims has not been effective from a prevention standpoint. In other words, the initial impression one gets appears to support the hypothesis that inadequate incentives to prevent diseases have been a feature of the mining industry's compensation scheme and for this reason: disease-rates have remained comparatively high by global standards. However, a closer look at evidence on the ground casts doubt on this hypothesis. From 1911, onwards, numerous pieces of legislation on miners' phthisis and other regulatory procedures on occupational health in the mines became effective forcing the mining industry to increase investment in technologies to control dust and improve medical surveillance (McCulloch, 2011; McCulloch, 2009). It therefore defies logic that in 1994, the Leon Commission of Inquiry into mine health and safety would make a finding that dust levels in South African gold mines remained high and had probably remained so for over fifty years. Even more perplexing is the commission's finding that for diseases such as pneumoconiosis, tuberculosis and noise-induced loss of hearing, there was no evidence suggesting that there was a decline in the prevalence or severity of these diseases over the past 20 years up to 1995.[351] If mine health and safety were as highly regulated as studies appear to show, one would have expected to see a positive impact on disease rates over time. Yet this does not appear to be the case. Interestingly, the important question about why occupational disease rates remain high

[350] When silicosis was first identified as a serious occupational health and safety problem in South Africa's gold mines in the late 1890s to early 1900s, it was associated with white miners hence the name "white death". According to Katz (1994), the primary reason for this was that at the time, white rock drillers had long-term contracts whereas black miners were on short-term contracts. Since silicosis is a progressive disease whose development is positively correlated with levels of exposure (see Chapter 4, white miners faced a greater risk of contracting the disease compared to their black counterparts. Today, the reverse is true. Between 1975 and 2007, some studies have found that silicosis rates among black gold miners have nearly doubled compared to white miners (Nelson, Girder-Brown, Ndlovu & Murray, 2010). One can therefore say that silicosis has transitioned over this period from being "white death" to "black death".

[351] Leon Commission Report (1995) paragraph 4.5.18

and largely unchanged despite the existence of extensive legislation which purports to put occupational health and safety risk management at the forefront has received much attention. Different interests and emotions often cloud proper analysis and understanding of the issues involved when it comes to this matter. Some believe that mining companies are simply negligent and prioritise profits over the welfare of their workers. Others blame science and politics for not presenting a correct historical picture of the problem of diseases in mines (McCulloch, 2011).

Today, mine health and safety in South Africa is a policy area governed by arguably one of the most comprehensive legislation in the country from a risk management perspective. The legislation in question is the MHSA[352] passed in the immediate aftermath of the publication of the Leon Commission's report. The commission specifically recommended the enactment of a stand-alone piece of legislation to regulate occupational health and safety in mines and works.[353] This was after the commission had found that the then existing legislation and its enforcement were inadequate. Consequently, most of the provisions of the MHSA emanated from the Commission's report itself. These include the objectives of the Act that range from protecting the health and safety of mineworkers, hazard identification and elimination to enforcement of health and safety measures at mines, among others.[354] In addition, the Act also imposes specific duties on mine owners focusing on occupational health and safety risk management in mines. These include; duty to ensure health and safety, duty to maintain a healthy and safe mine environment, duty to supply adequate health and safety equipment, duty to establish a health and safety policy, duty to provide health and safety training, duty to assess

[352] Act 29 of 1996

[353] Outside of mines and works, occupational health and safety in general industry is governed by the Occupational Health and Safety Act 85 of 1993

[354] Section 1 provides the objects of the Act as:

(a) To protect the health and safety of persons at mines;
(b) To require employers and employees to identify hazards and eliminate, control and minimise the risks relating to health and safety at mines;
(c) To give effect to the public international law obligation of the Republic that concern health and safety at mines;
(d) To provide for employee participation in matters of health and safety through health and safety representatives and the health and safety committees at mines;
(e) To provide for effective monitoring of health and safety conditions at mines;
(f) To provide for enforcement of health and safety measures at mines;
(g) To provide for investigations and inquiries to improve health and safety at mines; and
(h) To promote- (i) a culture of health and safety in the mining industry; (ii) training in health and safety in the mining industry; and co-operation and consultation on health and safety between the state, employers, employees and their representatives.

and respond to risk, and duty to establish a system of medical surveillance. In fact, the first two chapters of the Act mainly deal with risk management issues in mines. On paper, the Act looks quite comprehensive and solid. Yet despite all this, disease rates remain a growing concern. This raises some important questions with critical policy and practice implications. Is the legislation enforced and are mining companies complying with its provisions? If so, why have disease rates remained so high by global standards?[355] What lessons exist about diseases as an occupational health and safety issue from a compensation perspective? The last question is particularly important in the context of this study. Assuming that mining companies are fulfilling all their legislative obligations, yet diseases rates remain unchanged, it must cast serious doubt over the basis of the litigation currently pursued against these companies as an option for funding compensation payable to occupational disease sufferers. If the legal obligations of mine owners regarding occupational health and safety are met and regulators appear to be confirming this, what then would be the legal basis for alleging wrongdoing on the part of the same owners? If, on the other hand, the mine owners are not in compliance of the same statutory duties this too raises the question; what have the authorities done to rectify this?

Pure workers' compensation as a method for funding compensation for occupational diseases can be an efficient and cost-effective policy option for South Africa. The country is already familiar with the system, having operated it for decades. Linked to familiarity with the system is the fact that workers' compensation does not represent a fundamental policy shift for the country and does not require costly monitoring and evaluation mechanisms to be put in place. Furthermore, for employers and employees, pure statutory compensation brings one important benefit – certainty. Under a workers' compensation system, employers are certain of two aspects with important budgetary implications. They know what is required from them in terms of funding the system since contributions to a statutory fund are fixed. Where the workers' compensation system uses private insurers, the premiums payable by employers to insurers are also fixed and subject to annual review. In addition, employers are also certain that they will

[355] Having observed that incidence of disease in South African mines have remained high over long periods of time, the Leon Commission called for what it called "radical" measures to be taken to deal with the problem. Presumably, one of these measures is the promulgation of the MHSA whose provisions the commission also recommended after observing that the legislation and enforcement framework then in place was ineffective. Yet despite this, questions remain because the MHSA 20 years later does not appear to be producing any better results.

face no further claims outside of the statutory system since the exclusive remedy principle protects them against these. On the other hand, employees are certain of receiving compensation expeditiously and at no cost to them. This guarantee is quite valuable compared to the uncertainty associated with litigation in delict. There is uncertainty about whether or not the lawsuit will succeed and how long the whole litigation process takes. More importantly, workers' compensation internalises costs of compensating victims of disease thereby eliminating some of the externality spillovers from occupational diseases.

Furthermore, the social security basis of workers' compensation implies that it becomes easier to integrate it with other social security programmes such as healthcare, pensions and motor third party liability. With the adoption of national health insurance, another statutory system, it would be a much simpler task to integrate workers' compensation into that system if it is run on pure statutory lines compared to a completely different principle. Thus, workers' compensation is the most sustainable and affordable policy option for compensating occupational disease victims in the South African mining industry. This is particularly so in view of the problems of applying the common law elements of delict discussed in Chapter 4 and the by-products of litigation discussed in Chapter 5. However, to this must be added two important provisos. Firstly, the structure of the workers' compensation system requires a review with a view to simplifying it.[356] One way to simplify the system would be to harmonise the legislation governing compensation for occupational diseases. While maintaining a dual legislative system may have been justifiable in the past, it is no longer an attractive option today. A second proviso is that governance of the system needs improvement especially on the oversight role that government must play. As the *Mankayi* litigation revealed, one of the objectionable features of the current statutory compensation system for the mining industry is the low level of benefits. Stakeholders must therefore decide whether it would be cheaper to improve benefits under the existing statutory compensation structure or under a completely different and new structure. It is submitted that the former rather than the latter option would be less expensive, compared to implementing a new system of funding compensation.

[356] The current structure is unduly cumbersome. It uses different legislation from the rest of the country's workforce. Furthermore, compensation structures under the two systems are also materially different even for the same occupational disease or disability.

7.4 Employer's Liability Insurance

Another option for funding compensation for occupational diseases is to pass this risk over to the private insurance market. In connection with occupational risks, use of private insurance can take one of two ways. Firstly, it can cover occupational risks as defined in workers' compensation legislation, as is the case in the USA. This option creates a new class of liability insurance called workers' compensation insurance.[357] Legislation defines the risks that are covered, and employers are then required to buy coverage from private insurers. In the case of occupational diseases, legislation provides guidance on the diseases covered either by naming them specifically or through general clauses and presumptions. As pointed out in the previous section, even when workers' compensation insurance is through the private market, the exclusive remedy principle may still apply. This makes sense because it would be irrational for employers to buy insurance and still face the prospect of common law liability for the very same risk. A natural consequence of workers' compensation insurance is that compared to other classes of liability insurance, it usually attracts a high degree of regulation because of its social security nature. For example, in the USA where this class of insurance is mostly used, premium rates must be approved by regulators and insurers are not allowed to include aggregate claims limits or exclusions for claims arising from war or terrorism as is the norm in other classes of insurance (Query, 2014). Without constant regulatory oversight, it would be difficult for statutory compensation provided through the private market to fulfill its underlying public and social policy objectives. For example, insurers could impose too many restrictions in their policies, making it difficult for many injured workers to access compensation. Furthermore, the premiums they charge may also increase to unsustainable levels, a development that could have other negative impacts. For example, spiraling premiums may undermine the viability of businesses and their ability to create jobs.

A second way in which insurance can fund compensation for occupational diseases is through employers' liability insurance as the sole and exclusive remedy for workplace injuries and diseases. This approach forms the primary focus of the discussion in this section. Today, most

[357] Query (2014) submits that the US National Association of Insurance Commissioners (NAIC) workers' compensation is the fourth largest line of insurance in the US. In 2012, it accounted for US$52bn in net written premiums.

countries worldwide use some form of workers' compensation programme as the sole remedy for injured workers or in conjunction with employers' liability. Employers' liability insurance originated in England in the late nineteenth century primarily to protect employers against risks created by the Employers' Liability Act of 1880. Use of employers' liability insurance as the sole method of funding compensation for occupational risks is now rare, largely due to the dominance of workers' compensation. According to Parsons (2002), compensation systems where employers' liability is the sole and exclusive remedy for compensating workers injured at work virtually do not exist in Europe. Klein and Krohm (2006) did an international comparison of funding mechanisms for occupational risks in 20 of the most populous countries and they identified Bangladesh, Nigeria and Thailand as the only countries that exclusively use employers' liability insurance to fund compensation for occupational injuries and diseases. The study found that in Thailand, employer's liability insurance is compulsory, but is only available through a public insurer while in Nigeria; employers' liability insurance is available from private insurers. From the 1990s, onwards Southern African countries notably, Botswana, Lesotho, Malawi and Tanzania that until then, used to fund occupational risks through employers' liability insurance, began to convert their funding systems to social insurance (Fultz & Pieris, 1999).

Employer's insurance can offer a number of advantages. Insurance economists argue that without unnecessary regulatory interference, insurance can be an efficient method of funding occupational risks. The term efficiency in its general economic sense denotes a situation where the application of resources occurs in the most optimal way possible in order to maximise social welfare (Klein, 2014). In connection with compensation for occupational diseases, efficiency therefore requires that a method for funding compensation must be able to deliver both optimal deterrence and optimal compensation from an *ex ante* and *ex post* perspective (Schlesinger et al., 1993). Meeting these two conditions in equal measure is anything but easy because in practice, trying to meet them involves trade-offs. However, to the extent that private insurers use experience ratings to derive premiums which each insured must pay, it can have effective incentives for employers to prevent diseases at the workplace (Klein & Krohm, 2006). Other studies have also found that private insurance as a method of funding occupational risks is more efficient from a deterrence perspective compared to public social insurance (statutory) schemes in that it is associated with lower incidence of diseases and injuries (Shin et al., 2011). The theoretical basis for this finding is not hard to see. Insurers have an interest in minimising the

claims that they pay and consequently, they are more likely to reflect this imperative in the policies they issue to their clients.

Yet another advantage of using employer's liability insurance to fund compensation for occupational diseases is that competition among insurers is likely to guarantee consumers the best product for a competitive price. When private insurers compete, there are significant beneficial spillovers that accrue to those that they insure. There is significant economic literature on the role of competition in social welfare but perhaps the most commonly cited work in this area is that of Alfred Marshall, who developed the theory of consumer's surplus.[358] Consumer's surplus is the difference between the amount consumers are prepared to pay for a good or service and what they actually pay in the end.[359] Implicit in this is the expectation that competition causes the price to fall below what consumers as a group would be prepared to pay for the same quantity of a good or service. The benefit measured by the fall in price accrues to the consumer as surplus because they end up paying a price that is less than they would otherwise be prepared to pay. Marshall's theory applies equally to insurance because consumers are prepared to buy insurance at a price exceeding their expected loss as seen from this simple illustration by Klein (2014). Assume a consumer who faces a 10% probability of incurring a R10 000 loss. The consumer's expected loss is: 0.1 x R10 000 = R1 000. If the consumer decides to buy insurance, the insurer would charge a premium of R1 000 plus extra loadings for expenses, cost of servicing capital and profit. Therefore, the consumer will end up paying a premium greater than his loss expectancy suggests. With competition, the ability of the insurer to load the premium beyond what the consumer's expected loss suggests becomes limited, implying that the consumer saves in the process.

Its advantages aside, employer's liability insurance offered through the private market, comes with a range of preconditions. To begin with, insurance only works on risks regarded as insurable. In this regard, insurance literature provides that for any risk to be insurable, it must conform to certain preconditions. Charpentier (2008) outlines some of these conditions. He

[358] According to Dooley (1983), the theory of consumer's surplus did not originate from Marshall. Instead, it originated from A.A. Counot, but it was Alfred Marshall who developed it and his protégé, Cecil Pigou, refined the theory further into what it is today.
[359] Economic Theories – History of Economic Theory and Thought, available at: http://www.economictheories.org/2008/08/alfred-marshall-consumer-surplus.html

submits that a risk is insurable if it meets the following preconditions: (1) the expected claims from the insurance pool must occur at random – if losses are not random or are systemic or covariate, it becomes harder for the insurer to diversify risk; (2) the average claims must be measurable and quantifiable. Insurers must have a reliable estimate of the cost of expected losses from the insurance pool before they can supply coverage. If the number of expected losses or their aggregate cost cannot be measured, supplying insurance under those circumstances exposes the capital of the insurer to ruin; (3) the maximum possible loss should not undermine the solvency of the insurer.

Today it is a universal regulatory requirement that insurers must hold capital to support their risk-taking activities. The capital threshold set by regulators could decline because of catastrophic or systemic losses of which long latency disease is a prime example. This is the reason why insurers avoid certain risks like unemployment, war, as well as bank and savings deposit insurance (Miranda & Glauber, 1997); (4) the insurance pool must comprise a sufficiently large number of similar items independently exposed to risk to enable the law of large numbers to operate.[360] The law of large numbers enables insurers to diversify risk; and (5) there should be no asymmetric information, particularly moral hazard and adverse selection, as these can cause market failure. However, even though asymmetric information is the oft-cited cause of market failure in insurance markets, Miranda and Glauber (1997) studied the US crop insurance market and found that without government support or affordable reinsurance, systemic risk, not asymmetric information, could well be a more intractable obstacle to the viability of crop insurance markets. Nevertheless, the insurability of any risk depends primarily on the existence of these five key preconditions.

[360] The Law of Large Numbers (which is exactly the same principle as portfolio diversification) is arguably the most important principle enabling insurance companies to supply insurance. It states that as the number of insured items in the insurance portfolio increases, the uncertain aspect of the loss occurrences reduces and there is more accurate forecast of total losses incurred by the portfolio (Klein, 2014). Simply put, the law states that actual losses on a portfolio of insurable risks will get closer to the expected losses as the number of insured items increases. However, the law of large numbers is only efficacious if two key assumptions hold true. The first of these is that the insured items are independent. If the insured items are subject to systemic risks that lack stochastic independence, the law of large numbers produces diminishing returns. Secondly, the items in the insurance pool must be homogenous or similar. In practice this assumption is hardly met because individuals who buy insurance face varying levels of risk such that perfect homogeneity is never achieved, and it is for this reason, that insurers try to charge each member of the pool a premium which is relative to the degree of risk they face (Klein, 2014).

7.4.1 Coverage Issues under Employer's Liability Insurance

The use of employers' liability insurance to fund compensation payable to employees who succumb to occupational risks, such as injuries and diseases, raises a number of issues with important implications on the efficacy of this funding method relative to other options. Firstly, employer's liability insurance responds to an occupational health risk where the insured employer is legally liable to the employee. There is no specific definition of what *legally liable* means. However, in simple terms, the phrase means that the insured employer must have acted in a manner whereby any loss caused in the process becomes the responsibility of that employer at law. This implies that in order for someone to be legally liable, he or she must have committed an act that offends the law. This usually takes the form of negligent conduct or fault. The act in question must cause harm to another party and the harm must be of the type that the law regards as compensable.[361] Accordingly, legal liability of an employer primarily arises at common law (usually following commission of a negligent act), under statute (for example, under the strict liability doctrine) or vicariously. These three constitute the legal basis of an employer's liability towards an employee.

Often the legal liability of an employer arises from some breach of a legal duty defined either at common law or under statute.[362] Whether breach of a common law duty under the negligence rule and breach of a statutory duty constitute distinct causes of action varies among jurisdictions. In the UK and a majority of US states, negligence and breach of statutory duty by an employer are two independent torts which can be pleaded separately, and liability can rest on one or both (Matthews, 1984). On the other hand, in Canada, the Supreme Court held that negligence and breach of statutory duty are not separate torts. On the contrary, breach of

[361] This last requirement for legal liability often confuses many people. The mere fact that A has acted wrongfully and caused harm to B does not necessarily mean that A automatically becomes legally liable to B. The law must regard the type of harm or damage suffered by B as compensable. Situations where a person may cause harm to another which the law does not regard as compensable include liability for some types of pure economic loss. It can also happen that legislation may absolve certain persons from liability for harm that they have negligently caused. For example, Section 21 of the South African Road Accidents Fund Act of 1996 protects drivers who negligently and wrongfully cause harm to third parties from being legally liable. Instead, their liability goes to the Road Accident Fund (RAF). The same analogy is possible in relation to Section 35 of COIDA.

