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**TITLE:**

*A consideration of the fault standard in a claim for increased compensation under s 56(1) of the Compensation for Occupational Injuries and Diseases Act (COIDA)*

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**STUDENT NAME: ALEXANDER SPOOR**

**STUDENT NUMBER:**

**SUPERVISOR : PROFESSOR HALTON CHEADLE**

**WORD COUNT: 20469**

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## CONTENTS

CHAPTER 1: INTRODUCTION.....	6
I THE AIM AND BACKGROUND TO THE DISSERTATION .....	6
II STRUCTURE OF THE DISSERTATION .....	8
CHAPTER 2: AN OVERVIEW OF WORKERS' COMPENSATION .....	9
I. THE COMMON LAW ROOTS OF WORKERS' COMPENSATION .....	9
III. THE LEGISLATIVE DEVELOPMENT OF THE COIDA .....	14
CHAPTER 3: THE HISTORY AND DEVELOPMENT OF THE COMMON LAW DEFENCE OF CONTRIBUTORY NEGLIGENCE.....	18
I THE EARLY ORIGINS OF THE DEFENCE OF CONTRIBUTORY NEGLIGENCE.....	18
(a) The Roman and Roman-Dutch Law .....	19
(b) The English Law .....	19
(c) The South African law .....	21
II APPLICATION OF THE LAST OPPORTUNITY RULE UNDER THE DEFENCE OF CONTRIBUTORY NEGLIGENCE .....	23
(a) The objective gloss creates an objective test .....	23
(b) The principle of continuing negligence makes the determination of who has the last opportunity to act arbitrary .....	24
(c) The introduction of a test of comparative negligence goes against all earlier case law .....	26
III THE ADA BRINGS AN END TO THE LAW OF CONTRIBUTORY NEGLIGENCE .....	26
CHAPTER 4: CASE LAW REGARDING S 56 OF THE COIDA.....	28
I CLAIMING INCREASED COMPENSATION UNDER SECTION 56 OF THE COIDA.....	28
II HOW THE COURTS IMPORTED THE COMMON LAW DEFENCE OF CONTRIBUTORY NEGLIGENCE INTO A CLAIM FOR INCREASED COMPENSATION.....	29
(a) Mey v South African Railways and Harbours 1937 (CPD) .....	30
(b) Fred Saber (Pty), Ltd v Franks 1949(A) .....	31
(c) Grace v Workmen's Compensation Commissioner and another 1967 (4) SA 137 (T) .....	32
(d) Young v Workmen's Compensation Commissioner and Another 1998 (T). .....	33
III THE LAW OF CONTRIBUTORY NEGLIGENCE IN PRACTICE.....	34
CHAPTER 5: A NEW APPROACH TO S 56 OF THE COIDA.....	37
I THE CURRENT INTERPRETATION OFFERED BY THE COURTS IS LEFT TO STAND....	38
II THE COMMON LAW DEFENCE OF CONTRIBUTORY NEGLIGENCE DOES NOT APPLY TO A CLAIM FOR INCREASED COMPENSATION .....	40
(a) A plain reading of s 56 of the COIDA .....	40
(b) The importance of distinguishing between damages and damage causing events.....	42

III THE ADA APPLIES TO THE COIDA.....	45
IV RECONCILING THE TWO ALTERNATE APPROACHES TO A CLAIM FOR INCREASED COMPENSATION .....	49
V CONCLUSION.....	51

## CHAPTER I: INTRODUCTION

### I THE AIM AND BACKGROUND TO THE DISSERTATION

Under what circumstances and to what extent will employers be held liable for the sickness, injury and death of employees in the workplace? The initial answer to this question was seldom, if ever. The industrial revolution and the advent of the first modern industrial disasters spurred rapid legal development on this question. The law had to play catch up to these new capital intensive modes of production, and the closely associated development of the legal corporation, which permitted the separation of beneficial ownership from the management and operational control of the business.

From initially placing the burden of injury almost exclusively on the injured employee, growing social awareness of the inherent risks in the workplace has seen an ever increasing willingness to hold the employer liable.<sup>1</sup> This was initially driven by the courts, but developments were soon overtaken by the work of political activists and trade unions, which placed great pressure on business and the state to find more equitable systems of worker protection.<sup>2</sup> This culminated in what is so often referred to as a new balance<sup>3</sup> being struck in the form of comprehensive legislation to protect workers.

In South Africa, this comprehensive legislation is the Compensation for Occupational Injuries and Diseases Act 3 of 1993 ('the COIDA'). The COIDA extinguishes an employee's common law rights to sue the employer for damages<sup>4</sup> and instead introduces a no-fault system of compensation in which the employee is guaranteed an amount of compensation, when the harm from the accidents or occupational disease arises in the workplace.<sup>5</sup> The compensation payable is in most situations significantly less to that which could be claimed at common law, being capped at a maximum of the total pecuniary loss to an employee.<sup>6</sup> The employer thus avoids the risks associated with the possibility of costly damages claims while being obliged to fund the legislative compensation scheme through a tariff system. The tariffs

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<sup>1</sup> Wilson & Levy *WORKMEN'S COMPENSATION VOLUME I* (1939) viii, states that 'it [became] clear that industrial accidents could no longer be regarded as an aggregate of chance mishaps to unfortunate or careless individuals.'

<sup>2</sup> Benjamin P *Understanding the Occupational Health and Safety Act and the Compensation for Occupational Injuries and Diseases Act* (2011) 128.

<sup>3</sup> *Ibid* at 128; Debbie Budlender *Labour Legislation in South Africa 1924-1945* (unpublished Masters of Arts and Sociology thesis, University of Cape Town, 1979) 211; D Millard 'For whom the bell tolls...interplay between law of delict and social security law in three modern compensation systems ' (2010) TSAR 535.

<sup>4</sup> COIDA s 35(1).

<sup>5</sup> Benjamin *op cit* note 2 at 128.

<sup>6</sup> COIDA section 63 and 67 read with the relevant schedules.

payable are dependent on the risks associated with the class of industry and the safety record of the individual business.<sup>7</sup>

THE COIDA in recognition of the need to discourage employers from maintaining unsafe workplaces preserved a common law like<sup>8</sup> fault based entitlement to what is termed 'increased compensation' under s 56 of the COIDA.<sup>9</sup> The significance of the provision lies in the ability of an injured employee or their dependents to claim back the difference between the no-fault compensation paid and their respective pecuniary loss.<sup>10</sup> While potentially having a dramatic impact on the compensation received the section is completely underutilised.<sup>11</sup> The reasons for this underutilisation are said to lie in potential claimants either being ignorant of the provisions or unable to institute claims.<sup>12</sup>

This thesis will examine the interaction between the law that regulates workmen's compensation and one aspect of how this modern system of law deals with the age old problem of negligently caused harm in the workplace. In particular, it argues that another important reason why claims for increased compensation are underutilised is because the common law defence of contributory negligence is said to apply to a claim for increased compensation. The result of this is that laws, which have since been abolished with the passing of the Apportionment of Damages Act 34 of 1956<sup>13</sup> ('the ADA') continue to apply in this one statute. The result is that cases developed over a century ago, which involved law on hobbled donkeys and steam powered trains, continues to have a major influence on whether a claim for increased compensation is successful or not.<sup>14</sup> As will be shown, this position is untenable and a new interpretation of the provision for increased compensation is required.

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<sup>7</sup> Benjamin op cit note 2 at pp 141-2.

<sup>8</sup> Rautenbach IM 'The bill of rights and statutory intervention with common-law delictual remedies in compensation schemes for road accidents and work-related injuries and diseases' (2011) 3 Tydskrif vir die Suid-Afrikaanse Reg 529, Rautenbach suggests the section is fault bases it may be expected to display characteristics of liability found in delict.

<sup>9</sup> Benjamin op cit note 2 at 180, as Benjamin indicates this provision is the most important exception to the no-fault system of compensation in the COIDA.

<sup>10</sup> COIDA s 56(4)(b).

<sup>11</sup> Oliver & Smit (eds) et al 'Employment Injuries and Diseases' in Oliver, Smit and Kalula (eds) Social Security. A Legal Analysis (2003) 459 and 498; Benjamin op cit note 2 at 180.

<sup>12</sup> Ibid; Rautenbach op cit note 8 at 529, speculates that a second reason for this could be that the same institution which must make an award of equitable no-fault compensation must also adjudicate on the claim for increased compensation. As this compensation can only be recovered through assessing tariff contribution of employers at a higher rate there may be a natural reluctance to award such claims.

<sup>13</sup> The Apportionment of Damages Act No. 34 of 1956.

<sup>14</sup> Williams G *Joint Torts And Contributory Negligence: A Study of Concurrent Fault*, First ed (1951) at 235, Williams quotes from an Irish judge in the 1947 case of *Ross v. McQueen* [1947] N.I. 81 at 83 who states: '*... the determination of responsibility still involves the application of principles perhaps better suited to a more leisurely age.*'

## II STRUCTURE OF THE DISSERTATION

The dissertation is divided into five chapters. Chapter Two traces developments in workers' compensation from its early common law roots to the legislative regime of the COIDA. As will be shown, many substantial hurdles at common law prevented an employee from successfully claiming damages against the employer. These common law defences were gradually whittled away over time and then later subsumed by legislative compensation regimes. These regimes increasingly recognized that the default position was to place liability on the employer in recognition of the employer's ability to control and maintain a safe working environment.

Chapter Three examines the history of the common law defence of contributory negligence. It notes how the Roman, Roman-Dutch and English legal systems approached the issue of contributory negligence, and how the South African system awkwardly accepted the English approach. The law of contributory negligence had such a deleterious impact on a plaintiffs' claims, that the courts developed several glosses to alleviate this position. These glosses often appeared to overlap, conflict or completely undermine earlier positions of the court. The chapter concludes by indicating how these issues were resolved through legislative intervention in the form of the ADA. The reforms the ADA introduced were however never applied to the COIDA.

Chapter Four examines the South African courts' jurisprudence around the continued application of the defence of contributory negligence to claims for increased compensation. It is shown how originally the courts incorporated existing principles on the common law into a reading of the statute. However, later rulings of the court failed to contextualise these interpretations and take cognisance of the significant developments in the common law, as well as legislative developments. In the result a system which had clearly been recognised as unworkable, and replaced by legislation in every other avenue of the law, was allowed to operate unchallenged for 60 years.

Having illustrated the deeply problematic status quo, Chapter Five concludes by considering three possible ways forward: the continuation of the status quo, the elimination of contributory negligence from section 56 jurisprudence altogether and the application of the ADA to the COIDA.

## CHAPTER 2: AN OVERVIEW OF WORKERS' COMPENSATION

### I. THE COMMON LAW ROOTS OF WORKERS' COMPENSATION

Before the emergence of statutory systems of compensation, the common law held sway. Many of the common law defences that existed in the 19th and early 20th century have now been ameliorated or abolished, either through developments in the common law or as a result of legislative reform. As is shown here, many of the common law defences could only have arisen in the social milieu of *laissez faire* capitalism of the 19th century with its promotion of an individualistic political philosophy.<sup>15</sup>

In many respects the system of delict was ill prepared to deal with the demands of a modern industrialised society. However, where it failed, and harsh consequences proceeded to follow, these came in conflict with co-developing notions of social-democratic justice, the result was the necessity for legal development. Some of these harsh rules and their development are discussed here in order to contextualise the defence of contributory negligence, and demonstrate the movement towards greater employer liability.

The early English case of *Priestly v Fowler* (1837) 150 ER 1030 ('Fowler') is said to introduce two of these defences.<sup>16</sup> The first is the rule of 'common employment' or what was termed the 'fellow servant rule.' It is a rule in terms of which an employee is prevented from claiming damages against the employer for an injury resulting from the negligence of a co-worker with whom they were in 'common employment.'<sup>17</sup> The judgement clearly shows that the judge considered as absurd, the notion that a master could be held responsible for the negligence of his fellow servants.<sup>18</sup> It is clear that the judgment is informed by an understanding of employment taking place in the context of small scale, family owned enterprise, and does not anticipate the enormous changes that would be wrought by industrialisation and the emergence of large and depersonalised corporations.<sup>19</sup>

The timing of the judgment could not have been worse with the boom in industry from the industrial revolution. Large enterprises, owned and controlled by depersonalised

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<sup>15</sup> Fleming James Jr 'Contributory Negligence' (1953) 5 Yale Law Journal at 695.

<sup>16</sup> Malone, Plant & Little *Workers' Compensation And Employment Rights: Cases And Materials* 2 ed (1982) 2, in reference to the case of *Priestly v Fowler* (1837) 150 ER 1030.

<sup>17</sup> *Ibid.*

<sup>18</sup> *Ibid.*

<sup>19</sup> *Ibid.*

corporations could only act through their employees<sup>20</sup> and as a result the rule threatened to bring an end to corporate liability for negligent harm to employees<sup>21</sup>

An offshoot of the fellow servant rule, and also said to originate from the case of *Fowler* is the defence of *volenti non fit injuria*.<sup>22</sup> The rule is said to apply where a person consents to take certain risks which would otherwise allow for an action in delict.<sup>23</sup> An example of such consent could be consenting to work in a dangerous work environment.<sup>24</sup> The injustice produced by the rule led to its continual reform and erosion until it was eventually abolished by statutory reform.

