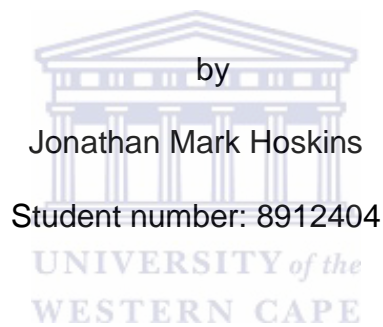


LAW FACULTY  
UNIVERSITY OF THE WESTERN CAPE

Incapacity, Disability and Dismissal: the implications for South African Labour  
Jurisprudence.

Mini-dissertation submitted in partial fulfillment of the requirements of the LLM  
degree.



SUPERVISOR: Craig Bosch

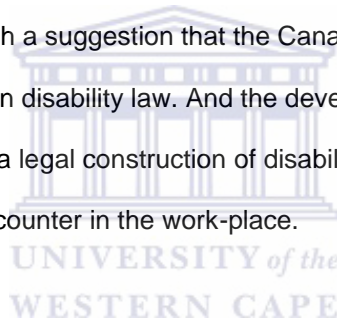
**KEY WORDS**

Dignity, discrimination, disability, dismissal, employment equity, equality, incapacity, Canadian disability jurisprudence; American disability jurisprudence; medical model of disability, social model of disability, legal construction of disability.



**ABSTRACT**

Disability in South African labour law is reduced to incapacity. An evaluation of disability and incapacity was made to advocate a clear conceptual break between the two concepts. Also, that disability should be grounded in a social model paradigm of disability which was a materialist critique of how capitalism constructs disability. To enhance the analysis discourse analysis was employed to illustrate how language, ideology and power sustained the notion of disability in capitalist society. A comparative analysis was made drawing on American disability jurisprudence and Canadian disability jurisprudence to illustrate the difference in approach between the two legal systems with a suggestion that the Canadian approach was better suited to the development of a South African disability law. And the development of South African disability law it was argued would benefit if a legal construction of disability was crafted to deal with the obstacles that disabled people encounter in the work-place.



**DECLARATION**

I declare that 'Incapacity, disability and dismissal: the implications for South African labour jurisprudence' has not been submitted for any degree or examination in any university, and that all sources I have used or quoted have been indicated and acknowledged by complete references.

Full name: Jonathan Mark Hoskins Date: 15 November 2009

Signed-----



## **ACKNOWLEDGEMENTS**

Firstly, I wish to thank my supervisor, Craig Bosch, for suggesting an enquiry into disability which opened up a new body of knowledge which I was not aware of, and, secondly to my wife, Blanche, for her unswerving support.



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# 1. INTRODUCTION

## 1.1 The Constitution<sup>1</sup>

Since the inception of the Constitution notions of equality, human dignity, freedom and justice form the bedrock of our democracy. The Preamble to the Constitution alludes to the idea of a “society based on democratic values, social justice and fundamental human rights”<sup>2</sup> It envisages a society which is democratic and open, where every citizen is equally protected by law. It also commits itself to “improve the quality of life of all citizens and to free the potential of each person” The Founding Provisions of The Constitution, once again, iterate the idea of human dignity and equality, and the advancement of human rights and freedom. Significantly, especially in section 3, is the idea of a common South African citizenship;<sup>3</sup> a citizenship that is informed by the equal entitlement of all South Africans to rights, privileges and benefits. These entitlements are, however, tempered by reciprocal duties and responsibilities that as a matter of course flow from citizenship. Chapter Two of the Constitution encompasses the Bill of Rights that “enshrines the rights of all people in our country and affirms the democratic values of human dignity, equality and freedom”<sup>4</sup>.

Section 7(2) compels the state to protect, promote and fulfill the rights found in the Bill of Rights. The Bill of Rights makes it imperative that the state is seen to be upholding and enforcing the provisions contained in the Bill of Rights. Section 9 of the Bill of Rights contains the equality clause that underscores the notion that “everyone is equal before the law and has the right to equal protection and benefit of the law”<sup>5</sup>. Section 9(3) spells out what is meant by section 9(1), by stressing that equality means that “[t]he state may

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<sup>1</sup> Act 108 of 1996

<sup>2</sup> Ibid, p.1

<sup>3</sup> Ibid, p. 3

<sup>4</sup> Ibid, s 7(1) p. 6

<sup>5</sup> Ibid s 9(1)



not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, ...ethnic or social origin, colour, sexual orientation age, disability” etc. This section, however, is not absolute; it is tempered by section 9(5) which states that discrimination on all the grounds adumbrated by section 9(3) will be considered to be unfair unless it is established that the discrimination is fair<sup>6</sup>. Section 10 is crafted in the form of an injunction that categorically states that “everyone has inherent dignity and the right to have their dignity respected and protected”.

These various provisions of the Constitution highlight the democratic, freedom guaranteeing, discrimination condemning thrust of the Constitution. It is a Constitution that sets out to ensure that the human dignity of all South African citizens are guaranteed, that discrimination in any form will be eradicated, that freedom and equality are the cornerstones of every person’s existence and where discrimination is allowed that that discrimination must be fair. Everybody without reservation has inherent human dignity, and the Constitution guarantees it.

## **1.2 Employment Equity Act<sup>7</sup>**

The enactment of the Employment Equity Act No. 55 of 1998 (EEA) was significant in that what was stated generally and expansively, and which laid the foundations with regard to equality, human dignity and freedom, in the Constitution, is particularized in the EEA. The EEA, using the cornerstones of the Constitution, clearly sets the parameters for the exercise of these important ideals squarely within the ambit of the workplace.

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<sup>6</sup> Ibid s 9(5)

<sup>7</sup> Act 55 of 1998

Given the history of racial discrimination in South Africa, the main thrust of the EEA is to address the problems of discrimination in the workplace.

Section 5 of the EEA speaks to the prohibition of unfair discrimination, and obliges every employer to promote equal opportunities in the workplace by eliminating unfair discrimination. Section 6 goes further and spells out in a comprehensive manner what are considered to be the bases of unfair discrimination.<sup>8</sup>

### **1.3 The Promotion of Equality and Prevention of Unfair Discrimination Act<sup>9</sup>**

In 2000 the above Act was enacted and it further expanded on the state's intention to eradicate discrimination of any kind. Section 6 very clearly states that "neither the state nor any person may unfairly discriminate against any person" Section 9 of the Act speaks specifically to unfair discrimination on grounds of disability and raises three very crucial areas that need to be observed when dealing with disabled people. Section 9(a) brings to the fore the whole idea of supporting or enabling facilities necessary for the functioning of disabled people in society. Section 9(b) speaks to environment accessibility, and provides that anybody who contravenes SABS standards that ensure an accessible environment for disabled people will be considered to have unfairly discriminated against disabled people. And section 9(c) requires persons to eliminate obstacles which prevent disabled people from enjoying equal opportunities, and provides that anything short of this would make such persons liable to unfair discrimination

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<sup>8</sup> Section 6(1) states: No person may unfairly discriminate, directly or indirectly, against an employee, in any employment policy or practice, on any one or more grounds, including race, gender, sex, pregnancy, marital status, family responsibility, ethnic or social origin, colour sexual orientation, age, disability, religion, HIV status, conscience, belief, political opinion, culture language and birth.

<sup>9</sup> Act 4 of 2000

against disabled persons. This section is also of the view that steps to make reasonable accommodation should be seriously considered when taking the needs of disabled people into account.

Notwithstanding, the important considerations of the Constitution, the Bill of Rights, the EEA and the Promotion of Equality and Prevention of Unfair Discrimination Act (PEPUDA), problems of discrimination still exist. And these problems invariably manifest themselves in all quarters of South African life, not least of which is within the confines of an important terrain of human activity, namely, the workplace.

The thrust of this study is to look at disability specifically as an under considered discriminated against category within the context of the workplace. The focus will essentially home in on the implications that incapacity and disability will have for dismissal. There is a perception that a dismissal for incapacity is less onerous for an employer than a dismissal for disability, and with a jurisprudence essentially based on incapacity dismissals the possibilities exist that the intentions of the EEA and PEPUDA may not become a reality. Let it be said at the outset that South Africa does not have a rich jurisprudential history with respect to disability discrimination within the workplace. South Africa's history is not based within the theoretical confines and discourses of disability as a socially determined and occurring construct. It rather has its history located within the conceptual home of incapacity. And a legal system, in its attempts to address issues of disability, is unable to do so adequately if its understanding of disability is historically reified within the limiting conceptual confines of incapacity. It will further be shown that latter day attempts to speak about disability, or to conceptualize it, have been loosely and unconsciously defined within terms of incapacity. And this does not bode well for our jurisprudence with regard to disability, if we are to re-conceptualize

disability as a socially constructed and socially interpreted social category. Hence an appropriate starting point to this study would be to analyze the origins and evolution of the term 'incapacity' and how it relates to 'disability' with the express aim to evaluate its worthiness as an explanatory tool.

## **2. AIM OF THE STUDY**

The aim of the study is to analyze the concepts 'incapacity' and 'disability' and what they mean with regard to dismissal in South African labour law.

## **3. PROBLEM STATEMENT**

This research will analyze the notion of disability and how it is used within the context of South African labour jurisprudence. It is contended that the notion of disability is viewed through the lens of incapacity. There is no clear distinction made in the use of these two concepts. A concept can be viewed as a repository of interrelated thoughts that imbues one with a particular defined outlook in the material world. And for one to be clear on what it is that one is looking for in the material world, the concept that one is dealing with should be clearly defined. The concept should contain the necessary essentials to enhance the explanatory power of the concept. Unfortunately, incapacity and disability as concepts do not lend themselves to clarity and clear definition within the South African jurisprudential context; hence the interchangeable use of the two terms which invariably leads to a diminishing of their explanatory power.

When used or applied in labour law no conceptual distinction is made between the two terms. And a cursory reading of South African textbooks, case law, assorted legislation and scholarly writings, clearly displays a tendency to conceptually enmesh the two concepts.

These two concepts have marked and distinct conceptual starting points states Marylyn Christianson when referring to items 10 and 11 of the Labour Relations Act's Code of Good Conduct: Dismissal:

"The use of 'disability' in items 10 and 11 would suggest that it is used interchangeably, or synonymously, with incapacity. No real distinction has been made between the two concepts. It is submitted that there are indeed distinct differences between disability and incapacity"<sup>10</sup>.

Charles Ngwena and Loot Pretorius agree with this observation when they say that:

"Employer's views about disability are often rooted in stereotypic assumptions about the incapacities rather than the capacities of people with disabilities. The tendency has been to view disability as coterminous<sup>11</sup> with incapacity..."<sup>12</sup>

Textbook writers like Fanie van Jaarsveld and Stefan van Eck, on the other hand, do not even try to make the distinction between incapacity and disability. In their textbook<sup>13</sup> a section entitled "Incapacity or Disability of Employee" and the content<sup>14</sup> thereof bears

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<sup>10</sup> Marylyn Christiansen "Incapacity and disability: A retrospective overview of the last 25 years" (2004) 25 Industrial Law Journal p889

<sup>11</sup> Having the same boundaries or extent ( in space, time or meaning) The Concise Oxford Dictionary 9ed p303

<sup>12</sup> Charles Ngwena and Loots Pretorius "Code of Good Practice on the Employment of People with Disabilities: An Appraisal" Industrial Law Journal (2003) 24 p1818

<sup>13</sup> Fanie van Jaarsveld and Jan van Eck Principles of Labour Law; (2002) p 208

<sup>14</sup> *Incapacity or Disability of Employee*

General principles Cases of *disability or incapacity render an employee temporarily or permanently incapable of making his services available*" must be distinguished from cases of incompetence and incompatibility. A distinction must be drawn between:

(i) physical disability as a result of ill-health or injury:

(ii) mental incapacity, for instance as a result of stress or illness, or intellectual impairment: and

(iii) chronic diseases resulting in habitual absenteeism, asthma, tuberculosis, alcoholism, depression, etc -

'The disability may prevent the employee from rendering his services satisfactorily or at all. There is a greater duty on an employer to accommodate an employee where his disability was caused by a work-related injury or illness. Any discrimination based on the incapacity of an employee resulting in his dismissal would constitute an automatically unfair dismissal

Procedure An employer is under a duty first to try and reasonably accommodate an employee suffering from incapacity or disability before deciding to dismiss such employee. If it appears that an employee is temporarily unable to perform, for a period that is unreasonably long, alternatives

this out. To illustrate this: a coordinating conjunction “or” is used between the words “incapacity” and “disability”. And coordinating conjunctions are usually used to join two items of equal syntactic importance.<sup>15</sup> Syntax can be understood to mean a grammatical arrangement of words, showing their connection and relationship<sup>16</sup>. The conjunction “or” can also be used as a synonym or explanation for a particular word<sup>17</sup>. If we are to take into consideration an understanding of how the word “or” is used and apply it to the phrase “Incapacity or Disability of Employee”, there are strong suggestions that the writers of this phrase intended the two words to be used to convey the same meaning, they are coordinating two words of equal syntactic importance. The fact that they used “or”, a coordinating conjunction between “incapacity” and “disability” means that they have attached equal weight or value to the use of the two words, that there exists a connectivity and an interrelatedness between the two words. The other understanding of the word “or” is where it introduces a synonym or explanation of a preceding word, for example, “suffered from vertigo or giddiness”<sup>18</sup>. In this example “giddiness”,<sup>19</sup> being the synonym for “vertigo”,<sup>20</sup> suggests “dizziness” and “the tendency to fall”. If one takes this construction of the coordinating conjunction “or” in the example given above, and applies

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short of dismissal should be investigated. Various factors should be taken into account, including nature of the employee’s work, the period of his disability and whether a substitute should be provided. In cases of permanent partial disability alternative work or diminished duties should be considered. An employee may not be dismissed for ill-health or injury unless the following requirements have also been met:

- (i) He is given the opportunity to state his case personally or through a representative
- (ii) *the cause of the disability has been investigated, for instance a work-related injury, alcoholism, drug abuse, depression, habitual absenteeism, - and so forth;*
- (iii) the employee is incapable of doing the work;
- (is) it is not possible to adapt his duties or his work circumstances to *his disability;*
- (v) *the degree of incapacity is severe;* and
- (vi) due to his disability and the circumstances mentioned above, his dismissal is justified,

<sup>15</sup> [http://en.wikipedia.org/wiki/Grammatical\\_conjunction](http://en.wikipedia.org/wiki/Grammatical_conjunction) (accessed 20 September 2006)

<sup>16</sup> *The Concise Oxford Dictionary* 9ed (1995) p1414

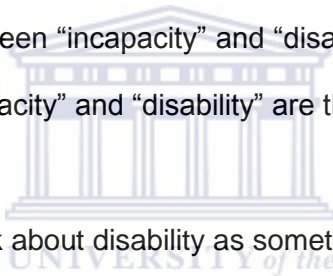
<sup>17</sup> *Ibid*

<sup>18</sup> *The Concise Oxford Dictionary* 9ed (1995) p957

<sup>19</sup> “Stagger or spin around” *The Concise Oxford Dictionary* 9ed (1995) p570

<sup>20</sup> “Dizziness, a tendency to lose balance” *The Concise Oxford Dictionary* 9ed (1995) p1558

it to the construction put forward by Van Jaarsveld and van Eck, then there are strong suggestions that they intended the two words “incapacity” and “disability” to be of similar conceptual value, that of conveying the idea that “incapacity” and “disability” convey the notion that in each case the employee has a bodily injury. And the content of the paragraph bears out to some extent what the heading suggests because it does not clearly distinguish between “disability” and “incapacity”. It does, however, suggest to us to distinguish between physical, mental and intellectual forms that “disability” and “incapacity” can take. For the authors the primary distinction is between mental and physical forms; “incapacity” or “disability” is conceptually the same. For them “incapacity” and “disability” are the same. The authors at no stage clearly draw out or define clearly the qualitative differences between “incapacity” and “disability” the authors, in fact, leave reader with the idea that “incapacity” and “disability” are the same thing.



Also, there is a tendency to talk about disability as something that happens to the human body. The following phrase lends itself to this kind of conceptualization “...where his disability was caused by a work-related injury or illness”. This phrase raises the idea that injury or illness brings about the disability. “His disability” suggests that it is present somewhere on his body, and was caused by particular injury or illness. For the authors disability is caused by an injury; that disability is the result of an injury to the body or the mind. The inference that can be drawn from this conceptualization is that the disability is the non-functioning hand or foot, or the epileptic mind. Incapacity, similarly, since it is used interchangeably with disability is also caused by an injury or illness to the body. Again, because the body has been made sick it has been rendered incapacitated and similarly, disabled. In considering whether the specific requirements have been met before an injured person can be dismissed for not being able to do their work, a

consideration that must be taken into account is the “degree of severity<sup>21</sup> of the incapacity”. Again, the idea of incapacity is spoken of as synonymous with how injured the person’s body is.

One other aspect of their appreciation of disability and incapacity occurs when they refer to the procedural aspects that have to be adhered to before a dismissal can be effected. Van Jaarsveld and van Eck speak about “...an employee suffering from incapacity or disability” “suffering” in this context suggests that there is a body that is hurting. You are either mentally or physically disabled or incapacitated meaning that you are mentally incapacitated or mentally disabled or physically incapacitated or physically disabled. For the authors there is no distinction between disability and incapacity they are all the same. The difference for them is, whether it is physical, mental or intellectual deficiency that the body suffers. Their essential point of departure is the body. The sense that one gets is that when one speaks of disability one is speaking about incapacity and vice versa.

To show a pattern which converges with the view adopted by text book writers van Jaarsveld and van Eck, the case, Tither/Trident Steel<sup>22</sup> will be analyzed to highlight the fuzziness of usage when considering these two terms. The arbitrator, R Lyster, citing *Mambalu v AECL Explosives Ltd (Zomerveld)* [1995] 5 BLLR 62 (IC), had this to say:

“It is now established law that the substantive fairness of the dismissal depends on whether the employer can fairly be expected to continue the employment relationship, bearing in mind the interests of the employee and the employer and the equities of the case. Relevant facts include

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<sup>21</sup> Fanie van Jaarsveld and Jan van Eck Principles of Labour Law; (2002) p 209

<sup>22</sup> 2004] 4 BALR 404 (MEIBC)



the nature of the *incapacity*, the cause of the *incapacity*...the effect of the employees' *disability* ...consulting with the employee about his *ailment*..." (my italics)

Once more there is a pattern that does not lend itself to clear definition when speaking about incapacity and disability.<sup>23</sup> This suggests that incapacity and disability are seen as an illness that once again suggests that the origins of incapacity and disability are of the body. For the arbitrator incapacity and disability are the same.

When one has regard to instances of legislation that deal with access to social security like the Social Assistance Act No 59 of 1992, the definition of a disabled person is considered to be:

"...any person who has attained the prescribed age and is, owing to his or her *physical or mental disability* (my italics), is unfit to obtain by virtue of any service, employment or profession the means needed to enable him or her to provide for his or her maintenance"

The following thoughts in respect of this definition are quite instructive:

"The Social Assistance Act determines eligibility for a disability grant for persons who suffer from a physical and mental disability...which renders them unable to sufficiently provide for their maintenance. Other than linking disability with functional incapacity, these statutes are of limited utility in the determination of disability...The criteria that are used to determine disability under...the Social Security Act ultimately stresses incapacity"<sup>24</sup>

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<sup>23</sup> Illness The Concise Oxford Dictionary 9<sup>th</sup> edition; Clarendon Press; Oxford; 1995; p28

<sup>24</sup> <http://butterworths.uwc.ac.za/nxt/gateway.dll/bc/8m6r/jn6r/14as> at p1 accessed 27 March 2006

The point is that to make for good labour law with regard to disabled people it is crucial that there is a clear understanding as to what disability and incapacity are. This research will, therefore, look at the concept of disability as understood in the social sciences, and American and British social science literature will be of great assistance in deepening the understanding of disability given the nascent nature of disability research in South Africa. It is also of importance that due consideration be given to various theories such as the medical model of disability and the social model of disability, because these theories could prove to be helpful in the development of the notion of disability in South African labour jurisprudence. It is my view that, since the Key Aspects on the Employment of People with Disabilities Code requires us to view disability from a social model of disability discourse, it is important to be able to explain why incapacity cases should be used with circumspection when a disability case is at issue. Thus, it has to be borne in mind that, to craft a progressive law relating to disabled people in the workplace, new interventions need to be made which would free up the limiting and constraining elements that are manifested in the notion of incapacity which, as explained above, has reduced the notion of disability to an injury to the body or the mind.

#### **4. SIGNIFICANCE OF THE STUDY**

The significance of the study is that, if labour jurisprudence is to protect disabled people, and give full content to the intentions of the Constitution, the Bill of Rights, the Employment Equity Act and other related legislation, it is imperative that we have a deeper and grounded understanding of the application of the law. It is of primary importance to clearly define what is meant when we speak of 'disabled people' or 'disability' especially in labour law, and more specifically in this instance with regard to dismissal, if we are to protect the interests of disabled people.

## **5. METHODOLOGY**

The methodology employed is to undertake this research by way of literature review. Relevant secondary and primary sources will be used, like books, articles, case law, legislation and internet sources.

## **6. OVERVIEW OF CHAPTERS**

### **Chapter 1**

Introduces and sets out the context of the research, identifies the problem, and outlines the methodology.

### **Chapter 2**

This Chapter will deal with the construction and social origins of disability.

### **Chapter 3**

This Chapter will draw on American jurisprudence as the oldest body of legal thought with regard to disability.



### **Chapter 4**

This Chapter will draw on Canadian jurisprudence which to some extent mirrors South African jurisprudence. It has developed a progressive body of law on disability that could be of benefit to the development of the South African law on disability.

### **Chapter 5**

This Chapter will locate where South African jurisprudence is presently with regard to disability. Cases, legislation and academic writers will be drawn on to assess the state of South African jurisprudence with regard to disability.

### **Chapter 6**

This Chapter will be a concluding chapter which will examine the possible implications for South Africa's labour jurisprudence in respect of disabled people.

