The expediency of including claims based on disablement caused by sexual harassment in South Africa's system of workers' compensation

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1. Introduction

In this article we will investigate the question of whether it is feasible to include compensation for disablement arising from a psychological disorder caused by sexual harassment in the South African workers' compensation system. Although claimants who suffered from disablement caused by Post-traumatic Stress Disorder ("PTSD") in the past were successful in their claims against the compensation fund, there is no jurisprudence dealing with a claim based on a psychological disorder as a result of sexual harassment. However, victims of sexual harassment have in the past successfully claimed against their employers on the basis of vicarious liability, the common-law duty of the employer to provide a safe workplace, discrimination by the employer in terms of the Employment Equity Act 55 of 1998 ("EEA") and the Constitution of the Republic of South Africa, 1996 ("Constitution"). These cases and the shortcomings of the remedies that they offer for certain victims will be discussed below. We will argue that it would be beneficial to most victims who suffer from disablement as a result of sexual harassment to be covered by the Compensation for Occupational Injuries and Diseases Act 130 of 1993 ("COIDA"), provided that they retain their right to claim against their employer on the ground of unfair discrimination. The legal dispensation of three countries which do make provision for claims based on disablement caused by sexual harassment against their compensation funds will be discussed to see how best to harmonise the remedies available to victims of sexual harassment.

2. South African jurisprudence on sexual harassment and workers' compensation

In several South African sexual harassment cases in which employees have claimed damages from their employers, the employers argued that the employees were barred from claiming from them, since COIDA was applicable and that harassed employees should claim from the compensation fund. In terms of section 35(1) of COIDA, an employee who is covered by COIDA has no action against an employer for damages in respect of any occupational injury sustained as a result of an accident or disease that arose out of and within the scope of the employee's employment. In the past, courts have paid scant attention to this defence of employers in the sexual harassment context and dismissed the arguments in this regard. [1]

In *Grobler v Naspers Bpk* ("*Grobler v Naspers*") [2] the High Court held that a successful claim under COIDA would require proof of an accident that caused the injury, and interpreted "accident" to refer to a specific incident. Acts that took place over an extended period, such as the acts of harassment in this case would, according to Nel J, not qualify as an accident. [3] In *Ntsabo v Real Security CC* the Labour Court merely stated that a claim, in sexual harassment cases, could not be based on COIDA because the condition of the victim was not brought on by conduct that fell within the job description of the victim or the perpetrator. [5] In *Media 24 v Grobler* ("*Media 24 v Grobler*") [6] the Supreme Court of Appeal ("SCA") found that the psychological disorder from which the victim suffered did not occur in the course of her employment [7] and that she was thus not barred by section 35 of COIDA from bringing a civil claim against her employer. Significantly, the court added that "[i]t may well be that employees who contract psychiatric disorders as a result of acts of sexual harassment to which they are subjected in the course of their employment can claim compensation under s 65." [8] The court thus did not exclude the possibility of a victim of sexual harassment bringing a claim in terms of COIDA, should the conduct causing the psychological disorder have taken place in the course of employment.

In a recent case, *MEC for the Department of Health, Free State Province v De Necker* ("*De Necker*"), [9] the SCA had to decide whether a medical doctor who was raped by a non-employee while on duty was barred by section 35(1) of COIDA from claiming damages from her employer for negligence. After examining South African and foreign jurisprudence, the court came to the

conclusion that the wrong causing the injury could not be seen as an accident, since it did not bear a connection to the employee's employment [10] and that COIDA was thus not applicable. This conclusion regarding rape cannot be faulted, but the court relied on *Ford v Revlon, Inc.* in Arizona in the United States of America dealing with a sexual harassment claim under workers' compensation and in this judgment the court held that sexual harassment was not compensable since it could not be regarded as an "inherent risk of employment". [12] Although the *De Necker* judgment dealt with rape and not sexual harassment, the implication of this judgment by the SCA is that a claim for compensation caused by sexual harassment should, like rape, not be compensable under COIDA. We do not agree with this view since we will argue that COIDA provides that employees suffering an injury caused by an accident or a disease "arising out of and in the course of the employee's employment" can claim against the compensation fund. The requirement of an "inherent risk of employment" sets too high a standard and is not appropriate for deciding whether a claim could be compensable in terms of COIDA. Based on statistics of the percentage of women harassed in the workplace, [13] we will argue that sexual harassment may be regarded as endemic to the workplace and resulting disablement could arguably be regarded as arising out of and in the course of the employee's employment. [14]

Some may prefer to close their eyes instead of acknowledging that the scourge of sexual harassment is endemic to workplaces around the world [15] and is one of the most significant factors causing psychological harm to women in the workplace. [16] In this article we will argue that harassed employees (men and women subjected to sexual harassment) who suffer from a disablement caused by the harassment, should be allowed to claim in terms of COIDA. The reasons for this view are the same as the reasons for adopting workers'

compensation legislation in the first place and allowing injured employees to claim against the fund and not against their employers.

The next section will briefly discuss the remedies for victims of sexual harassment that are currently available in South Africa. For all these remedies the employee is required to prove fault on the part of the employer. We will argue that a no-fault remedy would be to the advantage of most victims, [17] provided that they retain the right to claim against the employer in terms of legislation prohibiting unfair discrimination. Legal comparison with three other jurisdictions will demonstrate how claims in terms of workers' compensation can exist alongside legislative remedies which prohibit discrimination.

3. Remedies for victims of sexual harassment in South Africa

A variety of remedies are available to victims of harassment in terms of the South African legal system. In this regard, Darcy du Toit states that a diversity of rules regarding sexual harassment may create confusion, but concedes that "[g]iven the variety of circumstances in which sexual harassment can take place, it is certainly appropriate that protection should be as broad as possible". [18]

Victims can claim damages based on the common-law doctrine of vicarious liability of the employer, provided that the perpetrator is an employee of the employer and there was a "sufficiently close" connection between the harassment and the employment of the perpetrator. [19] The employee can in the alternative claim in terms of the common-law duty of the employer to provide a (physically as well as psychologically) safe workplace, [20] but to succeed with the claim, the employee will have to prove that the employer was negligent in not providing a safe workplace.

A victim may further, if constructively dismissed in terms of the Labour Relations Act 66 of 1995 ("LRA"), claim compensation for an automatically unfair dismissal [21] and will be successful if he or she can prove that the employer rendered a continued employment relationship intolerable. [22]

In addition, a victim may also claim damages for unfair discrimination [23] in terms of the EEA. [24] In terms of section 6(1) read with section 6(3) of the EEA, harassment of an employee is a form of unfair discrimination and is prohibited on any one, or a combination of grounds, including "race, *gender, sex*, pregnancy, marital status, family responsibility, ethnic or social origin, colour, *sexual orientation*, age, disability, religion, HIV status, conscience, belief, political opinion, culture, language, birth or on any other arbitrary ground". [25] Section 60 of the EEA provides that if an employee discriminates against another employee in contravention of the EEA (this would include sexual harassment), [26] the conduct must immediately be brought to the attention of the employer. The employer must consult the parties and must take steps to eliminate the discriminatory conduct. If the employer fails to take these steps he or she will be deemed to have contravened the EEA. However, the effectiveness of this remedy could be compromised in that the employer will not be held liable if he or she can prove that they did everything that was "reasonably practicable" (for example merely implementing a policy on the prohibition of sexual harassment) to ensure that the employee (the harasser) would not act in contravention of the EEA. [27]

A victim of sexual harassment may finally also base his or her claim on the violation of his or her constitutional rights to equality, dignity, privacy and bodily integrity [28] provided that the common law and legislation do not provide a remedy. [29]

Claims based on the common-law duty of the employer to provide a safe workplace, the vicarious liability of the employer and the constitutional rights of the victim, may be brought in either the High Court or the Labour Court. [30] If the claimant bases his or her claim on automatically unfair dismissal in terms of the LRA, the dispute may be referred to a council or the Commission for Conciliation Mediation and Arbitration ("CCMA") [31] and if conciliation fails, the dispute may be referred to the Labour Court. [32] Cases heard in the Labour Court and the High Court may be protracted and may involve costly litigation, especially when one of the parties lodges an appeal. A victim of sexual harassment may refer his or her claim based on discrimination in terms of the EEA to the CCMA for conciliation [33] and if conciliation fails, may then elect to have the dispute arbitrated at the CCMA [34] or adjudicated in the Labour Court. [35] The claimant does not have to pay for the process at the CCMA, but contrary to the general rule, parties involved in a sexual harassment dispute may appeal against the award of the arbitrator, [36] which can again lead to escalation of the costs. [37]

Should a complainant refer a case of automatically unfair dismissal to the Labour Court in terms of the LRA, the Labour Court may order compensation [38] and if the complainant bases his or her claim on unfair discrimination in terms of the EEA, compensation as well as damages may be ordered in terms of the EEA. [39] Rochelle le Roux explains that compensation deals with the infringement of an employment right (the right not to be unfairly dismissed and the right to equality) and damages deal with the remedying of patrimonial loss. [40] These remedies differ from the remedy provided for in COIDA in terms of which medical expenses may be claimed and compensation is calculated on the basis of the earnings of the employee and the employee's degree of disablement (thus, for the loss of earning capacity). [41] Both the LRA and the EEA provide that compensation (and damages) awarded must be "just and equitable". Le Roux points out that equitability entails that the court should also take other awards of compensation against the employer based on the same facts into consideration. [42]

Even though an employee could prove what is required for the above claims to be successful and may have the resources to pay for litigation, the employer could be a man of straw and the victim could be left without a remedy. It should further be kept in mind that although victims of sexual harassment are well-protected in terms of the Constitution as well as the common law and legislation as indicated above, there is the reality of workplace relationships that may have detrimental consequences for a victim of sexual harassment who dares to claim against his or her employer. In contrast to a claim against the compensation fund, pursuing a claim against the employer involves an adversarial process which is not conducive to a continuing employment relationship. [43] It is not surprising that many victims of sexual harassment rather resign than lay a charge. [44]

Thus far no reported claims for psychological disablement caused by sexual harassment have been brought against the compensation fund, [45] although claims for psychological disablement based on other causes were paid by the compensation fund. [46] The only cases in which COIDA featured in the context of sexual harassment are those in which employers argued that victims are barred from bringing a civil claim against them in terms of section 35 of COIDA. [47] In all these cases it was to the benefit of the victims that the courts did not accept the employers' arguments. The reason for this is that on the facts of each case, the employees could prove what was necessary for the particular claim and, furthermore, the employers were large corporate- or state employers, [48] all of whom were in a financial position to pay damages to the victim. However, had the employers been small enterprises and less affluent (or even bigger employers who became insolvent) the employees would have been in a detrimental position as a result of being excluded from COIDA and they would potentially have ended up with no compensation at all.