Restrictions on the fellow servant rule were introduced through chains of vicarious liability as well as the introduction of certain non-derogable duties on the employer.<sup>25</sup> Under the Roman law it was only the actions of slaves, and not the actions of free servants that could be attributed to the Master.<sup>26</sup> The Roman-Dutch authorities are conflicted on the subject, but the furthest they go is to impose liability on a party expressly entrusted with some duty by the master.<sup>27</sup> The non-derogable duties imposed on an employer were collectively described as, 'the duty to provide a reasonably safe working environment.'<sup>28</sup> As a result of this, the fellow servant rule was restricted significantly, as the employer became responsible for those employees who negligently failed to ensure a safe working environment.<sup>29</sup> Eventually in 1914 the Appellate Division in the case of *Mkkize v Martens* 1914 A.D. 733 came to accept the broad English doctrine, now applied under our law, which holds the employer strictly liable for the wrongs of his servants which are committed in the course of their employment.<sup>30</sup>

As McKerron has noted in agreement with Pollock, the best explanation for the expansion of vicarious liability, is based on the argument that the party was acting in furtherance of another's aims, and that such person should therefore ensure that in as far as these aims are pursued people should not be harmed by them.<sup>31</sup> The learned author then

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<sup>20</sup> Ibid.

<sup>21</sup> Ibid at 3.

<sup>22</sup> Ibid.

<sup>23</sup> R. G McKerron *The Law of Delict* 7 ed (1971) at 67.

<sup>24</sup> Ibid.

<sup>25</sup> Malone op cit note 16 at 4.

<sup>26</sup> McKerron op cit note 23 at 89.

<sup>27</sup> Ibid.

<sup>28</sup> Malone op cit note 16 at 6.

<sup>29</sup> Ibid at 5.

<sup>30</sup> McKerron op cit note 23 at 89 references the case of *Mkkize v Martens* 1914 A.D 733.

<sup>31</sup> Ibid at 90.

further submits that such a rule is subject to much qualification and in reality the issue is really one of public policy.<sup>32</sup> Corporations play a major role in the affairs of the world, if they could not be held liable, a great many people would have no effective redress.<sup>33</sup> Society could not tolerate the situation where one's private gain came at such expense.

Arising also in the 19th century was the defence of contributory negligence, which had application more generally, including outside of the employment context.<sup>34</sup> Here, the rule was that the slightest degree of negligence contributing to an accident by either party would defeat a claim for damages.<sup>35</sup> The most important exception to the rule, which the courts developed in order to mitigate its harsh application was the 'last opportunity' rule.<sup>36</sup> The rule stated that despite of the negligence of the plaintiff if the defendant had the last opportunity of avoiding the accident and failed to do so they would be solely liable.<sup>37</sup>

The above rules could only have arisen in the social context of the emergence of the industrial revolution. At this time, the expansion of industry was seen as a great social good and any fetters on it were strongly opposed by those in power.<sup>38</sup> In such a social context it is easy enough to see how strong considerations of individual fault could take on an appearance of moral justification and fairness in excluding liability.<sup>39</sup> The defence of contributory negligence, with ever increasing restrictions, would come to play a key role in limiting the liability of an employer for the consequences of negligently caused harm.<sup>40</sup>

Notwithstanding the changes to the common law, intended to mitigate the inequitable impact on workers and their dependents injured or killed in the course and scope of their employment, the cost and difficulty associated with the recovery of damages remained an almost insuperable obstacle to achieving justice. In South Africa this led to the enactment of legislation providing for the compensation of workers and the dependents of workers injured or killed in the course and scope of their employment on a no-fault basis through a system of compulsory insurance that we know today as workmen's compensation.

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<sup>32</sup> Ibid.

<sup>33</sup> Ibid.

<sup>34</sup> Malone op cit note 16 at 9.

<sup>35</sup> P.Q.R Boberg *The Law of Delict: Aquilian Liability* (1984) at 653; Williams op cit note 14 at 223; Shatwell, K O 'Contributory Negligence and Apportionment Statutes' (1949) 1(2) University of Western Australia Law Review at 146, while most commentators understand the case to introduce the 'stale mate rule' Shatwell uniquely understands the case to introduce the 'last opportunity rule.'

<sup>36</sup> Malone op cit note 16 at 9.

<sup>37</sup> McKerron op cit note 23 at 63; South African Law Commission Report (Project 96) *The Apportionment of Damages Act 34 of 1956* (2003) at p 4.

<sup>38</sup> Fleming op cit note 15 at 695.

<sup>39</sup> Ibid at 697.

<sup>40</sup> Ibid at 696.

Perhaps the most important principle to come out of this line of common law development was the duty on the employer to exercise reasonable care and diligence in providing a safe and healthy work environment. The principle is now enshrined in the Occupational Health and Safety Act 85 of 1993<sup>41</sup> ('the OHSA').<sup>42</sup> Aspects of it are also seen in section 56 of the COIDA with its fault based claim for increased compensation.

## II. THE MODERN LEGISLATIVE FRAMEWORK OF WORKERS COMPENSATION

The modern legislative framework of Occupational Health and Safety in South Africa is primarily made up of statutory provisions supplemented by the common law.<sup>43</sup> This framework covers two broad and overlapping areas. The first aims to *regulate and prevent* injury, death and disease arising out of the work environment. The second deals with the entitlement to *compensation* when such events do occur.<sup>44</sup> The OHSA and the Mine Health and Safety Act 29 of 1996<sup>45</sup> are the two major statutes which deal with the prevention of injury and disease.<sup>46</sup> The COIDA and the Occupational Diseases in Mines and Works Act 78 of 1973<sup>47</sup> are the only two statutes to deal with workers compensation.<sup>48</sup>

The COIDA and the OHSA should be read together. The primary purpose of the OHSA is to place certain general and specific duties on the employer. General duties are phrased very widely and require that an employer act in all *reasonably practicable* ways in order to ensure dangers in the workplace are assessed and mitigated against.<sup>49</sup> It is as a society that the standards of acceptability are set and the balance between the rights of employers and employees determined. This balance is set out in statutory form in the modern legal framework of Occupational Health and Safety in South Africa.<sup>50</sup> Employees and their dependents have historically and still disproportionately carry the burden of injuries and diseases in the workplace.<sup>51</sup> The systems of workers compensation and protection are there to correct this continuing historical imbalance.<sup>52</sup>

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<sup>41</sup> The Occupational Health and Safety Act No.85 of 1993.

<sup>42</sup> Benjamin op cit note 2 at 9.

<sup>43</sup> Ibid at 6.

<sup>44</sup> Ibid at 6.

<sup>45</sup> The Mine Health and Safety Act No. 29 of 1996.

<sup>46</sup> Benjamin op cit note note 2 at p 6.

<sup>47</sup> The Occupational Diseases in Mines and Works Act No. 78 of 1973

<sup>48</sup> Benjamin op cit note 2 at 6.

<sup>49</sup> Ibid at 7-9.

<sup>50</sup> Millard op cit note 3 at 535; Benjamin op cit note 2 at 9 & 128; Budlender op cit note 3 at 211.

<sup>51</sup> Benjamin op cit note 2 at 11.

<sup>52</sup> Ibid at 6.

The division between the legislation which provides compensation and that which aims to prevent injuries is porous. Under the COIDA each employer is required to pay a tariff towards the compensation fund for each worker employed. The amount paid per worker is dependent on the remuneration for that worker as well as the class of industry in which the employer operates.<sup>53</sup> Thus, the tariff is in part based on the possible risk of injury that may occur in a specific business operation.<sup>54</sup> The tariff may be raised in circumstances where the Director-General considers an accident record of a business to be less favourable than in comparable businesses.<sup>55</sup> Tariff reimbursement may also be given where the employer exceeds the safety standards in comparable businesses.<sup>56</sup> Importantly, the ability of the Director-General to increase the tariff may be activated where there has been a successful s 56 claim against the employer. In these circumstances the Director-General may invoke s 85(2) of the COIDA to raise the tariff.<sup>57</sup>

The COIDA extinguishes an employee's entitlement to sue an employer for negligently caused harm.<sup>58</sup> The COIDA is primarily based on a system of no-fault compensation. The basic underpinning of no-fault compensation systems is that, a person who benefits from running a business by relying on machinery and the labour of other persons, and essentially controls the organisation of the business, should be held responsible where an injury arises in this environment regardless of fault.<sup>59</sup> This is because the employer controls and derives a profit from the businesses operations, and thus should be responsible for when such structures fail.<sup>60</sup>

When the first Workmen's Compensation Act 25 of 1914<sup>61</sup> ('the 1914 WCA') came into force in South Africa, the Minister of Public Works indicated that its role was to provide moderate yet reasonable compensation to those vulnerable members of society who had little chance of successfully bringing a delictual claim.<sup>62</sup> Indeed, it was not only more difficult to bring a common law claim than a statutory claim for compensation but in either case the

<sup>53</sup> Ibid at 140.

<sup>54</sup> Ibid at 141 states, 'For assessment purposes economic activity is divided into 23 classes and 104 sub-classes; with assessments ranging from 0.12 cents per R100 of earnings for activities such as banking and financial investment to R5.80 for underground mining activities...'

<sup>55</sup> Ibid at 142.

<sup>56</sup> Ibid at 142, COIDA s 85(3) provides for the reimbursement of payments where safety standards exceed those in the same industry. Benjamin however indicates that the provision has not been utilised in recent times.

<sup>57</sup> See s 56(7) read with s 85(2) of the COIDA.

<sup>58</sup> COIDA s 35(1).

<sup>59</sup> Millard op cit note 3 at 545.

<sup>60</sup> Ibid.

<sup>61</sup> The Workmen's Compensation Act No. 25 of 1914.

<sup>62</sup> Meryl Du Plessis 'Mental Stress Claims in South African Workers Compensation' (2009) 30 Industrial Law Journal 1486.

plaintiff was faced with the prospect that the employer could be a person of straw.<sup>63</sup> The development from earlier workmen's compensation statutes leading up to the COIDA is discussed below.

### III. THE LEGISLATIVE DEVELOPMENT OF THE COIDA

The 1914 WCA was largely modelled on the equivalent English Act at the time.<sup>64</sup> The 1914 WCA permitted employees to choose between instituting a claim under the statute or under the common law, but not both. If the worker chose the statutory claim he would be required to provide the employer with notice of the accident<sup>65</sup> and then attempt to reach a private agreement with the employer on the compensation to be paid.<sup>66</sup> If no agreement was reached after two weeks the matter would be referred to a magistrate to decide the issue.<sup>67</sup>

The 1917 Workmen's Compensation Act<sup>68</sup> ("the 1917 WCA") expanded the coverage of the 1914 WCA to include certain industrial diseases.<sup>69</sup> These diseases were contained in a schedule to the Act, with each disease linked to certain industries.<sup>70</sup> If the disease was listed in a schedule and arose within the related industry, the disease was deemed to have arisen out of and in the course of employment and was thus compensatable. The employer would then bare the onus to rebut this finding.<sup>71</sup> If the disease was not contained in a schedule or the disease arose in an industry where it was not scheduled no claim for compensation was possible even if it could be shown that such disease arose in the course and scope of employment.<sup>72</sup> The only exception to the rule was where it could be shown that the injury arose not through a gradual process of exposure to some harmful substance but it could be shown to have arisen from an *accident*.<sup>73</sup>

The shortfall of the 1914 and 1917 WCA was that many employers simply failed to insure themselves, which meant a claim could result in insolvency and a resulting minimum pay-out to the employee.<sup>74</sup> This situation was considered to be problematic, particularly for larger employers who would be economically obliged to insure their employees, making

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<sup>63</sup> Benjamin op cit note 2 at 128; Millar op cit note 3 at 545.

<sup>64</sup> Budlender op cit note 3 at 204.

<sup>65</sup> Ibid at 205.

<sup>66</sup> Ibid.

<sup>67</sup> Ibid.

<sup>68</sup> The Workmens Compensation Act No. 13 of 1917.

<sup>69</sup> Budlender op cit note 3 at 205.

<sup>70</sup> Ibid at 206.

<sup>71</sup> Ibid.

<sup>72</sup> Ibid.

<sup>73</sup> Ibid.

<sup>74</sup> Ibid at 206 - 207.

uninsured rivals more competitive.<sup>75</sup> To deal with this situation the 1934 Workmen's Compensation Act<sup>76</sup> ('the 1934 WCA') introduced compulsory insurance through a system of private insurers. This insurance scheme was now overseen by a Compensation Commissioner, who would act as the first point of call where the employer and employee couldn't agree to a settlement.<sup>77</sup> Only where the Compensation Commissioner failed to resolve a dispute would the matter be referred to a magistrate.<sup>78</sup> This greatly reduced the need for incurring legal costs.<sup>79</sup>

The 1934 WCA removed the right to choose between statutory compensation and a claim under the common law. However what was added was a claim for increased compensation, where the accident was 'due to' the employer's negligence or a set group of employees. This claim was however restricted to the plaintiff's pecuniary loss.<sup>80</sup> Budlender conceives the extinguishing of the common law claims as a 'quid pro-quo' to business for agreeing to compulsory insurance.<sup>81</sup> This is despite the fact that as Budlender states, many elements of business appeared not to be opposed to this form of compulsory insurance.<sup>82</sup> Indeed for many elements in business such insurance appeared to be in their own economic interests.

The 1934 WCA importantly introduced an entitlement for the employer to claim back any money paid out to an employee as a result of the negligent actions of a third party. This principle appears to be in line with the principle of subrogation one finds in insurance law.<sup>83</sup> The 1934 WCA also introduced higher rates of compensation as well as introducing a system of compulsory Medical Aid.<sup>84</sup> All in all, the 1934 WCA marked a great improvement in the position of big business, by removing the uncertainties around large damages claims and ensuring injured workers returned to employment as soon as possible, through provision of medical care.<sup>85</sup>

There were however two major complaints which emerged from business in relation to the 1934 scheme. First, many employers still failed to insure themselves with policing of

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<sup>75</sup> Ibid at 207.

<sup>76</sup>

<sup>77</sup> Ibid at 210.

<sup>78</sup> Ibid.

<sup>79</sup> Ibid at 211.

<sup>80</sup> Ibid.

