JICLT
Journal of International Commercial Law and Technology
Vol. 6, Issue 3 (2011)

Employer's Duty to Provide a Safe Working Environment: A South African Perspective*

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Abstract. At common law, employers have a duty to take reasonable care for the safety of their employees in all the circumstances of employment. The duty to provide a safe work place relates to the employer's responsibilities imposed by the common law to ensure that the work place is reasonably safe, while the employer's duty to provide a safe work system relates to the responsibility to ensure that the actual mode of conducting work is safe. The South African legislation provides for various rights and duties for both employers and employees. In substance, these Acts restate the common law position in obliging employers to take all reasonable and practicable measures to ensure a safe and healthy work environment. Over and above the general duty, specific measures to be taken by the employers are set out in the regulations to the Acts. The aim of this paper is to analyse the provisions of section 8 of Occupational Health and Safety Act 85 of 1993 and section 2 (1) of the Mine Health and Safety Act 29 of 1996. They specify the list of duties imposed on employers, in particular the provision which provides that some of these duties are absolute, which means that an employer has to comply with them at all times. Secondly the paper examines the nature and the extent of obligation imposed on the employer towards the health and safety of their employees while they are carrying out their duties. This current position will be analysed in order to determine whether it is satisfactory.

1 Introduction

The health and safety of employees on the workplace is a very crucial issue which cannot be left to self regulation by parties involved. This is justified on the basis that employees are a vulnerable group in the employment relationship; hence, they are more likely to contract to their disadvantage. It was therefore imperative for government to intervene statutorily.

There are few overarching legislations in South Africa regulating employees' safety and compensation in the workplace. These are the Occupational Health and Safety Act[1], Compensation for Occupational Injuries and Diseases Act[2], Mines Health and Safety Act[3], and the Occupational Diseases in Mines and Works Act[4]. The

*This article was first published in Kierkegaard Sylvia (2010) Private Law: Rights Duties and Conflicts. International Association of IT Lawyers (IAITL).pp. 1066-1076.

[1] Occupational Health and Safety Act 85 of 1993 (hereinafter referred to as OHSA).

[2] Compensation for Occupational Injuries and Diseases Act 130 of 1993(hereinafter referred to as COIDA).

[3] Mine Health and Safety Act 29 of 1996 (hereinafter referred to as MHSA). The MHSA applies to mines and works, whilst the OHSA applies to other industries but does not apply to employers and workplaces to which the MHSA and certain matters covered by the Merchant Shipping Act apply. The protection of the health and safety of employees and other persons in the mining industry is a priority as mines are accident-prone environments. This is regulated by MHSA. In terms of section 2 (1) of the Act the owner of every mine that is being worked must:
(a) ensure, as far as reasonably practicable, that the mine is designed, constructed and equipped;
(b) to provide conditions for safe operation and a healthy working environment. He must further maintain it in such a way that employees perform their work without endangering the health and safety, of themselves or of any other person this is in terms of section 2(b).Employees also have a corresponding duty to provide and maintain safety while on mines this is outlined in section 22 of the Act as to:
(a) take reasonable care to protect their own health and safety;

overall objective of these pieces of legislation is to protect employees regarding their safety in the workplace. However, viewed individually, they serve different purposes. The Occupational Health and Safety Act and the Mines Health and Safety Act are aimed at ensuring health and safety of employees on the workplace. In essence, the Act serves a truly preventative purpose in the sense that it strives to prevent contraction of diseases or injuries by employees. On the other hand, COIDA and ODMWA deal with the aftermath of injury or disease, *i.e.* payment of compensation to the injured employee. This approach is informed by the ILO Conventions regarding employment injuries. They include the Social Security (Minimum Standards) Convention 102 of 1952 and Benefits in the Case of Employment Injury Convention 121 of 1964.

