

The financial responsibilities of the employer with regard to injuries caused by crime of the employee in the retail sector

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Dissertation submitted in partial fulfilment of the requirements
for the degree *Magister Legum* in Labour Law at the Potchefstroom Campus of the North-West University

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November 2014



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”



J.D. McLachlan

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**The financial responsibilities of the employer with regard to injuries
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Mini-dissertation submitted in partial fulfilment of the requirements of the degree
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by

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LIST OF ABBREVIATIONS

COIDA – *Compensation for Occupational Injuries and Diseases Act*

OHSA – *Occupational Health and Safety Act*

SANDF – South African National Defence Force

SAJHR – *South African Journal on Human Rights*

SAPS – South African Police Service

ABSTRACT

The employee's right to a safe working environment or a safe place of work is recognised in common law, the *Constitution of the Republic of South Africa* 1996, the *Labour Relations Act*, Act 66 of 1995, *The Basic Conditions of Employment Act*, Act 75 of 1997 and the *Occupational Health and Safety Act*, Act 85 of 1993.

The *Compensation for Occupational Injuries and Diseases Act*, Act 130 of 1993 (COIDA) prescribes the procedure for compensating employees for injury on duty.

Regionally the standards for working condition have been formalized by the South African Development Community. A safe workplace has been the cornerstone of development in working conditions and labour law, throughout the last century in generally and specifically the last decade.

COIDA provides for a system of "no-fault compensation" This eliminated the onerous common-law burden previously resting on employees to prove negligence on the part of the employer in order to be able to claim compensation for injury on duty.

However Section 35 of COIDA creates problems of it's own. It provides that no employee is allowed to claim damages from his/her employer for any injuries sustained on duty. Section 35(1) reads as follows:

"No action shall lie by an employee or any dependant of an employee for the recovery of damages in respect of any occupational injury or disease resulting in the disablement or death of such employee against such employee's employer, and no liability for compensation on the part of such employer shall arise save under the provisions of this Act in respect of such disablement or death.

The problem section 35 creates is that because of the protection it gives employers against claims, it derogates from employer's duty to provide a safe working environment. Even if an employee is injured because of the employer's negligence or failure to create a safe and secure working environment, no action may be taken against that employer.

In *Twalo v Minister of Safety & Security & another* (2009) 30 ILJ 1578 (Ck) the court held that an injury caused by an intentional act cannot be deemed an accident as defined in COIDA and that it would therefore not be covered by COIDA. In *DN v MEC for Health, Free State* 2014 (3) SA 49 (FB), once again, an accident in the ordinary and grammatical sense was held not to be an injury on duty if that injury had been caused by an intentional and deliberate act. These judgements followed an argument in *Minister of Justice v Khoza* 1966 (1) SA 410 (A). On this basis it is therefore possible to claim damages from the employer for an injury on duty that was not caused by an accident, but was caused by an intentional act performed by a criminal.

Opsomming

Die werknemer se reg op 'n veilige werksomgewing of 'n veilige werkplek word in die gemene reg, die *Grondwet van die Republiek van Suid-Afrika*, 1996, die *Wet op Arbeidsverhoudinge* 66 van 1995, die *Wet op Basiese Diensvoorwaardes* 75 van 1997 en die *Wet op Beroepsgesondheid en Veiligheid* erken.

Die *Wet op Vergoeding vir Beroepsbeserings en -siektes* 130 van 1993 (WVBS) skryf die prosedure vir die vergoeding van werknemers vir besering aan diens voor.

Op streeksvlak is die standarde vir werksomstandighede deur die Suider-Afrikaanse Ontwikkelingsgemeenskap geformaliseer. 'n Veilige werkplek is die hoeksteen van ontwikkelings in werksomstandighede en die arbeidsreg deur die afgelope eeu en spesifiek die afgelope dekade.

Die WVBS maak voorsiening vir 'n stelsel van skuldlose vergoeding (skuldlose skadeloosstelling). Dit het die swaar gemeenregtelike las uit die weg geruim wat voorheen op werknemers gerus het om nalatigheid aan die kant van die werkgewer te bewys ten einde vergoeding vir besering aan diens te kon eis.

Artikel 35 van die WVBS skep egter probleme van sy eie. Dit bepaal dat geen werknemer vergoeding van sy/haar werkgewer mag eis weens 'n besering opgedoen aan diens nie. Artikel 35(1) lui soos volg:

Geen aksie deur 'n werknemer of 'n afhanklike van 'n werknemer is ontvanklik nie vir die verhaal op daardie werknemer se werkgewer van skadevergoeding ten opsigte van enige beroepsbesering of -siekte wat arbeidsongeskiktheid of die dood van daardie werknemer tot gevolg het, en geen aanspreeklikheid vir vergoeding ten opsigte van sodanige arbeidsongeskiktheid of dood ontstaan aan die kant van daardie werkgewer nie behalwe kragtens die bepalings van hierdie Wet.

Die probleem wat artikel 35 skep, is dat dit, vanweë die beskerming wat dit aan werkgewers teen eise bied, afdoen aan werkgewers se plig om 'n veilige werksomgewing te verskaf. Selfs indien 'n werknemer weens die werkgewer se

nalatigheid of versuim om 'n veilige werksomgewing te skep beseer word, mag geen geding teen daardie werkgever ingestel word nie.

In *Twalo v Minister of Safety and Security and Another* (2009) 30 ILJ 1578 (Ck) het die hof beslis dat 'n besering veroorsaak deur 'n opsetlike handeling nie geag kan word 'n ongeval te wees soos omskryf in die WVBS nie en dat dit derhalwe nie deur die WVBS gedek word nie. In *DN v MEC for Health, Free State* 2014 3 SA 49 (FB) is insgelyks beslis dat 'n ongeval in die gewone en grammatikale sin nie 'n besering aan diens kan wees indien daardie besering veroorsaak is deur 'n opsetlike en berekende handeling nie. Hierdie uitsprake volg 'n argument in *Minister of Justice v Khoza* 1966 1 SA 410 (A). Op grond hiervan is dit dus moontlik om vergoeding van 'n werkgever te eis weens 'n besering aan diens wat nie veroorsaak is deur 'n ongeval nie, maar deur 'n opsetlike handeling deur 'n misdadiger.

Sleutelwoorde:

Werknemer

Prakties

Werkgever

Vergoeding

Besering

Verloop

Doel

Werkplek

Diens

Kassier

1. Introduction

If an employee meets with an accident resulting in his disablement or death such employee or the dependants of such employee are subject to the provisions of the *Compensation for Occupational Injuries and Diseases Act*¹, entitled to the benefits provided for and prescribed in COIDA. Certain conditions have to be met in order to qualify for compensation, *inter alia* that the injured must be an employee as defined in COIDA and in particular that the accident must have arisen out of and in the course of the employee's employment.

An employer can be held liable for the negligent injury or death of one of its employees if it did not, in terms of common law, create a safe and secure working environment. This stems from the common-law duty of the employer to provide safe working conditions or safe premises, safe machinery and tools and safe procedures for doing the work. From the common-law perspective found in *Safety at Work*,² it is obvious that notwithstanding legislation, safety measures or precautions, accidents at work will happen. The inevitable is true and that is that risk is part of all human activity and no absolute protection from illness, injury or death at work can be guaranteed.

The duty to provide a safe working environment is a requirement of the *Constitution*³. The Constitution⁴ guarantees everyone the right to life, which obviously includes the right not to be killed while protecting one's employer's money. Section 12⁵ guarantees the freedom and security of the person. Section 12(1)(C)⁶ providing that everyone has the right to be free from all forms of violence from either public or private sources. This implicitly includes the right not to be exposed to violence from criminals while in the service of one's employer. Section 22⁷ the Constitution guarantees the freedom to choose one's trade, occupation and profession. This would obviously also include the right to choose an employer that would guarantee that practice of this trade, occupation or profession would be free of danger . In

¹ 130 of 1993 (hereinafter referred to as COIDA).
² Mischke and Garbers *Safety at Work*. Page 3 - 5
³ S11 of the Constitution
⁴ See Section 11 of the Constitution.
⁵ Constitution
⁶ See Section 12(1)(c) of the Constitution.
⁷ See Section 22 of the Constitution

Section 24⁸ the Constitution guarantees the right to an environment that is not harmful to one's health or well-being. This would obviously include a safe working environment. In Section 34⁹ the Constitution also guarantees that a person whose rights have been infringed has the right of access to courts to address the infringement of those rights. In Section 38¹⁰ specifies the persons who have the right to enforce these rights and have access to the courts of this country to enforce such rights. The application of these rights is set out in Section 8¹¹ of the Constitution, Section 8(2)¹² provides as follows:

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

It stands to reason that this would apply to employers as well.