<sup>81</sup> Ibid at 212.

<sup>82</sup> Ibid.

<sup>83</sup> Ibid.

<sup>84</sup> Ibid.

<sup>85</sup> Ibid.

the Act being insufficient. Secondly, and more importantly, the scheme was run through private insurance companies. These companies were organised in such a way that competition was stifled and premiums were high.<sup>86</sup> A state run scheme was thus considered by many in industry as a more feasible option.<sup>87</sup>

Under the 1941 Workmen's Compensation Act ('the 1941 WCA') a state controlled compensation fund was set up.<sup>88</sup> The 1941 WCA ended the system whereby employer and employee were to reach agreement on compensation, now the commissioner was empowered to investigate all accidents and adjudicate on the required compensation.<sup>89</sup> The 1941 WCA had been based on two major aims, the first was that the insurance scheme would be run by the state and secondly that benefits paid out by the scheme would be higher.<sup>90</sup> These two aims were said to be linked, as the state scheme would be cheaper, this would allow for higher payments without higher premiums being paid for by the companies.<sup>91</sup>

The 1941 WCA also expanded the list of parties who could be held vicariously liable under a claim for increased compensation. This development may be linked to the developments in the common law around non-derogable rights and the fellow workmen rule. The provision was considered in the case of *Looyen v Simmer & Jack* 1952 (4) SA 547 (A)<sup>92</sup> ('Looyen'). In *Looyen* a claim for increased compensation under s 43 of the 1941 WCA was considered. The issue in that case was whether a shift-boss fell to be considered as one of the parties who could be considered as vicariously liable under s 43(a)(ii) (now s 56(1)(b) of the COIDA). This was important as if the shift boss was vicariously liable a claim for increased compensation would succeed.

In determining the answer to this question the court considered the development of the workmen's compensation statutes from the 1914 WCA up until the 1941 WCA.<sup>93</sup> In relation to the 1941 WCA the court looked at the relationship between the extinguishing of civil claims under s 7 of the 1934 WCA (now found under s 35 of the COIDA) and the introduction of the claim for increased compensation under s 43 of the 1941 WCA (now s 56 of the COIDA). In respect of this the court states the following:

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<sup>86</sup> Ibid at 213.

<sup>87</sup> Ibid at 214.

<sup>88</sup> Ibid at 216.

<sup>89</sup> Ibid.

<sup>90</sup> Ibid.

<sup>91</sup> Ibid.

<sup>92</sup> *Looyen v Simmer & Jack Ltd & another* 1952 (4) SA 547 (A).

<sup>93</sup> Ibid at 553-4.

'It is obvious that the Legislature did not intend to restore the Common Law liability completely so as to cover even accidents caused by fellow-workmen holding no position of authority whatsoever. But Parliament apparently intended the employer to be liable to pay increased compensation where someone appointed to be in charge of some part of the business had been negligent. In such a case it might well be thought fair to attribute the fault to the employer, whose business organisation had thus failed to reach a reasonable standard.'<sup>94</sup>[my emphasis.]

In determining liability for a claim for increased compensation the common law principles around non-derogable rights and the fellow workman rule were thus influential.

The 1993 COIDA largely followed the framework of the 1941 WCA. The COIDA however introduced certain important changes which included major changes to compensation for occupational diseases, and a broadening of the list of scheduled diseases.<sup>95</sup> Importantly it extended the protections for claims instituted through contracting of occupational diseases or injuries under s 35 by broadening the categories of parties considered as the employer.<sup>96</sup> This had the effect of restricting common law claims against those employed in the same work environment.

What is evident in the discussion above is that it was through a gradual process of contestation and development that the common law claims of employees were abolished and statutory claims broadened. The common law increasingly played a less prominent role and workers compensation a more significant one. As a result, the very nature of how an employer was held liable for accidents in the workplace changed. The new statutory systems however appeared to maintain certain aspects of the earlier common law system. The primary carryover from the common-law system was found in a claim for increased compensation. As will be shown in the next chapter, the common law defence of contributory negligence which is said to apply to this provision, can only produce absurdity and injustice, and should be abandoned, as the other common law principles discussed above have been.

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<sup>94</sup> Ibid at 557.

<sup>95</sup> Benjamin op cit note 2 at 125-6.

<sup>96</sup> Ibid at 125.

## CHAPTER 3: THE HISTORY AND DEVELOPMENT OF THE COMMON LAW DEFENCE OF CONTRIBUTORY NEGLIGENCE

### I THE EARLY ORIGINS OF THE DEFENCE OF CONTRIBUTORY NEGLIGENCE

Prior to the last opportunity rule it was the principle of proximate cause which was the test to determine liability at common law.<sup>97</sup> The first case to actually interpret a claim for increased compensation was under the 1934 WCA where the court expressly indicated the test was to determine the proximate cause of the accident.<sup>98</sup> This pursuit of a proximate cause arose at a time when the court was obliged to find a single or more often phrased as the proximate cause of an accident.<sup>99</sup> It is this principle of finding a proximate cause which is said to have often underlay the defence of contributory negligence'.<sup>100</sup>

Throughout its development, the defence of contributory negligence, prior to the advent of the ADA, always acted in an 'all or nothing' fashion. That is, either the plaintiff succeeded with his claim in full or walked away with nothing.<sup>101</sup> This is unfortunately the only consistent thing that can be said about the application of the defence.<sup>102</sup> As one Judge noted, despite the attention the rule had received from many eminent jurists, the law on contributory negligence remained obscure.<sup>103</sup>

A reason for this obscurity appears to be the haphazard way the law developed as a result of judges having to 'stretch' rigid rules which could often produce injustice to more just and reasonable ends. A result of this was a proliferation of case law, which has been referred to as a 'maze', an 'intellectual tyranny',<sup>104</sup> and lost in 'cloud cuckoo land'.<sup>105</sup> The most important of these developments on the defence of contributory negligence was the last opportunity rule which formed the basic test to determine contributory negligence. All of this however came to an end with the introduction of apportionment legislation. In this chapter the historical development of the common law of contributory negligence is considered up until its abolition by the ADA.

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<sup>97</sup> Boberg op cit note 35 at 424, here Boberg draws on the case of *Vorster v AA Mutual Insurance Association LTD* 1982 (1) SA 145 (T) at 160 which quotes from the case of *Pierce v Hau Mon* 1944 (AD) at 197.

<sup>98</sup> *Mey v South African Railways and Harbours* 1937 CPD at 364.

<sup>99</sup> Fleming op cit note 15 at 693.

<sup>100</sup> *Hau Mon* supra note 97 at 197.

<sup>101</sup> Fleming op cit note 15 at 691; McKerron op cit note 23 at 320.

<sup>102</sup> Williams op cit note 14 at 235.

<sup>103</sup> *Ibid* at 235, quoting from Lord Wright in *Caswell v. Powell Duffryn Associated Collieries, Ltd.* [1940] A.C. 152 at 179.

<sup>104</sup> Williams op cit note 14 at 236.

<sup>105</sup> Boberg op cit note 35 at 654.

(a) *The Roman and Roman-Dutch Law*

We know that the Roman law took the approach that contributory negligence acted as a complete bar to a claim for increased compensation. This was in large part because the procedural formula of the then Acquilian action only allowed the judge to condemn in full, or to absolve the defendant completely.<sup>106</sup> This 'all or nothing' approach has been attributed to two controversial texts in the Digest.<sup>107</sup> The first deals with the training javelin thrower, who injures a slave who is passing by. If the injury happens while training in the sports grounds the javelin thrower is not liable, while if practising outside the sports grounds he is liable.<sup>108</sup> The second deals with a barber who sets up a chair near the sports ground, a ball hits his hand while he is shaving a slave and the slave is injured.<sup>109</sup> While we do not know exactly how the Romans resolved the problem of liability in these cases it was likely through principles of fault and wrongfulness as opposed to causation.<sup>110</sup>

A later Roman text by Pomponius which took on a great prominence stated: '*if anyone incurs loss which is his own fault, he is not regarded as incurring loss.*'<sup>111</sup> Medieval scholars relied on this text in the 17th century to develop an approach to cases involving concurrent fault.<sup>112</sup> The development retained the Roman all or nothing approach but made it clear that the matter should more clearly be decided on principles of fault, the fault of the plaintiff being set off against that of the defendant.<sup>113</sup>

The modern Roman-Dutch usage appears to have embraced this principle and decided the matter based on a preponderance of fault. Only if the plaintiff's negligence was equal to or greater than that of the defendant would the claim be defeated.<sup>114</sup> Where the defendant was the more negligent party the plaintiff's damages remained unaffected.<sup>115</sup>

(b) *The English Law*

Contributory Negligence was a relatively recent development in the English law said to first arise in the 1809 case of *Butterfield v Forrester* 11 East 60, 103 Eng. Rep. 926 (K.B.

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<sup>106</sup> *Thoroughbred Breeders' Association v Price Waterhouse* 2001 (4) SA 551 (SCA) at 605.

<sup>107</sup> Project 96 Report op cit note 37 at 3.

<sup>108</sup> Ibid at 4.

<sup>109</sup> Ibid at 4.

<sup>110</sup> *Thoroughbred* case supra note 106 at 606.

<sup>111</sup> Ibid.

<sup>112</sup> Ibid.

<sup>113</sup> Ibid.

<sup>114</sup> Ibid.

<sup>115</sup> Ibid.

1809) (**Butterfield**).<sup>116</sup> In that case the plaintiff was riding home on his horse and collided with a pole which the defendant had negligently left lying across the road. The court held that the plaintiff could not claim damages as he himself had been riding negligently:

'A party is not to cast himself upon an obstruction which has been made by the fault of another, and avail himself of it, if he does not himself use common and ordinary caution to be in the right... one person being in fault will not dispense with another's using ordinary care for himself.'<sup>117</sup>

The judgement fails to clearly lay out what the specific principles are that apply to the facts of the case to justify the complete exclusion of liability on the part of the defendant. In the result, jurists have had to speculate ex-post facto not only on what rule the case introduced but on what principles it could be said to be based.<sup>118</sup> The main interpretation is that it introduces what has been termed the '*stalemate rule*' a rule where the slightest degree of negligence contributing to the accident by either party would defeat a claim for damages.<sup>119</sup>

The absence of clear principles guiding the decision in the original case of *Butterfield* may be due to the general underdevelopment of the law of negligence, which only started to take clear shape as an independent ground of liability some 100 years later in the early 19th century.<sup>120</sup> The law which was well established at this time was the law of causation.<sup>121</sup> In this regard it been said that through the law of causation negligence as an independent ground of liability emerged.<sup>122</sup>

The English approach to contributory negligence took no consideration of degrees of fault with the slightest negligence on the part of a plaintiff being sufficient to deny a claim for damages.<sup>123</sup> To defeat a claim it was sufficient to show that the plaintiff had failed to act in his own best interests and as a result contributed to the harm suffered. The negligence in contributory negligence is thus distinct from an action in negligence.<sup>124</sup>

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<sup>116</sup> As indicated in the Project 96 Report op cit note 37 at 4 as well as in McKerron op cit note 23 at 58 and 63 as well as Fleming op cit note 15 at 692.

<sup>117</sup> *Butterfield v Forrester* 11 East 60, 103 Eng. Rep. 926 (K.B. 1809) at 927.

<sup>118</sup> Fleming op cit note 15 at 692.

<sup>119</sup> Boberg op cit note 35 at 653; Williams op cit note 14 at 223; Shatwell op cit note 35 at 146.

<sup>120</sup> Fleming op cit note 15 at 693.

<sup>121</sup> Ibid.

<sup>122</sup> Ibid.

<sup>123</sup> Williams op cit note 14 at 223; Project 96 Report op cit note 37 at 4; Boberg op cit note 35 at 653.

<sup>124</sup> As indicated in J Neethling, J M Potgieter & P J Visser *Law of Delict* 5th ed (2006) at 150, there is a distinction between the action in negligence and a defence of contributory negligence primarily lying in the fact

This absolute nature of the defence of contributory negligence has been linked to earlier legal thinking on causation, where the court was obliged to find a single or more often referred to as a proximate cause of an accident.<sup>125</sup> The approach may also be due to the fact that there was no law on apportionment at the time, except in maritime law.<sup>126</sup>

This all or nothing approach could lead to harsh consequences, particularly where one of the parties sustained the whole of the loss while only being a minor cause of the harm. The courts blunted the unjust effects of the law by qualifying and raising certain exceptions to the rule.<sup>127</sup> The most important of these exceptions introduced by the English courts during the 19th century was the last opportunity rule.<sup>128</sup> The rule was specifically introduced to alleviate the harsh consequences of the stalemate rule.<sup>129</sup>

The origins of the last opportunity rule are found in the case of *Davies v Mann* 1809<sup>130</sup> better known as the *donkey case*. The plaintiff had negligently left his donkey with its forefeet tied next to the side of the road. The defendant went speeding around a corner in his horse drawn wagon and crashed into the donkey and killed it.<sup>131</sup> There was negligence on the side of both parties. The court however, instead of applying the stalemate rule held that despite the negligence of the plaintiff the defendant had the last opportunity of *avoiding the collision* and had failed to do so. In the result, despite the negligence of the plaintiff the defendant was held fully liable for the consequences of the accident.<sup>132</sup>

### (c) *The South African law*

Earlier South African judgements refer to the Roman and Roman-Dutch law showing that the defence of contributory negligence had a Roman and Roman-Dutch pedigree.<sup>133</sup> However, when applying the defence to modern railway and road accidents our courts relied mainly on

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that failing to act in one's own interests is not unlawful. However, negligence proper always refers to the breach of a legal right or duty. The result is that the negligence in the defence of contributory negligence cannot be considered as negligence. A better term for the defence would then be the defence of contributory *fault*. Importantly however the manner in which negligence is determined in the defence and the action are largely the same.