Commenting on the difficulty experienced by victims of sexual harassment if the case is referred to the Labour Court, Bernikow notes the following:

> [In] the LC … cases of this nature have often dragged on for an extensive period of time and compensation that was finally ordered in the worker's favour could not be claimed as the company had since gone into liquidation. Alternatively, the worker may not be able to prove the sexual harassment and/or constructive dismissal in the LC and after a lengthy legal battle be left with nothing else but a hefty legal bill. [49]

It is also a possibility that employees will not claim against employers in the first place if they think that they would not be able to prove what is required in terms of legislation or the common law, and even if they could, that the employer would not be in a financial position to pay damages.

In order to test the validity of our argument that COIDA could be interpreted to include claims for workers' compensation based on disablement caused by sexual harassment, the general structure of COIDA will be discussed in the following section.

4. Structure of COIDA

Workers' compensation legislation in most countries with developed social security systems is premised on the basis that the cost of injury and disease, which is an inevitable result of industrialisation, is shifted from the employee to the industry, which in turn spreads the cost to consumers by increasing the cost of the products of industrialisation. [50] This is done by means of social insurance schemes of which South

Africa's COIDA provides an example. COIDA is described as "important social legislation which has a significant impact on the sensitive and intricate relationship amongst employers, employees and society at large. The state has chosen to intervene in that relationship by legislation and to effect a particular balance which it considered appropriate." [51] Like all social legislation, the focus of COIDA is mainly the protection of employees. [52]

4.1 No-fault compensation

To understand the importance of COIDA, a brief overview of the common-law position that it supplanted is required. A successful delictual claim for damages could lead to an employee who suffered occupational injuries or diseases being awarded general damages, "including damages for past and future pain and suffering, loss of amenities of life and estimated 'lump sum' awards for future loss of earnings and future medical expenses, apart from special damages including loss of earnings and past medical expenses." [53]

However, to succeed in a common-law delictual action against the employer for an occupational injury or disease, the employee would need to prove all the elements of a delict, the most problematic being the requirement to prove fault (intent or negligence) on the part of the employer. [54] The employer has defences available, such as contributory negligence by the employee, which could lead to a proportional reduction of damages. Furthermore, a claim for damages is expensive — with the employee facing the prospect of paying the costs of the employer should the claim be unsuccessful — and time-consuming.

For the purposes of this article, the most important consideration is that, even if the employee's claim is successful, there is a likelihood that the employer may not be in a position to pay damages. [55] The employee could thus be left without a remedy, and it could be to his or her benefit to be allowed to claim in terms of COIDA, even though compensation is capped. [56] Consequently, the employee may receive less than could have been awarded in terms of a common-law claim.

In response to the issues resulting from the common-law claim for damages outlined above, a statutory insurance scheme for occupational injuries and diseases has been created in terms of COIDA. [57] Contributions to this fund are paid by employers according to an assessment made on the basis of the earnings of their employees. [58] An employer's safety record may affect the contribution payable by the employer. If the Compensation Commissioner is of the opinion that an employer's accident record is "less favourable than those of employers in comparable businesses", the employer's contribution to the fund may be increased. A comparatively good accident record, coupled with steps to prevent accidents may lead to a decrease in an employer's contribution to the fund. [59]

This "no-fault" system merely requires the employee to lodge a claim for pecuniary loss through an administrative process. [60] The employee does not have to prove negligence on the part of the employer to succeed with the claim. [61] As was stated in *Jooste v Score Supermarket Trading* ("*Jooste*"):

> "The Compensation Act supplants the essentially individualistic common law position, typically represented by civil claims of a plaintiff employee against a negligent defendant employer, by a system which is intended to and does enable employees to obtain limited compensation from a fund to which employers are obliged to contribute. Compensation is payable even if the employer was not negligent." [62]

Another advantage of the statutory scheme created by COIDA is that it makes provision for the payment of the reasonable medical expenses of employees for treatment of the disablement due to occupational injuries and diseases for two years from either the occurrence of the accident or the commencement of the disease. [63]

4.2 Eligibility

Benefits in terms of COIDA are payable for disablement [64] as a result of occupational injuries or diseases. Disablement refers to the extent to which an employee cannot do his or her work as a result of the injury or disease. Medical evidence may be brought to establish disablement and the degree thereof. [65] Thus, employees who suffer (total or partial) temporary disablement or permanent disablement can claim in terms of COIDA, as can dependants of employees who die as a result of occupational injuries or diseases.

In terms of section 22 of COIDA, read with section 1, an employee will be entitled to compensation for an occupational injury sustained as a result of an accident "arising out of and in the course of an employee's employment". No further definition of "accident" is provided and it has been up to the courts to determine the meaning of "accident". In *Nikosia v Workmen's Compensation Commissioner* an accident is described as "an unlooked-for mishap or an untoward event which is not expected or designed". [67] An accident arises out of the employee's employment where there is a causal connection between the accident and the employee's employment, such as where the employee is injured while at work. [68] There are some exceptions to this interpretation, notably in the cases discussed in this article. The requirement that the accident arises "in the course of" employment refers to instances where an employee is injured when he or she is performing duties that he or she is obliged to perform. [69] Ultimately, compensation for occupational injuries seems to be limited to instances where injuries are caused by accidents and therefore intentionally caused injuries are generally not covered.

Employees are also entitled to compensation for occupational diseases, which include any disease contemplated in section 65(1)(a) or (b) of COIDA. When an employee contracts a disease listed in Schedule 3 to COIDA (a scheduled disease), he or she is entitled to compensation. [70] However, compensation is still payable when an employee contracts an unscheduled disease, as long as the employee can prove that the disease arose out of or in the course of his or her employment. [71] Currently, the list of scheduled diseases is limited to diseases caused by exposure to certain substances or to excessive noise, vibrating equipment or repetitive movements, and makes no mention of psychological diseases such as PTSD. This does not mean that no claim for PTSD can be made, however, the onus is on the employee to prove that the PTSD arose out of or in the course of his or her employment.

As will be seen in the rest of the article, in most instances a court's decision as to whether an employee can claim in terms of COIDA or from the employer directly will hinge on whether or not the court found that the accident or disease arose "out of and in the course of employment". If it did, the employee is barred in terms of section 35 of COIDA, discussed below, from suing his or her employer.

4.3 Section 35 of COIDA

The statutory compensation system in terms of COIDA does not merely supplement the common-law claim against an employer for damages, it replaces it. As a result, section 35(1) of COIDA provides that:

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

What does this mean for employees who prefer suing their employers directly, believing that the sum awarded for common-law damages would be more than the compensation awarded in terms of COIDA? In *Jooste* the injured employee wanted to do exactly that, but was prevented by section 35 from suing her employer directly. She argued that section 35 is unconstitutional, because it violates the right to equality and the right of access to courts. [73]

According to the Constitutional Court, COIDA,

> "is important social legislation which has a significant impact on the sensitive and intricate relationship amongst employers, employees and society at large. The state has chosen to intervene in that relationship by legislation and to effect a particular balance which it considered appropriate. Section 35(1) is an element of that legislation." [74]

As to the claim that section 35 places employees at a disadvantage compared to non-employees who are not deprived of the common-law right to claim damages, the Constitutional Court applied the test for unfair discrimination developed by the court for cases where the differentiation is not based on a specified ground, which is:

(a) "The first inquiry is whether there is a rational relationship between the differentiation and a legitimate government purpose. If there is no rational relationship, the differentiation in question amounts to a breach of … section 9(1).

(b) The issue as to whether there is unfair discrimination in terms of section … 9(3) would ordinarily arise only if there is such a rational relationship. If so, the party challenging the constitutionality of the differentiation must establish that the differentiation amounts to unfair discrimination.

(c) If unfair discrimination is established, the party seeking to support the disputed measure attracts a duty to establish that the measure passes the test for limitation laid down in [section 36 of the Constitution]." [75]

The court found that section 35 does not violate the right to equal protection and benefit of the law in terms of section 9 of the Constitution, as the bar on

civil claims is "logically and rationally connected to the legitimate purpose of the Compensation Act, namely, a comprehensive regulation of compensation for disablement caused by occupational injuries or diseases sustained or contracted by employees in the course of their employment." [76] The court thus found section 35 to be constitutionally valid.

The court declined to be drawn into the issue of whether or not employees ought to have retained the common-law right to claim damages from employers, either over and above or as an alternative to the statutory compensation scheme. It regarded the question as representing "a highly debatable, controversial and complex matter of policy". [77] The legislature clearly decided to provide employees with benefits not available in terms of the common law, from a scheme funded by employers' contributions, and therefore decided to exclude employees' common-law rights against employers. [78]

The result of the *Jooste* judgment is thus that only those employees who are not covered within the scope of COIDA can claim directly from their employers for disablement resulting from occupational injuries or diseases. It is for this reason that the outcome of the cases discussed in this article, such as *De Necker*, usually depended on the court's finding on whether the occupational injury or disease arose out of or in the course of the employee's employment. Where the court finds that the accident or disease did not arise out of or in the course of employment, the employee would not be able to claim in terms of COIDA and is therefore not barred from claiming directly from the employer.

5. Could intentional conduct be regarded as causing an accident in terms of COIDA?

Sexual harassment will almost always be intentional conduct and it is therefore important to establish whether this is an obstacle for regarding the conduct of the harasser as causing an accident arising out of or in the course of employment. For this purpose, judgments dealing with the question of whether an injury caused by intentional conduct could be regarded as an accident arising out of and in the course of employment will be analysed. The judgments which will be discussed chronologically indicate that there is no consensus on how this question should be answered.

