

**NEW CHALLENGES:
SHIFTING POWER IN
UNCERTAIN TIMES**
12-14 August 2009



22nd ANNUAL LABOUR LAW CONFERENCE

THE EMPLOYERS DUTY OF CARE

Responsibility without Accountability
is not Responsibility at all

Jointly organised by:



The Institute of
Development and
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Centre for Applied
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At common law, an employer owes a duty to his employees to do all that a reasonable and prudent employer would do to secure their health and safety in the workplace.

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.

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The employer is held accountable:

- by the civil justice system which can award damages employees who have been harmed as a result of the employers breach of his duty of care,
- by the criminal justice system where a breach of the duty results in death.

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 judgements.

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In most countries the legislature has further refined the duty of care by enacting health and safety legislation (H&S legislation).

In general H&S legislation is intended;

- to give specific content to the duty of care,
- to enhance accountability by:
 - providing for a range of additional criminal and administrative sanctions.
 - to facilitate civil liability through the principle of strict liability for breach of a statutory duty.

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In this country the only mechanism whereby employers who breach the duty of care owed to their employees, can be held accountable is through a system of administrative sanctions, regulated by the inspectorate and the criminal justice system.

The civil justice system has no role to play, indeed it is expressly excluded.

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In South Africa, the employers duty of care is defined in two principal statutes;

- The Mine Health and Safety Act, 1996
- The Occupational Health and Safety Act, 1993

The general duty of care owed by the employer to its employees is set out in sections 2 and 8 of those acts respectively.

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In substance the acts restate the common law position, in obliging employers to take all reasonable and practicable measures to ensure a safe and healthy work environment.

As already indicated that definition is somewhat lacking in content.

Over and above the general duty, specific measures to be taken by the employers are set out in the regulations to the acts

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In South Africa the level of compliance by employers with H&S regulations are low.

- The 2008 Presidential Mine Health and Safety Audit found only a 66% compliance in the mining industry.
- A so called “Blitz Inspection Audit” of the Iron and Steel Industry, in March 2009, found compliance levels of 51%

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Not surprisingly the number of employees killed or disabled as a result of occupational injuries and diseases is unacceptably high too.

The presidential audit revealed that;

- 2 per 1000 mineworkers are killed each year,
- 8 per 1000 suffer disabling injuries.
- approximately 6000 in-service mineworkers were diagnosed in 2007 to have contracted an occupational lung disease or to have suffered NIHL

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When regard is the prevalence of occupational disease in mine-workers, it is not unreasonable to conclude that the risk to a mineworker, over a working lifetime, of being killed or disabled through injury or disease approaches 50%.

The risk to workers employed in heavy industry is likely not much lower.

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Both the DME and DOL's annual reports, attest to the dismal failure of the criminal justice system and the administrative penalties procedures to ensure accountability of employers for breaches of their duty.

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The Presidential Audit reported;

- On Compliance: “There is a pervasive culture of non-compliance” “Operators (in gold and platinum) tend to be intransigent”
- On Administrative penalties: “The system of administrative fines failed to serve as a deterrent for non compliance”

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- On health and safety prosecutions: “Provision is made in the Act for referral of cases to the Director of Public Prosecution where negligence has resulted in death or serious injury of someone. Every year referrals are made but no prosecution has ever taken place.”

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The Presidential Audit attributed the dismal failure of the systems that are established to hold employers accountable to the perennial problem of lack of capacity and resources in the inspectorate and prosecuting services.

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The audit's recommendations to address the chronic and extensive non compliance by employers with their duty of care included.

- Promoting a culture of safety
- the strengthening of the Mine Health and Safety inspectorate,
- better training and
- harsher penalties for contravention.

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In a nutshell nothing that was not recommended 15 years ago by the Leon Commission of Enquiry into Mine Health and Safety and nothing that has not already been tried and found to be wanting.

It is difficult to conceive given the current state of governance that the state has the capacity, skills resources or even the will to hold employers accountable for their breaches of the duty of care.

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Perhaps its time to look at other mechanisms by which employers might be held accountable and “incentivised” to take responsibility.

Without any effective mechanism through which employers may be held accountable, we have responsibility without accountability. A circumstance that is much the same as no responsibility at all.

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The problem of resources, skills and capacity aside, what distinguishes developed countries, with much better safety records, from ours, is that they rely upon the civil justice system, as their principal instrument, to hold accountable employers who breach the duty care owed to their employees.

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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.

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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 or maim 10 workers or 100.



The lack of any civil accountability does however not only impact on the employers enthusiasm to comply with his duty of care, it also has a very significant impact on the criminal justice systems ability to function as it should.

In the field of health and safety the two systems are inextricably entwined

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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 employers 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.

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This is why employers are seldom if ever prosecuted for contravening their general duty of care as set in the principle acts.

