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The Long Road to Compensation for Silicosis Sufferers in South Africa

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Silicosis has troubled the South African mining industry since the 1880s. Since 1902, several commissions of inquiry have investigated this problem but none of them recommended common-law liability as an appropriate mechanism for compensating victims. Instead, workers' compensation has always been preferred. There is no consensus among employers, workers and governments on the model for compensation; however, a large body of literature reveals the disappointing results of common law as a compensation mechanism. Therefore, in March 2011 – when the Constitutional Court of South Africa made the celebrated decision, Thembekile Mankayi v. AngloGold Ashanti Ltd*, that mine workers who contract diseases at work can sue their employers for damages – it marked the beginning of a new era in the quest for fair and just compensation for silicosis sufferers. In this article, I trace the developments around compensation for silicosis victims. I further argue that the trust settlement agreed in July 2019 may not significantly improve the situation of silicosis claimants, if at all. Contrary to the popular view that trusts represent a victory for mine workers, these institutions come with problems of their own. The article relies on evidence from local and other jurisdictions to illustrate the actual and potential problems associated with trusts as a mechanism for compensating mass claimants.*

Keywords: common law; litigation; silicosis; trust; workers' compensation; Mankayi; Constitutional Court of South Africa

Introduction

Silicosis has been the Achilles' heel of the South African mining industry for decades. Linked to this is the related issue of compensating silicosis sufferers. In March 2011 the South African Constitutional Court handed down a landmark judgment holding for the first time in South African legal history that mine workers who contract diseases at work can sue their employers for damages. The case in question is *Thembekile Mankayi v. AngloGold Ashanti Limited*.[1] Labour movements and rights groups celebrated the decision, describing it as a victory for mine workers from South Africa and other southern African countries who used to work for South African mining houses under the migrant labour system. An unknown number of these succumbed to silicosis and pulmonary tuberculosis over the years.

1 *Thembekile Mankayi v. AngloGold Ashanti Ltd* (2011), South African Constitutional Court Law Reports (ZACC), p. 3, available at www.saflii.org/za/cases/ZACC/2011/3.html, retrieved 1st October 2020. For an extended treatment of the arguments presented in this article, see A. Mushai, 'Alternative Funding Options for Occupational Diseases in South African Mines' (PhD thesis, University of the Witwatersrand, 2018).

However, those familiar with the history of the struggle for compensation in general, and the problem of silicosis in South African mines in particular, were surprised not only by the decision but by its timing, too. Silicosis has a long history in South African mines. Since 1902, a number of commissions of inquiry have investigated this matter but none recommended suing employers as a solution. Workers' compensation was always the preferred option for compensating workers injured at work. By the early 1900s, it was clear in many jurisdictions that suing the employer at common law was a problematic option for compensating injured workers.

The *Mankayi* judgment triggered several class action suits against gold mines, culminating in the July 2019 announcement of a settlement to establish a R5-billion trust to compensate silicosis and tuberculosis sufferers or their dependants. This article evaluates the developments that followed the Constitutional Court's decision. It draws on historical and current evidence to advance the argument that neither common-law liability nor trusts are ideal options for compensating silicosis sufferers. I further argue that on a balance of available evidence workers' compensation is a preferable mechanism for providing compensation for diseases. I begin with a historical evaluation of compensation under common law, leading to the adoption of workers' compensation starting in the 1880s. Next, the article provides an outline of the *Mankayi* judgment and the class-action preparations that followed, culminating in various trust settlements for silicosis sufferers. The article concludes by outlining the merits of workers' compensation over other options for compensating silicosis claimants.

Redressing Injuries Caused by Occupational Diseases before Workers' Compensation

The problem of occupational diseases in the South African mining industry dates back to the 1890s. Back then, workers injured in the course of employment turned to common law for compensation. However, the worker's prospects for getting compensation in common-law jurisdictions such as Australia, Canada, Great Britain, South Africa and the USA were limited mainly because common law gave employers protection from liability through the formidable defences of voluntary assumption of risk, contributory negligence and common employment. Collectively, these defences made it virtually impossible for an injured worker to get compensation from their employer. Furthermore, during industrialisation, employers enjoyed many privileges because they were considered harbingers of modernity and progress.[2] This thinking influenced how institutions, including the judiciary, treated them. The general view at the time was that by agreeing to work, one assumed the risks associated with that work, and the employer was not a guarantor of the employee's safety.[3]

In South Africa common-law rules, and their application, followed developments in Britain, as was true for other territories in the British Empire.[4] In Britain, the inability of common law to yield compensation triggered a series of government attempts between 1771 and 1818 to resolve the problem through insurance arrangements. But these were unsuccessful because people simply did not have faith in the government's ability to manage social security programmes.[5] Thereafter, attention shifted to reforming common law. Accordingly, the British Parliament passed the Employers' Liability Act of 1880. The Act sought to weaken the common-law defences, especially those of voluntary assumption of

2 W.F. Willoughby, *Workingmen's Insurance* (Boston, Thomas Y. Crowell and Co., 1898).
3 *Ibid.,* p. 8.
4 D.G. Raw, 'Compassion without Compensation: The Novelists and Baron Bramwell' (PhD thesis, University of Newcastle, 2013), p. 139.
5 See Willoughby, *Workingmen's Insurance*, p. 262.

risk and common employment. Despite these reforms, most injured workers still went uncompensated.[6] Nevertheless, the Employers' Liability Act triggered the enactment of similar legislation in most territories in the British Empire, such as Canada[7] and South Africa. Developments in Britain also had an influence in the USA. In the State of Georgia, for example, the common-employment defence was abolished by legislation, as had been the case in Britain.[8] In South Africa, the Cape Colony was the first territory to pass legislation along the lines of Britain's Act of 1880 when it passed the Employers' Liability Act of 1886.[9] Natal followed suit by enacting its own Employers' Liability Act in 1896.[10] Both Acts were replicas of the British Act of 1880. Eventually failure of the common law, despite the reforms, forced Britain to adopt workers' compensation in 1897.

Failure of the common law to yield compensation was by no means unique to traditional common-law countries such as Australia, Canada, Britain, the USA and South Africa. Workers in continental European countries, including Austria, Belgium, Denmark, France, Germany, Italy and the Netherlands, where employers' liability rules fell under the Napoleonic Civil Code, also struggled to secure compensation because rules on the liability of an employer under the Code were substantially similar to those under the common law.[11] For example, in France in the early 1900s only one in ten accidents resulted in compensation under the Civil Code.[12] Similarly, in Germany one in five accident claims resulted in compensation under the Civil Code.[13] Therefore, the inability of injured workers to get compensation was a common problem in many jurisdictions. It is for this reason that the workers' compensation principle was quick to gain global acceptance with the exception of the USA, where constitutional court challenges impeded early attempts to introduce the system.[14]

The Advent of Workers' Compensation in Germany and South Africa

Workers' compensation emerged because both the common law and the Napoleonic Civil Code produced unsatisfactory results as far as compensating injured workers was concerned. Germany pioneered workers' compensation in 1884 under the leadership of Chancellor Otto von Bismarck.[15] Bismarck included it in a social legislation programme that also included sickness (health) insurance, as well support for the elderly and invalids through pensions. Workers' compensation is a form of compulsory state social insurance financed by employers. Bismarck introduced workers' compensation because he saw it as a useful tool to

6 C. Parsons, 'Liability Rules, Compensation Systems and Safety at Work in Europe', *The Geneva Papers on Risk and Insurance: Issues and Practice*, 27, 3 (2002), pp. 358–82; A.F. Weber, 'Employer's Liability and Accident Insurance', *Political Science Quarterly*, 17, 2 (1902), pp. 256–83.