[362] In this regard, Singleton LJ in *Latimer v A.E.C Ltd [1952] 1 L.L.R 1349* at 1353 summed up the position as follows: *The duty of the employer is to act reasonably towards his men; to take care in a way that a prudent employer would; to see that his workmen are not exposed to unnecessary risks; and that obligation extends to the building in which they work, to the plant and in some cases at least it covers the providing of a proper system of work.*

a duty contained in legislation serves as further evidence of negligence by an employer.[363] The position in Canada is similar to that in South Africa where there is neither a separate delict called breach of statutory duty nor strict liability of an employer towards an employee. The requirement for liability is negligence and existence of breach of a statutory provision per-se does not constitute negligence but may be a decisive factor in the inference of negligence.[364] Where negligence and breach of statutory duty exist as separate causes of action, technically a stricter form of liability exists under the latter cause of action to the extent that the burden of proof required may be comparatively lighter or even framed under the strict liability doctrine. In the final analysis, whether or not an employer is legally liable for purposes of insurance coverage depends on the rules applied by the courts to evaluate negligence, as well as whether breach of statutory duties imposed on employers constitute a separate tort or delict.

The concept of legal liability itself represents an important limitation of employers' liability insurance with significant implications for the insured in particular. It even raises the question: If social security is the objective of a compensation system for victims of disease, it is highly questionable if use of a funding method that requires proof of legal liability of an employer before compensation is paid facilitates the attainment of this goal. Furthermore, in Chapter 2, we saw that occupational risks, such as diseases and injuries, can emanate from one of three sources namely; fault of the employee, fault of the employer and trade risk (or current methods of production where fault cannot be attributed to the employer or the injured employee.[365] Of these three sources, trade risk has historically been the biggest contributor to accidents and diseases. When applied to the three sources of occupational risk and ignoring doctrines such as strict liability, the concept of legal liability with its orientation towards the delictual element of fault, only covers one source, fault of the employer and disregards the other two. This means only claims for diseases and injuries that are attributable to the fault of the employer fall under employers' liability insurance. As for injuries and diseases caused by the fault of the employee or those falling under trade risk, employer's liability insurance provides no answer. Consequently, the injured employee gets no compensation under employer's liability insurance for harm he or she was responsible for causing, nor can the employer's liability policy respond

[363] *The Queen in Right of Canada v Saskatchewan Wheat Pool [1983] 143 DLR (3d) 9*
[364] See: Mushai, A & Hutcheson H.D (2013) UK moves to abolish strict liability for statutory breaches, *SHEQ Management*, May/June 2013 page 12-14
[365] Chapter 2, section 2.2

to any claim for which there is no legal liability. Therefore, without regulatory adjustment, employer's liability insurance is not as comprehensive as statutory compensation when it comes to the scope of cover that it provides. Statutory compensation would provide protection for all three sources of occupational risk, hence the employee would still be compensated even for harm arising from own negligence. **Figure 6** illustrates how statutory compensation and employer's liability insurance differ in their response to the three occupational risk sources.

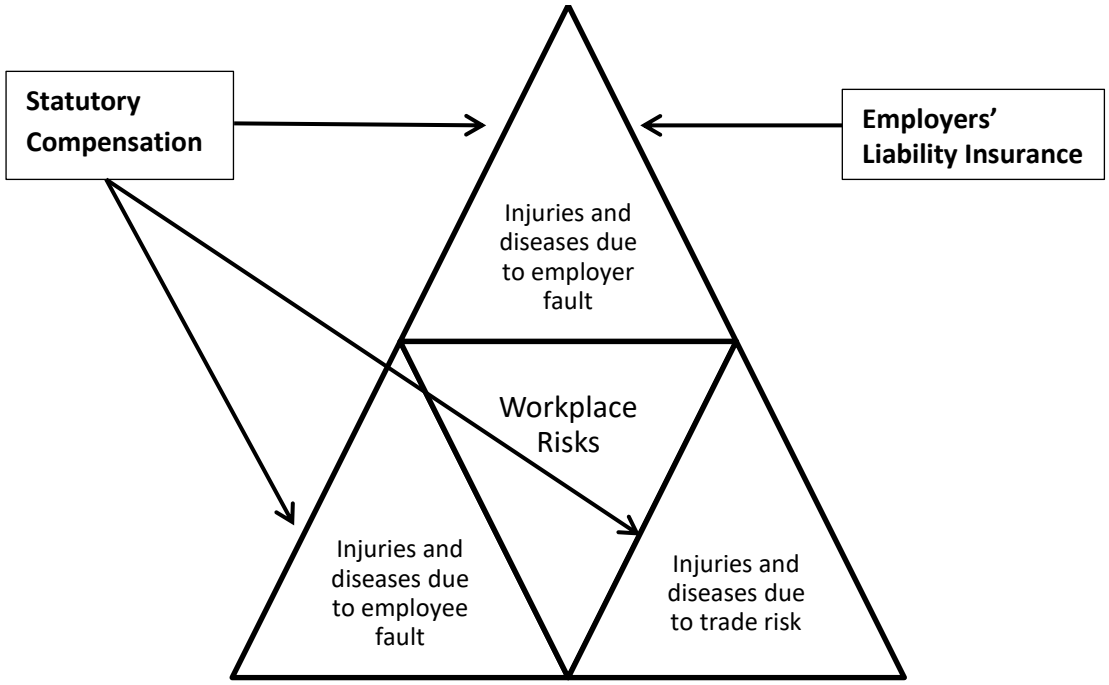


Figure 6: Statutory compensation and employers' liability insurance workplace risk matrix

If other operational conveniences of workers' compensation, such as ease of access to compensation, cost-effectiveness and time taken to get compensation are added to its broad coverage illustrated above, it is easy to see why workers' compensation remains the main and preferred source of compensation for injured workers worldwide.

A second employer's liability insurance issue that warrants consideration is the basis on which potential claims against employers are insured. As seen earlier in Chapter 5, liability insurance policies such as employer's liability can provide coverage on one of several bases, for example, causation, occurrence or claims made. Employer's liability policies used in the UK market

where this funding method is a major component of the compensation system provide coverage on causation, or occurrence basis, while those used in the South African market provide coverage on claims made basis. Some insurers use the word *sustained* instead of *cause* in the operative clause.[366] Each of these bases of coverage presents its own interpretation and application problems, some of which have ended up in the courts. In particular, the causation and occurrence bases of providing coverage have presented intractable challenges for insurers, especially in the context of long latency occupational diseases. The challenges are significantly less when these terms apply to occupational accidents resulting in injuries. With most occupational injuries, the happening of the accident or negligent act and the manifestation of its consequences are almost instantaneous, thereby presenting no problem of interpretation as regards issues like causation or the date of occurrence of an injury. Things are very different when it comes to long latency diseases where *cause* or *occurrence* can be very problematic concepts to conceptualise and apply.

Since liability of the insurer under employer's liability insurance depends on the existence of legal liability of the insured to the employee, the onus is on the insured to prove that the claim falls within the operative clause of the policy. In practice, this is anything but easy, particularly where causation and occurrence policies covering long tail risks are involved. One only has to look at the volume of case law that has emerged from jurisdictions such as the UK, to get a sense of the magnitude of the problems posed by the application and interpretation of operative words such like *causation* or *occurrence*.

[366] A typical employers' liability policy written on causation basis would have an operative clause along the following lines:
The Company will indemnify the Insured against legal liability for damages and claimant's costs and expenses in respect of bodily injury to or death, disease or illness of any Employee caused during any Period of Insurance arising out of and in the course of his employment by the Insured in the Business. See also: *Durham v BAI Limited* cited in Chapter 5 for a detailed analysis of the different versions of employers' liability operative clauses that have been used in the UK market over the years.
On the other hand, the operative clause on South African employers' liability policies which provide coverage on claims made basis defines the insured events as being:
Damages which the insured shall become legally liable to pay consequent upon death of or bodily injury to or illness of any person employed under a contract of service or apprenticeship with the insured which occurred in the course of and in connection with such person's employment by the insured within the territorial limits and on or after the retroactive date shown in the schedule and which results in a claim or claims first being made against the insured in writing during the period of insurance (Taken from the Mutual & Federal Insurance Company Limited Multimark policy, 2008).

Another issue of interest associated with the use of employer's liability insurance to fund compensation for workers affected by occupational risks, especially diseases, is the scope of cover provided under this type of insurance. Typically, employer's liability policies specify the risks covered in the operative clause and those excluded in the exceptions or exclusions section of the policy. Policy conditions are invariably included to complement policy exceptions. Given the social security objectives underpinning most funding methods for occupational injuries and diseases, a potential problem area with the use of employer's liability insurance is that insurers may restrict the cover they are prepared to provide in a way that distorts the social security objectives. There is also the possibility that insurers may refuse to insure certain firms whose business activities too much risk or through experience rating systems, the premiums they may charge to such employers may be prohibitively high. In addition, if insurance is not mandatory, some employers may opt not to buy coverage. This could leave employees of these firms facing the added risk that an uninsured employer may fail to pay a claim despite the existence of legal liability to an employee. This partly explains why the UK decided to make employer's liability insurance compulsory. According to Parsons (1999), cases of employees failing to get compensation from uninsured or insolvent employers were prevalent in the 1960s, prompting lawmakers to pass the Employer's Liability (Compulsory Insurance) Act in 1969.

However, refusal to provide coverage is not a guaranteed outcome in every situation where private insurance is used. Outcomes will also depend on the type of insurer supplying the insurance. For example, employers face no risk of refusal of coverage if employer's liability insurance is through mutual insurance whose business model does not prioritise profit making or by a state-sponsored insurer formed for the sole purpose of writing employer's liability insurance. Where insurance comes from commercial insurers whose objective is to make profit, it is plausible to argue that some employers may struggle to get coverage because of their perceived risk profile. If actual or potential prospects for profit in a particular class of insurance are low, commercial insurers withdraw supply that in turn, causes market capacity to insure that class of insurance to decline. Lewis (2010) makes some interesting submissions on this point using the employer's liability component of the UK compensation system as a point of reference. He submits that some observers have argued that had it not been for the no-fault pillar of the system, the employer's liability pillar would have long collapsed under the heavy burden of high costs, which in some cases, exceed the damages awarded to claimants.

When this happens, the premiums charged to employers who are chasing shrinking coverage go up and in the case of employer's liability insurance; this may have a negative impact on the viability of firms and their ability to hire more workers.[367] Therefore, without some form of regulatory intervention aimed at defining the risks that must be insured and specifying how those risks must be insured, employer's liability insurance provided through the private market may not provide the sort of social security outcomes that usually underpin the compensation for occupational injuries and diseases. Social security goals are generally incompatible with the profit objective.

Insurers also insert conditions and exceptions in their policies in order to circumscribe the cover they are prepared to provide. In order for an employer's liability policy to respond to a claim, there is need to meet two critical preconditions. The first is that the insured employer must be legally liable to the employee, a point discussed at the beginning of this section. However, there are a few further points that warrant further consideration as far as the application of the legal liability requirement is concerned. In the context of liability risks, rules governing legal liability lie in the law of delict, but it is common to find some enshrined under the doctrine of strict liability. This is normally the case in liability for defective products with its inherent consumer protection focus. Legal liability is an adversarial concept to the extent that its existence in any given situation is often highly contestable. It is common for the insured and the insurer to argue that there is no legal liability while the injured third party argues otherwise. Because of this, all the legal defences recognised in delict such as contributory negligence, necessity, voluntary assumption of risk and others are in theory, applicable to contest the legal

[367] The submissions by Lewis mirror the findings in an earlier study by Parsons (1999) who states that in the 1992 financial year alone, major employer's liability insurers made a combined underwriting loss of £200m. He further states that a study conducted on the UK employer's liability insurance market in 1994 showed that none of the insurers covered in the study had made an underwriting profit since 1987 causing insurers to regard this line of business as unattractive. This is evidenced by the fact that at the time, 50% of the study employer's liability market was in the hands of only three insurers and 72% of the same was held by six insurers making the market highly concentrated. Hood, (2005) submits that by the early 2000s, the UK employer's liability market was facing some serious viability problems to the extent that some major stakeholders were advocating for reform. A further illustration of what can happen to a line of liability insurance business perceived by insurers to be unattractive is the Director's and Officers' liability (D&O) insurance crisis in the US. According to Kaplan and Harrison (1993), insurance supply for D & O insurance began to shrink in the mid-1980s due to a combination of stringent legislative and regulatory requirements for directors as well as adverse judicial decisions. This triggered a D & O liability insurance crisis that saw premium rates increase by 570% on average, reduction in policy limits and an increase in deductibles. Kaplan and Harrison further submit that the number of D & O insurers across the US declined from 30 in 1984 to less than ten in 1986 and in 1985 three of the top ten D & O insurers stopped supplying this type of insurance. The authors further state that between 1985 and 1986 the number of firms failing to secure D & O insurance in the US increased from 7% to 16%.

liability of the insured towards the employee. However, for social policy reasons, courts often restrict the use of some defences in certain situations. For example, the application of the defence of *volenti non-fit injuria* in employment situations has been severely limited by the courts in many common law jurisdictions to the extent that it is difficult to envisage situations where the defence can apply, apart from cases of willful misconduct by an employee.

The possibility for contesting legal liability is one of the reasons why liability insurers typically make two promises to the insured in most of their policies namely; the promise to indemnify where legal liability is proven and the promise to defend the insured (commonly known as the duty to defend) in cases where legal liability is contestable. The two promises are not identical in their scope. The promise to defend is much broader than the promise to indemnify since an insurer can defend its insured even if the allegations made by the third party ultimately do not yield legal liability eventually leading to the obligation to indemnify. The duty to indemnify only arises when legal liability exists and the claim in question falls within the operative clause of the policy. Furthermore, the duty to defend can only be invoked by the insurer and the insured on the one hand, against allegations made by a third party (in the case of employer's liability insurance, the third party is actually the injured employee) against the insured. Implicit in this is the recognition that there is some community of interest between the insurer and the insured in that in as much as a successfully defended claim relieves the insured of any legal liability, it also relieves the insurer of the duty to indemnify. The fact that the insured employer can call upon the resources of the insurer to launch a defence against a claim by an employee while the latter is left to fend for him or herself is yet another objectionable feature of employer's liability insurance, especially when considered in the context of compensation for victims of occupational disease.

A further precondition which must be met before an employer's liability insurance policy can respond to a claim is that the insured must have observed the terms and conditions binding upon him under the policy. This is the policy liability requirement. Existence of policy liability is primarily a function of the law of contract. An employer's liability policy is a contract between the insurer and the insured employer hence if the insured breaches a term or condition of the contract it may provide the insurer with a further defence to a claim. It is important to note that policy liability only arises when the insured is legally liable to the third party. If the

insured is not legally liable, then the issue of policy liability does not arise since unlike legal liability, policy liability is not an abstract concept. It derives from the existence of legal liability. Thus, while legal liability can exist in the absence of policy liability, policy liability cannot exist in the absence of legal liability. Consequently, legal liability is a much broader requirement than policy liability. This lack of congruence represents yet another potential problem area with using employer's liability insurance to fund compensation for occupational diseases that may require regulatory intervention. Since legal liability is a comparatively broader concept than policy liability, it is again possible for some occupational risks to fall outside the scope of the policy available. Implications of this are that the employer may have to fund those residual risks from its own resources assuming that legal liability is incontestable. On the other hand, if legal liability is in dispute, the employee may have to sue the employer. Suing the employer at common law, particularly for occupational disease, has its own problems, as seen in Chapters 4 and 5. Even for risks covered by the policy, litigation against the employer may still be necessary if the insurer decides to defend the claim. Given the range of problems associated with suing the employer and the fact that employer's liability insurance as a funding method is prone to litigation, its efficacy is again questionable.

Liability insurers, like insurers of other risks, make extensive use of conditions in their policies. For example, it is common practice to incorporate a condition requiring the insured to take *reasonable precautions* to prevent loss. Implicit in this condition is that the insurer can avoid liability if the insured acts negligently. In theory, if the insurer can avoid liability because the insured failed to exercise reasonable precautions, the effect on the insured employee can be devastating unless the insured employer can pay the claim out of his own pocket. However, in practice, the efficacy of the reasonable precautions condition is highly questionable for two reasons. Firstly, regulators can specifically prohibit the use of such a condition in employer's liability policies. This is the position in the UK where regulations made under the Employer's Liability (Compulsory Insurance) Act 1969 specifically prohibit insurers from using the reasonable precautions condition in employer's liability policies (Parsons, 1999). Another reason to believe that the practical value of the reasonable precautions condition is far less than even insurers themselves seem to realise is that courts do not appear to be comfortable in

upholding this condition, especially if the end result is to defeat an otherwise insured claim.[368] Nevertheless, the mere fact that it is theoretically possible for the insurer under employer's liability insurance to avoid liability by pointing towards breach of a condition, such as that requiring the insured to take reasonable precautions, adds to the list of objectionable aspects of this method of funding compensation for occupational risks. It must further be emphasised that under workers' compensation, whether injury or disease to a worker was due to failure to take reasonable precautions by the employer or the employee is immaterial, the employee still receives compensation. If the social security aspect associated with compensating injured workers is to be preserved, regulators would have to not only define the risks covered under employer's liability insurance policies, but also monitor the conditions and exceptions that insurers include in their policies. Without this intervention, insurers may include conditions and exceptions that make it difficult for insured employers to get indemnity for claims that they are legally liable to pay, leaving workers vulnerable to the risk of rejection of some claims by insurers for falling outside the scope of existing policy coverage.