The purpose of workers compensation legislation was pointed out by Price J in *R v Canquan*[5] when he remarked that such legislation

> …is designed to protect the interests of employees and to safeguard their rights, and its effect is to limit the common-law rights of the employers and to enlarge the common-law rights of employees. The history of social legislation discloses that for a considerable number of years there has been progressive encroachment on the rights of employers in the interests of workmen and all employees. So much has this been the purpose of social legislation that employees have been prevented from contracting to their detriment. They have been prohibited from consenting to accept conditions of employment which the legislature has considered are too onerous and burdensome from their point of view.

From the above it is clear that the South African law places an obligation upon every employer to ensure a healthy and safe working environment for workers. This obligation finds its origins in the Constitution of South Africa, which states that every person is entitled to a safe and healthy working environment.[6] Despite the body of legislation, the common law continues to play an important role as far as it concerns contractual, delictual and criminal liability. Because of the imprecision of the common law duty to provide safe working conditions, the legislature saw fit to intervene.[7]

The aim of this paper is not to provide an exhaustive list of the rights and duties of the employer, but rather to analyse the provisions of section 8 of OHSA and section 2 (1) of the MHSA, which contains the list of duties imposed on employers. Secondly the paper examines the nature and the extent of obligation imposed on the employers towards the health and safety of their employees while they are carrying out their duties. This current position will be analysed in order to determine whether it is satisfactory.

2 The common law duty of employer relating to health and safety

The common law refers to those rules which form part of our law, but which are not created by legislation. The South African common law comes from the Roman Dutch Law. At common law, an employer has a duty to provide a safe working environment, safe equipment and tools and a safe method of work.[8] However, in terms of this duty the employer does not guarantee that working conditions will always be safe. Therefore, it would not

(b) take reasonable care to protect the health and safety of other persons who may be affected by any act or omission of that employee;
(c) use and take proper care of protective clothing, and other health and safety facilities and equipment provided for the protection, health or safety of that employee and other employees.

[4] Occupational Diseases in Mines and Works Act 78 of 1973 (hereinafter referred to as ODMWA).

[5] 1956 3 SA 355 (E) at page 357-358.

[6] South African Constitution Act 108 of 1996. Section 24 of the constitution of the Republic of South Africa states that "Every person has the right to an environment which is not harmful to their health and well-being".

[7] Grogan J *Workplace Law*, 10th edition, Juta & Co.Ltd, South Africa, 2009, 53-57.

[8] *SAR & H v Cruywagen 1938 CPD 219 at 229.*

ordinarily be possible in the event of an injury at work for an employee to claim damages from the employer based on the contract of employment.[9] Because of this, the employee would at common law have to proceed by means of an action in delict. This would require the employee to prove negligence on the part of the employer. An employee might have great difficulty in proving his or her claim and incur high legal costs in doing so.

In the case of *Van Deventer v Workmen's Compensation Commissioner*,[10] the following common law duties were referred to:

- if the work is of a dangerous nature the employer must take all reasonable precautions to ensure the safety of the workers;
- the employer cannot be held liable for any latent defects in the plant which could not be noticed by reasonable examination; and
- the employer must ensure that employees do not suffer as a result of the employer's personal negligence.

What measures are reasonable and prudent is a matter for the courts to decide in the light of all the circumstances relevant to the case before it. It is evident that the employer's common law duty is always qualified by the word "reasonable". The employer's duty to provide a safe working environment is not absolute; in other words, it is not expected of an employer to ensure safety against every possible remote occurrence. In this regard, the courts measure an employer's actions against the "reasonable man" (this test could also be called the "reasonable person" test, as women are included). The courts ask the following questions:

- Would a "reasonable man" in the position of the employer have foreseen the possibility that a person may be injured?
- Would the "reasonable man" have taken steps to guard against the accident which gave rise to the injury?
- Did the employer in question fail to take the steps a reasonable man would have?