### **Chapter 7**

Conclusion

## CHAPTER 2: DISABILITY AND CAPITALISM

The aim of this chapter will be to examine how capitalism contributes to the making of the concept, disability specifically focusing on questions around normality, the medical model of disability; social model of disability to show the systemic and structural influences in the construction of disability.

### 2.1 THE ORIGIN OF IDEAS

James I. Charlton was of the view that Malcolm X was wrong when he located the basis of oppression as lying inherently within white people. He says that by situating the basis of oppression exclusively in the ideas and notions of human beings, in this case white people, and not in systems or structures that marginalized people for political-economic and socio-cultural reasons Malcolm X missed the real origins of where racist ideas came from. Ideas do not spring from nowhere. They are not inherent in people. People are not born with certain ideas. Ideas do not occur naturally in people. Ideas have material bases from which they emerge.<sup>25</sup>

Just as racist ideas are spawned from specific systems and structures, so too, do ideas of disability have their origins within and are drawn from the logic and imperatives of a particular social structure. And implicit within these systems and structures do reside notions of power and domination which largely influence how social categories are constructed and disability is no exception.

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<sup>25</sup> James I. Charlton "Nothing about us without us: disability oppression and employment" (2000) University of California Press; Berkeley p 22

Capitalist society as a particular type of social structure and driven by its imperatives and logic will naturally create its own ideas about specific social phenomena and the understanding of disability is but one of a myriad of other social phenomena, for example race, gender, age etc.

Mike Oliver asserts that:

“[T]he economy, through both the operation of the labour market and the social organization of work, plays a key role in producing the category disability and in determining societal responses to disabled people. Further, the oppression that disabled people face is rooted in the economic and social structures of capitalism which themselves produce, racism, sexism, homophobia, ageism and disablism”<sup>26</sup>

James I. Charlton underscores this fact of capitalist society when he says that:

“...[F]rom these structures driven by the logic of their political and economic imperatives has evolved a particular kind of system which is informed by the demands of capital accumulation...”<sup>27</sup>

Michael J. Oliver agrees with James I. Charlton when he states:

. . . “that all phenomena (including social categories) are produced by the economic and social forces of capitalism itself. The forms in which they are produced are ultimately dependent upon

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<sup>26</sup> Len Barton (ed) Disability and society: emerging issues and insights p33

<sup>27</sup> Ibid p23

their relationship to the economy ... Hence, the category, disability, is produced in the particular form that it appears by these very economic and social forces".<sup>28</sup>

Hence it can safely be asserted that the idea of disability in capitalist society will be conceptualized in accordance with the logic and imperatives of capitalist society.

As the French philosopher Michel Foucault said:

"That the way we talk about the world and the way we experience it are inextricably linked – the names we give to things shapes our experiences of them and our experience of things in the world influences the names we give to them"<sup>29</sup>

Disability is a product of its particular time and space. Disability in capitalist society will be experienced in a very particular way, not least of which, it will be tempered by issues of class, race, gender, power, domination, ideology and so on. The act of naming disability is also an aspect of how that world has been experienced. There is an inextricable interplay between the experience and the crystallization of that experience into a particular name or label that forms a representation of that experience.

These two aspects are interlinked. Each of these aspects further strengthens and reinforces the other; that is, the physical experience and how this experience has been processed as an idea and, the representation of that idea by a particular name and imbued with a particular meaning.

Gleeson B.J confirms this when he says:

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<sup>28</sup> Michael J. Oliver 'Capitalism, Disability and Ideology: A Materialist Critique of the Normalization Principle' [www.leeds.ac.uk/disability-studies/archiveuk/olive/cap%](http://www.leeds.ac.uk/disability-studies/archiveuk/olive/cap%) [accessed 4 May 2005]

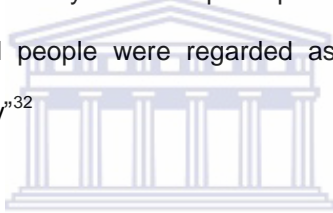
<sup>29</sup> Ibid p3

"[D]isability is both a socially and historically relative social relation that is conditioned by political-economic dynamics."<sup>30</sup>

"The primary motive force in the social construction of disability must be the material organization of production and reproduction"<sup>31</sup>

And Gleeson agrees with Mike Oliver's thoughts on how specific conceptualizations are manufactured within a specific historical time and space when he illustrates how impaired people were perceived in feudal society.

"Feudal society did not preclude the great majority of disabled people from participating in the production process, and even where they could not participate fully, they were still able to make a contribution. In this era disabled people were regarded as individually unfortunate and not segregated from the rest of society"<sup>32</sup>



And when feudal relations of production are contrasted with capitalist relations of production disability has a specific meaning for these two time periods; its meaning is historically and socially determined; it is time bound and Gleeson agrees when he says that disability is seen as:

"...a historically and socially *specific outcome* (emphasis added) of social development"<sup>33</sup>

Disability is a construction of a particular social organization in a specific time period together with the attendant political, ideological and discursive practices.

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<sup>30</sup> B.J. Gleeson "Disability and Society" Vol 12 No 2, 1997, p191

<sup>31</sup> Ibid p191

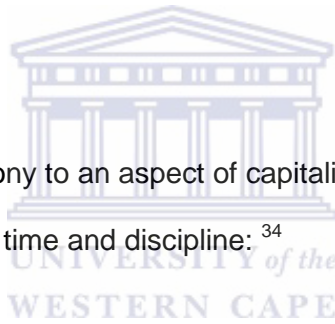
<sup>32</sup> Ibid p192

<sup>33</sup> Ibid p192

## 2.2 CAPITALIST SOCIETY

The logic of capitalist society is that it is a society that is based on the right of a small group of people to expropriate the surplus product created by society which translates ultimately into a profit. And to maintain a constant production of this surplus and profit the efficiency of production is of paramount importance. Hence, new innovations and methods to revolutionize production is an on-going process to ultimately exact and accumulate the best possible surplus and profit. And more importantly, the people who produce that surplus and profit must be able to constantly and to efficiently produce it. They must be mentally and physically healthy to withstand the rigours and demands of production.

Ryan and Thomas bear testimony to an aspect of capitalist production which is vital to its intrinsic nature which is speed, time and discipline:<sup>34</sup>



“The speed of factory work, enforced discipline, the time-keeping and production norms all these were a *highly unfavorable change (emphasis added)* from the slower, more self-determined methods of work into which many handicapped people had been integrated”

Hence the pursuit of profit engenders a highly competitive environment where the ability to work fast and efficiently is at a premium too stay ahead of the competition in the production of commodities for consumer needs and ultimately to make a profit. And the very nature of how capitalist production is arranged and effected is not suited to disabled people who suffer from impairments. It thrives on speed, discipline and time which disabled people cannot maintain at highly industrialized levels. Hence capitalist

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<sup>34</sup> Ibid p3



production by its very nature marginalizes and excludes disabled people. The logic of capitalist production is not about providing employment and jobs for people. Its intrinsic logic, its very nature is about surplus production and the expropriation of that surplus by a small dominant group in society, The real reason for employment in capitalist society is that workers are able to supply the essential ingredient for capitalist production and that is their labour power; it is about the steady supply of a labour power which is essential for creating surplus value and profit.

Mike Oliver agrees with this view when he speaks about competition and profit being the foundation upon how work has been organized in modern times. He says that:

“[w]ork has been organized around the twin principles of competition...and maximization of profit. Inevitably disabled people have suffered because of the way work has been organized around those two principles; inevitably we’ve experienced exclusion from the workforce and even sponsored research suggests that at least seven out of ten disabled people who are of working age don’t have jobs”<sup>35</sup>

To further illustrate this point Mike Oliver demonstrates that when production in Second World War was organized co-operatively and collaboratively and not for profit incidents of marginalization and exclusion of disabled people were at a minimum or non-existent. The point being made is that, even in capitalist countries where the emphasis is on co-operation and collaboration and not solely based on profit there is a tendency for greater inclusion. And because of the exigencies of a world war there was greater collaboration and therefore greater inclusion.

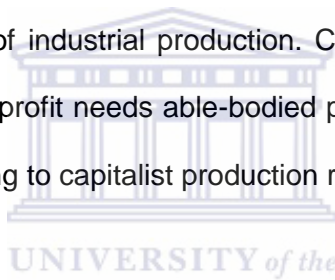
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<sup>35</sup> Ibid p33

The conclusion that can be reached, then, is that there exists a direct correlation between how many disabled people will be employed and how production is organized and under what conditions in the working environment.

Hence the environment that is created which is based on specific principles of organizing work has a direct bearing on the employability or not of disabled people.

In a work environment based on the maximization of profit and competition the chances are that disabled people will be unemployable. This kind of environment is not designed with disabled people in mind; it is designed with able-bodied people in mind who are able to withstand the rigours of industrial production. Capitalist society in the quest to accumulate surplus value and profit needs able-bodied people. Colin Barnes succinctly encapsulates this when referring to capitalist production relations:



“Disabled people have inhabited a cultural, political and intellectual form which whose making they have been excluded. . .<sup>36</sup>

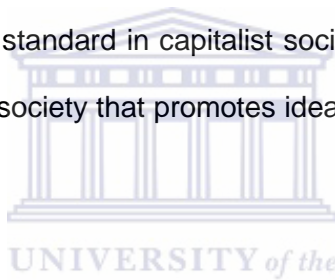
### **2.3 NORMALCY AND CAPITALIST SOCIETY**

The logic of capitalist society which is based on the profit motive creates the notion that to be able-bodied is to be normal. And because of the pervasive and dominant discourse around the idea of body image it is not unusual or unthinkable for people to aspire to activities that will make the body conform to the demands of normality as understood in capitalist society.

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<sup>36</sup> Colin Barnes (1996) 'Work, Utopia and Impairment' in Len Barton (Ed) Disability and Society: Emerging Issues and Insights. London Longman. p 45

Societies generally are about normality, and more specifically that particular society's normality. Hence capitalist society too, has its normality. And everybody in capitalist society is expected to meet the standards of this normality, the need to work faster, more efficiently in a bid to stay ahead of the competition, requires an able-bodied work-force. This is a normal and rational expectation in capitalist society. To be able-bodied is the standard in capitalist society. To be able-bodied is to be normal. Therefore, from the normal and able-bodied population will emerge the ideal worker which is expected to comply with the rationale and logic of capitalist relations of production. And given the rationale of capitalist society the ideal worker should be able-bodied. Able-bodied then becomes the standard or the norm by which people are judged in capitalist society. And if able-bodied is the norm and standard in capitalist society then capitalist society could be called an ablelist society; a society that promotes ideas that prefer able-bodied above non-able-bodied.



The conclusion that can be reached is that capitalist society, ableist society and normal society are enmeshed; that they mutually reinforce each other. Capitalism needs able-bodied people; it normalizes able-bodied people who are able to work efficiently and speedily; and at the same time it brings into play its dialectical opposite, people who are not able-bodied and renders them abnormal. These people are the disabled. Since they are disabled they do not meet the standard in capitalist society which is to be normal. To add weight to this observation Lennard J. Davis is of the view that the study of disability is the study of how capitalism normalized the body.<sup>37</sup> Claire Liachowitz<sup>38</sup>, makes the point that,

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<sup>37</sup> Ibid p38

<sup>38</sup> cited in Lennard J. Davis 'Enforcing normalcy: disability, deafness and the body' (1995) Verso; New York p10

“[m]uch of the inability to function that characterizes physically impaired people is an outcome of political and social decisions rather than medical limitations...an increasing number of sociological and psychological theorists regard disability as a complex of constraints that the able-bodied population imposes on the behaviour of physically impaired people”

Lennard J. Davis confirms this when he states that,

“[i]n an ableist society the normal people have constructed the world physically and cognitively to reward those with like abilities and handicap those with unlike abilities”<sup>39</sup>

The thinking then, is that, to be normal in capitalist society is to be able-bodied which also means not to be marginalized and excluded. It also means that not to be normal in capitalist society is to be disabled, marginalized and excluded.

And to maintain this idea of normality a particular kind of ideology has to inform this kind of society and that ideology is found in the medical model of disability.

## **2.4 MEDICAL MODEL OF DISABILITY: THE MEDICALISATION OF DISABLED PEOPLE**

The medical model of disability according to Mike Oliver saw disability “as an individual problem requiring medical treatment”<sup>40</sup> The assumption being that:

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<sup>39</sup> Lennard J. Davis “Enforcing normalcy: disability, deafness and the body” (1995) Verso; New York p10

<sup>40</sup> Len Barton (ed) Disability and Society: emerging issues and insights p 28

“Treatment, cure and amelioration are the appropriate responses to perceived pathologies and social problems...to have a disability is to have something wrong with you. Disability is seen as a personal tragedy which occurs at random to individuals, and the problems of disability require individuals to adjust or come to terms with this tragedy.”<sup>41</sup>

Also, for the proponents of the medical model of disability there is a complete disconnection between a disabled person’s impairment and the structures of society. They do not see the economic, social and political structures as having anything to do with a disabled person.

Mike Oliver concurs with this view in his criticism of the medical model adherents when he says:



“[T]hey ignore extraneous economic, political and social factors...”<sup>42</sup>

“...[T]he existing social order remains unchallenged”<sup>43</sup>

“...[I]t is taken as given the imposed segregation, passivity, and inferior status of ...disabled people ingrained in capitalist social relations, without seriously addressing questions of causality”<sup>44</sup>

The general thrust of this theory was that since disabled people could not function like able-bodied people they could be cured medically with the express idea to be made normal and to be integrated into normal society as a “normal able-bodied citizen worker”.

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<sup>42</sup> Ibid p21

<sup>43</sup> Ibid p21

<sup>44</sup> Ibid p22

It stressed the need to become able-bodied and normal. It also instilled in disabled people the desire and need to be able-bodied, this was the ideal. Hence disabled people were socialized and conditioned to see themselves as able-bodied. In other words a discourse was created around how disabled people were expected to perceive themselves and how capitalist society wanted them to be perceived. Capitalist society saw them as biological problems that could be medically cured. They, too, saw themselves as being medically curable.

And where they could not be medically cured they would then be institutionalized where they would be cared for until they were medically healthy for work; and where they were unable to be cured while being institutionalized they would then be permanently institutionalized away from society.

The assumptions that the medical model of disability operated from are predominantly premised on the idea that disability is a biological occurrence, a physical condition, an impairment that afflicts the individual. Disability is essentially about the body. And since the origins are biological in nature it can be corrected medically. Because the origins of disability are biological in nature they can be addressed by various medical interventions such as surgery, genetic screening, pre-implantation genetic diagnosis, prosthetics and various other interventions.

This kind of assumption fed into the notion that society needed to be compassionate and accommodating of these “poor unfortunates” and that society should invest in a health care system with the primary objective to cure these people so that they can be integrated into society and take up their places as “normal able-bodied citizen workers” ready to be productive.

Lennard J. Davis:

“[t]he normal citizen was a necessary development for capitalism. It was the able-bodied citizen worker who would be endowed with qualities necessary for factory work.”<sup>22</sup>

“The standardization of height, weight, and other physical traits were part of the notion of the worker”<sup>45</sup>

Ultimately, the very thrust of the medical model of disability with its medical interventions is to enable disabled people to live “normal” lives, that is, to be normalized, made able-bodied again, and to be returned to a state of normality.

In a paper titled ‘The Normalization Principle- Implications and Comments’ Bengt Nirje confirmed the thoughts by Talcott Parsons, Safilios-Rothschild and Topliss on the importance of striving to being ‘normal’ in ‘normal society’ when he outlined his thoughts on the importance of being ‘normal’ in his theory of normalization: He says that:

“The application of the normalization principle will not "make the subnormal normal" but will make life conditions of the mentally subnormal normal as far as possible bearing in mind the degree of his handicap, his competence and maturity, as well as the need for training activities and availability of services. Thus aims of care and services as well as goals of training - in striving to develop a better adjustment to society-are also part of the normalization principle. The realistic appraisal of the degree of handicap, the fluctuating social conditions and demands and the

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<sup>45</sup> Lennard J. Davids “J’ accuse! Cultural imperialism-ableist style” (1999) 18 Issue 1 Social Alternatives p 36

awareness that mostly only relative independence and integration can be attained are implied and stressed by the words "as close to the normal as possible"<sup>46</sup>

When one considers Bengt Nirje's thoughts, a central consistently occurring theme is the notion of acquiring the status of normality. The whole idea of normalization is to make those who are 'not normal' 'normal'. 'Thus the aims of care and services' are mechanisms "to develop a better adjustment to society" To create a situation which is 'as close to normal as possible', to 'make the subnormal normal'.

And Toplis is of the view that this down graded status of abnormality is an inevitability which flows from the tragic position that disabled people find themselves in. He says:

"While the particular type or degree of impairment which disables a person for full participation in society may change, it is inevitable that there will be a line, somewhat indefinite but non the less real, between the able-bodied majority and a disabled minority whose interests are given salience in the activities of society as a whole. Similarly the values which underpin society must be those which support the interests and activities of the majority, hence the emphasis on vigorous and independence and competitive achievement, particularly in the occupational sphere, with the unfortunate spin-off that it encourages a stigmatizing and negative view of the disabilities which handicap individuals in these valued aspects of life. Because of the centrality of such values in the formation of citizens of the type needed to sustain the social arrangements desired by the able-bodied majority, they will continue to be fostered by family upbringing, education and public esteem. By contrast, disablement which handicaps an individual in these areas will continue to be negatively valued, thus tending towards the imputation of general inferiority to the disabled individual or stigmatization"<sup>47</sup>

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<sup>46</sup> Bengt Nirje "European Normalization" <http://www.diligio.com/nirje.htm> Accessed 1 July 2008

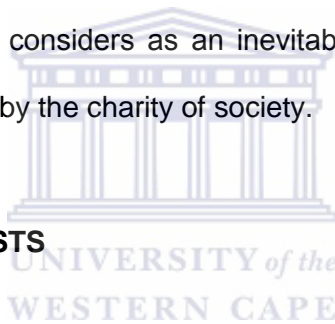
<sup>47</sup> E Topliss (1982) Social responses to handicap. Harlow: Longman p111-112



In the final analysis for the medical model proponents of disability it is about a physical or mental impairment, it has nothing to do with society.

The inference that can be drawn is that the disabled individual has to conform to the demands, imperatives and logic of capitalist/ableist society.

There is also a realization that those who are not considered to be 'normal' 'that mostly only relative independence and integration can be attained', here, there is a sense that there can only be a marginal level of integration for those who do not fit into the category of 'normal'. There is a sense that these individuals will have to reside on the margins of 'normal society' which Topliss considers as an inevitability, relegated to second class citizens waiting to be cared for by the charity of society.



## **2.5 SOCIAL MODEL THEORISTS**

Social model theorists of disability like Mike Oliver, Colin Barnes and Len Barton are sociologists from a Marxist tradition and their analysis of social relations in society is based on a critique of capitalist society and its role in marginalizing disabled people. They employ an emancipatory sociology which they believe is able to ask the questions that will go to the essence of disabled people's problems in capitalist society.

Len Barton's view with regard to the role that sociologists should play is instructive:

"A questioning approach to social reality is . . . based upon a conviction that existing social arrangements are neither natural nor proper and are therefore subject to critique and change"<sup>48</sup>

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<sup>48</sup> Len Barton "Disability and Society: emerging issues and insights" (1996) Prentice Hall; London p4

“That their tasks are to make connections between structural conditions and the lived reality of people in particular social settings”<sup>49</sup>

“Asking questions...sharpening the focus of concern...and providing critiques of existing forms of social conditions and relations”<sup>50</sup>

He continues in this critical vein by stating:

“Part of the sociological imagination involves a healthy skepticism and desire to get beneath the surface features to the deep structures of social relations and experience”<sup>51</sup>

And to drive home his point, he says:

“What is important sociologically in relation to disability is that we recognize the profundity of the struggle which is concerned with the realization of a barrier-free society”.

The social model theorists are of the view that critique and change are the paths to understanding the role that capitalist society plays with regard to the marginalization of disabled people. It is a social theory that is steeped in the ideas of challenging and changing restricting and inhibiting structures of society that hold in thrall a section of humanity just because they do not comply with the imperatives of the dominant discourses that hold sway in capitalist society namely, discourses based on oppression, marginalization, peripherilization and normalization.

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<sup>49</sup> Ibid p3

<sup>50</sup> Len Barton “Disability and Society: emerging issues and insights” (1996) Prentice Hall; London p3

<sup>51</sup> Ibid p5

The Social Model theory of disability is a critical tool which is able to ask questions which could peel away the layers of the all- prevailing, ubiquitous medical model discourse that keeps disabled people in a state of marginalization. It is also a social theory which seeks to demonstrate how the social construction of social categories such as race, gender, class and disability are primarily shaped by economics, politics, ideology and discursive practices.

In his criticism of Goffman's thoughts on the stigmatization of impaired people Mike Oliver raises a key aspect which is lost on Goffman's interactionist approach and which is crucial to the construction of disability which reduced relations between disabled and able-bodied people to a matter of stigmatization,<sup>52</sup> is the notion of causality. According to Oliver what is of primary significance for Goffman is the interaction between normal able-bodied individuals and abnormal disabled individuals; that is, how able-bodied people perceived disabled people. The social interaction between disabled and able-bodied is of importance to Goffman, the perceptions that able-bodied has of disabled, and not, how these two categories are constructed within the context of a particular historical moment and in this case, capitalist society. The root cause of how these social categories are socially constituted do not form part of Goffman's appreciation of the coming into existence of these categories. He takes these categories as given, as naturally occurring, and as having been there for all time and, more importantly, seeing their material context as not causally linked to their marginalization and stigmatization.

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<sup>52</sup> Goffman in further developing interactionist theory used the concept 'stigma', a term, which was used traditionally to refer to a mark or blemish denoting 'moral inferiority' necessitating avoidance by the rest of society. He suggested that the 'stigmatised' such as 'the dwarf' the blind, the disfigured, ...and the ex-metal patient are generally viewed as not quite human.

