

Enterprise responsibility for sexual harassment in the workplace: comparing Dutch and South African law

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Introduction

Sexual harassment in the workplace is generally deplored, destructive of working relationships and unlawful. Despite this it is widespread and possibly on the increase. In Spain, according to a 2006 survey, 7,9% of women workers had been harassed by managers and colleagues during the previous 12 months.¹ In the Netherlands the number of employees who had suffered sexual harassment by fellow-employees in the previous 12 months doubled from 2,5% in 2000 to 5,3% in 2003.² Why, despite all measures to discourage it, does it remain so disturbingly prevalent?

An important clue lies in the reluctance of victims to come forward. In 1990 a survey showed that, while 76% of career women in South Africa had experienced sexual harassment during their working lives, most “would rather resign than ‘make a fuss’.”³ In Greece, according to a 2004 survey, 62.2% of women left their jobs within six months of suffering sexual harassment.⁴

This, in turn, raises questions about the role of employers. Unwillingness to acknowledge sexual harassment, let alone act against (senior) perpetrators, appears to be common. In Greece, the same survey showed that in 67,5% of cases management was unaware of sexual harassment but, even when it was aware, no action was taken in 56.7% of cases.⁵ The same picture emerges from some of the cases discussed below.

The role of employers, it is submitted, is crucial. The employer controls the workplace; sexual harassment cannot be combated effectively unless it takes the necessary action. In recent years the law has increasingly recognised the employer’s responsibility in this regard. In various systems, employers’ general liability for

¹ Antonio Martín Artiles “Persistence of gender discrimination and sexual harassment at work” eironline (18-07-2006) at www.eurofound.europa.eu/eiro/2006/06/articles/es0606039i.htm.

² Surveys by European Foundation for the Improvement of Living and Working Conditions *Violence, bullying and harassment in the workplace* (2003) available at www.eurofound.eu.int. at 16. See also Duncan Chappell and Vittorio Di Martino *Violence at work* (3rd ed) International Labour Office, Geneva (2006) available at www.ilo.ru/news/200606/e-book_small.pdf

³ Lisa Dancaster “Sexual Harassment in the Workplace: Should South Africa Adopt the American Approach?” (1991) 12 *Industrial Law Journal* (‘ILJ’) 449. See also Rochelle le Roux, Thandi Orleyn & Alan Rycroft *Sexual Harassment in the Workplace* Durban: LexisNexis Butterworths (2005) at 7.

⁴ Anda Stamati “First survey of sexual harassment in the workplace” eironline (30-07-2004) at <http://www.eurofound.europa.eu/eiro/2004/07/feature/gr0407103f.htm>.

⁵ *Ibid.*

wrongful conduct by their employees (hereafter referred to as “employer liability”) has been extended expressly to include liability for acts of (sexual) harassment by their employees. The aim, clearly, is to persuade employers to be more vigorous in discouraging such conduct.

It may be too early to judge the effectiveness of such measures. However, it is evident that the principle of employer liability brings with it a number of legal questions which, in practice, may often be contentious. For example –

- What is the extent of the employer’s liability? Does it extend only to acts of sexual harassment committed within the workplace, or outside the workplace as well?
- Should a distinction be drawn between cases where the perpetrator has been placed in authority over the victim as opposed to cases where the perpetrator and the victim are of equal standing?
- Should employers’ liability for sexual harassment be regulated as part of their duty to ensure safe working conditions or as an aspect of the victim’s right to dignity and equal treatment?

And, last but not least,

- Should enforcement of the employer’s duty be at the instance of the victim of sexual harassment, in the form of a personal right of action against the employer, or is it primarily a responsibility of the state?

These questions are considered below (not necessarily in the same order) and revisited in conclusion. In doing so the position in the Netherlands will be contrasted with that in South Africa, a country where legal development in this area has been exceptionally important. Following the abolition of minority rule in 1994, radical interventions were called for to deal with the legacy of centuries of injustice. While apartheid is forever synonymous with racism, institutionalised inequality had created a climate where every form of discrimination could flourish. Discriminatory treatment of women was especially pervasive, nowhere more so than in the workplace. The manner in which the new legal order has addressed the issue of discrimination in general, and sexual harassment in particular, is therefore worthy of note.

A comparative approach

It is trite that legal comparison must be approached with caution. Law is embedded in social structures and political power relations. This means, in the first place, that legal comparison should focus on concepts and on the “functions that institutions perform”⁶ rather than on institutions themselves. For this reason, too, individual employment law offers a more appropriate terrain for “transplanting” legal concepts than collective labour law.⁷

⁶ R. Blanpain & C. Engels (Eds) *Comparative Labour Law and Industrial Relations in Industrialized Market Economies* 7th ed The Hague: Kluwer Law International 2001 at 12.

⁷ That is, to the extent that collective bargaining systems tend to be bound up with domestic power relations. See Bob Hepple ‘Can Collective Labour Law Transplants Work? The South African Example’ (1999) 20 *ILJ* 1 at 2–

At the same time, as Kahn-Freund argued more than 30 years ago, “[i]ndustrialisation, urbanisation, and the development of communications have greatly reduced the environmental obstacles to legal transplantation”.⁸ Even in the least developed countries there had been “a tendency, stronger here, weaker there, and of course of varying velocity, to assimilate the law to that of the developed countries.”⁹ On this basis there can be little doubt that, with the onset of globalisation, the world has grown “even more amenable” to comparative labour law. Countries around the world, Willborn suggests,

“although clearly unique and individual, are more similar than they ever have been before. Geography matters less, sociological and cultural differences are narrowing, and economic forces are becoming increasingly globalized. While important political and interest group differences still exist, we can draw on fast-developing intellectual resources to help us sort through them.”¹⁰

This reflects what has been termed the “convergence school” of comparative labour relations.¹¹ In the case of South Africa, certainly, a process of convergence is strongly evident. Here we find a legal system rooted in the civil law traditions of Europe as well as English common law, with a body of labour law strongly influenced by international and European labour law, where the process of convergence has become increasingly systematic. South Africa’s Constitution,¹² like its labour statutes,¹³ is based on the same international instruments that serve as sources of law in countries around the world.¹⁴ Similarly, in developing the common law South African courts continue to draw on the jurisprudence of other common law systems, while decisions of South African courts are referred to in those countries.¹⁵

Also in defining employer responsibility for sexual harassment in the workplace, it will be seen, South African law is at a crossroads of international influences. All these factors suggest a fruitful basis for comparative study of South African legal development in this area.

3; Colin Fenwick & Evance Kalula “Law and Labour Market Regulation in East Asia and Southern Africa: Comparative Perspectives” *The International Journal of Comparative Labour Law and Industrial Relations* (2005) 193 at 198–199.

⁸ Sir Otto Kahn-Freund ‘On Uses and Misuses of Comparative Law’ (1974) 37 *Modern Law Review* 1 at 8–9, cited in Steven L. Willborn ‘Onward and Upward: The Next Twenty-Five Years of Comparative Labor Law Scholarship’ *Comparative Labor Law and Policy Journal*, 2003; 25 (1) 183 at 187.

⁹ *Ibid.* For more discussion, see Blanpain & Engels *op cit* at 18–20.

¹⁰ Willborn *op cit* at 189.

¹¹ Blanpain & Engels *op cit* at 3–4.

¹² Chapter II of the Constitution of the Republic of South Africa, 1996.

¹³ Thus, the drafters of South Africa’s Labour Relations Act of 1995 drew *inter alia* on Italian, UK, German and Dutch law in designing the post-apartheid labour dispensation: Hepple *op cit* at 2.

¹⁴ In addition, the constitutions of countries such as Germany, Canada and India were referred to significantly by the drafters of the Constitution.

¹⁵ See, for example, *R v. Headteacher and Governors of Denbigh High School* [2006] UKHL 15.