Under the common law an employee ,who can prove that the employer did not act in the same manner as the "reasonable man" would have, will be entitled to claim damages from the employer based on delict (a delict refers to unlawful action which causes damages to another). However, section 35 of the Compensation for Occupational Injuries and Diseases Act (COIDA) has altered the common law position. Section 35 prevents an employee who has been injured on duty to claim damages from the employer. Instead, the employee must now claim from the Compensation Commissioner. The COIDA actually makes it easier for employees as they do not have to prove, *inter alia*, that the employer acted negligently (in other words not as a reasonable man) in order to claim compensation. The employee will, however, only be entitled to a fixed amount of compensation and this could be considerably less than that which the employee could have claimed if he had been successful with a delictual claim.

It is a common cause that risks precede in all spheres of life. Without risk, nothing can be done. Without risk, no economy could be advanced. There is a strong tendency to emphasize the risk at work, but persons who are not working are exposed to a different set of risks. Often, they face greater risks than persons who are working. Simply, in being alive, one is exposed to the risk of an accident, the risk of contracting a disease, and an extremely diverse variety of other risks.[11] According to the Health and Safety Executive of the UK, it is not possible to have a state of zero risk, because "a state of zero risk does not exist".

[9] Marx G L and Hanekom K "The Manual on South African Retirement Funds and other Employees Benefits, Vol 1, 2009, 35-43.
[10] 1962 (4) SA 28 (T).
[11] Joughing N Engineering Considerations in the Tolerability of Risk, address at the Mine and Occupational Health and Safety Seminar, South Africa, 2010.

Notwithstanding the above, in terms of the OHASA the employer is required to maintain as far as is reasonably practicable, a working environment that is safe and without risk to the health of his employees. Furthermore the Act qualifies the standard of care required of the employer. This means that the employer is required, to the extent that is reasonably practicable, to provide and maintain a working environment that is safe and without risk to the health of employees.[12]

3 Interpretation of the duty to take reasonable care and safety of employees

The common law requires the employer to provide a safe place of work, safe machinery and tools and to ensure that safe procedures and processes are followed. [13]Section 8 of the Occupational Health and Safety Act 85 of 1993, for example, imposes a general duty on every employer to provide and maintain, as far as is reasonably practicable, a working environment that is safe and without risk to the health of his employees.[14] The interpretation of the above section is qualified by the words reasonable practicable. This would mean that the obligation to provide safe premises, safe machinery, tools and safe systems of work is not an absolute one, but restricted by the concept of reasonableness.

Reasonableness is ultimately the measure which determines whether conduct complies with the Act. It is a complicated concept, the content of which may change from place to place and from time to time. Something which is regarded as reasonable and legally acceptable in one society or at a particular time may not be so regarded in another society or at another time. To determine whether a conduct is reasonable or unreasonable, the courts consider and balance the particular conflicting interests of the relevant parties, the parties' relationship to each other, the particular circumstances of the case, whether the harm was foreseeable, and any appropriate considerations of public policy. It is acknowledged that the inquiry into the reasonableness of conduct involves considerations of public and legal policy and that the courts are required to render a value judgment as to what society's notions of justice demand, in the process of determining a party's rights and granting relief to such party.[15]

4 The safety criterion: the reasonable person and reasonableness

What measures are reasonable and prudent is a matter for the courts to decide in the light of all the circumstances relevant to the case before it. The obligation to provide safe premises, safe machinery and tools and safe systems of work is not absolute one, but it is restricted by the concept of reasonableness (as stated above). Our courts have used the standard of the reasonable person as the criterion to determine the reasonableness of conduct. In *MacDonald v General Motors South Africa (Pty) Ltd*,[16] the Court dealt with the alleged failure on the part of an employer to adequately protect a tank platform, by the provision of railings, so as to prevent accidents to persons. In dealing with the standard of care, which should be taken in such a case, Eksteen J held as follows:

> "here again the test as to whether the protective devices contended for by the plaintiff ought to have been supplied must be the view that a reasonable person would take. An employer would only be expected to guard against accidents which are likely to happen in the ordinary common use of the machinery".