“Goffman’s use of the term stigma is based on perceptions of the oppressor rather than those of the oppressed...the issue of stigma is an issue of exploitation and oppression...and in the modern context he fails to move beyond the individual . . . he takes as given the imposed passivity and inferior status of stigmatized individuals and groups –including disabled people– ingrained in capitalist society, without seriously addressing questions of causality”<sup>53</sup>

Having laid the basis by investigating some key aspects which drives the social model project, what are the basic tenets of this model? In 1976 the Union of the Physically Impaired Against Segregation came to an understanding of disability. They concluded that disability was a form of social oppression. In their own words:

“In our view, it is society which disables physically impaired people. Disability is something imposed on top of our impairments by the way we are unnecessarily isolated and excluded from full participation in society. Disabled people are therefore an oppressed group in society. To understand this it is necessary to grasp the distinction between the physical impairment and the social situation, called ‘disability’, of people with such impairment. Thus we define impairment as lacking part of or all of a limb, or having a defective limb, organ or mechanism of the body; and disability as the disadvantage or restriction of activity caused by a contemporary social organization which takes no or little account of people who have physical impairments and thus excludes them from participation in the mainstream of social activities. Physical disability is therefore a particular form of social oppression”<sup>54</sup>

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<sup>53</sup> Len Barton “Disability and society; emerging issues and insights” (1996) Prentice Hall; London p22

<sup>54</sup> Len Barton “Disability and society; emerging issues and insights” (1996) Prentice Hall; London p25

It is good and well for UPIAS to show a distinction between impairment and disability and that impairment is about the body and that disability is about society. The question to ask is, how, is this explanation arrived at.

The present author will rely heavily on an account based on materialism by B.J. Gleeson a researcher from the Australian National University in Canberra to explain the impairment/disability dichotomy.

Gleeson starts by stating that all social relations are products of the practices that humans pursue in meeting their basic needs for food, shelter etc. The social practices of each community are seen as transforming the basic materials-both physical and biological-received from previous societies. These basic, historically-received materials are known to materialism as 'first nature' and include everything from the built environment to the bodies social actors receive from previous generations. When these materials are then taken and remade by a succeeding society they become known as 'second nature' <sup>55</sup>

From materialism emerges a distinctive conception of disability which parallels this twin conception of first and second nature. This Gleeson attributes to the efforts of Abberley, Finkelstein and Oliver where they make an important distinction between impairment, which refers to the absence of a limb, or having a defective limb, organism or mechanism of the body, and disability, which is the socially imposed state of exclusion or constraint that physically impaired individuals may be forced to endure<sup>56</sup>.

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<sup>55</sup> B.J.Gleeson "A historical materialist view of disability studies" Disability and society Vol 12, No 2, 1997, pp179-202 at p193

<sup>56</sup> Ibid p193

From this, disability is defined as social oppression which any society might produce in the transformation of first nature-the bodies and materials received from social formations<sup>57</sup>.

The critical point says Gleeson, is that the social construction of physically impaired people as disabled people arises, in the first instance, from the specific ways in which society organizes its basic material activities. (work, transport, leisure, domestic activities).

Attitudes, discourses, and symbolic representations are, of course, critical to the reproduction of disablement, but are themselves the product of the social practices which society undertakes in order to meet its basic material needs.

Important is the assumption that impairment is simply an altered state, characterized by absence or altered physiology, which define the physicality of certain people. No *a priori* (prior) assumption is made about the social meaning or significance of impairment that is, how impairment is perceived and given meaning to within its social context. Impairment can only be understood concretely-viz. historically and culturally-through its socialization as disability.

This is not to say that the materialist position ignores the real limits which nature, through impairment, places upon individuals. Rather, materialists seek to separate, both ontologically<sup>58</sup> and politically, the oppressive social experience of disability from the

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<sup>57</sup> Ibid p193

<sup>58</sup> Nature of being

unique functional limitations (and capacities) which impairment can pose for individuals.<sup>59</sup>

Impairment is a form of first nature which certainly embodies a given set of limitations and abilities which then places real and ineluctable conditions on the social capacities of certain individuals.<sup>60</sup>

However, the social capacities of impaired individuals can never be defined as a set of knowable and historically fixed 'functional limitations'. The capacities are conditioned both culturally and historically and must therefore be defined through concrete spatio-temporal analyses.<sup>61</sup>

Far from being a natural human experience, disability is what may become of impairment as each society produces itself socio-spatially: there is no *necessary* correspondence between impairment and disability. There are only historical geographic correspondences which obtain when some societies, in the course of producing and reproducing themselves, oppressively transform impaired into disablement. Gleeson goes on by stating and this is crucial that:

"[T]here is an established tendency for disability analysts to reduce disability to impairment: the ahistorical and aspatial assumption that nature dictates the social delimitation of disability"<sup>62</sup>

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<sup>59</sup> B.J.Gleeson "A historical materialist view of disability studies" Disability and society Vol 12, No 2, 1997, pp179-202 at p193

<sup>60</sup> Ibid p194

<sup>61</sup> Ibid p194

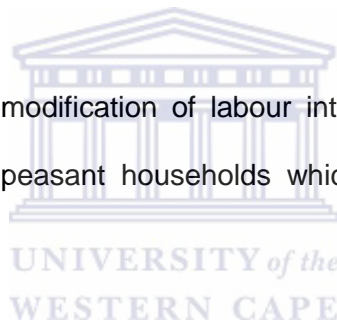
<sup>62</sup> Ibid p194

Against this, materialism recognizes that different societies may produce environments which liberate the capacities of impaired people whilst not aggravating their limitations.<sup>63</sup>

It is certainly possible to point to historical societies where impairment was socio-spatially reproduced in far less disabling ways than has been the case in capitalism.<sup>64</sup>

Gleeson attributes the non-disabling character of feudal English society both to a confined realm of physical interaction and, more importantly, to the relative weak presence of commodity production. He argues that the growth of commodity relations in late feudal England slowly eroded the labour-power of impaired people.<sup>65</sup>

Market relations and the commodification of labour introduced a social evaluation of work (the law of value) into peasant households which were relatively autonomous production units.<sup>66</sup>



The increasing social authority of the law of value meant that peasant households were increasingly subjected to an external force called the market which assessed the worth of labour by average productivity standards.<sup>67</sup>

This new way of approaching and evaluating the productivity of individual labour power meant that 'slower' 'weaker' individuals were devalued in terms of their potential for paid work.<sup>68</sup>

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<sup>63</sup> Ibid p194

<sup>64</sup> Ibid p194

<sup>65</sup> Ibid p194

<sup>66</sup> Ibid p195

<sup>67</sup> Ibid p195

<sup>68</sup> Ibid p195



For impaired workers this had a negative impact upon their ability to find work which was not subject to these new ways of working which were essentially driven by the demands of the market and commodification.

Together with these new arrangements sites of production were themselves evolving and were recreating social spaces which were compelled by the logic of competition to seek the most productive forms of labour–power. And not only was there a pursuit of the “most productive forms of labour-power” but the harnessing of this form of labour could not be done within the confines of the home as was the case in the feudal mode of production. There had to be a separation of home and work to best exact the optimum productive power from the ‘most productive forms of labour – power. This disjuncture of work and home in the pursuit of harnessing the “most productive forms of labour power” inevitably drove a wedge between the “most productive forms of labour-power” and those not “so productive forms of labour –power” viz impaired people.

In the words of Gleeson:

“[I]ndustrial work places were structured and used in ways which disabled ‘uncompetitive’ workers, including ...impaired workers. The rise of mechanized forms of production introduced productivity standards which assumed a ‘normal’ (viz male and non-impaired) worker’s body and disabled all others”<sup>69</sup>

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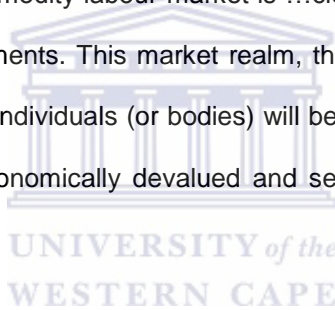
<sup>69</sup> Ibid p195

To sum up Gleeson states:

“For impaired people then, the social history of capitalism appears as a socio-spatial dialectic of commodification and spatial change which progressively disabled their labour-power”<sup>70</sup>

And to further his point he warns:

“The discriminatory design of work places ...often appears to disabled people as the immediate source of their economic exclusion. However, this is true in only a very immediate sense. The real source of economic devaluation is the set of socio-structural forces that condition the production of disabling workplaces. The commodity labour market is ...clearly implicated in the construction of disabling employment environments. This market realm, through the principle of employment competition, ensures that certain individuals (or bodies) will be rewarded and socially-enabled by paid labour, whilst others are economically devalued and sentenced to social dependency, or worse”<sup>71</sup>



The point of Gleeson’s analysis is that he demonstrates how the socio/economic structure of capitalist society has a direct bearing on the ontological transcendence from one state of being to another. He clearly shows how impaired moves to disabled simply because there is an organizational change from one type of social organization to another. Impaired people were impaired in feudal society but they became disabled in capitalist society. His argument is that disability is a uniquely capitalist moment. It is a spatial/temporal happening inimically capitalist in orientation. Competitive work relations amongst workers to meet the standards of the ‘normal’ worker which is productive; the harnessing of this worker into a factory to ensure that this kind of productivity was away

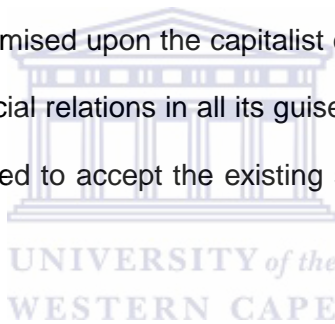
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<sup>70</sup> Ibid p195

<sup>71</sup> Ibid p197

from the home where it usually took place in feudal society are some of the elements which are crucial to the ensuring of capitalist relations of production are anathema to people who are impaired and so are disabled, since they do not measure up to the standard of the 'normal' worker in capitalist society.

However, a purely structuralist appreciation of the making of disability is not the entire story, theorists such as Tom Shakespeare have argued that beliefs, symbols, ideology, culture, language, texts and discursive practices all play a role in the disabling of impaired people. Culture in all its ramifications in capitalist society plays a crucial role in maintaining the being of disabled, just as it does in maintaining racism, sexism, homophobia etc. Culture is premised upon the capitalist economic structure but it is also crucial in maintaining these social relations in all its guises as a way of inducing consent from those who are marginalized to accept the existing social relations and its attendant power relations.



Hence, writers like Tom Shakespeare, Mike Oliver and Mairian Corker correctly aver that to deepen the understanding of the making of disability there is a need to look at the ideological, cultural and discursive practices at play which assist in the keeping of the capitalist social structure in place and not to rely exclusively on an analysis of the social structure as the only aspect in the construction of disability.

Tom Shakespeare explains:

"[P]eople with impairments are not simply disabled by material discrimination but also by prejudice"<sup>72</sup>

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<sup>72</sup> Len Barton "Disability and society; emerging issues and insights" (1996) Prentice Hall; London p48

He qualifies this prejudice:

“[[T]his prejudice is implicit in cultural representation, in language, and in socialization”<sup>73</sup>

And he explains this prejudice as the ‘othering’<sup>74</sup> of disabled people; the objectification of disabled people.<sup>75</sup>

Colin Barnes says of Mike Oliver in his analysis of the implications that capitalism had for disabled people which supports Tom Shakespeare’s stance:

“Oliver provides a materialist account of the creation of disability which places ideology – a set of values and beliefs underpinning social practices – or culture at the centre of the analysis”<sup>76</sup>

Following on this Colin Barnes says:

“[[I]mpairment cannot be explained simply with reference to single factors such as the economy, belief systems or cultural relativism. They are culturally produced through the complex interaction between ‘the mode of production and the central values of the society concerned’<sup>77</sup>

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<sup>73</sup> Ibid p48

<sup>74</sup> I will return to the explanation of the ‘other’ when discussing Peter Leonard.

<sup>75</sup> Len Barton “Disability and society; emerging issues and insights” (1996) Prentice Hall; London p48

<sup>76</sup> Len Barton “Disability and society; emerging issues and insights” (1996) Prentice Hall; London p48

<sup>77</sup> Ibid p51

And to add:

“Today, the importance and desirability of bodily perfection are endemic to western society. In terms of the oppression of disabled people, it finds expression in . . . the proliferation of ‘able-bodied’ values and the misrepresentation of disabled people in all forms of the communication of media. Moreover, it is only within the last decade or so that this cultural or ideological hegemony has been seriously challenged”<sup>78</sup>

And to conclude:

“It is evident that the cultural oppression of people with impairments can be traced back to the very foundations of western society. At its core lies the myth of bodily and intellectual perfection or ‘able-bodied ideal...there can be little doubt that it exercises a considerable influence on the lived experience of disabled people...It is clear, however, that this phenomenon can be explained with reference to material and cultural forces...and...prejudice, in whatever form it takes is not an inevitable consequence of the human condition, it is the product of a particular form of social development associated with western capitalism...and ...to eliminate prejudice...in addition to economic and political initiatives this must include the construction of a culture that acknowledges, accommodates and celebrates human difference, whatever its causes rather than to oppress it”<sup>79</sup>

Having shown how capitalism creates the social category ‘disabled’ the next important step in this analysis is the importance and necessity to deepen the understanding of disability with other tools of analysis. The question that needs to be addressed is; how does capitalism maintain and reproduce this social category of ‘the disabled’? It will be contended that for capitalism to reproduce this social category it relies on tools such as

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<sup>78</sup> Ibid p56

<sup>79</sup> Ibid p57

culture, language, ideology and discourse. And, likewise to peel away or to peer behind this cultural, linguistic, ideological, discursive veil of oppression that entralls disabled people discourse analysis will be employed as the instrument of choice in chapter three.



## CHAPTER 3: DISCOURSE AND IDEOLOGY: THE CONSTRUCTION OF DISABILITY

### 3.1 INTRODUCTION

The objective of this chapter is primarily to posit an understanding of disability which seeks to challenge and rethink how disability is presently thought about. It is an approach which endeavors to demonstrate that there is nothing essential or natural about disability; that disability is not a naturally occurring social category. Rather, it is socially constructed by human beings under very specific historical conditions and for very specific reasons.

The historical conditions within which disability occurs are constructed within environments where a myriad of power relations are at play. Within this array of power relations there usually is a set of dominant power relations informed by its ideological imperatives and are sustained and reproduced discursively. These dominant power relations to a large extent, also, have a bearing on how social categories are constituted and maintained given the dynamic, logic and imperatives of the social structure wherein these power relations are located.

To go behind this constructed veil of disability and to deepen the understanding of disability the works of Norman Fairclough, Collette Guillaumin ; Peter Leonard; Tom Shakespeare will all be considered to draw out a deeper appreciation of how disability is constructed, constituted and ultimately sustained in capitalist society.

And by way of introduction a quote from Mike Oliver about the notion of discourse:

“[D]iscourse is about the interplay between language and social relationships, in which some groups are able to achieve dominance for their interests in the way in which the world is defined and acted upon. Such groups include not only dominant economic classes, but also men within patriarchy, and white people within the racism of colonial and post-colonial societies, as well as professionals in relation to service users. Language is a central aspect of discourse through which power is reproduced and communicated”<sup>80</sup>

Colin Barnes according to Mairian Corker is of the view that:

“[D]isability is ‘socially created’ ‘located in the social and economic structure and culture of the society in which it is found’<sup>81</sup>



Tom Shakespeare expands on this theme:

“I do not ...intend to abandon the social model’s stress on material, environmental and policy factors. But rather than reducing the category ‘disability’ to straightforward social relation, I think an analysis of discursive practices offers a richer and complex picture of disability. It is in this sense...that I would say disability is socially constructed ...”<sup>82</sup>

So far a notion of discourse has been posited; the centrality of language and the role that it plays in discourse as a guarantor of certain power relations has been identified;

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<sup>80</sup> Mike Oliver “Politics and Language: understanding the disability discourse” Paper prepared for inclusion in the MA in Disability Studies Programme: Dept of Psychotherapy, University of Sheffield. <http://www.leeds.ac.uk/disability-studies/archiveuk/Oliver/> at p6 accessed 13 August 2008

<sup>81</sup> Mairian Corker “Deafness/disability-problematising notions of identity, culture and structure” <http://www.leeds.ac.uk/disability-studies/archiveuk/Corker/Deafness.pdf> at p11 accessed 13 August 2008

<sup>82</sup> Tom Shakespeare “Disability, identity and difference” <http://www.leeds.ac.uk/disability-studies/archiveuk/Shakespeare/Chap6.pdf> at p5 accessed 13 August 2008

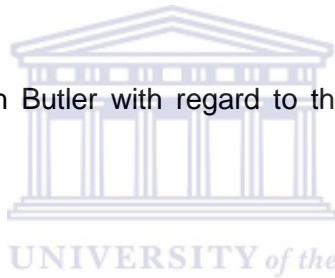


also the idea that a materialist account does not give a full 'rich complex' picture of disability; also the idea that disability as a 'socially created' socially constructed category has been brought to the fore; an aspect that also needs to be raised is the idea that 'disability' is not an essential, biological and naturally occurring social category, a reified for all time category, it is not a constant, static category; rather, it is a dynamic constantly changing category.

Judith Butler agrees when she shows how a social category is constituted by the dynamism of discourse:

"[T]he subject is discursively constituted...as fictions that are neither fixed nor stable"<sup>83</sup>

Bill Hughes agrees with Judith Butler with regard to the discursive constitution of the body:



"[T]he impaired body is a historically contingent product of power and...not a set of universal biological characteristics amenable to and objectively defined by diagnostic practices as the medical profession would have it...[T]he body is produced by meaning and interpretation and is therefore best understood in terms of discourse or cultural representation"<sup>84</sup>

And he further explains the point:

"Perhaps the best way to this 'anti-essentialist argument is... to think about non-disabled bodies. The non-disabled body is usually described as 'normal'. But what do we mean by 'normal'?"

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<sup>83</sup> Tom Shakespeare "Disability, identity and difference" <http://www.leeds.ac.uk/disability-studies/archiveuk/Shakespeare/Chap6.pdf> at p15 accessed 13 August 2008

<sup>84</sup> Bill Hughes "Disability and the body" In *Disabling Barriers – Enabling Environments*. Sage Publications; London; 2004 63-68 at p65,66

Clearly it is not a precise term, more of a statistical average. In other words, in reality, the normal or non-disabled body does not exist. What does exist is the linguistic convention or discourse of normality that conveys something to us about bodies and helps us to make sense of them. If the non-disabled body does not exist in any essential sense, then, the same applies to the disabled body. It is a metaphor, a cultural representation.<sup>85</sup>

It is a perception of the body in a particular state namely, impairment, that is socially constructed within the confines of a specific spatial/temporal context as disability; and the social construction of impaired people in the spatial/temporality of capitalist society manifests itself as disability.

Peter Leonard in his exposition on the concept of the 'subject'<sup>86</sup> echoes these thoughts when he says that:

"No contemporary social or political theorist would argue that the individual is free of social constraints, from the effects of the social, economic and wider cultural context"<sup>87</sup>

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<sup>85</sup> Ibid p66

<sup>86</sup> Peter Leonard locates the concept of *subject* with the confines of two concepts, namely, individual autonomy and structural determinism. The first meaning of the term 'subject' is often referred to as the 'humanist subject' or the subject of modernity, because it rests upon an assumption of the existence of an essential, self-directing individual person, able to act in modern, 'advanced' societies with relative freedom of choice. This subject carries, therefore, substantial individual moral and social responsibility for her or his conditions of existence. The second meaning of the term 'subject' is that which refers primarily to subjection, in the sense of being subject to another's power or authority. This is the subject as socially constituted, personal identity being the product of membership of specific cultures during particular historical periods. Whereas the first meaning of subject directs our attention to human agency and intention, to the individual ...the central actor in history, the second meaning, to varying degrees decentres the subject and gives attention to economic and social forces which constitute the individual's identity. The term 'subject', then may be used to explore the theorization behind the different meanings attached to the term in contemporary debates, and whether individual agency is possible within the context of dominant discourses or ideologies and their attendant social practices.

<sup>87</sup> Peter Leonard "Postmodern welfare: reconstructing an emancipatory project" Sage Publications; London; 1997 p33

Following from this it could be argued that impairment could in all probability manifest itself as some or other category other than disability should the organization of society change.

If the impaired body is socially constructed; a historically contingent product of power; how is it constructed? Collette Guillaumin and Christine Overall have interesting insights as to how this is achieved. Collette Guillaumin's account on the idea of race as a naturally occurring category highlights certain significant insights which will be drawn upon and which could prove helpful in appreciating the understanding of disability from another dimension.

The dimension alluded to is whether disability is natural and Christine Overall is of the view that for social categories to be of nature it must exist outside of human agency. And any social category that has been constructed by human intervention is a social construction and therefore not natural.

In referring to the social construction of identities such as gender, race and disability Christine Overall has this to say:

"To regard these identities as socially constructed is to say, first, that they are not "natural"; that is, they are not entities that exist in "nature" independent of human agency"<sup>88</sup>

She further draws on the work of Simone de Beauvoir to drive home the point by saying:

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<sup>88</sup> Christine Overall "Old age and ageism, Impairment and ableism: Exploring the Conceptual and Material Connections" NWSA Journal, Vol 18 No 1 (Spring) p126-137 p126

“One is not born, let alone conceived a woman, an Aboriginal, disabled person, or an elderly person, but rather becomes a woman, and Aboriginal, a disabled person, or an elderly person...to regard these identities as socially constructed is to say that they are created, reinforced and sustained, although not necessarily with intention or full consciousness, through normative conventions, relations and practices.<sup>89</sup>

To summarize, Christine Overall is of the view that race, age, disability are not naturally occurring categories. These are all socially constructed categories because they have been created by human intervention; human agency; these categories are the makings of human intervention. They are created, reinforced and sustained by human intervention.

The question then is how does this intervention actually facilitate the construction of these categories?