Apart from the coverage issues discussed above, employer's liability insurance is also vulnerable to other structural issues, market dynamics and changes may occur from time to time. These include inadequate capacity, lack of reinsurance support, regulation and changes in the legal and socio-political environment, among others. When employer's liability insurance applies as a method of funding for work-related injuries and diseases, it is conceivable that some form of regulatory intervention directed at this type of insurance specifically, may be required. If the insurance is to meet certain public policy objectives, the regulation may extend to areas such as premium rates, policy wordings and injuries or diseases falling under the scope of cover that insurers must provide. This is precisely what happened to Scottish insurers in 2011 when the UK Supreme Court upheld the validity of the Damages (Asbestos-related Conditions) (Scotland) Act 2009 which sought to make pleural plaques a compensable condition under employer's liability insurance even though the condition does

[368] There is a string of UK case law on this matter. The cause show that courts are generally reluctant to uphold the reasonable precautions condition in liability policies in the absence of reckless conduct bordering on intent by the insured – *Fraser v Furman [1967] 1 WLR 898; Woolfall & Rimmer Ltd v Moyle [1942] 1 KB 66;* and *City Tailors Ltd v Evans [1921] 9 LLR 46 CA.* Similarly, South African courts have generally followed the approach adopted by UK courts and in some cases, courts have cited with approval, a number of English cases on this matter. See for example; *Isando Foods (Pty) Ltd v Fedgen Insurance Co Ltd 2001 (3) SA 1278; Santam Insurance Co Ltd v CC Designing 1999 (4) SA 199; Patterson v Aegis Insurance Co Ltd 1989 (3) SA 478;* and *Theodoris v AA Mutual Assurance Association 1986 (3) SA 906.*

not result in any bodily disability.[369] Some insurers may view such intervention as too intrusive and decide not to write this line of insurance altogether. It is also possible that an insurer could become insolvent. While it is equally true that a statutory fund may also become insolvent, there is always the reassurance that government will find a way to make sure that the fund continues to fulfill its mandate, even if this means bailing the fund out using tax revenues. Such bailouts are, as a matter of fact, quite common. The same is not true of the failure of a private insurer. Collapse of a private insurer means that its liabilities are not paid at all in some cases and creditors often lose out in the process. Political and ideological factors can also play a part in whether employer's liability insurance is acceptable as a method of funding compensation for injuries and diseases arising in the course of employment. For example, when a new coalition government came to power in South Africa in 1941 that included the Labour Party, it marked the demise of the Workmen's Compensation Act of 1934 under which employers could insure their workmen's compensation risks with private insurers and ushered in the era of statutory compensation using a state entity (Garzarelli et al., 2008).

Any discussion on the efficacy of using employer's liability insurance as a method for funding compensation for occupational diseases would be incomplete without some reference to the perverse problem of asymmetric information. In insurance markets, this problem manifests itself in the form of adverse selection and moral hazard, both of which can cause insurance markets to fail on the supply side. Adverse selection is essentially a problem of hidden information. Insurance as a risk transfer mechanism is functionally dependent on adequate information about the insured risk. Adverse selection occurs when the insurer does not have sufficient information to distinguish between risk types, causing high-risk individuals to be more likely to buy insurance than low-risk ones (Klein, 2014). Akerlof (1970) submits that if the insurer has imperfect information about differences in the levels of risk posed by different people who apply for insurance then some markets may totally fail to exist, and others may continue to exist but become operationally inefficient. To mitigate this problem, insurers must invest in better risk screening techniques in order to price insurance contracts optimally. According to Klein (2014), if all policyholders pay premium reflecting their loss expectancy then, the tendency to select against insurers reduces. However, the ability of insurers to charge premiums that reflect the level of risk posed by each insured also depends on regulation.

[369] *Axa General Insurance Ltd & Others v Lord Advocate & Others* (supra)

Sometimes regulation may not allow full risk-based premiums to be charged and in some cases, community rating may be compulsory. Community rating naturally forces low-risk individuals to subsidise their high-risk counterparts. If the market is competitive, community rating becomes unsustainable because the market will eventually adjust and offer low-risk individuals contracts that reflect their level of risk (Rothschild & Stiglitz, 1976). It is for this reason that community-rating regimes operate with backing from legislation discouraging the formation of risk pools and makes participation compulsory.

Further to this, investing in better risk screening techniques increases the transaction costs of offering insurance to the market and this may in turn, make premiums prohibitive. There is also the possibility that adequate information is not available, forcing insurers to charge high-risk individuals less than their actual loss expectancy suggests. In turn, this incentivises high-risk individuals to buy more insurance and low-risk individuals to buy less leaving the insurer with an unbalanced pool of insured risks (Rothschild & Stiglitz, 1976). When this happens, losses incurred by the pool will outstrip the premium received making the supply of insurance unsustainable. That said, adverse selection is only be a serious concern in the area of insurance for occupational risks if employers have the freedom to choose whether to insure or retain the risks on the one hand, and insurers are also given the freedom to choose the risks they want to insure, on the other. If it is compulsory for all employers to buy employer's liability insurance, as is the case in the UK, Ireland and Cyprus, adverse selection does not arise since both high and low risk employers must buy insurance. The possibility that low risk employers may leave the pool ceases to exist by making participation compulsory.

Moral hazard is another asymmetric information problem commonly found in insurance markets. Like adverse selection, moral hazard can also cause insurance market failure on the supply side. Moral hazard is a problem that lies in the invisibility of the insured person's actions to the insurer and the things that motivates those actions once insurance is in place. Moral hazard is also one of the manifestations of the principal-agent problem. Economists argue that incentives are a powerful agent in shaping the behaviour of individuals and economic agents (Klein, 2014). Given a choice, people will always go for the course of action that places them in the most advantageous position. Moral hazard as a concept in insurance markets arises from the logic that once insurance is in place, the psychology of the insured towards the risk

that has been insured changes and he or she starts acting in ways that increase the likelihood of incurring the very same loss covered by insurance. Therefore, insurance causes moral hazard. Consequently, the most effective way to combat moral hazard is by structuring the incentives of the insured in such a way that they align to those of the insurer and reduce the scope for opportunistic behaviour.[370] This achievable by exposing the insured to part of the risk covered by insurance or monitoring how the insured behaves once insured. When the insurer can monitor and see what the insured does after purchasing insurance, what motivates those actions becomes a matter of no consequence, since the insurer can take immediate corrective measures as soon as the insured starts acting in a manner that is inconsistent with his or her obligations as specified in the insurance contract.

The bulk of literature on moral hazard focuses on its nature and effects in first party insurance where it is essentially an incentive-based problem between the insured and the insurer. In first party insurance, moral hazard relates to the possibility that the knowledge that the insurer would pay for the insured loss makes the insured to be less concerned about suffering that loss than would be the case in the absence of insurance. In mainstream insurance economics literature, the variant of moral hazard commonly discussed is *policyholder moral hazard* that refers to the effect that insurance has on the incentives of the insured to prevent the insured event from occurring or to mitigate its consequences. This type of moral hazard can therefore take place at two levels. Firstly, it can take place *ex ante* the insured event whereby the insured may have less incentive to take care to prevent loss once insurance is in place. *Ex-ante* moral hazard when it occurs increases the frequency of claims beyond assumptions made by the insurer when setting premiums. Secondly, policyholder moral hazard can also take place *ex-post* the insured event, in which case the insured may have less incentive to mitigate a loss covered by insurance. This dimension of policyholder moral hazard increases the severity of claims to the extent that an insured is not motivated to mitigate his losses even when it is

[370] To what extent can the behaviour of the insurer also induce moral hazard behaviour in the insured? This question has not received attention from economists and other academic writers. Nevertheless, Sen (1993:31) includes this thought-provoking quotation taken from the authors of *Hui-Nan Tzu* writing in China in 122BC:

> "If the measuring line is true then the wood will be straight, not because one makes a special effort, but because that which it is 'ruled' by makes it so. In the same way if the ruler is sincere and upright, then honest officials will serve in his government and scoundrels will go into hiding, but if the ruler is not upright, then evil men will have their way and loyal men will retire to seclusion". In view of this statement, is it plausible to say that the market conduct of the insurer may cause the insured to alter his behaviour in a risk-worsening way?

possible to do so. Policyholder moral hazard exists in both first party and third party insurance, and its effect is to increase the aggregate claims paid by the insurer.

However, Parsons (2003) argues that in liability or third party insurance, such as employer's liability insurance, the presence of insurance can alter the incentives of other parties in addition to the insured. In other words, in liability insurance, moral hazard has additional dimensions not seen in first party insurance. The first of these is *claimant moral hazard.* This refers to the potential effect that the existence of liability insurance might have on the claiming behaviour of third parties injured by the conduct of the insured. For example, it is plausible that faced with a choice of suing a wrongdoer with liability insurance on the one hand or another without insurance on the other, the third party would target the one with insurance as he is deemed to be more likely to pay. Such a choice can exist in situations where joint and several liability applies. In addition, it is possible that claimants have incentives to inflate their claims against parties they know to carry liability insurance. A second type of moral hazard found in liability insurance is what Parsons calls *jurisprudential moral hazard.* It refers to the possibility and extent to which the presence of liability insurance may influence lawmakers, judges, administrative agencies and policymakers in their decision-making, interpretation and application of liability rules. To put it rather crudely, this type of moral hazard can manifest itself through the perception that insurance companies have unlimited pools of funds and can therefore afford to pay any claim. Finally, Parsons also submits that liability insurance is susceptible to *underwriting moral hazard* rooted in the long-latency period associated with some liability risks such as occupational diseases. People who assess and evaluate these risks may be inclined to understate or underestimate them, knowing that they may not be accountable for the consequences of their poor judgment since they are unlikely to be around when those consequences become manifest.

Of the three types of moral hazard identified by Parsons that are unique to liability insurance, jurisprudential moral hazard is arguably the most plausible, while underwriting moral hazard is the least persuasive from an empirical and practical standpoint. As pointed out earlier, the presence of liability insurance can and often has led to a perception that insurers have limitless resources and can therefore afford to pay any claim, regardless of quantum. There have also been cases in some jurisdictions where courts have modified, expanded or applied liability rules

in ways suggesting that other considerations beyond the actual contract of insurance could have played a decisive role. For example, by developing the continuous or triple trigger principle at the height of the asbestos litigation, courts in the USA clearly intended to maximise the insurance coverage available to claimants. The principle holds that in long latency claims such as those for occupational diseases and pollution, all insurers who provided coverage from the period of initial exposure to manifestation of damage are liable for the cost of the damage (Anderson, 1987). In most US states where asbestos claims came before the courts, there was an inclination towards maximising insurance coverage rather than restricting it, even in cases where the language used in the policies suggested that the insurer intended to provide restricted cover (Raphael, 1995). Some of the judicial decisions seen at the height of the asbestos litigation in America smacked of jurisprudential moral hazard. In other countries, such as Sweden and the Netherlands, courts can take into consideration the economic circumstances of the parties when assessing damages, but where the defendant has liability insurance for the claim in question, personal circumstances are disregarded (Parsons, 2003). However, whether this can induce moral hazard or not depends on the angle from which one considers the question. On the one hand, it is plausible to say that if the law allows courts to take into account economic circumstances of the parties when fixing damages, it is not moral hazard if courts simply follow what the law says. On the other hand, there is scope for jurisprudential moral hazard if courts have wide discretion regarding the weight placed on the liability insurance factor when fixing damages.

Moral hazard is a more serious problem in the insurance of occupational risks compared to adverse selection. This is because even though moral hazard is commonly associated with private insurance, it is by no means exclusive to this type of insurance. On the contrary, it exists in workers' compensation schemes as well. There is a significant body of literature on moral hazard in workers' compensation systems especially from North America. Aiuppa and Trieschmann (1998) studied and found evidence of moral hazard in the French workers' compensation system. Bolduc et al. (2002) used panel data from the Canadian construction industry to investigate the impact of workers' compensation benefits on employer and employee behavior. Campolieti and Hyatt (2006) compared the incidence of Monday claims (the 'Monday effect') in the Ontario workers' compensation system with those from previous studies conducted in the USA. Garzarelli et al. (2011) examined the potential existence of moral hazard under the COIDA compensation system of South Africa in view of the minimum

wage system used in various industries. Thus, of the two asymmetric information problems, moral hazard is a more serious problem than adverse selection since it is common to both private insurance and statutory compensation schemes. Moral hazard can cause private insurance markets to fail while in statutory compensation systems, if left unmanaged, its existence can undermine their efficiency and viability.

Finally, apart from the asymmetric information problems of adverse selection and moral hazard, employer's liability insurance as a method of funding compensation for occupational diseases susceptible to lack of reinsurance support. No insurer can operate without reinsurance support, let alone for a risky liability class like employer's liability insurance. If the risk-bearing capacity of an insurance company is a function of its capital, then reinsurers essentially lend extra capital to insurance companies thereby enabling them to supply insurance even for risks they could otherwise not afford to insure. Without reinsurance support, insurers have two choices, neither of which is desirable. They can withdraw supply of coverage altogether for the class of business concerned. Alternatively, they can pass the additional cost of carrying risk to the insured, making insurance unaffordable (Miranda & Glauber, 1997). If the price of insurance is beyond what the intended consumers can afford, if given a choice, they will forego that insurance altogether. Both these options can cause failure of the market.

In South Africa, when international reinsurers made it known that they were not prepared to reinsure political riot, strikes and terrorism following the Soweto student riots of 1976, the short-term insurance market for these risks was driven to the brink of collapse. This eventually led to the formation of SASRIA, a separate entity, in 1979, to insure political riot, strikes and terrorism (Mushai & MacGregor, 2016). Without this intervention by the government and the insurance industry, the market for the insurance of political riot, strikes and terrorism could easily have collapsed due to lack of reinsurance support. Reinsurers, just like insurers, are not keen on providing insurance coverage for risks that have an element of correlation such as war, political riot, strikes and some occupational diseases, like tuberculosis. This is because, when risks lack stochastic independence, diversification cannot take place (Miranda & Glauber, 1997; Danzon, 1987). When the scope for diversification is limited or absent, the risk in question becomes difficult and costly to manage using the insurance mechanism.

A further point worth noting about insurance and reinsurance is that their prices intertwine. When there is limited reinsurance capacity, the price of insurance for the affected classes goes up and *vice versa*. Likewise, when there is an increase in direct insurance supply, the demand for reinsurance for that particular class of business declines, forcing the price to fall. Therefore, the price of reinsurance affects the price of insurance. However, the extent to which the price of insurance affects demand (price elasticity of demand) depends on several factors, such as the type of insurance in question, legislation as well as the existence and accessibility of other products that can be used to provide comparable protection. Hence, if the insurance in question is compulsory like employer's liability in the UK and a few other countries, then price does not have a direct impact on demand. These dynamics of the insurance market can be complex and often lead to phenomena known as underwriting cycles. An underwriting cycle is a cyclical pattern of rising or falling premiums, capacity and profits (Cummins, Harrington & Klein, 1992). The frequency of underwriting cycles varies and can be anything from three to five years or even longer. Causes of these cycles are diverse, ranging from random increases in claims frequency to underpricing of risks by insurers in order to cope with competition (Keane & Diacon, 1995). Peaks and depressions of the cycle are sometimes called the "hard" and "soft" phases of the market respectively. The hard phase of the underwriting cycle is characterised by shrinking coverage, tighter underwriting standards, higher profitability and withdrawal of insurance supply by some insurers. Conversely, the soft phase of the cycle is associated with a glut in insurance coverage, lax underwriting standards, falling premium rates and low profitability (Cummins et al., 1992).

Underwriting cycles have historically led to market destabilisation and crises for some classes of insurance, particularly during the hard phase. Liability insurance is particularly prone to this development and most of the crises occurred in the 1970s and 1980s, mainly in the USA (Cummins et al, 1992). Cummins et al submit that an underwriting cycle triggered the medical malpractice insurance crisis of the mid-1970s in the USA. Then there was the product liability crisis in the mid-1980s, also in the USA, triggered by adverse judicial developments, mainly to do with asbestos litigation that caused insurers to review their product liability insurance policies (Vascusi, 1991). Arguably, the oft-cited underwriting cycle-related liability insurance crisis is the director's and officer's (D&O) liability crisis of the mid-1980s, which was particularly acute in the North American insurance markets. The crisis saw mass withdrawal by US liability insurers from the D&O market between 1984 and 1986, against a background

of skyrocketing premium rates and dwindling coverage (Kaplan & Harrison, 1993). Given the tendency of liability insurance markets to drift into crisis after an underwriting cycle, and the destabilising effect that such crisis can have on the market as a whole, it is not difficult to see why employer's liability as a method of funding compensation is an undesirable for occupational diseases where social security considerations may be paramount.

7.4.2 Occupational Diseases and the Problem of Insurability

Use of employer's liability insurance as a funding method for employee compensation for long latency diseases contracted in the course of employment poses additional challenges, some of which raise serious questions about the insurability of this risk. Section 6.3 outlined the preconditions for risk insurability. Of these, three are particularly relevant to the discourse on insurability of long latency diseases. The first is the idiosyncrasy or stochastic independence requirement which holds that losses from the insurance pool must be random and not systemic or covariate. A second precondition of particular interest to the discussion on long latency disease coverage concerns the need for potential losses to be financially quantifiable and measurable. The final precondition is that which holds that for a risk to be insurable, the maximum possible losses from the insurance pool should not undermine the solvency of the insurer. Long latency diseases fail to meet all three preconditions, and this raises some important policy and practice questions on the desirability of conventional employer's liability insurance as a funding option.

Many authors have written on the characteristics of long latency disease that do not conform to the preconditions for insurability. Danzon (1987) identifies layers of uncertainty that long latency periods present which complicate risk measurement. For example, long latency complicates the determination of the relative contribution of multiple parties to the development of a disease and it allows liability rules to change over time, making risk assessment, estimation and quantification that serve as the linchpins of insurance, an inexact science. Faure (2004), argues that using liability insurance to cover long latency disease presents the insurer with a number of coverage uncertainties. These include not knowing how the courts will determine liability; how that liability will be quantified for purposes of setting

the level of damages; and whether the damages awarded will be within the limits of liability set in the insurance policy. In addition, long latency diseases have features that act as barriers to the use of insurance, such as difficulty of determining causation and setting the appropriate premium (Munich Re, 2004). Other authors who have made important contributions on the question of the insurability of long latency disease include Munich Re (2009), Stempel (2006), Munich Re (2012) and Raphael (1995).

With specific reference to mineworkers, long latency diseases like silicosis and asbestosis are in many ways not idiosyncratic. There is nothing random about silicosis because as long as workers operate under conditions where the risk of inhaling silica dust exists, a significant number of them will contract the disease. On current South African evidence, silicosis is not a random disease because even the existence of an extensive legislative and enforcement framework has made little impact on silicosis rates in local mines. Nelson, Girder-Brown, Ndlovu and Murray (2010) studied silicosis trends among South African gold miners who had an autopsy between 1975 and 2007. They found that the trend has been one of a general increase in the number of miners contracting the disease. As of 2007, the study also found that the proportion of miners with silicosis at autopsy stood at 32% for black gold miners and 22% for white mineworkers.[371] Nevertheless, and perhaps more importantly, the study makes two critical insights that appear to cast serious doubt on the randomness of the disease as an insurable risk. Firstly, the study found evidence suggesting that silicosis rates are strongly correlated with age and length of service – the higher the length of service of members in a particular sample, the higher the silicosis rate. Secondly, the study confirms some points made in Chapter 4 about silicosis as a progressive disease that the higher the level and period of exposure to silica dust; the higher the silicosis rate tends to be. Given this insight, it is safe to say that from an insurance standpoint, silicosis claims are not random. If anything, they are covariate. This property of silicosis and other progressive diseases defies one key condition for risk insurability, implying that without adequate reinsurance or some other form of government support, insurance market failure could occur on the supply side because any form of correlation in losses threatens the solvency of insurers. As already discussed previously in

[371] Nelson et al. further submit that between 1975 and 2007, the proportion of black miners with silicosis increased more than ten-fold. Thus, it is safe to say that silicosis has re-invented itself from the "white death" of the mid-1880s to early 1900s when the disease used to be more prevalent among white miners (Katz, 1994) to "black death" today where the disease is now mostly prevalent among black miners.