Were similarities all that existed, however, legal comparison would have little purpose.¹⁶ If similarities create a common language, it is the differences between systems that provide the real substance of comparative study. Observing how problems are dealt with in other systems, as Blanpain puts it, “contributes to the better perception of one’s own national system” and “enriches one’s own approach to and understanding of industrial relations”.¹⁷ Importantly for present purposes, it may also indicate possible directions of future legal development.¹⁸

The scope of employer liability

Although the doctrine of employer liability was unknown in Roman law, it has found its way into many if not all legal systems. Over 100 years ago a leading South African judge observed:

“The Roman-Dutch law recognises and adopts the principle, that a master or employer is liable for the injuries caused by his servants or workmen, within the scope of their employment. This general principle is also the law in England, Scotland, the United States of America, France, Belgium, Holland, Italy, Denmark and Norway.”¹⁹

Despite its delictual (tortious) nature, employer liability is “strict” (that is, not dependent on fault by the employer). This represents a fundamental departure from the rule that such liability arises from wrongful conduct on the part of the person held liable. In the late 19th century Pollock explained the rationale of employer liability as follows:

“I am answerable ... for the wrongs of my servant or agent, not because he is authorized by me or personally represents me, but because he is about my affairs, and I am bound to see that my affairs are conducted with due regard to the safety of others.”²⁰

The basis for this extended form of liability has always been seen as “considerations of social policy”²¹ rather than legal principle. Most important of these considerations,

¹⁶ As Ronnmar puts it: “A fundamental prerequisite for a meaningful comparison is the existence of important differences, but also basic similarities, between the countries subjected to study”: “Managerial Prerogative and the Employee’s Obligation to Work: Comparative Perspectives on Functional Flexibility” (2006) 56 *ILJ* [UK] 35.

¹⁷ Blanpain & Engels *op cit* at 4. See, for example, Jane Aeberhard-Hodges “Sexual harassment in employment: Recent judicial and arbitral trends” *International Labour Review* Vol. 135 (1996), No. 5 at 499.

¹⁸ Blanpain & Engels *op cit* at 6–7. For example, “one of the principal factors persuading Australia to move away from its historic practice of explicit discrimination against women was the existence of a “world wide trend towards equal pay for females””: Willborn *op cit* at 191, citing National Wage and Equal Pay Cases 1972, 147 C.A.R. 172, 177–78 (1972).

¹⁹ Per Kotze CJ in *Lewis v The Salisbury Gold Mining Company* (1894) OR 1 at 20; cited in *Hirsch Appliance Specialists v Shield Security Natal (Pty) Ltd* 1992 (3) SA 643 (D) at 648.

²⁰ Pollock *Liability for the Torts of Agents and Servants* (1885) 1 *L.Q. Rev.* 207 at 209, cited in R.G. McKerron *The Law of Delict* 2nd ed Cape Town: Juta (1939) at 99.

²¹ McKerron *op cit* at 100.

as the House of Lords recently reiterated, is “the belief that a person who employs others to advance his own economic interest should in fairness be placed under a corresponding liability for losses incurred in the course of the enterprise”.²² In practice it is “best understood as a loss-distribution device”. Given that few employees could afford to pay substantial amounts of damages, it allows the victim of an employee’s wrongful conduct to recover damages from a party more likely to be able to pay – that is, the employee’s (possibly blameless) employer.

The very fact that liability is strict, however, makes it all the more important to define its scope clearly. By definition, employer liability is based on the employment relationship. It follows, in Salmond’s much-quoted phrase, that “[a] master is not responsible for a wrongful act done by his servant unless it is done in the course of his employment”.²³ Unfortunately, “course of employment” is hardly a precise concept. According to Salmond, an act is done in the course of employment “if it is either (a) a wrongful act authorised by the master or (b) a wrongful and unauthorised *mode* of doing some act authorised by the master.”²⁴ In South Africa, similarly, the “standard test” of vicarious liability holds that an act done by an employee “solely for his own interests and purposes” falls outside the course of employment unless there is “a sufficiently close link” between the employee’s act and the employer’s business.²⁵ Such a link will only be present if “at the relevant time the employee was about the affairs, or business, or doing the work of, the employer”; and “affairs of the employer”, in turn, “must relate to *what the employee was generally employed or specifically instructed to do*”.²⁶ An employer may thus be liable even if the employee’s conduct was unauthorised provided that, in committing it, the employee was engaged in “an activity reasonably necessary” to achieve the employer’s objectives.

In its classic form, therefore, the doctrine hardly seems applicable to acts of sexual harassment by employees. Sexual harassment “authorised” by an employer will not only be exceptional but would make the employer directly liable. Typically, harassment is not only unauthorised but also prohibited, either expressly or by implication, and forms no part of “what the employee was generally employed or specifically instructed to do”. The employer’s obvious defence will be that the

²² *Lister and Others v Hesley Hall Ltd* [2001] UKHL 22 at par 65, with reference to Fleming *The Law of Torts* 9th ed (1998) at 410.

²³ *Salmond on Torts* 1st ed (1907), cited in *Lister v Hesley Hall* at par 67 (above). The leading case in South Africa is *Mkize v Martens* 1914 AD 382. It may be noted that the terms “course” and “scope” of employment are often used interchangeably.

²⁴ *Ibid.*

²⁵ *Minister of Police v Rabie* 1986 (1) SA 117 (A) at 134. In *K v Minister of Safety and Security* [2005] 8 BLLR 749 (CC) the Constitutional Court added an important qualification: in deciding whether a “sufficiently close” link existed, “a court should consider the need to give effect to the spirit, purport and objects of the Bill of Rights”: at par 32.

²⁶ *Absa Bank Ltd v Bond Equipment (Pretoria) (Pty) Ltd* (2001) 22 ILJ 95 (SCA) at par 5; emphasis added.

employee was *not* acting “in the scope of his employment” but was, to use the classic phrase, “on a frolic of his own”.²⁷

Codification of employer liability does not necessarily solve the problem since, in the last analysis, legislation must grapple with the same questions that the common law courts have been faced with. In terms of article 6:170 of the Dutch Civil Code an employer is liable for damage caused to a third party through wrongful conduct of a “subordinate” in the course of his or her employment, provided the possibility of such wrongful conduct was “increased” as a result of an instruction given by the employer.²⁸ In practice this has been interpreted to mean that a “functional relationship” must exist between the employee’s duties and her or his wrongful conduct.²⁹ This does not mean that the conduct must have formed part of those duties; even the fact that the employer could not have prevented it, or that the employee had disobeyed the employer’s instructions, does not in itself exonerate the employer.³⁰ However, the existence of a “functional relationship” is a question of fact, and in practice “it is not impossible that a judge will consider that, although an employee did commit harassment or sexual intimidation, it was unrelated to the performance of his duties.”³¹

Thus, where a man doing odd jobs for an employer committed sexual harassment, the court found that it was not his activities that brought him into contact with his victim but merely his presence in the workplace and, although he was “subordinate” to the employer, his actual duties did not increase the possibility of misconduct. The employer was therefore not liable.³²

It is against this background that the enactment of legislative measures dealing specifically with employer responsibility for sexual harassment in the workplace must be seen. In Europe the amendment of the Equal Treatment Directive³³ in 2002 provided a definition of “harassment” as well as “sexual harassment”, stigmatising both as “discrimination on the grounds of sex”.³⁴ Employers, in terms of the new

²⁷ *Joel v Morison* (1834) 6 C&P 501 at 503.

²⁸ Article 6:171 of the Code extends the employer’s liability to wrongful conduct by a “non-subordinate” (e.g., independent contractor) whilst doing work for the employer’s business.

²⁹ I. van der Putt-Van Vesseem *Aansprakelijkheid van Scholen* Letselschadebureau Haaglanden BV at http://www.letselschadeforum.nl/Letselschade_Nieuws/Letselschade_Bureau_Haaglanden/Aansprakelijkheid_van_scholen_20060930139/. This may be compared to the requirement of a “sufficiently close link” between the employee’s act and the employer’s business in South Africa: see above.

³⁰ J.C.M. Bonnier “Aansprakelijkheid van de werknemer” at <http://www.dakweb.nl/rh/96-9/96-9-35.htm>. See also G.J.J. Heerma van Voss “Nieuw Burgerlijk Wetboek, vrouwen en arbeidsrecht” in A. Mattijssen (Ed) *Het Nieuw Burgerlijk Wetboek & Vrouwen* Amsterdam (1994) at 142; available at https://www.openaccess.leidenuniv.nl/bitstream/1887/3545/1/355_068.pdf.

³¹ M.S.A. Vegter *Vergoeding van psychisch letsel door de werkgever* Sdu Uitgevers (2005) at 156; available at dare.uvu.nl/bitstream/1871/8967/1/boek_psychisch_letsel.pdf (translation by the present author).