In her exposition on socially constructing impairment Christine Overall raises the question of signification. She says that the term “impairment” is given a definition by picking out certain states of physical features-limbs, organs, and systems-and attributing significance to them as fundamentally defining particular individuals and groups of individuals as abnormal or defective in ways that are believed to be “biological”. In this sense impairment too, could also be redefined or expanded, by picking out new arrays of features thought to be abnormal or defective.<sup>90</sup>

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<sup>89</sup> Ibid p126

<sup>90</sup> Ibid p127

Robert Miles in his writings on 'race' construction also employs the notion of signification. And to echo and amplify Christine Overall's thoughts Robert Miles sees signification as the "central moment in the process of representation"<sup>91</sup>

What does he mean by this? He says it is the process of depicting the social world and social processes, of creating a sense of how things 'really are'.<sup>92</sup>

He further elaborates by saying that the representational process turns on the notion of signification. How then does signification bring into being the representational process? He states that the process of signification comes about where meanings are attributed to particular features, objects and processes in such a way that they are given special significance. Signification therefore involves selection from an available range of objects, features or projects, and certain ones are chosen to convey additional meaning. The object, feature or process treated in this way thereby becomes a sign of the existence of some hypothesized or real phenomena.<sup>93</sup>

The point being made is that there are no constant for-all-time social categories, social categories are socially and culturally bounded and circumscribed by what that particular society or social context wants it to mean. The process of signification that Robert Miles employs to explain and which is pivotal to the process of representation, more or less effects the same action which Christine Overall employs in bounding a particular social category, which is the role that human intervention or human agency plays in the circumscribing of a particular social category. It is a group of people who with the requisite power has the capacity to effect the process of signification which brings about

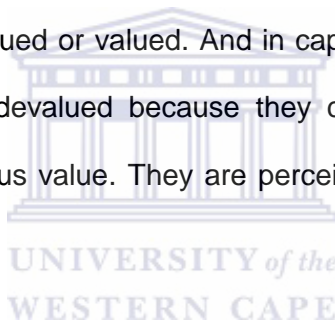
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<sup>91</sup> Robert Miles Racism. New York; Routledge; 1990 p70

<sup>92</sup> Ibid p70

<sup>93</sup> Ibid p70

the notion of representation. And for Robert Miles the selection of a particular somatic characteristic in the constructing of 'race' namely skin colour, and giving it meaning whether valued or devalued, and in the case of 'race' valued being equated with white and devalued with black is an act of human agency. It is human intervention which brings into being the process of signification which is the process of setting aside a group of people based on a shared characteristic and then making that shared characteristic the defining attribute of that particular group. The shared characteristic then represents that group. So, where a group of people have been signified as having a physical or mental impairment the signified shared attribute, the impaired body or mind, becomes the symbol that represents that particular social grouping, meaning is then attributed which is either devalued or valued. And in capitalist society people who have impairments are most times devalued because they cannot perform as able-bodied people in the creation of surplus value. They are perceived to be not as productive as able-bodied people.



### **3.2 THE 'MARK': CONSTRUCTING DISABILITY AS A 'NATURAL GROUP'**

Collette Guillaumin raises some key factors around the understanding of the "mark" which could further be useful in the understanding of the construction of disability as a "natural group". Guillaumin in her thoughts on the social construction of social categories raises the idea of the "mark" and the very unnaturalness of the "natural group". She also demonstrates how the understanding of the "mark" leads to the creation of the very unnatural "natural group". Firstly, she states that the characteristics of the "mark" vary in terms of the permanence of the mark in relation to the body. The permanence of the mark in relation to the body suggests the degree of subjection that

the body is subjected to. It is a sign of the permanence of the power relationship between the marker and the marked.

The dominating group imposes its fixed inscription on those who are materially subjected to them. Drawing on this exposition and taking into consideration the relation between able-bodied and disabled an argument could be made that the broken limb or non-functioning mind could be construed as the “mark” in relation to the body which is imposed upon by the able-bodied to establish a power relation between able-bodied and disabled person. And since the impaired body where it cannot be fixed or repaired, the non-functioning limb or mind is symbolic of the permanence of the power relations that exist between able-bodied and impaired person. The non-functioning limb or mind then becomes an expression of the social station of an impaired person; it also connotes the permanence of this relationship where the impaired body cannot be fixed to satisfy the requirements of normality in capitalist society. And over time this continued practice moves from that of being inherently and intrinsically part of that social category to that of being *symbolic*. It becomes natural. Whenever a person appears to be physically or mentally dysfunctional because they have been so “marked” it is naturally assumed that these specific social actors have a particular station in society which emits from the idea that they have to be cared for, cured and rehabilitated. It is also naturally assumed that these specific social actors are permanently locked into this particular social relation purely on the basis that they cannot return to normal society as the ideal worker/citizen. They have been “marked”.

The natural mark has been presumed to be the intrinsic cause of the place that a group occupies in social relationships; it is the origin of these relationships; it is supposed to be

the internal, therefore the natural 'capacities' that determine social facts. In the words of Collette Guillaumin:

"The modern idea of a natural group is the fluid synthesis of two systems: the traditional system of the mark purely functional...which is no different from marking live stock and a system which sees in any object whatever a substance which secretes its own causes, which is *in itself its own causes*. *What interests us here is the social group, and its practices which are supposed to be the product of its specific nature(my emphasis).*"<sup>94</sup>

The idea of the natural group has its origins in the idea of the natural mark. When the impairment of the disabled person is considered the whole identity of the impaired person is distilled into the idea of the impairment. The impairment being the broken body or the broken mind, this biological particularity, symbolizes that which is impaired. In fact the broken body is transformed into an idea a representation of the physicality of the broken body, the broken body has been signified it has been given a specific significance. It has been given a particular meaning. The impaired person's broken body has become intrinsic to his/her whole existence. It is the core of the impaired person's existence. It is the impaired person's existence. It is what makes him/her relevant or irrelevant. It is what gives them meaning. They represent something although devalued. They stand in relation to others in a particular way. It is the very origin of how social relationships are formed with others in society. The broken body has been internalized and reconstituted as a notion of nature. The broken body is its own cause for its existence in the social context that it finds itself in. And that which it does or does not do emanates from its specific intrinsic nature, the physical mark, the natural mark of the

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<sup>94</sup> Collette Guillaumin "Race and the nature of system of marks" (p133-152) In Collette Guillaumin (1995) Racism, sexism, power and ideology United Kingdom, Taylor and Francis p142



broken body. However, whatever this broken body does or does not do emits from its natural state, which is the broken body.

And it is on this basis that able-bodied people engage or relate to disabled people. And it is on this basis that able-bodied people in capitalist society disable impaired people, on the basis of its “natural state”, the broken body. This usually becomes a social relation of domination simply because disabled people are not suited for capitalist society. They cannot comply with the demands and rigours of capitalist society; capitalist society is also not prepared to change in a fundamental way at a structural level and at a discursive level to appreciate the ontological peculiarities of disabled people. They are not the normal citizen worker who can respond to the demands of capitalist society. They do not fit into the mould and expectations of the ‘normal citizen worker’. In short, they are not productive, that is, they are not able to produce a surplus at a sustained level which is essential for the survival of capitalist society. And it is so because the very “nature” of the disabled person disqualifies them. The intrinsic essence of the disabled person disqualifies them. And what may that intrinsic essence be? It is none other than the broken body or broken mind. It is therefore very “natural” for disabled people to be unproductive and for that matter unemployable; it is in their ‘nature’.

Collette Guillaumin further expounds on how “nature” gives disability its permanency when she says:

“‘Nature’ proclaims the permanence of the effects of certain social relations on dominated groups. Not the perpetuation of these social relations themselves but the permanence of the effects”<sup>95</sup>

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<sup>95</sup> Ibid p143

Guillaumin is arguing that the whole idea of “nature” is not one that looks at the social relation under-girded by power that is brought into existence by the “marking” of disabled people and their subsequent marginalization and domination, it rather focuses on the effects, the practical outcomes of the relationship, what a disabled person can or cannot do, this is important for the whole idea of “nature”. Its primary role is to mask the true nature of the relationship between able-bodied and disabled, namely, one of domination. Rather its emphasis is on the “nature” of disabled people and as argued above this “nature” is informed by the broken body or broken mind which is intrinsic to disabled people and what flows from this intrinsicness is that disabled people are not productive as would the demands of capitalist society would want.

Guillaumin says:



“To speak of a natural specificity of social groups is to say in sophisticated way that a particular “nature” is directly productive of a social practice and to by pass the social relationship that this practice brings into being”<sup>96</sup>

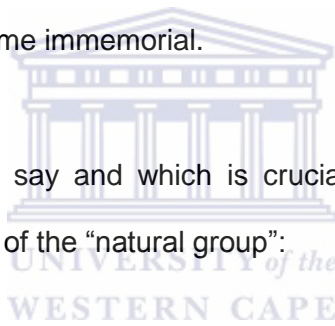
It is natural for the disabled to be unproductive and unemployable. Their inability which leads to their un-productivity which leads to their un-employability is a direct result of the social relation between able-bodied and disabled and this flows from the logic of capitalist society. Disabled people are seen as unproductive in the capitalist sense simply because the structures of capitalist society which are constructed on the underlying logic of profit which is fueled by competing with rival capitalists to stay ahead of the competition is unable to accommodate disabled people. Disabled people are not able to stand up to the rigors of the demands of capital accumulation where speed is at a

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<sup>96</sup> Ibid p143

premium if a capitalist enterprise is to stay ahead of the competition. In short capitalist society is not designed for disabled people. And it is by the very nature of capitalist society that specific social relations are brought into existence. In this case it clearly draws stark contradictions between able – bodied, productive and employable; and disabled, unproductive and un-employable. And since this contradiction is perpetuated the social relation is also perpetuated; and since the social relation is perpetuated the practice is perpetuated and over time a perception is created from the social practice and this takes on a mental construct which suggests that this is a natural occurrence, it is for all time. It therefore becomes a case of this is what the disabled do or do not do it is in their nature to do or not to do certain things therefore it is natural to disabled people, they have been doing this for time immemorial.

Guillaumin goes on further to say and which is crucial to understanding the reason behind the idea of the ideology of the “natural group”:



“The idea of the nature of the groups concerned precludes recognition of the real relationship by concentrating attention first on isolated, fragmented traits, presumed to be intrinsic and permanent which are supposed to be the direct causes of practices ...It is thus that slavery becomes an attribute of skin colour, that non-payment for domestic work becomes an attribute of the shape of sexual organs...”<sup>97</sup>

Guillaumin rightly states that the idea of the “nature of groups” is precisely to hide the true relationship between dominated and dominant groups which is fundamentally about hiding the power relations.

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<sup>97</sup> Ibid p143

Rather, the focus is directed at the supposed 'intrinsic nature' of the dominated group and to show that it is by their intrinsic nature that they occupy a certain position in society. These traits are connected to a naturalist affirmation whose contradictions, logical silences and affirmations demonstrate dubiousness and ambiguity. And the imaginary character of a term of the connection is invisible-thanks to Nature"<sup>98</sup>

And to conclude, she says:

"The idea of the somatic-physiological internal specificity of the social group concerned is an imaginary formulation (in the sense that naturalness exists in the mind) associated to a social relationship. This relationship is identifiable through the criteria noted (broken body/mind), which are completely material, technological and economic".<sup>99</sup>

The ideological implications of "nature" and of natural groups cannot be passed over says Guillaumin and therefore it occupies a central place in all social relations. Ideologically hidden, the natural form, whether it is common knowledge or already institutionalized, it is at the centre of the technical means used by the relationships of domination and power to impose themselves on dominated groups, and to go on using them.<sup>100</sup>

To conclude, the invention of the idea of the "natural group" cannot be separated from domination and the appropriation of human beings. It unfolded in this precise relationship. But appropriation which treats human beings as things and from that draws ideological variations, is not enough in itself to lead to the modern understanding of

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<sup>98</sup> Ibid p146-147

<sup>99</sup> Ibid p 147

<sup>100</sup> Ibid p148

natural groups. And the element that crucially constitutes the modern understanding of natural group is the whole idea of a factor that is internal to the object in question. Also, if what is expressed by the term 'natural' is the pure materiality of the implicated objects then the objects in question are no natural than the relationships that constituted them. And these relationships are by no means natural since they do not exist outside of human intervention. And this coincides with the views of Christine Overall when she speaks about the fixity of impairment as a biological entity for she concludes that impairment is also a socially constructed entity it is not naturally occurring and by this she means that:

“For the so-called biological substratum...is itself, socially constructed. It is not a natural entity, pre-existing human intervention, and, possessing an existence independent of human intervention. Instead the so-called biological substratum is itself a product of social construction; that is, it is created, reinforced, and sustained...through human relations and practice”<sup>101</sup>

These relationships are precisely because of human intervention; and this intervention is essentially about power. And Guillaumin says that these very relationships “*make them, since they only exist as things within these relationships*”.<sup>102</sup> Therefore impaired people exist as disabled because they have been constituted by a relationship of disability which is constituted and constructed by the able-bodied and is based on power. She further states:

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<sup>101</sup> Christine Overall “Old age and ageism, Impairment and ableism: Exploring the Conceptual and Material Connections” NWSA Journal, Vol 18 No 1 (Spring) p126-137 p127

<sup>102</sup> Ibid p150

“Outside of these they do not exist; they cannot even be imagined. They are not givens of nature, but naturalized givens of social relationships”<sup>103</sup>

### 3.3 THE NARRATIVE

John B. Thompson’s ideas on “the narrative” as a tool to give a particular social practice an air of eternity and “for all time” is an apt device, in this case, to give the idea that the category of the disabled is a naturally occurring social category. He shows how “the narrative” (the telling of stories) as a device, is used to legitimate ideology’s attempts at sustaining and justifying relations of domination over a period of time; to give it an aura of timeless acceptance. He says:

“For ideology, in so far as it seeks to sustain relations of domination by representing them as ‘legitimate’, tends to assume a narrative form. Stories are told which justify the exercise of power by those who possess it, situating these individuals within a tissue of tales that recapitulate the past and anticipate the future”<sup>104</sup>

The notion of the ‘narrative’ is a powerful device to cement the idea of the permanence of the ‘natural group’. It gives the idea of the ‘natural group’ the quality of timelessness that ‘natural groups’ have evolved over a period of time and that human intervention had no hand in its creation.

Having discussed the ‘naturalization of social groups and also raised the issue around the construction of a sense of timelessness by employing the idea of the narrative, one

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<sup>103</sup> Ibid p150

<sup>104</sup> John B. Thompson “Studies in the Theory of Ideology” Polity Press; London; 1984 p.11

other crucial aspect that needs to be discussed is to show the centrality of language in the perpetuation and reproduction of the idea of the “natural group”.

### **3.4 LANGUAGE AND DISCOURSE IN THE CONSTRUCTION OF DISABILITY.**

Mike Oliver states that often people assume that language is about communication.<sup>105</sup>

Vivien Burr agrees with Mike Oliver when she says that traditionally and in a common sense way people see language as a means of expressing that which they are experiencing in the world and how they experience themselves'. Language is generally seen as a vehicle or instrument to convey certain feelings and to describe the world as it is experienced daily.

She says:



“People use language to give expression to things that already exist in ‘themselves’ or in the world...the relationship between language and the person sees the one as a means of expressing the other”<sup>106</sup>

She continues and adds:

“When people talk about ‘myself’, their ‘personality’ or some aspect of their experience, it is assumed that that this ‘self’ or ‘personality’ or experience predates and exists independently of the words used to describe it... We think of language as a bag of labels

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<sup>105</sup> Mike Oliver “Politics and Language: Understanding the Disability Discourse” (Paper prepared for inclusion in the MA in Disability Studies Programme: Department of Psychotherapy, University of Sheffield) p3

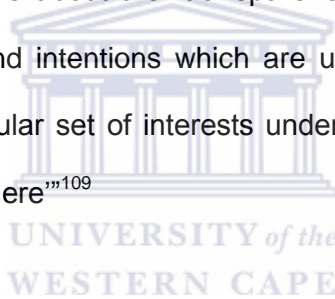
<sup>106</sup> Vivien Burr (1995) “An Introduction to Social Constructionism” London; Routledge; at p33

which we can choose from in trying to describe our internal states (thoughts, feelings etc)<sup>107</sup>

This is not so says Vivien Burr and makes the point that:

“Language is not transparent’ i.e. we should guard against the common sense assumption that language is nothing more than a clear, pure medium through which our thoughts and feelings can be made available to others, rather like a good telephone line or window which has no irregularities in the glass to distort our view”<sup>108</sup>

Norman Fairclough also speaks about the “transparency of language” which in actual fact hides its true meaning and intentions which are usually ideologically loaded and used in the pursuit of a particular set of interests under the appearance of being “just naturally, commonsensically ‘there’”<sup>109</sup>



This understanding of language is not how language is supposed to be understood. It is too simplistic and does not posit the idea of language as a part of discourse. As Mike Oliver alludes:

“Language cannot be understood merely as a symbolic system or code but as a discourse, or more properly as a series of discourses” <sup>110</sup>

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<sup>107</sup> Ibid p33

<sup>108</sup> Ibid p34

<sup>109</sup> Norman Fairclough “Language and Power” p12

<sup>110</sup> Mike Oliver “Politics and Language: Understanding the Disability Discourse” (Paper prepared for inclusion in the MA in Disability Studies Programme: Department of Psychotherapy, University of Sheffield) p4

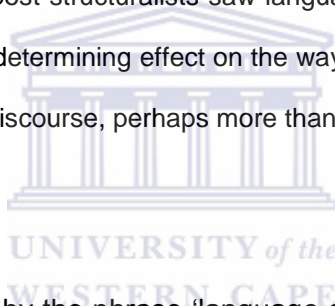


And Norman Fairclough agrees with Mike Oliver when he states that:

“...[T]he conception of language that we need is that of discourse, language as a form of social practice.”<sup>111</sup>

And Sara Mills agrees with the views of Oliver and Fairclough when she says that:

“Within structuralist and post-structuralist theory, the use of the term discourse signaled a major break with previous views of language and representation. Rather than seeing language as simply expressive, as transparent, as a vehicle of communication, as a form of representation, structuralist theorists and in turn post-structuralists saw language as a system with its own rules and constraints, and with its own determining effect on the way that individuals think and express themselves. The use of the term discourse, perhaps more than other terms signals this break with past views of language.”<sup>112</sup>



What then is to be understood by the phrase ‘language as a form of social practice’ that is, as discourse?

Alden Chadwick drawing on Michel Foucault is of the view that:

“Discourse means more than words; it is the transmission of words, it is communication –not just speaking and writing but also non-verbal acts, physical acts or visual symbols... (it) (*my inclusion*)... may...include professional journals, text books; guidelines; circulars; reports; training materials; policies; TV programmes; videos...”<sup>113</sup>

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<sup>111</sup> Norman Fairclough (2001) “Language and Power” Longman, London. p16

<sup>112</sup> Sara Mills (1997) “Discourse” Routledge, London. p8

<sup>113</sup> Alden Chadwick (1996) Knowledge, Power and the Disability Discrimination Bill Disability and Society, Vol 11 No 1 pp25-40 at p31

He adds that:

“...Discourse orders the way in which things are experienced and thought about...this does not just happen, it happens in the context of institutional practices. Discourses determine what we think and what we do; they influence what is included in or what is excluded from social organizations”.<sup>114</sup>

Alden Chadwick also adds that:

“...[All] people would be subject to a number of discourses...sexuality, discipline, health, politics, race, employment, class, culture and so on...these different discourses cross and recross the social world, sometimes intersecting, sometimes competing, sometimes merging”<sup>115</sup>

Chadwick drawing from Foucault’s “The Order of Discourse” states that:

“...[T]here exists in every society procedures to control, select, organize and distribute the production of discourse. These procedures determine why a certain thing is seen or not seen; why it is described in such a way and analyzed at such a level; why such a word is employed with such meaning and in such sentence”.<sup>116</sup>

Also, Chadwick raises the power/knowledge nexus which is Foucauldian in origin and key to Foucault’s work. Quoting from Foucault:

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<sup>114</sup> Alden Chadwick (1996) Knowledge, Power and the Disability Discrimination Bill Disability Ibid p31

<sup>115</sup> Ibid p 32

<sup>116</sup> Ibid p 32

We should admit that power produces knowledge...that power and knowledge imply one another; that there is no power relation without the correlative constitution of a field of knowledge nor any knowledge that does not presuppose and constitute at the same time power relations"<sup>117</sup>.

He goes on to say:

"When I think of the mechanics of power, I think of its capillary form of existence, of the extent to which power seeps into the very grain of individuals, reaches right into their bodies, permeates their gestures, their posture, what they say, how they learn to live and work with other people".<sup>118</sup>

This idea of the permeability of power is underscored by Ann Levett et al when they say that:

"Power as Foucault was quick to remind us, is not the exercise of some dramatic force emanating from a single point at the apex of the state. The power of apartheid was relayed through millions of channels of communication, from the government-controlled media through to everyday conversation. Power is, rather, a function of a multiplicity of discursive practices that fabricates and positions subjects."<sup>119</sup>

The authors restate this when they state that:

...Power is productive rather than only repressive..."<sup>120</sup>

Richard Haugman had this to say about discourse:

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<sup>117</sup> Ibid p 33

<sup>118</sup> Ibid p 33

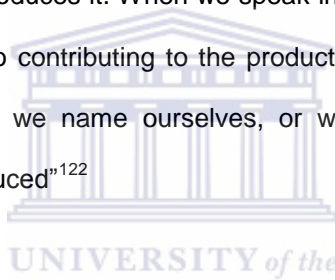
<sup>119</sup> Ann Levett et al "Culture, Power & Difference: Discourse Analysis in South Africa" p 3

<sup>120</sup> Ibid p 2

“...Discourse is about the interplay between language and social relationships, in which some groups are able to achieve dominance for their interests in the way in which the world is defined and acted upon. Such groups include not only dominant economic classes, but also men within patriarchy, and white people within ...racism...Language is a central aspect of discourse through which power is reproduced and communicated”<sup>121</sup>

Mark Priestly reiterates the view of Richard Haugman when he says that:

“Language is a social phenomenon. As such it is embedded within wider social processes and relationships of power. The way we acquire and use language not only reflects our relationship to the wider social world, it also reproduces it. When we speak in terms of gender, race, class, age, sexuality, or disability we are also contributing to the production of those same social divisions and categories. Moreover, when we name ourselves, or when others name us within such categories, we too are being produced”<sup>122</sup>



Vivien Burr, Sara Mills, Mike Oliver, Norman Fairclough, Richard Haugman and Mark Priestly raise some key aspects in the understanding of discourse and of the centrality of language in discourse.