This common-law duty has been the subject of legislation in the form of the *Occupational Health and Safety Act*¹³ which provides for a variety of duties that an employer has to perform. These duties must be performed “as far as is reasonably practicable”. The OHSA holds people responsible and criminally liable if a duty or a prohibition in terms of the OHSA is not complied with¹⁴.

The law pertaining to employment injuries and diseases is an area where state accommodation or intervention is vital. The reason is that the common law position is unsatisfactory because it provides for only severely restricted claims for an employee who has sustained injuries on duty. At common law such an employee has to institute a delictual action against his employer for compensation. This is an onerous route to follow, since the employee will not succeed in his claim unless he can prove intent or negligence on the part of his employer, or on the part of a co-employee, in respect of whom the employer could be held vicariously liable.

⁸ See Section 24 of the Constitution
⁹ See Section 34 of the Constitution
¹⁰ See Section 38 of the Constitution
¹¹ See Section 8 of the Constitution
¹² See Section 8(2) of the Constitution
¹³ 85 of 1993 (hereinafter referred to as the OHSA)
¹⁴ Section 37 and 38 of the OHSA.

Employees do, however, enjoy a common-law right to a safe working environment, and health and safety legislation is aimed at supplementing this basic right.¹⁵

In statutory law however, the employer's liability for the negligent causation of the death or injury of an employee limits the employee's rights to institute action based on delict in that section 35 of the COIDA¹⁶ specifically provides that "no action shall lie by an employee or any dependant of an employee for the recovery of damages in respect of any occupational injury or disease resulting in the disablement or death of such employee against such employee's employer, and no liability for compensation on the part of such employer shall arise save under the provisions of [COIDA] in respect of such disablement or death".

Section 22(4) of COIDA provides as follows: "For the purposes of this Act an accident shall be deemed to have arisen out of and in the course of the employment of an employee notwithstanding that the employee was at the time of the accident acting contrary to any law applicable to his employment or to any order by or on behalf of his employer, or that he was acting without any order of his employer, if the employee was, in the opinion of the director-general, so acting for the purposes of or in the interests of or in connection with the business of his employer."

The Employer enjoys the protection of Section 35 against delictual liability only if the accident has arisen out of or in the course of the employees employment and if the other criteria set for compensation in COIDA have been met. It is therefore of the utmost importance to establish what is considered and arising out of and in the course of employment.

Recent case law has raised the question of what is considered as to be an accident arising out of or in the course of employment and has emphasised the need to establish which rules apply and what the courts consider in coming to the conclusion that an accident arose out of or in the course and scope of employment. The discussion of the court's judgements will begin with the *Khoza case*¹⁷, followed by

¹⁵ Loewenson R "Employment, Injuries and Diseases" (Paper presented to the ILO Expert Consultation Committee on the Health Impact of Occupational Risk in Africa Geneva July 1997)

¹⁶ *Compensation for Occupational Injuries and Diseases Act* 130 of 1993.

¹⁷ *Minister of Justice v Khoza* 1966 1 SA 410 (A)

*Twalo v Minister of Safety and Security and Another*¹⁸ and *DN v MEC for Health Free State* 2014 (3) SA (FB)

Keywords:

Employer

Employee

Injury

Course

Scope

Compensation

Workplace

Employment

Practicable

Cashier

¹⁸ *Twalo v Minister of Safety and Security and Another* 2009 30 ILJ 157(CK);

2. General and legal duties of the employer

2.1 Introduction

It is the duty of the employer to provide a safe working environment for its employees. In the context of this dissertation, this duty may specifically concern employees affected by crime as well. According to the long title of the OHSA¹⁹ the Act aims to provide for the health and safety of persons at work.

The duties of the employer under common law included inter alia the duty to provide a safe working environment. This included proper training for employees if needed, as well as the provision of safe machinery and safe operating systems. This duty required properly trained supervisors as well. The remedy of the employee injured on duty under common law was one of the delict of the employer if he could prove the employer negligent.

In the employment contract both the employer and the employee must be fully aware of the nature of the duties. In terms of Section 13 of the OHSA, the employer has the duty to inform the employee as of the dangers involved in working in the specific work place.

The common-law position with regard to liability when someone was negligently killed or injured in the workplace, was as follows:

If the elements of negligence against the employer were proven delictual action could be taken by the employee against the employer. Loewenson²⁰ regards this as unsatisfactory, because it severely restricts the claims and employee can bring.

The law pertaining to employment injuries and diseases is an area in which state intervention was vital because the common-law position was very unsatisfactory. It

¹⁹ *Occupational Health and Safety Act* 85 of 1993 Section 8(1).

²⁰ Loewenson R "Employment, Injuries and Diseases" (Paper presented to the ILO Expert Consultation Committee on the Health Impact of Occupational Risk in Africa Geneva July 1997)

allowed only severely restricted claims by an employee that sustained injuries on duty. In common law such an employee has to institute a delictual action for compensation against his employer. This is an onerous route to follow, since the employee will not succeed in his claim unless he can prove intent or negligence on the part of his employer, or unless he can prove negligence or intent on the part of a co-employee, in which case the employer can be held vicariously liable. Employees do, however, enjoy a common-law right to a safe working environment and health and safety legislation is aimed at supplementing this basic right.²¹

The three facets of the common-law duty overlap and there is a cross-pollination of these facts. A certain symbiotic situation arises when it is impossible to establish where the one duty stops and the next starts. The standard for the employer's conduct is that of the reasonable reasonable man. If the employer fails to take the steps the reasonable man would, the employer could be held responsible. In the Coetzee case, the court set out the test for the reasonable man as follows:

- (i) The reasonable man would foresee the danger in the situation.
- (ii) The reasonable man would take precautions to eradicate the set danger
- (iii) The man did not take the necessary precautionary steps

For this to work, the employee has to prove intent or negligence or he has to prove that the co-employee was negligent and responsible for his injuries.

The common-law position was that the employer had to provide a safe working environment and it was generally accepted that employees could stop working if the situation at work became too dangerous, the employer then had to render the workplace safe. Employees would not be deemed to be in breach of contract if they stopped working because of dangerous or unsafe working conditions.

Statutory law, section 8 of the OHSA²² imposes a general duty on the employer towards its employees, as follows:

²¹ *Compensation for Occupational Injuries and Diseases Act 130 of 1993.*
²² *OHSA.*

Every employer shall provide and maintain, as far as is reasonably practicable, a working environment that is safe and without risk to the health of his employees.

This means that the common-law duty to provide a safe working environment for employees was written into and expanded in statutory law, namely section 8(1)²³.

Legislation always takes precedence over common law and here the premise is that the employer must comply with the provisions of the legislation. The duties placed on the employer - that every employer must provide and maintain, as far as is reasonably practicable, a working environment that is safe and without risk to the health of his employees²⁴. These include many things, e.g. the identification of hazards, training, supervision, and the making available of information which are mentioned in subsection (2) and are dealt with in detail in certain regulations²⁵ made under the Act.

The duties of the employer referred to in subsection (1) include the provision and maintenance of systems of work, plant and machinery that, as far as is reasonably practicable, are safe and without risks to health²⁶; taking such steps as may be reasonably practicable to eliminate or mitigate any hazard or potential hazard to the safety or health of employees, before resorting to personal protective equipment²⁷; making arrangements for ensuring, as far as is reasonably practicable, the safety and absence of risks to health in connection with the production, processing, use, handling, storage or transport of articles or substances²⁸; and establishing, as far as is reasonably practicable, what hazards to the health or safety of persons are attached to the work²⁹ performed.