In *Minister of Justice v Khoza* ("*Khoza*") [79] the Appellate Division dealt with the situation where a police officer accidentally shot a colleague when he playfully pointed his fire-arm at him. The court held that the causal connection between the accident and employment (required by the phrase "arising out of and in the scope of employment") involves only a broad test which would generally be satisfied if the accident happened at the place where

the employee was executing his duties. [80] Although the facts of the case did not involve intentional conduct, Rumpff AJ gave examples of circumstances in which the causal connection with the employment would be severed, even if the injury occurred at the workplace. One of these is where the employee is injured by another person and the motive for the assault bears no connection with the employee's duties. [81] In this particular case the court held that even though the police officer played with his fire-arm, he was still executing his duties, namely guarding arrested persons in a police vehicle. The court further held that if there had been a digression in terms of time and place, it was negligible and the injury can still be regarded as having arisen out of the injured employee's employment. [82] In a concurring judgment, Williams AJ formulated the enquiry as "whether it was the actual fact that he was in the course of his employment that brought the workman within the range or zone of the hazard giving rise to the accident causing injury." [83]

In *Ex Parte Workmen's Compensation Commissioner: In Re Manthe* ("*Manthe")* the court held that the *dictum* of Rumpff AJ regarding causation in the case of intentional conduct was *obiter* and the *Manthe* court seems to have based its finding on the formulation of the enquiry into causation by Williams AJ, as quoted above. The court held that an injury caused by the intentional conduct of a robber who injured an employee between his place of work and the office of his employer could still be regarded as an "accident", even though a member of the public could just as well have been the victim of the robber. The court held that no special connection is needed between his employment and the injury in the case of intentional conduct (as the *dictum* by Rumpff AJ in *Khoza* would suggest) and held that each case must be decided on the facts before the court. [85]

In contrast to *Manthe*, the test in *Khoza* was followed in *Twalo v Minister of Safety & Security,* in which a police officer intentionally shot and killed one of his colleagues at work because of an entirely personal dispute. The court held that the definition of "accident" should not be broadened to include the intentional killing of one employee by another in the absence of a causal connection with their respective duties *vis-à-vis* their mutual employer. However, this formulation (as in *Khoza*) left the door open for intentional conduct to be included under COIDA, provided that there is a causal connection between the conduct and the duties of the employee.

In line with the *Manthe* decision, the court in *Van de Venter v MEC of Education: Free State Province* (without referring to the *Khoza* judgment) held that an injury caused by a robbery by outside persons could be regarded as an accident and compensable in terms of COIDA.

The judgments of courts on whether injuries resulting from intentional acts could be regarded as accidents arising out of and in the course of employment are thus inconsistent, but it is clear from these judgments that the facts of the case will play an important role and that there is room to hold that an injury (or disease) arose out of employment, if there is a link between the conduct that caused the injury and the employment.

Regarding the question of whether there could be a link between employment and rape, the SCA in *De Necker* relied on the *dictum* in *Khoza* that a claim based on intentional conduct will be excluded if there is no link with employment. The court in *De Necker* held that the question is "whether the event is a risk which can be reasonably held to be incidental to the employment". [88] Navsa ADP (Brand, Pillay and Mbha JJA and Schoeman AJA concurring) answered this question as follows:

> "I am unable to see how a rape perpetrated by an outsider on a doctor … on duty at a hospital arises out of a doctor's employment. I cannot conceive of the risk of rape being incidental to such employment. There is no more egregious invasion of a woman's physical integrity and indeed her mental well-being than rape. As a matter of policy alone an action based on rape should not, except in circumstances in which the risk is inherent, and I have difficulty conceiving of such circumstances, be excluded and compensation then be restricted to a claim in terms of COIDA." [89]

Navsa ADP continued:

> "Dealing with a vulnerable class within our society and contemplating that rape is a scourge of South African society, I have difficulty contemplating that employees would be assisted if their common law rights were to be restricted as proposed on behalf of the MEC. If anything, it might rightly be said to be adverse to the interest of employees injured by rape to restrict them to COIDA. It would be sending an unacceptable message to employees, especially women, namely, that you are precluded from suing your employer for what you assert is a failure to provide reasonable

protective measures against rape because rape directed against women is a risk inherent in employment in South Africa. This cannot be what our Constitution will countenance." [90]

The court discussed and found support for its view in the judgment of *Ford v Revlon, Inc.* ("*Ford*") [91] in Arizona in the United States of America ("USA"). This case dealt with whether the employee was barred by the exclusivity rule [92] from bringing a civil claim based on sexual harassment against her employer. The court in *De Necker inter alia* quoted the following sentence from the *Ford* judgment: "[b]y law, exposure to sexual harassment is not an inherent or necessary risk of employment, even though it may or may not have been endemic." [93]

This decision of the Arizona Supreme Court that the exclusivity rule was not applicable and the employee could claim from her employer is certainly informative when debating the merits of including sexual harassment under COIDA. But it must be kept in mind that in most states in the USA, including Arizona, the exclusivity doctrine will not be applicable if the employer

himself, or a supervisor, intentionally caused the injury. [94] Intentional injury by a co-employee would be compensable in terms of workers' compensation, where the employer was unaware of the situation. [95] No distinction is drawn in South Africa between acts of co-employees and supervisors, except that employees could be entitled to additional compensation if the employer was negligent. Purely mental harm is further also not claimable, with certain exceptions, in terms of the Arizona compensation scheme, [96] while in most other jurisdictions this is included. [97] Reference to this case is thus of limited value. The case was also decided 27 years ago and the increased realisation of the frequency of sexual harassment may have the effect that sexual harassment could nowadays be regarded as having a causal connection with the victim's employment. We agree with the court's reasoning in *De Necker* that rape cannot be conceived as a risk inherent to employment and that sexual harassment should also not be regarded as a risk inherent to employment, but it cannot be gainsaid that there is a causal connection between sexual harassment and employment.

We argue that sexual harassment as a cause of disablement should not be seen as being excluded from COIDA as a matter of principle since, even though harassment constitutes intentional conduct, there is a strong causal link between harassment and the workplace. The workplace brings victims into close contact with harassers, since this conduct would not have been possible but for close contact as part of the working relationship. This may satisfy the test for causation in cases of intentional conduct laid down by Rumpff JA in *Khoza*, namely that there must be a link between intentional conduct and the employment before the accident causing the injury will be regarded as arising out of employment. The test formulated by Williams JA in the same case will also be satisfied by the circumstances surrounding sexual harassment at work, namely:

> "[T]he enquiry on the particular issue is whether it was the actual fact that he was in the course of his employment that brought the workman within the range or zone of the hazard giving rise to the accident causing injury." [98]

The court in *De Necker* was of the opinion that the test in *Khoza* could lead to uncertainty and formulated the test as follows: "whether the wrong causing the injury bears a connection to the employee's employment." [99] One cannot find fault with this test, but then the court went further and said the question might rightly be asked "whether the act causing the injury was a risk incidental to employment." This last formulation constitutes a very strict test which will have the effect that the scope of protection that is afforded by COIDA will be

diminished, while this Act should not be interpreted restrictively "so as not to prejudice a workman if it is capable of being interpreted in a manner more favourable to him." [100]

This article does not propose that all cases of sexual harassment at the workplace should be compensable under COIDA. The courts dealing with claims in terms of COIDA constantly remind us that "each case must be dealt with on its own facts". [101] If an employee is harassed at the workplace but, for example, a relationship was established beforehand outside of the workplace, the harassment would probably not be seen as arising out of the employment of the victim.

It is a fact that sexual harassment is a phenomenon which thrives in workplaces, since it bears a link with the power relationships inherent in most workplaces. [102] There is no doubt that all over the world employees, especially women, run an increased risk of being sexually harassed when they enter the labour market. Sexual and racial harassment, along with bullying, account by far for most complaints referred to the Equal Employment Opportunities Commission ("EEOC") in the USA. [103] In 2015, the EEOC received 6,822 complaints dealing with sexual harassment. [104] In Australia 21% of all complaints to the Australian Human Rights Commission are filed under the Sex Discrimination Act of 1984, and 88% of those complaints have to do with sex discrimination in the workplace, although only one out of five victims of sexual harassment files a claim. [105] In 2013, harassment accounted for 17% of disputes received by the Canadian Human Rights Commission. In the European Union 45 to 55% of women have experienced sexual harassment in the workplace; [106] 17% of women working in urban India have experienced some form of sexual harassment while on the job and in 2013, the Equal Employment Office in Japan dealt with 9,230 sexual harassment consultations. [107]

Although no official figures on sexual harassment are available for South Africa, it is doubtful that the situation is any different here. [108] The cases that are reported are typically only the tip of the iceberg. One of the most

important reasons is that victims of sexual harassment were afraid to testify against the harasser. [109]

In light of the above, it seems reasonable that the costs of sexual harassment should, like other injuries and diseases, not be borne by South African employees, but by industry. Workers' compensation is the instrument used for the transfer of the cost of the disablement from the employee to the industry. This is the position in many countries in the world, three of which will be discussed below in the section dealing with legal comparison.

6. Classifying sexual harassment as an injury or a disease

COIDA compensates employees who suffer from an injury caused by a work-related accident or an occupational disease as discussed above. The question is whether the disablement of a victim of sexual harassment could be classified as an injury or a disease.

Sexual harassment could lead to a psychological disorder after one incident, but it usually takes a series of incidents to result in disablement. A victim of harassment will typically suffer from PTSD. [110] If one argues that PTSD is an injury suffered as result of an accident, the *dictum* of Nel J in *Grobler v Naspers* is an obstacle, since this court held that a series of incidents could not be regarded as an accident. [111] Likewise in *Odayar v Compensation Commissioner,* a tribunal held that the claim by a member of the South African Police Service that exposure to traumatic events caused PTSD could not succeed, since he could not point to any specific incident that caused the PTSD and therefore there was no accident that caused the injury. However, on appeal the High Court held that Odayar's claim can succeed on the basis that he suffered from a disease and that there was no reason to hold that PTSD should be caused by one incident:

> "In terms of s 65(1)(b) of the Act an employee who claims compensation for an occupational disease such as post-traumatic stress disorder must prove that the disease arose 'out of and in the course of his or her employment'. An employee need not prove exposure 'to an extreme traumatic event or stressor'." [113]

In *Urquhart v Compensation Commissioner,* a press photographer claimed compensation from the Compensation Fund for PTSD caused by being exposed to various traumatic scenes and events. Both the tribunal and the court *a quo* held that his claim could not succeed, since he could not point to a single stressful event which could be regarded as an accident causing his injury. Commenting on the judgment of the court *a quo*, the High

Court remarked on appeal that "[t]here was no evidence whatsoever to justify a finding that, medically speaking, post-traumatic stress disorder cannot amount to an occupational disease". [115]

To support this view, the court then referred to the *obiter dictum* (which it found highly persuasive) by the court in *Media 24 Ltd v Grobler*: [116]

> "It may well be that employees who contract a psychiatric disorder as a result of acts of sexual harassment to which they are subjected in the course of their employment can claim compensation under s 65 [i.e. for an occupational disease] but those are not the facts of this case and I need express no opinion thereon." [117]

Regarding whether psychiatric disorders could be the basis of a successful claim the court in *Urquhart v Amalgamated Press* held that,

> "[t]he law has long recognized that for purposes of compensation or damages a psychiatric disorder or psychological trauma is as much a personal injury as a cracked skull, and there is nothing in the definitions of 'accident' and 'occupational injury' in the Act to indicate that this legislation has a contrary intention". [118]

Since it held that the cumulative effect of a series of specific incidents could be regarded as an accident causing an injury in terms of COIDA, it was therefore not necessary for the court to decide whether PTSD could in this case amount to an occupational disease. [119]

Meryl Du Plessis is in favour of classifying PTSD as a disease rather than an injury. She refers to the fact that the International Labour Organisation ("ILO") in 2002 adopted a List of Occupational Diseases in view of the "need to strengthen identification, recording and notification procedures for occupational accidents and diseases" and that most jurisdictions did not object to mental disorders being regarded as occupational diseases. [120]

Du Plessis points out that section 233 of the Constitution provides that when interpreting any legislation, every court must prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law. [121] In the light of the approach of the ILO referred to above, South Africa would be complying with international law if psychological disorders are classified as occupational diseases.