7 T. Jennissen, M.J. Prince and S. Schwartz, 'Workers' Compensation in Canada: A Case for Greater Public Accountability', *Canadian Public Administration*, 43, 1 (2000), pp. 23–45.

8 J.M. Kleeberg, 'From Strict Liability to Workers' Compensation: The Prussian Railroad Law, the German Liability Act and the Introduction of Bismarck's Accident Insurance in Germany 1838–1884', *New York University Journal of International Law and Politics*, 36, 1 (2003), pp. 53–132.

9 Employers' Liability Act 35 of 1886, University of Pretoria Space Institutional Repository, available at https://repository.up.ac.za/handle/2263/56550?show=full, retrieved 1 October 2020.

10 Employers' Liability Act 12 of 1896, University of Pretoria Space Institutional Repository, available at https://repository.up.ac.za/handle/2263/56550?show=full, retrieved 1 October 2020.

11 I.M. Rubinow, *Social Insurance with Special Reference to American Conditions* (New York, Henry Holt and Co., 1913).

12 *Ibid.*, p. 88.

13 H.W. Wolff, *Employers' Liability and Workmen's Compensation: Two Lectures Delivered at the National Liberal Club on 17th and 23rd February 1898* (London, P.S. King and Son, 1898), p. 7.

14 D.H. van Doren, *Workmen's Compensation and Insurance* (New York, Moffat, Yard and Co., 1918), pp. 58–70.

15 Van Doren, *Workmen's Compensation and Insurance*, p. 8; A.F. Weber, 'Employers' Liability and Accident Insurance', *Political Science Quarterly*, 17, 3 (1902), p. 260; H.B. Bradbury, *'Workmen's Compensation Law* (New York, The Banks Law Publishing Co., Third Edition, 1917), p. 12.

weaken the growing influence of the Social Democratic Party (the Socialists) among the working class.[16] From Germany, workers' compensation legislation spread into Austria, most of Europe and beyond. The essence of workers' compensation lies in placing the responsibility to fund compensation on employers, while government assumes responsibility for administering the system. A central feature of the German model of workers' compensation that endures into the present is the ban on common-law actions against employers.[17]

Since workers' compensation is a creature of legislation, its fundamental features –such as the participation of employers, the method of deriving employers' contributions, the basis for paying compensation and the benefit types – are also specified in legislation. None of these main features derives from common rules or principles. The whole system is administrative and, despite variations in the design of workers' compensation schemes in different countries, they have one thing in common: compensation is paid on a no-fault basis.[18] By dispensing with the need to prove fault, workers' compensation delivers compensation relatively quickly and at no cost to injured workers. Furthermore, compensation is easy to access because there are no stringent conditions that a worker must meet to qualify for payment.

By the end of the 19th century, the South African mining industry already faced serious health and safety problems of which occupational diseases were the most challenging. It was against the background of common-law rules that blocked compensation to injured workers that workers' compensation first emerged in the mining industry in the form of the Rand Mutual Assurance Company, which was established in 1894. The purpose of this mutual company was to pay compensation to workers who suffered injury or disease in the course of employment.[19] It is not clear what prompted this response by the industry given that the trade union movement was still in its infancy at the time.[20] A plausible explanation for the mining industry's initiative could lie in Fishback and Kantor's argument for the introduction of workers' compensation in the USA. They argue that employers and insurers agreed to workers' compensation because they expected gains from replacing negligence liability.[21] Motives aside, South African legislation providing for compensation to victims of occupational diseases in the mining industry began to take shape in the wake of Union in 1910. In 1911 the first Miners' Phthisis Act was passed, while in 1914 workmen's compensation legislation for general industry was formalised through the first Workmen's Compensation Act.[22]

It did not take long after the formation of the Rand Mutual Assurance Company for silicosis rates to reach crisis proportions in the Rand gold mines. Industry reports at the time, however, tended to emphasise achievements in the containment of the disease while playing down the size of the problem.[23] Despite these efforts, the occupational health crisis in the mines could not be hidden when, towards the end of the Anglo-Boer War in 1901, it became clear that most of the Cornish rock drillers who had gone back to England when mining

16 See, for example, Willoughby, *Workingmen's Insurance*, p. 32.
17 See, for example, Parsons, 'Liability Rules', p. 364.
18 I. Shin, J-B. Oh and K.H. Yi, 'Workers' Compensation and Occupational Injuries', *Safety and Health at Work*, 2, 2 (2011), pp. 148–57.
19 D. Budlender, 'The Workmen's Compensation Act', *South African Labour Bulletin*, 9, 4 (1984), pp. 22–41.
20 J. Lang, *Bullion Johannesburg – Men, Mines and the Challenge of Conflict* (Johannesburg, Jonathan Ball, 1986).
21 P.V. Fishback and S.E. Kantor, 'Adoption of Workers' Compensation in the United States, 1900–1930', *Journal of Law and Economics*, 41, 2 (1998), pp. 305–41. It is also possible that pressure on the mining industry to create a compensation system came from the state. In 1891 the South African Republic appointed Joseph Klimke as State Mining Engineer, who made it his personal mission to improve safety in mines. See E.N. Katz, 'Revisiting the Origins of the Industrial Colour Bar in the Witwatersrand Gold Mining Industry', *Journal of Southern African Studies*, 25, 1 (1999), pp. 73–97.
22 Workmen's Compensation Act 25 of 1914, available at https://www.lexisnexis.co.za/legislation/national, retrieved 4 October 2020.
23 J. McCulloch, 'Air Hunger: The 1930 Johannesburg Conference and the Politics of Silicosis', *History Workshop Journal*, 72, 1 (2011), pp. 118–37.

operations stopped at the outbreak of war, had failed to return to the Rand.[24] Investigations revealed that approximately 200 of them had died of silicosis. The scale of mortality among black miners who, unlike their white counterparts, were engaged on short-term contracts, remains unknown.[25] Since then silicosis has been at the centre of legislative and policy developments in the South African mining industry. Between 1902 and 1925, six commissions of inquiry investigated silicosis.[26] More recently it has been the subject of a number of commissions of inquiry including the Erasmus Commission (1976), the Nieuwenhuizen Commission (1981) and the Leon Commission (1995). However, on the question of compensation none of these commissions recommended common-law liability as an option for compensating victims of this disease. It is against this background that the decision reached by the Constitutional Court in the *Mankayi* case came as a surprise not only from a timing perspective but also given the long history of official and industry responses to the problem of silicosis in South Africa.