Vivien Burr is of the view that “language is not transparent”. Sara Mills saw “language as a system with its own rules and constraints, and with its own determining effect on the way that individuals think and express themselves” Mike Oliver says that language is a not a “symbolic system or code but is a discourse”. Richard Haugman deepens Mike Oliver’s understanding of language by accepting that language should be viewed as a

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<sup>121</sup> Richard Hugman (1991) “Power in caring professions” Macmillan, London p37

<sup>122</sup> Mark Priestly “Discourse and identity: disabled children in mainstream high schools” p92-102 in Mairian Corker and Sally French (1999) (eds) Disability Discourse; Open University; Buckingham; at p92

discourse and adding that discourse is about “the interplay between language and social relations”. Not only is there this interplay between language and social relations he also introduces the idea that there are specific groups in society which dominate. And when the idea of domination is raised the idea of power can be inferred from this kind of relationship. And Haugman is of the view that language is a central aspect of discourse through which power is reproduced and communicated. Mark Priestly’s view of language as a social phenomena is that not only is it embedded within wider social processes and relations of power it also reproduces these social processes and relations of power. And he gives instances where this reproduction of social processes and power relations takes place which are in cases of gender, race, class, age sexuality and disability. He believes that these very social categories and social divisions are reproduced within the confines of discursive practices of which language is central. Also, key to understanding the significance of language in the reproduction of specific categories and power relations is the idea of ideology. And John B. Thompson is of the view that relations of domination and the ways in which they are sustained by meaningful expressions cannot be properly understood without a thorough understanding of the workings of ideology<sup>123</sup>.

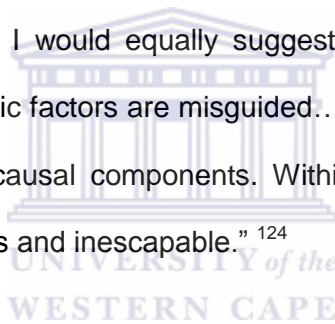
To conclude an argument has been made that discourse definitely has a role to play in the peeling back of layers of meaning which hides the source of how certain groups with power dominate and ascribe roles and identities to others. The social model of disability which has its origins in a critique of capitalism and its preoccupation with structure cannot explain the complex dynamics around identity construction. And it for this reason that discourse analysis is employed to delve deeper than the common- sense –taken-for- granted conceptualizations can be laid bare. And this can be found in the criticism and deconstruction of the dominant discourse of capitalist- ableist-normalcy. The idea for

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<sup>123</sup> John B. Thompson “Studies in the theory of Ideology” P11

this approach is based on resisting the hegemony of ableist society which excludes and marginalizes disabled people; it is an act of demolishing the supremacy of the 'ideal' citizen who gains power from the production and regulation of social and economic structures of inequality and legitimation through his (for he is male) reference to professional knowledge. And finally, Mark Priestly concludes that:

“Social model theorists such as Oliver, Finkelstein, Abberley etc have not devoted particular attention to the question of meaning and representation...I would support any argument which suggests that it is vital to consider material relations: a theoretical explanation which neglects the disabling role of society, which ignores socio-economic structures, is a mere fantasy. I would equally suggest that mono-linear explanations reducing everything to economic factors are misguided...disability is a complex process, which involves a number of causal components. Within this, the role of culture and meaning is crucial, autonomous and inescapable.”<sup>124</sup>



Mark Priestly is of the view that there is more to the understanding in terms of how disability is constructed. It is agreed that it is a complex category and it cannot just be explained in purely structural terms there is the discursive element which needs to be drawn into the framework of analysis and deconstruction. The essential structural analysis of the social model theorist alone cannot explain all the complexities of the construction of disability. And it is hoped that this chapter has brought this element to the construction of disability which is crucial for understanding it with the view to constructing a legal understanding of disability.

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<sup>124</sup> Mark Priestly “Cultural representation of Disabled People: dustbins for disavowal?” In Disability Studies: Past, present and future (ed) Len Barton and Mike Oliver(1997), Leeds: The Disability Press, p217 233 at p224-225

## CHAPTER 4: AMERICAN DISABILITY LAW

### 4.1 INTRODUCTION

Having chartered a path in the social sciences to demonstrate how the structures of capitalist society help create the social category, the disabled, and, how by layers of ideological, cultural and linguistic discourses this notion is sustained, chapter 4 will show how American legal discourse, in the form of the Supreme Court sought to hamper the development and protection of disabled people despite the progressive nature of the American with Disabilities Act. A case will be made that will demonstrate that, because of the narrow interpretation that the Supreme Court has given to defining disability, it has made it impossible for disabled people to successfully access the protection of the ADA. The structure of the chapter will survey the Supreme Court decisions that have hamstrung the stated objectives of the ADA; will address the notion of mitigation as an instance of restricting access to the protection of the ADA; and, finally, discuss reasonable accommodation and undue hardship as instances of the unwillingness of the

### 4.2 HISTORICAL BACKGROUND

Ruth O'Brien states that the American with Disabilities Act (ADA):

It transforms disability from a medical category that involves a limited group of people into one that describes the human condition.”<sup>125</sup>

Members of the disability community also reacted favourably:

“it reflect[ed] a paradigm shift of disabled people redefining and reclaiming disability’ replacing a medical model with a social and civil rights model”<sup>126</sup>

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<sup>125</sup> Ruth O'Brien “Bodies in Revolt: Gender Disability and a Workplace Ethic of Care” (2005) Routledge, NewYork. At p1

" the ADA changed awareness of people with disabilities, that they have a right to opportunity rather than pity." Moreover...society is more aware of physical accessibility for which the ADA is responsible, and it has made people with disabilities aware that they have rights to employment ...and can ask for accommodations."<sup>127</sup>

"To provide a clear and comprehensive mandate for the elimination of discrimination against disabled people."<sup>128</sup>

There was a new galvanized sense amongst disability activists, lawyers and writers that highlighted the extreme importance of the plight of the disabled.

Wendy E. Parmet lends another critically important insight into the ADA when citing Jane West's observation:

... [t]he ADA require[d] us to change our thinking about people with disabilities. The ADA demands that we focus on people not disabilities; that we focus on what they can do, not on what they cannot do."<sup>129</sup>



Jane West's observation that placed emphasis on the person rather than on the impairment was significant. It sent a message that demanded that society looked at disabled people as human beings and not as human beings with impairments; that, disabled people were able to be capable and productive members of society if society made the necessary accommodations to facilitate what they can do rather than what they cannot do.

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<sup>126</sup> Susan Gluck Mezey "Disabling Interpretations: The American with Disabilities Act in Federal Court" University of Pittsburgh Press, Pittsburgh, P35

<sup>127</sup> Susan Gluck Mezey Ibid P36

<sup>128</sup> Nancy Lee Jones "American with Disabilities Act: Statutory Language and recent issues" [http://www.policyalmanac.org/social\\_welfare/archive/crs\\_ada.shtml](http://www.policyalmanac.org/social_welfare/archive/crs_ada.shtml) p 1 [Accessed 4 June 2005]

<sup>129</sup> Wendy E. Parmet at p122



But, if there was a disproportionate concern over the impairments that they have and how these could be corrected and medicated rather than a concern for how best they could be utilized to make a contribution to society with the assistance of society, then, the way in which disabled people will be perceived will be perpetuated by a perception of society which does not see, it, society as the key agent in the disabling of impaired people. Society has to change; it has to accommodate impaired people. And by accommodating impaired people the emphasis moves away from the impairments of disabled people as the source and origin of their disability and will correctly be located in society as the ultimate agent in disabling people with impairments.

When we start from the position of the person, it leads us to pose questions about the person and his/her relationship to society; there is a dialectical interplay between person and society; which hinges on society's meanings and interpretations of impaired people which manifests itself in specific perceptions, worldviews and thoughts about impaired people. And in most cases especially in the work place translates into discrimination of impaired people.

A society dominated by such ableist thinking will wittingly or unwittingly discriminate against an impaired person. And, since impaired people do not fit into society's perception of normal which has been socially constructed in the image of able-bodied people, the chances are great that they will be marginalized and discriminated against.

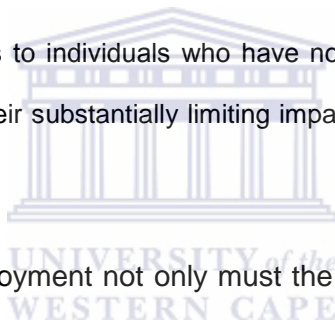
### 4.3 HOW DOES THE ADA DEFINE DISABILITY?

The ADA states that a person is considered to be disabled when any of the following requirements are met:

“...a physical or mental impairment that substantially limits one or more of the major life activities’ of such an individual...

[has] a record of such an impairment’ refers to an individual who has a history of, or has been misclassified as having, a mental or physical impairment that substantially limits one or more major life activities

...the ‘regarded as’ prong applies to individuals who have no substantially limiting impairments but are treated as if they do or their substantially limiting impairments result from the attitudes of others (42 U.S.C.#12102).”<sup>130</sup>



Also, for the purposes of employment not only must the person claiming to be disabled satisfy the criteria of the “substantially limits” clause but they must also be a “qualified individual”. A “qualified person” is someone who is impaired but is also able to do the particular job desired whether or not reasonable accommodations have been made.<sup>131</sup>

The essential criteria for the job being that the disabled person must be able to fulfill the essential functions of the job<sup>132</sup> Judith Johnson emphasises this aspect of the definition when she says that:

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<sup>130</sup> Susan Gluck Mezey Disabling Interpretations: The American with Disabilities Act: In federal Court P.34

<sup>131</sup> 42 U.S.C. # 12102 (8)

<sup>132</sup> At p 39

“qualified” ...means that a person must be able to perform essential job duties of the position with or without reasonable accommodation”<sup>133</sup>

“To establish a prima facie case under the ADA, a plaintiff must prove: (1) he is a disabled person as defined by the ADA; (2) he is qualified, with or without reasonable accommodation, to perform the essential functions of the job held or desired; and (3) the employer discriminated against him because of his disability.” <sup>134</sup>

The problem with this enquiry is that in US jurisprudence the majority of disability discrimination cases do not reach the stage where the discrimination has to be proved.

The American Bar Association’s statistics of Title 1 employment cases makes for interesting reading in respect of the success rate of employees claiming disability discrimination. It found that from the period 1992 to 1997 only 8% of employees were successful in claims based on disability discrimination. The reasons for a disproportionate employer success rate in disability discrimination cases according to the American Bar Association is attributed to the fact that the ADA insists that before the question of discrimination can be raised, that the person claiming disability discrimination first, had to satisfy the definitional requirements of disability. Where these requirements are not met, the chances of successfully petitioning the courts based on a claim of disability discrimination are reduced.

As far as the ABA was concerned it was restricting enough that the ADA insisted that the definitional requirements of disability were complied with before discrimination could be addressed, but it was entirely a different matter when the Supreme Court also imposed a

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<sup>133</sup> Judith J. Johnson “Rescue the American with Disabilities Act from Restrictive Interpretations: Alcoholism as an Illustration” <http://law.bepress.com/expresso/eps/1602> Accessed 19 October 2007

<sup>134</sup> At (n133)

further obstacle in the way of a disabled person by adopting a literalist interpretation to defining disability.<sup>135</sup>

“[S]atisfying the requirements that the plaintiff meet the ADA’s restrictive interpretation of disability—a physical or mental impairment that substantially limits a major life activity—and still be qualified to meet the essential job functions with or without reasonable accommodation.”<sup>136</sup>

This stringent stance in defining disability seriously called into question the extent to which a disabled person had to be impaired before they could be protected by the ADA.

The sense that could be discerned was that the disabled person had to be substantially disabled before such protections could be made available and any attempts at mitigation of the impairment would oust<sup>137</sup> a claim to being disabled.

Jerome Bickenbach alluded to this view, that the trend to consider an impaired person that has been societally disabled as not “disabled enough”<sup>138</sup> is one such manifestation of a narrow interpretation of disability which disqualifies disabled persons from the protections envisaged by the ADA.

Wayne Thomas Oake’s remarks in this regard are instructive when he confirms the viewpoint that disabled people are disqualified from the protections of the ADA simply because they are not “disabled enough” to warrant the protections. He says:

“The foremost argument...is that disability protection ...offered by the Americans with Disabilities Act, have failed in (a) large part to achieve many of its stated objectives...The courts consistently find that plaintiffs with disabilities are not disabled within the meaning of the relevant statutes.

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<sup>135</sup> At p1

<sup>136</sup> At p1-p2

<sup>137</sup> *Sutton v United Airlines, Inc.*, 527 U.S. 471 (1999); *Murphy v United Parcel Serv. Inc.*, 527 U.S. 516 (1999); *Albertson’s v Kirkingburg*, 527 U.S. 555 (1999)

<sup>138</sup> Jerome E. Bickenbach “Disability and Equality” *Journal of Law and Equality* Vol 2, No 1 Spring 2003 p.7

Plaintiffs must overcome a multifaceted definition of disability, weaving through an obstacle course that will often find them either too disabled to qualify for accommodations or insufficiently disabled to be eligible for statutory protection.”<sup>139</sup>

#### **4.4 WHAT DID THE COURTS SAY?**

The observations and thoughts of the writers discussed above, that rightly placed society at the centre of the disabling process, was not given the necessary support by the Federal Supreme Court. In fact these decisions fundamentally setback disability rights in the USA. These court decisions illustrated that the judiciary especially the Federal Supreme Court was not ready to give practical expression to the spirit and hope that was generated by the ADA. Their subsequent interpretations and applications of the ADA laid a strong emphasis on the impairment of the disabled person rather than to focus, more importantly on the disabled person’s socially induced discrimination which took the form of not being hired for a particular job; being dismissed from a particular job; or by not being given the necessary reasonable accommodations to do a particular job.

This discrimination is further exacerbated when a discriminated against disabled person sought redress from the courts. And, the courts in turn, were only concerned with whether the person was impaired or not by scrupulously making sure that the disabled person complied with all the elements of the definition of disability. The person concerned had to first establish that they were indeed impaired in terms of the ADA definition before matters of discrimination could be dealt with.

“ What it means to have a disability ... is critical to the implementation of the ADA ... the ADA generally only protects those who fall within its protected class...Hence cases brought under the

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<sup>139</sup> Wayne Thomas Oates (2005) Perspectives on Disability, Discrimination, Accommodations and Law: A Comparison of the Canadian and American Experience LFB Scholarly Publishing, New York. P.vii

statute must face the initial, gatekeeping question, what does it mean to be a person with a disability.”<sup>140</sup>

The Supreme Court's first case based on the interpretation of disability in *Bragdon v Abbott*<sup>141</sup> adopted a wide, expansive and purposive interpretation of disability. The issue in this case was whether a person who was HIV positive could be considered to be disabled. The plaintiff in this case, Bragdon, was of the view that Congress intended the ADA only to cover those aspects of a person's life that have a public, economic, or daily character. The point was that a major life activity could only be of an economic, public or daily character before it could be considered to have any bearing on a person's disability. Any other factor outside of this group of activities did not count and in this case the issue was about the plaintiff's ability to reproduce and that her HIV status should be considered as a substantially limiting factor in respect of a major life activity, namely, reproducing and bearing children. Since it is claimed to have undermined this considered life activity in a substantial way it followed then that the respondent should be considered to be disabled.

The Supreme Court differed with the interpretation put forward by the plaintiff. The Court went further and stated that the interpretation that the plaintiff proffers which restricts aspects of a person's life only to aspects of an economic, public or daily character does not fit in with the definition proffered by the ADA and underscored by Congress.

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<sup>140</sup> Wendy E. Parmet “Plain meaning and mitigating measures: Judicial construction of the meaning of disability” *Backlash...* p 122

<sup>141</sup> 524 U.S. 624 (1998)

In the Supreme Court's words:

Inclusion on that list of activities such as caring for one's self, performing manual tasks, working, and learning belies the suggestion that a task must have a public or economic character."<sup>142</sup>

The question raised in *Bragdon*<sup>143</sup> was fundamental. It sought not to exclude the respondent from the category of the disabled by extending the ambit of "major life activities" to include matters concerning health and reproduction. Secondly, and more importantly, it indirectly, raised the question about society's involvement, the dentist in this case, in the marginalization of impaired people. *Bragdon* helped to extend the definition of disability by broadly interpreting "major life activities" to include activities over and above that of being economic or public by taking into consideration the reproductive capacity of the respondent.

This case demonstrated a willingness on the part of the majority of the Supreme Court to look at the discrimination that the plaintiff suffered and would suffer as a result of the substantially limiting activity (HIV positive) which impacted upon her ability to reproduce (major life activity). It addressed the discrimination that the woman suffered and would suffer because of the substantially limiting activity (HIV status). And by addressing the discrimination, *Bragdon* indirectly, questioned these discriminatory attitudes and perceptions which are rooted in society.

Discrimination is a practice which has its origins in society. It is a social practice which is a manifestation of how society relates to impaired persons and this perception leads to the disabling of impaired people.

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<sup>142</sup> Ibid p 10 - 12

<sup>143</sup> Ibid p 10 - 12

And to extend the approach adopted in *Bragdon* by extension Judges too as members of society are not excluded from these practices since they are members of society and are informed by particular perceptions of the society in which they live and in this case perceptions about disabled people.

It is from this kind of cultural and social environment that a particular notion of the disabled is constructed. These notions lend themselves to common sense constructions and popular conceptions of disability which are based on notions of incapacity and dependence which in the final analysis are essentially society- disabling acts that are geared to disable impaired people.

To reinforce this viewpoint Marilyn J. Philips writes about how the media and advertising reinforce popular conceptions of the disabled:

“Commercial advertising and the popular media establish and reinforce such notions, powerfully influencing social attitudes and behaviour towards persons with disabilities. Newspapers and magazine articles, as well as television interviews and editorial commentaries, abound with examples of disabled people as damaged goods.”<sup>144</sup>

It is within this context fueled by common sense, taken for granted notions of disability wherein the Federal Supreme Court of the United States is located. The point is, is that the Federal Supreme Court is not immune from these common sense notions of disability. Kay Schriener and Richard K. Scotch make the same observation that:

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<sup>144</sup> Wendy Parmet Plain Meaning and Mitigating Measures in *Backlash Against the ADA: Reinterpreting Disability Rights* p145



“[I]f the marginalization of people with disabilities is the result of social processes that are embedded in our culture, then it is not surprising that...legal institutions... such as the courts frequently mirror well established limiting assumptions about people with disabilities ...”<sup>145</sup>

“The human factor is likely to affect judicial behaviour...Cases that are ...factually ambiguous...are likely to be determined primarily by judicial preference...how a judge views such cases will vary from judge to judge”<sup>146</sup>

To illustrate this point the Judge in *Vande Zande v State of Wisconsin Department of Administration*<sup>147</sup> perpetuated the idea that impaired people are not deserving of accommodation and full participation in society as fully fledged citizens.

The judge in this case, Judge Posner, ridiculed the plaintiff when she said that to use the bathroom instead of the kitchen stigmatized her as different and inferior.

Her request to work at home was met with a rebuke that “most jobs in organizations ...involve team work...rather than solitary unsupervised work” He then further degraded when he suggested that the plaintiff might next be asking for cappuccinos and massages as reasonable accommodations. He then proceeded to spell out what reasonable accommodation meant as far as he was concerned.

“...the employee must show that the accommodation is reasonable in the sense [that it is]...both efficacious and proportional to cost. Even if this prima facie showing is made, the employer has an opportunity to prove that upon more careful consideration the costs are excessive in relation to either the benefits of accommodations or to the employer’s financial survival or health.”<sup>148</sup>

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<sup>145</sup> Kay Schriener and Richard K. Scotch The ADA and the Meaning of Disability in Backlash Against the ADA: Reinterpreting Disability Rights p 168

<sup>146</sup> Ibid p 168-169

<sup>147</sup> 44 F.3d 538 (7<sup>th</sup> Cir. 1995)

<sup>148</sup> Ibid at p 543

And to drive home his point Judge Posner further opined that:

“Even if an employer is so large or wealthy – or, like the principal defendant in this case is a state, which can raise taxes in order to finance any accommodations that it must make to disabled employees – that it may plead ‘undue hardship’, it would not be required to expend enormous sums in order to bring about a trivial improvement in the life of a disabled employee.”<sup>149</sup>

The stance however, that the minority judges, Justices Stevens and Breyer, in *Sutton v United Airlines* took, does indicate that some judges indeed have moved away from restricting common sense understandings of construing what constitutes disability with regard to the ADA. His all important observation was that of interpretation and construction of the ADA definition of disability. In that he highlighted the restricting and parsing approach adopted by the *Sutton Court* which construed the three pronged definition as three self-contained instances of what constituted a disability. The idea of approaching the definition as an interrelated whole was to cast the net widely enough to include all people who suffered from an impairment that substantially limited a major life activity.<sup>150</sup> So, that if a person claiming disability discrimination was not successful with regard to the first prong of the definition, where the impairment substantially limits a major life activity presently, then the claimant could resort to the other two prongs in his claim based on disability discrimination. Robert Burgdorf raises a point about the approach of the Court:

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<sup>149</sup> Nancy Lee Jones “American with Disabilities Act: Statutory Language and recent issues” [http://www.policyalmanac.org/social\\_welfare/archive/crs\\_ada.shtml](http://www.policyalmanac.org/social_welfare/archive/crs_ada.shtml) pg 8[Accessed 4 June 2005]

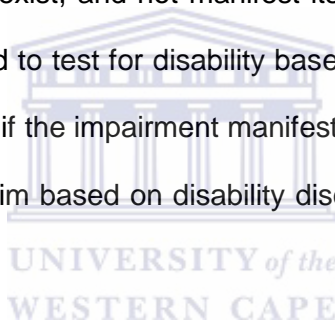
<sup>150</sup> Robert L. Burgdorf at p11

“First, because the phrase “substantially limits” appears in the present tense in the ADA definition of disability, the Court construed it as requiring a *present substantial limitation, not a potential or hypothetical one...*”<sup>151</sup> (*emphasis added*)

And, in the Courts words:

“A disability exists only where an impairment ‘substantially limits’ a major life activity, not where it ‘might,’ ‘could,’ or ‘would,’ be substantially limiting”<sup>152</sup>

The implications for this kind of stance is that if a person who claims disability discrimination does not succeed on the first prong, and in the reasoning of the court, that the disability should presently exist, and not manifest itself later, or existed in the past, then, the courts are not obliged to test for disability based on the other two prongs. The court will only test for disability if the impairment manifests itself in the here and now, not later and not in the past. A claim based on disability discrimination should be tested on all three prongs.