[12] Section 5 (1).
[13] *Van Deventer v Workmen's Compensation Commissioner 1962 (4) SA 28 T*. See also *Oosthuizen v Homegas (Pty) Ltd 1992 (3) SA 463 (T)*.
[14] Basson A *Essential Labour Law* 5th edition, 2009, South Africa. p 384-385.
[15] See Van der Walt & Midgley Delict Principles and Cases Second Edition Butterworths Durban 1997, par 56.
[16] *1973 (1) SA 232 (E)*.

In the *Kruger v Charlton Paper of South Africa (Pty) Ltd*,[17] the Court held that a person in the position of employer (*Charlton Paper of South Africa (Pty) Ltd*), would not have foreseen that the plaintiff, a qualified electrician, would have squeezed through a gap on the side of a live electrical terminal which was not isolated and which conduct resulted in him sustaining certain injuries.

The South African courts have used the standard of the reasonable person as the criterion to determine the reasonableness of conduct, JC Van Der Walt and JR Midgley, Principles of Delict (3rd edition) at para 121 remarked as follows concerning the concept of the reasonable person and such person's attributes:

> "The criterion of the reasonable person is the embodiment of an external objective standard of care. The qualities, experience, idiosyncrasies and judgment of the particular actor are in principle not relevant in determining the qualities of the reasonable person. The law requires adherence to a generally uniform and objective degree of care. The reasonable person is the legal personification of the ideal standard to which everyone is required to conform. Such a person represents an embodiment of all the qualities which we require of a good citizen".[18]

The South African law has for time immemorial accepted the concept of the reasonable person when gauging conduct where a duty of care is required. The MHSA echoes this sentiment, but sets a higher standard of care.

The question of reasonableness will depend on the circumstances of each instance. Factors that will play a role in determining reasonableness and thus culpability within the mining environment include, at the very least: the availability of technology; the simplicity or complexity of the establishment of health and safety systems; and the relative costs thereof.

5 State of zero risk: is the employer duty absolute

From the above discussion, it becomes evident that the obligation imposed on the employer is not absolute one, but is restricted by the concept of reasonableness. The common law duty may, in certain cases, include the assessment of hazards and risks.

Great emphasis has been placed in the Western world on the prevention of occupational diseases and injuries. Detailed statutes and regulations govern specific industries in many countries, for example, the Control of Substances Hazardous to Health Regulations of the United Kingdom and various regulations applicable to the use of asbestos and lead, fire protection, mines, and quarries, petroleum, etc. Risk management is an important part of managing health and safety. In the United Kingdom, the Management of Health and Safety at Work Regulations, 1999, require every employer to make a "suitable and sufficient assessment of the risks to health and safety of his employees to which they are exposed whilst they are at work". The particularity of the assessment is determined by the risk in question.

Of relevance to the South African mining industry in determining acceptable levels of risk is the Mine Health and Safety Act,[19] which requires that the employer to ensure that the working environment at a mine, is healthy and safe as "reasonably practicable". The words "reasonably practicable" are defined in section 102 of the MHSA as meaning "practicable having regard to:

- The severity and scope of the hazard or risk concerned;

[17] *2002 (2) SA 335 SCA.*
[18] *Supra* note 14.
[19] *Ibid* note 4.

- the state of knowledge reasonably available concerning that hazard or risk and of any means of removing or mitigating that hazard or risk;[20]
- The availability and suitability of means to remove or mitigate that hazard or risk; and
- The costs and the benefits of removing or mitigating that hazard or risk.

Against this backdrop, mines are required to strive continually for improvement in their safety performance. It is important to note that the Act requires only that reasonable precautions and not all precautions be taken. In summary, if mining fatalities are to be reduced significantly in the short term, it is essential to change the attitude of all employees towards safety. In the longer term, it is possible to reduce risk by improving knowledge or introducing improved mining methods.