³² Judgment of the Rechtbank Arnhem of 4 July 2002 (Rb. Arnhem, 4 juli 2002, NJkort 2002, 52) as summarised in Van der Putt-Van Vesseem *op cit.*

³³ Directive 76/207/EEC on the equal treatment of men and women, as amended by Directive 2002/73/EC. Implementation by member states was required by October 2005.

³⁴ Amended article 2.2 and 2.3.

article 2(5), are expected “to take measures to combat all forms of sexual discrimination and, in particular, to take preventive measures against harassment and sexual harassment in the workplace, in accordance with national legislation and practice.”

Different states of the European Union have given effect to the Directive in different ways.³⁵ In the Netherlands, articles 7:658 (safety at work), 7:646 (prohibition of discrimination between men and women) and 6:162 (general liability for wrongful acts) of the Civil Code, read with the Working Conditions Act (WCA)³⁶ and the Equal Treatment Act (ETA),³⁷ provide a basis for holding employers liable for acts of sexual harassment by employees.³⁸ The latter two statutes will be compared with their South African equivalents before looking more closely at recent developments in South Africa.

Safety legislation

In the Netherlands, although harassment is defined as a form of discrimination, employer liability for sexual harassment is regulated primarily in terms of the WCA. Article 3 of the statute requires employers to “ensure the safety and health of employees in relation to all aspects of the work process” and, as part of that duty, to implement a policy to “prevent or, if that is not possible, to limit psychosocial stress at work”. “Psychosocial stress” is defined as including sexual harassment.³⁹ Case law has indicated that employers are expected to act “effectively” and “preventively” against sexual harassment and to penalise it.⁴⁰ These duties are enforced by the labour inspectorate;⁴¹ thus, no personal remedy accrues to a complainant in the event of breach. However, article 7:658 of the Civil Code (a) requires the employer to manage the workplace in a such a way as may reasonably be necessary to prevent injury to employees, and (b) renders the employer liable for injury suffered by employees in the performance of their duties.⁴² European law moreover requires that

³⁵ Twenty states, including the Netherlands, already had laws that made it possible to hold an employer liable for sexual harassment by an employee: see The Irish Presidency of the European Union in association with FGS Consulting and Professor Aileen McGolgan *Report on Sexual Harassment In The Workplace in EU Member States* (June 2004) Executive Summary at xiii–xiv; available at unece.org/gender/publications/Multi-Country/SexualHarassmentReport.pdf.

³⁶ Arbeidsomstandighedenwet (Arbowet) of 1998, discussed below. Sexual harassment is also dealt with by the Regulation on Sexual Harassment of Civil Servants of 1994.

³⁷ Algemene Wet Gelijke Behandeling (AWGB) of 1994, discussed below.

³⁸ See also article 7:611 of the Civil Code, requiring employers and employees to conduct themselves as “good” employers and employees; cf judgment of Gerechtshof Leeuwarden dated 6 September 2000 (Case no 9700469), available at http://www.vrouwenrecht.nl/modules/jurisprudentie/?act=jur_info&vj_id=308.

³⁹ Article 1.3.e, WCA, effective as from 1 January 2007. “Sexual harassment” is no longer defined in the WCA but should be given the same meaning as in the ETA: Commissie Gelijke Behandeling *Gelijke behandeling: oordelen en commentaar 2006* Utrecht: Willem-Jan van der Wolf (2007) at 60 (hereafter ‘Oordelenbundel’).

⁴⁰ Commissie Gelijke Behandeling *Gelijke behandeling: oordelen en commentaar 2003* Deventer: Kluwer (2004) at 91.

⁴¹ A victim of sexual harassment may therefore lodge a complaint with the labour inspectorate: see, for example, decision of Commissie Gelijke Behandeling dated 25 May 1999 (case no 99-48; CWI; RN 1999, nr. 1080) at par 3.1.

⁴² The employer can only escape liability by proving that it complied with this duty or that the damage was due to a significant extent to deliberate or reckless conduct of the employee: article 7:658.2. Liability may also arise

compensation awarded to victims of discrimination “must be adequate in relation to the damage sustained”.⁴³ Member states must accordingly “ensure real and effective compensation or reparation ... for the loss and damage sustained by a person injured as a result of discrimination ... in a way which is dissuasive and proportionate to the damage suffered; such compensation or reparation may not be restricted by the fixing of a prior upper limit”.⁴⁴ By way of the Civil Code, thus, victims of sexual harassment acquire a remedy for damages suffered.

Recent court judgments and decisions of the Commission for Equal Treatment⁴⁵ have clarified the content of the employer’s duty. The following points should be noted:

- employers are expected to have a written policy for the prevention of sexual harassment that is adequate and clear, and to apply it properly when dealing with complaints;⁴⁶
- sexual harassment by a manager creates a presumption of employer liability, in that the manager exercises authority on behalf of the employer, whereas in the case of sexual harassment by a fellow-employee the test is whether the employer dealt properly with the complaint;⁴⁷ and
- if there is no adequate policy, the fact that sexual harassment by a manager takes place outside working hours is immaterial.⁴⁸

In South Africa the application of safety and health legislation in relation to sexual harassment is more problematic. As in the Netherlands, every employer is under a general duty to “provide and maintain, as far as is reasonably practicable, a working environment that is safe and without risk to the health of his employees”.⁴⁹ There, however, the similarity ends. The South African statute focuses on the prevention of hazards arising from the performance of work and makes no mention of sexual harassment. Failure by an employer to comply with its statutory duties is a criminal offence⁵⁰ and does not entitle an injured employee to seek damages from the employer; instead, compensation may be claimed from a state-administered fund in

from the conduct of third parties (for example, clients of the employer) to whom the employer entrusts the implementation of its duty: *Meuffels v Ca-La* HR 9 november 2001, RvdW 2001/157, JAR 2001/257, as discussed in J.M. Fleuren-van Walsem & G.J.J. Heerma van Voss *Kroniek van hot social recht* Afl. 2002/10 at <http://www.njb.nl/NJB/mem/archief/art40210.html>.

⁴³ Clause 18, Preamble to Directive 2002/73/EC. In principle, no distinction is drawn between physical and psychological injury: Marianne Gijzen The Netherlands Country Report on Measures to Combat Discrimination for the European Network of Legal Experts in the non-discrimination field (December 2004) at ec.europa.eu/employment_social/fundamental_rights/pdf/legnet/nlrep05_en.pdf, citing M.S.A Vegter “Aansprakelijkheid werkgever voor psychische schade werknemer als gevolg van seksuele intimidatie van de werknemer” in *Aansprakelijkheid, Verzekering en Schade*, nr. 5, October 2001 at 133-140, 134-135 where the relevant case law is discussed.

⁴⁴ Article 6.2, Directive 2002/73/EC.

⁴⁵ Commissie Gelijke Behandeling. For a detailed overview of its activities, see *Commissie Gelijke Behandeling Hot verschil Gemaakt: Evaluatie AWGB en werkzaamheden CGB 1999-2004* (no date) available at www.cgb.nl/_media/downloadables/CGB%20evaluatie.pdf.

⁴⁶ CGB decisions 2006-36 and 2006-250, summarised at *Oordelenbundel 74–75*. See, for example, the sexual harassment policy of the University of Leiden at <http://www.reglementen.leidenuniv.nl/index.php3?c=37>.

⁴⁷ CGB decision 2006-250, *ibid* at 75.

⁴⁸ *G v Van M BV* Rechtbank Amsterdam (case no KG 01-79; judgment dated 22 February 2001).

⁴⁹ Section 8(1), Occupational Health and Safety Act 85 of 1993 (“OHSA”).