The starting point of any health and safety programme aimed at, establishing what hazards to the health and safety of persons attach to any work performed is that the employer should evaluate and perform a risk assessment of all work, activities,

²³ *Occupational Health and Safety Act 85 of 1993 Section 8(1)*
²⁴ *Occupational Health and Safety Act 85 of 1993 Section 8(1)*
²⁵ *Occupational Health and Safety Act 85 of 1993 Section 8(2)(a) – (j)*
²⁶ *Occupational Health and Safety Act 85 of 1993 Section 8(2)(a)*
²⁷ *Occupational Health and Safety Act 85 of 1993 Section 8(2)(b)*
²⁸ *Occupational Health and Safety Act 85 of 1993 Section 8(2)(c)*
²⁹ *Occupational Health and Safety Act 85 of 1993 Section 8(2)(d)*

systems of work, plant or machinery in order to provide such information³⁰, instructions, training and supervision as are reasonably required to ensure a safer working environment for the employee. This includes the further duty not to permit any employee to do any work or to produce, process, use, handle, store or transport any article or substance or to operate any plant or machinery, unless the required precautionary measures have been taken³¹.

The first duty of the employer towards the employee is set out in Section 8(1)³² which places a general duty on the employer to provide and maintain, as far as is reasonably practicable, a working environment that is safe and without risk to the health of its employees.

The specifics of this duty are set out in section 8(2)³³ which provides for the following:

Without derogating from the generality of an employer's duties under section 8(1), the matters to which those duties refer include in particular the following:-

- (a) Providing and maintaining of a co-ordinated procedure, as far as is reasonably possible, of work procedures and systems that are not detrimental to the health of employees;
- (b) taking such measures as are reasonably possible to eliminate dangers to the health of workers;
- (c) arranging such safety measures;
- (d) establishing the risks and dangers associated with work processes and with the transport and storage of machinery and material used in such work;
- (e) training of employees;

³⁰ *Occupational Health and Safety Act 85 of 1993 Section 8(2)(e)*

³¹ *Occupational Health and Safety Act 85 of 1993 Section 8(2)(f)*

³² *Occupational Health and Safety Act 85 of 1993 Section 8(1)*

³³ *Occupational Health and Safety Act 85 of 1993 Section 8(2)*

- (f) ensuring safe working conditions and not allowing employees to work unless the required safety precautions have been taken;
- (g) complying with the Act and ensuring that all employees comply with the Act;
- (h) enforcing of the provisions of the Act;
- (i) not allowing employees to perform duties without training³⁴

The point of entry to a workplace is part of the workplace and should therefore fall under the common-law duty of providing a safe workplace for the employees. With regard to the first leg of the employer's common-law duty to provide safe working conditions. Mischke and Garbers³⁵ further stipulated that the entrances to and exits from the place of work must be safe.

Section 9 of the OHSA takes the general duties set out in Section 8 a step further by providing that the employer must conduct his undertaking in such a manner as to ensure, as far as is reasonably practicable, that persons other than those in his employment who may be directly affected by his activities are not thereby exposed to hazards to their health or safety. This duty is extended to every self-employed person to conduct his undertaking in such a manner as to ensure, as far as is reasonably practicable, that he and other persons who may be directly affected by his activities are not thereby exposed to hazards to their health or safety.

In the event that the employer fails to comply with the statutory duties his non-compliance could lead to criminal prosecution. Section 38 of OHSA³⁶ sets out offences and penalties in connection with occupational health and safety and section 39³⁷ creates certain presumptions which the state can use to their advantage in prosecuting non-compliance. However the lack of national or provincial standards

³⁴ *Occupational Health and Safety Act 85 of 1993* Section 8(2)i.

³⁵ Mischke C and Garbers C *Safety at work: A guide to occupational health, safety, and accident compensation legislation* (Juta Kenwyn 1994)

³⁶ *Occupational Health and Safety Act 85 of 1993* Section 38

³⁷ *Occupational Health and Safety Act 85 of 1993* Section 39

regarding the safety of cashiers leaves the cashiers with limited protection under the law.

A further problem arises from the statutory provisions regarding the duties of the employer, because these duties need to be complied with only as far as they are reasonably practicable. The term “reasonably practicable”³⁸ means practicable having regard to:

- (a) the severity and scope of the hazard or risk concerned;
- (b) the state of knowledge reasonably available concerning that hazard or risk and of any means of removing or mitigating that hazard or risk;
- (c) the availability and suitability of means to remove or mitigate that hazard or risk; and
- (d) the cost of removing or mitigating that hazard or risk in relation to the benefits deriving there from;

To establish what is reasonably practicable, the employer should clearly do a risk analysis of the working conditions of the employees concerned find ways to avoid or prevent the risk completely or if that is impossible, to take steps to mitigate the risk.

³⁸ See section 1 of the *Occupational Health and Safety Act 85 of 1993*

2.2 Current situation in South Africa regarding risks faced by the retail sector

It is common cause that one of the root causes of crime is opportunity and it is my opinion that the duty of the employer to create a safe working environment should therefore include an attempt at minimizing opportunity for crime.

The Benjamin Greeff committee³⁹ stated that Occupational accidents and work related ill health impose a considerable cost on the South African Economy and Society. Prevention policies to promote and enforce compliance with occupational health and safety legislation are not inadequately developed.

It is clear⁴⁰ that, in South Africa, the hazard or risk concerned is very severe. Statistics of robberies at business premises where cashiers are involved are the following.

	2004/2005	2005/2006	2006/2007	2007/2008	2008/2009	2009/2010	2010/2011	2011/2012	2012/2013	2013/2014
RSA	3320	4387	6689	9862	13920	14534	14667	15951	16377	18615

Statistically this would mean that currently an average of more than 2 business premises are robbed and attacked every hour in South Africa whilst the incidents of robbery were less than ten per day during 2004 and has increased since then

It is common cause that in the number of incidents caused by crime, a high percentage of injuries are very severe. According to Altbeker⁴¹, South Africa is at the very top of the world's rankings for violent crimes. That cause temporary or permanent damage that leave people disabled after such incidents, that frequently cause brain or spinal damage and that are fatal in a high number of these incidents.

³⁹ Benjamin and Greeff Report of the *Committee of Inquiry into a National Health and Safety Council in SA* (May 1997) 161.

⁴⁰ National Commissioner's office, SAPS on 2014-09-18 robberies at business premises to Parliament

⁴¹ Altbeker, A. 2007. *A country at war with itself: South Africa's crisis of crime*. Johannesburg : Jonathan Ball.

According to Masuku⁴² robberies in South Africa are much more likely to involve the use of a weapon than robberies in other countries. Some survey have found that as much as 80 per cent of serious robberies reported to the South African Police Service involved the use of a firearm, compared to less than 20 per cent in economically developed countries.

Notwithstanding quite strict legislation the rules regarding safe working environment has no effect on the number of incidents or injuries to cashiers who are injured during robberies or other criminal acts. Statistics shown that the incidents have increased every year from 2009 to 2013. By contrast incidents in the industrial sector and the mining sector have decreased owing to safety measures. According to statistics released on 18 September 2014 given out by the office of the National Commissioner of the SAPS, robberies at business premises have increased as follows:

Province	2004/ 2005	2005/ 2006	2006/ 2007	2007/ 2008	2008/ 2009	2009/ 2010	2010/ 2011	2011/ 2012	2012/ 2013	2013/ 2014
Eastern Cape	317	231	241	488	851	1 273	1 658	2 173	1 949	2 448
Free State	44	23	62	298	785	873	1024	1 106	1 152	993
Gauteng	2 116	3 150	4 505	5 113	6 244	6 379	5 553	5 116	5 010	6 026
KwaZulu-Natal	382	518	997	1 923	2 499	2 066	1 943	1 911	2 353	2 707
Limpopo	128	75	83	314	529	630	756	1 131	1 222	1 374
Mpumalanga	89	77	195	305	818	978	1 105	1 388	1 310	1 260
North West	154	195	393	732	1 015	1 130	1 162	1 348	1 232	1 369
Northern Cape	6	8	16	54	121	147	157	211	215	282
Western Cape	84	110	197	635	1 058	1 058	1 309	1 567	1 934	2 156
RSA	3 320	4 387	6 689	9 862	13 920	14 534	14 667	15 951	16 377	18 615

⁴² Masuku, S., 2002. "Prevention is better than cure" S A Crime Quarterly, 2: 1-7; Burrouws, S., Bowman, B., Marzopoulos, R. & van Niekerk, A. 2001. *A profile of fatal injuries in South Africa 2000. Second Annual Report of the National Injury Mortality Surveillance System*. Tygerberg: Medical Research Council.