The structure of COIDA regarding diseases in section 65, read with schedule 3, is that certain diseases are linked to certain substances or circumstances. If the disease is listed and the employee did come into contact with, or was exposed to the substance or matter (that is, worked in certain occupations), there will be a presumption that the disease arose out of the employment of the employee. If the disease is not listed, the employee can still prove that the

disease arose out of his or her employment, but the onus of such proof will be on the employee.

PTSD should be added to the list of diseases under COIDA to ensure that the victim is not burdened by the onus to prove that the PTSD arose out of his or her employment if he or she was at the workplace and doing his or her duties. Such a provision could be worded similarly to the provision in Queensland, Australia (discussed below), where the Workers' Compensation Act states that for a claim based on a psychiatric or psychological disorder, the employment must be the major significant contributing factor to the injury, but if the employee is injured while at the place of employment, the employee need not prove that the employment was the major significant contributing factor to the injury. [122]

An additional advantage of categorising PTSD as an occupational disease under COIDA, and not an injury, is that the issues of whether the disablement was as a result of an accident and whether a claim for disablement resulting from intentional conduct is possible, do not arise in the context of occupational diseases. All that is required in terms of section 65 is that it must be proved that the diseases arose out of and in the course of employment.

7. Legal comparison

One should be mindful of the pitfalls of legal comparison, especially in the field of social security, since these systems are often integrated pieces of social legislation based on complex political and economic circumstances unique to each country. However, Du Toit's argument is persuasive that the convergence of especially labour law (and by implication also social security law) as a result of the role of the International Labour Organisation [123] means that legal comparison will have even more legitimacy than in other contexts. [124]

This discussion does not purport to be a full legal comparison and should rather be seen as case studies of how these countries deal with claims based on psychological disorders resulting from sexual harassment in terms of their workers' compensation schemes.

The position in Denmark, Australia and the USA was chosen for comparison, since these jurisdictions allow for compensation for psychological disorders in contrast to the approach followed in, for instance, Austria, England and Germany, where psychological disorders are generally excluded. [125] Moreover,

the wording of workers' compensation statutes in the USA and Australia is in general similar to that in South Africa, requiring that the accident resulting in an injury or disease must have taken place "in the course of and arising out of employment." In these jurisdictions this phrase has generally been interpreted to include mental stress caused by sexual harassment. The Danish system was chosen as an example of a European country allowing such claims, although the wording of the act is not similar to COIDA.

A trend that is gaining ground is including psychological disorders under workers' compensation in contrast to the old-fashioned rules of compensating only for physical injuries. [126] For this reason trade unions in Europe are critical of the fact that many European countries do not recognise such diseases as compensable. [127]

7.1 Denmark

European directives prohibiting discrimination based on sex and sexual harassment [128] were transposed into Danish legislation in 2006 and 2007, [129] but the Danish system already in the 1990's interpreted legislation prohibiting sex discrimination as including sexual harassment. [130] Claims by victims of sexual harassment may be brought in courts and tribunals similar to discrimination claims in general, and no special rules apply. [131] Victims of sexual harassment may simultaneously claim against the Danish workers' compensation fund, as will be explained below.

In Denmark employers are obliged to take out insurance for workers' compensation with approved insurance companies. [132] The Workers' Compensation Act (*Arbejdsskadeloven, ASL*) [133] makes provision for compensation for an industrial injury which includes an accident or a work-related disease and the Labour Market Occupational Diseases Fund ("AES"), to which employers have to contribute, was established for compensating

industrial diseases. [134] Claims against the AES can be brought in terms of the Workers' Compensation Act for an industrial injury, which is an accident or occupational disease as a consequence of the work or the working conditions. [135] An accident is defined as a personal injury caused by an incident or influence that occurs suddenly or within a period of five days. [136] If a disease is not on the list of occupational diseases, it is still possible to recognise it as an occupational disease on recommendation of the Occupational Diseases Committee. [137]

PTSD [138] is categorised as a disease and was added to the list of occupational diseases in 2005. In the case of sexual harassment, the employee will have a claim if he or she suffered a psychological disorder as a result of the harassment. [139]

No compensation is payable by the fund for loss of earnings as a result of not being able to go to work for a period of time, or for pain and suffering. [140] However, the employee may claim under tort law for these damages, if certain requirements are met. [141] Generally, pain and suffering are not compensable under Danish tort law, but the victim may have a claim if pain and suffering had the effect that he or she became ill. He or she may also claim in terms of tort law, if he or she could not prove sufficient loss of earning capacity to be compensated under the Workers' Compensation Act and also for discrimination and humiliation. [142] The employee must first claim in terms of the Workers' Compensation

Act and only afterwards in terms of tort law for damages that are not covered by the workers' compensation fund. The employee's claim against the employer will thus be reduced by the amount that was paid by the workers' compensation fund. [143]

Recently a parking attendant was compensated for sexual harassment by colleagues in terms of the Workers' Compensation Act, since the Occupational

Diseases Committee held that the depression from which she suffered was caused by the sexual harassment and constituted an occupational injury. [144]

Victims of sexual harassment in the Danish system are thus well-protected in that their claims for PTSD are included in workers' compensation. They can further claim amounts not paid by the compensation fund from their employer and they are not precluded from simultaneously bringing a claim in terms of anti-discrimination legislation.

7.2 Australia

Victims of sexual harassment in Australia have different bases on which they can claim for damages suffered as a result of the harassment.

7.2.1 Claims in terms of anti-discrimination legislation

Victims of sexual harassment in Australia may claim against their employers in terms of the Sex Discrimination Act of 1984 which establishes the rights of employees and determines in which circumstances employers may be held liable. The Australian Human Rights Commission ("AHRC") issues guidelines on the implementation of the Act. Substantial amounts have recently been awarded to victims, [145] but the process may be lengthy and stressful. This was the experience of the victim in *Richardson v Oracle Corporation Australia Pty Ltd* who only received adequate compensation after a legal battle which lasted five years. The Director of the Queensland Working Women's Service Inc. commented as follows on the difficulties of victims who claim in terms of anti-discrimination legislation:

> "The preparation of a claim (which will typically be under anti-discrimination legislation) is time consuming, and the wait for a conciliation conference can be lengthy often exceeding 6 months and in some cases more than 12 months. The necessary focus on past events over which she had little control, including the behaviour of the harasser and the lack of support she may have received in her workplace, can be traumatic and hinder healing processes while the build-up of stress and anticipation of facing the alleged harasser or a hostile employer can make the process of a formal complaint a very difficult time. It is not uncommon for women to withdraw from this process." [147]

Victims who suffered a mental or psychological injury may in certain circumstances choose to claim from the various workers' compensation acts in the different states. Compensation may be capped, but the no-fault, non-adversarial- and speedier process may be preferable for some victims.

7.2.2 Eligibility for workers' compensation

Since Australia is a federation without a federal system of compensation for occupational injuries and diseases, it is "impossible to speak of an 'Australian' law of workers' compensation." [148] Some Australian jurisdictions require employers to take out insurance with private licensed insurers to cover their liability under workers' compensation schemes. In other jurisdictions employers have to pay contributions to a central government-run scheme. [149] In general, victims will have a claim if they suffer a personal injury which causes incapacity. Injury includes "physical, mental or personal injury", which will also include a disease. Compensation is paid for injuries and diseases that cause total or partial incapacity as well as death. Compensation includes medical care, rehabilitation assistance and lost earnings. [150]

Claims are limited to instances where the injury had been caused by an accident which arose out of, and in the course of, employment. [151] There was initially some uncertainty about whether "arises out of" meant that there had to be a causal connection between the accident and the job, or whether a lower threshold, namely if the accident occurred while performing the job, was sufficient to satisfy this requirement. The courts interpreted the requirement of "arises out of" to be satisfied if the accident occurred while performing the job and the result is that the employee now no longer needs to prove a causal connection. [152] A closer causal connection is generally required for a disease (and not an injury) to be compensable, since the employment must have been a significant or substantial contributing factor to the disease. [153] However, where the disease is linked to particular circumstances, such as the nature of the employment, the onus to prove causation is not as onerous. [154] In most jurisdictions a disease will be compensable even if the employee had a pre-existing psychological condition, as long as workplace stress aggravated the pre-existing condition. [155]

7.2.3 Claims for psychological disorders

Australian systems of workers' compensation generally provide that victims of sexual harassment may claim in terms of the workers' compensation legislation, if the employee suffers from a psychological injury (mental injury) as a result of the harassment. [156]

In Queensland an injury is defined as a

> "personal injury arising out of, or in the course of, employment if—
>
> (a) for an injury other than a psychiatric or psychological disorder – the employment is a significant contributing factor to the injury; or
>
> (b) for a psychiatric or psychological disorder – the employment is the major significant contributing factor to the injury." [157]

A higher threshold is thus set for psychological injuries. However, if the employee is injured while at the place of employment, the employee need not prove that the employment was the major significant contributing factor to the injury. [158]

In some jurisdictions victims will also be compensated for pain and suffering in terms of workers' compensation. Queensland is an example of such a jurisdiction. [159] This also used to be the position in New South Wales ("NSW"), but since amendments to the NSW Workers' Compensation Act in 2012, claims for pain and suffering are no longer included in workers' compensation. [160]

7.2.4 Interaction between common-law, workers' compensation and discrimination claims

In a minority of Australian jurisdictions employees are barred from bringing a common-law claim for damages against their employers and only have a claim against the compensation fund. [161] Recently the right of injured employees to bring a common-law claim against their employers for damages suffered was restored in some jurisdictions. The right of injured workers in Queensland who were restricted since 2003 to claim against their employers for injuries in terms of the common law, [162] has been restored by 2015 legislation. [163] In South Australia the common-law claims against employers were barred by legislation in 1986, but were restored for seriously injured employees who suffer more than 30% whole body impairment in 2014. [164] In NSW, [165] Western Australia [166] and Tasmania [167] employees may sue their employer for damages after claiming in terms of workers' compensation, but their claim will be reduced by the amount already paid by the compensation fund.