<sup>125</sup> Fleming op cit note 15 at 693.

<sup>126</sup> Ibid at 694.

<sup>127</sup> Boberg op cit note 35 at 653; McKerron op cit note 23 at 63.

<sup>128</sup> McKerron op cit note 23 at 63; Williams op cit note 14 at 223-4, indicates that in the US the defence is called the doctrine of the last clear chance and in Canada it is referred to as the doctrine of ultimate negligence.

<sup>129</sup> *Hau Mon* supra note 97 at 196.

<sup>130</sup> *Davies v Mann* (1809) 11 East 60.

<sup>131</sup> Project 96 Report op cit note 37 at 4.

<sup>132</sup> Ibid; McKerron op cit note 23 at 224.

<sup>133</sup> Boberg op cit note 35 at 661.

English decisions.<sup>134</sup> The result was that in the late 19th and early 20th centuries the South African courts abandoned the Roman and Roman-Dutch principles of relative fault and instead adopted the English approach to contributory negligence.<sup>135</sup> This fact was lamented by Watermeyer J in *Pierce v Hau Mon* 1944 AD 175 where he indicated that the law could have developed along different lines if the Roman-Dutch authorities had been more referred to in earlier cases.<sup>136</sup>

The adoption of the English law included the early importation of the last opportunity rule.<sup>137</sup> The South African courts however went even further than the English courts by developing the last-opportunity rule to apply to cases dealing with the negligence of third parties' as well.<sup>138</sup> That is, where the negligence of a third party may disqualify a plaintiff from claiming increased compensation. This would occur in the instance where a passenger is injured by the negligence of the driver with whom she is travelling, and that of the negligent defendant driver.<sup>139</sup>

The last opportunity rule was used as a practical tool to determine who acted last, or whose negligence operated later.<sup>140</sup> The rule is most often spoken of in terms of which party had the last opportunity of avoiding the accident.<sup>141</sup> The person with the last opportunity to act is termed the *proximate* cause of the accident (sometimes the sole, direct or effective cause) and is held fully and exclusively liable for the damages.<sup>142</sup>

As with the English common law defence of contributory negligence, the rule is generally explained by the courts in terms of the law of causation.<sup>143</sup> Boberg states that the last opportunity rule was not a test of comparative negligence, as the Roman and Roman-Dutch law was, but a test of causation.<sup>144</sup> McKerron indicates that legal causation is the principle on which the rule is based but subject to the court's finding of a single cause of the

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<sup>134</sup> Ibid.

<sup>135</sup> Ibid; *Hau Mon* supra note 97 at 195; *Thoroughbred Breeders'* supra note 106 at 606-7.

<sup>136</sup> *Hau Mon* supra note 97 at 195.

<sup>137</sup> Boberg op cit note 35 at 661; McKerron op cit note 23 at 64.

<sup>138</sup> McKerron op cit note 23 at 64; *Niehaus v Worcester Divisional Council* 1932 CPD 53; *South African Railways and Harbours v Acutt Worthington* 1935 NPD 314.

<sup>139</sup> *Niehaus* ibid at 54-6.

<sup>140</sup> Project 96 Report op cit note 37 at 4.

<sup>141</sup> Ibid at 3, McKerron op cit note 23 at 321; Boberg op cit note 35 at 424, reference is to the case of *Vorster* supra note 97 at para 161 quoting Boberg in the 1970 Annual Survey of South African Law at 176.

<sup>142</sup> Shatwell op cit note 35 at 152; McKerron op cit note 23 at 63.

<sup>143</sup> See the Project 96 Report op cit note 37 at 4; Boberg op cit note 35 at 653, calls it a test of causation not of comparative culpability; *Hau Mon* supra note 97 at 197.

<sup>144</sup> Boberg op cit note 35 at 653.

accident.<sup>145</sup> Glanville however argues that the rule was *sui generis*, merely a bold attempt by the courts to 'do rough justice' and was never a branch of any legal doctrine.<sup>146</sup> It was because judges felt a need to relate the rule to some legal doctrine that they would sometimes speak about the law as if its basis lay in principles of causation or remoteness.<sup>147</sup>

## II APPLICATION OF THE LAST OPPORTUNITY RULE UNDER THE DEFENCE OF CONTRIBUTORY NEGLIGENCE

We have seen that the defence of contributory negligence first applied the stalemate rule, before the last opportunity rule became the leading test of causation. In practice, the onus rested on the plaintiff to demonstrate that the defendant had the last opportunity to act to avoid the accident.<sup>148</sup> If the plaintiff could not prove this, the stalemate rule applied. The exception to this was where there was a dependants claim, in that instance the defendant would be liable unless he could show that the last opportunity had rested with the deceased party.<sup>149</sup>

While the last opportunity rule had originally been introduced to mitigate the harshness of the stalemate rule, this rule too started to come under more scrutiny by the courts. Changing socio-economic conditions brought more complex factual matrixes which tended to reveal the inadequacies of the last opportunity rule.<sup>150</sup> The courts response was not to develop a deeper understanding of the underpinnings of the law of contributory negligence, but rather to adapt, stretch and reinterpret the application of the law. Three of the most important adaptations are considered below.

### *(a) The objective gloss creates an objective test*

The last opportunity rule was initially considered from the subjective perspective of the parties. That is, who in the circumstances, plaintiff or defendant, had *actual knowledge* of the dangerous situation and failed to avoid the accident. This development had unintended consequences. The most glaring of these was that the more attentive of the parties would often have the later opportunity of avoiding an accident.<sup>151</sup> The result was a situation where the more prudent party would be punished, while the more negligent party got off with no liability. Such a situation could not be tolerated and thus the objective gloss was

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<sup>145</sup> McKerron op cit note 23 at 320.

<sup>146</sup> Williams op cit note 14 at 236.

<sup>147</sup> Ibid.

<sup>148</sup> McKerron op cit note 23 at 321.

<sup>149</sup> Ibid.

<sup>150</sup> Shatwell op cit note 35 at 147.

<sup>151</sup> Boberg op cit note 35 at p 653.

adopted by both the English<sup>152</sup> and South African Courts.<sup>153</sup>

In England, the objective gloss is often attributed to the case of *British Columbia Electric Rly. Co v Loach* 1916 1 A.C. 719<sup>154</sup> ('Loach') and holds that the party with the last opportunity to act is the one who if they had not been negligent *would have had* the last opportunity to act.<sup>155</sup> Thus one moves from a question of *who actually had* the last opportunity to act to *who would have had* the last opportunity to act but for their negligence.

In application the rule was problematic. If the test was applied by the plaintiff exclusively against the defendant, the plaintiff would generally succeed.<sup>156</sup> Boberg states that the objective gloss spelt the end of the last opportunity rule.<sup>157</sup> This was because there was no logical basis to apply the objective standard to only one party. However in applying the test to both parties a contradiction emerges. If both parties had acted to the objective standard of reasonableness there would have been no accident in the first place, as the entire accident is premised on the negligence of the parties causing the accident!<sup>158</sup> This attempted movement back in the cone of causation went too far, producing an unworkable result, which as Boberg states brought the law into the realm of 'cloud-cuckoo-land.'<sup>159</sup>

*(b) The principle of continuing negligence makes the determination of who has the last opportunity to act arbitrary*

This rule looked to determine the periods of time over which negligence could be said to operate. This rule allowed the application of the last opportunity rule to be avoided in certain instances. That was because, what may have looked like two consecutive acts of negligence could be determined as concurrent negligence, thus resulting in application of the stalemate rule.

The principle of continuing negligence did this by eliminating the artificial distinction between 'static negligence' (leaving a cart unattended in the road) and 'active negligence' (driving a carriage into a static cart). While the party actively colliding with

<sup>152</sup> Shatwell op cit note 35 at 148.

<sup>153</sup> McKerron op cit note 23 at 321; *Hau Mon* supra note 97 at 190.

<sup>154</sup> *British Columbia Electric Rly. Co v Loach* 1916 1 A.C. 719.

<sup>155</sup> Boberg op cit note 35 at 653; Williams op cit note 14 at 225.

<sup>156</sup> Shatwell op cit note 35 at 148.

<sup>157</sup> Boberg op cit note 35 at 654.

<sup>158</sup> Ibid at 653.

<sup>159</sup> Ibid at 654.

the cart may have had what appears to be the last opportunity to act, leaving the cart in the road is now considered as a continuation of the negligent act and thus both parties negligence is simultaneous and the stalemate rule applies.<sup>160</sup>

In the case of *Butterfield*, Bayley J stated that, 'if he [the plaintiff] had used ordinary care he must have seen the obstruction; so that the accident appeared to happen entirely from his own fault.'<sup>161</sup> As a result of this dicta later cases seemed to consider that between the driver and the static obstruction, legal responsibility would rest solely with the driver, even if he had not seen the obstruction.<sup>162</sup> The absurdity of this outcome is demonstrated by an example. Suppose a party negligently leaves a barrel of dynamite in the road, another party then negligently crashes into it. Applying the reasoning above, in such an instance not only is the former party not liable but the latter party must pay for the damages as well as the destroyed dynamite.<sup>163</sup>

To interpret *Butterfield* consistently Glanville argues that the case must be considered as an application of the principle of continuing negligence, and no liability arises as there is a concurrence of fault. The leaving of the pole in the road is an act of continuing negligence, with the rider not actually seeing the pole in time to stop meant there was a concurrence of fault.<sup>164</sup> Thus the rule is considered as a gloss developed by the courts to mitigate the inflexibility of the last opportunity rule.<sup>165</sup>

In practice, the rule of continuing negligence was unwieldy and afforded the court an unprincipled and unguided discretion, making predicting the outcome of any case difficult, and any decision open to being set aside on appeal.<sup>166</sup> The rule demonstrates clear similarities to the objective gloss. In the *Butterfield* case had the objective gloss applied the stalemate rule may well have come into effect, as who could say in such an instance which party *would have had* the last opportunity to act had they not been negligent.

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<sup>160</sup> Shatwell op cit note 35 at 150.

<sup>161</sup> Williams op cit note 14 at 228.

<sup>162</sup> Ibid.

<sup>163</sup> Ibid at 229.

<sup>164</sup> Ibid at 228, Glanville indicates that:

'The owner of the pole was guilty of continuing negligence in leaving it as an obstruction to the highway, and, the rider did not having actually seen the pole in time to pull up, the rider was not solely to blame.'

<sup>165</sup> Shatwell op cit note 35 at 150.

<sup>166</sup> Williams op cit note 14 at 225-6.

(c) *The introduction of a test of comparative negligence goes against all earlier case law*

Glanville argues that *Loach's* case introduced a rule that could not be fitted within the rubric of the law of contributory negligence. Instead he argues the principle developed goes beyond the last opportunity rule and replaces it with a rule based on principles of comparative negligence.<sup>167</sup> This then is something of a return to the Roman-Dutch approach of a system of comparative negligence. But such a rule which relies on principles of comparative fault has been consistently rejected by the South African and the English courts.<sup>168</sup>

However, there have been other judgments, calling for a 'common sense' approach to contributory negligence, which may be said to embrace such an approach.<sup>169</sup> This development has been taken up by some courts who have equated the defence with the 'common sense' approach found in the modern law of causation.<sup>170</sup> This then would lead to equating the law of contributory negligence with the current law of causation.<sup>171</sup> The advantage to such an approach is clear. It would bring forth a consistency to the law. Secondly a flexible approach would allow the law to deal appropriately with nearly any factual scenario which a court may have to consider.<sup>172</sup>

### III THE ADA BRINGS AN END TO THE LAW OF CONTRIBUTORY NEGLIGENCE

The defence of contributory negligence first applied the stalemate rule and when this was found inadequate adopted the last opportunity rule. When developments in industry showed the failings in the last opportunity rule, a further series of glosses developed. The result was a proliferation of case law, and legal rules which often seemed to contradict earlier rulings, or produce absurdity.<sup>173</sup> The courts seemed unable to escape from these legal confines.

As a result of the injustices produced by the law of contributory negligence the legislature chose to intervene. England adopted the Law Reform (Contributory Negligence) Act of 1945 and South Africa adopted the ADA. What the ADA did was

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<sup>167</sup> Ibid at 234.

<sup>168</sup> *Hau Mon* supra note 97 at 195; Shatwell op cit note 35 at 149; Project 96 Report op cit note 37 at 5.

<sup>169</sup> Shatwell op cit note 35 at 147 & 154, this approach is recently considered in terms of the general laws of causation in the recent Constitutional Court decision in *Lee v Minister for Correctional Services (Treatment Action Campaign and others as amici curiae)* 2013 (2) BCLR 129 (CC) discussed in the final chapter.

<sup>170</sup> Shatwell op cit note 35 at 153.

<sup>171</sup> Ibid at 154.

<sup>172</sup> Ibid at 154.

<sup>173</sup> *Hau Mon* supra note 97 at 185; McKerron op cit note 23 at 64.

revolutionise the law by abolishing the 'all or nothing' approach of the courts and replacing this with the principles of apportionment of liability.<sup>174</sup> As Williams has argued the basis of the rule was really about placing liability on the more negligent party.<sup>175</sup> In the result once the principles of apportionment arose the very basis of the last opportunity rule fell away, and in its place a more logical and rational basis was introduced.<sup>176</sup>

The courts are now no longer obliged to find a 'single proximate cause'<sup>177</sup> to any accident and thus the basis for the last opportunity rule has fallen away.<sup>178</sup> Since this time courts and legal writers have laid out a substantive body of authority for denying contributory negligence as a fixed rule of law.<sup>179</sup> Some have even gone as far as to deny that there ever was a 'last opportunity' rule.<sup>180</sup> Significantly, many of these judicial doubts only came about in consequence of the passing of apportionment legislation.<sup>181</sup>

Despite this however our courts have given a largely unqualified acceptance to the law of contributory negligence.<sup>182</sup> In practice this has meant little. Since the ADA's passing in 1956 a new methodological approach to causation has developed. The result is now that courts are able to approach the issue of causation on far broader principles of common sense.<sup>183</sup>

The injustices produced by the application of the defence of contributory negligence resulted in legislative intervention in the form of the ADA.<sup>184</sup> As a result the common law defence of contributory negligence has essentially ceased to exist and develop. The result is that where a court wishes to rely on this law, they will firstly have to sift through old case law which left unresolved many of the riddles of the defence of contributory negligence. Once the ADA passed resolving such riddles became merely academic and as such the law has not developed since the passing of the ADA. It could not have been contemplated by the legislature that such dated law could apply to a modern workers compensation statute.