With 18 615 incidents annually, the risk is not distant or remote. It is imminent⁴³.

2.3 Duties of the employer in the retail sector

The employer should be obliged to provide the necessary health and safety equipment for the personal protection of employees that are exposed to the hazards identified above. The definition of "health and safety equipment"⁴⁴ is "any article or part thereof which is manufactured, provided or installed in the interest of the health or safety of any person". The author is of the opinion that safety equipment should have been issued to the victims of crime at the workplace. However no such equipment is currently issued to cashiers. The author fails to understand how failure to do so would protect an employee during criminal activity. The question needs to be asked why such employees had not been issued with safety equipment to protect them against the guns and knives of the criminals, for instance bullet proof cubicles, bullet proof vests or firearms to protect themselves and their fellow employees as well as the money of their employer.

Methods that proved successful in mitigating the risk included measures designed to minimise the presence of money in the cashier's work space for instance place. By means of a vacuum system in which a vacuum tablet with money collected at the till was placed in a vacuum pipe that sucked this tablet with money to a safe place away from the cashier. Another method would be to use drop safes, the keys for which are not kept at the cashiers. Other steps that may ensure the safety of cashiers include to removing money more frequently; ensuring that the premises and cashiers are protected by security companies and that armed guards guarding premises to protect the cashiers and the money. It may be necessary to train cashiers in what to do during a robbery and for them to receive debriefing counselling afterwards.

Research on national safety standards for cashiers failed because neither the Department of Labour nor the Department of Trade and Industry could shed any light on what the minimum safety requirements for effective protection for cashiers against robbery or other criminal acts should be.

⁴³ National Commissioner's office, SAPS on 2014-09-18 robberies at business premises to Parliament

⁴⁴ *Occupational Health and Safety Act* 85 of 1993 Section 1

Owing to the risk involved it cannot be said that the employee has a safe working environment which means that the employer did not create a safe working environment. It should therefore be possible to hold the employer liable in delict.

The author is also of the opinion that such an employer is negligent or malicious. When the employment contract is signed, the employer does not inform the employee of danger associated with this specific working environment.

Even the cashiers statistically have the most dangerous work in South Africa no warning is required and no danger pay is paid.

It is common cause that the presence of money creates the opportunity for crime. The employer in the retail sector exacerbates this risk by advertising, specials and discounts.

The question that remains is whether the current system of criminal prosecution of employers not fulfilling their duties towards their employees could to a certain extent compensate the employees or their dependants. An interesting angle might be the application of Section 300 of the Criminal Procedure Act⁴⁵ which reads:

“Where a person is convicted by a superior court, a regional court or a magistrate’s court of an offence which has caused damage to or loss of property (including money) belonging to some other person, the court in question may, upon the application of the injured person or of the prosecutor acting on the instructions of the injured person, forthwith award the injured person compensation for such damage or loss: provided that -

a regional court or a magistrate’s court shall not make any such award if the compensation applied for exceeds the amount determined by the Minister from time to time by notice in the Gazette in respect of the respective courts”.

The practical application of this section would mean that the criminal could be held liable for the damage caused to the employee in the robbery. This however would be complicated by the following:

⁴⁵ *Criminal Procedure Act, Act 51 of 1977*

2.4 The identity of the assailant

The time lapse between identifying the assailant and the rest of the assailants and the prosecution and conviction of the said assailants concerned.

It is possible and in South Africa quite probable that the assailant is from another country and will flee the country soon after the robbery. It is also probable that even if the assailant is traced and convicted he has no financial means to compensate the injured employee. Such circumstances would leave the employee destitute even if an immediate identification is made. We live in South Africa and know that this happens in the most exceptional of cases only.

The further implication of the application of Section 300 would be that the SAPS becomes responsible if the robber is killed during arrest or during the robbery⁴⁶.

It is common cause that most cashiers are female. Therefore their bodily and psychological integrity needs to be protected not only against any form of harm but also against criminals⁴⁷.

⁴⁶ *Criminal Procedure Act, Act 51 of 1977*

⁴⁷ Breslau, N. 1998 "Epidemiology of trauma and posttraumatic stress disorder" In R. Yehuda (ed.). *Review of psychiatry*, Vol 17, pp 1 – 30. Washington, D.C. Paul. New York : Macmillan. American Psychiatric Association, 2000.

Kessler, R. C. Sonnega, A., Bromet, E., Hughes, M & Nelson, C. B. 1995 "Posttraumatic stress disorder in the National Comorbidity Survey" *Archives of General Psychiatry*, 52(12) : 1048 – 60

Norris, F.H., Murphy, A.D. Baker, C.K., Perilla, J.L., Guttierrez Rodriguez F. & Gutierrez Rodriguez, J. 2003. 'Epidemiology of trauma and posttraumatic stress disorder in Mexico. *Journal of Abnormal Psychology*, 112(4) : 646-56."

Stein, M., Walker, J., Hazen, A. & Forde, D. 1997. "Full and partial posttraumatic stress disorder: findings from a community survey". *American Journal of Psychiatry*, 154: 1114-9.

2.5 Development of the common law

In the matter of *Grobler v Naspers*⁴⁸ the court found that policy considerations justify the extension of the liability of the employer for the harassment of an employee and held that it was enjoined by the Constitution to develop the common law and to make the adaptations necessary to protect and promote the rights to dignity, freedom and security, and in particular, the right of women in the workplace to physical and psychological integrity.

It was held that the Constitution⁴⁹ should develop the common law and make the necessary adaptations to protect and promote the right to dignity, freedom and security, and in particular, the right of women in the workplace to physical and psychological integrity. This should place a higher premium on the duty of the employer to provide a safe working environment.

The basic principle of employee safety is the fact that safety in the workplace is also the responsibility of the employee. Safety in the workplace depends on the conditions set out by the employer but is mostly policed by the employee. If one considers structures set up by the employer such as safety inspectors and safety measures. it would not be right or fair to hold the employer liable for the negligent injury or death of an employee that did not comply with the employer's rules and instructions. It will be a travesty of justice to hold the employer responsible after it has done what the common law required of it and after it provided safe working conditions. To hold the employer responsible for the employee's own negligent conduct that caused his death or injury would be contrary to fairness.

However, the shop owner is currently not held criminally or civilly liable for not supplying the cashiers with the safety equipment that would eliminate or minimize the hazards to the cashiers at the place where they handle the money of the owner.

If he were to adhere to legislation, the only way he would be held responsible or liable would be if he deviated from or acted in contravention of the legislation. If,

⁴⁸ 2004 25 ILJ 439 (C).

⁴⁹ *Constitution of the Republic of South Africa*, 1996.

however he acted negligently but COIDA⁵⁰ applied the civil liability of the employer that results from his or any other person's negligence would be covered by the provisions of COIDA,⁵¹ which means that the delictual culpability would only arise if the common law rules applied and the common-law rules would apply only if they were not excluded by legislation.

⁵⁰ Act 130 of 1993.

⁵¹ Act 130 of 1993.

3. Compensation for Occupation Injuries

The employers can be held liable for the negligent injury or death of one of its employees if it did not create a safe and secure working environment as required by common law by providing safe working conditions or by providing safe premises, safe machinery and tools and safe procedures for doing the work. Employer liability in common law is limited by the phrase "as far as is reasonably practicable". In statutory law however, the employer's liability for the negligent death or injury of an employee is limited by section 35 of the COIDA.⁵² Though this is not unlimited cover for the liability of the employee, delictual liability for injury on duty would only be considered in the most exceptional cases⁵³.

COIDA⁵⁴ provides a system of "no fault" compensation for employees who are injured in accidents that arise out of and in the course of their employment or who contract occupational diseases. Employees are therefore entitled to compensation regardless of whether their injury or illness was caused by the fault of their employer or any other person. At the same time, employees are prevented from instituting claims for damages against their employers (and managers and certain categories of fellow-employees) for the damage suffered as a result of the accident or disease. A system of "no fault" worker's compensation such that established by COIDA, can be seen as representing a balance between the competing interests of employers and employees.⁵⁵

How fairly that balance is struck by a particular compensation system requires an analysis of the costs and benefits of compensation. In principle there are advantages for all in the removal of compensation for occupational accidents and disease from the realm of common law. The employer is relieved of the prospect of costly claims for damages and in return is required to make regular contributions to the Compensation Fund. The employee, on the other hand, is able to receive compensation without having to prove that any person's negligence caused the

⁵² *Compensation for Occupational Injuries and Diseases Act 130 of 1993.*

⁵³ See *Twalo Twalo v Minister of Safety and Security and Another* 2009 30 ILJ 1578(Ck) and *DN v MEC for Health, Free State* 2014 (3) SA (FB).