It seems as if there is a trend in Australia to restore injured employees' common-law claims against their employers, although there may be restrictions

placed on this right, such as that the injury must have a certain degree of seriousness or that the employee must first claim from the compensation fund and then, the amounts not paid, from the employer. Regarding the interaction between sexual harassment claims in terms of workers' compensation and anti-discrimination legislation, the judgment in Victoria in *Collins v Smith* ("*Collins*") [168] brings some clarity. The employee claimed damages from her employer for sexual harassment in terms of the Equal Opportunity Act 2010 ("EOA") after having claimed

compensation under the Accident Compensation Act 1985 ("ACA"). The employer contended that ACA and the Workplace Injury Rehabilitation and Compensation Act of 2013 ("WIRCA") barred the claim under the EOA. The Victorian Civil and Administrative Tribunal analysed the wording of the acts, holding that remedial legislation, such as the EOA, is to be interpreted beneficially in order to give effect to its objects of protecting the human rights of victims of discrimination. [169] The tribunal furthermore held that the EOA has a different focus from the compensation legislation and moreover, compensation for pain and suffering may be awarded in terms of the EOA, which is not paid under workers' compensation. [170] The tribunal further held that the acts are not in conflict and should be interpreted in harmony with each other. [171] The implication is that victims of sexual harassment can claim both against the workers' compensation fund and also bring an action against the employer based on anti-discrimination legislation.

Although the wording of anti-discrimination and workers' compensation acts may be different in other Australian jurisdictions, the wide interpretation of the right to equality for victims of sexual harassment will without doubt be followed in other jurisdictions.

In summary, the position in Australia in general is that claims based on sexual harassment fall within workers' compensation, but employees may also bring civil claims against their employers under certain conditions. Such claims further do not prohibit the employee from bringing a claim against the employer in terms of anti-discrimination legislation as held by the tribunal in *Collins.* Victims of sexual harassment in most states in Australia are thus well-protected since they have various remedies available to them.

7.3 The United States of America

In the USA victims of sexual harassment have a variety of remedies to compensate them for damages suffered as a result of the harassment. They are protected by federal anti-discrimination legislation as well as similar legislation in the different states. Depending on the legal position in the particular state, they may claim against the workers' compensation fund as well as retaining a common-law action and a discrimination claim against their employer.

7.3.1 Anti-discrimination legislation

In terms of section 2000e-2 (s 703) Title VII of the Civil Rights Act of 1964 (Title VII), [172] discrimination by an employer on the basis of race, colour, religion, sex or national origin in respect of compensation, terms, conditions or privileges of employment is unlawful. Title VII created the Equal Employment Opportunity Commission ("EEOC") to issue guidelines which are applicable in all states on how the law should be enforced. Sexual harassment was already in 1986 recognised as discrimination which is prohibited by Title VII. In *Burlington Industries, Inc. v Ellerth* and *Faragher v City of Boca Raton* the vicarious liability of an employer was extended by the Supreme Court to impose strict liability for sexual harassment of employees by supervisors. Employers will be liable for sexual harassment by non-supervisors (co-employees) if the employer knew or should have known that the harassment occurred. [175]

7.3.2 Workers' Compensation

Workers' compensation consists of separate systems for federal employees and private employees. Compensation schemes for private employees are regulated by legislation in each state. The schemes generally provide for no-fault compensation for an injury or a disease arising out of, and in the scope of, employment or words to that effect. [176] Most states make provision for psychological (mental) injuries, although some require that the mental injury must flow from a physical injury. [177] Claims based on sexual harassment which caused a psychological injury are included in the workers' compensation acts of most states and are generally regarded as being included in the term "accident". [178]

7.3.3 The exclusivity rule

Employees are generally barred from bringing a civil law claim against an employer in terms of the exclusivity rule, if their disease or injury is covered by workers' compensation. [179]

Most state schemes provide that if discrimination caused the psychological disorder, workers' compensation will not be the exclusive remedy, but employees will still have a claim based on discrimination against their employers. However, in some states such as Alabama the exclusivity rule will also be applicable to discrimination claims. [180] The extent to which civil claims will be barred in terms of the exclusivity rule differs between the different states and will depend on the wording of the specific statute and the interpretation of the statute by the courts. [181]

The working of the exclusivity rule is illustrated in *Peterson v Arlington Hospitality Staffing Inc.* which dealt with the Wisconsin Workers' Compensation Act ("WCA"). [183] In this case the victim argued that the exclusivity rule should not bar her from bringing a civil claim against her employer, since "mental anguish" is not compensable in terms of the Wisconsin compensation fund. The court gave the following reasons for not agreeing with her argument: "The WCA's history, purpose and application demonstrate that the decision to create an exception to the statute is best reserved for the legislature." [184] The court further explained that:

> "[t]he legislature resolved the conflict among these interests by establishing a system under which workers, in exchange for compensation for work-related injuries regardless of fault, would relinquish the right to sue employers and would accept smaller but more certain recoveries than might be available in a tort action… the WCA stands as an evolving public policy decision arrived at by the legislature after weighing the competing policy considerations now presented by the representatives on the advisory council. We have repeatedly stated that the provisions of the WCA must be liberally construed to effectuate the statute's goal of compensating injured workers… However, more importantly, we must also exercise care to avoid upsetting the balance of interests achieved by the WCA." [185]

This argument is similar to the judgment of the South African Constitutional Court in *Jooste* regarding the goal and policy consideration of workers' compensation as discussed above.

The fact that workers' compensation in some states in the USA bars civil claims against employers if the claim falls under the relevant workers' compensation act, unless an exception applies, is criticised by Anik Shah. The author argues that all states should allow civil claims in addition to workers' compensation in terms of the "cumulative remedy theory." [186] In terms of this theory employees should be allowed to bring a civil claim against the employer for compensation for those losses that were not compensated under the workers' compensation scheme.

In summary, a minority of states [187] do not include sexual harassment claims under workers' compensation, but in most states these claims are allowed and are furthermore not regarded as the exclusive remedy available to victims. [188] However, even in states where the exclusivity rule is applicable, if the harassment was an intentional act by the employer himself (or a supervisor), or if the employer knew or should have known that the harassment occurred, the conduct which caused the injury will not be regarded as an "accident" and the exclusivity rule will not be applicable. [189] Whether the exclusivity rule will be applicable will therefore depend on the wording of the different acts and the interpretation of these acts by the courts. [190]

7.3.4 Interaction between common-law, workers' compensation and discrimination claims

The exclusivity rule does not deprive a victim from claiming damages for being discriminated against in terms of Title VII or anti-discrimination legislation in the different states. [191] In most states the position is thus that victims of sexual harassment at the workplace may bring a claim of discrimination irrespective of whether they could claim in terms of workers' compensation or whether their claim was successful or not. The reason for allowing a discrimination claim is that compensation in terms of workers' compensation schemes is usually for loss of earning capacity, medical expenses, etcetera (economic injury), while damages for discrimination concern the personality rights of employees. In *Byers v Labor & Industry Review Commission* it was stated that "[b]ecause the WCA does not identify, fully remedy, or adequately deter an employer's discriminatory conduct, it cannot adequately address discrimination in the workplace." [192]

The above discussion indicates that in most states in the USA employees who suffered mental injuries caused by harassment will be barred by the exclusivity rule from bringing a civil claim against their employer. However, if the employer or a supervisor was personally responsible for the injury, the employee may bring a civil claim against the employer. This will ensure that an employer cannot escape liability (and hide behind the compensation fund) in cases where the injury was the result of intentional or extremely

negligent conduct. Regarding protection against discrimination, in most states the availability of a remedy in terms of workers' compensation is no bar against claiming in terms of anti-discrimination legislation. If Shah's recommendation above that victims in all states should be allowed to claim damages not covered by workers' compensation from employers is accepted, the system would cast an even wider net of protection for victims of sexual harassment in the USA.

8. Recommendations and conclusion

Section 39(1) of the Constitution provides that when interpreting the Bill of Rights, a court must promote the values that underlie an open and democratic society based on human dignity, equality and freedom, and section 39(2) provides that when interpreting any legislation a court must promote the spirit, purport and objects of the Bill of Rights. Our argument is that in the light of section 39, a court that has to decide whether a psychological disorder caused by sexual harassment could be seen as a disease in terms of COIDA, should take the constitutional rights of victims relating to equality, dignity, freedom and security of the person, bodily integrity, fair labour practices and the right to access to social security into consideration. Including such a claim in COIDA would have all the advantages as spelled out above and will go a long way in providing an effective remedy to persons whose rights have been infringed in an egregious way.

The door has already been opened by the SCA in *Media 24 Ltd v Grobler* in which Farlam J stated that in principle it could be possible for an employee who is a victim of sexual harassment to claim compensation under COIDA, although it was not seen as the appropriate remedy in the particular case.

Darcy du Toit is not in favour of an extension of COIDA benefits to victims of sexual harassment. He remarks that "the net effect of section 35 would be to extend protection to employers rather than to victims". [193] He regards the SCA's observation in *Media 24 v Grobler* above as "ominous". [194]

We agree with Du Toit that preventing sexual harassment is not just about safety at work, but about combating sex discrimination. [195] One can also share his discomfort with "equat[ing] a violation of an employee's fundamental rights with a mere industrial accident". [196]

The solution to this detrimental situation would be to allow employees to retain a civil claim against their employer as in Denmark, some states in the USA and some Australian jurisdictions as discussed above. However, in such a scenario consideration should be given to the judgment in *Jooste* in which the Constitutional Court described the issue of the exclusivity bar as "highly debatable, controversial and a complex matter of policy" [197] and declined the

invitation to make a policy choice under the guise of a rationality review. As far as the court was concerned, the matter should be left to the legislature. This issue is therefore still not addressed, but the debate remains valid. [198]

Although it is desirable that injured and ill employees should be able to claim compensation in terms of COIDA and to retain a civil claim against their employers for damages not within the ambit of COIDA, we agree that this is a matter for the legislature involving a major overhaul of COIDA. Such an amendment would of course be applicable to all employees covered by COIDA. [199] The position in jurisdictions that do allow such claims (and those returning to this position in Australia), as discussed above, as well as the debate in England on the retention of employees' right to bring a civil claim against their employer, will be instructive. [200]

Although we focussed on sexual harassment, we recommend that all victims of discrimination even if their claims are allowed under COIDA, should still be allowed to claim against their employers in terms of discrimination legislation. A grave injustice would be done to the constitutional rights of victims if section 35 bars them from claiming against their employer on the ground of discrimination. While workers' compensation deals with economic loss, damages caused by unfair discrimination compensate the victim for an infringement of personality rights. As indicated above, the LRA provides that awards by the Labour Court must be just and equitable. This leaves room for the court to take a successful claim against the compensation fund into consideration when awarding compensation and damages to the victim. Retaining a claim based on discrimination together with a claim against workers' compensation is in line with the position in Denmark and most jurisdictions in Australia as well as the USA as discussed above.