⁵⁰ Section 38(1), OHSA.

respect of “disablement” (partial or complete) caused by accidents or diseases “arising out of and in the course of an employee’s employment”.⁵¹ Although such compensation is awarded on a no-fault basis, the system was clearly not designed for dealing with cases of sexual harassment. Most obviously, it is questionable whether a wrongful act can or should be regarded as an “accident”. Second, compensation is due only in respect of injuries that result in some form of “disablement”.⁵² Third, the amount of compensation is capped by various formulas applicable to different categories of injuries and diseases, based on the employee’s past earnings.⁵³ Most importantly, section 35 of COIDA expressly abolishes the right of employees to claim (additional) damages from employers in respect of any occupational injury or disease.⁵⁴

These problems, it is submitted, are fundamental. In the context of sexual harassment, the net effect of section 35 would be to extend protection to employers rather than to victims. Certainly, employers faced with claims arising from sexual harassment by employees have been quick to invoke section 35; and, ominously, the Supreme Court of Appeal has observed in an *obiter dictum* 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 [COIDA]”.⁵⁵ Significantly, however, the courts have managed to avoid applying this principle in all the matters that have so far come before them, albeit for reasons that are at best somewhat technical and, at worst, questionable. Thus, in one case it was ruled that an “accident” for purposes of COIDA means a specific incident whereas the plaintiff’s harassment had taken place over a period of time.⁵⁶ In another case it was held (problematically) that the acts of sexual harassment did not arise in course of the “employment” of either the perpetrator or the victim.⁵⁷ No less problematically, the Supreme Court of Appeal has found that injury caused by an act of harassment committed outside the workplace did not arise

⁵¹ Sections 1, 15, 22 and 65, Compensation for Occupational Injuries and Diseases Act 130 of 1993 (‘COIDA’).

⁵² In the Netherlands an employee unable to work as a result of sexual harassment, even though not disabled for purposes of the WCA, is entitled to continued payment of wages in terms of article 7:628 of the Civil Code (dealing with inability to work for which the employer is responsible): see judgment of Rechtbank Rotterdam dated 27 November 2002 (Case no 43441) available at http://www.vrouwenrecht.nl/modules/jurisprudention/?act=jur_info&vj_id=493.

⁵³ Schedule 4, COIDA. Thus, even if compensation is due, it will not necessarily bear any relation to the damage suffered by the employee. The Act does provide for additional compensation if the employer was negligent but this, too, is limited to pecuniary loss: section 56, COIDA. For criticism, see MP Olivier, N Smit & ER Kalula *Social Security: A Legal Analysis* Durban: LexisNexis Butterworths (2003) at 480 and 485. It is submitted that article 6.2 of Directive 2002/73/EC (above) offers a more principled approach.

⁵⁴ In *Jooste v Score Supermarket Trading (Pty) Ltd* 1999 (2) BCLR 139 (CC) the Constitutional Court held that this limitation did not violate the right to equal treatment; a no-fault system of compensation funded by employers’ contributions, while excluding the employee’s right to claim damages, represented a rational legislative decision falling beyond the jurisdiction of the courts.

⁵⁵ *Media 24 Ltd & another v Grobler* [2005] 7 BLLR 649 (SCA) at par 77.

⁵⁶ *Grobler v Naspers Bpk & another* [2004] 5 BLLR 455 (C) at 528–529. In addition, the victim and the perpetrator had been employed by different legal entities within the same corporate group, thus precluding the perpetrator’s employer from relying on section 35 of COIDA.

⁵⁷ *Ntsabo v Real Security CC* [2004] 1 BLLR 58 (LC) at 96–97.

in the course of employment.⁵⁸ Had it taken place inside the workplace, it is implied, such injury might have been regarded as the consequence of an “accident” covered by COIDA, thus excluding the employer’s liability.⁵⁹

Such an outcome would be highly problematic. In essence, it would equate a violation of an employee’s fundamental rights with a mere industrial accident. At the same time it would nullify the employer’s responsibility towards the victim by rendering it immune against claims arising from breach of its duty to protect her dignity. The point is that preventing sexual harassment not just about safety at work; it is about combating sex discrimination. For this reason, it is submitted, legislation implementing the right to equal treatment creates a more appropriate framework for dealing with sexual harassment.

Equality legislation

In the Netherlands, Directive 2002/73 resulted in amendments to article 7:646 of the Civil Code and to the ETA expressly prohibiting harassment and sexual harassment.⁶⁰ Paragraph 6 of the former now provides that the general prohibition of direct discrimination includes harassment and sexual harassment. The new article 1a of ETA similarly states that discrimination for purposes of the statute includes harassment. In one of the first interpretations of article 1a by the Commission for Equal Treatment, failure by the directors of a company to take measures to prevent a sexually intimidating atmosphere in the workplace was held to be a contravention of article 1a and, therefore, of article 7:646.⁶¹

In South Africa the former Industrial Court accepted that “sexual harassment is a form of sexual discrimination”,⁶² while the former Labour Appeal Court termed it “an egregious invasion of [the victim’s] employment security and her dignity”.⁶³ In both cases it was accepted that an employer is under a duty to protect its employees against sexual harassment in the employment relationship. The interim Constitution

⁵⁸ Fn 55 above.

⁵⁹ Post-traumatic stress disorder arising from working conditions has been accepted as an occupational injury or disease which is therefore subject to COIDA: see *Urquhart v Compensation Commissioner* [2006] 1 BLLR 96 (E); *Odayar v Compensation Commissioner* (2006) 27 ILJ 1477 (N).

⁶⁰ Act of 5 October 2006 in *Staatsblad van het Koninkrijk der Nederlanden* dated 17 October 2006, with effect from 18 October 2006: Oordelenbundel at 59–60. See also Minister van Sociale Zaken *Memorie van toelichting op wetsvoorstel Wijziging van de Wet gelijke behandeling van mannen en vrouwen en het Burgerlijk Wetboek ter uitvoering van Richtlijn 2002/73/EG* (12 september 2005) at http://home.szw.nl/navigatie/dossier/dsp_dossier.cfm?set_id=340&doctype_id=226#7066600.

⁶¹ CGB decision 2006-250, *Oordelenbundel* (2006) at 75. Like the WCA, the ETA does not place any personal right of action at the disposal of a victim of discrimination; such claims must be brought in terms of the appropriate provisions of the Civil Code. Enforcement in terms of the ETA proceeds by way of complaints to the Commissie Gelijke Behandeling (Equal Treatment Commission) which may issue advisory awards or institute legal action: see sections 13–15, ETA.

⁶² *J. v M. Ltd* (1989) 10 ILJ 755 (IC) at 757–758. The Industrial Court had been established in terms of the (previous) Labour Relations Act 28 of 1956 with jurisdiction to determine “unfair labour practices”, a concept broad enough to include sexual harassment: in general, see Alan Rycroft & Barney Jordaan *A Guide to South African Labour Law* 2nd ed Cape Town: Juta (1992) chapter 3.

⁶³ *Intertech Systems (Pty) Ltd v Sowter* (1997) 18 ILJ 689 (LAC) at 705.

of 1993, followed by the final Constitution of 1996, entrenched the right to equality and placed a general prohibition on all forms of “unfair” discrimination, including sex discrimination.⁶⁴ Separate statutes have been enacted to implement these provisions inside and outside the employment context.⁶⁵ Within the employment context the Employment Equity Act⁶⁶ establishes an integrated complex of rights and duties giving effect to the right to equality. On the one hand it prohibits unfair discrimination against employees in any employment policy or practice;⁶⁷ on the other hand it requires “designated employers”⁶⁸ to implement employment equity plans which must, *inter alia*, contain measures to “identify and eliminate employment barriers, including unfair discrimination, which adversely affect people from designated groups.”⁶⁹ The Act expressly provides that “[h]arassment of an employee is a form of unfair discrimination and is prohibited on any one, or a combination of grounds of unfair discrimination listed in subsection (1)”.⁷⁰

Employer liability is regulated by two mechanisms. First, section 60 of the Act states that an employer will be held co-responsible for any contravention of the Act (thus, including sexual harassment) by an employee “while at work” unless, after consulting “all relevant parties”, it takes “the necessary steps to eliminate the alleged conduct”. Liability can also be avoided by proving that the employer did “all that was reasonably practicable” to prevent the contravention.⁷¹ In addition, any contravention must “immediately be brought to the attention of the employer”.⁷² Should a dispute reach the Labour Court the onus is on the employer to show that no unfair discrimination took place.⁷³ No limit is placed on the amount of compensation and/or damages that may be awarded to a victim.⁷⁴

⁶⁴ Section 9(3) of the Constitution of the Republic of South Africa, 1996, prohibits discrimination on 17 listed grounds, including sex and gender, as well as any other ground involving an analogous infringement of human dignity. These various forms of prohibited discrimination are collectively referred to as “unfair discrimination”.