Chapter 5, long latency disease claims filed in the USA largely undermined the solvency of Lloyd's of London.

Mainstream insurance literature confirms that insurance is only possible in situations where potential losses are measurable and quantifiable. Once again, long latency diseases present insurers with insurmountable hurdles when it comes to estimating their exposure. One aspect of long tail risks in general that complicates their measurability and quantification is their susceptibility to the problem of retroactive liability. According to Faure and Fenn (1999), retroactivity refers to the possibility that between the commission of the delict and the making of the claim, liability rules and standards may have changed significantly. In its most acute form, the problem of retroactive liability implies that an act that may not have attracted liability in the past may do so today. Faure and Fenn further argue that this problem is more likely to arise where there is constant changes in legislation or judicial decision. Liability risks are the most susceptible to the retroactivity problem because of their sensitivity to law and legal changes. Environmental impairment, pollution, and long latency occupational disease are prime examples of liability risks where this phenomenon is present. In these two areas, liability rules are often subjected to regular changes such that it becomes impossible for insurers to foresee how liability may arise in future and adapt policy conditions accordingly (Faure, 2001). If retroactive liability is combines with jurisprudential moral hazard, measuring and quantifying exposure on long latency disease becomes even more complicated. Some US judicial decisions that expanded liability beyond what the insurance policies intended to cover compounded Lloyd's of London's problems of the late 1980s. Its own miscalculation aside, Lloyd's could not have foreseen this judicial development *ex ante* and therefore could not have measured the risk accurately.

In South Africa, silicosis claims created by the *Mankayi* judgment defy all three conditions of insurability identified above. The claims are virtually impossible to measure and quantify monetarily. There is no accurate measure or reliable estimate of the number of claimants likely to file claims. Estimates vary so widely that not only is it impossible to reconcile some of them, it is also difficult to base any decisions around them as well. The long latency period for silicosis which ranges from ten to forty years coupled with its geographical spread due to the migrant labour system, means that the number of claimants is hard to estimate. Some studies

put the current silicosis rate among living miners at between 22% and 30% while others have estimated that over time, up to 60% of miners will eventually contract silicosis (McCulloch, 2011). Other studies found that between 1975 and 2007, no decrease in the rate of silicosis among miners who had an autopsy at death took place (Nelson et al., 2010). Apart from the impossibility of determining the number of potential claimants, there is also the issue of the undiminishing silicosis rates among current miners. This is arguably the biggest barrier to the use of insurance to cover these claims. No insurer or reinsurer would be keen on providing insurance coverage for a risk that appears to be unresponsive to risk management efforts. Added to this is the problem of the interface between silicosis and tuberculosis that adds another layer of uncertainty from an insurance standpoint. Some studies have found that the highest rates of tuberculosis seen worldwide in recent times were among South African gold miners (Murray et al., 2011). However, tuberculosis is also a prevalent disease in the general population so much that an insurer who insures this disease under employer's liability insurance would have a serious problem in distinguishing between work and non-work-related tuberculosis.

A further complication associated with any attempts to use employer's liability insurance as a funding method for compensation paid to occupational disease sufferers is the dearth of case law to provide insights into the liability rules that courts will employ to determine liability of wrongdoers in delict for diseases. Insuring liability risks is quite a challenge even under the best of circumstances when liability rules are clear, and it is bound to be even more complicated when liability rules are as unclear as they currently stand in South Africa on this issue. One only has to take a cursory look at the volume and complexity of case law coming from the UK legal system on liability for occupational diseases to appreciate how difficult it can be for courts to come up with clear and consistent liability rules for these claims. Case law acts as a useful guide for liability insurers to assess exposure posed by different types of wrongful acts. Without any sort of insight into the applicable liability rules, how they will apply and the level of potential damages, it is impossible to predict future losses and their magnitude. Given these uncertainties, it is not hard to see why insurers may find this line of business unattractive and consequently withhold supply of insurance. A critical precondition of insurance is that the insured risk must be capable of quantification in financial terms. As things stand at present, it is impossible to quantify the silicosis claims brought through the *Mankayi* litigation.

When all is said and done, the question whether employer's liability insurance can be considered a viable option for funding compensation to employees who contract diseases in the course of employment in contemporary South Africa may turn out to be a purely academic one. This is because market practice in the South African insurance market has and still is, to exclude from employer's liability coverage, liability for disease or impairment that arises from a gradually operating cause that does not arise from a sudden and identifiable accident or event. Silicosis is a disease whose occurrence is gradual. It is also impossible to confine the disease to a specific and identifiable event or accident. The same applies to virtually all occupational diseases that continue to bedevil the mining industry. They are anything but sudden and accidental. Therefore, even under the assumption that employer's liability insurance is a viable policy proposition for funding compensation for occupational diseases in mines, silicosis and other long latency diseases would still fall outside the scope of existing employer's liability coverage in South Africa. Therefore, without some form of regulatory intervention, insurers would exclude most diseases from their policies anyway. Furthermore, given the wide publicity about the potential magnitude of the silicosis liabilities since the *Mankayi* judgment, insurers are unlikely to find participating in this section of employer's liability business to be in their best interest. This is partly because because of the high levels of asymmetric information, especially adverse selection, that characterises it. Virtually all mining houses facing the prospect of a lawsuit would be more likely to come forward to buy insurance.

Chapter 5 discussed the main insurance coverage options or policy triggers used by insurers to insure liability risks.[372] Lewis (2012) argues that none of these policy triggers adequately addresses the issue that over the period of exposure or development of a long latency disease, there could be several employers and insurers involved in either exposing the employee to risk or in supplying insurance, raising the problem of how liability should be shared among them. Thus, while the causation trigger, for example, tries to assign liability on the basis of cause, it only succeeds in identifying all who may have caused the disease but still falls short when it comes to how liability should be apportioned among them. The occurrence and claims made triggers simply try to avoid this question by imputing liability on grounds of occurrence of harm or the making of a claim respectively. Naturally, where several employers may have

[372] Chapter 5, section 5.4.2.1

contributed to the development of a disease each of them would want to minimise their contribution as much as possible. Consequently, the question of apportionment of liability among several employers or their insurers lies at the heart of long latency disease claims and has been the subject of extensive litigation on employer's liability policies, especially in the UK. On some occasions, the decision by the courts on the matter caused government to change the law when it became clear that the court's verdict was inconsistent with the public policy objectives on employer's liability. Thus, when the court decided in *Barker v Corus*[373] that an insurer is not liable in full for harm suffered by an employee exposed to risk of contracting an asbestos-related disease by more than one employer, the UK government overturned the decision by amending Section 3 of the Compensation Act of 2006. The effect of the amendment was to make the liability of potential defendants joint and several. However, the amendment is restricted to mesothelioma claims only. In other disease claims, the decision in *Barker v Corus* remains law.

Countries that rely solely on employer's liability insurance to fund compensation for occupational risks are not many. Available studies on funding methods for occupational risks cite Bangladesh, Nigeria and Thailand as some of the few countries in the world that rely solely on employer's liability insurance to perform this task (Shin et al., 2011; Klein & Krohm, 2006). That not many countries seem to trust employer's liability insurance as a dominant or sole method for funding compensation for occupational risks is not a coincidence. From the foregoing, it is evident that use of employer's liability insurance in general to fund compensation for long latency diseases in particular, involves a range of technical and operational problems. Most of the problems go to the root of the insurability of long latency diseases. Furthermore, employer's liability insurance is not immune from litigation.

Given the foregoing, there are many reasons to be less optimistic about the appeal of this funding method in South Africa. Firstly, it is highly unlikely that there is appetite among insurers for occupational diseases as a risk due to the insurability issues involved. Secondly, there is also too much uncertainty about occupational diseases as a risk so much that its appeal to insurers must be very low. Thirdly, from a policymaking perspective, it is also difficult to

[373] Supra

see where support for this funding method can come from. After all, the use of private employer's liability insurance to fund legislatively defined occupational risks gave way to workers' compensation under a state agency in 1941 when the Workmen's Compensation Act 1941 repealed and replaced the Workmen's Compensation Act 1934. It is highly unlikely that the country can witness a return to using employer's liability insurance. In fact, such a policy shift is unnecessary given the vulnerability of employer's liability to litigation. Furthermore, in a country where the current thinking among major stakeholders is for the state, rather than the private sector to do more, a proposal to use private insurance to fund compensation payable to workers disabled by injuries or disease is unlikely to get political support.

7.5 Co-existence of Workers' Compensation and Common Law Liability

Another possible policy option for funding compensation for diseases is one that provides no fault workers' compensation and leaves the door open for victims of occupational disease to pursue common law claims against employers. It will be recalled that the *Mankayi* judgement has by default, introduced this method of funding compensation into the local compensation system, but only for the mining industry. Combining workers' compensation and common law liability of employers to fund compensation for occupational risks is not something new. A number of countries have compensation systems structured in this way, but many of them have specific guidelines regarding when common law liability can come into play. For example, in Europe, compensation systems that combine statutory compensation and civil liability of employers are common and most of them specify conditions under which common law liability can be invoked (Parsons, 2002; Klein & Krohm, 2006). Even then, significant variations still exist among countries when it comes to how the compensation system is structured and how the two avenues of recovery interface with each other.

One of the interactions discussed in previous sections of this chapter is the pure workers' compensation system that generally bars claims for damages against the employer under the common law or statute, with common law liability only becoming possible in the most exceptional of circumstances. The approach exists in countries such as Germany, Austria, France and Switzerland. Outside of Europe, the system also exists in New Zealand, the USA

and in South Africa. However, in South Africa, the ban on common law claims only applies to workers in the general industry. In New Zealand, common law claims against employers are virtually unknown, while in France, such claims are only allowable where there is inexcusable fault on the part of the employer. In Germany, the only instance when an employee can sue the employer for damages is when the employer intentionally injured the employee. Consequently, in France, Germany, Austria and New Zealand, among others, claims against employers for damages, though technically possible, are unlikely to arise in practice.

Another version of the co-existence of workers' compensation and common law liability is one in which in addition to claiming workers' compensation, an employee can also sue the employer in damages if ordinary fault on the part of the employer exists and employers are required to buy employer's liability insurance. Unlike in Germany or France where the fault that must be proved is qualified, under this version of the co-existence of workers' compensation and common law liability, only ordinary fault is required for damages to be awarded but the possibility of damages being awarded against the employer must be insured. This is the system obtaining in the UK. Under the UK system, an employee injured at work is entitled to no-fault benefits from the state-run Industrial Injuries Scheme. In addition, the employee can pursue claims for damages in tort or under breach of statutory duty against the employer who in turn, looks to his private insurer for indemnification in terms of the Employers' Liability (Compulsory Insurance) Act of 1969 (Lewis, 2012). The Act makes it mandatory, with few exceptions for every employer who conducts business in the UK to obtain employer's liability insurance from a private insurer or mutual association. There are a very few other countries with strong connections to the UK notably Guernsey[374], Ireland and Cyprus which have adopted the UK approach to make employer's liability insurance compulsory (Parsons, 2002). Therefore, the main distinguishing feature of this approach is the requirement that employers' liability insurance be compulsory for all employers.

A third version of systems of compensation where workers' compensation co-exists with employer's liability is found in countries that include Australia, Brazil, Chile, Colombia, Ghana, India, Indonesia, Kenya, Malaysia, the Netherlands, Peru, Turkey, Venezuela (Munich

[374]Compulsory employer's liability insurance was introduced in Guernsey in 1993 (Clyde & Co LLP, January 2016)

Re, 2009) as well as Zimbabwe (Kaseke & Ncube, 2003). In these countries, employees who are injured or contract diseases in the course of employment are entitled to no-fault workers' compensation and in addition, they can sue the employer for damages if negligence exists. However, even though workers' compensation co-exists with common law liability of employers in these countries, there is no law that makes employer's liability insurance mandatory. Employers are therefore free to insure their common law liability or to retain it. Therefore, under this system there is always the risk that a liable employer may still fail to honour the judgment, leaving the employee uncompensated if that employer decides not to buy employer's liability insurance. This risk is often underestimated yet it is a distinct possibility, especially where long latency diseases are involved (Schlesinger et al., 1993). Mass delict claims such as those involving silicosis class actions currently contemplated in South Africa following the *Mankayi* litigation have all the attributes necessary to bankrupt some employers. The bankruptcies witnessed in America in the aftermath of the asbestos litigation are a classic example of what can happen when mass claims confront the same defendant companies against a background of non-existent or limited insurance coverage. Even under the assumption that the employer decides to buy insurance, either party can rescind the insurance contract at any time leaving the employees vulnerable to default by the employer unless there is a legal requirement to the effect that the cover once purchased is irrevocable.

However, whether workers' compensation co-exists with employer's liability with or without compulsory employer's liability insurance does not solve the problem of litigation which over time can overburden the entire system with costs. Costs associated with litigation against employers can be quite substantial to the extent that the whole compensation system can become unsustainable in the end. This possibility does not receive the attention it deserves in South Africa yet is significant. Intricate issues associated with attributing liability in long latency disease cases are such that disputes become inevitable and prevalent. Where disputes are common, litigation also becomes an unavoidable consequence. There are two important points to note when it comes to the problem of relentless litigation. The first one concerns the economic consequences of litigation. Litigation can cause a lot of strain, on the targeted firms and the economy as a whole. When firms file for bankruptcy to avoid spiralling liabilities, as happened in the US at the height of the asbestos litigation crisis, the impacts are largely macro in nature, but they have micro dimensions too in the form of job losses, reduced potential earnings for current employees among other consequences (Stiglitz et al., 2002). More than

that, it is virtually impossible to know the full cost and impact of those bankruptcies to the broader economy. As pointed out in Chapter 5, close to a hundred firms have gone into bankruptcy because of asbestos liabilities in the US to date. A developing country like South Africa can ill afford such an avoidable and manageable shock on its economy. However, it is a realistic prospect that the silicosis claims triggered by the *Mankayi* judgment, coupled with the obvious attraction to lawyers of class actions have the ability to produce these undesirable outcomes. It is for this reason that it has been argued that an efficient compensation system for occupational risks should aim to avoid or limit the scope for litigation as much as possible (Garza-Zavaleta, 1997).

In addition to the propensity for litigation in mass-delictual claims like silicosis to induce defendant firms to slide into bankruptcy is yet another important point to consider. Litigation is also costly for those who may be seeking to rely on it for redress. A common misconception held by many is to equate the right to sue with getting compensation and justice. Nothing could be further from the truth. In this connection, Rakoff (2016) makes some interesting submissions about the situation in contemporary America regarding the ability of ordinary people to access the courts. He submits that most Americans with what most would consider as straightforward grievances are increasingly failing to have their proverbial day in court due to a variety of factors of which the cost of legal representation and other related expenses associated with initiating litigation and seeing it through are among the main ones.[375] Rakoff further argues that even the existence of the contingent fee system has failed to reverse the trend whereby most Americans can no longer afford a lawyer in an environment where prospects of success when filing a lawsuit with legal representation are two times higher than those for someone without representation.[376] The contingent fee system introduced into the American legal system to address the high cost of legal representation, but this has produced

[375] Jed Rakoff has been an adjunct professor at Columbia Law School since 1988. He has served as a federal judge for the Southern District of New York since 1996, following his appointment to that position by then US President Bill Clinton. According to Rakoff, between 1985 and 2012, the average rate charged by lawyers in America has increased more than three times the rate of inflation from $112 to $536 for lawyers who are partners in their firms and from $79 to $370 for associate lawyers per hour. Making reference to statistics from the National Centre for State Courts, Rakoff further submits that these show that up to 1970 most Americans who initiated or defended lawsuits in state courts had legal representation compared to today where two thirds of people who bring or defend civil suits in state courts do so without representation.

[376] Under the contingent-fee system, lawyers agree to take up a case on behalf of a plaintiff free of charge under the agreement that if the case is won the lawyers get a sizeable proportion of the award as a fee but if the case is lost, the plaintiff pays nothing. There are strong reasons to support that argument that this system provides incentives for lawyers to inflate the amount of damages they claim.

limited results. Rakoff cites two main reasons for this; one is that the contingent fee system is only available to plaintiffs and by design does not benefit defendants. The other is that most American lawyers will only consider taking a case on a contingent fee basis if prospects for success are good and more importantly, if the quantum of the expected award is likely to be substantial, at least in the hundreds of thousands of dollars. Although America lies at the extreme end of the scale when it comes to its culture and cost of litigation, there is no reason to believe that the problems discussed by Rakoff cannot occur anywhere else. After all, the same problems are what caused many countries to adopt workers' compensation as a funding method for personal injury claims arising in the course of employment in the early 1900s.

If Americans, with high per capita incomes, are struggling for access to legal representation and the courts, the problem is likely to be worse in a developing country context even after allowing for the unique idiosyncrasies of the American tort system. If people have unequal access to courts because of barriers such as the high cost of legal representation, then funding compensation using the workers' compensation pillar alongside the common law liability of employers pillar raises efficiency and equity questions, especially around the latter pillar. To the extent that some workers with genuine grievances against the employer cannot afford the cost of litigation and end up abandoning their common law claims, questions arise on whether such a compensation system utilises resources in the best possible way to maximise the combined utility or social welfare of all workers (Klein, 2014). In addition, common law claims against the employer for long latency disease are inherently complex for various reasons, as seen in Chapter 4. The issues involved in these claims are so complex that chances of success in claims filed under the employer's liability pillar without legal representation are remote. Therefore, unless there is a mechanism to ensure that all employees who want to file claims against the employer have access to legal representation, then further questions arise regarding the equitability of merely granting workers the right to sue the employer even though in practice most of them would not afford to benefit from that right.[377]

[377] In the USA, it has been found that parties to a lawsuit who are unrepresented by a lawyer have a higher probability of losing the suit compared to those with legal representation (Rakoff, 2016).