⁵⁴ *Compensation for Occupational Injuries and Diseases Act 130 of 1993.*

⁵⁵ *Compensation for Occupational Injuries and Diseases Act 130 of 1993.*

accident or disease and without the worry that the employer may have no assets to satisfy a successful claim for damages. (This latter concern is particularly important for the employees of small employers). Society as a whole should benefit in that its funds can be used to offer benefits to claimants and not be spent on wasteful litigation over whether an accident was caused by a negligent act or omission.

*In Jooste v Score Supermarket Trading*⁵⁶ the High Court found that section 35 of the Act⁵⁷ infringes the right to equality of employees, vis-à-vis employers (the section precludes the common-law liability of the employer for damages arising from an injury in the workplace) and has to be declared invalid. However, the Constitutional Court did not confirm the declaration of invalidity, given the broader purpose and structure of the Act.

The qualifying requirements for the application of section 35 of COIDA are that an employee's death or injury must have been caused by an accident which took place "during the course and scope" of the employees employment⁵⁸. The concept of an accident arising out of and in the course of employment as applied in case law to establish what would be considered an accident therefore needs to be discussed critically.

The COIDA contains a specific definition of who qualifies as an employee. In addition, certain categories of persons are explicitly included in or excluded from the definition of "employee". "Employee" is defined as a person who has entered into or works under a contract of service or of apprenticeship or learnership, with an employer, whether the contract is express or implied, oral or in writing, and whether the remuneration is calculated by time or by work done⁵⁹ or is in cash or in kind.

An "occupational injury" means a personal injury sustained as a result of an accident. An employee involved in such an accident is entitled to be paid compensation. There should, however, be a causal connection between the accident and the loss suffered by the employee.

⁵⁶ 1998 9 BCLR 1106 (E).

⁵⁷ *Compensation for Occupational Injuries and Diseases Act* 130 of 1993.

⁵⁸ See section 22 of COIDA.

⁵⁹ See *Sterris v Minister of Safety & Security* 2007 ILJ 2522 (C): payment of remuneration is required.

An employee involved in an accident is entitled to be paid compensation in terms of the *Compensation for Occupational Injuries and Diseases Act*. The term “accident” means an accident arising out of and in the course of an employee’s employment and resulting in a personal injury, illness or the death of the employee. For section 35 of COIDA to apply to exclude the civil remedies of an employee the accident must have arise out of and in the course of an employee’s employment. To discuss the concept used with regard to compensation for accidents on duty critically, the concept of an accident arising out of an in the course of employment need to be considered. For this purpose the applicable case law and the deviations in case law as well as legislation in this regard should be discussed.

In the event that the personal injury, illness or death of the employee is the result of the employers delictual conduct and the courts find that the accident, illness or death did not arise out of or in the course of the employee’s employment, but at the workplace, civil claims may be brought against the employer.

Even though the accident needs to arise out of or in the course of the employee’s employment the two elements, although interrelated, are to be distinguished. The description of what should be understood under “out of” and “in the course of ” the employee’s employment is contained in the judgment of the Appellate Division of the then Supreme Court in *Minister of Justice v Khoza*⁶⁰. Translated the court held that “in the course” means that the accident must have happened while the employee was busy doing his work and “out of” means that the accident must have happened in relation to the employee’s work.

In *Ongevallekommissaris v Santam Versekeringsmaatskappy Bpk*⁶¹ the court quoted the passage in *Weaver v Tredegar Iron Co* 1940 3 All ER 157 179H (per Lord Parker) to draw the distinction:

“In some cases, no doubt, it may be helpful to consider whether the man owed a duty to his employers at the time of the accident, and indeed if duty be construed with sufficient width, it may be a decisive test, but so construed, to say that the man was doing his duty means no more than that he was acting within the scope of his employment. The man’s work does not consist solely in

⁶⁰ 1966 2 All SA 4 (A); 1966 1 SA 410 (A) 417.

⁶¹ 1965 2 SA 193 (T) 197.

the task which he is employed to perform. It includes all matters incidental to that task”

And further

“The question is not whether the man was on the employer’s premises. It is rather whether he was within the sphere or area of his employment.”

In the *Gunter* case,⁶² a farm manager, a Mr Gunter, travelled to town in his own private vehicle and was involved in an accident. It was found that in the course and scope of his duties as a farm manager was extended to the fact that he had to purchase spares needed for the running of the farm even though he was driving his own motor vehicle. In the *Gunter’s* case⁶³ his objections against the Director General's finding succeeded and it was decided that his claim under COIDA was to be upheld. It is therefore obvious that the course and scope of employment of a farm manager includes his discretion of which vehicle to use, whether his own or that of his employer, if the actions he is performing are for the purpose of furthering the business of his employer. In this case his employer was a farm owner and he went to town to buy spares. What makes this case very interesting is the fact that this accident did not take place at a workplace – in this case the farm of the employer⁶⁴ - but away from the workplace and in the employee’s own vehicle, not a work vehicle.

After the judgement in *Van De Venter v MEC for Education*⁶⁵ accidents that render employees eligible for compensation in terms of COIDA⁶⁶ now include intentional injuries caused by criminals as well, and not only accidents defined in the Act. In this case the court had to decide, among other issues, whether the injuries sustained by a teacher, who was injured in the course of extra-curricular training activities which the teacher was lawfully instructed to undertake and was remunerated for, were sustained in an accident arising in the course of the teacher’s employment. The court held that it did not matter whether the plaintiff ’s agreement to render services as an independent or outside trainer could be classified as an amendment to her contract of employment or as an additional agreement, because in rendering coaching

⁶² *Gunter v Compensation Commissioner* 2009 (30) ILJ 2341 (O).

⁶³ *Gunter v Compensation Commissioner* 2009 (30) ILJ 2341 (O).

⁶⁴ *Gunter v Compensation Commissioner* 2009 (30) ILJ 2341 (O).

⁶⁵ *Van De Venter v MEC of Education : Free State Province* 2010 (HC).

⁶⁶ *Compensation for Occupational Injuries and Diseases Act* 130 of 1993.

services she was on her own pleaded version, acting on instructions of the principal conveyed to her by the head of sport at the school and was therefore acting within the course and scope of her employment.

For purposes of this dissertation⁶⁷ it is important to bear in mind the provisions of Section 22(4) of COIDA⁶⁸ that if employees were involved in accidents while acting contrary to the law or contrary to or without instructions issued by or on behalf of the employer, they might still receive compensation because of to a presumption created in the Act. An accident occurring in such circumstances is presumed to have arisen out of and in the course of employment if the employee was acting for the purposes of or in the interests of or in connection with the employer's business. *Minister of Justice v Khoza* emphasized that it must have been the fact that the employee acting in the course of his employment that brought him within the range or zone of the hazard that gave rise to the accident that caused the injury.

Under certain circumstances the causal connection might be broken. In *Minister of Justice v Khoza*, three such circumstances were identified:

- (a) where the employee would have been injured even if he or she had not been at work;
- (b) where the employee of his or her own accord broke the link between his or her employment and the accident; and
- (c) where the employee is intentionally injured by another employee for reasons unrelated to the employment.

In the case of *Etsebeth v Minister of Defence*⁶⁹ the argument of the plaintiff was whether the accident on which the plaintiff's claim was based arose out of and in the course and scope of his employment with the SANDF. This obviously would have affected the claim and the influence of section 35 of the COIDA.⁷⁰ In this instance the plaintiff was an apprentice aircraft mechanic and performed his work mostly on the ground. It involved cleaning, refilling, greasing and oiling aeroplanes in the air and on the ground. On the day concerned, however he undertook a flight in a

⁶⁷ Taking into account the reasoning in *Twalo*.

⁶⁸ COIDA

⁶⁹ *Etsebeth v Minister of Defence* 209 of 2009 JDR 1234 GMP.