The *Mankayi* Case and Threats of Class Action Lawsuits

Since 1911 workers' compensation legislation in South Africa has evolved in a two-pronged manner. On the one hand legislation provides for compensation for diseases in mines and works, while on the other legislation provides for compensation for injuries and diseases in general industry. The current laws dealing with these two areas are the Compensation for Occupational Injuries and Diseases Act 130 of 1993 (COIDA) for general industry and the Occupational Diseases in Mines and Works Act 78 of 1973 (ODMWA) for diseases in mines and works. Of particular importance for the purpose of the Constitutional Court's decision is Section 35(1) of COIDA. This section abolishes the right of employees to sue employers for damages at common law and restricts them to claiming workers' compensation benefits only. Unlike COIDA, ODMWA does not have a provision equivalent to Section 35(1). However, Section 100 of ODMWA prohibits mine workers whose claims for diseases fall under that Act from further claiming under any other Act, which would include the later COIDA.

Thembekile Mankayi worked for AngloGold Ashanti Limited from 1979 to 1995 as an underground rock driller. In 2004, doctors informed him that he had silicosis, an incurable but compensable disease under ODMWA. He received a lump sum compensation of R16, 320.00. Since silicosis is incurable, Mankayi had no prospect of getting employment anywhere else. In 2006 he sued AngloGold Ashanti in delict (for a civil wrong), alleging that the company was negligent in exposing him to harmful dusts and gases causing him to contract silicosis. He claimed R2.6 million in damages. AngloGold Ashanti raised an exception to Mankayi's claim. It argued that the claim lacked a cause of action since Section 35(1) of COIDA bars claims of this nature. Alternatively, AngloGold's defence was that even if Mankayi's allegations were true, it was not liable to him since no such liability exists under South African law because of Section 35(1) of COIDA. Judicial precedent at the time was in favour of AngloGold Ashanti. Not surprisingly, both the High Court and the Supreme Court of Appeal ruled against Mankayi, who then took the matter to the Constitutional Court. Mankayi's legal representatives managed to convince the Constitutional Court that the case involved a constitutional matter pertaining to loss of rights by citizens. However, a

24 E. Katz, *The White Death – Silicosis on the Witwatersrand Gold Mines 1886–1910* (Johannesburg, Witwatersrand University Press, 1994).
25 *Ibid.*, p. 2.
26 J. McCulloch, 'Counting the Cost: Gold Mining and Occupational Disease in Contemporary South Africa', *African Affairs*, 108, 431 (2009), pp. 221–40.

week before the Constitutional Court handed down its decision, Mankayi died and was buried in his home district in the Eastern Cape.

For decades, courts interpreted Section 35(1) and its predecessors as giving protection to all employers, including mining companies, against common-law claims for damages by employees injured in the course of employment. Consequently, several past attempts to claim damages from employers had failed because courts consistently ruled that an employee had no right to sue the employer for damages regardless of whether the employee's workers' compensation derives from COIDA or ODMWA.[27] The question the Constitutional Court had to answer in the Mankayi case was as follows: does Section 35(1) of COIDA bar mine workers from suing their employers at common law, notwithstanding that they cannot claim compensation benefits under that Act but must claim under ODMWA, which does not have a similar provision? The Constitutional Court disagreed with the High Court and Supreme Court of Appeal, finding that Section 35(1) only applies to employees whose claims fall under COIDA thus paving the way for common-law actions against mining companies. Rights groups, the media and trade unions celebrated the judgment, describing it as a victory for mine workers.[28]

Not long after the Constitutional Court judgment, reports of multiple, uncoordinated and in some ways confusing legal proceedings dominated the local media. In August 2012, there was a report of a pending class action lawsuit against three of the country's largest gold-mining companies, AngloGold Ashanti, Gold Fields and Harmony Gold.[29] At about the same time, registration of claimants began in South Africa and neighbouring countries, notably Lesotho and Eswatini (formerly Swaziland). Another major development came in May 2013 with the announcement that a class action had begun in London against another mining giant, Anglo American South Africa. In July of the same year the London High Court dismissed the case, saying there were no compelling reasons why the case could not be heard in South African courts.[30] Yet another class action comprising more than 17,000 former miners or their dependants from across southern Africa began in January 2013 and the number of claimants reportedly was growing at a rate of 500 per month at the time.[31] On 26 September 2013 came the announcement that Anglo American South Africa had reached a settlement – but without an admission of liability – with 32 ex-miners suffering from silicosis, in a lawsuit dating back to 2004.[32]

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27 Some of the unsuccessful cases include the following: *Mlomzale v. Mizpha Boerdery (Pty) Ltd* (1997), Volume 1, South African Law Reports, p. 790; and *Rand Mutual Assurance Company Ltd v. Road Accident Fund* (2008), South African Supreme Court of Appeal Law Reports (ZASCA), p. 114. (The Southern African Legal Information Institute [SAFLII] is an online repository of legal information from South Africa, especially decisions of the Supreme Court of Appeal. The judgments are available at www.saflii.org/content/southafrica-index, retrieved 26 September 2020.) In these and other cases, courts ruled that no common-law action for damages by an employee against an employer exists in South African law.

28 Khulumani Support Group, 'A Victory for Mineworkers with Silicosis – Judgment in the Case of *Mankayi v* Anglo Gold Ashanti', 3 March 2011, available at http://www.khulumani.net/reparations, retrieved 4 March 2011; and the *Sowetan* carried a story titled, 'Ex-Miner Wins Claim for Compensation – But Victory Comes Too Late for Him – He Died Last Friday', *Sowetan*, 3 March 2011, available at http://www.sowetanlive.co.za, retrieved 5 March 2014.

29 W. Roelf, 'South Africa Gold Miners Face Lung Disease Lawsuit', *Reuters*, 21 August 2012, available at https://af.reuters.com/article/idAFL6E8JL44720120821, retrieved 21 August 2012.

30 *Vava and Others v. Anglo American South Africa Ltd* (2013), England and Wales High Court of the Queen's Bench Law Reports (EWHC), p. 2131, available at https://www.casemine.com/judgement/uk/5a8ff7d960d03e7f57eb2768, retrieved 1 October 2020.

31 'Silicosis Suit Could Crush SA's Gold Mining Sector', *South China Morning Post*, 28 January 2013, available at https://www.scmp.com/business/commodities/article/1137852/silicosis-suit-could-crush-safricas-gold-mining-sector, retrieved 28 January 2013.

32 M. Gebhardt, 'Anglo American SA Reaches Settlement with Silicosis-Stricken Miners', *Business Day*, 26 September 2013, available at https://www.businesslive.co.za/bd/companies/mining/2013-09-25-anglo-american-sa-reaches-settlement-with-silicosis-stricken-miners2/, retrieved 26 September 2013.

On 1 June 2015, in an even more confusing development, the then Minister of Health Dr Aaron Motsoaledi announced that the South African government planned to pay R1.5 billion to miners suffering from lung disease.[33] The payment came under the terms of the existing workers' compensation scheme for the mining industry. This development was confusing because on the one hand the government announced a payment to silicosis sufferers through workers' compensation arrangements, while on the other hand lawyers were filing multi-billion-rand class action lawsuits against mining companies under the common law. On 13 May 2016 the High Court certified that a class action against 30 gold-mining companies, representing nearly the entire South African gold-mining industry, could proceed to trial. According to documents placed before the court, the number of claimants represented in the class actions was said to be anything between 17,000 and 500,000.[34] Further to this, mobile X-ray centres opened in Lesotho to screen ex-miners for silicosis, with plans to open more in other neighbouring countries.