Combining workers' compensation and common law liability of employers has several advantages. One of them is that delay in accessing compensation commonly encountered under the employer's liability pillar due to its propensity to attract litigation are mitigated by prompt payment under the workers' compensation pillar. In addition to this, is yet another advantage of blending workers' compensation with fault-based employer's liability; the approach enables occupational risks to be handled collaboratively between government and the private sector. A further advantage is that systems that fund compensation using the dual approach of workers' compensation and common law liability could potentially be more successful from a deterrence perspective. In other words, employers are more likely to invest in occupational health and safety if they know that if they are negligent they will be subject to sanctions through payment of damages. However, some have argued that to the extent that employers can buy liability insurance, the deterrent effects of common law liability become questionable at best and weak at worst (Wagner, 2006). Furthermore, America's experience with asbestos litigation has shown that there are serious doubts about tort liability's overall deterrent effect on potential injurers (RAND Corporation, 2002). It must also be pointed out that exposure of employers to litigation is not the only way to achieve deterrence. Deterrence can form part of a workers' compensation system through experience rating of contributions, for example (Koning & Lindeboom, 2015).

In most of the countries where workers' compensation operates alongside the employer's common law liability, there tends to be a huge imbalance in overall contribution of the two pillars to the total compensation payable. In most cases, the workers' compensation pillar is the more dominant of the two in terms of total payments made. One country that represents an exception to this general trend is the UK. Until 1995, the workers' compensation pillar paid more money per year than the fault-based employer's liability pillar (Oliphant & Wagner, 2012). In the early 2000s, the employer's liability pillar contributed 52% of total compensation paid to injured workers in the UK compared to the no-fault industrial injuries scheme's 48% (Parsons, 2002). As of 2012, even though the employer's liability system pays more in monetary terms per year, the no-fault industrial injuries scheme compensates four times as many workers as the employer's liability system (Oliphant & Wagner, 2012). Despite this, serious questions remain about the cost-efficiency of the fault-based employer's liability system. For example, a 2009 study of a sample of 280 personal injury cases heard before district courts across the UK showed that claimants' costs alone amounted to £1.80p for every

£1 of damages paid (Lewis, 2010). Other studies have also shown that on average, costs for claims settled below £15 000 exceeded the damages awarded.[378] Lewis further submits that the fault-based pillar in the UK's occupational injuries and diseases compensation system has largely been sustained by the presence of the no-fault industrial injuries scheme otherwise on its own, it would probably have collapsed a long time ago mainly due to its unsustainable cost structure.

Since 2011, the South African system for funding compensation to workers who contract diseases in the course of employment has become fragmented and inequitable. A worker who contracts an occupational disease in general industry is restricted to claiming workers' compensation in terms of the provisions of COIDA. The worker cannot sue the employer for negligence because such a claim does not exist under the same legislation. However, the worker can claim increased compensation if fault can be proved. By contrast, a mineworker who contracts an occupational disease as defined in ODMWA can claim workers' compensation and on top of that, the worker can claim damages in delict for the same disease under the auspices of the *Mankayi* judgment. Given the long history of occupational diseases in mines, not many would have imagined the authorisation of common law claims. If lawmakers and policymakers believed that the right to sue the employer for damages would place mineworkers in a better position, they did not have to wait for a century before granting them this right. Furthermore, the right to sue the employer comes at a time when mining as an industry is in decline both in terms of its contribution to GDP and direct employment creation (McCulloch, 2009).

The undesirability of the state of affairs where workers in one industry can claim workers' compensation and damages while those in other industries can claim workers' compensation only can be analysed from a variety of perspectives. One way to look at the situation is from the perspective of the workers themselves. It can be argued that the right to sue the employer is desirable because it increases the odds of maximising compensation payable to sick workers by giving them two avenues to recover compensation - they can claim statutory benefits as well

[378] It is partly for this reason that the British government proposed wide-ranging changes to civil litigation in the country in 2011, aimed at making litigation a less appealing option in civil disputes. See Chapter 4, note 178.

as damages. Assuming that this argument is correct, the obvious question is; why is the right to claim damages from the employer only enjoyed by workers from one industry and not by all workers? No reasons exist from the perspective of simple logic or equity to explain why the current position providing workers with the same needs with different legal remedies may be desirable. That the current position of workers in general industry and those in the mining industry on compensation for occupational diseases flies in the face of the doctrine of horizontal equity, is difficult to dispute. The needs of a silicosis sufferer working in the mines and one who may have contracted the same disease from a different work environment are no different.

Alternatively, it is possible to examine the situation regarding the differentiation between workers in the mining industry and those in general industry on compensation for occupational diseases from the perspective of employers. Originally, workers' compensation came into being to address the failures of the common law on employers' liability for accidents. In return for becoming wholly responsible for financing the system, employers received protection from further common law actions for injuries or diseases arising out of and in the course of employment under the exclusive remedy principle. It is for this reason that workers' compensation is a trade-off for both employers and workers (Boggs, 2015; Fishback & Kantor, 1998). It is against this background that the prohibition of common law claims for damages against employers embodied in COIDA must be understood. As time went by, some countries started to introduce exceptions to the rule barring claims for damages against employers. In some cases, the perforation of the exclusive remedy principle was prompted by the neglect to ensure that workers' compensation benefits remained fair and adequate (Danzon, 1987). Regardless of the actual reasons behind the relaxation of the exclusive remedy principle, the fact remains that statutory compensation is a social contract between employers and workers underwritten by the government. One therefore does not need much imagination to appreciate that the protection under the exclusive remedy principle ought to apply to all employers. Nevertheless, in contemporary South Africa, this is not the case anymore. This begs the question; what is the rationale for according employers in general industry protection from common law liability and denying the same protection to those in the mining industry? Again, no reason exists in logic or equity to justify this state of affairs. The little attempt made to justify this state of affairs (for example in the Constitutional Court's judgment in the *Mankayi*

case) is not persuasive at best, and in a number of respects, it offends basic notions of common sense.

The Constitutional Court in the *Mankayi* judgment attempted to advance reasons why mineworkers deserve different treatment from the generality of the workers when it comes to issues of compensation for diseases contracted in the course of employment. In essence, the court argued that historically, mineworkers had sacrificed a lot for the economic wellbeing of the country at immense cost to themselves and their families. Stripped of its emotional appeal, this argument has little merit. The scope of social security benefits does not depend on some arbitrary assessment of a business sector's contribution to the economic wellbeing of a country. Were that to be the case then the military and the police could equally argue that their contribution to the wellbeing of economic agents in the whole country warrants their differential treatment when it comes to compensation for occupational diseases. Even under the assumption that mineworkers deserve different treatment in terms of compensation they receive for occupational diseases, there are better ways to achieve that than suing their employers. If COIDA pays better workers' compensation benefits than those under ODMWA, as correctly pointed out by the court in the *Mankayi* judgment, would it not have been a much cheaper, simpler and more sustainable policy intervention to amend ODMWA in order to align its benefits to those available under COIDA? Given the historical failures of common law liability to improve the position of injured workers, it is surprising that there is a belief that allowing mineworkers to sue their employers is an option for offsetting the deficiencies in the legislation governing their statutory compensation benefits. On the contrary, it is submitted that allowing common law claims against employers may actually worsen the position of mineworkers overall. Those who are already sick are not guaranteed any compensation and those currently in employment face uncertainty about the security of their jobs if the common law claims impose (as they are bound to) unsustainable costs on the employer.

To suggest that mineworkers deserve differential treatment because of the immense historical contribution of the mining industry to the wealth of the country not only ignores all the vital lessons that history has bestowed on humankind, but it is irrational too. It is irrational because firstly, it implies that suing the employer for damages is actually a benefit extended to mineworkers. Secondly, it is irrational to the extent that it attempts to rationalise that this

benefit is one which mineworkers alone are entitled to enjoy to the exclusion of other workers. This view lacks empirical support. It is difficult to find anywhere in literature where suing the employer for damages as a way of funding compensation for diseases arising in the course of employment has been shown to be beneficial to workers in practice. There is a dearth of literature endorsing this view.[379] As indicated in the earlier section, there is a big difference between having the right to sue and actually securing compensation. More often than not, the expectation of winning, no matter how remote, overshadows the practical difficulties endemic in the process of litigation such as the possibility of failing to meet the legal standard required to win, the high cost of litigation and delay in getting compensation. In the context of compensation for long latency disease, the difficulties are further amplified by some unique risk characteristics shared by these diseases to the extent that it is highly contestable whether litigation is an efficient way to access compensation at all (RAND Corporation, 2002).

7.6 Funding Compensation for Diseases and Injuries Separately

A fourth policy option that can be considered for funding compensation for occupational diseases in South Africa is to separate diseases from injuries and assign them different funding systems based on each risk category's own profile and idiosyncrasies. This approach combines pragmatism with realism by recognising that diseases and injuries are distinct risks deserving of separate treatment. On top of that, there are several reasons why this approach could produce beneficial results. Firstly, as occupational risks injuries and diseases share few similarities, hence there are strong reasons to believe that it may be more efficient to separate them since they cannot form a homogenous risk pool whether under statutory compensation or employer's liability insurance. Secondly, occupational diseases have unique characteristics, most of which defy the notion of insurability and therefore warrant separate treatment. Some of the unique characteristics include long latency periods, the difficulty of predicting the number of expected claims *ex ante* and the practical challenges involved in executing technical tasks such as setting provisions and apportioning liability where multiple defendants are involved. For these and

[379] On the contrary pre-workers' compensation literature is unanimous in endorsing the view that the common law proved an impediment to compensation hence its replacement by workers' compensation (Willoughby, 1898; Blanchard, 1917; Van Doren, 1918). In the post-workers' compensation era, very few countries rely on suing the employer as a primary mechanism for compensating workers who get injured or sick at work (Klein & Krohm, 2006; Parsons, 2002). This further shows distrust by policymakers of the common law.

other reasons, diseases need a different approach compared to injuries. Thirdly, separating diseases from injuries also enables the implementation of focused and customised risk management controls for each risk category, thereby enhancing efficiency. For example, occupational injuries occur frequently and are therefore capable of accurate prediction in terms of their cost and frequency. On the other hand, it is much harder to predict and quantify the costs associated with diseases with any reasonable degree of accuracy. Fourthly, funding compensation for diseases and injuries separately may contribute to the development of better cooperation between government and the private sector to improve occupational health and safety. In most countries that fund these risks separately, the private sector takes care of occupational accidents while the government, acting in collaboration with the private sector, takes charge of occupational diseases. Fifthly, as pointed out in Chapter 3, that most workers' compensation schemes that emerged in the early 1900s focused specifically on occupational injuries rather than diseases. Separating funding approaches for injuries and diseases removes distortions from statutory compensation systems usually induced by diseases whose risk features are dissimilar with those for injuries. Finally, despite the fact that statutory funds that combine coverage for diseases and accidental injuries are, as a matter of principle, supposed to be financed by employer contributions, in practice it is common for governments to use general tax revenues to bail out insolvent funds (Klein & Krohm, 2006). When funding for diseases and injuries is separate, the risk of statutory funds becoming insolvent and therefore requiring a government bailout reduces. When government bails out public entities, public expenditure in other socially desirable programmes such as development of infrastructure reduces. It is for this reason that government bailouts breed public resentment. The current debate on state bailouts to South African Airways is a case in point.

A common practice seen in countries that fund compensation for diseases and injuries separately is to assign diseases to a central public fund administered by the government or a government agency while private insurers handle injuries under workers' compensation insurance. Even though private insurers provide insurance, workers' compensation legislation still defines the risks insured. Private insurers only assume the responsibility of providing indemnity to employers whose employees suffer injuries in the course of employment. The rationale for funding diseases and accidents separately is that since occupational accidents meet all the conditions for insurability, insurance can be an efficient way to handle these risks. This view makes more sense in view of the fact that insurers enjoy significant information

advantages on things like accident causes, prevention and trends that they have every incentive to share with their clients. By sharing this information with their clients, insurers achieve two critical things. Firstly, they make their clients to become more discerning in the face of risk. Secondly, a more discerning clientele reduces claims that insurers ultimately have to pay.

In addition to the above, is yet another reason why private insurance can be an efficient mechanism for funding compensation for accidental injuries. The premium charged to each employer is experience-rated, whereby the risk profile of each insured determines the premium it pays. By making employers pay a premium which is consistent with their relative risk levels, private insurance for accidental injuries can be a powerful incentive for employers to invest in accident and claims prevention (Klein, 2014).[380] For example, when the Netherlands introduced experience rating to its disability insurance scheme in 1998, there was a significant reduction in the number of claims filed under the system in the aftermath of this policy reform from 11% of the covered population in 2001 to 7.2% in 2012 (Koning & Lindeboom, 2015). In addition, experience rating ensures that there is correlation between premiums collected and the expected claims expected from the pooled funds, thereby ensuring the viability of the system (Klein & Krohm, 2006). The 'command and control' approach to accident prevention enshrined in most workers' compensation statutes, does not always produce the desired results. Instead, a system based on well-structured incentives could be more effective (Elser, 2010). Design and operational features of private insurance contain effective incentives for insured people to take proactive steps to prevent loss. Whether the insurance is through workers' compensation or the employer's liability principle is however, a different matter. What is beyond dispute is that occupational accidents are random in their occurrence and their frequency and severity are measurable using probability making them a perfect fit for insurance.

Given the dominance of the public sector in occupational health and safety since the advent of workers' compensation in the early 1900s, policymakers sometimes do not prioritise the benefits of competition. Instead, social insurance features of these systems tend to dominate over efficiency-enhancing ones like competition. However, signs of change started to appear

[380] It is also possible to use experience rating in monopolistic public statutory compensation systems as is done in Bulgaria, the Czech Republic, Germany, France, Italy, Luxembourg and Poland (Elser, 2010). However, studies of statutory compensation systems have found that apart from the USA, most countries do not have adequate administrative capacity to link contributions paid by employers to their risk profile (Klein & Krohm, 2006).

at the dawn of the new millennium. Accordingly, Klein and Krohm (2006) posit that there are strong indications that workers' compensation systems in developed countries are gravitating towards privatisation and utilisation of pricing systems that seek to strengthen the link between risk and employer contributions. In 1996, the Netherlands privatised the sickness benefit component of its disability insurance programme and in 1998; experience rating became a feature of the disability insurance programme (Koning & Lindeboom, 2015). In Finland and Norway, private insurers insure the occupational risks defined in workers' compensation legislation (AISAM, 2004). Countries with separate funding structures for diseases and accidental injuries have also embraced the privatisation movement to the extent that their compensation systems represent a departure from the traditional format where the public sector tends to have a monopoly. It therefore appears that some countries are departing from this orthodox approach in favour of combining public and private sector participation in occupational health and safety in order to maximise social welfare and reduce costs. It has also been argued that involving the private sector helps the compensation system to adapt quickly to the ever-changing dynamics of the work environment and legal developments compared to public sector-driven ones (AISAM, 2004).

On the other hand, diseases and conventional insurance do not blend very well. Long latency diseases do not conform to most of the fundamental principles of insurance and therefore deserve a different funding approach along the lines of risk pools. In countries like the UK, where compulsory employer's liability insurance covers both accidental injuries and diseases, most insurers have historically regarded this liability insurance line as risky and unattractive (Parsons, 2002). This characterisation is mainly due to the presence of occupational diseases. The near-disaster at Lloyd's of London in the early 1990s provides further empirical support of the incompatibility of occupational diseases and orthodox insurance. The institution's problems were fundamentally rooted in environmental risks and long latency disease claims. Long latency occupational diseases effectively develop over the working life of the employee and some only become ascertainable when the employee has retired. Over this period, the employee may have changed jobs several times implying that any objectionable conduct leading to the development of the disease is not attributable to a single employer (Elser, 2010). In some cases, some of the employers who could have played a part in exposing the employee to hazardous working conditions may no longer be traceable. Therefore, the problems associated with proving causation, determining when the disease occurred, ascertaining who is

responsible and apportioning liability in cases involving multiple wrongdoers must be resolved first before insurance can respond to a claim. More often than not, litigation and its associated costs compound these problems further. All these problems cease to exist when compensation for diseases is separate through a public risk pool or some other similar arrangement.

There are several countries in Europe with separate funding methods for diseases and accidents. Notable among these are Belgium, Denmark and Portugal (Elser, 2010). In Belgium, employers are responsible for funding compensation for occupational injuries to their employees. Since 1971, the law requires employers to buy liability insurance for this risk (Philipsen, 2009). In return, employers are generally relieved of any civil liability in respect of occupational accidents for which they are required to have liability insurance. Occupational diseases fall under a separate fund (*Fonds des Maladies Professionnelles*) or FMP, a state-entity created for the sole purpose of providing insurance for occupational diseases (Munich Re, 2004a). Likewise, in Portugal, private insurers cover industrial accidents on a fully funded basis while a state pool operating on a pay-as-you-go basis caters for occupational diseases (Munich Re, 2002). In Denmark, both occupational injuries and diseases were at some point, covered by private insurance before the decision to leave occupational injuries with the private insurance market and transfer diseases to a separate institution formed by trade unions and employers' organisations (AISAM, 2004). This change implemented with effect from 1 January 1999, saw the establishment of an independent entity, the Labour Market Occupational Diseases Fund whose function is to administer compensation for occupational diseases (Munich Re, 2004a). Munich Re further states that the Danish compensation system is rather unique in terms of how the roles of public and private sector players are structured. Insurers do not partake in activities like claims adjudication and quantification. Instead, these roles go to a public entity, the National Industrial Injuries Board (or *Arbejdsskadestyrelsen*).

There are a number of reasons to believe that countries with different funding approaches for occupational diseases on the one hand, and accidental injuries on the other, may have found a sustainable way to manage this important public policy area. According to Munich Re (2012), two of the most critical future challenges to compensation systems for occupational risks are long tail risks (in the context of employment, these are invariably long latency occupational diseases) and catastrophic events affecting many workers at once, such as a natural disaster.

Furthermore, in those countries where industrial injuries and diseases fall under employer's liability insurance, serious questions arise about whether these portfolios are operating as optimally as they could.

Insurance contracts operate optimally when insurers have adequate information to assess and quantify risks covered in the pool. Information required to assess and quantify the risk of long latency disease is not only imperfect and difficult to find, it may be completely unavailable in some cases. When accidental injuries and diseases fall under the same pool, it amounts to pooling high and low risks together. In their seminal work Rothschild and Stiglitz (1976) demonstrated the impact of imperfect information on insurance markets and argue that when high risks are pooled together with low risk ones, the former represent an externality on the latter so much that under certain conditions, equilibrium may not exist at all. The high risks subsidise the low risks and the only thing that may eventually prevent low risks from exiting the pool is regulation that may restrict market competition. Otherwise, if the market for occupational risks was freely competitive, it is plausible that the market itself would provide an alternative coverage mechanism for low risks devoid of the externality exerted by high-risk individuals. Reduced to its logical conclusion, this could imply that a competitive market free from interference would develop separate risk pools for accidental injuries and diseases. Thus, countries that have separate funding structures for diseases and injuries have systems that largely conform to insurance economic theory.