6 Controversial features of our common law duty of the employer

Work can be dangerous. Similarly, sometime types of work are more dangerous than others, but it is safe to say that all types of work carry risks to the health and safety of employees. This is mindful, of the fact that the common law already recognises the duty of employer to take reasonable care for the safety and health of their employees. The vague common law duty is ill-suited to address fast changing and specific health and safety concerns in the workplace properly. It also means that there is a need to address health and safety in the workplace by means of legislation augmented by detailed regulations.

Against the backdrop, the legislature realised the deficiencies in the duty of the employer to provide safe working environment. As a result, in order to ensure that employees are protected against workplace injuries and diseases, the legislature applies a double - barrel approach namely by legislation aimed at prevention of workplace injuries. This is evident from the Occupational Health and Safety, and the Mine Health and Safety legislation. Secondly the legislation provides compensation for employees who have been injured or become ill as a result of his or her work.[21] The deficiency of the common law, is further exacerbated by the fact that in South Africa, the civil justice system is expressly excluded as a mechanism to hold employers accountable by virtue of the provisions of section 35 of the Compensation for Occupational Injuries and Diseases Act, 1993, which precludes any employee or the dependant of any employee from suing the employer to recover the harm or loss flowing from any occupational injury or disease in the civil courts.

In addition, the occupational health and safety statutes make no reference to risk management principles, and provide no guidance as to the relationship between 'reasonably practicable' and risk management. Both processes appear to require duty holders to identify and weigh up risks and possible control measures, but it is far from clear what exactly the relationship between these two processes is. This was evident when we examined (above) the way in which the courts and occupational health statutes have interpreted the notion of *reasonably practicable*. In determining what is reasonably practicable, the courts have been influenced by the 'event focus' of prosecutions, in that charges are usually brought in response to particular incidents or risk scenarios and the evidence and argument focuses on these events in hindsight, while the occupational health and safety risk management provisions are framed as a proactive and holistic process, to prevent or control risks arising from work or at a workplace, across the board, before incidents occur.

7 Safety obligations of employees

The safety obligations of employees are relevant and must be taken into account when considering the question of whether the workplace was safe, as far as reasonably practicable. In terms of OHASA, every employee is required to:

[20]Since 1990 the mining industry conducted an intensive research and development programme, which led to a major advance in knowledge and the development of techniques for mitigating the hazards and risks.
[21] Compensation for Occupational Injuries and Diseases Act 130 of 1993 of South Africa.

- Take reasonable care for the health and safety of himself and other persons who may be affected by his acts or omissions;
- As regards a duty or requirement imposed on his employer or any other person by this Act, cooperate with such employer or person to enable that duty or requirement to be performed or complied with;
- Carry out any lawful order given to him, and obey the health and safety rules and procedures laid down by his employer or by anyone authorized thereto by his employer, in the interest of health and safety;
- If any situation in which is unsafe or unhealthy comes to his attention, as soon as practicable report such situation to his employer or to the health and safety representative for his workplace or section thereof;
- If he is involved in any incident which may affect his health or which has caused any injury to himself, report such incident to his employer or to anyone authorized thereto by the employer, or to his health and safety representative, as soon as practicable but not later than the end of the particular shift during which the incident occurred, unless the circumstances were such that the reporting of the incident was not possible, in which case he shall report the incident as soon as practicable thereafter.

8 Compliance with health and safety practices

According to Stranks,[22] there are two factors that influence compliance with health and safety practices, namely;

- The interaction of individual s with their job and the working environment; and
- The influence of equipment and system design on human performance

The job and working environment's design should be based on task analysis of actions required by the operator.[23] From a health and safety viewpoint, task analysis provides the information for evaluating the suitability of machinery, tools and equipment, work procedures and patterns, and the operator's physical and social surroundings. South Africa has introduced a number of statutes covering a wide range of hazardous exposures. The Occupational Health and Safety Act is one example. The enforcement of this Act adds new grounds to former reasons for the advancement of occupational safety. To the extent that the OHS Act stimulates the development of reliable means of assuring the application of safety knowledge, it can be expected to contribute to the fulfilment of safety in any area where harmful occurrences are a concern.[24]