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<sup>174</sup> McKerron op cit note 23 at 64-5.

<sup>175</sup> Williams op cit note 14 at 236.

<sup>176</sup> Shatwell op cit note 35 at 155.

<sup>177</sup> This is the phrasing used in the latest case dealing with a claim for increased compensation in *Young v Workmen's Compensation Commissioner* 1998 (3) SA 1085 (T) at 1091 discussed below.

<sup>178</sup> McKerron op cit note 23 at 65.

<sup>179</sup> Williams op cit note 14 at 236.

<sup>180</sup> McKerron op cit note 23 at 64; Williams' op cit note 14 at 231.

<sup>181</sup> McKerron op cit note 23 at 64.

<sup>182</sup> Ibid.

<sup>183</sup> McKerron op cit note 23 at 65.

<sup>184</sup> Potgieter & Visser et al (2006) op cit note 124 at 145.

## CHAPTER 4: CASE LAW REGARDING S 56 OF THE COIDA

### I CLAIMING INCREASED COMPENSATION UNDER SECTION 56 OF THE COIDA

The provision of s 56 of the COIDA allows an employee or in the case of death, his dependents to claim increased compensation where the disease is caused by the employer or certain groups of employees.<sup>185</sup> Compensation is also claimable where an accident or occupational disease are caused by the above parties negligent failure to repair a patent defect, in plant material or condition of the premises, place of employment or equipment.<sup>186</sup> The most significant sections of s 56 of the COIDA are laid out below.

#### '56. Increased compensation due to negligence of employer

(1) If an employee meets with an accident or contracts an occupational disease which is due to the negligence-

(a) of his employer;

(b) of an employee charged by the employer with the management or control of the business or of any branch or department thereof;

(c) of an employee who has the right to engage or discharge employees on behalf of the employer;

(d) of an engineer appointed to be in general charge of machinery, or of a person appointed to assist such engineer in terms of any regulation made under the Minerals Act, 1991 (Act No. 50 of 1991); or

(e) of a person appointed to be in charge of machinery in terms of any regulation made under the Occupational Health and Safety Act, 1993 (Act No. 85 of 1993), the employee may, notwithstanding any provision to the contrary contained in this Act, apply to the commissioner for increased compensation in addition to the compensation normally payable in terms of this Act.

(2) For the purposes of subsection (1) an accident or occupational disease shall be deemed also to be due to the negligence of the employer if it was caused by a patent defect in the condition of the premises, place of employment, equipment, material or machinery used in the business concerned, which defect the employer or a person referred to in paragraph (b), (c), (d) or (e) of subsection (1) has failed to remedy or cause to be remedied.

(4) (a) If the Director-General is satisfied that the accident or occupational disease was due to negligence as referred to in subsection (1), he shall award the applicant such additional compensation as he may deem equitable.

<sup>185</sup> Benjamin op cit note 2 at 180; COIDA s 56(1)(a)-(e).

<sup>186</sup> COIDA s 56(2).

(b) The amount of such additional compensation together with any other compensation awarded in terms of this Act shall not exceed the amount of the pecuniary loss which the applicant has in the opinion of the Director-General suffered or can reasonably be expected to suffer as a direct result of the said accident or occupational disease.'

As is evidenced by s 56(4)(a), the Director-General has an equitable discretion to award increased compensation. The discretion is based on the same requirements as set out in 56(1), that the accident or disease be 'due to' the parties and circumstances listed in s 56(1)(a) and (b). The Director-General needs to be 'satisfied' that this state of affairs exists before awarding increased compensation.

While the phrase 'due to' has not been interpreted under the COIDA it has been interpreted in a series of cases under the 1934 WCA and the 1941 WCA to mean 'caused by.' Given that the COIDA provisions on increased compensation are worded in substantially the same manner the previous case law would be considered as valid.<sup>187</sup> The full phrase in s 56(1) then is to be read as 'caused by the negligence.' From this reading the courts have said the common law defence of contributory negligence is applicable to the statute.

This interpretation would later come under scrutiny in another line of cases dealing with the application of the ADA to the COIDA had passed. In this line of cases it has been held that the ADA has no application to the COIDA. The basis of these decisions relies on what is said to be internal distinctions between damages and causation listed in the COIDA, where the ADA is said to only apply to damages and not compensation.

In this section, these two lines of cases are critically considered. What the case law shows is that since 1937, the interpretation of the phrase 'due to' has not been the subject of any critical inquiry. As a result the fossilized principles of the common law defence of contributory negligence have applied to the statute. This has meant that the law on increased compensation has failed to keep pace with developments in the common law of causation as well as statutory developments in the COIDA.

## II HOW THE COURTS IMPORTED THE COMMON LAW DEFENCE OF CONTRIBUTORY NEGLIGENCE INTO A CLAIM FOR INCREASED COMPENSATION

The first case dealing with a claim for increased compensation was that of *Mey v South African Railways and Harbours* 1937 CPD 359 ('Mey') which considered a claim under s

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<sup>187</sup> Benjamin op cit note 2 at 126.

34 of the 1934 WCA. While the case of *Fred Saber (Pty), Ltd v Franks* [1949] 1 All SA 356 (A)<sup>188</sup> ('Fed Saber'), which considered a claim under s 43(1) of the 1941 WCA, is often cited as the leading case on the interpretation of the phrase 'due to' in a claim for increased compensation, the reasoning of the court comes almost exclusively from the decision in *Mey*

(a) *Mey v South African Railways and Harbours 1937 (CPD)*

In *Mey*, Watermeyer J looks to interpret the phrase 'due to' in a claim for increased compensation. He indicates that the words 'due to' are constantly used and well known in relation to claims in delict.<sup>189</sup> He then references an English law case which deals with such a claim, he specifically indicates that there is nothing unique in this case and that there are several others he could have relied on to demonstrate his point.<sup>190</sup> The case mentioned deals with an action based on negligence in which the last opportunity rule is applied. Watermeyer J concludes that the words 'due to' mean 'caused by' in *legal language*.<sup>191</sup>

Watermeyer J's conception of 'cause' in the phrase 'caused by' is then elaborated on when he states:

'The lawyer is not concerned with the logical difficulties as to the meaning of a cause, he seeks to place responsibility for damage upon the party whose wrongful act is the main cause of the damage.'<sup>192</sup>

The court, again drawing on English case law,<sup>193</sup> determines that the inquiry into a claim for increased compensation requires applying the last opportunity rule, with its various qualifications and glosses, as the test to determine the *proximate* cause of the accident.<sup>194</sup> Watermeyer J holds that the critical inquiry under s 34 is directed to determining the *proximate cause* of the accident.<sup>195</sup> As we have seen, under the common law defence of contributory negligence this required an application of the last opportunity

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<sup>188</sup> *Fred Saber (Pty), Ltd v Franks* [1949] 1 All SA 356 (A)

<sup>189</sup> *Mey* supra note 98 at 362-3.

<sup>190</sup> *Ibid* at 363.

<sup>191</sup> *Ibid*.

<sup>192</sup> *Ibid* at 363.

<sup>193</sup> *Ibid* at 363-4.

<sup>194</sup> *Ibid* at 364.

<sup>195</sup> *Ibid*.

rule. Importantly, while the court relies on common law principles in interpreting the statute the extent to which these principles apply is never made clear.<sup>196</sup>

*(b) Fred Saber (Pty), Ltd v Franks 1949(A)*

The respondent, a woodworker operating at a circular saw had to have his hand amputated after it came in contact with the unguarded part of the circular blade which protruded below the work-table.<sup>197</sup> The machine was new, and in breach of statute had been left on the factory floor without a protective guard.<sup>198</sup> Franks, the injured employee, claimed that the accident was 'due to' the negligence of the employer in not supplying the required safety guards<sup>199</sup> and in the alternative that the failure to provide such guards constituted a patent defect in the premises, which had 'caused' the accident, by the failure of the employer or one of his employees as referenced in ss 43(1)(a)(ii)-(v) knowingly or negligently failing to remedy such defect.<sup>200</sup>

The acting workmen's' compensation commissioner awarded increased compensation to Franks after finding that the accident was 'due to' the negligence of the employer in allowing an unguarded machine to be used on the workshop premises.<sup>201</sup> The employer objected to this decision arguing that the accident was unrelated to the negligence of the employer in allowing the unguarded machine on the premises but rather due to the negligence of Franks. The objection was disallowed by a majority, who ruled that in the circumstances, the actions of Franks constituted only momentary forgetfulness and thus could not be considered as negligent in the circumstances.<sup>202</sup>

The case essentially turns on whether the act of the respondent in putting his hand under the table was negligent.<sup>203</sup> The court formulates the test under s 43 of the 1941 WCA in the following way:

'Before dealing with the facts, it is necessary to construe the words "due to" in sec. 43 of the Workmen's Compensation Act. In legal language these words mean "caused by", and consequently the enquiry under sec. 43 is directed to ascertaining the cause of the accident.

<sup>196</sup> Ibid at 362, where the court states, 'I do not wish to go beyond what is necessary to consider for the purposes of deciding the present case and so I shall not deal with the construction of sec. 5 of the Act except in so far as it is necessary for that purpose.'

<sup>197</sup> *Fred Saber* supra note 188 at 363.

<sup>198</sup> Ibid at 364, it was in breach of s 54(1)(a) of the regulations made under the Factories, Machinery and Building Work Act, 1941.

<sup>199</sup> Ibid at 363; in breach of s 43(1)(a)(i) of the 1941 WCA.

<sup>200</sup> Ibid at 363; s 43(1)(b) of the 1941 WCA.

<sup>201</sup> Ibid at 364.

<sup>202</sup> Ibid at 356.

<sup>203</sup> Ibid at 366.

See *Mey v. South African Railways & Harbours* (1937, C.P.D. 359 at p. 363). If the accident was, notwithstanding the negligence of the appellant caused by the respondent's own negligence or if it was caused by the combined negligence of the appellant and the respondent, the respondent is not entitled to recover increased compensation under sec.43.<sup>204</sup>[my emphasis]

This interpretation of 'due to' comes directly from the case of *Mey*. It is the sole reference in *Fred Saber* dealing with how to interpret a claim for increased compensation under the statute. The court eventually agrees with the court a quo that Frank's actions are not negligent, he is rather only momentarily forgetful and thus the defence of contributory negligence fails.<sup>205</sup>

What the cases of *Mey* and *Fred Saber* demonstrate is that the inquiry into an entitlement to compensation is an inquiry into the *cause* of the accident. That is the first point both of the courts make. However, in determining this *cause*, the courts apply the then current law of causation which applied the defence of contributory negligence. This would make perfect sense as there was no other way to determine a *cause* at this time. As indicated earlier prior to the last opportunity rule the test of causation was to determine the proximate cause. This then appears to be the overriding determination of a claim for compensation.

(c) *Grace v Workmen's Compensation Commissioner and another* 1967 (4) SA 137 (T)

In this case, the plaintiff wished to argue that the ADA had altered the law of contributory negligence such that contributory negligence on the part of an employee would not defeat a claim for additional compensation.<sup>206</sup> Counsel argued that since the passing of the ADA the courts have been permitted to apply the principles of apportionment to the statute. The court considers that the main obstacle to accepting this interpretation was the case of *Fred Saber*.<sup>207</sup> Specifically, the court holds that while *Fred Saber* was not a decision on the operation of the law of contributory negligence, the court in reaching its decision 'clearly had in mind' the common law principles of contributory negligence.<sup>208</sup> The result is that *Fred Saber* is considered to have interpreted the words 'due to' in s 43 so as to import the principles of contributory negligence at common law and to make these applicable to the statute.

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<sup>204</sup> Ibid at 366.

<sup>205</sup> Ibid at 369-70.

<sup>206</sup> *Grace v Workmen's Compensation Commissioner and another* 1967 (4) SA 137 (T) at 139.

<sup>207</sup> Ibid.

<sup>208</sup> Ibid.

The court thus considers itself bound by the decision unless it could be shown that the ADA had been amended by s 43 of the 1941 WCA such that the *Fred Saber* judgement was no longer binding.<sup>209</sup> Using principles of statutory interpretation the court argues that the ADA on its face does not apply to the WCA and that it is possible to interpret the two acts consistently with no absurdity arising. The basis of this interpretation is two-fold. First, the ADA only makes reference to damages, not compensation. Secondly, the WCA itself draws a distinction between damages and compensation in sections 7(a) & (b) and 8(1)(a) of the 1941 WCA.<sup>210</sup> On this basis the court holds that the ADA has no application to the 1941 WCA.

The reasoning of the court is problematic in several respects. Instead of laying emphasis on the general test laid out in *Mey* and *Fred Saber*, being to determine the 'cause' of the accident the court gets bogged down in the defence of contributory negligence. Then court then gives a narrow interpretation of the 1941 WCA to justify the previous precedents of the court. These again focus on the distinction between damages and compensation in the COIDA. The leading textbook on damages has indicated this division between compensation and damages is 'unrealistic.'<sup>211</sup>

(d) *Young v Workmen's Compensation Commissioner and Another 1998 (T)*.