Yet another reason to believe that separating funding for diseases from that for injuries is desirable lies in the nature of insurance as a risk transfer mechanism. Insurance depends on the principle of risk diversification. Implicit in this is that the risk covered by insurance must be capable of diversification. In insurance parlance, risk can be diversified and therefore insurable if it is pure. Risk is pure if it involves no possibility of gain and has some level of uncertainty about whether loss will occur and the size of that loss (Klein, 2014). This begs an obvious question – is long latency disease a pure risk? As pointed out earlier there are many reasons to doubt the purity of diseases as insurable risks. Their potential to be systemic can even cause the failure of insurance markets. Consider silicosis as an example. The rates of infection for this disease correlate with age and length of service (Nelson et al., 2010). This casts doubt about the disease as a pure risk because the longer someone works under conditions

where silica dust is present, the higher the probability that they are going to develop silicosis. Other diseases like tuberculosis are communicable, which further reinforces the presence of systemic risk. When employees work at the same mine under similar conditions, there is no stochastic independence at mine level and this in turn undermines efforts to pool long latency disease risks (Miranda & Glauber, 1997). The working conditions at one mine are likely to be more or less similar to those at any other mine due to regulatory and other compliance requirements.

It would be interesting to see how countries that separate funding for diseases and accidents compare with countries using other compensation methods. However, a few authors have provided positive reviews of compensation systems of countries where diseases are funded separately form occupational accidents. Commenting on the Belgian compensation system, Philipsen (2009) submits that in theory, the system contains some insurance-based incentives for the prevention of accidents. AISAM (2004) in its review of lessons learnt from privatisation efforts for statutory compensation programmes in Europe, submit that the decision to separate funding models for occupational diseases and accidental injuries, with the latter being handled through the private insurance market is a well-informed one which appears to have worked well in all countries where it has been adopted. Parsons (2002) argues that the compensation system used in countries like Belgium, Portugal and Denmark represents a sound division of risk and it offers a solution to most of the problems associated with compensation for occupational diseases. Parsons further observes that determining definitively whether or not some diseases are occupational or not is near impossible, proving causation is also another near-impossible task and where employer's liability insurance is used as is the case in the UK, the problems associated with long latency disease complicate risk pricing and reserving. Yet another point made by Parsons in support of the separation of occupational diseases from injuries is that both the tort system and the liability insurance system have empirically failed to effectively deal with occupational diseases.

Nowhere are these failures more apparent than the tort system of the USA. The system has proved to be woefully inadequate as a funding mechanism for long latency diseases. The RAND Corporation (2002) argues that from a policy standpoint, the American tort system, when analysed in the context of asbestos litigation, has failed to meet its oft-cited objectives of

providing optimum compensation to victims, deterring potential injurers and ensuring focused corrective justice. The deterrence and corrective justice arguments hold that liability and compensation rules must operate in such a way that those who play a role in exposing others to injury attract sanctions according to their relative culpability. However, asbestos litigation in America has shown that more often than not, this is not the case in practice. Instead, most of the litigation witnessed in recent years has targeted defendants whose culpability in asbestos exposure is both questionable and negligible (Barnes, 2007). This invariably is the case after the main culprits file for bankruptcy protection. Lawyers and judges have always found ways to extend the range of potential defendants to maximise recovery of compensation.

In conclusion, it is fair to say that the separation of occupational diseases from occupational injuries offers a number of distinct advantages and is therefore a policy option that looks promising. The main advantages it brings revolve around the role that incentives play in shaping the behaviour of employers and the benefits of competition and the pragmatic position that long latency diseases and accidental injuries are distinct risks deserving separate treatment. Although it can be argued that incentives can and often are built into public sector administrative process[381], often these are not scientifically linked to actual claims experiences of employers due to lack of administrative capacity (Klein & Krohm, 2006). On the other hand, benefits of competition in an area such as compensation for occupational risks with its long history of monopolistic public sector dominance can be hard to appreciate, and therefore easy to ignore. Another important point to note about treating diseases and occupational accidents as distinct pillars of the compensation system is that each pillar is allocated a funding method that is consistent with its risk characteristics and more focused controls can thereafter be applied. This avoids the one-jacket-fits-all approach that has caused compensation systems in many countries to suffer from fiscal stress. Long latency occupational diseases have unique risk features that require not only focused but also bespoke solutions for funding compensation to victims.

[381] Germany has a public workers' compensation system with significant accident prevention measures. It incorporates market forces into the compensation system. Empirical evidence suggests that this design is delivering substantial benefits for Germany (Philipsen, 2009).

7.7 Retaining and Reforming the Current System

A final policy option for funding compensation for occupational diseases relevant to South Africa is to retain the current system subject to the implementation of important reforms, aimed at making the system administratively cost efficient. This policy option starts from the simple premise that there are features of the existing compensation system worth retaining, and at the same time, there are other features of the existing system that are unsatisfactory. The unsatisfactory features need to be changed. In terms of cost, this option is likely to be the most affordable. It also has the added attraction of being less disruptive compared to introducing a completely new compensation regime. However, in order to implement the necessary reforms to improve the current system, government must avoid mistakes seen in other countries where sectarian interests have impeded the implementation of necessary reforms that are in the broader national interest.[382] When government fails to act in a particular policy area, it leaves room for sectarian interests to capture it. This is precisely what happened in the USA, in the area of asbestos compensation where judges and lawyers have dominated for years, due to government inertia (Barnes, 2007).

Several authors have written about the objectionable aspects of the current South African system for funding occupational risks in general. McCulloch (2009) provides a comparative analysis of benefit computation under COIDA and ODMWA and concludes that the former provides a better benefit structure than the latter. Roberts (2009) provides another comparison of the two statutes ODMWA and COIDA, and highlights a number of differences between them. One of these is that ODMWA pays lump sums based on wages while COIDA pays pensions if the degree of disablement exceeds the statutory threshold of 30%. Roberts also argues that the compensation system under ODMWA is discriminatory and operates as a state subsidy to the mining industry since most mineworkers who contract occupational diseases rely on the public health system. However, an interesting omission from the critique by Roberts, especially on the point of ODMWA not paying pensions, is that, mineworkers and trade unions have historically supported lump sums over pensions.[383] Murray et al. (2011) state

[382] For example, in the USA, federal government efforts to introduce legislation to govern spiraling asbestos litigation claims have fallen victim to sectarian interests, notwithstanding that there is not only broad consensus, but also overwhelming evidence suggesting that the current system has failed (Barnes, 2007). Even the courts have pleaded with the federal government to intervene, but to no avail.

[383] Nieuwenhuizen Commission Report (1981) para 4.36

that government has done nothing to implement its long-standing goal of improving compensation payable to mineworkers compared to what is paid to workers in general industry. Garzarelli et al. (2011) have identified potential incentive problems in the current system due to the presence of minimum wages in some sectors of the economy. The ODMWA system has other problems too, notably; a poor administrative framework, delays in the finalisation of claims[384] and poor benefits which in a majority of cases, are not adjusted for long periods even for something as obvious as inflation (Garzarelli et al., 2008). Administratively, the current system also contains some features deserving of improvement. COIDA falls under the Department of Labour while ODMWA falls under the Department of Health, and there is significant duplication of tasks as well.

To the objectionable features of the current compensation system identified above should be added two additional ones. The first is the introduction of common law claims against mine employers by the *Mankayi* litigation. This development has been described by some authors as "surprising" given that despite the long history of occupational diseases in South African mines common law claims against employers had until 2011, never been considered a viable way to fund compensation payable to those affected (McCulloch, 2011). The dismal failure of the common law to ensure that compensation is paid to deserving workers injured in the course of employment was the primary reason why it was dislodged by workers' compensation starting in the early 1900s. A corollary of using the common law to fund compensation payable to workers who contract diseases at work is litigation. Experience shows that this too hardly enhances the position of the worker, yet it is now a feature of the compensation system in mines. In the USA where litigation has been the preferred method of choice to address asbestos claims, this method has failed to produce the desired results (RAND Corporation, 2002; US Chamber of Commerce, 2005; Nell, 2006). A second objection of the current system is its weak incentive structure.

[384] As of September 2016 it was reported in the media that the ODMWA Compensation Fund for Occupational Diseases had a backlog of 106 000 approved claims with another estimated 400 000 claimants yet to be traced- Tamar Kahn "Fund has 106 000 mine workers that need to be paid out" available at: http://www.bdlive.co.za, accessed on 8 September 2016)

Structurally, the current two compensation pillars - one for the general industry and the other for diseases in the mines - differ in ways that defy even basic logic. To begin with, the desirability of maintaining two separate pieces of legislation dealing with a common issue is questionable. While there may have been reasons in the past to support this dual structure, it is submitted that the system has served its purpose and must be replaced by a consolidated and monolithic one governed by a singular legislative framework. For example, between the 1960s and the 1980s, mining was by far the most dominant economic sector in the South African economy with unparalleled contribution to the gross domestic product, employment creation and foreign exchange earnings. These and other considerations may have provided valid reasons for bespoke institutions and legislation for the sector. Today, things have changed significantly. Gold mining is an industry that is 'dying industry' (McCulloch, 2009:221). The dual compensation system is therefore neither justifiable nor consistent with economic imperatives for prudent public expenditure. The Nieuwenhuizen Commission of Inquiry into occupational diseases in South African mines questioned the dual structure in its 1981 report and this observation remains sound today.[385] It suggested that aspects of ODMWA could easily be incorporated in the then Workmen's Compensation Act 1941 thereby ridding the compensation system of duplication of tasks.

Chapter 3 indicated that the system provided under COIDA is a blend between personal accident and employer's liability insurance under a pure workers' compensation framework. Under the personal accident pillar, injured and sick workers get workers' compensation benefits on a no-fault basis. All that is required for a worker to get no-fault compensation under the personal accident pillar of COIDA is for a worker to meet the conditions set in the respective section governing compensation for occupational diseases.[386] The main requirement is that the disease in question must be occupational as defined by the legislation. In addition, an employee who meets the employer's liability conditions set in Section 56 of the Act can claim for increased compensation under the employer's liability pillar. Within this framework, the sick employee cannot sue the employer for damages. Consequently, COIDA integrates personal accident insurance and employer's liability insurance under a pure workers' compensation framework to the extent that fault of the employer attracts increased

[385] Nieuwenhuizen Commission Report, para 4.14
[386] The relevant section is section 65(1)(a)

compensation, but the employer gets protection from further civil liability towards an employee.

By contrast, the compensation system currently provided under ODMWA for mineworkers who contract diseases in the course of employment provides for the payment of no-fault workers' compensation benefits and in addition, allows common law claims against the employer. It is not clear how the two types of compensation actually work out in practice. For example, if an employee claims compensation under ODMWA and succeeds in a claim for damages against the employer, does the employee keep the amounts or the workers' compensation benefits would include workers' compensation when assessing damages. If the employee keeps the two amounts, does that not amount to double compensation? The court did not address these issues in the *Mankayi* judgement.

There is also the rather confusing aspect that in the case of accidental injury claims by mineworkers, these fall under COIDA since ODMWA only applies to diseases. Anyone familiar with how compensation systems that combine workers' compensation and common law liability are designed in other countries, would find it incomprehensible that the South African one bans mineworkers from suing their employers when they are injured, but allows them to do so when they contract diseases. Allowing mineworkers to sue employers for diseases in the face of all the problems discussed in Chapter 4 makes the logic behind this measure even more questionable. Does it mean that whatever vices that litigation against mine employers is supposed to cure only relates to diseases not accidents? After all, the concept of fault of an employer is the same whether it results in a disease or an accident. What is it about diseases that makes suing the employer desirable which is absent from an accident resulting in bodily injury? Occupational accidents and occupational diseases are two sides of the same coin - they are both occupational health and safety risks. One would therefore have thought that when it comes to remedial responses that they attract at a policy level, there should be no difference. Many would find it difficult to comprehend a policy response that provides that if workers contract a disease from employment, they can sue the employer, but if they have an accident they cannot.

The objectionable features of the current compensation system do not end there. Unlike COIDA, ODMWA has no provision for increased compensation and there is evidence that the author could find suggesting that attempts have been in the past to have this simple but important anomaly between the two Acts addressed. When people fail to address simple but important matters, their ability to find the right solutions to the more complex matters becomes questionable. In addition to this, is yet another structural problem with the compensation system under ODMWA. The system is rather too complicated. It requires the Commissioner for Occupational Diseases to administer four separate accounts; the state account, the mines account, the works account and the research account. This set up has proved so problematic in the past that courts had to clarify the responsibilities of various stakeholders to replenish these various accounts when they run into deficits.[387] Not only is such a cumbersome administrative structure undesirable, it is also unnecessary.

Nevertheless, all the objectionable aspects of the current system discussed up to this point pale in comparison to the fact that litigation is now an integral part of the compensation system for diseases in mines. Those familiar with the record of the common law as a method of funding compensation for occupational risks before the advent of workers' compensation and its propensity for litigation, would find this outcome from the *Mankayi* litigation particularly worrisome. In order to appreciate how litigation can operate to the detriment of those in need of compensation, it is perhaps helpful to put things into perspective. It is now nearly a decade since the Constitutional Court handed down its landmark judgment in March 2011. Even those that had never voiced their dissatisfaction with the system up to that point hailed the court's decision as a victory for mineworkers. However, the biggest irony in all this is that up to this point, mineworkers there is no indication that mineworkers are any closer to getting compensation through the litigation route opened by this judgment. In fact, the exact period it might take before results start to appear is uncertain. Critics of using the common law and litigation as a method for funding compensation for occupational diseases point to this, as well as other problems inherent in the whole process to support the argument that the common law system is not and never will be, an effective mechanism for funding compensation for long latency diseases. Its dismal record speaks for itself and even in present times, it continues to

[387] Chamber of Mines of South Africa v The Compensation Commissioner for Occupational Diseases. This case is discussed in Chapter 6.

disappoint. One cannot find evidence in contemporary literature or in practice supporting the view that the common law is a successful method for funding compensation for occupational diseases, even from countries that have used it for decades. In fact, the opposite is true. There is no reason to believe that the common law that South Africa has not used for more than a century and has failed to produce desirable results in other countries would suddenly be a panacea for the problem of long latency diseases in the mining industry.

A further limitation of seeking compensation through the common law and litigation that appears to be misunderstood is that such compensation is only available in those cases where fault on the part of the employer is present. On paper, this may look deceptively simple, but the reality is quite different in practice. The workplace is a very complex environment where multiple factors interact and when things go wrong, it is not always possible to attribute blame to a single party (Gaskins, 1990). Therefore, unless the courts are prepared to be more interventionist and devise new rules aimed at circumventing some of the practical problems that characterise the process of attributing fault, compensation will remain elusive. Even then, an interventionist approach by the courts makes the law uncertain and creates problems for other parties. For example, liability insurers find it difficult to operate in legal systems where liability rules are constantly changing because this makes it impossible to assess and estimate risk.

Notwithstanding the misgivings about the current South African compensation system for occupational injuries and diseases outlined above, it is fair to point out that the system has some positive features that can form a good platform for reform. The first of these features is the system provided under COIDA where personal accident combines with employer's liability insurance under a single workers' compensation framework. The personal accident component pays compensation on a no-fault basis while the employer's liability component pays increased compensation, based on fault of the employer or vice-employers, as defined in the Act. In theory, there should be no need for employers to face further liability since the system responds to occupational diseases on a no-fault, and to a limited extent, on a fault basis. No fault compensation is paid as of right and increased compensation is available if types of blameworthy conduct stipulated in the Act caused the disease sustained by the employee. If administered well, this setup can provide equitable compensation and remain affordable to

employers at the same time. No one can accuse such a system of being unfair because diseases caused by trade risks and fault of the employer or employee attract compensation as of right. In addition, if the disease was due to the fault of the employer or vice-employer, the system allows the affected worker to claim additional compensation. Therefore, in theory the system deals with fault of the employer by allowing the employee to claim more compensation.

However, merely retaining the blended system as currently provided under COIDA does not go far enough. In addition to retaining this framework, it is important that government address two additional, but critical issues by way of reform. The first is the need for the compensation system to incorporate clear, objective and effective incentives for employers to manage occupational health risks. The current provisions in COIDA dealing with this issue do not go far enough.[388] A closer look at the relevant section of the Act leads to the inescapable conclusion that notwithstanding the existence of a wide body of literature on the role of incentives in accident and disease prevention, the legislature does not appear to place much importance on this matter. The section in COIDA dealing with this matter is too thin on requirements and vague on substance. For example, all matters dealing with the question of when and how assessments paid by employers are adjustable to reflect actual claims experience or investments made to improve occupational health and safety are subject to the discretion of the DG. There are no concrete parameters set by the Act at all, on the circumstances under which an adjustment of assessments paid can occur. Furthermore, the Act does not impose any obligations on the DG to ensure that assessments paid by employers reflect their claims experience and initiative in accident and disease prevention. Instead, the Act only grants the DG a power to use his or her discretion on such an important matter with far-reaching implications on the efficiency and viability of the whole compensation system. The Act provides that where, in the DG's opinion, an employer's reported claims are higher or lower than normal, he or she "may" adjust the assessment paid or offer the employer a rebate respectively. How the claims experience of an employer is to be determined and at what intervals this is supposed to happen, is not clear. There seems to be an implicit assumption that the office of the DG has the requisite administrative and technical capacity to systematically

[388] This issue is dealt with under Section 85 of the Act

deal with these issues. However, empirical evidence, especially in contemporary South Africa, suggests that the validity of this assumption is highly questionable.[389]

A second critical issue that needs investigation and addressing, relates to the question discussed at length in Chapter 3: Why is it that only a tiny proportion of claims filed for increased compensation under the employer's liability component of the COIDA system are successful? It has been argued that statutory compensation provisions are supposed to be interpreted and applied liberally and in such a way that they enhance, rather than hinder, access to compensation by those who qualify to be compensated.[390] Because of the overall social security orientation of COIDA, there should be as few obstacles as possible placed before workers who need increased compensation where negligence of the employer is present. Courts have also held that the provision allowing payment of increased compensation is remedial in nature and requires a liberal interpretation to maximise returns to claimants.[391] However, empirical results as determined from the annual reports of the Compensation Fund paint a disappointing picture to the extent that many claims for increased compensation are not successful. It is questionable whether this component of the COIDA compensation framework is actually serving its intended purpose. It could not have been the intention of the legislature that the provision should exist on paper only without producing any meaningful results, which appears to be the case at present.