Overnight the mining industry faced a huge, costly and potentially ruinous problem. The Constitutional Court judgment created multi-billion-rand liabilities, in quantity anything but small. The class actions arising from the judgment could cover hundreds of thousands of mine workers from South Africa, Botswana, Lesotho, Malawi, Mozambique, Eswatini and Zimbabwe, countries that historically supplied migrant labour to South African mines.[35]

Those familiar with the record of the common law, class actions and the cost of litigation would have found the developments in the aftermath of the *Mankayi* ruling unworthy of celebration for several reasons. First, in its traditional form, the common law has a poor record as a compensation mechanism for work-related injuries and disease, as argued above. Without the assistance of an interventionist judiciary prepared to depart from the norm, common-law rules rarely result in compensation. The development of British jurisprudence on compensation for long-latency disease in tort, and the complexities involved, is illustrative of this point.[36] Second, suing employers for causing a disease is unprecedented in South African legal history despite over 100 years of battling silicosis. Third, empirical evidence from other jurisdictions, notably the UK and the USA, suggests that more often than not gains from litigation hardly benefit the actual victims, especially in class action lawsuits.

The case of asbestos litigation in America is particularly illuminating. A greater proportion of the billions of dollars awarded for asbestos injury never reached the pockets of claimants.[37] A RAND Corporation study found that by the end of 1982 approximately one billion US dollars in awards had gone into asbestos litigation, of which less than a third went to the claimants, with the rest going towards legal fees and other administrative expenses.[38] Admittedly, other idiosyncratic features and procedures of the US legal system increase the

33 'R1.5bn Government Pay Out for Sick Miners', *The Star*, 1 June 2015, available at http://news24.com/citypress/business/r1.5bn-payout-on-the-card-for-mine-workers-20160223, retrieved 1 June 2015. See also, D. Faku, 'Payouts to Miners with Lung Disease', *Pretoria News*, 1 June 2015, available at https://www.pressreader.com/south-africa/pretoria-news, retrieved 1 June 2015.

34 'South African Gold Mining Actions Certified', Clyde and Co. LLP, 13 May 2016, available at https://www.lexology.com/library/detail.aspx?g=1aad9b3f-c003-4928-8d2e-855b4e9f2ee7, retrieved 13 May 2016.

35 The scope of and changes in labour recruitment to the South African mines can be followed in many works, including F. Wilson, *Labour in the South African Gold Mines 1911–1969* (Cambridge, Cambridge University Press, 1972); F.A. Johnstone, *Class, Race and Gold: A Study of Class Relations and Racial Discrimination in South Africa* (London, Routledge, 1976); A.H. Jeeves, Migrant Labour in South Africa's Mining Economy: *The Struggle for the Gold* Mines' *Labour Supply,* 1890–1920 (Kingston, McGill-Queens University Press, 1985); and P. Harries, Work, Culture and Identity: Migrant Laborers in Mozambique and South Africa, c.1860–1910 (Portsmouth, N.H., Heinemann, 1994).

36 A. Porat and A. Stein, 'Indeterminate Causation and Apportionment of Damages: An Essay on Holtby, Allen and Fairchild', *Oxford Journal of Legal Studies*, 23, 4 (2003), pp. 667–702.

37 M.J. White, 'Asbestos and the Future of Mass Torts', *Journal of Economic Perspectives*, 18, 2 (2004), pp. 183–204.

38 S.J. Carroll, D. Hensler, A. Abrahamse, J. Gross, M. White, S. Ashwood and E. Sloss, *Asbestos Litigation Costs and Compensation* (Santa Monica, California, RAND Institute for Civil Justice, 2002).

cost of litigation. One such feature is 'forum shopping', a practice used by lawyers whereby litigation takes place in a different jurisdiction to the one where the cause of action occurred.[39] Forum shopping is supposed to benefit the claimant but a number of studies have found that, in the USA in particular, the resort to forum shopping often has little to do with claimant interests.[40] Skyrocketing litigation costs and the growth of a litigious culture have been the subject of policy debate in the USA and other countries, as well. For instance, in 2011 the State of Texas proposed a 'loser pays bill', which was meant to discourage people from resorting to litigation by making the loser in a lawsuit bear the legal costs of their adversary.[41] Other US states have also adopted various reforms to the tort system to curb spiralling costs.[42] The issue of spiralling litigation costs also came before the British Parliament between 2010 and 2011. In 2010, the British government appointed a commission headed by Lord Justice Jackson to review civil litigation costs and make recommendations.[43] In a significant number of cases involving personal injury, costs exceeded the damages awarded to plaintiffs. Subsequent to the release of the commission's report, the British government tabled a range of measures aimed at making civil litigation an option of last resort.[44]

These developments reinforce the historical fact that the common law is inherently adversarial, and consequently claims often result in expensive litigation. Claims for long-latency disease in particular can be very complex, requiring courts to consider issues relating to conduct dating back decades. In the case of mass silicosis claims, the sheer number of potential claimants raises fundamental questions about the desirability of judicial over public policy measures to determine compensation. In the USA, even the courts have expressed frustration with litigation despite the fact that they opened the asbestos litigation floodgates in the first place. Since the 1990s, the US Supreme Court has led a campaign through its judgments for federal intervention to control asbestos litigation.[45] In one case, the court was candid enough to say the system of adjudicating these claims was not working.[46] Realising the challenges that long-latency occupational diseases pose, some European countries – notably Belgium, Denmark, Finland and Portugal – have public institutions solely designed for compensating disease claimants along administrative lines.[47] This virtually eliminates the need to resort to costly and time-consuming litigation.

The parallels between asbestos claims in America since the 1970s and silicosis claims in contemporary South Africa are in many respects remarkable. First, they both involve long-latency injury. Asbestosis has a latency period of around 30 years while the latency period for silicosis runs up to 40 years depending on the degree of exposure to silica dust.[48] Second, they involve hundreds of thousands of claimants. Third, the number of claimants is

39 J.E. Stiglitz, J.M. Orszag and P.R. Orszag, *The Impact of Asbestos Liabilities on Workers in Bankrupt Firms* (Washington DC, American Insurance Association, 2002).

40 M.J. White, 'Asbestos Litigation: Procedural Innovations and Forum Shopping', *Journal of Legal Studies*, 35, 2 (2006), pp. 365–98; and Swiss Re, *Liability and Liability Insurance: Yesterday–Today–Tomorrow*, (Zurich, Swiss Reinsurance Company Ltd, 2001).

41 'Tort Reform – Sorry Losers', *The Economist*, 19 May 2011.

42 J. Barnes, 'Rethinking the Landscape of Tort Reform: Legislative Inertia and Court-Based Tort Reform in the Case of Asbestos', *Justice System Journal*, 28, 2 (2007), pp. 157–81.

43 L.R. Jackson, *Review of Civil Litigation Costs: Preliminary Report*, Volume 1 (Norwich, The Crown Stationery Office, 2010).

44 'Legal Reform - No Fee Lunch', *The Economist*, 31 March 2011.

45 *Amchem Products Inc. and Others v. Windsor and Others*, Volume 521, United States Court of Appeals for the Third Circuit 591 (1997), p. 598. This case is cited in Barnes, 'Rethinking the Landscape of Tort Reform", p. 157.