*Young*, is the most recent decision on a claim for increased compensation and the only case to consider such a claim in the constitutional era.<sup>212</sup> The court with little scrutiny takes as trite the application of the common law defence of contributory negligence to a claim for increased compensation. The court however takes this one step further than under previous decisions and in so doing reveals the flaw in its reasoning:

'As a prerequisite for a claim for additional or increased compensation, the Act requires proof by a workman that the accident in which he/she was injured was 'due to' the negligence of his employer or a person entrusted with the management of the business or any branch thereof of the employer, or due to a patent defect ...Once the workman surmounts this hurdle, it is open to the employer to show that the workman was also negligent and that his negligence contributed to the accident and therefore to his damage.

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<sup>209</sup> Ibid.

<sup>210</sup> Ibid, the court also draws on the case of *Table Bay Stevedores v South African Railways and Harbours*, 1959 (1) SA 386 (AD) which highlights this distinction as well.

<sup>211</sup> In Potgieter, Steynberg and Floyd *Visser and Potgieter: Law of Damages* 3<sup>rd</sup> edition (2012) at 2 footnote 16.

<sup>212</sup> The claim however is still made under s 41 of the 1941 WCA.

It is now trite law that the words 'due to' mean 'caused solely by', as was decided in *Fred Saber (Pty) Ltd v Franks...*<sup>213</sup>[my emphasis]

What the court does here is to confuse two aspects of the law of contributory negligence with the law of causation. First, as indicated in chapter three, the law of contributory negligence has always operated in an all or nothing manner. This was under the Roman and the Roman-Dutch law and the English law. However, the test used to determine the party who is contributory negligent has constantly been evolving, as we have seen the defence of contributory negligence was constantly open to reinterpretation by the courts.

The inquiry into a claim for increased compensation as *Mey* and *Fred Saber* have indicated is an inquiry into the *cause* of the accident. This initially took the form of determining the 'proximate cause' of the accident until this test was replaced by the last opportunity rule. The tools of the time only allowed the courts to place liability on a single cause. What *Young* appears to have done is to raise this constantly evolving test to determine the cause of an accident into a fixed principle. It was never the rule that the accident must have been shown to be *caused solely by* a party; it was merely that *liability* could only be placed *solely* on a party or both parties concurrent act. To interpret this any other way would be in conflict with basic notions of causation.

### III THE LAW OF CONTRIBUTORY NEGLIGENCE IN PRACTICE

What the case law above demonstrates is that the leading decisions on the law of contributory negligence always articulated the underlying test to a claim for increased compensation as determining the cause of the accident. This was in line with the common law of causation at the time, which spoke in terms of a proximate cause. This common law test however changed significantly with the passing of the ADA and has continued to evolve since then.

Instead of our courts considering the underlying principles of causation on which the test under s 56 of the COIDA is premised and on which the common law of contributory negligence was said to be premised<sup>214</sup> they got bogged down in the *application* of the common law defence of contributory negligence and its many glosses. The underlying principle of determining the cause of the harm was ignored.

What is further apparent from the case law on increased compensation is the extent to which the common law defence of contributory negligence is applicable is unclear. In fact in

<sup>213</sup> *Young v Workmen's Compensation Commissioner* 1998 (3) SA 1085 (T) at 1091.

<sup>214</sup> *Hau Mon* supra note 97 at 197.

none of the cases considered under the claim for increased compensation are the glosses of contributory negligence truly applied. This is because in *Mey*, *Fred Saber*, and *Young* the court never has to apply the last opportunity rule. In *Mey*, factual causation is completely absent so the principles of contributory negligence do not apply. In *Fred Saber* and *Young* the plaintiff is found not to be negligent.

As has been suggested in the chapter above, if these glosses were to apply to a claim for increased compensation under s 56 of the COIDA the outcome of the cases would be almost impossible to predict. Take the scenario in *Fred Saber*, for the point of argument we can assume that the plaintiff was also negligent. In such an instance who can be said to have had the last opportunity to act ?

To answer this question requires applying the rules of continuing negligence as well as the objective gloss to the last opportunity rule. On the face of it the injured employee Franks appears to have the last opportunity to act when he put his hand under the table, however can you say the negligence of the employer ever ended? Was it not the fact that the negligence of leaving a saw in a dangerous unguarded position persisted up until the point he put his hand under the table. In that instance the stalemate rule would likely apply.

However if we apply the objective gloss to the last opportunity rule and ask who *would have had* the last opportunity to avoid the accident if they had not been negligent the answer may be different. If the defendant had not been negligent the saw would never have been left in its unguarded state and the accident could never have manifested. But postulating such a question as 'would the employee then have the last opportunity to avoid the accident' is absurd. Cases like these show how the rule is completely unworkable, and as Boberg states, 'lost in cloud cuckoo land.'<sup>215</sup>

Yet another take is to apply the comparative test to the law of contributory negligence, which appears to surpass the last opportunity rule in its entirety. McKerron has phrased this notion slightly differently in his reference to the consideration of the respective parties 'responsibility.'<sup>216</sup> Between the employer who allows an unguarded machine on the premises in breach of a regulation, or an employee who knowingly works on such a machine, and loses concentration and is injured who is the more responsible party? It is submitted many factors would require consideration and that such a test would resemble the current laws of causation.

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<sup>215</sup> Boberg op cit note 35 at 654.

<sup>216</sup> McKerron op cit note 23 at 320.

From the above it is clear that the many glosses on the law of contributory negligence can produce various outcomes, when applied to the same factual circumstances. This is a result which could not be tolerated under the basic principle of the rule of law enshrined in the Constitution of the Republic of South Africa 1996.<sup>217</sup> In the final chapter, some alternative interpretations of s 56 of the COIDA are provided.

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<sup>217</sup> The Constitution of the Republic of South Africa 1996, section 1(c).

## CHAPTER 5: A NEW APPROACH TO S 56 OF THE COIDA

It has been shown above that the common law defence of contributory negligence is unworkable in practice, and could not reasonably be considered to apply to the COIDA. This then poses the question of how a claim for increased compensation should be interpreted. Previously, our courts were bound by principles of parliamentary sovereignty which restricted their ability to put the values of dignity and equality and the right of access to justice at the forefront of their considerations.<sup>218</sup> The Constitution is now the supreme law<sup>219</sup> which means that all law including statutory provisions must be interpreted purposively in light of the Bill of Rights.<sup>220</sup>

There are a number of interpretations of s 56 of the COIDA open to a court. First, it could be argued that the law should stay as it is. This argument has little legal support; however, there are a number of policy issues which are considered to be relevant to maintaining the status quo. Under consideration however these policy issues are found wanting showing there is little to justify the continued application of the common law defence of contributory negligence.

The second possible interpretation is to argue that on a plain reading of the provisions of s 56 of the COIDA there is nothing to suggest that the common law defence of contributory negligence will apply. The default position would then be that a claim is established by reliance on the general laws of causation.<sup>221</sup> This position would bring more consistency to the law in terms of applying the same principles of causation to the COIDA as under the common law. It would also continue the historical movement towards the risk of harm being more fairly weighted between the employer and employee.

The third possible interpretation is to argue that the ADA applies to a claim for increased compensation. As with the second option this would bring more consistency to the common law and that under the COIDA as it relates to causation. It would also introduce the principles of apportionment. Many of the arguments in support of this position overlap with those with the second interpretation. Applying the ADA to the COIDA in distinction to the

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<sup>218</sup> Christo Botha *Statutory Interpretation* (2007) at 53.

<sup>219</sup> S 2 of the Constitution states:

'This Constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled.'

<sup>220</sup> Both op cit note 218 at 55; Section 39(2) of the Constitution states:

'When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights.'

<sup>221</sup> For a recent exposition on the laws of causation see J Neethling & JM Potgieter *Neethling-Potgieter-Visser Law of Delict* 7th edition (2015) at chapter 5.

second option would have the added benefit of ensuring that negligent third parties, who along with the employer negligently injure an employee, are treated in a more equitable manner.

The thesis concludes by arguing that continuation of the status quo is constitutionally unworkable. Secondly whether the second or third interpretations are accepted, the outcome for a claimant seeking increased compensation would largely be the same.

#### I THE CURRENT INTERPRETATION OFFERED BY THE COURTS IS LEFT TO STAND

A possible argument in support of the status quo is that the compensation provided under the no-fault scheme of the COIDA is already sufficient, and that any increased compensation is neither required nor justified. In support of this there are Constitutional Court decisions that deal directly with the extinguishing of a common law claim and their replacement with lesser payouts under statutory schemes of insurance.

In the case of *Jooste v Score Supermarket Trading (Pty) Ltd (Minister of Labour Intervening)* 1999<sup>222</sup> (2) SA 1 (CC) ('Jooste') the court ruled that in terms of s 9(1) of the Constitution, the extinguishing of the common law claim for damages against the employer under s 35(1) of the COIDA was 'logically and rationally connected to the legitimate purpose of the compensation Act.'<sup>223</sup> In reaching this conclusion, it must be said that the court considered an award of increased compensation under s 56(4) of the COIDA.<sup>224</sup> The implication of this may be that the court indirectly supports the current interpretation of s 56(4) of the COIDA, though the provision and its interpretation were never directly in issue before the court.

In *Law Society of South Africa and Others v Minister of Transport* <sup>225</sup>('Law Society') the court deals with the extinguishing and restriction of certain common law claims through a statutory amendment to the Road Accident Fund Act 56 of 1996 ('the RAF Act').<sup>226</sup> Prior to amending s 21 of the RAF Act a victim or third party was entitled to claim damages from the owner, driver or employer of the driver of the vehicle where the person could not claim these damages from the fund itself.<sup>227</sup> The new act abolished this common law claim with two exceptions (i) where the fund was unable to pay any

<sup>222</sup> *Jooste v Score Supermarket Trading (Pty) Ltd (Minister of Labour Intervening)* 1999 (2) SA 1 (CC).

<sup>223</sup> *Ibid* at para 17.

<sup>224</sup> Rautenbach op cit note 8 at 530; Jooste supra note 222, in this case the court only takes a cursory glance at s 56 of the COIDA at para 14 of the judgement.

<sup>225</sup> *Law Society of South Africa and Others v Minister for Transport and Another* 2011 (2) BCLR 150 (CC).

<sup>226</sup> The Road Accident Fund Act No. 56 of 1996.

<sup>227</sup> *Ibid* at 411.

compensation and (ii) in the case of emotional shock arising from someone else other than the third party.<sup>228</sup>

The case is significant for the fact that a more favourable interpretation of s 56 of the COIDA would essentially expand the scope of compensation. It is thus significant to consider why the court felt it was justified in limiting the common law claims of certain parties. The court essentially justifies this position by indicating that this will help the economic vitality of the Road Accident Fund and serve as an interim measure for the introduction of a fairer and more equitable social security system of compensation for victims, which the state indicated would be based on a system of no-fault liability.<sup>229</sup>

It is submitted that these principles are not in point with regards to the COIDA. Firstly the road accident fund is paid for by all motorists based on a levy on fuel. A motorist has no control over the system in which vehicles operate; they must take the road system as they find it. It is clear that the conditions in the workplace are largely dependent on the actions of the employer, and the employee must essentially take the work place as they find it. The employer further has a direct interest and duty to ensure a safe working environment.<sup>230</sup>

It is further evident, on a preliminary consideration of economic theories on the law of delict, that where a system permits the employer to avoid the full implications and costs associated with negligent conduct this will fail to ensure an adequate deterrence of such conduct, and result in loss not being spread fairly between the respective parties.<sup>231</sup> The maximum payout to an employee is already capped at the pecuniary loss, to deny the possibility for this full pecuniary loss, where the employer has acted negligently would only skew the system of compensation more in favour of the employer. Further, in allowing a rule that is well recognised as being unpredictable and unjust this would infringe the foundational principles of the rule of law under the Constitution.<sup>232</sup>

Another argument based on policy is that if the rule were to be abolished it would result in a greater number of accidents in the workplace. The reasoning behind this is that a plaintiff who knows the difficulties in bringing a successful claim will be more cautious in the workplace, knowing his negligent actions come with the possibility of higher costs.

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<sup>228</sup> Ibid at 411.

<sup>229</sup> Rautenbach op cit note 8 at 532.

<sup>230</sup> Malone op cit note 16 at 6.

<sup>231</sup> See Stephen R Perry, *Tort Law* in Dennis Patterson (ed) *A companion to Philosophy of Law and Legal Theory* (1996) pp 57-78.

<sup>232</sup> The Constitution s 1(c), s 12(1)(c) of the Constitution provides the right to be free from all forms of violence,

Morally there is little to be said about such an argument. Studies indicate that an employee's conscious choice plays a negligible role in preventing accidents.<sup>233</sup> Instead it is large corporations who manage and control the workings of their businesses who are in the strategic position to reduce the possibility of accidents in the workplace. This much is evidenced by the fact that since the introduction of no-fault compensation corporations have acted to reduce the number of accidents in the workplace.<sup>234</sup> Secondly it is clearly evident that plaintiff's as a class are naturally incentivised to avoid bodily injury. If disability, mutilation and death are not incentive enough to act cautiously, little else is likely to do the job.