Through this Act the safety of employees is protected by keeping them informed of dangerous substances with which they are working. Section 14 of OHS Act holds individuals criminally liable under the Act when it is shown that they knowingly and intentionally violated the Act. However, legal requirements do not in themselves optimise safety. At best a climate for the study and enactment of means to attain the desired objective is created. Grimaldi and Simonds (1989) express that the spirit and the letter of the law must be fulfilled for that to take place. In support , Fairbrother argues that the greatest occupational health and safety challenge is perhaps not providing standards and regulations to enhance safety, but rather how this law will be enforced. [25] This challenge is not unique to the occupational health law, as the same issue is being faced in all countries and with respect to all labour standards.

[22] Stranks, J.W. Human factors and safety. London: Financial Times, Pitman Publishers, 1994A.
[23] Dilley, H and Kleiner, B.H, Creating a culture of safety. Work study, 1996, 45 (3), 5-8.
[24] Grimaldi, J.V, and Simonds, R.H, Safety Management, 1989, 5 edition, Richard D.Irwin.
[25] Loewenson, R, Occupational Health and Safety Legislation in Southern Africa: Current Trends. Rondesosch: Institute of Development & Labour Law, University of Cape Town, 1996.

Pybus makes an interesting observation of organisations with a world class safety performance in the seamless link between standards and people. [26] On the one side, the standards are a good fit with the organisational culture and the way people work. On the other side, there are people who seek to improve the standards in a continuous cycle of dynamic growth. Evidently, many organisations fail to achieve this balance and synergy, focusing largely on the standards rather than creating an organisational culture of safety. [27]

It is important to note that standards and regulations may be regarded as an important catalyst to guide the employer in providing a safer workplace. However, it must not be seen as the only method. Research from Zhang, asserts that a poor safety culture may be linked to many accidents. [28] Thus although an organisation might adhere to safety legislations, the current culture of the organisation might be negative towards safety, resulting in a poor safety culture. It is therefore necessary to explore not only culture, but safety culture in an organisation, focussing on the shared set of values and beliefs towards safety of a group of people. [29]

9 Recognition of prevention and rehabilitation as part of integrated approach

A well-developed social security system does not only concern itself with the compensation of individuals when a certain risk materialises. It also covers preventative and rehabilitative measures. Several policy documents have recognised the increased importance of introducing prevention and rehabilitation as part of the South African employment accident and diseases scheme.[30]The implementation of these principles will lead to improved health and safety standards, limiting death, injury and sickness due to the workplace, assisting injured and sick employees to return to work, and bringing about major savings that could be passed on to the benefits available for those who have become sick or injured.

In a recent comprehensive investigation into the social security system of South Africa, it was the view of the Committee that:

> ". . . unlike overwhelming precedent in this regard, no comprehensive strategy has yet been developed to incorporate prevention as part of the overall system of employment injury and disease protection. The recommendation made by the Report of the Committee of Inquiry into a National Health and Safety Council, namely that prevention policy must be developed as part of a national strategy, is supported. All compensation agencies, including the mutual associations, should participate in developing this policy."[31]

This fairly negative view is also held with respect to the issue of reintegration:

> "COIDA is not strong on reintegration measures. In contrast with the position elsewhere, there is no provision in COIDA, which specifically attempts to enforce reintegration measures such as compulsory rehabilitation or vocational training programmes. It is, therefore, especially in the area of reintegration measures that the system is extremely deficient. One would have to suggest that policy-makers should, as a matter of priority, consider the introduction of