⁶⁵ Section 9(4) of the Constitution required the enactment of legislation “to prevent or prohibit unfair discrimination”.

⁶⁶ Act 55 of 1998 (‘EEA’). The Act was influenced to a significant degree by the Canadian Employment Equity Act of 1995. Discrimination outside the employment relationship is dealt with by the Promotion of Equality and Prohibition of Unfair Discrimination Act 4 of 2000 (known as the “Equality Act”).

⁶⁷ Section 6(1), EEA. 19 prohibited grounds of discrimination are listed, including sex and gender. In addition, section 5 places a general duty on all employers “to [eliminate] unfair discrimination in any employment policy or practice,” which includes “the working environment and facilities”: section 1, EEA.

⁶⁸ In practice, “designated employers” are those in the public sector as well as medium to large employers in the private sector: see section 1 read with Schedule 4.

⁶⁹ Section 15(2)(a), EEA. “Designated groups” is defined as “black people, women and people with disabilities”. “Black people” is defined as “Africans, Coloureds and Indians”: section 1, EEA.

⁷⁰ Section 6(3), EEA.

⁷¹ See, for example, *Mokoena & another v Garden Art (Pty) Ltd & another* [2008] JOL 21227 (LC) where the employer was found not liable in that its conduct had met this requirement.

⁷² Section 60(1). In *Nsabo v Real Security* [2004] 1 BLLR 58 (LC) “immediately” was interpreted as meaning “within a reasonable time in the circumstances”: at p 91. This interpretation has been adopted by the Code of Good Practice (fn 75 below): see item 8.1.2.

⁷³ Section 11, EEA. Article 7:646.8 of the Dutch Civil Code has a similar effect.

⁷⁴ Section 50(1), EEA. See, for example, *Christian v Colliers Properties* [2005] 5 BLLR 479 (LC). For comment, see Alan Rycroft “Compensating the Harassed Employee” Paper presented to 17th Annual Labour Law Conference (Johannesburg, 2004) available at <http://www.lexisnexis.co.za/ServicesProducts/presentations/17th/AlanRycroft.doc>.

The action expected of employers in preventing and dealing with sexual harassment is spelled out in the Amended Code of Good Practice on the Handling of Sexual Harassment Cases in the Workplace.⁷⁵ “Sexual harassment” is defined extensively.⁷⁶ The employer’s fundamental responsibility is to “create and maintain a working environment in which the dignity of employees is respected”.⁷⁷ This includes adopting a sexual harassment policy as well as defined procedures for reporting and dealing with complaints.⁷⁸

Alternatively, it is possible that – at least in many cases – measures to prevent sexual harassment may be enforced by the labour inspectorate using its administrative powers. “Designated” employers⁷⁹ are under a duty to draw up and implement employment equity plans which must include, *inter alia*, measures to eliminate unfair discrimination – in other words, including sexual harassment.⁸⁰ The labour inspectorate has extensive powers to enforce these provisions, including the power to seek court orders.⁸¹ The Labour Court has held in a number of cases that these administrative procedures are exclusive; in other words, employees have no personal right to seek the enforcement of affirmative action measures in their own favour.⁸² However, it is inconceivable that the right of employees to enforce the fundamental right enshrined in section 6 of the EEA, by claiming damages arising from an employer’s failure to take measures to eliminate sexual harassment, could be precluded on this basis. Although it has yet to be confirmed by the courts, it is submitted that a victim of sexual harassment may lodge a complaint with the labour inspectorate while, at the same time, instituting legal action against the perpetrator and/or the employer in terms of section 60.

⁷⁵ GN 1357 of 4 August 2005; available at http://www.workinfo.com/free/Sub_for_legres/data/equity/cgpsh2.htm. A Code of Good Practice is not a source of law but serves as a guide to the interpretation of law. In the Netherlands, while broad guidelines for employers have been formulated, no similar code has been published: Ministerie van Sociale Zaken en Werkgelegenheid “Seksuele intimidatie: informatie voor werkgevers” at http://home.szw.nl/navigatie/dossier/dsp_dossier.cfm?set_id=102&link_id=5498#463300. The WCA regulations published by the labour inspectorate (*Arbobesluit: integrale versie geldig vanaf 1 januari 2007*) do not deal expressly with sexual harassment: see article 2.15 at <http://www.arbo.nl/onbekend/onbekend/algemeen/szw-documenten/Wetten/docs/arbobesluit-integrale-versie-januari-2007-doc.pdf> do.

⁷⁶ In essence, sexual harassment is characterised as “unwelcome conduct of a sexual nature that violates the rights of an employee and constitutes a barrier to equity in the workplace”: item 4. Its various defining features are explained more fully in item 5.

⁷⁷ Item 6.

⁷⁸ Item 8.

⁷⁹ In essence, medium to large employers in the private sector and all employers in the public sector: see section 1, EEA.

⁸⁰ Sections 15(2)(a) and 20(2)(b), EEA. Measures to prevent unfair discrimination are included under “affirmative action measures”.

⁸¹ See Chapter V Part A, EEA.

⁸² *Dudley v City of Cape Town & another* [2004] 5 BLLR 413 (LC); *Cupido v GlaxoSmithKline South Africa (Pty) Ltd* [2005] 6 BLLR 555 (LC).

And yet, in practice, very few claims involving sexual harassment have been brought against employers⁸³ and, of these, only one has been based on section 60.⁸⁴ The applicant in this matter was a female security guard who, after suffering prolonged harassment by her supervisor, was driven to resign by the employer's unresponsiveness to her complaints. Her claim of unfair dismissal,⁸⁵ combined with a claim of unfair discrimination, was successful. While certain aspects of the judgment are open to question,⁸⁶ it leaves no doubt that in circumstances such as these section 60 of the EEA offers an effective remedy to victims of sexual harassment.

As noted above, however, section 60 applies only to harassment perpetrated in the "workplace" by an "employee" of the victim's employer – in other words, a fellow-employee.⁸⁷ Where either of these factors is absent, section 60 will not apply.⁸⁸ To hold an employer liable under such circumstances it is therefore necessary to go beyond section 60.⁸⁹ Two mechanisms developed by the South African courts to extend the employer's liability are discussed below: (a) application or development of a common law remedy, and (b) direct enforcement of the victim's constitutional right to equality.

⁸³ Le Roux *et al* list 61 reported cases between 1989 and 2004 dealing with sexual harassment, most of them post-1998 (*op cit* at 133–134). Many were brought by perpetrators dismissed for sexual harassment challenging the fairness of their dismissal. One possible explanation for the lack of claims against employers is that cases of sexual harassment are increasingly being resolved by means of internal procedures (see above). It is also likely that many disputes are settled through conciliation before they reach court: cf Ronald Bernikow "10 Years of the CCMA – An Assessment for Labour" (2007) 11 *Law, Democracy & Development* (Special Edition) 13, especially at 20–21.

⁸⁴ *Ntsabo v Real Security CC* [2004] 1 BLLR 58 (LC).

⁸⁵ "Dismissal" is defined in the Labour Relations Act 66 of 1995 ('LRA') as including termination of employment by an employee where the employer has made continued employment "intolerable": section 186(1)(e), LRA.

⁸⁶ In particular, the finding that the applicant's dismissal was unfair but not "automatically unfair" (i.e., based on a prohibited ground such as sex discrimination) has been criticised. In the later case of *Christian v Colliers Properties* [2005] 5 BLLR 479 (LC) an employee who was forced to resign as a result of sexual harassment was awarded compensation for automatically unfair dismissal in terms of the LRA as well as damages for unfair discrimination in terms of the EEA. For a comparable decision in the Netherlands, see judgment of Rechtbank Rotterdam dated 30 September 1999 (Case no 103099/HA ZA 98-2312) available at http://www.vrouwenrecht.nl/modules/jurisprudentie/?act=jur_info&vj_id=154.

⁸⁷ Le Roux *et al op cit* at 94–96; Benita 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 at 1921. In the Netherlands, the more general wording of article 3 of the Arboret appears to avoid this difficulty.

⁸⁸ In addition, "the employer will only be liable if it fails to take the necessary steps to eliminate harassment after it has been brought to its attention": Rochelle le Roux "Sexual harassment in the workplace" (2004) 25 *ILJ* 1897 at 1906. Liability for permitting sexual harassment to take place can thus be avoided by taking appropriate action after it is reported.