46 *Ortiz and Others v. Fibreboard Corporation and Others*, Volume 527, United States Supreme Court 815 (1999), p. 821. This case is cited in White, 'Asbestos and the Future of Mass Torts', p. 198.

47 Association Internationale des Sociétés d'Assurance Mutuelle (AISAM), *Workers' Compensation in Europe* (Brussels, International Cooperation Network Working Group, 2004).

48 Munich Re, *Occupational Diseases: Are They Insurable?* (Munich, Workers' Compensation Centre of Competence, 2004).

impossible to determine *ex ante*. And, finally, these claims are expensive to decide through normal judicial channels. In addition, mass claims pose a real threat to the solvency of defendant firms, as well as the job security of their workers. A study of the impact of asbestos liabilities on workers in bankrupt US firms found that between 50,000 and 60,000 jobs had been lost due to asbestos liability-induced bankruptcies.[49] In the period 1982 to 2006, approximately 85 US asbestos firms filed for bankruptcy because of asbestos litigation.[50] Any litigation process comes with uncertainty for both the plaintiff and the defendant because outcomes remain unpredictable for both sides. Securing damages is not a logical and guaranteed consequence of suing someone. Furthermore, even if the court finds in favour of a claimant, the defendant company possibly may be unable to satisfy the judgment.[51]

In this section I have discussed some of the challenges that come with using the common law and litigation to settle mass claims like those related to silicosis. It is rare to come across literature or country experiences where the common law and litigation are associated with beneficial outcomes, especially in cases involving mass claimants. Even fewer are the countries that rely on the common law as a main source of compensation for work-related diseases. Furthermore, even in countries where the common law exists alongside workers' compensation, its use is rare due to the attractive benefits under workers' compensation. This is particularly the case in Europe.[52]

From Class Action Lawsuits to Trust Settlements

Despite the Constitutional Court judgment and the preparatory work towards class actions that followed in its immediate aftermath, no employer has yet faced liability for causing a disease. On the contrary, in July 2019 came the news that the Gauteng High Court had approved a R5-billion silicosis trust settlement between gold-mining companies and silicosis sufferers.[53] This settlement saw the establishment of the Tshiamiso Trust with a mandate to identify and process payment to claimants who contracted silicosis or pulmonary tuberculosis during or after employment as gold miners from March 1965. That mining companies agreed to this settlement is hardly surprising. As far as possible, companies try to avoid litigation, not least because it comes with too many risks and uncertainties. Litigation can take many years to finalise, and many companies simply do not have an appetite for lengthy court battles. The *Mankayi* litigation is a case in point. Litigation began in the High Court in 2006 and took five years to reach the Constitutional Court. Even then, the case was still far from completion because after the Constitutional Court decision, it was supposed to go back to the High Court for trial. Nevertheless, advocates for litigation contend that without the prospect of litigation, mining companies would not have done anything more to improve compensation payable to silicosis victims. In fact, there is merit in the argument that the unfair payment to Mankayi, of R16,320.00 for contracting silicosis, makes the mining industry partly responsible for the events that later followed.

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49 See, for example, Stiglitz *et al.*, *The Impact of Asbestos Liabilities*, p. 26.

50 M. Nell, 'Backing Away from the Abyss: Courts May Be Starting to Get a Grip on Asbestos Litigation', *American Bar Association Journal*, 92, 9 (2006), pp. 26–32. See also G. Tweedale and R. Warren, 'Chapter 11 and Asbestos: Encouraging Private Enterprise or Conspiring to Avoid Liability?', *Journal of Business Ethics*, 55 (2004), pp. 31–42.

51 *Ibid.*, pp. 27–8. See also C. Parsons, 'Employers' Liability Insurance – How Secure is the System?', *Industrial Law Journal*, 28, 2 (1999), pp. 109–32.

52 See, for example, Parsons, 'Liability Rules', p. 363.

53 T. Niselow, 'Court Approves Historic R5bn Settlement in Silicosis Saga', *Fin24*, 26 July 2019, available at https://www.news24.com/fin24/companies/mining/breaking-court-approves-historic-r5bn-settlement-in-silicosis-saga-20190726, retrieved 26 July 2019.

Funding for the Tshiamiso Trust came from six gold-mining companies: African Rainbow Minerals, Anglo American South Africa, AngloGold Ashanti, Gold Fields, Harmony Gold and Sibanye Stillwater. For purposes of payment, claimants can belong to one of four categories. Category 1 comprises miners who contracted silicosis or faced exposure to silica dust since March 1965. In Category 2 are dependants of deceased miners who succumbed to silicosis. Category 3 comprises workers suffering from pulmonary tuberculosis, and Category 4 caters for dependants of deceased miners who succumbed to tuberculosis. Actual payments range from R70,000.00 to R500,000.00 per person depending on the category of claim.[54] It is not clear yet whether the Tshiamiso Trust is going to establish its own administrative system for finding and vetting claimants. This, however, would increase the Trust's transaction costs and may have a negative impact on the value of awards.

Trusts as a method for compensating occupational disease claimants are a recent phenomenon in the South African legal system, having first appeared in 2003. The story began when in 1997 an asbestos lawsuit was started against Cape Plc on behalf of South African ex-miners and their dependants. The claimants alleged that, due to the company's negligence, they had contracted asbestos-related diseases in the course of employment. Soon after the beginning of litigation it became clear that Cape Plc was in a bad financial state to the extent that its capacity to satisfy the judgment, if found to blame, was questionable.[55] For reasons which remain unclear, Gencor Limited, which was undergoing a restructuring exercise at the time, was made part of the litigation as a co-defendant with Cape Plc. The restructuring eventually led to the formation of BHP Billiton Limited. Gencor in particular had no appetite for a protracted legal battle because it feared this could derail its restructuring exercise. Therefore, in 2003 both Cape Plc and Gencor agreed to settle the matter through the establishment of the Asbestos Relief Trust with a total capital amount of R400 million.[56] Claimants under this trust are from South Africa and Eswatini. In 2006 the Switzerland-based Eternit Group paid R136 million to form the Kgalagadi Relief Trust.[57] Finally, in 2016 AngloGold Ashanti and Anglo American South Africa paid R464 million towards the establishment of the Qhubeka Trust. Its purpose is to compensate approximately 4,400 claimants suffering from silicosis and other lung diseases allegedly contracted while they worked for the two companies.

It is worth noting that both AngloGold Ashanti and Anglo American South Africa are part of the group of six that also funds the R5-billion Tshiamiso Trust formed in 2019, in addition to funding the Qhubeka Trust. The proliferation of trusts adds another layer to a compensation system that is already fragmented. Mining companies contribute towards compensation for injuries and diseases through workers' compensation under ODMWA. It is now becoming clear that trusts emerging in South Africa pay compensation along disease lines. Hence, there are trusts for asbestos diseases and others for silicosis and so on. In addition, common-law claims remain a possibility because, as things stand, the *Mankayi* judgment remains valid law. The desirability of such a complex compensation system is questionable.