The common-law rules of contributory negligence thus tend to burden the plaintiff disproportionately in relation to the employer. The loss incurred by a corporation is not to life and limb at most it may involve damage to property, and the raising of tariffs. In this way disproportionate pressures are put on an employee to the benefit of the employer. The rule operates in an unbalanced way, a careless defendant is let off each time a plaintiff is negligent, while the plaintiff is punished. Thus the defendant's negligence is immediately offset by their not being held responsible.<sup>235</sup> The result is a rule which acts as a net incentive to carelessness on the part of the employer, not to safety.<sup>236</sup>

## II THE COMMON LAW DEFENCE OF CONTRIBUTORY NEGLIGENCE DOES NOT APPLY TO A CLAIM FOR INCREASED COMPENSATION

### *(a) A plain reading of s 56 of the COIDA*

The principle argument for why the ADA is not applicable to the COIDA has been that it internally distinguishes between a claim for compensation and one for damages, with the ADA only dealing with damages. The reason the courts even had to consider the exclusion of the ADA from the COIDA is based on what the default interpretation of a claim for increased compensation has been. This default position is that the common law defence of contributory negligence is applicable to the statute. This, as we have seen is supported in a line of cases since the decision in *Mey*.

The decision in *Mey* forms the foundation on which the common law defence of contributory negligence is said to apply to the COIDA. In that case the court held that the

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<sup>233</sup> Fleming op cit note 15 at 702.

<sup>234</sup> Ibid at 702.

<sup>235</sup> Ibid at 701.

<sup>236</sup> Ibid at 702.

critical test for a claim for increased compensation was directed at determining the proximate cause of the accident.<sup>237</sup> This notion of cause obliged the court to seek to place full liability on a single party. Where the proximate cause could not be established no claim was possible.

It has been said that the underlying basis of the defence of contributory negligence are found in the principles of causation, subject to finding a single cause.<sup>238</sup> Whereas the court in *Mey* was obliged to interpret the provision in line with the laws of causation prevalent at the time, it is submitted that a court now would be obliged to interpret the statute in line with the modern laws of causation to the exclusion of the common law defence of contributory negligence. On a plain reading of the provisions of s 56 of the COIDA there is nothing to suggest that the common law defence of contributory negligence should be available. A law graduate, versed in the principles underlying the Constitution, would likely not even give any cognisance to archaic defences in of the common law, let alone have an on idea how to apply them.

The phrase 'due to' has already been interpreted to mean 'caused by', this interpretation is derived from the law of delict. The only known civil law legal basis to establish a causal relation is through the use of the principles of delict. In the absence of the COIDA clearly stating how an alternate test is to apply the default position must be to apply the general laws of causation to the exclusion of the common law defence of contributory negligence.

To the extent that the choice between the first and second interpretations may be ambiguous certain principles of interpretation are important. The first is that the COIDA is a remedial statute and our courts have consistently stated that remedial legislation should be interpreted in favour of the class of employees to whom it is said to apply.<sup>239</sup> Thus a more favourable interpretation to employees should be preferred.

Secondly, as the case of *Looyen* indicates, the provisions of the statute are to be interpreted in a broad, as opposed to a narrow sense.<sup>240</sup> Thus the provisions of s 56 should be interpreted to describe the field of liability widely.<sup>241</sup> Lastly, the very basis of the development of compensation legislation was to create a simpler and more efficient system of

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<sup>237</sup> *Mey* supra note 98 at 364.

<sup>238</sup> McKerron op cit note 23 at 320; Boberg op cit note 35 at 653.

<sup>239</sup> *Davies v Compensation Commissioner* (3) 1995 (3) SA 689 (C) at 694F-G; *Uruquhart v The Compensation Commissioner* 2006 (1) SA 75 (E) at para 17 as referenced in Benjamin op cit note 2.

<sup>240</sup> *Looyen* supra note 92 at 554.

<sup>241</sup> *Ibid.*

compensation in comparison to the common law.<sup>242</sup> Maintaining an obscure common law defence in the statute clearly goes against the very purpose of the legislation.

Where courts were once bound to finding a single proximate cause to an accident, now such a search is not so arduous and causation is dealt with on common sense principles. It is submitted that under the Constitution there can only be one system of law dealing with general issues of causation.<sup>243</sup> The abolition of the defence of contributory negligence in every other sphere of life through the ADA is testament to the fact that such principles are no longer in line with the *boni-mores* of society and the principles enshrined in the Constitution.<sup>244</sup>

*(b) The importance of distinguishing between damages and damage causing events*

The phrase 'due to' in s 56(1) of the COIDA has been interpreted in light of the common law, and particularly the 'last-opportunity' rule. It is good to recall that under s 56(1) of the COIDA it is an 'accident' or 'occupational disease' which must be shown to be 'due to the negligence' of a set group of parties or their failure to repair a patent defect. The term 'accident' is defined in the COIDA but this definition is self-referential and not particularly useful.<sup>245</sup> Instead the courts have interpreted the word 'accident' in its popular and ordinary meaning as something which comes about unexpectedly or is not planned for or designed.<sup>246</sup>

Up until the 1941 WCA a claim for increased compensation based on contracting an occupational disease could only be claimed where it could be shown that the disease arose in circumstances amounting to an accident.<sup>247</sup> It was only with the 1993 COIDA that the provision regarding increased compensation expressly listed 'occupational diseases' alongside 'accidents.' Thus, up until at least 1941 claims for increased compensation based on occupational diseases and accidents arising in the workplace were treated in the same way.

The last opportunity rule was often phrased as a consideration of which party had the last opportunity to avoid the *accident*. The wording in the COIDA appears to be a carryover

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<sup>242</sup> Benjamin op cit note 2 at 6.

<sup>243</sup> *Pharmaceutical Manufacturers Association of SA and Others; In Re: Ex Parte Application of President of the RSA and Others* 2000 (3) BCLR 241 (CC), where Chaskalson CJ stated:

'There is only one system of law. It is shaped by the Constitution which is the supreme law, and all law, including the common law, derives its force from the Constitution and is subject to constitutional control.'

<sup>244</sup> See Devenish G.E. *Interpretation of Statutes* first edition (1992) at 325 where he speaks about the law offending the *boni-mores* of society.

<sup>245</sup> "'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.'

<sup>246</sup> Benjamin op cit note 2 at 147.

<sup>247</sup> See the 1934 WCA s 5(1) and the 1941 WCA s 43(1).

of the common law 'last-opportunity rule'. It has historically been the case that a claim for increased compensation arises when the 'accident' is due to a party's negligence. This also appears to go clearly with the 'all or nothing' approach to issues of causation in the common law, where the court sought to find a single proximate cause of the accident. Thus, on a plain reading of the COIDA the entitlement to increased compensation is based on avoiding an *accident*, as opposed to *harm* arising from an *accident*.

This reasoning may however appear to come in conflict with developments in the law of causation and negligence. An important question which only clearly arose after the passing of the ADA is the distinction between what Neethling & Potgieter call, fault in respect of 'damage' and fault in relation to the 'damage causing event'.<sup>248</sup> This is important in the context of the law of contributory negligence, where up until now the reference in the relation to the 'last-opportunity' rule has been a reference to the 'last-opportunity to avoid the accident.'

In a series of cases in the 1970's this issue was considered by the courts. The first case was *King v Pearl insurance Co Ltd* 1970 1 SA 462 (W), ('King'). Colman J ruled that the failure of a plaintiff to wear a helmet while driving a scooter, which was involved in a collision with a motor vehicle, did *not* constitute contributory negligence.<sup>249</sup> This was decided on the basis that the failure to wear a helmet bore no relation to the damage causing event (the accident). The court stated that it was only negligence in relation to the damage causing event (accidents) which were relevant for the purposes of the ADA.<sup>250</sup>

The decision would be criticised in *Bowkers Park Konmka Cooperative Ltd v SAR and H* 1980 1 SA 91 (E) ('Bowkers'). Here the court, in reference to a reading of the word 'damages' in s 1(1)(a) of the ADA espoused the now well accepted statement on contributory negligence, that claims under the ADA relate to fault in relation to damage not fault in relation to a damage causing events.<sup>251</sup> Better put, under the law of delict a party is liable for causing damage not for causing of 'accidents' which lead to damage.<sup>252</sup> The decision was supported in *Union National South British Insurance Co Ltd v Vitoria* 1982 1 SA 444 (A), ('Vitoria'). In *Vitoria* the court ruled that the failure to wear a seat-belt was contributory negligent.<sup>253</sup>

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<sup>248</sup> Neethling & Potgieter op cit note 221 at 173.

<sup>249</sup> Ibid at 173-4.

<sup>250</sup> Ibid.

<sup>251</sup> Ibid.

<sup>252</sup> Boberg op cit note 35 at 405.

<sup>253</sup> Neethling & Potgieter op cit note 221 at 173-4.

Boberg supports the decision in *Vitoria*. He is critical of the position in *Bowkers* only in as much as he believes that it was always the case at common law that the courts considered the fault in relation to the harm not the fault in relation to the harm causing event for purposes of contributory negligence.<sup>254</sup> His position is that the common law was not changed by the reference to 'damages' in the ADA. He states that it was only because there was no reason in earlier cases for making the distinction between the accident and the resulting harm that it was not brought up and definitively decided. Thus he states it was indeed always a question of the fault in relation to the harm.<sup>255</sup>

Boberg's indication that this has always been the position under the common law is difficult to reconcile with the 'last opportunity rule.' Indeed in Boberg's own work and that of McKerron it is indicated that the last opportunity rule dealt with a consideration of who had the last opportunity to avoid the 'accident' by reasonable care.<sup>256</sup> This is echoed by the leading English textbook by Williams.<sup>257</sup> Even later textbooks seem to accept that this was the approach at common law.<sup>258</sup>

The reference to the 'last opportunity to act' as Boberg indicates was merely 'loose' or imprecise speaking.<sup>259</sup> In all cases it was really the harm and not the accident which Boberg indicates mattered.<sup>260</sup> Indeed this is now an accepted trite principle in the law of delict that a claim in delict is a claim for harm caused, not for the causing of accidents.<sup>261</sup>

As above, the wording in s 56 of the COIDA appears to be in conflict with this reasoning. The commissioner's discretion in awarding compensation depends exactly on her being satisfied that the *accident* or occupational disease arose as a result of the negligent act.<sup>262</sup> Are these statutory provisions also the result of 'loose wording' or a 'loose understanding' of the principles of the common law?' It is suggested that they very well may be, given the history of how workers compensation developed.

How would this principle then be applied to the COIDA, where the ADA is said not to be applicable and contributory negligence (now classified as contributing to the harm) is a

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<sup>254</sup> Boberg op cit note 35 at 403-4.

<sup>255</sup> Ibid.

<sup>256</sup> Ibid at 654; McKerron op cit note 23 at 63.

<sup>257</sup> Williams op cit note 14 at 224.

<sup>258</sup> Neethling & Potgieter op cit note 124 at 145.

<sup>259</sup> Boberg op cit note 35 at 403-4.

<sup>260</sup> Ibid.

<sup>261</sup> Ibid.

<sup>262</sup> COIDA s 56(4)(a)

complete defence?<sup>263</sup> If Boberg is right in that the 'last opportunity to act' related to damages, then the 'last opportunity rule' would be impossibly strict. A plaintiff contributing even in the slightest way to the harm caused would lose the claim completely. This would in practice have the effect of abolishing the last opportunity rule, and instead returning to a time when the slightest negligence in relation to the harm would disqualify a party from a claim.

### III THE ADA APPLIES TO THE COIDA

Many of the arguments given above for why the common law defence of contributory negligence should not apply to the COIDA, could be used as negative justifications to apply the ADA to COIDA. In this section, one negative argument and one positive argument are made for the application of the ADA to the COIDA. These arguments arise in the context of claims for the recovery of damages and compensation, now contained under s 36 of the COIDA.

The first argument is that the failure to apply the ADA to the COIDA would result in certain inequitable results which could not have been contemplated by the legislature. The second is the argument that the ADA indirectly applies to the COIDA in the context of a claim by the Director-General or employer individually liable against a negligent third party for the recovery of compensation paid to an employee. The implication of this is that if the ADA applies to a claim for compensation under s 36(b) then it should apply to a claim for compensation under s 56 of the COIDA.

The relevant provisions of s 36 of the COIDA are laid out below:

**36. Recovery of damages and compensation paid from third parties.**—(1) *If an occupational injury or disease in respect of which compensation is payable, was caused in circumstances resulting in some person other than the employer of the employee concerned (in this section referred to as the “third party”) being liable for damages in respect of such injury or disease—*

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

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<sup>263</sup> Would increasing your own harm automatically lead to a disqualification for a claim for damages in its entirety? In Neethling & Potgieter op cit note 221 at 174 it is indicated that under the ADA, in relation to compensation for exacerbating or increasing the damages from the accident, since the passing of the ADA, contributory negligence is said to only be relevant to the increase in damages from the act. Thus it is only the increase in the harm that comes from the failure to wear a seatbelt that falls to be apportioned, and not the loss that would have resulted regardless of wearing a seatbelt or not.

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

The leading case dealing with a third party claim is *South African Railways and Harbours v South African Stevedores Services Co Ltd* 1983 (1) SA 1066 (A)<sup>264</sup> ('Stevedores Services') which deals with a third party claim under the 1941 WCA. In this case the husband of Mrs G had been killed by the concurrent negligence of South African Railways and Harbours (SARH) and the South African Stevedores Services Co (SASS). The SARH as employer had duly paid out compensation to Mrs G as the dependent of the deceased. Mrs G then sued the SASS as a negligent third party under s 8(1)(a) for the outstanding amount of the damages suffered. The total amount of damages was R 20,300, of this SARH had already paid out R 13,287 in compensation; Mrs G's damages claim against SASS was thus R 7,012.

When SASS was sued for damages it joined the SARH as a third party in terms of s 2(6) of the ADA claiming that the R 7,012 should be apportioned between itself and the SARH. It was common cause that the negligence of the SARH and SASS was in the ratio of 40/60. The SARH then filed a claim in terms of s 8 (1)(b) of the 1941 WCA to regain the monies paid out to Ms G. In the court a quo the damages paid by the third party and the compensation paid by the employer were apportioned between to the two parties in terms of the ADA.