⁸⁹ In principle, South African courts are prepared to recognise general common law remedies even where specific statutory remedies exist to the extent that the former are not abolished expressly or by necessary implication: *Fedlife Assurance Ltd v Wolfaardt* [2001] 12 BLLR 1301 (SCA). Thus, the EEA does not exclude the right of a victim of sexual harassment to hold her employer liable in delict (tort): *Media 24 Ltd & another v Grobler* [2005] 7 BLLR 649 (SCA) at pars 75–76. See also *Orr & another v Unisa* [2004] 9 BLLR 954 (LC) at pars 13–17.

Applying or developing the common law

Section 8(3) of the Constitution mandates the courts to give effect to a basic right by applying, or if necessary developing, the common law “to the extent that legislation does not give effect to that right”.⁹⁰ In addition, section 39(2) states that, when doing so or when interpreting any legislation, a court “must promote the spirit, purport and objects of the Bill of Rights”.

A landmark case in the development of the doctrine of the employer’s vicarious liability was *Grobler v Naspers Bpk & another*.⁹¹ In this matter the plaintiff had suffered severe sexual harassment at the hands of a trainee manager (Samuels) who was, however, employed by another company within the same corporate group. Since this precluded her from relying on section 60 of the EEA, the victim therefore proceeded against Samuels’s employer in terms of the common law doctrine of vicarious liability. According to the “standard test” for employer liability (see above) she had little chance of success. The court, however, ruled that the doctrine should be interpreted afresh in the light of its evolution in a number of foreign jurisdictions.⁹² From the judgment of the Canadian Supreme Court in *Bazley v Curry*⁹³ Nel J extracted the principle that “[v]icarious liability was always concerned with policy considerations that have changed over the centuries and represented a compromise between the social interest in providing an innocent victim of a wrongful act with a remedy against a financially strong defendant and a concern that unreasonable burdens are not placed on enterprises”.⁹⁴ He went on to cite *Bazley* as follows:

“[Courts] should openly confront the question of whether liability should lie against the employer, rather than obscuring the decision beneath semantic discussions of ‘scope of employment’ and ‘mode of conduct’.... The fundamental question is whether the wrongful act is sufficiently related to conduct authorized by the employer to justify the imposition of vicarious liability. ... Once engaged in a particular business, it is fair that an employer be made to pay the generally foreseeable costs of that business. ...In determining the sufficiency of the connection between the employer’s creation or enhancement of the risk and the wrong complained of, subsidiary factors may be considered. These may vary with the nature of the case [but include] the extent of power conferred on the employee in relation to the victim [and] the vulnerability of potential victims to wrongful exercise of the employee’s power.”⁹⁵

⁹⁰ See also section 173 of the Constitution, providing for the power of superior courts to develop the common law, and

⁹¹ [2004] 5 BLLR 455 (C).

⁹² The reported judgment (in Afrikaans) runs to over 70 pages, citing numerous decisions from Australia, Canada, New Zealand, the UK and the USA. A summary appears in Whitcher *op cit*.

⁹³ 174 DLR (4th) 45, at pp 514–517 of the judgment. Much attention was also given to the House of Lords judgment in *Lister v Hesley Hall Ltd*. [2001] UKHL 22: see pp 517–520 of the judgment and Douglas Brodie “Enterprise Liability: Justifying Vicarious Liability” *Oxford Journal of Legal Studies* 2007 27 (493).

⁹⁴ At 515.

⁹⁵ At 516–517.

Nel J ultimately found for the plaintiff on the basis that “even without applying the ‘supervisor’ test⁹⁶ ... Naspers would be liable since the employment relationship created or increased the risk of harassment.”⁹⁷ Even if he was wrong in this finding, the learned judge held, he would be justified in developing the common law rule in accordance with various provisions of the Bill of Rights to hold Naspers vicariously liable.⁹⁸

The judgment has been criticised on various grounds, *inter alia* that it “[elevates] the *ratio* for vicarious liability to the test for vicarious liability”⁹⁹ and that “vicarious liability in the context of sexual harassment is being approached differently compared to other circumstances”.¹⁰⁰ To avoid these and other problems, Le Roux argues for further development of the “standard test” in the light of the Constitution by focusing on the concept of “course of employment” rather than “risk of enterprise”. These questions are returned to below. Suffice it to note that it is debatable whether the above judgment did, in fact, go beyond the limits of the standard test. “Stated differently,” Whitcher suggests,

“there was a sufficiently close connection between the wrongful acts and the job Samuels was authorized to perform. Using that line of reasoning, the court was able to find, for policy reasons, that it would be fair and just to hold Naspers vicariously liable”.¹⁰¹

These contrasting interpretations underline the danger of slipping into subtle if not semantical distinctions when applying different concepts to the same facts. It is noteworthy that, when the matter went on appeal, the Supreme Court of Appeal – notwithstanding its own formulation of the standard test (above) – declined to rule on the employer’s argument that Nel J had been wrong in his interpretation of the doctrine.¹⁰² By then, it should be noted, Samuels’s employer (Media 24) had assumed liability on behalf of its subsidiary (Naspers), thus enabling the court to find that the employer had failed in its common law duty to provide the victim with a safe working environment. It was clear, the court held, that “the legal convictions of the community require an employer to take reasonable steps to prevent sexual harassment of its employees in the workplace and to ... compensate the victim for harm caused thereby should it negligently fail to do so.”¹⁰³ By failing to take action to deter Samuels at an earlier stage the employer had breached this duty.

⁹⁶ In terms of which an employer is liable for harm caused by an employee in the course of exercising supervisory authority: see *Faragher v City Boca Raton* 524 US 775 (1998); *Burlington Industries Inc v Ellerth* 524 US 742 (1998), as discussed by Whitcher *op cit* at 1913–1915.

⁹⁷ At 526; translation by the author.

⁹⁸ At 527.

⁹⁹ Le Roux *et al op cit* at 89; see also Whitcher *op cit* at 1908–1909.

¹⁰⁰ Le Roux *op cit* at 1902–1903.

¹⁰¹ *Op cit* at 1919.

¹⁰² At par 63.

¹⁰³ At par 68.

Relying directly on the Constitution

Both the above judgments demonstrate the flexibility of the common law in fashioning remedies where, for technical reasons, statutory protection of basic rights may be lacking.¹⁰⁴ There are, however, situations where the common law may offer no remedy which the court finds capable of being applied or developed for this purpose. In such cases it is possible to invoke the constitutional right itself, albeit only as a last resort.¹⁰⁵ The question therefore arises to what extent constitutional rights – in particular, to equality or dignity – may be relied on in cases of sexual harassment where neither section 60 of the EEA nor the corresponding common law remedies are applicable.

The Labour Court was recently faced with a situation of this nature in *Piliso v Old Mutual Life Assurance Co (SA) Ltd & others*.¹⁰⁶ The applicant, after suffering sexual harassment in the form of odious notes affixed to her workstation by an unknown perpetrator, instituted action against her employer in terms of section 60 of the EEA while also alleging, in the alternative (a) failure by the employer to provide a safe working environment and (b) violation of her constitutional rights.¹⁰⁷ Section 60 of the EEA, the court found, did not apply because there was no evidence that the perpetrator was an employee of the employer. Nor, given the unforeseeable nature of the harassment, could it be said that the employer had failed in its duty to provide a safe working environment. The employer's culpability, it was held, arose from the inadequacy of its response to the employee's plight which, in effect, amounted to a breach of the employee's constitutional right to fair labour practices.¹⁰⁸ Although the matter has not been taken on appeal, it remains to be seen whether this approach will be endorsed in future cases.

From “employer liability” to “enterprise liability”

To sum up: in South Africa as well as the Netherlands special rules have been enacted to regulate employer liability for sexual harassment in the workplace. In the Netherlands, while such liability is expressly regulated by the WCA, employees may

¹⁰⁴ “[T]he genius of the common law is that the first statement of a common-law rule or principle is not its final statement. The contour of rules and principles expand and contract with experience and changes in social conditions. The law in this area has been and should continue to be sufficiently flexible to adapt to changing social conditions”: per McHugh J in *Hollis v Vabu Pty Ltd* [2001] 207 CLR 21, cited in *Grobler v Naspers Bpk & another* [2004] 5 BLLR 455 (C) at 521. See also Sir Bob Hepple ‘The Common Law and Statutory Rights’: 3rd Hamlyn Lecture (2004) available at http://ucl.ac.uk/laws/hamlyn/hamlyn04_3.pdf. at 15; now published in *Hepple Rights at Work: Global, European and British perspectives* Sweet and Maxwell (2005).