[26] Pheng, L.S & Shiua, S.C, The Maintenance of Construction Safety: Riding on ISO 90 00 quality Management systems. Journal of Quality in Maintenance Engineering, 2000, 6 (1), 1355 – 2511.
[27] Ibid.
[28] Beckmerhage, I.A, Berg, HP, Karapetrovic, S.V. & Willborn, W.O 2003. Integration of management systems: Focus on safety in the nuclear industry. International Journal of Quality & Reliability Management, 20 (2): 210-228. Available from emerald: http//www.emeraldinsight.com.[Date access: 2011-01-27.
[29] Ibid.
[30] Benjamin P and Greef J Report of the Committee of Inquiry into a National Health and Safety Council in South Africa, (Pretoria: Department of Labour May 1997).
[31] *Transforming the Present – Protecting the Future* (Draft Consolidated Report of the Committee of Inquiry into Comprehensive System of Social Security for South Africa) (March 2002) ch 12, par 12.5.

> measures which would give effect to the principle of labour market integration. Rehabilitation, vocational training and, where appropriate, linking entitlement to benefits payment to participation in such programmes, should serve as minimal mechanisms to attain this goal."[32]

Three instruments can, generally, be utilised to prevent occupational injuries/diseases from occurring: firstly, active accident prevention; secondly, the use of risk-based contributions/premiums; and thirdly, sanctions for misconduct.[33] In South Africa, all three instruments are utilised. The effectiveness of these instruments is, however, debatable.

10 Employers duty to provide a safe working environment: Is this position satisfactory?

In South Africa, the civil justice system is expressly excluded as a mechanism to hold employers accountable by virtue of the provisions of section 35 of the Compensation for Occupational Injuries and Diseases Act, 1993, which precludes any employee or the dependant of any employee from suing the employer to recover the harm or loss flowing from any occupational injury or disease in the civil courts.

Section 35 affords employers immunity from the civil consequences that would normally flow from a breach of their duty of care. From the employer's perspective it is of no civil or financial consequence if they kill 10 or 100 employees. The lack of any civil accountability does not however only impact on the employer's enthusiasm to comply with his duty of care. It also has a very significant impact on the criminal justice system's ability to function as it should. In the field of health and safety the two systems are inextricably entwined.

One of the consequences flowing from the lack of civil accountability is that our courts have not had opportunity to develop a body of case law to determine the content and meaning of the employer's duty of care. Put differently there are no yardsticks or standards of conduct against which the employers conduct can be measured and judged. The only measures are those laid down in the regulations.[34]

This is why employers are seldom if ever prosecuted for contravening their general duty of care as set in the principle acts. There is no developed law on what those duties are. In criminal matters where the State must prove its case beyond any reasonable doubt, this presents an insuperable obstacle to prosecutors. Such prosecutions, if any, are in terms of the regulations which tend to be more specific. However many of the regulations are and increasingly qualified by terms such as "reasonable", "practicable" or "adequate", terms that are in themselves meaningless until given content through the courts. Therefore, there is a need to introduce law which will address issues of occupational health and safety in a compressive manner, to include aspects such reintegration, prevention, the social costs associated with occupational diseases, and rehabilitation or workers who have injured at the workplace.[35]

To illustrate the point of how important the development of the law is, we could refer to the US law of torts (law of delict) in relation to the duty of care owed by the employer to his employee. At the risk of over simplification:

1) The US law of torts has been developed to take into account the social costs associated with occupational injuries and disease.
2) It does not seek to hold employers liable for every occupational accident or disease, only preventable ones.

[32] Olivier *et al* "Social Security: A legal Analysis", 1st edition, LexisNexis Butterworth's, South Africa, 2003, 492.
[33] Calabresi G *The Costs of Accidents: A Legal and Economic Analysis* (1970) 26.
[34] Spoor R "The employer's duty of care: responsibility without accountability is not responsibility at all" paper presented at the 2nd Annual Labour Law Conference, South Africa, 12-14 August 2009.
[35] *Ibid* No 30, 492 – 493.

3) In assessing whether or not an occupational accident or disease was preventable the court asks two questions:

- What is the cost to the employer of preventing the accident or disease?
- What is the cost to society of not preventing the accident or disease?