On appeal, the SARH argued that it was entitled to claim back from SASS the full amount which it had paid to the deceased (R13,287) and that this amount was not to be apportioned under the ADA. SASS raised three defences, two being relevant for our purposes. It firstly argued that s 8(1) of the 1941 WCA which deals with third party claims was of no use in cases where the employer had himself been negligent in relation to the accident.<sup>265</sup> In the alternative SASS argued that s 1 and 2 of the ADA could be invoked by the defendant to apportion the claim for compensation.

While SASS relied on certain English judgements to argue for apportionment, the court distinguished between the English and South African compensation regimes at the time. Importantly, under the English law the workman still had the option to proceed at

<sup>264</sup> *South African Railways and Harbours v South African Stevedores Services Co Ltd* 1983 (1) SA 1066 (A).

<sup>265</sup> *Ibid* at 1077.

common law or claim under the statute.<sup>266</sup> The court then distinguished between payment of compensation by the employer, and payment of damages by a third party, as payments whose underlying basis were no longer common to both parties. The employers claim was statutory in nature, while that of the employee against the third party was based on the common law.<sup>267</sup>

As the court indicates, if both claims had been made under the common law, then the underlying basis of the claims would have been the same and s 2(6) of the ADA would have allowed for an apportionment between the parties. The 1941 WCA had radically changed this position by abolishing an employee's claim against the employer.<sup>268</sup> The *damages* claim against the third party under s 8(1)(a) was thus delictual in nature, the basis of which is explained by the court as:

'On the other hand, the Act does not impose on such third party any liability which does not exist at common law; the third party will be entitled to set up against a claim by a workman under s 8 (1)(a) such defences as he would ordinarily be entitled to raise against him in an action on delict. For example, prior to 1956 he would have been entitled to raise the defence of contributory negligence on the part of the workman, and since then he can, in such a case, claim an apportionment of damages by virtue of the provisions of s 1 of the 1956 Act. And it follows that the right of action conferred on the commissioner or the employer individually liable under s 8 (1)(b) is dependent on the workman having a right of action at common law for damages against the third party.'<sup>269</sup> [my emphasis]

Thus, the common law defence of contributory negligence is not open to the third party, instead only the principles of apportionment apply under the ADA.<sup>270</sup> It is submitted then in the absence of the defence of contributory negligence, the default position will be the general laws of causation apply in establishing the causal connection required under s 36(1)(b). The court goes on to elaborate on this point:

'If the commissioner or the employer individually liable wants to avail himself of his right of action under s 8 (1)(b), he must in the first instance show that, in so far as the accident is concerned, the workman would have a good cause of action against the third party in respect

<sup>266</sup> Ibid at 1081.

<sup>267</sup> *Stevedores Services* op cit note 264 at 1083, the court makes this in reference to the cases of *Table Bay Stevedores (PTY) LTD v South African Railways and Harbours* (1959) 2 All SA 1 (A) and *Grace*.

<sup>268</sup> *Stevedores Services* at 264 at 1085.

<sup>269</sup> Ibid at 1084-5.

<sup>270</sup> Benjamin op cit note 2 at 183 writes in reference to the *Stevedores Services* case that 'The Act does not impose any liability on a third party that does not exist at common law, and a third party may seek an apportionment of liability in terms of the Apportionment of Damages Act 34 of 1956 against an employee whose injury was caused by his own fault.'

of the injuries caused by him. That is a fundamental prerequisite. The commissioner (or the employer) cannot recover compensation under the section unless he can show that the third party was causally negligent in relation to the accident in which the workman was injured. It is common ground that in the instant case this condition has been satisfied.<sup>271</sup> [my emphasis]

The claim for compensation under s 8(1)(b) is dependent on showing a good 'cause of action.' A fundamental prerequisite of this is establishing a damages claim under s 8(1)(a).<sup>272</sup> Section 8(1)(a) relies on the general laws of causation to the exclusion of the common law defence of contributory negligence. Thus a claim for compensation under s 8(1)(b) will arise in circumstances where a damages claim has succeeded, even when that damages claim is apportioned.

This result can arise in two possible ways. First, it could be said that a claim for compensation under s 8(1)(b) is established by reliance on the general laws of causation as applied under s 8(1)(a). There is however an alternative interpretation. That is the claim for compensation under s 8(1)(b) is based on a claim for damages under s 8(1)(a). As the claim under s 8(1)(a) allows for the application of the principles of apportionment (in circumstances where contributory negligence under the common law could act as a complete defence) under the ADA this means a claim for compensation under s 8(1)(b) is indirectly dependent on the application of the ADA. This will at least be the situation in certain cases.

The argument goes some way to undermine a long line of precedent which have argued that the ADA has no application to claims for compensation under the COIDA. However does this claim for compensation against a third party have any relevance to a claim against a negligent employer? It is submitted that it does.

There are clear similarities between sections 56(1)(a) and s 36(1)(b).<sup>273</sup> Both provisions use similar language to establish a causal connection, with s 36(1)(b) using the phrase 'was caused' and s 56(1)(a) using the phrase 'due to' interpreted as 'caused by.' Secondly both claims are dependent on a negligent act being the cause of the harm. In s 56(1) it is the negligent act of the employer which must be the cause of the harm. Reading

<sup>271</sup> *Stevedores Services* at 264 at 1085.

<sup>272</sup> Benjamin op cit note 2 at 183- 4 indicates, 'The right of action of the Director-General or employer individually liable against the third party is distinct from that of the worker. It is not a claim for damages - but an action to recover the compensation paid. The claim can however only succeed if the employee has a basis of claiming damages'.

<sup>273</sup> The equivalent sections of s 8(1)(a) and s 8(1)(b) under the 1941 WCA are sections 36(1)(a) and s 36(1)(b) under the COIDA.

s 36(1)(a) and s 36(1)(b) together it is the negligent act of the third party which is the prerequisite for a claim for compensation under s 36(1)(b).

#### IV RECONCILING THE TWO ALTERNATE APPROACHES TO A CLAIM FOR INCREASED COMPENSATION

The distinction between claims under the law of delict and under a compensation statute now often comes down to demarcating the entitlements under each system to avoid double compensation.<sup>274</sup> This is not the problem under s 56 of the COIDA, which instead requires a consideration of how these branches of law overlap and interact. Determining the interaction between delictual claims and those under the COIDA is however made more difficult by the application of the ADA.

The current interpretation of the COIDA as we have seen is stuck in a time when completely different principles governed the laws of delict. Since the introduction of the ADA, distinguishing between the common law of delict and the law under the ADA has become difficult. That is because the common law since 1956 has developed off the back of the application of the ADA. Thus what is now statutory law, and what is the common law is not completely clear.

In this respect, it must be recognised that the 'distinct' approaches suggested above may be more *alike* than they are made out to be. That is, the application of the common law of causation as it relates to negligently caused harm, cannot as I see be separated from the principles which were introduced under the ADA. For purposes of this work however I do not think that is important. In the end, a damage causing event or the realisation of a risk in the widest sense is a matter of policy.<sup>275</sup> That is that both legal norms and factual circumstances must be determinative of whether a victim is entitled to compensation.<sup>276</sup> The road accident fund and the COIDA are clear examples of private risks being brought into this social sphere.<sup>277</sup>

It is clear that to continue interpreting s 56(1) of the COIDA in light of the common law defence of contributory negligence is unconstitutional. A rule which cannot be consistently applied, that is uncertain, that has been recognised widely as unjust should not be used to determine whether a claim for increased compensation will succeed. Such a rule breaches the most basic principles of the rule of law enshrined in the Constitution.<sup>278</sup>

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<sup>274</sup> Millard op cit note 3 at 538-9.

<sup>275</sup> Ibid at 541.

<sup>276</sup> Ibid.

<sup>277</sup> Ibid at 542.

<sup>278</sup> The Constitution s 1(c).

The test of the last opportunity rule marked a grand attempt at applying a rigid rule to a myriad of factual circumstances. However, over time new factual scenarios showed this simply didn't work. Whether the rule is considered as a rule of causation or 'responsibility' is of little value in how to interpret the statute.<sup>279</sup> As the 1939 English Law revision Committee Report indicated:

'In truth there is no such rule the question, as in all questions of liability for a tortious act, is, not who had the last opportunity of avoiding the mischief, but whose act caused the wrong.'<sup>280</sup>

It is submitted that in the absence of the application of the defence of contributory negligence the general laws of causation should apply.<sup>281</sup> A flexible rule is needed to deal with the many situations that arise in regard to negligently caused harm. The laws of legal causation already deal with the issue of 'proximity' in a more detailed and consistent way than the last opportunity rule; there is no need for another stream of law which overlaps with these principles.<sup>282</sup>

The laws of causation are however dynamic and still the subject of controversy as the recent case of *Lee v Minister for Correctional Services (Treatment Action Campaign and others as amici curiae)* 2013 (2) BCLR 129 (CC)<sup>283</sup>, ('Lee') shows. In *Lee* the majority of the court ruled that the 'but for test' of factual causation was not inflexible.<sup>284</sup> Applying a flexible approach was required to serve the ends of justice where an inflexible rule would lead to injustice.<sup>285</sup> The Constitutional Court, while reiterating the need to take a 'common sense' approach, held that it was sufficient to show that a reasonable system would have made it 'less likely' to contract TB and that this would have been enough to establish factual causation.<sup>286</sup> What is important here is the court considered that a flexible test would be necessary where an inflexible approach would lead to injustice.

Cameron J in his minority judgment criticises the majority judgment on three points. He firstly indicates that an increase in exposure to risk is not enough to infer probable causation.<sup>287</sup> Secondly, that negligence is by its very nature the unreasonable increase of risk

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<sup>279</sup> Alberta Law Reform Institute (Report No. 75) *Last Clear Chance Rule* (1997) at 7; McKerron op cit note 23 at 320.

<sup>280</sup> As quoted in *Hau Mon* supra note 97 at 185.

<sup>281</sup> This is supported by the Alberta Law Reform Institute op cit note 279 at 9.

<sup>282</sup> Ibid.

<sup>283</sup> *Lee v Minister for Correctional Services (Treatment Action Campaign and others as amici curiae)* 2013 (2) BCLR 129 (CC).

<sup>284</sup> Neethling & Potgieter op cit note 221 at 193-4.

<sup>285</sup> Ibid.

<sup>286</sup> *Lee* supra note 283 at para 60.

<sup>287</sup> Ibid at para 106.

of harm and that this should not be conflated with factual causation which still requires showing the connection to a specific harm.<sup>288</sup> And lastly, that the approach by the majority leaves no consideration of how to weigh up the size of the risk incurred that would establish factual causation.<sup>289</sup> Cameron J would thus have referred the matter back to the High Court in order to develop the law of causation. What both the majority and minority judgments however recognise is a rigid approach to causation will not work in certain situations.

The case law on increased compensation has not dealt with a claim regarding an occupational disease. The express wording to include occupational diseases in a claim for increased compensation only arose with the 1993 COIDA. Up until this time it has always been 'accidents' to which the last opportunity rule has applied. Where a rigid approach of the common law has failed in situations of diseases, such as TB, the last opportunity rule is only certainly to be inappropriate. The referral to a last opportunity to avoid a disease such as silicosis could only ever have made any sense when such diseases were required to have arisen in a situation amounting to an accident.

Causation remains a complex issue. As Neethling & Potgieter have stated, at the most basic level these developments in the law of causation are about the linking of facts and answering the question, does one fact arise out of another.<sup>290</sup> They argue that because of how complex and dynamic our world and our reality is it is not possible to have a general test of causation.<sup>291</sup> Neethling & Potgieter hold instead that causation must be based on the facts of each case.<sup>292</sup> They come to the conclusion that there are as many tests for factual causation as there are causal links.<sup>293</sup>

## V CONCLUSION

If a claim for increased compensation is dependent on application of the general laws of causation, the issues around the common law defence of contributory negligence become largely irrelevant. In making this award of compensation it must be noted that the Director-General exercises an *equitable* discretion in determining the amount to be awarded. This discretion must account for the amount of no-fault compensation that has been awarded, and

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<sup>288</sup> Ibid at para 107.

<sup>289</sup> Ibid at para 108

<sup>290</sup> Neethling & Potgieter op cit note 221 at 195.

<sup>291</sup> Ibid.

<sup>292</sup> Ibid.

<sup>293</sup> Ibid, Neethling & Potgieter claim a review of the case law demonstrates this.

is limited to awarding, at most, the difference between this compensation and the total pecuniary loss.<sup>294</sup>

If the ADA was applied to a claim for increased compensation it would also result in the application of the common law of causation to the COIDA. It would further result in the application of the principles of apportionment under the ADA. How these principles would overlap with those of the equitable discretion exercised by the Director-General is unclear. It is submitted however that in all likelihood the impact would be minimal, as the principles of contributory negligence, are, as we have seen, founded on principles of equity.<sup>295</sup> The application of the ADA to the COIDA would also have the added benefit of allowing the principles of apportionment to apply to a claim against a third party under s 36(1)(b) of the COIDA.

The common law defence of contributory negligence was a harsh and inequitable rule that grew out of the clash between new and old forms of production. It favoured the interests of the emerging financial elite at the expense of ordinary people. The social milieu of the industrial revolution now seems a long way off, yet its principles and ethos have persisted for 60 years since the ADA ruled it unacceptable in every other sphere of human life. This fact perhaps shows that despite progressive Constitutional legislation to protect the rights of workers, the organised interests of a small elite remain elevated above others. It is hoped that the abolition of the defence of contributory negligence, as applied to a claim for increased compensation under the COIDA, will go some way to levelling these interests by ensuring a more dignified life for workers and their dependents through elevated levels of compensation.

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<sup>294</sup> COIDA s 56(5)(b).

<sup>295</sup> Boberg op cit note 35 at 645.

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