⁷⁰ *Compensation for Occupational Injuries and Diseases Act* 130 of 1993.

helicopter. The flight was undertaken to search for poachers and he was used as one of the observers or poachers. The plaintiff was injured during this particular flight. The court found that the accident fell in the scope and course of his employment. Interestingly while it is highly debatable whether this trip had anything to do with his job, it was nevertheless found to be the scope and course of his employment with the SANDF.

Considering the fact that cashiers are present at the place of business of their employer only to handle the money of the employer and that the money is the cause of crime, one can hardly say that the employee affected by crime is not the responsibility of the employer.

In the case of *Boer*⁷¹ it was found that the course and scope of employment are not dependent on whether he was registered and the employer was indeed paying the workman's compensation contribution. So even people not registered are deemed to be acting in course and scope of their employment and therefore he had no claim against his employer but he had a claim in terms of COIDA.⁷²

In *Hammond* case⁷³, the appellant was working for the South African Police Service and was discharged on legal grounds. The court had to find a causal link between his condition and his employment. In other words, that his condition was caused by "an accident arising out of and in the cause of employment"⁷⁴. In this case it was argued that the condition of the appellant had not been caused by an accident but by an illness, a disease that arose out of the appellant's employment, entitling the appellant to Compensation in terms of section 65 of COIDA.⁷⁵ The court held that the appellant failed to prove that his illness or disease or condition arose out of and in the course of his employment.

What the courts need to do in the cases of an employee in retail sector is an expansive interpretation of the expression "accident arising out of and in the course of the employee's employment". The type of interpretation needed would have to be

⁷¹ *Boer v Momo Development* 2004 25 ILJ 1247 (T).

⁷² *Compensation for Occupational Injuries and Diseases Act* 130 of 1993.

⁷³ *Hammond v the Compensation Commissioner* 2005 26 ILJ 45 (T).

⁷⁴ *Hammond v the Compensation Commissioner* 2005 26 ILJ 45 (T).

⁷⁵ *Compensation for Occupational Injuries and Diseases Act* 130 of 1993.

like that found in *Odayar v Compensation Commissioner*.⁷⁶ The action of the criminal is intentional and illegal and the employee should not be prejudiced because of the fact that such intentional action could never be deemed an accident as defined in the Act. In the "course and scope" should be interpreted as though the employee had a duty to protect the money of his employer. The interpretation of the court in *Twalo v Minister of Police*⁷⁷ that states that the deliberate shooting of an employee cannot be deemed an accident would leave thousands of employees vulnerable. It would only make sense if one thinks that a criminal could negligently rob a shop or place of business.

In *Carmichele v Minister of Safety and Security*⁷⁸ vicarious liability was extended to the actions of non-employees. The rapist was not an employee of either the SAPS or the Department of Justice. The test was further extended to an assumption that this rapist would not have been granted bail if the captain an employee of the SAPS and the prosecutor, an employee of the Department of Justice had brought certain facts to the attention of the court. If the relevant facts are considered in South Africa in 2014 - a country where murderers, rapists and perpetrators of other serious crimes get bail every day - the nexus between this rapist and the SAPS and the Department of Justice and the harm suffered by Mrs Carmichele,⁷⁹ becomes almost non-existent, however but the court still found that they were vicariously liable for the act or omission of their employees. In the Von Benecke case⁸⁰ the court held that the previous test for vicarious liability would have failed the applicant. It held that the test had to be extended to accommodate the principles and values set out in the Constitution⁸¹ and therefore to develop the common law. Where an employee sustains an injury on duty, we have a set of completely different rules. The impression is that section 35 of COIDA⁸² rules supreme.

⁷⁶ 2006 27 ILJ 1477 (Natal).

⁷⁷ *Twalo v Minister of Safety and Security* 2009 30 ILJ 157 (CK).

⁷⁸ *Minister of Safety and Security v Carmichele* 2004 3 SA 305 (SCA).

⁷⁹ *Minister of Safety and Security v Carmichele* 2004 3 SA 305 (SCA).

⁸⁰ *Minister of Defence v Von Benecke* 2013 2 SA 361 (SCA).

⁸¹ *Constitution of the Republic of South Africa*, 1996.

⁸² *Constitution of the Republic of South Africa*, 1996.

No development of the common law in respect of the principles of vicarious liability is done, irrespective of the provisions of section 39(2) of the Constitution⁸³ and no heed is paid to the provisions of section 39(1) of the Constitution.⁸⁴ It suppresses or undermines the rights of an employee set out in sections 34 and 38 of the Constitution⁸⁵ by not allowing them to sue their employer for vicarious liability. In my opinion this has the following effects: It ignores the only limitation of rights allowed in section 36 of the Constitution.⁸⁶ This favours private persons affected by crime above employees affected by crime. An employer therefore has a greater duty of care towards visitors to its business premises than it currently has towards its employees that are affected by the very same crime.

In the case *Van De Venter v MEC for Education*⁸⁷ the court discussed the safety measures that the employer took to ensure the safety of its employees in order to create a safe working environment. The opinion was expressed that these were sufficient because the employee took no steps to use the safety measures. In the retail sector for instance in retail stores such as Woolworths, Edgars, Spar, Foschini, Shoprite and Checkers, these safety measures are non-existent. The cashier has neither safety doors or any other safety equipment which they could lock or use to protect themselves. Owing to section 35 of COIDA⁸⁸ or their own negligence, the employers have, across the board, decided not to supply any safety measures to protect these employees.

The courts have shown us in *Van De Venter v MEC for Education*⁸⁹ that they have not been willing to develop or extend the common law as they are required to do by section 39 of the Constitution,⁹⁰ but have been quite willing to extend the vicarious liability test in the *Von Benecke* and *Carmichele*⁹¹ cases.

⁸³ Constitution of the Republic of South Africa, 1996.

⁸⁴ Constitution of the Republic of South Africa, 1996.

⁸⁵ Constitution of the Republic of South Africa, 1996.

⁸⁶ Constitution of the Republic of South Africa, 1996.

⁸⁷ 2010 (HC).

⁸⁸ Compensation for Occupational Injuries and Diseases Act 130 of 1993.

⁸⁹ *Van De Venter v MEC of Education : Free State Province* 2010 (HC).

⁹⁰ Constitution of the Republic of South Africa, 1996.

⁹¹ *Minister of Safety and Security v Carmichele* 2004 3 SA 305 (SCA).

From a reading of the decisions in *Twalo*⁹² and *DN v MEC for Health*⁹³ it becomes clear that when the courts found that the accident had not arisen out of or in the course and scope of employment. Section 35 of COIDA⁹⁴ did not apply and that the employee or dependants of the employee could therefore institute a delictual claim. It is therefore important to scrutinise the reasoning behind the findings in these matters to try to deduce the principles that may be applied in future.

Because of the number of incidents per year in this sector as reflected in the 2013 / 14⁹⁵ SAPS statistics it cannot be said that this risk or danger is a distant risk or danger. If one looks at the prevalence of these incidents, it amounts to approximately 52 incidents per day (in other words, on average more than two per hour). One cannot argue that the chances of such incidents occurring are either remote or distant. It is clear that this risk or hazard is imminent. It is also clear that the common-law principle of liability for creating a dangerous situation comes into play. It is common cause that crime occurs if the opportunity is there and that the big motivating factor for criminals is the availability of money. In this way business practices create a dangerous situation, which is exacerbated by the collection of money, the cornerstone of business as profit. The massive budgets for promotions, advertisements, specials, banners, media campaigns, pamphlets increase business and sales. This creates an ever growing pool of money in the retail sector specifically. The person in the middle of this danger is obviously the cashier who receives and protects the money for their employers. Furthermore there is the principle of the more money the better. The common-law principle of creating a dangerous situation should be applicable.

In *Kruger v Coetzee*⁹⁶ the test for negligence in this regard was set out as follows: Would the reasonable man have foreseen the danger? Would the reasonable man have taken precautions to prevent the dangerous situation? And did he take such precautionary measures? If he did not, he would be deemed negligent and liable for

⁹² *Twalo v Minister of Safety and Security and Another* 2009 30 ILJ 157(CK);

⁹³ *DN v MEC for Health, Free State* 2014 (3) SA (FB)

⁹⁴ *Compensation for Occupational Injuries and Diseases Act* 130 of 1993.