One plausible explanation for the insignificant number of claims for increased compensation that succeed is how the defence of contributory negligence applies to these claims. In most countries where this defence is recognised, it falls under legislation. South Africa is no exception. In South Africa, the legislation in question is the Apportionment of Damages Act of 1956. This Act provides for the apportionment of damages where the harm suffered by a claimant is partly due to his or her own fault. This legislative conceptualisation of contributory negligence represents a departure from the common law where apportionment of blame and

[389] For example, in Chapter 6 section 6.2, several local cases are discussed which illustrate how public officials tasked with running administrative agencies often fail to discharge their mandate, due to incompetence or complexity of the task in question.

[390] Mushai, A & Vivian, R.W (2012) "Sex, injury and workers' compensation" *SHEQ Management* May/June 2012, 10-11

[391] See: *Looyen v Simmer & Jack Mines (Pty) Ltd,* (supra)

hence damages, is not recognised under the "all or nothing" principle (Neethling, Potgieter & Visser, 2015). Under this principle, a claimant is entitled to all the compensation for the harm suffered or nothing at all. The Apportionment of Damages Act varied this common law position by allowing apportionment of damages in proportion to the degree of fault demonstrated by the parties. It applies, with few exceptions, to all situations where contributory negligence exists. Claims for increased compensation under COIDA represent one of those few exceptions. Consequently, a claim for increased compensation can be defeated in its entirety if it the worker was also negligent. The claimant's degree of culpability is irrelevant. Courts have endorsed this interpretation by holding that contributory negligence on the part of the injured worker is a complete defence to a claim for increased compensation.[392] Therefore, under COIDA, contributory negligence is conceptualised not from a statutory standpoint, but from a pure common law perspective where its practical results are to defeat most claims for increased compensation. It constitutes a complete defence available to the employer. As seen in Chapter 2, contributory negligence was one of the three defences available to employers at common law that accounted for most injured employees going without compensation culminating in the introduction of statutory compensation.

The application of the contributory negligence defence in claims for increased compensation under Section 56 of COIDA is inconsistent with the view expressed by the courts that the this provision should be viewed as remedial in nature deserving of liberal interpretation in order to allow as many employees as possible to benefit from it.[393] This is impossible to achieve if features of the common law like the recognition of contributory negligence as a complete defence remain an integral part of this provision. In theory, the increased compensation provision is an attractive feature of the system but its practical efficacy diminishes significantly due to the application of the common law notion of contributory negligence. Proving fault of the employer has historically undermined the ability of injured workers to access compensation anyway, hence the necessity for complicating things even further by incorporating the common law notion of contributory negligence into claims for increased compensation is debatable. It is difficult to see why the common law and not the statutory notion of contributory negligence is preferable for dealing with claims for increased compensation yet in all other cases outside

[392] *Fred Saber (Pty) Ltd v Franks 1949 (1) SA 388 (AD)* and *S.A.R & Harbours v Stoltz,* (supra)
[393] *Looyen v Simmer & Jack Mines,* (supra)

of occupational injuries and diseases the reverse is true. It is not surprising that most claims for increased compensation do not succeed.

Yet another feature of the current compensation system under COIDA that commendable is the payment of pensions for permanent disablement (PD) based on the degree of disability sustained by the worker. If ever there was a situation where lump sums are not ideal, it is for compensating workers who contract occupational diseases. In a majority of cases, diseases have a mortal impact on the working career of an employee. Furthermore, some diseases, like silicosis, are incurable. The only option is to manage the disease once an employee contracts it. This entails long-term care. In addition, it is more difficult to assess the long-term impact of an incurable disease such as silicosis, than an injury. The payment of lump sums under the current system is also anomalous in that the lump sums paid under ODMWA are not earnings-related but depend on the degree of functional impairment to the affected worker as determined by the certification committee. On top of this is the obvious problem that lump sums are vulnerable to misuse. Finally, and perhaps more crucially, it is virtually impossible to integrate lump sums into other social security programmes of a country since they are a once-off payment. For example, in South Africa, there is the state old age grant that is payable to men and women from age 60 on a means-test basis (Casey & McKinnon, 2009).[394] If an employee who is injured or diagnosed with an occupational disease gets a lump sum and squanders it, chances are that the same employee would look to the state old age grant for support. On the other hand, if the employee gets a pension, the state old age grant can augment what the employee gets under workers' compensation, something that is clearly in the employee's best interest.

There is yet another reason why pensions are more desirable than lump sums that not many people appear to understand. When a disability produces functional impairment, the quality of life of the victim changes. By paying the victim pension benefits for life, it is an attempt to compensate the change in the quality of life over the entire lifespan of the affected person. A lump sum does not achieve that to the extent that the duration of its enjoyment is indeterminable. In other words, there is no mechanism for linking a lump sum to how long the

[394] Before 2008 the state old age grant was paid to women from the age of 60 and to men aged 65 and above.

recipient will live. By contrast, pension payments are linked to longevity risk making them more secure than lump sums.

Strangely, mineworkers and their trade union representatives are on record as having been strongly opposed to the payment of compensation for occupational diseases in the form of pensions and for expressing strong preference for lump sums. For example, during the 1981 Nieuwenhuizen Commission of Inquiry into Compensation for Occupational Diseases deliberations, both mineworkers and the Mineworkers Union came out in strong support of the payment of lump sums to occupational disease victims. According to the commission's report, the general view from the workers and their trade union representatives was that lump sums payable under ODMWA offered better security than pensions payable under the now repealed Workmen's Compensation Act of 1941 which depend on an employee's life expectancy and the period for which benefits remain payable to dependents.[395] It is difficult to see how a benefit payment option that exposes the proceeds to the possibility of misuse can offer better security than the one that is devoid of that possibility. Not surprisingly, the commission disagreed with the reasoning of the workers and their union and instead, expressed the view that paying pensions was a better option than paying lump sums.[396] However, the main challenge with paying disability benefits as a pension lies in ensuring that these benefits remain realistic and are not eroded by inflation to the extent of being useless. If those responsible for administering the compensation system avoid this pitfall, it is difficult to argue against payment of disability benefits as pensions.

Further to the foregoing, the reasoning that lump sums offer better security than pensions also appears to lack empirical support. The few cross-country studies conducted on how disability benefits for occupational diseases and injuries are paid show that in most countries, pensions are preferred once the degree of functional disability exceeds a certain level. **Table 2** below shows how disability benefits are assessed in South Africa compared to other selected countries. In as far as the general industry is concerned, South Africa is in line with the rest of the world.

[395] Nieuwenhuizen Commission Report (1981) para 4.28
[396] Nieuwenhuizen Commission Report para 6.1.1.7

Table 2: Approaches to Assessing Disability under Workers' Compensation in Selected Countries

Country	**Level of Permanent Disability**	**Type of Benefit**
Belgium	n/a	Only pensions are paid, no lump sums
Colombia	5-50% >50%	Lump sum Pension
Denmark	≤15% >15%	Lump sum Pension
France	≤10% >10%	Lump sum Pension
Germany	≤20% >20%	Lump sum Pension
Italy	≤11% >11%	Lump sum Pension
Norway	n/a	Only lump sums are paid when PD ≥15%
South Africa	≤30% >30%	Lump sum Pension
Spain	≤33% >33%	Lump sum Pension
Switzerland	≤10% >10%	Lump sum Pension
UK	≤14% >14%	Lump sum Pension

[Source: Munich Re, 2004a]

It should however be pointed out that as far as South Africa is concerned, the position represented in Table above only relates to the general industry. ODMWA compensation pays lump sums only.

As noted previously in this chapter, there have been reports that appear to suggest that the South African government is beginning to warm to the idea of reviewing the current compensation system with consolidating the current legislation being one of the issues under consideration.[397] The initiative is has the support of all major stakeholders; the government, the South African Chamber of Mines and trade unions. However, and as demonstrated in this section, fragmented legislation is not the only objectionable aspect of the compensation system as it currently stands. Other aspects, such as the litigation sanctioned by the *Mankayi* judgment,

[397] Section 6.2

the efficacy of increased compensation under COIDA, incentives for employers to prevent accidents and diseases as well as ensuring that benefits paid are fair and realistic, among others, also need attention. The proposed review must therefore be comprehensive and guided by empirical evidence of what has and has not worked elsewhere in the world, taking into account idiosyncratic conditions. For example, silicosis levels in South Africa are without parallel anywhere in the world. Hence, merely reviewing the current system without linking the task to this local challenge will not produce the desired results. Nevertheless, among all the policy options available, reforming the current framework is the most preferable because not only is it the least disruptive option, it is the most economical too. While others like assigning different funding structures for diseases and accidents have strong economic and efficiency appeal, there simply is not enough political will in contemporary South Africa at present for the adoption of a policy measure with such a significant private sector dimension.

7.8 Conclusion

The primary purpose of this chapter was to evaluate the policy options that available to South Africa for funding compensation for occupational diseases. A number of policy options exist each with its own economic social and political implications. Some are more feasible than others for reasons of ideology and cost. The policy options for funding compensation for occupational diseases that were evaluated in this chapter are: use of pure workers' compensation (as defined); private employer's liability insurance; blending workers' compensation and common law liability; assigning different funding structures for occupational diseases and accidental injuries; and retaining the current setup, subject to the adoption of significant reforms. Evidence from other countries helped in the assessment of each of these policy measures to illustrate how they have performed in those countries.

Countries with pure statutory compensation systems, such as Germany, have managed to integrate some market elements into them to good effect. Most importantly, pure statutory systems offer the advantages of stability and certainty. Likewise, the few countries that have taken the bold step of separating funding for occupational diseases from that for accidents have also earned positive reviews from a number of authors on the performance of their systems. In

particular, these countries have managed to assign compensation for accidents to insurance markets and in the process, benefit from competition and other efficiency-related spillovers associated with it and at the same time, avoid all the problems concerning the assignment of liability for diseases by using a liability-neutral funding approach for them. Although this funding option has strong economic and efficiency appeal, social security considerations often overshadow these qualities. On the other hand, combining workers' compensation with common law liability burdens the compensation system with high costs from litigation on the common law side. These costs have been so high in some cases that any potential benefits that can, in theory, flow from common law liability such as deterrence, become questionable. On top of that is yet another more worrisome feature of combining workers' compensation with common law liability whereby a greater proportion of the awards coming out of the common law through the litigation process end up in the pockets not of the injured claimants but of third parties. Finally, the efficacy of retaining and reforming the existing compensation system stands out as the most feasible and cost-effective for South Africa. Reforms must focus on minimising litigation, rationalising the legislative environment, incorporating an effective incentive structure and making benefits fair and realistic.

8 CHAPTER 8: CONCLUSION AND RECOMMENDATIONS

8.1 Event

This study sought to illustrate the unsuitability of the common law to fund compensation for long latency diseases following the Constitutional Court's decision in 2011 to allow mineworkers to sue their employers in delict. The court's decision caught many by surprise. Before this judgement, the official position held that employees had no common law claim for damages against employers arising out of occupational accidents or diseases since this cause of action does not exist under existing workers' compensation legislation. Both the High Court and Supreme Court of Appeal confirmed this view. The view was so entrenched that the plaintiff in the Mankayi case could not find an advocate to argue his case in the Constitutional Court. Seven years have since passed and to date, the courts have not yet ruled in a case involving damages for occupational diseases. Mankayi, the plaintiff in the case, died a few days before the judgement, courts have certified several class actions and a number of mining companies have agreed out of court settlements. Other class actions are pending. It is clear the current state of affairs is unsatisfactory and a sustainable way of resolving this matter needs is necessary. In addition to illustrating the unsuitability of the common law, this thesis evaluates the various options for compensating victims of long latency occupational diseases

8.2 Inadequacy of the Common Law as a Compensation System (1837 - 1880)

The *Mankayi* judgement opened the door to common law actions for compensation. This is of course the position where it all started in 1837 with the decision in *Priestly* case (supra). Right from the very beginning, it was realised that the common law was hopelessly inadequate as a mechanism for providing compensation for occupational injuries, let alone diseases. Almost immediately, reforms to the common law with respect to employees were necessary. The notion that the common law can work as a mechanism to provide compensation for occupational accidents, let alone diseases, first became problematic nearly 200 years ago and there is no point in attempting to elevate the common law to a compensation system now. The evolution of workers' compensation into a global phenomenon confirms this. It is clear that

the door opened with the *Mankayi* case can at best be a temporary opening paving the way to a more permanent and sustainable solution.

8.3 Inadequacy of a Modified Common Law System (1880-1897)

The UK solution to the limitations of the common-law as a compensation system was to attempt to modify the common law to enable employees to access compensation which culminated with the passing of the Employer' Liability Act of 1880. This in itself was problematic. The law is at its best when it is of general application. It is thus problematic to have one law for injured employees and another for other injured persons. However, the UK employment reforms reflected the concerns of the age where limitation to working hours, protection of women and prohibition of child labour, safety conditions in the workplace, and lifting restrictions against forming trade unions were the order of the day. The Employer's Liability Act of 1880 has to be seen against this background.

These reforms proved to be inadequate with respect to occupational accidents. Occupational diseases are much more difficult to deal with in terms of the common law. If the reforms were inadequate to deal with occupational accidents, they would be hopelessly inadequate to deal with the complex matter of long latency occupational diseases as the UK courts have subsequently found. It is unlikely that the common law is capable of successful modification to, in any form, adequately deal with long latency occupational diseases. Therefore, modifying or, as is commonly said, developing the common law to deal with occupational diseases does not represent a viable option deserving of any serious consideration. Thus, even with the progressive reforms of 1880, the reformed common law proved inadequate making the introduction of workers' compensation legislation inevitable. The UK did not decide to prohibit common law actions but allowed the reformed common law and worker's compensation to co-exist. Both the reformed common law and workers' compensation operate under the auspices of legislation. What is often not well-publisised and should be emphasised is that in South Africa, both forms also co-exist except that the common law claims are contained within the worker's compensation legislation, currently s56 of COIDA. This is important since the system aims to internalise worker's compensation risks, resulting in

certainty. If correctly implemented, the employer pays the levy; having done so, certainty replaces uncertainty. Workers compensation, if correctly implemented and backed by the right incentives, achieves the optimum economic outcome.

Therefore, the common law even if reformed to reflect idiosyncrasies of the workplace, will still be inadequate. Reforming the common law as attempted in 1880 in the UK will not provide a solution to occupational diseases in the mining industry. The experiment to reform the common in UK lasted for 17 years. Some US states tried the same solution of reforming the common law and like the UK, came to the same realization.

8.4 Inadequacy of the Common Law backed by Optional Private Insurance

Another option is to retain the common law, and use optional insurance to cover the liability arising therefrom. This option has not seriously been considered and for good reason. Nowadays, employer's liability insurance contracts available in South Africa and other developing markets exclude occupational diseases, especially those with long latency periods that tend to develop gradually. A specialist market may well develop to cover them. This option nearly caused the insolvency of the entire Lloyd's insurance market. In any event, the purchase of insurance would have to become compulsory or many, particularly smaller companies, would not insure the risk and could face insolvency. Because of the complexity of occupational diseases, any solution involving the common law as a remedy is unlikely to work in the end.

8.5 Inadequacy of the Common Law Backed by Compulsory Insurance

This is the initial system, upon which victims of road accidents received compensation in South Africa dating back to 1942. It proved to be unsatisfactory and after a while, the state established a fund to re-insure the risk. This system is unlikely to work for occupational accidents and diseases and it is unlikely there will be any enthusiasm to try this again. Further, since the basis of this system is the common law, this too is unlikely to avoid the same problems the common

is associated with, particularly given the complexities of long latency occupational diseases as a risk. Because of problems with this system, the South African road accident system evolved to the current system that is run by the government via an agency. Nevertheless, the current bodily injury compensation system for road accidents has become victim to the principal-agent problem and excessive litigation that have seriously undermined the viability of the state agency. Given this experience, no one would imagine that the same system could work for long latency diseases.

8.6 The Common Law with a State Fund

The road accident fund eventually evolved into a state fund applying common law rules to compensate victims of road accidents. This system has proved to be inadequate in many respects. As things stand, government is in the process of replacing this system with a strict liability system, modelled on workers' compensation. Changing the road accident fund from a common law-based system to a strict liability system is highly significant and confirms a central thesis of this study. Under the common law regime. The road accident fund fell victim to "over-lawyering" and excessive litigation and in the process, its viability was undermined. The fund is technically insolvent and on at least one occasion, has seen its accounts frozen by the courts for failure to pay compensation on time. Government has no other option than to reform it from a common law-based institution into something more sustainable. Given the problems seen in the road accident fund, there will be little, if any, support for the use of this option as a compensation method for long latency occupational diseases in particular.

8.7 The Common Law and Class Actions

This is the position created by the *Mankayi* litigation. What has happened to the whole mining industry in South Africa is what happened in the asbestos matter which started in the UK as a case in which eventually 7 500 claimants were found and R2.1bn was claimed. When Cape plc indicated it faced insolvency, the matter transferred seamlessly to South Africa ending up with a settlement of R411m. This system is clearly unsuccessful for a number of reasons. Firstly, it does not produce certainty. Companies face unfunded uncertain liabilities years after

the event. This risk is not internalised as a known cost of production. Secondly, the court never decides if the individual employees meet the criteria for compensation. It is impractical for the court to deal with 7 500 claimants and in total, hundreds of thousands of cases. Only an administrative process can deal with mass-claims of this nature. It is for this reason that lawyers attempt to get employers to set up a trust as happened in the asbestos case and is currently happening with the silicosis matter. The same practice has also been common in America with asbestos litigation.

If trust funds turn out to be the way to deal with silicosis claims, it amounts to workers' compensation does. In the end, the system of forming trust funds becomes a workers' compensation system via the back door. The same outcome is achievable by simply transferring the problem to the workers' compensation system. Thirdly, the American experience has shown that trusts and class actions are subject to abuse; economically speaking, they can easily become a victim of the principal-agent problem. They can also inflict a lot of institutional damage to the firms targeted and in turn, this can have adverse economic and social consequences. Finally, as has happened with the Asbestos Relief Fund where after claiming an initial R2.1bn, final settlement was R411m, ten years later R400m remains and the fund becomes subject to what in South African is called capture. In one of the trust's annual reports, the trustees reported that they were under pressure from public officials to disburse funds outside of the provision of the trust. This system will result in a host of unmonitored trust funds coming into existence after decades of litigation many of which may end up captured. In any event, this system still depends on the common law that is unworkable in the case of compensation for long latency diseases.