Not only was Justice Stevens critical about the “plain language” approach that the Supreme Court adopted in the Sutton case, he was also highly critical of the central issue that came before the Court, namely the idea around mitigation or the use of aids, medication, palliative devices which mitigated the impairment suffered by disabled person.

When *Vande Zande* is juxtaposed with *Bragdon* there is a patent difference in approach. The court in *Bragdon* clearly displayed an inclusive expansive approach to the interpretation of disability; it rooted its decision in the perceptions that society had of disabled people. The decision in *Vande Zande* clearly served to perpetuate and

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<sup>151</sup> At p11

<sup>152</sup> At p10

reinforce common- sense held perceptions of disabled people. If the court in *Bragdon* was to decide in the *Vande Zande* case the probability existed that the outcome would have been different in spite of the fact that the *Bragdon* case dealt with the definition of disability and the *Vande Zande* case dealt with questions of accommodation.

In the final analysis what these two cases highlighted was the manner in which the courts approached the questions asked of them, these two cases bring into stark focus how judges too, as products of society, will decide cases depending on the specific markers that are of importance to them. In *Vande Zande* there is a patent disregard for the concerns of the disabled person. Judge Posner clearly displayed this rigid unbending notion that disabled individuals should bend to the dictates of normal able-bodied society. And that it should not be the other way round where society changes and adapts to the needs of disabled people. The emphasis and approach in *Bragdon* proved differently. It indirectly highlighted the need for society to think of disabled people as worthy of consideration by applying a wider interpretation of disability to ensure that people who claim disability are adequately protected by the ADA.

Having juxtaposed these two cases to draw out the different approaches the two courts adopted, it is with regret that in the next four Supreme Court decisions on disability discrimination, the Supreme Court adopted the stance taken by Judge Posner in the *Vande Zande* Case.

In *Toyota Motor Manufacturing v Williams*<sup>153</sup> the facts of this case were first addressed in the Sixth Circuit Court and its findings were that Williams' impairments were "sufficiently disabling" The Court felt that she was substantially limited in a major life activity and her ability to perform house hold tasks or tend to her personal grooming did not undermine

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<sup>153</sup> *Toyota Motor Manufacturing , Kentucky, Inc v Williams*, 564 U.S 184 (2002)

the conclusion that she was disabled. The Supreme Court subsequently reversed this decision. Judge O' Connor was of the view that the Sixth Circuit Court was wrong in that it restricted its inquiry essentially to her ability to perform tasks at work. The Supreme Court's construction of major life activity was based on the notion that these activities had to be of "central importance to daily life". The Supreme Court's understanding of "daily activity" did not take into consideration the activity of work and less so, a particular kind of job. Work in the sense of holding down a particular kind of job was not for the Supreme Court a factor in determining what constituted an activity of "central importance to daily life" The court was of the view that the Sixth Circuit Court had to assess her overall ability to perform tasks. And because household tasks like bathing, brushing teeth, dressing are among the types of tasks central to the daily activities of human existence, these should have been taken into consideration when the Sixth Circuit court determined whether Williams was substantially limited in a major life activity. The Supreme Court then concluded that because Williams did not show that she was unable to perform tasks of "central importance to daily life" she could not be considered to be substantially limited in a major life activity.

This, according to the Judge constitutes an important life activity. This to some extent trivialized the idea as to what constituted a major life activity. What could be more major as a life activity than work, which in essence forms the core of all human existence? To equate work with an everyday activity like brushing one's teeth is to completely miss the intentions of the ADA as espoused in its preamble. And Susan Gluck Mezey's observations are on point when she says:

"...the majority denigrated the significance of her work by holding that the manual tasks she performed during working hours were not centrally important and that because she could brush her teeth and comb her hair, she was not substantially limited in her ability to perform manual

tasks. According to the Court, because she could attend to her personal hygiene, she was not disabled and not entitled to the protection of the act, despite her inability to earn a living... ”<sup>154</sup>

And if one goes back to the preamble of the ADA the primary intentions of the ADA clearly articulates the view that the ADA was enacted to:

“...provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities.”<sup>155</sup>

The problem it would seem in respect of US disability discrimination lies with the disjuncture or the dissonance between how previously cited writers and observers expected disability to be defined in the ADA and how eventually it was interpreted by the courts. In Three<sup>156</sup> significant Federal Supreme Court cases the courts consistently addressed the question around issues of how impaired the individual was.

The conclusion that can be drawn from the analysis of these cases is that the judgments did not hinge on the “elimination of discrimination against people with disabilities”<sup>157</sup> Rather, the emphasis is founded on ascertaining whether the person is impaired and to what extent they are impaired. This kind of emphasis is clearly constructed from a bio-medical orientation which is founded essentially on the impaired body and the extent of its impairment and not on how society fashions a discourse of disablement which arises from specific cultural perceptions about the impaired body and manifests itself in discrimination.

#### **4.5 MITIGATING MEASURES**

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<sup>154</sup> Susan Gluck Mezey At p.58

<sup>155</sup> ADA preamble.42 U.S.C.#12101(b)(1) (2000)

<sup>156</sup> Sutton v United Airlines, Inc., 527 U.S. 471 (1999); Murphy v United Parcel Serv. Inc., 527 U.S. 516 (1999); Albertson’s v Kirkingburg, 527 U.S. 555 (1999)

<sup>157</sup> At (n156)

To bedevil the understanding of disability even further in *Sutton v United Airlines* the notion of mitigation was at issue. The outcome of the case further restricted the protection that the ADA afforded to people claiming to be disabled. It held that a person could not be considered to be disabled where an impaired person was able to mitigate their impairment by the use of medication or the use of palliatives or any instruments that assisted the impaired person in ameliorating the effects of their impairment. This was a decision that ran contrary to the EEOC regulations which expressly stated that any assistance that an impaired person received which mitigated the effects of the impaired person's impairment should not be taken into consideration when considering whether a particular person was disabled or not.

The facts in *Sutton v United Air Lines*<sup>158</sup> was that the plaintiffs, applicants for jobs as airline pilots with uncorrected vision of 20/200 were not considered to be disabled simply because when they corrected their vision with the help of spectacles they were duly considered to be not disabled. The court was of the view that their corrected vision did not constitute an impairment that substantially limited a major life activity such as work and in their case being airline pilots.

In *Murphy v United Parcel Service*<sup>159</sup> this trend was repeated. The court upheld the plaintiff's dismissal on the basis that the hypertension that the plaintiff suffered, that when mitigated and controlled by the taking of medication which helped the plaintiff function normally daily could not be considered to be an impairment that substantially limited the plaintiff in a major life activity because of the assistive effect of the medication.

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<sup>158</sup> 527 U.S. 471, 119 S Ct 2139, 144 L Ed. 2d 450 (1999).

<sup>159</sup> 527 U.S. 516, 119 S.Ct 2133, 144 L.Ed. 2d 484 (1999)

Finally in *Albertson, Inc v Kirkingburg*, a commercial truck driver with monocular vision was dismissed because he failed to maintain his federal commercial driver's certification. What is crucial and significant in this case is that a new dimension to mitigation was introduced. The idea that where the body was able to compensate within itself to correct or mitigate an impairment, the person concerned would not be considered to be disabled. The ambit of mitigation was in fact extended in this case because not only were medication and devices considered to be mitigating factors, but any coping mechanisms that the body itself was able to provide to mitigate any impairment were also included.<sup>160</sup>

These three Supreme Court cases have starkly illustrated the US Supreme Court's stance with regard to who should be admitted to the class of disabled people even to such an extent that where a person's body was able to compensate or cope with an impairment this would oust the person concerned from the class of disabled persons.

John Hockenberry in an op-ed column in the *New York Times*, June 29, 1999 put the Supreme Court's position into stark perspective when he wrote:

"This is something of a revelation. I have a job. I have a family. I travel all over the world. By this definition the fact that I use a wheelchair to mitigate my paraplegia suggests that I am not disabled"<sup>161</sup>

Wayne Thomas Oakes observes further that:

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<sup>160</sup> Brian East "The definition of disability after *Sutton v United Airlines*"  
<http://www.nls.org/confbrineast.htm> accessed 6 November 2007

<sup>161</sup> John Hockenberry "Disability Games". *New York Times* editorial: June 29, 1999.



“Consequently, if those with disabilities, even by arduous efforts, are able to overcome some of the impacts of their disability with various coping techniques, they may then be deemed not substantially limited in a major life activity, adjudged not disabled and not covered by the ADA.”<sup>162</sup>

To conclude, Wayne Thomas Oakes’ observations certainly ring true with regard to the protection of disabled people when he says that the underlying thinking of the courts, and the Supreme Court more so, is that the person claiming disability must be so impaired that she/he is unable to perform a major life activity that an average person in the general population is able to.<sup>163</sup> The person claiming disability must be so impaired that he/she is significantly restricted with regard to the condition, manner, or duration in the performance of a major life activity in comparison to an average person.<sup>164</sup> The impairment must be of such a nature that it is irremediable before a person claiming disability will be allowed any protection under the ADA.

#### **4.6 REASONABLE ACCOMMODATIONS<sup>165</sup> AND UNDUE HARDSHIP<sup>166</sup>**

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<sup>162</sup> Wayne Thomas Oakes “Perspectives on disability discrimination, accommodations and Law p 117

<sup>163</sup> Wayne Thomas Oakes Ibid p 97

<sup>164</sup> Ibid p 97

<sup>165</sup> Sec 12111 (9)(A)(B) of the Americans with Disabilities Act defined reasonable accommodation as modifications or adjustments to a job or the work environment that will enable a qualified applicant or disabled employee to participate in the application process or to perform essential job functions. Reasonable accommodation also includes adjustments to assure that a qualified individual with a disability has rights and privileges in employment equal to those of employees without disabilities and these adjustments and modifications may include job restructuring, part-time or modified work schedules, reassignment to vacant positions acquisition or modification of equipment or devices, appropriate adjustment or modifications of examinations, training materials or policies, the provision of qualified readers or interpreters, and other similar accommodations for individuals with disabilities.

<sup>166</sup> Section 12111(10) spelt out what undue hardship meant. It being an action that required significant difficulty and expense taking into consideration the following factors:

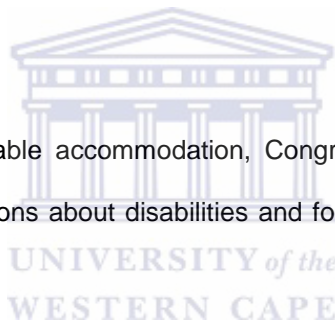
- a) the nature and cost of the accommodation needed;
- b) the overall financial resources of the facility or facilities involved in the provision of the reasonable accommodation;
- c) the number of persons employed at such facility;
- d) the effect on expenses and resources, or the impact otherwise of such accommodation upon the operation of the facility;

Reasonable accommodation in this regard will be discussed in conjunction with undue hardship to illustrate once again the restrictive interpretation that the American courts have adopted in accommodating disabled people; and on the other hand, how indulgent they have been to employers when interpreting the cost that employers have to endure, or the hardship, to effect reasonable accommodations for disabled people. The discussion will hinge on the role of cost-benefit analysis and the central role that it plays in the affording of reasonable accommodations to disabled people.

#### 4.6.1 REASONABLE ACCOMMODATION

To underscore the importance of reasonable accommodation for disabled people Jeffrey Cooper wrote:

By imposing the duty of reasonable accommodation, Congress hoped to force employers to overcome their preconceived notions about disabilities and focus [instead] on the capabilities of individual applicants”<sup>167</sup>



To support this claim the EEOC Interpretive Guidance stated that:

“The reasonable accommodation requirement is best understood as a means by which barriers to the equal employment opportunity of an individual with a disability are removed or alleviated for example . . . physical or structural obstacles...rigid work schedules...inflexible job procedures.”<sup>168</sup>

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e)the overall financial resources of the covered entity; the overall size of the business of a covered entity with respect to the number of its employees; the number, type, and location of its facilities; and f)the type of operation or operations of the covered entity, including the composition, structure, and functions of the workforce of such entity; the geographic separateness, administrative, or fiscal relationship of the facility or facilities in question to the covered entity.

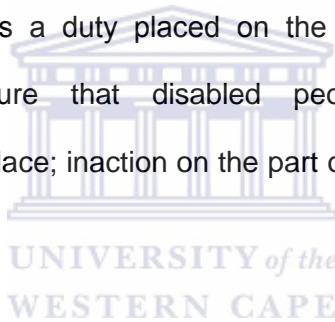
<sup>167</sup> Jeffrey Cooper , *Overcoming Barriers to Employment: The meaning of Reasonable Accommodation and Undue Hardship in the American with Disabilities Act*, 139 U.Pa.L.Rev.1423 (1991), at 1431-1436

<sup>168</sup> EEOC Interpretive Guidance 29 CFR 1630.9, App at 419

And to further augment the importance of reasonable accommodation for the disabled section 102(b)(5)(A)<sup>169</sup> addressess the link between reasonable accommodation and discrimination:

“. . . discrimination is . . . not making a reasonable accommodation to the known physical and mental limitations of an otherwise qualified individual with a disability who is an applicant or an employee. . .”<sup>170</sup>

What is of cardinal importance in respect of discrimination and its link to reasonable accommodation, that Cliona Kimber raises, is that the failure on the part of the employer to provide reasonable accommodation is considered to be discriminatory. A closer reading suggests that there is a duty placed on the employer to act, there is “an affirmative”<sup>171</sup> duty to ensure that disabled people receive the necessary accommodations in the work place; inaction on the part of the employer is considered to be discriminatory.



The EEOC regulations also make it very clear that the duty to provide reasonable accommodations “is bound up with ( and keyed into)”<sup>172</sup> enabling individuals to perform the essential functions of the job and this is crucial because in the final analysis for disabled people to be productively employed they need to be able to do the job that they are applying for.

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<sup>169</sup> American with Disabilities Act 1990.

<sup>170</sup> Section 102(b)(5)(A) American with Disabilities Act

<sup>171</sup> Cliona Kimber et al *Disability Discrimination Law in the United States, Australia and Canada* at p68

<sup>172</sup> Cliona Kimber at (fn) 54 at p69

In section 101(8) of the ADA<sup>173</sup> the question of the “qualified person with a disability is dealt with. A qualified person is a person:

“with or without, reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires”<sup>174</sup>

The EEOC regulations expands on this definition to include a person who:

“satisfies the requisite skill, experience, education and other job-related requirements of the employment position such person holds or desires and who, with or without reasonable accommodation can perform the essential functions of the job”<sup>175</sup>

And the EEOC specifies that the essential functions of the job should mean the fundamental job duties of the position and does not include the marginal aspects of the job, and, the reason that the job exists is precisely to perform that specific function or because there are a few people who can do this particular job or because the position is a highly specialised position and the disabled person is being hired because of his expertise .<sup>176</sup>

#### **4.6.2 UNDUE HARSHIP**

Undue hardship is a defence that an employer can draw on where it is found that the accommodations that are being made to ensure that a disabled person in the work-place is in a position to perform the essential requirements of the job are onerous. Originally, the test to establish the extent to which an employer should suffer in its attempts at making reasonable accommodations with regard to a disabled person was up to the point

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<sup>173</sup> Americans with Disabilities Act of 1990

<sup>174</sup> Americans with Disabilities Act of 1990

<sup>175</sup> EEOC 29 Interpretive Guidance 29 CFR 1630.2(m), App.at 410-11

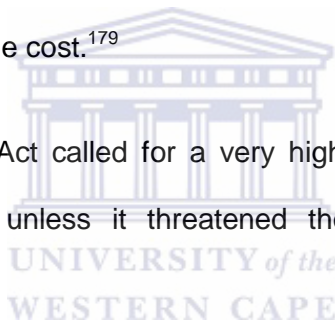
<sup>176</sup> Cliona Kimber at p 56

where the very existence of the employer's business was threatened, the so-called bankrupt provision. This would mean all 'reasonable accommodations' could be requested and complied with short of bankrupting the employer.<sup>177</sup>

This test however has been changed and to reduce this burden on employers, Congress left in place a substantial duty to accommodate however, an accommodation now, does not cause undue hardship unless it requires "significant difficulty or expense."<sup>178</sup>

The factors indicate that what matters most in determining whether an accommodation causes undue hardship is not the cost of the accommodation in the abstract, but rather the employer's ability to bear the cost.<sup>179</sup>

As originally introduced, the Act called for a very high standard: an accommodation would not be unreasonable unless it threatened the continued existence of the employer's business.



#### **4.6.2.1. The Role of Cost Benefit Analysis**

To get to grips with the thinking around making reasonable accommodations available in US disability jurisprudence an apt beginning would be to consider the stance taken by Judge Posner in *Vande Zande v. State of Wisconsin Department of Administration*<sup>180</sup>. For Posner accommodation meant that:

"the employee must show that the accommodation is reasonable in the sense [ that it is] ... both efficacious and proportional to cost. Even if this prima facie showing is made, the employer has

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<sup>177</sup> Cliona Kimber at p 79

<sup>178</sup> Jeffrey Cooper at p 1449

<sup>179</sup> At p1449

<sup>180</sup> 44 F.3d 538 (7<sup>th</sup> Cir 1995)

an opportunity to prove that upon more careful consideration the costs are excessive in relation to either the benefits of accommodations or to the employer's financial survival or health"

In *Borkowski v. Valley Central School District*<sup>181</sup>, Judge Calabresi held that an accommodation is reasonable only if the costs are not clearly disproportionate to the benefits that it will produce.

"the concept to reasonable accommodation permits the employer to expect the same level of performance from individuals with disabilities as it expects from the rest of the workforce ... But, the requirement of reasonable accommodation anticipates that it may cost more to obtain that level of performance from an employee with a disability than it would to obtain the same level of performance from the rest of the work force"

For Posner the burden lies with the employee to show that reasonable accommodation is both efficacious and proportional to cost and that it should be "something less than the maximum possible care"<sup>182</sup>. And what is crucial to their understanding of making reasonable accommodations and should be borne upper most, is that, for them the employee should be reasonable in the asking for accommodations. Judge Calabresi, stated that the term "reasonable" was a relational one that evaluated the desirability of a particular accommodation according to the consequences that it would engender both as to benefits and to costs. The issue that can be raised from this reasoning is that the onus lies with the employee to be reasonable if accommodations are to be made by the employer and reasonable means little or no cost to accommodate a disabled employee.

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<sup>181</sup> 63 F.3d 131 (2<sup>nd</sup> Cir 1995)

<sup>182</sup> Michael Ashley Stein at p100

Calabresi's reasoning is fraught with the common sense notions of the capabilities of disabled people. By alluding to the fact that reasonable accommodations implied that disabled people can not perform the same as able bodied people in the work place unless they were accommodated. And if an employer wanted to maintain these performance levels consistent with other members of the work force then he/she would have to incur a cost by making reasonable accommodations. And if the employee was not reasonable, that is, that the costs to make the accommodation exceeded the benefits, then the employer was not obliged to make the accommodation.

In *Trans WorldAirlines Inc v. Hardison*<sup>183</sup>, it was held that an accommodation creating more than a de-minimis cost constitutes an undue hardship.

In *Willock v Delta Airlines*<sup>184</sup>, the court evaluated a request to work at home by focusing on so called expense, lack of supervision, "risks" to computer networks, equipment and possible compromises of confidential information. The court further argued that "most jobs, like the plaintiff's cannot be performed at home without a substantial reduction in the quality and productivity of the employee's performance. The level of hardship imposed on the employer was not part of the analysis, but, it seems that inconvenience was considered and somehow factored into a comparison of costs and benefits.

In *Stone v City of Mt Vernon*<sup>185</sup> the court went further than Posner and imposed a cost benefit responsibility on the plaintiff. The court stated that the plaintiff has an obligation

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<sup>183</sup> 432 U.S. 63,84 (1997)

<sup>184</sup> 926 F. Supp. 1555 (N.D. Ga. 1995)

<sup>185</sup> 118 F.3d 92 (2<sup>nd</sup> Cir. 1997)

to ensure that the requested accommodation does not impose costs on the employer that clearly exceed the benefits of the accommodation.

Gathering from the cases cited above in the United States the courts are quite sensitive to the costs of any accommodations imposed on the employer. Reasonable accommodations are dependent on a cost-benefit analysis and only awarded where costs and benefits are roughly proportional to each other. It also appears that the cost and inconvenience to the employer must be relatively insignificant while the benefit of accommodations to the employer must be significant.