Apart from the foregoing, it is possible that some of the activities on which trusts will embark may duplicate what is already taking place under the workers' compensation system. Take, for example, the tasks of identifying, locating, assessing and processing eligible claimants. The workers' compensation system conducts most of these activities on an ongoing basis. Therefore, to have several trusts doing more or less the same task is

54 *Ibid.*
55 J. Townsend, 'Schemes of Arrangement and Asbestos Litigation: In Re Cape Plc', *The Modern Law Review*, 70, 5 (2007), pp. 837–47.
56 J.M. teWaterNaude, 'The Story of the Asbestos Relief Trust – Part 1', *Occupational Health Southern Africa*, 20, 1 (2014), pp. 4–6.
57 *Ibid.*, p. 5.

unnecessary. Interestingly, in September 2016, the Compensation Commission for Occupational Diseases in Mines reported that it was sitting on a backlog of 106,000 claims approved by its Medical Bureau for Occupational Disease.[58] This suggests the possibility that a significant number of claimants on this list will also qualify for payment under the trust established in 2019, or those before it. A better approach would be to investigate the causes of this backlog and find solutions to expedite the process; otherwise the same problem will also affect the trusts, especially those for silicosis and tuberculosis where the number of claimants is high.

Amid all this lies a central question – are trusts an improvement on the existing workers' compensation system, or are they just an additional layer of less significant value? Attempting to provide a definitive answer to this question may be premature because most of the trusts are still young. Consequently, there is little or no empirical evidence of their performance. The Asbestos Relief Trust is an exception having been in existence since 2003. Its experiences and performance provide useful insights into some of the challenges that arise from using trusts to settle mass bodily injury claims.

There is an expressed view to the effect that the Asbestos Relief Trust is a model for sound and efficient occupational disease compensation in South Africa.[59] However, this view is contestable because there are several reasons to question trusts as a method for compensating silicosis claimants in South Africa. To illustrate this point it is perhaps helpful to begin by looking at a few lessons from the USA where trusts for compensating bodily injury and disease claimants have a much longer history, dating back to 1985 with the establishment of a two and a half billion US dollar trust fund following the collapse of Manville Corporation, a leading asbestos producer at the time.[60] After a brief examination of asbestos trusts in the USA, my focus will shift to the Asbestos Relief Trust in South Africa.

Unless properly supervised, trusts can be an inefficient way to handle compensation cases involving large numbers of claimants. In January 2014, Judge George Hodges of the Western District of North Carolina slashed the amount lawyers wanted put into a trust from one and a quarter billion to 125 million US dollars, after finding that the plaintiffs' lawyers had misrepresented the claims and evidence against the defendant company, Garlock Sealing Technologies.[61] In the USA, bankruptcy trusts usually refuse to share information on claims they pay, making it possible for plaintiffs to claim from multiple trusts for the same injury, a practice called 'double-dipping'.[62] In one instance, a California jury awarded a navy machinist nine million US dollars after he claimed that his exposure to asbestos occurred exclusively aboard a nuclear submarine. Soon after the award, he went on to file 14 other claims with different trusts for the same injury, alleging that his exposure occurred at different companies contrary to what he had said in the original California claim.[63]

Another concern with US asbestos trusts has been their perceived lack of transparency. For many years, most trust activities went unmonitored. Both federal and state laws regarded information on claim payments as private and confidential, hence significant malfeasance

58 T. Kahn, 'Fund has 106,000 Mine Workers that Need to Be Paid Out', *Business Day*, 8 September 2016, available at https://www.businesslive.co.za/bd/companies/mining/2016-09-08-fund-has-106000-mine-workers-that-need-to-be-paid-out/, retrieved 8 September 2016.

59 See, for example, teWaterNaude, 'The Story of the Asbestos Relief Trust', p. 4.

60 D.R. Anderson, 'Financing Asbestos Claims: Coverage Issues, Manville's Bankruptcy and the Claims Facility', *Journal of Risk and Insurance*, 54, 3 (1987), pp. 429–51.

61 D. Fisher, 'Judge Slashes Asbestos Liability in Garlock Bankruptcy to $125m', *Forbes*, 10 January 2014, available at https://www.forbes.com/sites/danielfisher/2014/01/10/judge-slashes-asbestos-liability-in-garlock-bankruptcy-to-125-million/#fa023616bd65, retrieved 3 February 2017.

62 *Ibid.*, p. 2.

63 *Ibid.*

went unchecked.[64] This prompted Congress to put together the Furthering Asbestos Claim Transparency (FACT) Bill in March 2013.[65] This Bill required asbestos trusts to lodge comprehensive quarterly reports with the Executive Office of US Trusts, covering such matters as claims handled from initial filing to resolution. It also required trusts to make public disclosures on claims received and on how they were resolved.[66] Later, the scope of FACT was extended, resulting in the Fairness in Class Action Litigation and Furthering Asbestos Claim Transparency Act of 2016. It is apparent from this that, in the USA, trusts for compensating asbestos disease claimants have raised concerns to the extent that lawmakers have deemed it necessary to pass legislation to regulate their activities. At face value, the introduction of a framework to monitor and supervise trusts might appear a benign development, yet regulation comes at a cost. Overall, asbestos trusts have been roundly criticised, and lawmakers have had no choice other than to pass legislation to address concerns raised by the public.[67]

Although trusts are a recent phenomenon in South Africa compared to the USA, the Asbestos Relief Trust is an exception, having been in existence for nearly two decades. An examination of its 2013 Annual Report provides important insights for the purposes of this discussion. Trusts exist for the benefit of an ostensibly passive group of people, in this case, occupational disease sufferers. Trustees act as agents of disease sufferers. A critical imperative binding on all trustees is the need to act in the best interest of beneficiaries. In the case of occupational disease trusts, the mandate of trustees is to determine and honour claims by people who meet the criteria for compensation. However, the Asbestos Relief Trust's 2013 Annual Report records that in May 2012, the Deputy Minister of Mineral Resources called trustees to a meeting in Pretoria. At this meeting, it was proposed that an *ex gratia* payment of R30 million be paid out to claimants who apparently did not meet the compensation criteria.[68] The trustees rejected this proposal. In October 2012, trustees received yet another call to attend a meeting at the offices of the Chief Master of the North Gauteng High Court, also in Pretoria, where another request was made for trustees to pay the R30 million to people who, in the judgement of trustees, did not qualify for compensation.[69] Present at this meeting were officials from the Department of Mineral Resources and the Premier of Northern Cape's office. During the meeting, the Chief Master announced plans to appoint two additional trustees. On 5 August 2013, the Master appointed the two trustees in a decision that was made without any consultation with the original trustees or the beneficiaries.[70]

The experiences of the Asbestos Relief Trust illustrate what can go wrong with trusts. The story raises several issues with important implications for the use of trusts as a mechanism for compensating silicosis victims, at least in the case of contemporary South Africa. Motives behind the apparent interference by public officials in the affairs of an independent trust, operating well within its mandate, remain deeply troubling. Clearly any trust that pays disputed claims jeopardises the interests of genuine and future beneficiaries. The Asbestos Relief Trust came into being in 2003 with a capital amount of R400 million. According to its 2013 Annual Report (some ten years after its formation), funds available for

64 T. Povtak, 'Senate Considers FACT Act, Asbestos Claims', February 2016, available at https://www.asbestos.com/news/2016/02/03/senate-considers-fact-act-asbestos-claims/, retrieved 8 February 2017.
65 *Ibid.*
66 *Ibid.*
67 See, for example, Carroll *et al*., *Asbestos Litigation Costs*, p. 26. See also M. Bernstein, 'Mass Torts and Bankruptcies', *Litigation*, 24, 1 (1997), p. 6.
68 Asbestos Relief Trust, *Asbestos Relief Trust Annual Report 2013* (Johannesburg, Asbestos Relief Trust, 2013), p. 4.
69 *Ibid.*
70 *Ibid.*

distribution stood at R305,443,879.00, the equivalent of 76 per cent of the initial capital amount at inception. This appears to suggest an over-estimation of the expected claims, even allowing for the long latency period of asbestos-related diseases. This view becomes more plausible after a further look at the number of filed claims. As of 28 February 2013, the Asbestos Relief Trust had received 14,512 claims of which 10,109 were found to be invalid. In 2008, the number of new claims filed with the trust showed a marked decline.