8.8 Integrating the Worker's Compensation Legislation and Reforms

The UK, having found that the common law even if reformed, remained inadequate as a compensation system for occupational injuries, followed the German example and introduced workers' compensation. Workers' compensation proved to be the most satisfactory solution as seen from its adoption virtually though out the modern world. The only viable solution is to ensure that occupational diseases form an integral part of the workers' compensation system. In other words, the most effective way to dealing with compensation for occupational diseases

is to ensure that the cost of compensating those affected by them is internalised. In order to realise the goal of internalising costs of diseases and in the process making them a cost of production, there should be a single holistic system dealing with occupational accidents and diseases. That way, the system becomes simple and avoids unnecessary duplication of effort as seen in the USA in connection with firm-level bankruptcy trusts. In particular, single and holistic legislation also avoids anomalous situations such as that currently obtaining in South Africa where compensation options depend on the sector in which one work. In addition, the system requires an effective and objective incentive structure where contributions relate to efforts by employers to prevent diseases in mines. Workers' compensation is therefore the only workable solution to the problem of long latency occupational diseases in South Africa. Suing the employer has never worked and continues to disappoint. Any attempt to make the common law a part of the South African compensation landscape for occupational diseases must be understood in the light of the economic damage that can arise as evidenced by what happened at Lloyd's and in America. Attempts to use the common law must have regard to current UK jurisprudence on the matter showing that using the common law on long latency diseases literally requires the development of new jurisprudence. The Constitutional Court said a lot in the *Mankayi* case about constitutionalism but as Antonin Scalia (1936-2016) once aptly said: "A law can be both economic folly and constitutional".

8.9 Recommendations

Therefore, this thesis recommends that:

(a) Compensation for occupational diseases ought to be placed under a unified workers' compensation system in terms of a single Act of parliament.

This recommendation is not novel. It appeared in the past but nothing came of it. The *Mankayi* judgment is the consequence firstly of this inexplicable inaction. The Erasmus (1976) and Nieuwenhuizen Commissions (1981) made the same recommendation. The mandate of the Erasmus Commission (1976) did not include compensation for occupational diseases but a central concern and finding of that commission was the vast array of legislation, much of it overlapping and unclear, dealing with occupational health issues in South Africa. This central concern is well founded and no doubt, in general, is unavoidable. There is no reason why there

should be different workers' compensation Acts instead of one. The historical reason for the existence of ODMWA has long since passed. There is no need to deal with compensation for occupational diseases in two pieces of legislation, each having its own infrastructure. If accidents, regardless of occupation fall under COIDA; there is no need for two acts to deal with occupational diseases. Much of ODMWA can be incorporated within the single compensation Act which itself can be revised to deal with the occupational diseases problem in a clearer and administratively more efficient manner.

(b) There is need for improved and consistent communication between Government, Labour and the Private Sector on workers' compensation issues.

The root of the current problem is inadequate communication and discussion between government, labour and the private sector on worker's compensation issues. It is clear to anyone who cares to examine the matter that the lump sum compensation payable in terms of ODMWA is inadequate and no longer suitable. This inadequacy triggered the *Mankayi* litigation. Evidence from other countries shows that even where worker's compensation exists alongside common law liability workers are less inclined to resort to common law actions if benefits paid under workers' compensation are fair and realistic. When compensation for occupational diseases first came into being more than one hundred years ago, South Africa was a forerunner in the field. Over the decades, it has fallen behind. It was possible to avoid the current problems if the three parties had paid more attention to workers' compensation issues. Nedlac is an appropriate forum for this. This entire problem was avoidable if the issues had received attention earlier.

(c) Better education on workers' compensation issues

Workers' compensation is one of the great success stories internationally and in South Africa. The fact that virtually every country in the world has adopted it in one form or another is ample evidence of this. Part of the current problem, especially in South Africa, is that it is no longer well known. In particular, the fundamental premise on which the workers' compensation philosophy rests appears to even less understood, especially by public officials and those tasked to run the system. Therefore, increased effort is required to increase public awareness of the success of workers' compensation. That way, workers in particular, become less inclined to believe claims that the system of suing the employer for damages at common law works to their best interest. History has long discredited this notion and it is incomprehensible that one hundred years after this vital historical insight there appears to be a belief in contemporary

society that the common law can be an effective mechanism for compensating victims of occupational disease. Seven years after the ruling by Constitutional Court, not a single case has been finalised via the common law avenue that the court opened. This alone says a lot about the common law as a compensation system.

(d) Better management of benefits and incentives under workers' compensation

There is need to ensure that benefits are reviewed systematically to keep them at realistic levels. This is critical not only for the credibility of the compensation system in general, but for the welfare of beneficiaries as well. Regardless of the perspective from which one looks at it, the compensation paid to Mankayi relative to his service and medical condition was a mockery of equity. In addition, there is need for incentives incorporated into the workers' compensation system for purposes of preventing accidents and diseases in particular to be managed in a more scientific and objective manner. This is because incentives play a critical role in shaping the behaviour of employers. Disease rates in mines continue to be a concern notwithstanding the existence of what many consider as comprehensive legislation on occupational health and safety. Therefore, it is clear that regulation alone is not enough. Regulation needs the support of an effective incentive regime.

(e) Litigation within the workers' compensation system should be minimised

Workers' compensation is an administrative process designed to guarantee compensation at minimal cost. Litigation is one of the factors that can cause costs to the system to spiral out of control. Absence or presence of litigation in a compensation system depends on the design and structure of the system. Empirical evidence shows that if a workers' compensation system falls under the burden of excessive litigation, it compromises its efficiency and ability to meet the needs of victims of long latency disease. In addition, litigation hardly works in the interest of occupational disease claimants and often turns out to be ruinous even to those who may have won the lawsuit. The French philosopher, Voltaire (1694-1778), aptly summed up what can happen in such situations when he wrote; "I was never ruined but twice: Once when I lost a lawsuit and once when I won one".

8.10 Contributions and Theoretical/Policy Implications

A common belief is that the common law can work as a mechanism for compensating victims of long latency disease. Among those who share this belief is the South African Constitutional Court. In its *Mankayi* judgement of March 2011, there is an unmistakable perspective that by allowing mineworkers to sue their employers for occupational disease, it represents fairness and justice to them. Many other people share this view including civic and labour organisations. The *Mankayi* judgement was celebrated as representing justice for mineworkers following decades of injustice. However, this thesis has shown that it is virtually impossible to apply the common law in theory and practice to determine compensation payable to victims of long latency disease. In theory elements of delict, particularly causation do not fit the developmental profile of long latency diseases. Even the conceptualisation of something seemingly straightforward as harm presents problems in occupational disease claims as seen from the debate on pleural plaques. Common law principles are also difficult to apply in practice. This is evident if one looks at UK jurisprudence on the matter dating back to the 1950s. The jurisprudence reveals a clear pattern; the common in its true sense hardly produces compensation in long latency disease claims. In the UK, its use is at the expense of extensive litigation and the development of new rules seeking to bend the unresponsive common law ones. The material contribution principle developed in the 1950s sought to obviate the problem of proving causation. Not long thereafter, the same principle proved unsuitable to prove causation in non-progressive diseases like mesothelioma prompting the courts to develop yet another principle, that of increasing the risk of injury. As science continues to develop, weaknesses of the common as a compensation mechanism for long latency diseases also continue to develop. As a response, new rules continue to emerge compounding lack of certainty. Workers' compensation eliminates most of these problems.

In addition, use of the common law as a compensation mechanism for long latency diseases creates other practical problems that in aggregate worsens rather than enhance the position of victims and institutions upon which the responsibility to pay damages rests. The common law is vulnerable to the principal-agent problem and creates externalities for others. Litigation associated with the common law saw many firms filing for bankruptcy in the USA at immeasurable economic and social cost. The common law also fails to internalise costs

associated with compensation paid. An emerging pattern from suing firms at common law for diseases that started in the USA with asbestos litigation and then spread to South Africa is the formation of trusts by companies found liable. The proliferation of trusts brings an array of problems. However, above all else, end up purporting to do the same thing that workers' compensation does.

In South Africa, policymakers appear to be unaware of the limitations of the common or to downplay them. Either way, this could turn out to be a costly mistake. At a time when the rest of the world is moving towards single-peak regulatory systems, South Africa appears to be going in the opposite direction. Most countries are working towards making their compensation systems as integrated as possible to rid them of deadweight losses by making their compensation systems as integrated as possible. The need for this could not be greater in South Africa where plans are underway to introduce national health insurance. This requires alignment of the compensation system for long latency diseases with the healthcare system. It is impossible to achieve this alignment under the current compensation frameworks for diseases that are highly fragmented. The mining industry has its own compensation framework separate from that for the general industry.

Policymakers need to learn from experiences of other countries. This thesis provides a platform for making informed choices on the question of compensation for occupational diseases. The thesis does not claim that all the problems arising from use of the common to compensate victims of long latency disease will happen in South Africa in connection with silicosis claims. On the contrary, the thesis points to what can happen with a view to helping those on whom the responsibility to make choices on this matter rests.

8.11 Limitations of the Study

A noteworthy limitation of this study is the dearth of local precedents on compensation for occupational diseases at common law both before the landmark 2011 Constitutional Court judgement and after. Availability of such precedents could have enhanced the analysis in a number of respects. Firstly, the precedents could have provided vital insights into the liability

rules that local courts would employ to overcome the numerous legal and evidentiary obstacles that typify the use of the common law as a mechanism for compensating victims of long latency occupational disease. Secondly, availability of local precedent could also have provided an important reference for the further critical appraisal of the common law as a compensation mechanism for long latency disease. To overcome this limitation, the study primarily used jurisprudence from the UK as a proxy for local case law to highlight the nature and complexity of issues and problems that can arise when the common law is applied to the area of compensation for long latency occupational diseases. Even though the English and Roman Dutch common laws share some legal principles and doctrines, the context within which the court makes a decision is also vital and from that perspective, local precedents would have been beneficial. Even though most of issues and problems that UK jurisprudence revealed over the years are more likely to arise in South Africa when the common law is used to compensate victims of long latency disease, contextual factors may influence some of the decisions that courts arrive at and the significance of this cannot be underestimated.

8.12 Areas for Further Research

This study covers a wide range of issues around the question of compensation for occupational diseases at common law and under the workers' compensation principle. One area of importance that warrants further research is that relating to the externality aspects of compensation for occupational diseases under the common law and the extent to which workers' compensation could be a superior mechanism of compensation in this regard. Some of the deadweight losses that the common law generates when used in compensating workers with occupational diseases are borne by people with nothing to with the underlying transactions from which those losses arise. On the other hand, workers' compensation appears to minimise deadweight losses generated by externalities of this nature. This area is particularly important in the context of South Africa's introduction of the common law as a compensation mechanism for the mining industry. It would also be interesting to do some empirical work on the stock market reaction to the *Mankayi* judgement to determine if investors priced the uncertainty that the judgement created.

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APPENDICES

APPENDIX 1

Adoption of workers' compensation in selected countries and in the USA (1884-1948)

Year of first enactment	Country	Effective date
1884	Germany	1884
1887	Austria	1887
1894	Norway	1894
1895	Finland	1895
1897	England	1897
1898	Denmark, Italy, France, Switzerland	Varies from country to country
1900	Spain, New Zealand, South Australia	Varies from country to country
1901	Netherlands, Greece, Sweden	Varies from country to country
1902	Western Australia, British Columbia	Varies from country to country
1903	Russia, Belgium	-
1905	Cape of Good Hope, Queensland	Varies from country to country
1906	Venezuela	-
1907	Transvaal	1907
1911	Peru, Japan	-
1914	Union of South Africa	1914
1915	Argentina, Colombia	-
1916	Chile, Cuba	-
1928	Zimbabwe	1928
1929	Zambia	1929
1931	Mauritius	-
1941	Namibia	1941
1948	Tanzania	1948

[Source: Blanchard, 1917; Fultz & Pieris, 1999]

Enactment of Statutory Compensation Laws in the USA (1902-1948)

Year of first enactment	State	Effective date
1902	Maryland	1902
1908	United States	1908
1909	Massachusetts, Montana	1910
1910	New York	1910
1911	Nevada, New Jersey, California, Wisconsin, Washington	1911
1911	New Hampshire, Ohio, Kansas, Illinois	1912
1912	Michigan, Arizona, Rhode Island	1912
1913	Oregon, Nebraska, Minnesota, Texas, West Virginia	1913
1913	Connecticut, Iowa	1914
1914	Louisiana, Kentucky	1914
1915	Colorado, Indiana, Maine, Oklahoma, Pennsylvania, Vermont, Wyoming	Varies from state to state
1917	Delaware, Idaho, New Mexico, South Dakota, Utah	Varies from state to state
1918	Virginia	-
1919	Alabama, Missouri, North Dakota, Tennessee	Varies from state to state
1920	Georgia	-
1929	North Carolina	-
1935	Florida, South Carolina	-
1939	Arkansas	-
1948	Mississippi	-

[Rubinow, 1913; Fishback & Kantor, 1998]

Some of the laws failed the constitutional challenges in the courts while others failed to gather sufficient votes in national referendums. This further delayed their effective dates. For example, it was only in 1926 that voters in Missouri approved the workers' compensation law even though it first appeared in 1919 (Fishback & Kantor, 1998).

APPENDIX 2

Silicosis Rates among Black South African Gold Miners (2002-2016)

YEAR	RATE PER 1000 AUTOPSIES	RATE AS A %
2002	252	25.2
2003	250	25.0
2004	277	27.7
2005	216	21.6
2006	237	23.7
2007	229	22.9
2008	216	21.6
2009	354	35.4
2010	378	37.8
2011	362	36.2
2012	396	39.6
2013	361	36.1
2014	374	37.4
2015	367	36.7
2016	416	41.6

[Source: SANIOH Pathology Disease Surveillance Reports 2002-2016**]**

APPENDIX 3

Pulmonary TB Rates among Black Gold and Platinum South African Miners (2002-2016)

YEAR	OCCUPATION	DISEASE RATE PER 1000 AUTOPSIES	RATE AS A %
2002	Gold mining	274	27.4
	Platinum mining	383	38.3
2003	Gold mining	328	32.8
	Platinum mining	305	30.5
2004	Gold mining	341	34.1
	Platinum mining	310	31.0
2005	Gold mining	348	34.8
	Platinum mining	315	31.5
2006	Gold mining	379	37.9
	Platinum mining	275	27.5
2007	Gold mining	406	40.6
	Platinum mining	335	33.5
2008	Gold mining	437	43.7
	Platinum mining	315	31.5
2009	Gold mining	356	35.6
	Platinum mining	360	36.0
2010	Gold mining	384	38.4
	Platinum mining	289	28.9
2011	Gold mining	346	34.6
	Platinum mining	262	26.2
2012	Gold mining	352	35.2
	Platinum mining	235	23.5
2013	Gold mining	265	26.5
	Platinum mining	199	19.9
2014	Gold mining	305	30.5
	Platinum mining	242	24.2
2015	Gold mining	274	27.4
	Platinum mining	215	21.5
2016	Gold mining	247	24.7
	Platinum mining	189	18.9

[Source: SANIOH Pathology Disease Surveillance Reports 2002-2016]

APPENDIX 4

Lloyd's Underwriting Results – Non-Marine Business (1983-1991)

Underwriting Year	**1983**	**1984**	**1985**	**1986**	**1987**	**1988**	**1989**	**1990**	**1991**
Accident/Health									
Premium £m	188	162	144	153	173	179	214	332	486
U/writing Result	(1.5)	13.6	8.1	19.1	10.7	7.8	8.6	0.8	(3.5)
Motor									
Premium £m	283	324	390	434	516	583	644	696	960
U/writing Result	(5.3)	(14.1)	(18.8)	(6.9)	0.8	3.4	(8.7)	(14.8)	(9.8)
Property Insurance									
Premium £m	570	666	738	911	998	948	971	1336	1548
U/writing Result	(0.1)	12.0	29.2	44.4	22.6	23.0	(85.9)	(50.2)	(26.0)
Liability									
Premium £m	312	365	415	624	608	415	522	877	1135
U/writing Result	(134.0)	(81.5)	(94.7)	(36.5)	(62.0)	(132.8)	(108.9)	(77.8)	(76.9)

[**Source:** Bannister, 1995]

APPENDIX 5

US firms that filed for bankruptcy due to asbestos liabilities (1982-2003)

YEAR	COMPANY
1982	Amatex Corporation; Johns-Manville Corporation; Unarco Limited
1984	Wallace & Gale (Pty) Limited
1985	Forty-Eight Insulations Limited
1986	Pacor Inc.; Prudential Lines Limited; Standard Insulations Inc.; United States Lines
1987	Nicolet; Todd Shipyards; Gartke Corporation
1988	Brunswick Fabricators Inc.; Waterman Steamship Corporation
1989	Hillsborough Holdings; Raymark (formerly Raybestos-Manhattan); Delaware Insulations
1990	Carey Canada; Celotex; Philip Carey Company; National Gypsum; Standard Manufacturing Asbestos & Insulation
1991	Eagle-Picher Industries; H.K. Porter
1992	Kentile Floors; Cassiar Mines
1993	American Shipbuilding; Baldwin Ehret Hill; Fibreboard Corporation; Keene Corporation
1995	Lykes Brothers Steamship;
1996	Rock Wool Manufacturing
1998	SGL Carbon; M.H. Detrick; Fuller-AustinInsulation; Brunswick Fabrications; Atlas Corporation
1999	Rutland Fire Clay; Joy Technologies
2000	Armstrong World Industries; Babcock & Wilcox; Owens-Corning; Pittsburgh Corning; Burns & Row Enterprises
2001	Bethlehem Steel; E.J. Bartells; Federal-Mogul/T&N; G-I Holdings (formerly GAF); United States Gypsum; United States Mineral Products; W.R. Grace; Eastco Industrial Safety Corporation; Skinner Engine Company; Washington Group International
2002	AC&S; A.P. Green; Harbison-Walker Refractories (NARCO); Synkoloid (Artra Group); J.T. Thorpe & Company
2003	Combustion Engineering; Proko Industries 2004 Flintkote

[Source: Tweedale & Warren, 2004]