¹⁰⁵ “[A]n Act of Parliament [cannot] simply be ignored and reliance placed directly on a provision in the Constitution, nor is it permissible to side-step an Act of Parliament by resorting to the common law”: *Phillips and Others v National Director of Public Prosecution* 2006 (2) BCLR 274 (CC) at par 51. See also *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and Others* 2004 (7) BCLR 687 (CC) at par 22; *Minister of Health and Another NO v New Clicks South Africa (Pty) Ltd and Others* 2006 (2) SA 311 (CC) at pars 434–437.

¹⁰⁶ [2007] JOL 18897 (LC).

¹⁰⁷ In particular, section 23(1) of the Constitution, which states that “[e]veryone has the right to fair labour practices”.

¹⁰⁸ At pars 81, 89. For comparative analysis of employer liability in the context of the employee's right to privacy, see Debbie Collier “Workplace Privacy in the Cyber Age” (2002) 23 *ILJ* 1743.

also have remedies in terms of the ETA (which applies both inside and outside the workplace) and article 6:170 of the Civil Code. In South Africa the position is different in several ways:

- COIDA, in regulating safety at work, offers no express remedy to victims of sexual harassment and excludes employer liability for injury suffered;
- the common law right to safe working conditions gives a clear remedy to victims of sexual harassment;
- the Equality Act (unlike the ETA) does not apply to employees, therefore only the EEA is applicable to sexual harassment in the workplace;
- general employer liability is regulated in terms of common law rather than statute; and
- all law is subject to the Bill of Rights, which may also be relied on directly where both statute and common law are silent.

The diversity of the rules applicable to sexual harassment creates a degree of uncertainty. Litigants will obviously rely on the cause of action that best fits their claim while the courts, certainly in South Africa, have been more concerned with crafting remedies than with working out a consistent approach. Given the variety of circumstances in which sexual harassment may take place, it is certainly appropriate that protection should be as broad as possible. Different remedies, however, imply different criteria, thus creating scope for technical argument and variable outcomes. An employer's general (vicarious) liability, for example, has traditionally depended on wrongful conduct by an employee acting "in the course of" employment. Statutory liability for sexual harassment, on the other hand, depends on failure by the employer to take either preventive or remedial action; moreover, it extends only to harassment of the employer's own employees. Are there any unifying principles that may inform the various rules as a basis for a more harmonious approach?

It is submitted that two such principles can be identified. First, it is recognised both in Europe and in South Africa that sexual harassment is a form of discrimination. This implies that protection against sexual harassment must be understood as an assertion of the right to equality, regardless of the legal rule relied on by the victim.¹⁰⁹ This, in turn, means that derogations from that right must be construed restrictively¹¹⁰ – in other words, the employer's defence must be interpreted narrowly, not only when a sexual harassment claim is brought in terms of equality

¹⁰⁹ It is submitted that this factor also justifies treating vicarious liability for sexual harassment differently, and more stringently, than in respect of wrongful conduct by employees not involving the violation of fundamental rights: see above.

¹¹⁰ See, for example, *Johnston v Chief Constable of the Royal Ulster Constabulary* [1986] ECR 1651 (ECJ); *Matinkinca and Another v Council of State, Ciskei and Another* 1994 (1) BCLR 17 (Ck); *Kauesa v Minister of Home Affairs, Namibia and Others* 1995 (11) BCLR 1540 (NmS).

legislation but also when the victim relies on her right to safe working conditions or seeks to hold the employer vicariously liable.¹¹¹

Secondly, employer liability in all its various forms is ultimately bound up with the same policy consideration – that is, the employer’s responsibility not only to its employees but also to third parties for injury caused by those who carry out its work. With the huge growth of corporate power and the scope of companies’ operations in recent decades this principle has taken on special significance. It is underlined by the development of a broader notion of corporate social responsibility (CSR) during the same period – the employer’s responsibility,¹¹² that is, not only for the conduct of its employees but also for the impact of its operations on the environment and on society at large.¹¹³ The fact that CSR norms are essentially voluntary¹¹⁴ does not detract from their significance as points of reference, and possibly guidelines, for legal development. Norms that are voluntary in one country may be legally binding in another; similarly, non-binding norms may become legally binding.¹¹⁵ The evolution of the doctrine of vicarious liability itself may be seen as an illustration of this process. Even more pertinent, it is submitted, is the “risk of enterprise” doctrine as enunciated in the *Bazley* judgment and given legal effect in *Grobler v Naspers* (above).¹¹⁶ Arguably, this approach goes a long way towards addressing the problems of “employer liability” outlined above and, for this reason, deserves closer consideration.

Enterprise responsibility does not depend on any specific conduct of the perpetrator or the employer; it arises from the very act of carrying on an enterprise. “The workplace”, as the UK Court of Appeal has explained, “is the very place where harassment is often encountered and from which its victim is often powerless to

¹¹¹ Thus, “in the course of employment” should be interpreted broadly in the context of a sexual harassment claim based on the employer’s vicarious liability in order to give the fullest possible protection to the employee’s right to equal treatment which is actually at issue.

¹¹² In principle, it is submitted, social responsibility should be expected not only of companies but of employers in general. As Davies & Freedland point out, even “[t]he individual employer represents an accumulation of material and human resources” (*op cit* at 17), thus assuming a “social” nature.

¹¹³ “Corporate social responsibility (CSR) is a concept whereby companies integrate social and environmental concerns in their business operations and in their interaction with their stakeholders on a voluntary basis”: Communication from the Commission to the European Parliament, the Council and the European Economic and Social Committee *Implementing the Partnership for Growth and Jobs: Making Europe a Pole of Excellence on Corporate Social Responsibility* COM(2006) Brussels, 22.3.2006 at 1: available at ec.europa.eu/employment_social/soc-dial/csr/index.htm.

¹¹⁴ An aspect that has, however, been much criticised: cf Stephen Gardner “CSR in the EU - An alliance to narrow divisions?” *Ethical Corporation* (February 2007) available at http://www.mvo-platform.nl/index.php?option=com_content&task=view&id=181&Itemid=45&lang=nl_NL.

¹¹⁵ For example, the ILO Tripartite Declaration calls on multinational companies to “promote equality of opportunity and treatment in employment” in all their operations: see clause 22, *Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy* International Labour Office, Geneva: 4th edition, 2006. The recent amendments to the Dutch ETA and WCA, in accordance with Directive 2002/73/EC, have turned this guideline into a legal duty as far as the prevention of sexual harassment is concerned.

¹¹⁶ For an overview, see *Grobler v Naspers Bpk & another* [2004] 5 BLLR 455 (C) at 508–526; Whitcher *op cit* at 1915–1917. For criticism, see Le Roux *et al op cit* at 89–91.

escape. It is thus often likely to be a risk incidental to employment.”¹¹⁷ Nor does enterprise liability depend on the existence of an employment relationship between the perpetrator and the employer. Rather, “the employer should also be responsible for the activities of contractors (even if they are ‘genuinely’ self-employed) in situations where they can be regarded as engaged in the conduct of his enterprise”.¹¹⁸ At least conceptually, it is submitted, the various forms of employer liability discussed above could be harmonised on this basis. Doing so would shift the focus of inquiry towards a single question: was there a sufficiently close connection between the perpetrator’s conduct and the conduct of the enterprise?¹¹⁹ The likely effect would be to narrow the scope for technical defences and, hence, a broadening of employer liability. It would, however, stop well short of absolute liability. As the court in *Bazley* observed, “‘mere opportunity’ to commit a tort, in the common ‘but-for’ understanding of that phrase, does not suffice”.¹²⁰ The requirement of a “sufficiently close” connection, arguably, preserves a balance of fairness by absolving the employer of liability for conduct falling beyond the perpetrator’s connection with the enterprise.