However, in an article<sup>186</sup> by Michael Ashley Stein he cites evidence from an empirical study done by Professor Peter Blanck which shows in some cases that an employer's reliance on undue hardship as a defence against making reasonable accommodations for disabled people in the work place is not always well founded. Michael Ashley Stein in citing this evidence, however, warns that the evidence acquired in this study should not make the assumption that the evidence from this study should be extrapolated as a generality for all work places given the great variability from work-place to work-place. But what is important, is that it gives an insight, to some extent, into the quantifiable costs that businesses have to incur to make reasonable accommodations for disabled people. Overall 72% of accommodations required no cost, 17% carried an expenditure of less than \$100.00 and only 1% cost between \$500.00 and \$1000.00.<sup>187</sup>

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<sup>186</sup> Michael Ashley Stein *The law and economics of disability accommodations* Duke Law Journal Vol 53:79 2003 at p103

<sup>187</sup> Michael Ashley Stein at p104



On the other side of the coin the external benefits that accrue to employers who bear the cost of reasonable accommodations are relatively substantial. A federal agency found that, on average for every dollar spent on accommodation companies saved \$50.00 in net benefits. To expand on this trend Prof Blanck referred to the “ripple effects” emanating from the making of accommodations available to disabled people in the workplace and amongst these desirable consequences was that productivity was higher, reports of greater dedication, better identification of qualified candidates, and the enjoyment of fewer insurance claims and so on.<sup>188</sup>

To conclude, in this chapter an argument was made that US disability jurisprudence was interpreted too strictly, resulting in the needless exclusion of a great many disabled people from the protections of the Americans with Disabilities Act. The parsimonious literal interpretation as to what constitutes a disability with the “substantially limiting” clause being the Achilles heel of persons alleging disability should be reviewed. The use of the mitigation strategy to render disabled people not disabled as decided in the Sutton Trilogy of cases should also be reviewed. The use of a cost/benefit analysis to undergird whether reasonable accommodations will be made or not detracts from the duty that employers have towards disabled people in the work place.

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<sup>188</sup> Michael Ashley Stein at p105

## **CHAPTER 5: CANADIAN DISABILITY LAW**

Having analyzed the restrictive approach to disability jurisprudence in chapter 4 of the American Federal Supreme court, attention will turn to the Canadian position on disability discrimination. It is a jurisprudence that broadly interprets definitions of disability and more importantly deals with the discrimination that the disabled person suffers because of the impairment. It is also a jurisprudence that correctly lays the reason for and impaired person's disability at the door of society. It is a jurisprudence that squarely addresses and locates disability in society. For them society disables.

### **5.1 INTRODUCTION**

The argument of this chapter will be structured in five parts. It will discuss the importance of substantive equality in the Canadian Charter of Rights and Freedoms; the purposive interpretive approach in Canadian jurisprudence; how Canadian jurisprudence approaches discrimination with regard to disability and the social model orientations of Canadian disability jurisprudence, an exercise in method will be employed utilizing the *Levac* case to illustrate how, in the main, Canadian jurisprudence approaches disability discrimination and lastly, an exposition on reasonable accommodations and undue hardship will be dealt, again, to show the difference in approach of the two legal systems.

## 5.2 THE CANADIAN CHARTER OF RIGHTS AND FREEDOMS: SUBSTANTIVE EQUALITY

Section 15 (1) The Canadian Charter of Rights and Freedoms (the Charter) states:

“Every individual is equal before the law and under the law and has the right to equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national ethnic origin, colour, religion, sex, age, or mental health or physical disability<sup>189</sup>.”

Section 15 of the Charter plays a pivotal role in setting the boundaries and conditions necessary for the eradication of any form of discrimination in Canadian society. Section 15 is essentially grounded in the ideas of equality and human dignity, and any form of discrimination will be tested against it, and, if found to contradict it, will be struck down. It sets the ultimate standard by which every action will be judged in Canadian society.

Also, not only does section 15 form the cornerstone of Canadian society, section 15 is primarily and essentially premised on a particular notion of equality, namely, substantive equality. And at the core of this notion of equality are the eradication of any form of discrimination and the restoration of human dignity.

In *Law v Canada*<sup>190</sup> Iacobucci J touched on the notions of human dignity and freedom when he explained what the purpose of section 15 was:

“It may be said that the purpose of s. 15 is to prevent the violation of essential human dignity and freedom through the imposition of disadvantage, stereotyping, or political or social prejudice, and

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<sup>189</sup> Section 15(1) The Canadian Charter of Rights and Freedoms.

<sup>190</sup> *Law v Canada (Minister of Employment and Immigration)* [1999] 1 S.C.R. 497 <http://scc.lexum.umontreal.ca/en/1999/1999rcs1-497/1999rcs1-497.html> Accessed 3/3/2008 at p497

to promote a society in which all persons enjoy equal recognition at law as human beings or as members of Canadian society, equally capable and equally deserving of concern, respect and consideration.”

To drive home the importance of section 15 Iacobucci J spelt out at length what it meant when he said:

“Human dignity means that an individual or group feels self-respect and self-worth. Human dignity is harmed by unfair treatment premised upon personal traits or circumstances which do not relate to individual needs, capacities, or merits. It is enhanced by laws which are sensitive to the needs, capacities, and merits of different individuals, taking into account the context underlying their differences. Human dignity is harmed when individuals and groups are marginalized, ignored, or devalued, and is enhanced when laws recognize the full place of all individuals and groups within Canadian society. Human dignity within the meaning of the equality guarantee does not relate to the status or position of an individual in society *per se*, but rather concerns the manner in which a person legitimately feels when confronted with a particular law. Does the law treat him or her unfairly, taking into account all of the circumstances regarding the individuals affected and excluded by the law?”<sup>191</sup>

The key underlying principle of section 15 and its concern for human dignity is the principle of substantive equality.<sup>192</sup> What is substantive equality?

Jonathan Penney explains the essential nature of substantive equality and its relationship with human dignity by highlighting the core importance of difference.

“In order to give proper concern and respect for the dignity of people, differences among people must be taken into consideration”<sup>193</sup>

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<sup>191</sup> At p 27

<sup>192</sup> Jonathan Penney “A Constitution for the disabled or a disabled constitution” (2002) 1 *Journal of Law & Equality* 83-115 at p95

This recognition of difference will require different treatment in order to achieve equality. And this is fundamental to the idea of substantive equality.<sup>194</sup>

He drives home his point by drawing on the succinct remarks McIntyre J made in *Andrews v Law Society of British Columbia*<sup>195</sup>.

“Accommodation of differences...is the essence of equality.”<sup>196</sup>

Macintyre J further explained the notion of difference which per se did not necessarily mean unequal. He said that it must be recognized that every difference in treatment between individuals under the law will not necessarily result in inequality, and, also, that identical treatment may frequently produce serious inequality.<sup>197</sup>

This particular understanding of equality is in stark contrast to understanding equality in purely formalistic terms. Formal equality is based on the principle of equal treatment. And key to a formal notion of equality is the idea of treating all people the same, regardless of the differences amongst them. People who are alike should be treated alike. According to Robert T. Long:

“Some thinkers draw a distinction between *formal* equality and *substantive* equality, where formal equality means ... the same laws applying equally to everyone—while substantive equality requires abolishing, or at least greatly reducing, differences in wealth, opportunity, or influence.”<sup>198</sup>

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<sup>193</sup> Penney (n 6)

<sup>194</sup> Penney (n 6)

<sup>195</sup> *Andrews v Law Society of British Columbia* [1989] 1 S.C.R. 143

<sup>196</sup> At p 169

<sup>197</sup> (n 9) p 21 <http://scc.lexum.umontreal.ca/en/1989/1989rcs1-143/1989rcs1-143.html> Accessed 3 March 2008

<sup>198</sup> Robert T. Long *Liberty the other equality* <http://www.fee.org/pdf/the-freeman/0510Long.pdf> (Accessed 4 March 2008)

Sandra Fredman expands on this understanding of equality in a paper she presented for the South African Journal on Human Rights Conference held 5-7 July 2004 when she provides four cardinal aspects of substantive equality:

“...[E]quality ought to encompass four central aims. First, it should break the cycle of disadvantage associated with out –groups. Second, it should promote respect for the equal dignity and worth of all, thereby redressing stigma, stereotyping, humiliation and violence because of membership of an out-group. Third, it should entail positive affirmation and celebration of identity with community, and, finally, it should facilitate full participation in society.”<sup>199</sup>

And she goes on to explain:

“It can be seen from this that the positive duty to promote equality includes a duty to make positive provision ...it is not sufficient for positive measures to remove barriers...in addition it is necessary to take active steps to make sure that individuals are equipped to take advantage of opportunities”<sup>200</sup>

The key aspect of Sandra Fredman’s point of view is that it is not enough to break down barriers that constrain equality, but that co-terminously, there exists a positive duty to make sure that individuals are equipped to take advantage of the opportunities that are presented to them in the pursuit of realizing their full potential as citizens. Individuals must be in a position to fully enjoy the right that has been conferred upon them. If equality means that I have a right to be accommodated in my workplace because of a

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<sup>199</sup> Sandra Fredman “*Providing equality: Substantive equality and the positive duty to provide*” at p4 [http://www.law.wits.ac.za/sajhr/conference\\_papers/fredmanpaper.pdf](http://www.law.wits.ac.za/sajhr/conference_papers/fredmanpaper.pdf) (Accessed 24 January 2007)

<sup>200</sup> Fredman (n 13) at p4

particular impairment that I suffer from, then it means that I am able to enjoy that right in a very material and substantive way. This is the stark difference between formal rights and substantive rights. With regards to the latter there exists a positive duty to act, and with regards to the former there is no duty to act, in respect of the proposed right. This ties in with the general thrust of section 15.

The analytical framework and interpretative construction of section 15 were grounded and developed in four<sup>201</sup> important Supreme Court of Canada cases.

For Cliona Kimber, The phrase “every individual is equal before the law and under the law and has the right to equal protection and equal benefit of the law highlights two important aspects of section 15. First, it raises the question of interpretation; and, secondly, which is of paramount importance, it signaled that for Canadian jurisprudence the idea of “equality was to be given a substantive content”<sup>202</sup>. Furthermore, for her, equality should not only have a “substantive content,” but also be “results-oriented and which lays emphasis on appropriate remedies”.<sup>203</sup>

The Andrews case<sup>204</sup> aptly illustrates this: the Court was not prepared to see section 15 of the Charter as a guarantee of formal equality only, but, in fact, as a promoter of substantive equality. The Court focused on the effects of the discriminatory practice, rather than try to establish what the intent of the discriminator was. Additionally it was of crucial importance for the correct understanding of equality that the Court found that unintentional systemic discrimination was prohibited as far as section 15 of the Charter was concerned. Intention was not a factor in establishing whether somebody had been

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<sup>201</sup> Andrews (n 9); *R v Turpin* [1989] 1 S.C.R. 1296; *R v Swain* [1991] 1 S.C.R. 933; and *Law* (n 2).

<sup>202</sup> Gerard Quinn, Maeve McDonagh & Cliona Kimber *Disability Discrimination Law in US, Australia, Canada* (1993) at p188

<sup>203</sup> Kimber (n 16) at p188

<sup>204</sup> See (n 9)

discriminated against; rather, the effect of the alleged discriminatory practice was key.<sup>205</sup>

The words of McIntyre J are apt in this regard:

“...discrimination may be described as a distinction, whether intentional or not ... which has the effect of imposing burdens, obligations or disadvantages on [an] ... individual or group not to imposed upon others, or which limits access to opportunities, benefits and advantages available to other members of society”<sup>206</sup>

### 5.3 THE CHARTER - CONTEXTUAL INTERPRETATION: PURPOSE AND CONTEXT

The Charter is the foremost piece of legislation in Canadian society, and, to give it its overarching and all important place therein it also has to be interpreted in a particular way, to ensure its relevance in the quest to acquit itself of its stated objectives and mandate, namely, the pursuit of equality and human dignity. In two important cases<sup>207</sup> the interpretative approach that was to be used when interpreting the provisions of the Charter was made abundantly clear, to ensure that the scope and intent of the Canadian Constitution was given its fullest expression. In the *Big M. Drug Mart* case Chief Justice Dickson set out what the proper interpretative approach should be with regard to the Charter:

“The purpose of the right or freedom in question is to be sought by reference to the character and larger objects of the Charter itself, to the language chosen to articulate the specific right or freedom, to the historical origins of the concepts enshrined and where applicable, to the meaning and purpose of the other specific rights and freedoms with which it is associated within the text of the Charter.”<sup>208</sup>

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<sup>205</sup> At p 184

<sup>206</sup> At p 184

<sup>207</sup> *R v Big M. Drug Mart*, [1985] 1 S.C.R. 295 and *Regina v Oakes*, [1986] 1 S.C.R. 103.

<sup>208</sup> At p 344.



The interpretative approach adopted by Chief Justice Dickson is suggestive of a method which seeks to use every possible interpretative device to achieve a particular objective, and, in this case, the enforcing of a particular right or freedom. In the quest to satisfy this goal he sets out some markers or devices that could be employed to achieve this. Some of the devices that he believes should be employed are to refer to: “character and larger objects of the Charter itself”; “the language used to articulate the specific right or freedom”; and “the historical origins of the concepts”. The Chief Justice clearly is of the view that a particular right or freedom should be given the fullest and widest possible interpretation and appreciation, given the specific circumstances, so that it can be of real benefit to its intended recipient. Jonathan Penney supports the view that if this goal oriented purposive method is to achieve its desired goal it requires a:

“[B]road liberal interpretation of the Charter’s rights, freedoms and protections”<sup>209</sup>

Jonathan Penney is further of the view that not only must the Charter be broadly and liberally interpreted, it in fact demands to be understood within the particular confines of the context in which it occurs. Hence, of paramount importance is the necessity to understand the particular provision within its unique set of circumstances; a contextual analysis is, therefore, vital. To support his assertion he draws on the insights of Wilson J in a freedom of speech case in *Alberta*<sup>210</sup>:

“The *Charter* should be applied to individual cases using a contextual rather than an abstract approach. A contextual approach recognizes that a particular right or freedom may have a different value depending on the context and brings into sharp relief the aspect of the right or freedom which is truly at stake in the case as well as the relevant aspects of any values in competition with it.

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<sup>209</sup> Penney (n 6) at p 95

<sup>210</sup> *Edmonton Journal v Alberta (Attorney General)* [1989] 2 S.C.R. 1326 at pp 1355 – 1356 at paras 51-52

This approach is more sensitive to the reality of the dilemma posed by the particular facts of a case and is more conducive to finding a fair and just compromise between two competing values ... The importance of a *Charter's* right or freedom, therefore, must be assessed in context rather than in the abstract and its purpose must also be ascertained in context.”

In *Regina v Oakes*<sup>211</sup> the purposive approach to interpretation was once again confirmed in a presumption of innocence case. The Chief Justice reiterated that section 11 (d) of the Charter constitutionally entrenched the presumption of innocence as part of the supreme law of Canada, and that to interpret the meaning of s 11(d) “it is important to adopt a purposive approach”.<sup>212</sup> He concludes by saying that one of the important tools when beginning the interpretative process is to understand the intrinsic value that the relevant provision embodies. In his words:

“To identify the underlying purpose of the Charter right in question, therefore, it is important to begin by understanding the cardinal value it embodies”<sup>213</sup>

Wayne Thomas Oakes, citing *Regina v Oakes*, affirms the liberal interpretation idea when he says:

“The court emphasized the need to liberally construe constitutional protections as such an interpretation was central to the goal of advancing equality.”<sup>214</sup>

In the *Oakes* case Chief Justice Dickson was at pains to emphasize the importance of adopting the proper interpretative tool when the questions of equality and freedom were at issue. In the words of the Chief Justice:

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<sup>211</sup> See (n 21)

<sup>212</sup> At p21

<sup>213</sup> At p22

<sup>214</sup> Wayne Thomas Oakes *Perspectives on Disability, Discrimination, Accommodations and Law* (Year) at p67

“The presumption of innocence is a hallowed principle lying at the very heart of criminal law. Although protected expressly in s. 11(d) of the Charter, the presumption of innocence is referable and integral to the general protection of life, liberty and security ... The presumption of innocence protects the fundamental liberty and human dignity of any and every person accused by the State of criminal conduct. An individual charged with a criminal offence faces grave social and personal consequences, including potential loss of physical liberty, subjection to social stigma and ostracism from the community ... In the light of the gravity of these consequences the presumption of innocence is crucial. It ensures that until the State proves the accuser’s guilt beyond reasonable doubt, he or she is innocent. This is essential in a society committed to fairness and social justice.”<sup>215</sup>

And finally, a further instance to show this expansive, purposive trend in Canadian jurisprudence generally, around the question of interpretation. The Quebec Charter of Rights, in keeping with the Charter, did not have a definition of the term “handicap”, and in *Quebec v Montreal*<sup>216</sup> the Court had cause to deal with this issue. It found that:

“A liberal and purposive interpretation and a contextual approach support a broad definition of the word “handicap”... “handicap” must not be confined within a narrow definition that leaves no room for flexibility.”<sup>217</sup>

To summarize, thus far: any right or freedoms guaranteed by the Charter should not only be widely and liberally interpreted but should be assessed and analysed within the bounds of its particular context and circumstances.

Finally in the words of Iacobucci J:

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<sup>215</sup> Regina v Oakes p22

<sup>216</sup> Quebec v Montreal City and Quebec v Boisbriand (2000) 1 S.C.R.665, 2000 SCC 27

<sup>217</sup> Quebec at p 665

"It is inappropriate to attempt to confine analysis under s. 15(1) of the *Charter* to a fixed and limited formula. A purposive and contextual approach to discrimination analysis is to be preferred, in order to permit the realization of the strong remedial purpose of the equality guarantee, and to avoid the pitfalls of a formalistic or mechanical approach."<sup>218</sup>

#### **5.4 THE SIGNIFICANCE OF DISCRIMINATION IN CANADIAN DISABILITY LAW**

In stark contrast to the United States as argued in chapter four, the Canadian treatment of disability follows a different path. Canadian jurisprudence approaches disability discrimination in a purposive way by looking at the discrimination that the disabled person suffered. Canadian thinking on this aspect is not reduced to showing that a particular bio-medical condition is substantially limiting and, therefore, renders the person concerned unable to do particular class of job or to remain in a particular class of job. Rather than concentrating on defining who is disabled by having to meet a strict and rigid set of criteria, the Canadian position at the outset addresses the discrimination that the person experiences as a result of the manner in which society views the bio-medical condition or impairment from which that person suffers. This approach has its origins in the Canadian Constitution: the Charter in section 15(1)<sup>219</sup> very clearly states that everyone is equal before the law, and that nobody should be discriminated against based on such categories as, race, gender and of particular importance for the purposes of this study, disability.

The discrimination that a disabled person suffers is crucial and fundamental to addressing issues of disability discrimination in Canadian jurisprudence. The fact that Canadian disability jurisprudence lays emphasis on the discrimination that an impaired

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<sup>218</sup> *Law v Canada (Minister of Employment and Immigration)* [1999] 1 S.C.R. 497  
<http://scc.lexum.umontreal.ca/en/1999/1999rcs1-497/1999rcs1-497.html> Accessed 3 march 2008

<sup>219</sup> Section 15(1) Every individual is equal before and under the law and has the right to equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

person suffers, indicates a fundamental shift in how it approaches disability discrimination, compared to the approach in the USA. Section 2 of the Canadian Human Rights Act conveys the intentions, scope and spirit of the Act which is clearly based on creating the circumstances for the development of the specific categories<sup>220</sup> that it speaks to. In the words of the Act:

“The purpose of this Act is to extend the laws in Canada to give effect ... to the principle that all individuals should have an opportunity equal with other individuals to make for themselves the lives that they are able and wish to have and to have their needs accommodated, consistent with their duties and obligations as members of society, without being hindered in or prevented from doing so by discriminatory practices based on race, national or ethnic origin, colour, religion, age, sex, sexual orientation, marital status, family status, disability ...”<sup>221</sup>.

The Human Rights Act's intentions reiterate without reservation the Charter's intentions quite clearly. It sees “all individuals” as having the potential to advance, and to live the lives that they are able to carve out for themselves, without being hindered by, or being prevented by, discriminatory practices based on race, national or ethnic origin, religion, age, sex...or disability. These two pieces of legislation are of the view that these social cleavages should not be an impediment or barrier to the advancement and development of any individual in society, and that where accommodations are needed for that advancement and development then they should be forthcoming so that all individuals are able to their lives as equals, with dignity, and, also, in the best possible position to fully realize their potential.

A key observation that can be discerned from the Human Rights Act is that it is located within a context which suggests that the notion of equality is of vital importance to

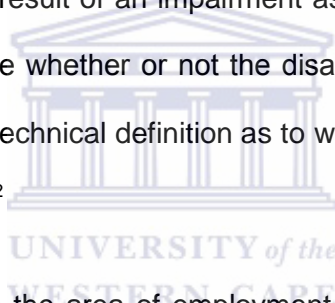
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<sup>220</sup> Race, national or ethnic origin, colour, religion, sex, age, mental or physical disability.

<sup>221</sup> <http://laws.justice.gc.ca/> “Canadian Human Rights Act” accessed 22 Jan 2008

advance the idea of human dignity. It moves from the position that nobody in society should be treated in a manner that infringes upon their rights to equality and human dignity simply because they are different. It is a piece of legislation that seeks to root out socially constructed discriminations. It is in the spirit of this piece of legislation that disabled people in Canada have been more fortunate than their counterparts in the United States, whenever the courts have to decide on cases dealing with disability discrimination.

The Canadian courts also employ a more expansive interpretation to their understanding of disability, and pivotally, as argued above, rather emphasize the discrimination that the disabled person suffered as a result of an impairment as opposed to the practice in the USA, which seeks to determine whether or not the disabled person's claims that he or she is impaired conforms to a technical definition as to whether he/she is disabled or not as is the practice in the USA.<sup>222</sup>



The Employment Equity Act in the area of employment obligates employers to identify and eliminate discriminatory employment practices and promote a proper representation of four equality seeking groups, including disabled people within the federally regulated workforce. What is significant of the Employment Equity Act is that it identifies four separate groups of disabled people but nowhere in its identification of these disabled people does it resort to a process of evaluating the bio-medical condition of these people. Plainly put it does not embark upon a meticulous investigation to establish whether a person claiming to be impaired indeed does have such an impairment and the extent of the impairment.<sup>223</sup>

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<sup>222</sup> Sutton Trilogy See chapter 4

<sup>223</sup> Wayne Thomas Oakes "Perspectives on disability, discrimination, accommodations and law" p 72

## 5.5 THE SOCIAL MODEL ORIENTATION OF CANADIAN LAW

In the *Quebec v Montreal City* another significant aspect of Canadian jurisprudence was raised that tied in with the important notions of human dignity and equality, and the role that discrimination plays in undermining these concepts. In its approach to eradicating disability discrimination the Court correctly identified and located the source of disability discrimination as being within society, urging that:

“. . . courts should adopt a multi-dimensional approach that *considers the socio-political dimension of “handicap”*<sup>224</sup> (my emphasis).