If the cost of prevention is less than the cost of the harm done to society then the court will hold that the employer's failure to prevent the accident or disease was tortious and the employer will be held responsible for the harm done. The awareness of the social cost associated with occupational injury and disease, is almost completely lacking in South Africa. The cost is enormous and is borne overwhelmingly by sick and disabled workers, their families and the communities they hail from.[36]

11 Concluding remarks

The health and safety obligations of the employer to take steps which are reasonably practicable to ensure health and safety are consistent with the common law duty to provide a reasonable safe working place. Section 8 (1) read with section 1 of OHS Act and section 102, 2 and 5 of the MHSA were an attempt by the legislature to give some content to the requirement of reasonableness.

The legislature together with the common law allows and to a great extent, compels the employer to adopt a holistic approach to safety management. The employer may use a number of measures forming part of a safety management system to ensure a reasonable safe working place. The employer may rely on risk management, formal and informal training of employees, an organizational structure of experienced and competent employees, safe equipment, safe systems of work, safety procedures, supervision, discipline, maintenance procedure, the fact that the employee also has a duty to take reasonable care for his own safety and the safety of others.

Very often employers set for themselves a safety objective, for example to achieve zero risk and harm in the workplace. Such a goal must be distinguished from the legal criterion of safety. The legal safety criterion determines when a workplace is regarded as "safe" or "safe as far as reasonably practicable". This question is completely separate from any goal set by the employer. In other words, even if an employer does not achieve its own safety goal, such fact does not mean that the workplace was "unsafe" or not "safe as far as reasonably practicable. In order to be meaningful, a safety objective must refer not only to a fatality or a lost time injury rate, but also to a time period to which it applies. Such objective should be realistic and achievable.

In addition, it needs to be understood in making judgments on tolerable levels of risks in industry, and in all spheres of life that every action gives rise to a risk. Without risk, nothing can be done. Because zero risk is a physically impossibility, it is not possible to design for a state of zero risk in all engineering design. While the strategic target of achieving zero risk is laudable it does not provide any practical guidance to engineers as to what acceptable limits of risk should be. This causes a significant and real problem in the design and the management of risk. Without meaningful guidelines, engineers, managers and authorities often find themselves in disagreement. Thus, it has become essential to establish criteria for tolerable levels of risks and unacceptable levels of risks in order to design and manage engineering systems properly. Zero risk is a physically impossibility. However, it is sound policy to set targets for improving safety, but these targets have to be achievable and reasonably practicable.

In conclusion, in most civil law jurisdictions the common law duty of care, is constantly being refined and given meaning and content by the courts through their judgments. In most countries, the legislature has further refined the employer's duty of care by enacting health and safety legislation. In general, health and safety legislation are intended firstly to give specific content to the duty of care, and to enhance accountability by providing for a range of additional criminal and administrative sanctions; secondly , to facilitate civil liability

[36] *Ibid* note 23.

through the principle of strict liability for breach of a statutory duty. As indicated above there is a need for a paradigm shift.

The Committee of Inquiry into a National Health and Safety Council concluded that the system of compensation under the Compensation for Occupational Injuries and Diseases Act (COIDA) and Occupational Diseases in Mines and Works Act (ODMWA) has not maximised its potential to promote preventative activities.[37] Even though it is more cost effective to run an effective rehabilitation scheme than merely paying long-term cash benefits to victims of occupational accidents or diseases, reintegration measures are not sufficiently addressed in the South African laws. [38]

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[37] Olivier *et al* "Social Security: A legal Analysis", 1st edition, LexisNexis Butterworth's, South Africa, 2003, 491-499.
[38] COIDA requires that the employer must pay the compensation due to the injured employee for the first three months of temporary total disablement (s 47 (3)). This could perhaps be seen as a measure which will ensure to some extent the continuation of the employee's link with his employment. However, this remains essentially a temporary measure, which is not backed by other (re)integration measures.