As noted already, the notion of enterprise liability has been criticised on a number of grounds. Most importantly, it has been argued, “in terms of *Naspers* vicarious liability will not be imposed where sexual harassment occurs in a low or no risk or equal relationship”.¹²¹ Moreover, all the key cases relied on in that judgment “dealt with very special responsibilities, which included the (almost parental) care of children and other vulnerable people”. This raises the question “whether the risk [of sexual harassment] identified in *Naspers* is really comparable”.¹²² Instead, Le Roux suggests, it may be preferable to “develop the traditional test,¹²³ rather than to find a relationship involving subordination or to rely on a construction (like enterprise risk) that may sometimes undermine the policy considerations vicarious liability attempts to serve”.

In fact, “enterprise risk” may be a broader and more flexible concept than the above criticism would suggest. Subordination of the victim to the perpetrator, for example, is just one of an open-ended series of factors considered by the court in *Bazley* (and

¹¹⁷ *Majrowski v Guy's & St Thomas's NHS Trust* [2005] IRLR 340 at 350.

¹¹⁸ Douglas Brodie “Enterprise Liability: Justifying Vicarious Liability” *Oxford Journal of Legal Studies* 2007 27 (493). An entrepreneur’s liability for damage caused by non-employees performing work on behalf of an enterprise is expressly provided for by article 7:658.4 of the Dutch Civil Code.

¹¹⁹ In the “standard test” of vicarious liability, it will be noted, the question is narrower: was there a “sufficiently close connection” between the perpetrator’s wrongful act *and the scope of his personal duties*? This applies also to the notion of a “functional relationship” between the perpetrator’s conduct and his duties postulated in terms of article 6:170 of the Dutch Civil Code.

¹²⁰ At 63, quoted in Brodie *op cit*. In *Majrowski* (above) the Court of Appeal gave the following example which, though couched in the language of vicarious liability, does illustrate the point: “if two employees, neighbours perhaps, who have a confrontational relationship outside and unconnected with their work, continue the confrontation at work so that one harasses the other, there would be no sufficient[ly] close connection between the nature of their employment and the harassment”.

¹²¹ *Op cit* at 1902–1903.

¹²² *Ibid* at 1903.

¹²³ I.e., whether the employee committed the wrongful act “in the course and scope of employment”.

in *Naspers*) in judging “the sufficiency of the connection between the employer’s creation or enhancement of the risk and a wrong complained of”.¹²⁴ Indeed, the development the “standard test” suggested by Le Roux points towards outcomes similar to those of a test based on enterprise liability. As she goes on to observe: “Employment relationships have spatial limits and on each occasion it will be for the court to determine, with reference to the nature of the job, the specific tasks of the employee and the powers and intimacies involved, where the boundaries are.” The implications of such an approach was spelled out in *Isaacs v Centre Guards t/a Town Centre Security*:¹²⁵

“In answering the question in the context of forbidden acts, an important distinction is drawn between a prohibition which limits the *sphere of employment*, on the one hand, and one which deals with *conduct within the sphere of employment*, on the other... The general rule is that an employee who disregards a prohibition which limits the sphere of his employment is not acting in the course of his employment, but an employee who disregards a prohibition which only deals with his conduct within the sphere of his employment is not acting outside the course of his employment.”

On this basis, Le Roux comments, “there is very little that the employer can do to avoid liability in the case of sexual harassment” in respect of conduct “within the sphere of employment”; but, while it “may appear unfair”, this approach “serves the policy considerations underpinning vicarious liability and is consistent with the [employer’s] constitutional duties”.¹²⁶

For practical purposes, it is submitted, employer liability for employee conduct within the “sphere of employment” may be difficult to distinguish from “enterprise liability” except on technical grounds. The “sphere of employment” concept, however, has the drawback of being confined to “employees”, thus allowing the employer to contract out of liability “by recourse to the kinds of private law devices that allow a denial of responsibility at common law”.¹²⁷ Enterprise liability, on the other hand, is not dependent on an employment relationship, nor on the creation of any special risk by the employer (for example, placing the perpetrator of sexual harassment in a position of authority over the victim). Such a fact would merely reinforce the victim’s claim.

To sum up: enterprise liability arises from the creation of an enterprise in which numerous processes are set in motion and numerous individuals (employees and non-employees) engage in complex relationships with one another as well as the public at large. Sexual harassment is one of the incidents that may occur in the

¹²⁴ Whitcher *op cit* at 1916–1917. See the *Bazley* judgment at 59ff, cited in *Grobler v Naspers* (above) at 516–517.

¹²⁵ [2004] 3 BLLR 288 (C) at par 23, cited by Le Roux *op cit* at 1904–1905.

¹²⁶ Le Roux *op cit* at 1905.

¹²⁷ Brodie *op cit*.

process. If it does, the doctrine implies that the enterprise must escape liability if the act of harassment is fundamentally divorced from the conduct of its business. But, if such act arises within the sphere of its business activity, the enterprise should be accountable for the risk it has created.

Conclusion

Using the concept of enterprise liability, which answers are suggested to the questions that were noted at the outset?

First, enterprise liability does not imply limiting the employer's liability to acts of sexual harassment committed within the workplace or within the scope of the perpetrator's employment. The essential question is whether it occurred *as a result of* the perpetrator's connection with the business of the enterprise. Thus, for example, an enterprise may be liable if a person doing work on its behalf (whether as an employee or independent contractor) sexually harasses a co-worker outside the workplace or outside working hours provided their relationship arose within the context of that work, but not if it arose independently of the enterprise.

Nor is enterprise liability limited to instances of sexual harassment by senior employees of junior employees placed under their authority. Harassment by a perpetrator of a co-worker may also render the employer liable if their working relationship was a causal factor of the harassment.

As in the "standard test", enterprise liability is strict but not absolute. The implication is that, in creating working relationships among individuals, an employer must be mindful of the possibility of sexual harassment and take appropriate preventive as well as remedial measures. There may therefore be circumstances where an employer should not be held liable – for example, where it does everything reasonably possible to prevent sexual harassment and address its consequences.¹²⁸

It has been argued that sexual harassment must be seen as a violation of the fundamental rights to dignity and equal treatment. This makes it appropriate to frame its prohibition in the context of equality legislation (as is the case in South Africa and in terms of Directive 2002/73/EC). Given that derogations from fundamental rights must be interpreted strictly, it means that employers' defences to victims' claims must likewise be interpreted strictly, thereby reinforcing the position of disempowered claimants.

This does not mean that the prevention of sexual harassment may not, at the same time, be treated as an aspect of safety at work. The proviso is only that it may not detract from the victim's right to claim damages from the perpetrator and/or the employer or to enforce her right to equal treatment. As in other contexts, the role of the state in preventing or sanctioning unlawful conduct (in this case, failure to

¹²⁸ See, for example, *Mokoena & another v Garden Art (Pty) Ltd & another* [2008] JOL 21227 (LC). Were the employer to be liable for patrimonial and sentimental damages irrespective of its efforts to prevent sexual harassment, it is arguable that an employer would have little incentive to take preventive action.

provide safe working conditions) should be seen separately from a victim's entitlement to redress for injury suffered as a result of such conduct. This, broadly speaking, is the position in the Netherlands. While the WCA allows the labour inspectorate to enforce the measures in respect of sexual harassment required by the Act, victims are able to recover compensation in terms of the relevant provisions of the Civil Code.¹²⁹

In South Africa, as noted above, the equivalent safety legislation is inappropriate. In the event that sexual harassment is considered an "accident" for purposes of the statute, employer liability would be excluded. This would strike at the root of any policy aimed at encouraging employers to accept responsibility sexual harassment in the workplace. On the other hand, the Employment Equity Act likewise provides for intervention by the labour inspectorate to enforce certain of its requirements, including the duty of designated employers to take measures to eliminate sexual harassment. This does not exclude victims' right to claim damages or compensation for the unfair discrimination they have suffered.

Such a combination of administrative action to combat sexual harassment and victims' personal right to claim damages for the consequences of harassment, it may be concluded, is appropriate. It is also appropriate that the test of enterprise liability should be used in determining an employer's or enterprise's liability for such harassment. Such an approach, it is submitted, would go some way towards promoting the purpose of the doctrine of employer liability: that is, to encourage employers to meet the standard of social responsibility that is expected of them.

¹²⁹ On the advantages of administrative enforcement by means of the labour inspectorate over litigation, see Simone Timman "Seksuele intimidatie en wetgeving" *Quality Matters* (juli 2004) 7 available at <http://www.e-quality.nl>.