If this recommendation is accepted, it will involve an amendment to section 35 of COIDA to the effect that the exclusivity defence will not be available to employers in the case of disablement which was caused by discrimination. [201] This will partly address concerns that it will be financially adverse to the interests of victims to restrict them to COIDA claims and that employers would not have the incentive to ensure a safe workplace.

Employees who have been harassed will most likely claim against the compensation fund for temporary or permanent disablement caused by PTSD. This type of psychological disorder has already been recognised by South African courts in the *Urquhart* and *Odayar* cases. Du Plessis's argument that PTSD should be regarded as a disease in line with the stance of the ILO and included in the list of diseases in COIDA, should be supported. The employee

would then not be burdened with the onus of proving that the disease arose out of his or her employment.

In short, our recommendations entail that psychological disablement caused by sexual harassment should be treated by our courts as a disease arising out of employment in terms of COIDA; that section 35 of COIDA should be amended so that employees may retain claims against their employers based on discrimination and that psychological diseases should be included in schedule 3 of COIDA.

Summary

This article investigates whether it is feasible to include compensation for disablement arising from a psychological disorder caused by sexual harassment in the South African workers' compensation system. The authors argue that in order to protect the constitutional rights of victims of sexual harassment, it is desirable to provide a remedy to victims that is not dependent on proving that the employer is at fault and which is further not dependent on the employer's financial position. Such a remedy is provided by the Compensation for Injuries and Diseases Act ("COIDA") for employees who suffer an injury or disease arising out of and in the course of their employment. In the light of the high incidence of sexual harassment in the workplace, it is argued that there is a causal connection between the disablement caused by sexual harassment and the workplace and that the disablement could thus be seen as arising out of and in the course of the employee's employment. Legal comparison indicates that a number of countries which allow claims based on psychological disablement as a result of sexual harassment in terms of workers' compensation schemes, do not bar victims from also claiming damages caused by unfair discrimination from their employers.

The authors' recommendations entail that psychological disablement caused by sexual harassment should be treated by South African courts as a disease arising out of employment in terms of the COIDA; that section 35 of COIDA should be amended so that employees may retain claims against their employers based on unfair discrimination and that psychological diseases should be included in schedule 3 of COIDA.

* The authors would like to thank two anonymous reviewers for their helpful comments and recom-mendations.

1 See *Grobler v Naspers* Bpk (2004) 25 ILJ 439 (C); *Ntsabo v Real Security CC* 2003 (24) ILJ 2341 (LC) para 77; *Media 24 v Grobler* (2005) 26 ILJ 1007 (SCA).

2 (2004) 25 ILJ 439 (C).

3 Para 516. However, two years later in *Urquhart v Compensation Commissioner* (2006) 27 ILJ 96 (E) it was held that an "accident" could also refer to a series of incidents.

4 2003 (24) ILJ 2341 (LC) para 77.

5 *Ntsabo v Real Security* 2003 (24) ILJ 2341 (LC) 2380.

6 (2005) 26 ILJ 1007 (SCA).

7 Para 77. In this case the incident occurred outside the workplace when the victim showed a flat that she wanted to sell to her co-employee.

8 Para 77. S 65 deals with diseases for which employees can claim in terms of COIDA.

9 (2014) 35 ILJ 3301 (SCA).

10 Para 31.

11 153 Ariz 38,734 P. 2d. 580 (1987).

12 Paras 47-49.

13 D Du Toit "Enterprise responsibility for sexual harassment in the workplace: comparing Dutch and South African law" in F Penning, Y Konijn & A Veldman (eds) *Social Responsibility in Labour Relations: European and Comparative Perspectives* (2008) 183 183-206. See also P Joubert, C van Wyk & S Rothman "The effectiveness of sexual harassment policies and procedures at higher education institutions in South Africa" (2011) 9 *SAJHRM* 18-27; B Whitcher "Two roads to an employer's vicarious liability for sexual harassment: *S Grobler v Naspers Bpk en 'n ander* and *Ntsabo v Real Security CC*" (2004) 25 *ILJ* 1907-1912.

14 Ss 22 and 65 of COIDA.

15 UN General Assembly "In-depth study on all forms of violence against women: Report of the Secretary-General" UN Doc No A/61/122/Add.1 (2006) 42 <http://www.un.org/womenwatch/daw/vaw/violenceagainstwomen> (accessed 22/08/2016); ILO "When work becomes a sexual battleground" (2013) *ilo.org* <http://www.ilo.org/global/about-the-ilo/newsroom/features/WCMS_205996/lang–en/index.htm> (accessed 4-07-2016). See A Rycroft "Sexual harassment in the workplace: Reflecting on Grobler v Naspers" (2004) 25 *ILJ* 1899.

16 RC Sorenson, MG Mangione-Lambie & RC Luzio "Solving the Chronic Problem of Sexual Harassment in the Workplace: An Empirical Study of Factors Affecting Employee Perceptions and Consequences of Sexual Harassment" (1998) *Cal WL Rev* 34(2) 476; P Halfkenny "Legal and workplace solutions to sexual harassment in South Africa (Part 2): The South African Experience"(1996) 17 *ILJ* 213 224 states that "[h]arassment related health problems are less visible than those caused by toxic chemicals or workplace noise, but can be as debilitating"; EC Recommendation on the protection of dignity of women and men at work 131 of 1991 92/131/EC "Annex: A code of practice on measures to combat sexual harassment" (10-03-2016) *EUR-Lex* <http://eur-lex.europa.eu/legal-content/EN/TXT> (accessed 22/08/2016) art 1:
"Sexual harassment pollutes the working environment and can have a devastating effect upon the health, confidence, morale and performance of those affected by it. The anxiety and stress produced by sexual harassment commonly leads to those subjected to it taking time off work due to sickness, being less efficient at work, or leaving their job to seek work elsewhere … Sexual harassment may also have a damaging impact on employees not themselves the object of unwanted behaviour but who are witness to it or have a knowledge of the unwanted behaviour."

17 See A Rycroft "Compensating the sexually harassed employee" (2004) 25 *ILJ* 1153 1169, who suggests that a "more strategic initiative [than sexual harassment litigation] that could involve the workers" compensation scheme" is required.

18 Du Toit "Enterprise responsibility for sexual harassment in the workplace" in *Social responsibility in labour relations* 201.

19 *Grobler v Naspers* 2004 (4) SA 220 (C) 297-298; *K v Minister of Safety and Security* 2005 (6) SA 419 (CC) 445. See a discussion of the damages that were awarded in this case in H Irvine "Liability of employers in sexual harassment cases confirmed by the Supreme Court of Appeal" (2005) 14 *CLL* (2005).

20 *Media 24 Ltd v Grobler* 2005 (6) SA 328 (SCA) 349. See Halfkenny (1996) 17 *ILJ* 221:
"[P]lacing on the employer an affirmative duty to prevent harassment is based on the assumption that harassment is endemic, widespread, part of the workplace culture, thereby requiring strong preventive measures. The underlying assumptions are similar to those embodied in workplace health and safety regulation: the workplace contains health hazards which can result in injury or death to workers; because the employer has control over the work environment, the employer has both the responsibility and the interest in preventing injuries; workers collectively experience the hazards and have a collective interest in prevention and enforcement. The burden is therefore on the employer to formulate effective policies and to ensure compliance with these policies. Further this approach acknowledges that groups of workers are affected negatively and affords collective solutions."

21 S 187 of the LRA. See *Christian v Colliers Properties* 2005 (26) ILJ 234 (LC).

22 S 186(1).

23 See *Christian v Colliers Properties* and *Ntsabo v Real Security* (2003) 24 ILJ 2341 (LC).

24 See, for example, *Ntsabo v Real Security* (2003) 24 ILJ 2341 (LC).

25 S 6(3) read with s 6(1) of the EEA (own emphasis). See also item 3 of the Code of Good Practice on the Handling of Sexual Harassment Cases in the Workplace GN 1357 in *GG* 27865 of 4 August 2005.

26 Sexual harassment is defined in item 4 of the Code of Good Practice 2005 as:
"unwelcome conduct of a sexual nature that violates the rights of an employee and constitutes a barrier to equity in the workplace, taking into account all of the following factors:
4.1 whether the harassment is on the prohibited grounds of sex and/or gender and/or sexual orientation;
4.2 whether the sexual conduct was unwelcome;
4.3 the nature and extent of the sexual conduct; and
4.4 the impact of the sexual conduct on the employee."
4.1 whether the harassment is on the prohibited grounds of sex and/or gender and/or sexual orientation;
4.2 whether the sexual conduct was unwelcome;
4.3 the nature and extent of the sexual conduct; and
4.4 the impact of the sexual conduct on the employee."

27 S 60(4). See the criticism on this section: R le Roux "Section 60 of the Employment Equity Act 1998: Will a comparative approach shake this joker out of the pack?" (2006) 27 *Obiter* 411 428. The 2005 Amended Code of Good Practice on the Handling of Sexual Harassment Cases in the Workplace provides the guiding principles on what is regarded as reasonable steps by an employer to prevent an employee from being sexually harassed.

28 See ss 9, 10, 12 and 14 of the Constitution. See A Botes "Identifying sexual harassment in the workplace? Do not forget to remember the Code of Good Practice" (2015) 36 *ILJ* 1718 1719. See also C Cooper "Harassment on the basis of sex and gender: A form of unfair discrimination" (2002) 23 *ILJ* 1. According to Cooper harassment "sets up an arbitrary barrier to the full and equal enjoyment of a person's rights in the workplace. It also constitutes a violation of the dignity of the individual." See further PAK le Roux "Sexual harassment and the Labour Appeal Court: Defining power relationships in the workplace" (2015) 25 *CLL* 49-52. PAK le Roux "Discrimination Law Update: The court considers harassment, age and pregnancy as determinative factors" (2014) 11 *CLL* 99-103.

29 *Piliso v Old Mutual Life Assurance Co (SA) Ltd* (2007) 28 ILJ 897 (LC). This case concerned harassment of an employee by a non-employee.

30 S 77(3) of the Basic Conditions of Employment Act 75 of 1997.

31 S 191(1)(a) of the LRA.

32 S 191(5)(b).

33 S 10(2) of the EEA. However, she will have to satisfy the CCMA that she has made a reasonable attempt to resolve the dispute (s 10(4)(b)).

34 While still retaining her right to appeal to the Labour Court after arbitration. Ss 10(6)(a)(i) and 10(8) of the EEA.

35 S 10(6)(a) of the EEA.

36 S 10(8) read with s 10(6)(a) of the EEA.

37 According to Rycroft an award of a large amount in damages "almost certainly ensures the matter will be taken on appeal", leading to delays and extra legal costs. A Rycroft (2004) *ILJ* 1165-1166.