There simply are no precedents and 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.

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Such prosecutions as there are, are in terms of the regulations which tend to be more specific.

However and increasingly, many of the regulations are themselves qualified by terms such as “reasonable”, “practicable” or “adequate”, terms that are in themselves meaningless until given content through the courts.

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The lack of specificity in H&S legislation also encourages so called “check list” compliance, by employers.

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The failure to use the civil justice system also prevents the development of legal and specialist expertise that is essential to an effective prosecution.

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We have dozens of independent legal, medical and technical specialists dealing with whiplash injuries and the mechanisms of motor vehicle accidents. These are fostered in the civil justice system.

On dust related diseases and the mechanisms by which furnaces erupt and petrochemical plants operate we have none.

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Some might suggest more specific regulations as an alternative to developed legal precedent.

This is not realistic. Increasingly it becomes apparent that the majority of major accidents and disease are caused by the failure of complex systems.



Complex systems cannot be made to operate safely by statutory regulation.

The knowledge required to operate complex industrial systems safely resides with the employer and its engineers and managers alone.

Which is why responsibility is best left to them.

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

At the risk of over simplification;

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

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- 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?

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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.

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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.

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If we take for example of the +-2200 in service mineworkers found, as per the presidential audit, to have contracted silicosis or Silico-Tuberculosis in 1997.

If we assume an average 17 years of service and an average age of 40 and that they will all be found to be unfit for service. Then the cost will be;

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- 2200 x lost earnings of R40 000/yr x 20 years = R1,76 billion
- 2200 x R250/month medical expenses for life x 20 years= R11 million
- Add to that the multipliers associated with minor children whose education is interrupted and whose physical and mental health is impaired by poverty and malnutrition we talking of a cost to society well in excess of R2 billion.

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The total value of the compensation (funded by the employer) to which they are likely entitled through the statutory compensation system (ODMWA) is approximately 2200 x R40 000= R88 million.

The likely cost of prevention, namely improved ventilation, is probably a few hundred million rand.

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Even on a discounted scenario, the employers have passed on, or externalised, a cost associated with their business to their employees and society well in excess of a billion rand in one year by failing to provide a healthy work environment, in breach of their duty of care.

They were able to do so because they are not and know that they will not ever be called to account.

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Sick and injured workers covered by the COID Act don't fare much better.

In a matter where I have recently had actuarial assessments done, the direct financial loss to a mother with 3 small children whose husband, a diesel mechanic, had died in a mine accident, was R2.6 million and the value of her and the children's COID benefit R885 000. Leaving a shortfall or of over R1.5 million, successfully passed on to society by the employer.

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The Presidential audit fails to address issues around the social cost and compensation. It records simply that:

“Compensation matters were not addressed because they fall outside the scope of the Act.”

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Much of the South African writing, it's hardly a debate, on Workmen's Compensation focuses on the advantages it affords which include.

- No fault compensation
- The social cost to employers of unlimited liability for civil claims
- The inefficiency and cost of civil justice.

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What is largely omitted or ignored is:

- The huge inefficiencies in the system,
- Under compensation,
- How it impacts on rational economic decision making,
- The extent to which it externalises the cost of occupational injury and disease to society,
- How it removes accountability.
- How it is an impediment to legal development, learning and improved health and safety standards.

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This is not an argument to abolish workers compensation.

In many jurisdictions the social benefits of statutory no fault compensation systems are well recognised and co-exist perfectly well with the civil justice system.

Employees have an election whether to claim compensation under that system or to proceed in terms of the civil law.

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In conclusion:

I hope to have made the argument that;

- We have unacceptable levels of occupational injury and disease in this country.
- At the heart of this problem lies employers low levels of compliance with their statutory and common law duty of care.
- Employers breach the duty of care with impunity because there is no accountability.

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- Accountability is secured through the civil and criminal and administrative justice systems.
- The criminal and administrative justice system, as it has application to health and safety, is not effective to ensure accountability.
- The criminal and administrative justice system does not work due to resource, capacity and skills restraints.

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- The criminal justice system does not work because the content of the duty of care is not defined and developed in our civil justice system.
- The employers' duty of care is not amenable to statutory regulation as it is too complex.
- The employers' statutory and common law duty of care owed to his employees is poorly developed.

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- The civil justice system is excluded, by the provisions of section 35 of the COID Act, from playing its rightful rule in ensuring accountability.
- Only the civil justice system can develop the content of the employers duty of care and foster the skills and capacity requisite to enforce it.
- Without accountability there is no duty of care.
- The social cost associated with the current lack of accountability is huge and is borne by workers their families and communities.

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It is futile to seek to impose ever greater formal responsibilities on employers.

To secure the safety of workers we should be working to ensure accountability and justice.

Richard Spoor

August 2009