⁹⁵ National Commissioner's office, SAPS on 2014-09-18 robberies at business premises to Parliament

⁹⁶ *Kruger v Coetzee* 1966 (2) SA 428 (A)

the damage caused by such an omission. Once again, in the cases of Carmichele⁹⁷ and Von Benecke⁹⁸ the test for vicarious liability was extended to accommodate Constitutional values and principles. As far as an employee is concerned, however, section 35 of the COIDA⁹⁹ prohibits such an extension and prohibits a claim against the employer for an injury on duty, even if it were obvious that he ought to be liable for not providing a safe working environment or for creating a dangerous situation.

⁹⁷ *Minister of Safety and Security v Carmichele* 2004 3 SA 305 (SCA).

⁹⁸ *Minister of Defence v Von Benecke* 2013 2 SA 361 (SCA).

⁹⁹ *Compensation for Occupational Injuries and Diseases Act* 130 of 1993.

4. Instances where the injury or death results from crime

In *Twalo's* case¹⁰⁰ the plaintiff (the wife of the deceased) in her personal capacity and in her capacity as mother and natural guardian of her three minor children, claimed damages from the Minister of Safety and Security and the second defendant, a police officer in the employ of the SAPS, following the unlawful and intentional shooting and killing of her husband, also an officer in the employ of the SAPS, at the police station at which both the second defendant and the deceased were stationed. The plaintiff alleged that the co-employee had been acting in the course and scope of his employment at all material times. In addition to denying liability, the Minister delivered a plea in which he admitted that the second defendant was an employee at the time of the shooting but denied that he had been acting in the course and scope of his employment when he shot the deceased.

It should be clear that the approach is wrong because the COIDA¹⁰¹ would only apply if the employee (the deceased was acting in the course and scope of his employment and not the perpetrator's illegal action. This kind of reasoning would apply only if the vicarious liability of the employer for the action of the killer was to be investigated.

Be that as it may the minister in a second special plea also pleaded that the plaintiff's claim was barred by the provisions of s 35(1) of the Compensation for Occupational Injuries and Diseases Act 130 of 1993¹⁰². The court was called upon to determine whether the shooting of the deceased was an accident as defined in COIDA¹⁰³ and whether it caused the deceased to sustain an occupational injury which resulted in his death. The plaintiff contended that the shooting was not an accident and further that the second defendant had intentionally shot the deceased which bore no relationship with the deceased's duties as a police officer as he was not carrying out any functions in relation to his duties at the time. Therefore, according to the plaintiff,

¹⁰⁰ *Twalo v Minister of Safety and Security and Another* 2009 30 ILJ 157(CK); The facts set out below is as reflected in the headnote of the reported case with some comment added as indicated.

¹⁰¹ *Compensation for Occupational Injuries and Diseases Act* 130 of 1993.

¹⁰² *Compensation for Occupational Injuries and Diseases Act* 130 of 1993.

¹⁰³ *Compensation for Occupational Injuries and Diseases Act* 130 of 1993.

the provisions of s 35 of COIDA¹⁰⁴ were not applicable. The Minister, on the other hand, argued that the court had to look at the conduct of the deceased at the time of the shooting, and not merely at the conduct of the second defendant. He urged the court not to place a restrictive interpretation on the definition of “accident” and to interpret it so as to include both a negligent and an intentional act.

The court considered the definitions of 'accident' and 'occupational injury' in COIDA¹⁰⁵ and the authorities on these definitions as well as the purpose of the Act¹⁰⁶. The court rejected the Minister's contention that the definition of an accident should be broadened to include not only a negligent act but also the intentional killing by one employee of another despite the absence of any causal connection with their respective duties vis-à-vis their mutual employer.

The court noted that, on the basis of the pleadings and the agreed facts, it was not in dispute that the second defendant had intentionally shot the deceased and had pleaded guilty to a charge of murder. There was no question, therefore, that the deceased's death was due to any negligence on the part of the second defendant. In any event, the Minister had specifically denied any such negligence. On these facts the shooting was patently not an accident as defined in COIDA¹⁰⁷.

The court noted further that it was similarly not in dispute that the second defendant had not been acting in the course and scope of his employment with the SAPS when he shot the deceased. The second defendant's actions in shooting the deceased were premeditated and carried out with the intention to kill him. In addition to the fact that the intentional shooting of the deceased was not an accident, the second defendant was not 'about the affairs, or business, or doing the work of, the employer¹⁰⁸'. The sole reason for the second defendant having shot the deceased was a private dispute between them. The fact that it took place while both of them were on duty as policemen and at their workplace was entirely coincidental. The shooting could have occurred at any other place entirely unrelated to their work

¹⁰⁴ *Compensation for Occupational Injuries and Diseases Act 130 of 1993.*

¹⁰⁵ *Compensation for Occupational Injuries and Diseases Act 130 of 1993.*

¹⁰⁶ *Compensation for Occupational Injuries and Diseases Act 130 of 1993.*

¹⁰⁷ *Compensation for Occupational Injuries and Diseases Act 130 of 1993.*

¹⁰⁸ Twalo

environment as the motive for the shooting bore no causal relationship with their work. The court clearly applied the principles in *Khoza*¹⁰⁹.

The court rejected the Minister's line of reasoning because, if accepted, it would mean that, as long as the victim was acting in the course and scope of his or her employment at the time of the incident, it would not be necessary to show that a causal relationship existed between the nature of the injury and the duties carried out by the victim. This approach would lead to anomalous results and the right to claim compensation in terms of COIDA¹¹⁰ would effectively be unqualified.

Accordingly the court was satisfied that the intentional shooting of the deceased was not an accident and that the deceased had not sustained an occupational injury that resulted in his death. The provisions of s 35 of COIDA¹¹¹ were therefore not applicable, and the plaintiff was not precluded from claiming damages from the Minister.

From the case of *DN v MEC for Health*¹¹² it is clear that a greater duty is once again placed on the employer to provide a safe and secure working environment for employees because in this case the incident was an accident as defined in the Act and not an intentional criminal deed. The facts appear from the headnote to the reported case:

“A medical practitioner (plaintiff) claimed damages from her employer (MEC for Health and defendant) for the injuries she sustained during an assault and rape while on duty at a state hospital. The MEC filed a special plea alleging that the plaintiff was precluded by s 35 of COIDA from instituting any action against him. The plaintiff countered that the incident was not an “accident” as defined in COIDA and the provisions of s 35 were therefore not applicable. Issues identified by the court for determination were (a) whether the incident was an “accident” as contemplated in s 35 of the Act; and (b) whether it arose out of and in the course of her employment as a paediatric registrar.

¹⁰⁹ Minister of Justice v Khoza 1966 (1) SA 410 (A)

¹¹⁰ *Compensation for Occupational Injuries and Diseases Act* 130 of 1993

¹¹¹ *Compensation for Occupational Injuries and Diseases Act* 130 of 1993

¹¹² *DN v MEC for Health, Free State* 2014 (3) SA (FB)

The court decided the issue by referring to the *Khoza*-case¹¹³. The court held that the rape and assault incident was not an accident as contemplated in s 35 of COIDA¹¹⁴. The court stated that although the incident was unexpected, it was also an intentional and deliberate criminal act perpetrated by the assailant, which could not have been an 'accident' in the ordinary and grammatical sense and as courts have interpreted it to mean¹¹⁵. Mocumie J found that this means an injury resulting from an assault that is unrelated to the job does not arise "out of or in the course of" employment. He referred to *Kau v Fourie* 1971 (3) SA 623 (T) (assault on an employee by the employer); *F Langeberg Foods Ltd v Tokwe* [1997] 3 All SA 43 (E) at 50 (assault by a security guard employed by the employer); and *Twalo v Minister of Safety and Security* [2009] 2 All SA 491 (E) in paras 17 – 18 (assault on one police officer by another police officer) in coming to this conclusion.

The court addressed the second issue by finding that there was no causal connection between the plaintiff's employment and the incident because she had been deliberately injured by another person who was not supposed to be, or authorised to be, on the employer's premises, 'and the motive for the attack bore no relationship to the duties of the workman'. The court further found that the risk resulting in the injury — i.e. the assault and rape — was not a risk that was a usual, natural incident of the job or that came with the territory of the job. The court concluded that the plaintiff was not precluded by section 35 of COIDA¹¹⁶ from claiming damages from the MEC.