38 S 193(1)(c) of the LRA.

39 S 50(2)(a) and (b). Also see *Ntsabo v Real Security* (2003) 24 ILJ 2341 (LC) in which the Labour Court awarded patrimonial as well as non-patrimonial damages for pain and suffering. See a discussion of this case in H Schooling "Compensation for victims of sexual harassment" (2003) 13 *CLL* 41-44.

40 R Le Roux "Getting Clarity: The difference between Compensation, Damages, Reinstatement and Backpay" (2011) 32 *ILJ* 1520 1539-1540.

41 Sch 4 of COIDA

42 Le Roux (2011) *ILJ* 1539.

43 A Williams "Few report workplace sexual harassment" (2014) *HeraldLive.co.za* <http://www.heraldlive.co.za/report-workplace-sexual-harassment/> (accessed 30-08-2015).

44 D Du Toit "Enterprise responsibility for sexual harassment in the workplace" in *Social responsibility in labour relations* 183. See P Halfkenny (1996) 17 *ILJ* 213 where she refers to the problems facing women "in a workplace situation where they are unlikely to be believed, and where the remedy may well be dismissal of a co-worker and little if any compensation for the target of the harassment", which is why many harassed women would rather resign than "make a fuss" (at 214). See also B Guter & M Koss "Changed women and changed organizations: Consequences of and coping with sexual harassment" (1993) 42 *J Vocat Behav* 28 30.

45 Most likely due to victims pursuing claims under the EEA or LRA per the avenues mentioned above.

46 See *Odayar v Compensation Commissioner* (2006) 27 ILJ 1477 (N).

47 See *Grobler v Naspers*, *Media 24 Ltd v Grobler* and *Ntsabo v Real Security* referred to above. S 35 is discussed in part 4 3 below.

48 See also *MEC for the Department of Health, Free State Province v DN* (2014) 35 ILJ 3301 (SCA).

49 R Bernikow "Ten years of the CCMA- an assessment for labour" (2007) 11 *LDD* 20-21. See also Rycroft (2004) *ILJ* 1165-1167.

50 *Ford v Revlon Inc.* 53 Ariz 38 (1987) 734 P.2d 580; N Smit "Employee injuries and diseases" in M Olivier, N Smit & E Kalula (eds) *Social Security: A Legal Analysis* (2003) 462.

51 *Jooste v Score Supermarket Trading (Pty) Ltd* 1999 (2) SA 1 (CC) para 9.

52 Smit "Employee injuries and diseases" in *Social Security* 464.

53 *Jooste v Score Supermarket Trading* 1999 (2) SA 1 (CC) para 13.

54 P Myburgh, N Smit & D van der Nest "Employment injuries, diseases and motor vehicle accidents" in MP Olivier (ed) *Social Security Law – General Principles* (1999) 307.

55 *Jooste v Score Supermarket Trading* 1999 (2) SA 1 (CC) para 13.

56 The current recommended maximum compensation for temporary total or 100% permanent disablement (both calculated on 75% of the employee's monthly earnings) is R23 569.00 per month (GN 448 in *GG* 39931 of 15 April 2016) 5.

57 And its predecessor, the Workmen's Compensation Act 30 of 1941.

58 S 83 of COIDA.

59 S 85.

60 *Jooste v Score Supermarket Trading* 1999 (2) SA 1 (CC) para 14.

61 Smit "Employee injuries and diseases" in *Social Security* 466. However, this does not mean that negligence plays no role, as increased compensation can be payable if the injury or disease was caused by the negligence of the employer – section 56 of COIDA.

62 *Jooste v Score Supermarket Trading* 1999 (2) SA 1 (CC) para 15.

63 S 73(1). After two years the Commissioner may pay the costs for further medical aid if it can reduce the disablement from which the employee is suffering.

64 S 1 of COIDA defines "disablement" as including temporary partial disablement, temporary total disablement, permanent disablement or serious disfigurement.

65 See *Healy v Workmen's Compensation Commissioner* 2010 (2) SA 470 (E).

66 1954 (3) SA 987 (T).

67 900 E-F.

68 Smit "Employee injuries and diseases" in *Social Security* 474.

69 See for example *Johannesburg City Council v Marine and Trade Insurance Co* 1970 (1) SA 181 (W) 183-186.

70 S 65 (1)(a) of COIDA.

71 S 65(1)(b).

72 *Jooste v Score Supermarket Trading (Pty) Ltd* 1999 (2) SA 1 (CC).

73 Ss 8 and 22 of the Interim Constitution Act 200 of 1993; ss 9 and 34 of the Constitution.

74 *Jooste v Score Supermarket Trading (Pty) Ltd* 1999 2 SA (CC) 1 para 9.

75 Para 11.

76 Para 17. It also found that s 35 does not violate the right of access to courts or the right to fair labour practices (paras 21 and 22).

77 Para 17.

78 Para 17.

79 1966 (1) SA 410 (A).

80 417.

81 417.

82 417.

83 419-420.

84 [1979] 4 All SA 885 (E).

85 888.

86 (2009) 30 ILJ 1578 (Ck) para 17.

87 ZAFSHC 04-10-2012 case no 3545/2010 18.

88 Para 11.

89 Para 32.

90 Para 33.

91 153 Ariz 38,734 P.2d 580 (1987).

92 A rule similar to the one provided for in s 35 of COIDA. Discussed below at 7 3 3.

93 *MEC for the Department of Health v De Necker* (2014) 35 ILJ 3301 (SCA) para 28.

94 Title 23 of the Arizona Revised Statutes 1022(A).

95 *Irvin Investors, Inc. v. Superior Court* (1990) 166 Ariz. 113, 800 P.2d 979 116.

96 SG Biddle & MJ Foster "When is Workers' Compensation the Exclusive Remedy in Sexual Harassment Cases?" State Bar of Arizona <http://www.myazbar.org/azattorney/archives/dec96/dec96_biddle.pdf> (accessed 15-12-2015).

97 See *Green v Wyman-Gordon Co.* (1996) 422 Mass 551, 664 NE2d 808, 12 BNA IER Cas 333, 69 CCH EPD 44307, 51 ALR5th 771.

98 *Minister of Justice v Khoza* 1966 2 All SA 4 (A) para 9.

99 Para 31.

100 *Davis v Workmen's Compensation Commissioner* 1995 (3) SA 689 (C) 694F-G.

101 *MEC for the Department of Health v De Necker* (2014) 35 ILJ 3301 (SCA) para 31.

102 H McLaughlin, C Uggen & A Blackstone "Sexual harassment Power, Workplace Authority and the Paradox of Power" (2012) 77 *American Sociological Review* 626.

103 ILO "When Work becomes a Sexual battlefield" (2013) *ILO.org* <http://www.ilo.org/global> (accessed 06-08-2015); Catalyst "Quick Take: Sex Discrimination and Sexual Harassment" (25-05-2015) *Catalyst* <http://www.catalyst.org/knowledge/sex-discrimination-and-sexual-harassment-0> (accessed 07/08/2015).

104 US Equal Employment Opportunity Commission statistics (2015) *US Equal Employment Opportunity Commission* <https://www.eeoc.gov/eeoc/statistics/enforcement/sexual_harassment_new.cf> (accessed 22/07/2016).

105 Catalyst "Quick Take: Sex Discrimination and Sexual Harassment" (25-05-2015) *Catalyst*.

106 A Numhauser-Henning & S Laulom "Harassment related to Sex and Sexual Harassment Law in 33 European Countries: Discrimination vs. Dignity" January 2012 European Commission <http://ec.europa.eu/justice/gender-equality/files/your_rights/final_harassement> (accessed 22/08/2016).

107 Catalyst "Quick Take: Sex Discrimination and Sexual Harassment" (25-05-2015) *Catalyst*.

108 See P Halfkenny (1996) 17 *ILJ* 214 where the rate of sexual harassment in South Africa is estimated as ranging from 35% to 76%, and where reference is made to a 1990 survey in which it was found that "76% of career women have been subjected to some form of sexual harassment during their working lives". See also L Dancaster "Sexual harassment in the work-place: Should South Africa adopt the American approach" (1991) 12 *ILJ* 449 450.

109 *Nkadimeng v Omega Risk Solutions* (2012) 33 ILJ 1747 (CCMA) 1752 and 1754.

110 R le Roux, A Rycroft & T Orleyn *Harassment in the Workplace: Law, Policies and Processes* (2010) 18.

111 *Grobler v Naspers Bpk* 2004 (4) SA 220 (C) 299-300. Although Du Toit "Enterprise responsibility for sexual harassment in the workplace" in *Social responsibility in labour relations* 192 regards the reasons that the court provides for its attempt to avoid determining whether employees who contract psychiatric diseases as a result of sexual harassment can claim compensation in terms of COIDA as "at best technical and, at worst, questionable".

112 (2006) 27 ILJ 1477 (N).

113 1482.

114 [2006] 1 BLLR 96 (E)

115 Para 11.

116 [2005] 3 All SA 297 (SCA).

117 Para 77.

118 *Urquhart v Compensation Fund* (2006) 27 ILJ 96 (E) para 14. See also M du Plessis "Mental stress in South African workers' compensation" (2009) 30 *ILJ* 1477-1478.

119 Para 19.

120 Du Plessis (2009) *ILJ* 1490-1491.

121 1490.

122 S 34 of the Workers Compensation and Rehabilitation Act of 2003.

123 See Discrimination (Employment and Occupation) Convention No. 111 of 1958 and instruments of the United Nations such as the Declaration on the Elimination of Violence against Women and the Convention on the Elimination of All Forms of Discrimination against Women ("CEDAW").

124 Du Toit "Enterprise responsibility for sexual harassment in the workplace" in *Social responsibility in labour relations* 186. South African courts have taken developments regarding liability for sexual harassment in other countries into consideration in *Grobler v Naspers* (2004) 25 ILJ 439 (C) and *K v Minister of Safety and Security* [2005] 8 BLLR 749 (CC). See Whitcher (2004) *ILJ* 1907 1911.

125 K Oliphant "The Changing Landscape of Work Injury Claims: Challenges for Employers' Liability and Workers' Compensation" in K Oliphant & G Wagner (eds) *Employers' Liability and Workers' Compensation: Tort and Insurance Law 31* (2012) para 35. Although COIDA is based on the wording of the English statute, a comparison with England will not be instructive. The reason is that although it is in principle possible to claim against the English compensation fund for mental injuries, the requirements are so high that it is almost impossible for a claimant to be successful. R Lewis "Employers' Liability and Workers' Compensation: England and Wales" in K Oliphant & G Wagner (eds) *Employers' Liability and Workers' Compensation: Tort and Insurance Law 31* (2012) 160 para 62.