Given the foregoing argument, the view that trusts represent an efficient way to provide compensation to long-latency disease claimants becomes questionable. In South Africa, where trusts have a comparatively short history, available evidence – especially in relation to the Asbestos Relief Trust – does not appear to support this view. Many would find suggestions of political interference worrisome, and the proliferation of trusts in South Africa increases the risk of 'double-dipping', in which the same claimants claim from more than one trust for the same disease. Yet another concern is the prospect of a lack of standardisation in the amounts of compensation that the different trusts pay. It is quite possible that some trusts could pay more compensation than other trusts even for the same medical condition or disease. Paying different levels of compensation to workers with the same medical condition, simply because they happen to belong to different trusts, violates the principle of horizontal equity – that people with similar needs should have similar remedies.[71]

Why the Workers' Compensation Principle May Still Be a Better Option

As explained earlier workers' compensation, as an option for providing compensation for injuries and diseases in South Africa, first emerged in the mining industry when the common law was unresponsive. Today there are different versions of workers' compensation around the world but the fundamental principle remains unchanged – the responsibility to pay compensation for work-related injuries and diseases lies with employers through state-controlled and administered mechanisms. Both private and public workers' compensation systems adhere to this principle.[72] Some systems retain the employee's right to sue the employer for damages while in others that right does not exist. Circumstances under which an employee may sue an employer also vary between countries. In Austria, Canada, Germany, Mexico, the Philippines, the USA and New Zealand, common-law claims against the employer are virtually non-existent, while in Australia, the Netherlands, India, Ireland, Kenya, Ghana, Malaysia, Singapore, the United Kingdom and Zimbabwe, employees can sue the employer for damages subject to proof of fault.[73] In France, even though common-law claims against employers are permissible, such claims are rare because an employee can only sue the employer in cases of gross negligence (*faute inexcusable*).[74] Globally, countries that rely on employer's liability (proving fault against the employer) as the main method of compensation are rare.[75]

Under workers' compensation, victims of occupational disease have a claim against the administrative system rather than the employer. There is no need to prove fault. The system falls under the direct supervision of the government. More importantly, government is responsible for defining the rules for paying compensation as well as those for determining the level of benefits. By contrast, employers' liability places most of these critical

71 M.J. Trebilcock, 'Incentive Issues in the Design of No-Fault Compensation Systems', *University of Toronto Law Journal*, 39, 1 (1989), pp. 19–54.
72 Munich Re, *Workers' Compensation: Analysis of Private and Public Systems* (Munich, Munich Re Group, 2000).
73 Munich Re, *Asbestos – Anatomy of a Mass Tort* (Munich, Munich Re Group, 2009).
74 *Ibid.*, p. 42.
75 R.W. Klein and G. Krohm, 'Alternative Funding Mechanisms for Workers' Compensation: An International Comparison', *International Social Security Review*, 59, 4 (2006), pp. 3–28.

responsibilities in the hands of the courts. Since traditional common-law rules do not respond adequately to claims for long-latency disease, courts have to modify or expand these rules from time to time in order for them to yield compensation.[76]

Commercial activities sometimes impose costs on society not captured by the voluntary mechanism of the market place. Early jurists like Pound understood this problem in the context of production under a wage economy.[77] It is plausible to argue that social costs generated in the course of employment are costs of production, and employers should treat them as such. Otherwise, in the absence of a compensation system that addresses the social-cost problem adequately, diseases like silicosis ultimately will burden people not involved in their creation. In South Africa that burden goes further. Most sick miners depend on the public healthcare system, which in turn relies on taxpayers for funding.[78] If not managed carefully, a greater burden of occupational diseases like silicosis might be borne by the wrong members of society, such as family members. A better way to manage the situation is to convert the burden of silicosis into a cost of production, taking into account the efforts that each employer makes to reduce disease rates. Doing so minimises the risk of these social costs burdening parties that did not generate them. Workers' compensation achieves this goal better than any other compensation mechanism because the levies that employers pay are a cost of production. Ideally, the levy that each employer pays to the workers' compensation fund reflects the magnitude of potential social costs that its activities generate or impose on society. Linking social costs to levies that employers pay ensures that workers' compensation incentivises investment in disease prevention by employers.

To prevent some employers from avoiding the responsibility of paying for social costs, workers' compensation relies on legislation to compel them to do so. Workers' compensation converts social costs generated by industrial and commercial activities into costs of production paid for by the employer to the administrative system and then passed on by the employer to consumers through the price mechanism. In theory, the prices of goods and services the production of which generates higher social costs ought to reflect this.[79] On the other hand, any problems relating to matters such as adequacy of benefits become the responsibility of government in its role as the administrator of the workers' compensation system. Government ought to achieve this by adapting legislation to suit changing patterns in occupational health and safety risks, as well as the general cost of living. The essence of workers' compensation lies in how it apportions roles between government and employers. Furthermore, because it is an administrative process, its activities are transparent to the extent that they are subject to public auditing.

An effective compensation mechanism for occupational injuries and diseases should seek to meet two primary objectives.[80] The first is to determine who should pay compensation, taking into account the public policy priorities of equity and efficiency. Efficiency entails the application of resources in the best way possible to increase social welfare, while equity denotes fairness.[81] A second objective that an effective compensation system should meet is deterrence. Effective deterrence depends on the incentives built into the compensation

76 See, for example, Porat and Stein, 'Indeterminate Causation', p. 668. See also J. Stapleton, 'Compensating Victims of Diseases', *Oxford Journal of Legal Studies*, 5, 2 (1985), pp. 248–68.

77 R. Pound, 'The End of Law as Developed in Legal Rules and Doctrines', *Harvard Law Review,* 27, 3 (1914), pp. 195–234.

78 J. Roberts, *The Hidden Epidemic amongst Former Miners: Silicosis, Tuberculosis and the Occupational Diseases in Mines and Works Act in the Eastern Cape, South Africa* (Durban, Health Systems Trust and Department of Health, Republic of South Africa, 2009).

79 S. Shavell, 'Economic Analysis of Accident Law', *National Bureau of Economic Research Working Paper Series* (Cambridge, Massachusetts, National Bureau of Economic Research, 2003).

80 P.M. Danzon, 'Compensation for Occupational Disease: Evaluating the Options', *Journal of Risk and Insurance*, 54, 2 (1987), pp. 263–82.