The reason for finding that this incident was not an accident is given as that the attack was intentional and deliberate. The question arises whether this finding is correct. If one considers the application of the principles of COIDA¹¹⁷ with regard to wilful misconduct, one finds that it is still considered to be an accident if the employee had been seriously injured or the employee's death had been caused by the incident. Once again the decision turned on the definition of "accident" and not

¹¹³ Minister of Justice v Khoza 1966 (1) SA 410 (A)

¹¹⁴ Compensation for Occupational Injuries and Diseases Act 130 of 1993

¹¹⁵ Per definition an accident is a 'sudden unlooked for mishap' or an 'unintended and unexpected occurrence producing loss or harm'.

¹¹⁶ Compensation for Occupational Injuries and Diseases Act 130 of 1993

¹¹⁷ Compensation for Occupational Injuries and Diseases Act 130 of 1993

really on whether the incident happened in the course and scope of the doctor's work – which the author will argue is in fact the case.

Whether this judgement will be followed is questionable specifically if one take into account the reasoning behind the finding. The court referred to *Ex parte Workmen's Compensation: In re Mathe* [1979] 4 All SA 885 (E) where an employee who was a supervisor was instructed by his employer to fetch his subordinates' paycards. While he was on duty, but outside his place of employment and carrying out these instructions, he was robbed. Addleson J held that it was the actual fact that the employee was on duty that exposed him to the risk of robbery. The question is how the facts in this case are different.

The court further referred to the judgment in *Van de Venter v MEC for Education*¹¹⁸ where an employee was robbed on school premises by persons unemployed by the school. The court held that an injury sustained by an employee under such circumstances was an 'accident' as contemplated in s 35. Mocumie J argued that *Van de Venter* was not correctly decided and quoted the Supreme Court of Appeal's decision in *MEC for Education, Western Cape Province v Strauss*¹¹⁹ stating that the conclusion, therefore, had to be the same now as then after inferring that the facts were substantially the same. In that case the court held that an injury sustained by an educator during the course of an educational activity fell under an occupational injury. The reasoning was that the SCA referred to 'an injury suffered at work', which Mucomie J argued is not the requirement of COIDA¹²⁰. COIDA¹²¹ requires that the injury must "arise out of and in the course of employment".

¹¹⁸ Supra

¹¹⁹ 2008 (2) SA 366 (SCA).

¹²⁰ *Compensation for Occupational Injuries and Diseases Act 130 of 1993*

¹²¹ *Compensation for Occupational Injuries and Diseases Act 130 of 1993*

6. CONCLUSIONS AND RECOMMENDATIONS:

Case law indicates that an employer that does not provide a safe and secure working environment for his employees can be held civilly liable for the injuries or death of his employees at work caused by crime, contrary to Section 35 of the Compensation for *Occupational Injuries and Diseases Act*¹²² prevention and compliance policing of standards is currently not up to standard. COIDA¹²³ does not provide for compensation for pain, suffering and loss of quality of life caused by injury or disease, and these damages cannot be recovered by civil action if Section 35 of COIDA¹²⁴ is adhered to.

The author agrees with the following point of view of Professor Benjamin in their report¹²⁵

“There is no compensation for the pain, suffering and loss of life quality caused by injury or disease and these damages cannot be recovered through civil action”

This catalogue of shortcomings reveals that the bulk of poor OHS¹²⁶ practices by employers are “externalized and borne by workers, their families and public institutions rather than their employers”.

The employer should be held liable for not mitigating this specific risk and for exacerbating the risk for the employees through greed. Applicable case law that supports this argument is found in *Twalo v Minister of Safety and Security*,¹²⁷ *Rauff v Standard Bank Properties*¹²⁸ and *DN v MEC for Health*¹²⁹. There is no need to develop the common law in this regard, because of the employment relationship and the common law duty to provide a safe working environment. The employer clearly owes its employees a duty of care.

¹²² *Compensation for Occupational Injuries and Diseases Act* 130 of 1993.

¹²³ *Compensation for Occupational Injuries and Diseases Act* 130 of 1993.

¹²⁴ *Compensation for Occupational Injuries and Diseases Act* 130 of 1993

¹²⁵ Paul Benjamin page 3.

¹²⁶ *Occupational Health and Safety Act and Regulations* 85 of 1993

¹²⁷ 2009 30 ILJ 157 (CK).

¹²⁸ 2003 24 ILJ 126 (W).

¹²⁹ *DN v MEC for Health*, Free State 2014 (3) SA (FB)

The question is whether we should allow the deliberate failure of the employer to provide a safe working environment to drain social security funds in the form provided for in COIDA.

In addition to the risks mentioned above, come post-traumatic stress syndrome paranoia and other psychoses as a residual of these incidents. Keeping in mind the state of knowledge readily available about the hazard or risk and about means of removing or mitigating that hazard or risk, I have to state that it is highly unlikely that anybody that spends more than one day in South Africa would have no knowledge of the risks involved. As to the means of removing or mitigating that risk, one has to look at where the same or similar type of risk exists. Another group of employees exposed to crime in their daily work are members of the SAPS and they mitigate the specific hazards and risks by through training, protective gear, protective vehicles, firearms and other equipment. However, in the retail business for instance where a high percentage of these incidents occur, the employees affected do not receive any training, protective vehicles, protective gear nor other equipment that might mitigate this well-known and prominent hazard and risk.

As far as the cost of removing or mitigating that hazard or risk is concerned, compared to the benefits deriving there from, one has to ask what the cost is of the injuries, death, scarring or psychological damage to the employees involved. Can one really attach a cost factor to a cashier's life? Can one really equate the life or psychological trauma of an employee to the cost of protective clothing, bullet proof gear, supplying firearms, training? The Constitution¹³⁰ guarantees the right to life. In *S v Makwanyane*¹³¹ the question was whether Makwanyane, a convicted murderer had the right to life. The Supreme court found that he did have the right to life. How much more should we not protect the life of employees? How much more precious should the lives of employees that are innocent, mothers, daughters and sisters not be?

¹³⁰ Constitution of the Republic of South Africa, 1996.

¹³¹ *S v Makwanyane* 1995 3 SA 391 (CC).

*In Jooste v Score Supermarket Trading*¹³² in the High Court found that section 35 of the Act¹³³ infringes the right to equality of employees vis-à-vis employers (the section precludes the common-law liability of the employer for damages arising from an injury in the workplace) and has to be declared invalid. However, the Constitutional Court did not confirm the declaration of invalidity, given the broader purpose and structure of the Act. Following the judgement in *Van De Venter v MEC for Education*¹³⁴ accidents that render employees eligible for compensation in terms of COIDA,¹³⁵ now also include intentional injuries caused by criminals and not only accidents as defined in the Act.

There is case law that indicates that an employer that does not provide a safe and secure working environment for its employees can be held civilly liable for the injuries or death of its employees at work caused by crime, contrary to Section 35 of COIDA.¹³⁶ Prevention and compliance policing of standards is currently not up to standard. COIDA¹³⁷ does not provide for compensation for pain, suffering and loss of quality of life caused by injury or disease, and such damages cannot be recovered by civil action if Section 35 of COIDA¹³⁸ applies.

Judgements that shed light on the development of labour law are plentiful. In *Twalo* it is submitted, the court correctly held that this was not a matter that fell under section 35 of COIDA because the incident would have happened even if the deceased were not on the premises of the employer.

The fact that the matter of *DN v MEC for Health* was decided contrary to the rules of *stare decices* might lead to it being overturned in the near future, but for now the judgement is the guiding principle.

¹³² 1998 9 BCLR 1106 (E).

¹³³ *Compensation for Occupational Injuries and Diseases Act 130 of 1993.*

¹³⁴ *Van De Venter v MEC of Education : Free State Province 2010 (HC).*

¹³⁵ *Compensation for Occupational Injuries and Diseases Act 130 of 1993.*

¹³⁶ *Compensation for Occupational Injuries and Diseases Act 130 of 1993.*

¹³⁷ *Compensation for Occupational Injuries and Diseases Act 130 of 1993.*

¹³⁸ *Compensation for Occupational Injuries and Diseases Act 130 of 1993.*

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