126 In Canada, for example, the different provinces are increasingly providing for psychological injuries resulting from bullying and harassment to be included in workers' compensation. See S Rudner "Workers' compensation for harassment, mental distress?" (01-12-2015) *Canadian HR Reporter* <http://www.hrreporter.com/columnist/canadian-hr-law/archive/2015/01/12/> (accessed 22/08/206) *Ahraf v SNC Lavalin* ATP Inc., 2013 ABQB 688; DR Bokenfohr "Canada: Workplace bullying and harassment: To what extent does workers' compensation insulate employers from liability?" (18-03-2014) *Mondaq* <http://www.mondaq.com/canada> (accessed 10-08-2015).

127 J LaDou "The European influence on workers' compensation reform in the United States" (2011) 10 *Environmental Health* <http://ehjournal.biomedcentral.com/articles/10.1186/1476-069X-10-103> (accessed 08-08-2015).

128 EC Directives 2006/54 and 2004/113.

129 Danish Equal Treatment Act (Consolidated Act no. 734 of 28 June 2006 and the Danish Gender Equality Act (consolidated Act no. 1095 of 19 September 2007).

130 R Nielsen "Denmark" in A Numhauser-Henning & S Laulom (eds) *Harassment related to Sex and Sexual Harassment Law in 33 European Countries: Discrimination versus Dignity* European Network of Legal Experts (2011) 82 <http://ec.europa.eu/justice/gender-equality> (accessed on 20-06-2016).

131 Nielsen "Denmark" in *Harassment related to Sex and Sexual Harassment Law* 85.

132 European Commission "Your social security rights in Denmark" (2013) *European Commission* <http://ec.europa.eu/employment_social/empl_portal/SSRinEU> (accessed 04-08-2015).

133 Workers' Compensation Act *cf* Consolidated Act 278 of 14 March 2013.

134 National Board of Industrial Injuries "The History of the Workers' Compensation Act" <http://www.ask.dk/en/English/About-us/110-years-of-workers-compensation> (accessed on 4-08-2015).

135 S 5 of the Workers' Compensation Act.

136 S 6(1).

137 OECD *Mental Health and Work:Denmark* (2013) *OECD* <http//dx.doi.org/10.1787/9789264188631-en> (accessed 22/08/2016).

138 Where "symptom onset of the disease is within six months and the disease is fully present within a few years". Post-traumatic stress is covered if triggered by traumatic events that are "of an exceptionally ominous or catastrophic nature", Administrative Order No. 12 of 13 January 2015.

139 V Ulfbeck "Employers' Liability and Workers' Compensation: Denmark" in K Oliphant & G Wagner (eds) *Tort and Insurance Law*: *Employers' Liability and Workers' Compensation* (2012) para 17.

140 Unless the harassment was so severe that it led to a "mental injury" and sufficient loss of earning capacity, which is covered by the ASL.

141 Ulfbeck "Employers' Liability and Workers' Compensation: Denmark" in *Tort and Insurance Law* paras 16 and 17.

142 S 26 EAL. See Ulfbeck "Employers' Liability and Workers' Compensation: Denmark" in *Tort and Insurance Law* para 61.

143 S 77 of the Act provides as follows:
"Benefits under this Act shall not form a basis for remedy against a person who causes an injury and is liable to injured persons or their surviving dependants, subject, however, to section 10 A. Claims of injured persons or their surviving dependants against the person causing the injury shall be reduced to the extent that compensation has been paid or a liability exists to pay compensation under this Act to the persons in question".

144 Y Frederiksen "Compensation for occupational injury from effects of sexual harassment" (undated) *Norrbom Vinding* <http://www.norrbomvinding.com> (accessed 30-06-2015).

145 K Dear "Sexual Harassment in Australian Worplaces … Still?" (undated) *Australian Centre for Leadership for Women* <http://www.leadershipforwomen.com.au/transform/> (accessed 13-07-2016). However, other victims of sexual harassment have settled for what is described as 'woefully inadequate' compensation after conciliation in P Mc Donald & S Charlesworth "Settlement outcomes in sexual harassment complaints" (2013) 24 *Australasion Dispute Resolution Journal* 267.

146 [2014] FCAFC 82.

147 Dear "Sexual Harassment in Australian Workplaces… Still?" (undated) *Australian Centre for Leadership for Women*.

148 M Lunney "Employers' liability and workers' compensation: Australia" in K Oliphant & G Wagner (eds) *Tort and Insurance Law*: *Employers' Liability and Workers' Compensation* (2012) para 2.

149 Para 48.

150 Para 23.

151 Similar to ss 22 and 65 of COIDA.

152 Lunney "Employers' liability" in *Tort and Insurance Law* para 11.

153 Para 18.

154 Para 19.

155 R Guthrie, M Ciccarelli & A Babic "Work-related stress in Australia: the effects of legislative interventions and the cost of treatment" (2010) 33 *Int J Law Psychiatry* 104.

156 Lunney (2012) "Employers' liability" in *Tort and Insurance Law* para 24.

157 S 32(1) of Workers Compensation and Rehabilitation Act 2003.

158 S 34.

159 But only if the degree of permanent impairment is more than 5%; S 237(1)(a).

160 In terms of the Workers Compensation Legislation Amendment Act 53 of 2012, s 67 of the Workers Compensation Act 70 of 1987 was omitted and claims of pain and suffering are no longer available.

161 Nothern Territory: S 52 of the Workers Rehabilitation and Compensation Act 1988 (see *Zabic v Alcan Gove Pty Ltd* [2015] NTSC 1).

162 Queensland: S 239 Workers Compensation and Rehabilitations Act 2003.

163 Queensland: Workers' Compensation and Rehabilitation and Other Legislation Amendment Act 2015.

164 The Return to Work Act 2014 (SA) (RTW).

165 S 151A(1)(b) Workers Compensation Act 1987.

166 S 93 K Workers' Compensation and Injury Management Act 1981.

167 S 133(1) Workers Rehabilitation and Compensation Act 1988.

168 (Human Rights) [2015] VCAT 1992.

169 Paras 88-89.

170 Para 85.

171 Para 105.

172 Originally passed as Public Law 88-352 (78 Stat. 241.).

173 524 U.S. 742, 118 S. Ct. 2257 (1998).

174 524U.S. 775, 118S. Ct. 2275 (1998). See Whitcher (2004) 25 *ILJ* 1914.

175 *Fleenor v. Hewitt Soap Co.*, 81 F.3d 48, 50 (6th Cir. 1996).

176 For example, in Wisconsin an employee will be entitled to compensation where the employee sustains an injury "where, at the time of the injury, the employee is performing service growing out of and incidental to his or her employment" (2011 Wisconsin Code Chapter 102. Worker's compensation, Conditions of liability 102.03(1)(c)1)) and where the accident or disease causing injury arises out of the employee's employment. (2011 Wisconsin Code Chapter 102. Worker's compensation, Conditions of liability 102.03(1)(5)(e)) <http://docs.legis.wisconsin.gov/statutes/statutes/102/03> (accessed on 16-09-2015).

177 MD Green & DS Murdock "Employers' liability and workers' compensation: United States" in K Oliphant & G Wagner (eds) *Tort and Insurance Law*: *Employers' Liability and Workers' Compensation* (2012) para 14.

178 *Rogers v Burger King Corporation*, 82 P 3d 116, 121 (Okla. 2003).

179 See, for example, 2011 Wisconsin Code Chapter 102. Worker's compensation, Conditions of liability 102.03(2).

180 *Busby v Truswal Systems Corporation* 551 So.2d 322 (1989) 325.

181 SG Biddle & MJ Foster "When is Workers' Compensation the Exclusive Remedy in Sexual Harass-ment Cases?" (1996) <http://www.myazbar.org/azattorney/archives/dec96/dec96_biddle.pdf> (accessed 22-08-2016).

182 276 Wis.2d 746 (2004).

183 WIS. STAT. § 102.03(2) (2001-02),1

184 Para 10.

185 Para 14.

186 A Shah "Supplementing state workers' compensation schemes with cause of action under state common law for employee third party sexual harassment claims against employers" (2007) 15 *J Gender & Soc Pol'y & L* 29.

187 See Green & Murdock "Employers' Liability and Workers' Compensation: United States" in *Tort and Insurance Law*: *Employers' Liability and Workers' Compensation* para 32, n 58.

188 For example, Maryland and Kentucky. See L Copeley "The intersection of Workers' Compensation and Emotional Distress Employment Claims" (2015) *American Bar* <http://www.americanbar.org/tools/digitalassetabstract.html/content/dam/aba/events/labor_law/2015/november/annual/papers/178.pdf> (accessed 30/10/2016); Green & Murdock "Employers' Liability and Workers' Compensation: United States" in *Tort and Insurance Law*: *Employers' Liability and Workers' Compensation* para 32.

189 Green & Murdock "Employers' Liability and Workers' Compensation: United States" in *Tort and Insurance Law*: *Employers' Liability and Workers' Compensation* para 32.

190 See, for example, *Lentz v. Young*, 195 Wis. 2d 457, 536 N.W.2d 451 (Wisc. Ct. App. 1995) 472 and "Workers' compensation no longer the exclusive remedy" available at <http://www.ppnlaw.com> (accessed 15-12-2015).

191 See *Meyers v Chapman Printing Co., Inc.* 840 S.W. 2d 814 (1992) para 819.

192 *Byers v Labor & Industry Review Commission (1997, Wis) 561 NW2d 678, 73 BNA FEP Cas 127*8 para 26. See also *Palmer v Bi-Mart Company, Inc. (1988) 92 Or App 470, 758 P2d 888;* Biddle & Foster "When is Workers' Compensation the Exclusive Remedy in Sexual Harassment Cases?" (19-11-2012) *Myaz Bar* <http://www.myazbar.org/azattorney/archives/dec96/dec96_biddle.pdf> (accessed 22-08-2016).

193 Du Toit "Enterprise responsibility for sexual harassment in the workplace" in *Social responsibility in labour relations* 192.

194 192.

195 193.

196 192.

197 *Jooste v Score Supermarket* 1999 (2) SA 1 (CC) para 17.

198 A van Niekerk *Law@Work* 2 ed (2012) 466 n 52.

199 See the Report by the Committee of Inquiry into a Comprehensive System of Social Security in South Africa (the Taylor Committee) *Transforming the present – Protecting the future: Consolidated Report* (2002) 115-116.

200 See PWJ Bartrip *Workmen's Compensation in Twentieth Century Britain: Law, history and social policy* (1987) ch 10; Report of the Departmental Committee on Alternative Remedies (1946, Cmd 6860), chaired by Sir William Monckton.

201 The phrase "save under the provisions of this Act" in s 35(1) could be interpreted as opening the door to an amendment to the exclusivity defence.