81 R.W. Klein, *A Primer on the Economics of Insurance* (Georgia State University, Research Gate, 2014).

system. At common law, liability for negligence rests on the premise that the threat of liability (sanctions) for occupational injuries and diseases creates incentives for employers to take precautions. However, a significant number of authors question the deterrence effect of the common law.[82] Controversy aside, the common law, to its credit, can achieve deterrence at least in theory. Due to the long-latency nature of diseases like silicosis, however, it is possible that by the time the disease becomes manifest, the responsible employer is no longer in business. By contrast, since workers' compensation is a product of legislation, it is practicable to include effective deterrence mechanisms in the legislation. One of the most-cited mechanisms used to achieve this is to charge each employer a levy that reflects its accident record.[83] Trusts fall short on deterrence because they lack a mechanism to track the accident record of each employer. Most trusts formed in recent years follow a similar pattern. At the beginning, the defendant firms face the prospect of litigation individually or collectively. Eventually, a firm agrees to a trust settlement and pays a capital amount into a trust regardless of its level of culpability. Trustees then assume the duty of paying claimants. Incentives to prevent future accidents and diseases do not feature in this arrangement.

On the positive side, because everything done under workers' compensation derives from legislation, the system discourages interference for political gain or for any other reason. Yet as seen above in relation to the Asbestos Relief Trust, such interference is possible with trusts. Furthermore, workers' compensation offers greater protection against the prospect of claimants turning out to be more numerous than anticipated – a real prospect under trust arrangements. The capital amount paid into a trust at inception is a hit-or-miss process, with some amounts too high while others might be too low. Workers' compensation is not vulnerable to such uncertainties because government underwrites the system, providing greater security in the event that the contributions collected from employers fail to meet claims in any given financial year.

By design, South Africa has a sound workers' compensation system. It comprises two types of compensation. The first is no-fault (or 'normal') compensation, paid in terms of Section 22 of COIDA to any employee who sustains injury or contracts a disease in the course of employment. For the purposes of normal compensation, it makes no difference whether the injury or disease is due to the negligence of the employer or that of the employee – fault is not a consideration. The second type of compensation is 'increased' compensation, paid in terms of Section 56 of the same Act. However, unlike normal compensation, increased compensation requires the injured employee to prove that the injury was due to negligence on the part of the employer, senior management or a patent defect in premises, plant or machinery. If, in the opinion of the Compensation Commissioner, the injury or disease resulted from the negligence of the employer or a patent defect in plant premises or machinery, the employee qualifies for increased compensation. The system, therefore, pays no-fault compensation, as well as additional compensation in cases of employer negligence. However, COIDA only applies to general industry – it does not apply to compensation claims for diseases contracted in mines. For mine workers, the relevant legislation is ODMWA, which operates differently to COIDA in two main respects. First, ODMWA contains no provision for increased compensation. Second, ODMWA only pays

82 See, for example, Trebilcock, 'Incentive Issues', p. 71; Carroll *et al*., *Asbestos Litigation Costs*, p. 38; H. Schlesinger, J.T. Schmit and E.C. Venezian, 'Occupational Disease: Efficiency in Compensation Systems', *Journal of Insurance Regulation*, 11, 4 (1993), pp. 476–90; and G. Wagner, 'Tort Law and Liability Insurance', *The Geneva Papers on Risk and Insurance – Issues and Practice*, 31, 2 (2006), pp. 277–92.

83 P. Koning and M. Lindeboom, 'The Rise and Fall of Disability Insurance Enrolment in the Netherlands', *Journal of Economic Perspectives*, 29, 2 (2015), pp. 151–72; N.J. Philipsen, 'Compensation for Industrial Accidents and Incentives for Prevention: A Theoretical and Empirical Perspective', *European Journal of Law and Economics*, 28, 2 (2009), pp. 163–83.

lump sums as compensation whereas, under COIDA, if the degree of disability from a disease or injury exceeds 30 per cent, the claimant receives a disability pension.

However, it would be misleading to suggest that the workers' compensation system in South Africa is devoid of problems. Fragmentation within the system would not exist had government adopted the 1981 Nieuwenhuizen Commission recommendation to consolidate the two Acts into one – the previous Workmen's Compensation Act 30 of 1941 (which was replaced by COIDA in 1993) and ODMWA.[84] That the ODMWA system is sitting on a backlog of 106,000 claims is indicative of administrative problems.[85] Delay in paying claims is not unique to ODMWA. It applies to COIDA, as well.[86] Yet things were very different in the past when skilled miners from Australia, Great Britain and Canada flocked to South African mines.[87] Expatriate workers were looked after well, in terms of wages and compensation benefits, compared to their black counterparts. For example, between 1911 and 1929, a sum of over 11 million pounds was paid as compensation to white miners and their dependants compared to £702,036.00 paid to black miners.[88] Although racial disparities in workers' compensation legislation ceased to exist in 1994, benefits started to deteriorate at that point, with no formal plan to keep them within realistic levels. The compensation paid to Thembekile Mankayi is a case in point. Systematic erosion of benefits in government statutory arrangements often forces those in need of compensation to look for alternative remedies.[89] But the existence of these problems within the South African workers' compensation system should not detract from the main argument developed here: that workers' compensation is more conceptually sound than other methods, such as common-law liability of employers or trusts, for compensating silicosis sufferers. However, if government fails to take the necessary policy and legislative measures to ensure that benefits remain up to date, inevitably problems will arise.

Conclusion

The purpose of this article has been twofold. First, it sought to evaluate developments that unfolded subsequent to the landmark Constitutional Court decision in the *Mankayi* case. Second, the article sought to argue that, despite the decision to form trusts to compensate silicosis sufferers, reasons can be found to support the proposition that workers' compensation may still be the most viable compensation choice. In the eyes of many, the post-2011 developments are a culmination of decades of perceived injustice by mining companies towards victims of silicosis. Understandable as this perception is, this article has used local and international developments to advance the argument that the emergence of trusts as a vehicle for compensating silicosis sufferers comes with problems of its own. Without an effective regulatory framework to supervise and evaluate their operations, trusts become vulnerable to various forms of improper conduct. Evidence from the USA concerning asbestos bankruptcy trusts, as well as from the South African Asbestos Relief Trust, provides important insights into how things might go wrong when trusts are used to settle mass claims. The ways in which things might go wrong range from possible agency problems to errors in estimating the amounts needed to meet claims. If these problems

84 South African Department of Minerals and Energy Affairs, *Report of the Commission of Inquiry into Compensation for Occupational Diseases in the Republic of South Africa* (Pretoria, Republic of South Africa, 1981).
85 See Kahn, 'Fund has 106,000 Mine Workers that Need to be Paid Out'.
86 R. Ehrlich, 'Persistent Failure of the COIDA System to Compensate Occupational Disease in South Africa', *South African Medical Journal*, 102, 2 (2012), pp. 95–7.
87 See, for example, Lang, *Bullion Johannesburg*, p. 78, and Katz, *The White Death*, p. 2.
88 See McCulloch, 'Air Hunger', p. 125.
89 See Danzon, 'Compensation for Occupational Disease', p. 273.

receive no attention *ex ante*, trusts promise to be yet another expensive but less valuable addition to the South African compensation system. Given the long history of silicosis in the gold-mining industry, such an outcome would be particularly disappointing.

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