The remarks made by the Court are quite instructive because it urged the courts to take note of the social and political aspects of “handicap”<sup>225</sup>. To expand, it highlighted the importance of taking into account the socio-political context in which “handicap” was located. When the Court signposts the socio-political aspects of “handicap” as being important, the inference that can be drawn from such a statement is the key role that power plays with regard to the social construction of “handicap”. People with power within a particular social context have the power to ascribe a particular status and social category in society to others.

Coupled with the idea of social context, of importance for the Court were the notions of human dignity and equality, rather than a narrow focus “on the bio-medical condition.”<sup>226</sup>

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<sup>224</sup> See (n 30)

<sup>225</sup> The terms “disability” and “handicap” have been given a broad meaning in Canadian law. (There is no difference in law in the meaning attached to these two terms). The leading definition of the terms within the context of human rights legislation is *Entrop v. Imperial Oil Ltd. (No. 6)*, where an Ontario Board of Inquiry defined “handicap” as:

“...an illness, injury or disfigurement that creates a physical or mental impairment and thereby interferes with a person’s physical, psychological and/or social functioning.”

<sup>226</sup> At p

The warning from the courts to refrain from a narrow focus on the “bio-medical” condition, that is, the impairment per se, of the impaired person is a warning which seeks to eradicate the possibility for stereotyping and prejudice.<sup>227</sup>

The crucial part of the Court’s judgment is, that it correctly foregrounds the importance of understanding an impaired person’s “bio – medical condition” (impairment) within the social context in which it takes place and the meaning that is attributed to it within that social context. The significance of an impaired person’s “bio-medical condition” is: that, in a society that is dominated by able –bodied persons, the meaning that is ascribed to an impaired person because of the “bio-medical condition” from which they suffer, is that impaired people are perceived as not being normal and, in so doing are stereotyped and prejudiced against which results in a downgraded marginalized person.

This very act of stereotyping and prejudice manifests itself in discriminatory practices. It is a disabling activity on the part of able-bodied society to which impaired people are subjected. Able-bodied society creates the circumstances for an impaired person to be discriminated against. Therefore, able-bodied society, in its prejudice and stereotyping which manifests in discrimination, is central to the construction of disability. Michael Lynk supports this view when he says that:

“The thrust of the contemporary legal approach towards disability is to separate the truly disabling features of a person’s impairment from the unnecessary burdens sustained by discriminatory attitudes, laws, practices, and structural barriers. In other words, a person with a disability should be assessed in light of their own true abilities and not by the filter of our own prejudices, assumptions, stigmas and misunderstandings of their impairment.”<sup>228</sup>

And drives home his point:

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<sup>227</sup> At p

<sup>228</sup> Michael Lynk *Disability and the Duty to Accommodate in the Canadian Workplace*  
[http://www.ofl.ca/uploads/library/disability\\_issues/ACCOMMODATION.pdf](http://www.ofl.ca/uploads/library/disability_issues/ACCOMMODATION.pdf) Accessed 30 July 2009 p 6



“The Supreme Court of Canada, in *Montreal (City)* has accepted the social critique of our traditional attitudes towards disability because they (our traditional attitudes) (my addition) locate the problem of disablement solely within the domain of the person with a disability, and thereby ignore the significant role played by society in constructing mutable barriers in the workplace and other environments.”<sup>229</sup>

And concludes:

“In its judgment, the Court urged a broad definition of disability, and directed that it must take into account the social context of the impairment.”<sup>230</sup>

## **5.6 AN EXERCISE IN METHODOLOGY: *LEVAC VS CANADIAN ARMED FORCES.***

To illustrate the discrimination based approach that Canadian jurisprudence has adopted in dealing with disability its key elements will be demonstrated in an examination of the Tribunal case, *Levac vs Canadian Armed Forces*<sup>231</sup>.

In this case, the Tribunal was not persuaded that, based on the evidence, a real risk of sufficient proportions was demonstrated to exist which would justify the outright exclusion of the Complainant or others like him from continuing his employment in the Canadian Armed Forces simply because his medical condition as determined by the Respondent indicated that he was in less than perfect health.

By analyzing the *Levac* case it will be shown to what extent the Tribunal was not persuaded by the case made by the Respondent. It will also demonstrate the extent to which judicial forums, like the Tribunal, will go to ensure that an employer, when discriminating against a prohibited category, like the disabled, has exhausted all possible

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<sup>229</sup> At p 6

<sup>230</sup> At p 7

<sup>231</sup> *Levac v Canadian Armed Forces* [1992] F.C.J. No. 618

avenues short of suffering hardship that goes to the very existence and sustainability of the business in question. Anything short of such undue hardship does not exculpate the employer from a charge of discrimination.

In deciding this case the Tribunal took into consideration four important aspects: 1. Did the Respondent discriminate against the Complainant on a prohibited ground of discrimination, namely, physical disability?<sup>232</sup>

2. If the Respondent did discriminate based on a prohibited ground did he invoke the Bona Fide Occupational Requirement defence?<sup>233</sup>

3. Did the Respondent reasonably accommodate the Complainant in the face of the alleged discrimination up to the point of undue hardship? What does the law<sup>234</sup> say in this regard?

The law is quite clear in that an employer cannot discriminate directly or indirectly against a disabled person by dismissal or by differentiating adversely against him or her. However, if an employer does discriminate against a disabled person, the onus is on the employer to show on a balance of probabilities that the reason for the discrimination was based on good grounds. These good grounds have to be based on a bona fide

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<sup>232</sup> Section 7(a) of the Act

<sup>233</sup> Section 15(a) of the Act

<sup>234</sup> Section 3(1): "For all purposes of this Act, race, national or ethnic origin, colour, religion, age, sex, marital status, family status, disability . . . are prohibited grounds of discrimination."

Section 7: "It is a discriminatory practice, directly or indirectly,

(a) to refuse to employ or continue to employ any individual, or

(b) in the course of employment, to differentiate adversely

in relation to an employee, on a prohibited ground of discrimination.

Section 15: It is not a discriminatory practice if any refusal, exclusion, expulsion, suspension, limitation, specification or preference in relation to any employment is established by an employer to be based on a bona fide occupational requirement."

occupational requirement. To ensure that no frivolous or spurious bona fide occupational requirement is given as justification for the discrimination the *Etobicoke* case<sup>235</sup> set in place the test for a bona fide occupational requirement. BFOR is both a subjective and an objective test. Justice McIntyre laid down the now oft-cited criteria:

The subjective test:

"To be a bona fide occupational qualification and requirement, a limitation, such as mandatory retirement at a fixed age, must be imposed honestly, in good faith, and in the sincerely held belief that such limitation is imposed in the interests of the adequate performance of the work involved with all reasonable dispatch, safety and economy, and not for ulterior or extraneous reasons aimed at objectives which could defeat the purpose of the Code."<sup>236</sup>

In addition to the subjective test, the BFOR requirement must meet the objective test which was described as follows:



"In addition it must be related in an objective sense to the performance of the employment concerned, in that it is reasonably necessary to assure the efficient and economical performance of the job without endangering the employee, his fellow employees and the general public."<sup>237</sup>

An analysis of these two tests indicates that there is a seriousness that can be gleaned from the language used. The use of the word "must" displays the peremptory nature of the language. The language of the judgment does not give the employer discretion in this matter. The language clearly displays un-ambiguously that, with regard to the subjective test, the bona fide occupational requirement "must be imposed honestly" "in

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<sup>235</sup> *Etobicoke (Borough) v Ontario (Human Rights Commission)*, (1982) 132 D.L.R (3<sup>rd</sup>) 14 (1982) S.C.R. 202 at p208

<sup>236</sup> At p 208

<sup>237</sup> At p 208

good faith” “and not for ulterior or extraneous reasons aimed at objectives which could defeat the purpose of the Code”.

With regard to the objective test, again, there is the lack of discretion allowed to the employer, Justice McIntyre stated that the BFOR:

“[M]ust be related in an objective sense to the performance of the employer concerned, in that it is reasonably necessary to assure the efficient and economical performance of the job without endangering the employee, his fellow employees and the general public.”<sup>238</sup>

Anything short of this would not satisfy the BFOR test. In the light of this exposition the Tribunal naturally, after a consideration of all the facts and circumstances, came to the conclusion that the Respondent could not establish a justification for dismissing the Complainant based on the BFOR test.

The Tribunal, though, did establish that the Complainant was dismissed because of his disability.

The Tribunal declared that to come to another conclusion, namely, one that favoured the employer, would be tantamount to opening the floodgates for employers to embark upon routine or non-routine examinations, with a view to establishing the existence of degrees of disability, slight or otherwise, in their employees, in the hope of circumventing the main purpose of the Act, which is the elimination of illegal discrimination. This would be a flagrant violation of the Canadian Human Rights Act. The Tribunal went on to say that it would be untenable if, in violation of the Act, it were to countenance acts of discrimination against persons who were disabled in Canadian society.

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<sup>238</sup> At p 208

To under gird the decision by the Tribunal, the Supreme Court in *Alberta Human Rights Commission vs Central Alberta Dairy Pool*,<sup>239</sup> declared that there existed a legal obligation for the Respondent to take appropriate reasonable steps up to the point of undue hardship to accommodate the Complainant, who was adversely affected by the Respondent's discriminatory practice. Moreover, it was further declared that there was an onus upon the Respondent to establish that it had made serious efforts to accommodate the Complainant's impairment without the Respondent having suffered undue hardship.

Justice Wilson declared as follows citing Dickson CJ:

"Dickson C.J., in effect, focused upon the bona fide aspect of the BFOR and found that an occupational requirement could not be imposed bona fide unless the employer had exercised its duty to accommodate those on whom the requirement would have an adverse impact. The purpose of the Canadian Human Rights Act, S.C. 1976- 77, c. 33, he stressed, was to prevent discrimination, and discrimination resulting from adverse impact could only be prevented by importing into the BFOR a duty to accommodate."<sup>240</sup>

"The words "occupational requirement" meant that the requirement must be manifestly related to the occupation in which the individual complainant is engaged. Once it is established that a requirement is "occupational", however, it must further be established that it is "bona fide". A requirement which is prima facie discriminatory against an individual, even if it is in fact "occupational", is not bona fide for the purpose of s. 14(a) if its application to the individual is not reasonably necessary in the sense that undue

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<sup>239</sup> *Alberta Human Rights Commission vs Central Alberta Dairy Pool* (1990) 2 S.C.R 489

<sup>240</sup> At p 489

hardship on the part of the employer would result if an exception or substitution for the requirement were allowed in the case of the individual. In short, while it is untrue the words "occupational requirement" refers to a requirement manifest to the occupation as a whole the qualifying words "bona fide" require an employer to justify the imposition of an occupational requirement on a particular individual when such imposition has discriminatory effects on the individual."<sup>241</sup>

## **5.7 REASONABLE ACCOMMODATION**

To contextualize the discussion on reasonable accommodations in Canadian jurisprudence the court in the important case of *Quebec v Montreal City; Quebec v Boisbriand*<sup>242</sup> did not discount the view that there must exist proof of a medical deficiency which results in a physical or mental impairment, however, the court was very clear when it stated that the medical condition should not be the overriding factor, the determining factor in the determination of disability. It is but one factor in the overall assessment and that of crucial consideration should be given to the social conditions and circumstances that give meaning to the impairment. The court went further and stated that the emphasis should be on the social integration of an impaired individual into society; that the focus should be on the obstacles created by society that obstructed an impaired person's integration into society. The Court drove home its point by emphasizing the social effects of distinction, exclusion and preference as key, rather than the precise cause or origin of the impairment which is the want of disability jurisprudence in the United States.<sup>243</sup>

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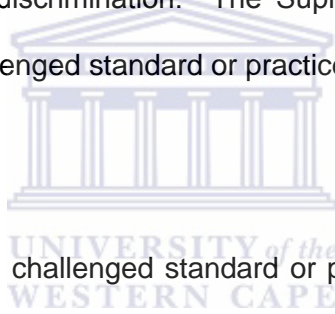
<sup>241</sup> *Alberta Dairy Pool v Alberta Human Rights Commission*, (1990) 2 S.C.R 489

<sup>242</sup> See (Fn 37) at p76

<sup>243</sup> See (Fn 37) at p 76

Hence, moving from this position where society plays a crucial role in the disabling process, Canadian jurisprudence is of the view, that it is society then who should correct these wrongs. It is society that should effect the necessary reasonable accommodations to properly integrate disabled people back into society. And in this case, the employer as a member of society is burdened with this obligation. However, it must be said that they are not without recourse. They can invoke the undue hardship defence to ameliorate the burden of accommodations that they have to make in respect of a disabled employee.

In *British Columbia (PSERC) v. British Columbia Government and Service Employees' Union ("Meiorin")*<sup>244</sup> the Supreme Court articulated a unified three-step test for determining the existence of discrimination. The Supreme Court's three-step test in assessing the validity of a challenged standard or practice, implores the courts to ask the following three questions:



Has the employer adopted the challenged standard or practice for a purpose *rationally connected* to the performance of the job? Has the employer adopted the standard in an *honest and good faith belief* that it is necessary to fulfill the work-related purpose? And, is the standard *reasonably necessary*, in that it would be impossible to accommodate an individual employee without imposing undue hardship upon the employer?

With the arrival of this unified test, discrimination analysis is now more straight-forward and more comprehensive. The three step test begins with a general review of the particular work performed, then moves to assessing the employer's subjective intent for creating the standard, and finally focuses on the accommodation of the individual worker

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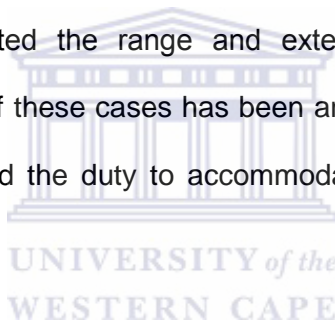
<sup>244</sup> *British Columbia (PSERC) v. B.C.G.S.E.U.* (2001), 46 McGill Law Journal 533.

and the defences that the employer can erect to attempt to justify either the standard or its particular application. If the employer fails on any one of the steps, then it is in breach of its duty not to discriminate.

The essence of the new approach in *Meiorin* has been to require employers to accommodate the characteristics of individual employees as much as reasonably possible, while taking a strict approach to any exceptions from the accommodation duty.

### **5.7.1 The Extent of the Employer's Duty to Accommodate**

Several cases have highlighted the range and extent of the employer's duty to accommodate and a sample of these cases has been analyzed to show how the courts and tribunals have approached the duty to accommodate by employers in respect of disabled people.



The employer bears the legal responsibility to initiate the process of accommodation<sup>245</sup>. The Canadian Human Rights Tribunal in *Conte v Rogers* clearly spelt out the extent of the employer's obligation to seek solutions with regard to accommodating a disabled person. The tribunal was of the view that more than mere negligible was needed to satisfy the duty to accommodate, since the employer was in control of the work-place and that at the very least the employer was required to find out what the current medical condition of the person was, when the person would recover and what the chances were for giving the employee alternative work. This was the least that the employer could have done in the circumstances. And the conclusion of the tribunal was that the

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<sup>245</sup> Central Okanagan School District No. 23 v. Renaud, [1992] 2 S.C.R. 970



employer fell far short of this.<sup>246</sup> This was also the case in *Morris v British Columbia Railway* where the employer was held to have discriminated against Mr. Morris based on disability when the employer terminated Mr. Morris following his return to work from a bout of depression. The Tribunal found that the employer failed to properly consider the medical input. The Tribunal determined that the employer improperly ignored the employee's input with respect to his condition.

The adjudicator highlighted that the employer is obliged not only to properly consider a doctor's assessment with respect to an employee's fitness to return to work, but also to consider the employee's concerns as to whether or not his performance will be affected by persisting disability.

The reason for the application of this imposition on employers is that employers have not utilized sufficient creativity, investigation efforts, or co-operation in devising an accommodation. In *Deborah Marc v Fletcher Challenge Canada, Ltd*<sup>247</sup> a British Columbia tribunal was of the view that employers have a duty to accommodate disabled employees and while suggestions from the employee in finding accommodation solutions were welcomed, there was no duty on the employee to find solutions this, was the sole preserve of the employer.

And in several other cases it was found that employers were not vigorously pursuing the obligation to accommodate disabled people.

In *Metsala v. Falconbridge Ltd*, Falconbridge failed to return a female employee to work in accordance with her documented medical restrictions. The Tribunal found that the employer failed to make appropriate inquiries and failed to gather accurate information to

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<sup>246</sup> (1999), 00 C.L.L.C. 230-005 (C.H.R.T.); *Morris v. British Columbia Railway* 2003 BCHRT 14

<sup>247</sup> (1998), 35 C.H.R.R. D/112 (BC Trib)

assess the accommodation entitlements of the employee. Failed to understand the proactive nature of the employer's accommodation obligations (i.e. need to secure and properly assess all relevant input). Failed to appreciate the scope of the duty to accommodate; particularly that it goes beyond offering positions that an employee is currently qualified for. Erroneously acted on impressionistic assumptions about the employee's abilities and skills rather than securing and evaluating relevant information from the relevant parties, the employee and her attending.<sup>248</sup>

And finally in *Re Calgary District Hospital Group*<sup>249</sup> the considerable weight that the duty places upon the employer is once again demonstrated in the case of a nurse with a back-related injury was preparing to return to work. Her back injury had left her unable to perform several key aspects of her regular position, including the lifting and transferring of patients. The employer had determined that, because of her physical limitations, it was unable to place her into another nursing position. The union maintained that the hospital had not examined ways to re-arrange the nursing positions in order to find an accommodation.

The arbitration board agreed with the union. It found that, although the nurse was unable to perform the duties of any of the nursing positions as they were currently structured, the employer had not taken the additional step of determining whether any nursing position could be modified to accommodate her. In its award, the board said it is not sufficient for the employer to show that its employee could not perform any of the current job descriptions. It must also be able to show that the job descriptions cannot be altered without undue hardship:

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<sup>248</sup> *Metsala v. Falconbridge Ltd.* (2001), 8 C.C.E.L. (3d) 120 (Ont. Bd. Inq.).

<sup>249</sup> (1995), 41 L.A.C. (4th) 319

The duty to accommodate requires more than determining that an employee cannot perform *existing* jobs...Having determined that the Grievor could not perform any existing job, the employer was obligated to turn its attention to whether, and in what manner, existing nursing jobs could have been *adjusted, modified or adapted* – short of undue hardship to the hospital – in order to enable the Grievor to return to work despite her physical limitations.<sup>250</sup>

As part of the remedy, the board ordered the hospital to:

“...conduct a thorough examination of its work place in order to ascertain how, without incurring undue hardship, it can adapt or modify a nursing job (or jobs) so that the Grievor’s physical disability can be accommodated.”<sup>251</sup>

The employer’s duty to accommodate includes an ongoing obligation to reassess opportunities to accommodate as employment circumstances change. These changes would include an improvement in an employee’s health, resulting in an unfeasible accommodation now becoming viable. Or it could include an increase in the staffing level of a workplace, meaning that an employer may no longer incur undue hardship by providing an accommodation. In *Jeppesen v. Ancaster*<sup>252</sup> an applicant for a municipal fire fighter’s job was initially refused employment because of a visual disability. At the time, the municipal fire service provided both firefighting and ambulance services, and it required its employees to hold separate driver’s licences to operate both ambulances and fire trucks. The applicant’s visual disability meant that he was able to acquire a license to drive a fire truck, but not an ambulance. However, when staffing levels

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<sup>250</sup> Calgary at p 326

<sup>251</sup> At n 63

<sup>252</sup> (2001), 2001 C.L.L.C. 145,103 (Ont. Bd. Inq.).

increased, and more firefighter openings became available several months later, the applicant applied again. He requested an accommodation – to drive only a fire truck – which the firefighting service turned down. An Ontario human rights board of inquiry upheld the subsequent complaint, ruling that the employer had never specifically considered whether the hiring of new firefighters afforded it an opportunity to accommodate the applicant by hiring him to perform firefighting duties only.

## 5.8 UNDUE HARDSHIP

What was the approach that Canadian law adopted when considering the possible undue hardship that the employer could suffer?

An employer and/or a union are required by law to accommodate an employee, unless the required accommodation would result in undue hardship to the employer and/or the union. The Supreme Court of Canada, in *Central Alberta Dairy Pool*<sup>253</sup> and *Renaud*<sup>254</sup> laid out the important aspects of the “undue hardship” test.

In *Central Alberta Dairy Pool*, the Supreme Court developed a non-exhaustive list of six factors that it said were relevant to what constitutes “undue hardship”.

They are financial cost, impact on a collective agreement, problems of employee morale, interchangeability of the work force and facilities, size of the employer’s operations and safety.

In addition to these six classic undue hardship factors, an unarticulated seventh factor now appears to be emerging: the legitimate operational requirements of a workplace. While labour arbitrators and human rights tribunals have not yet formalized this new

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<sup>253</sup> *Central Alberta Dairy Pool v. Alberta (Human Rights Commission)*, [1990] 2 S.C.R. 489

<sup>254</sup> *Central Okanagan School District No. 23 v. Renaud*, [1992] 2 S.C.R. 970

factor, recent decisions indicate an allowance for undue hardship in the workplace that does not easily fit within the classic six factors.

A labour board or human rights tribunal that is applying these factors will balance them with the right of the employee seeking an accommodation to be free from discrimination. Rarely will all of these factors come into play in any one single case. While the Supreme Court itself did not lay out these undue hardship factors in any order of importance, it is clear from the subsequent case law that some of these factors have significantly more weight than others. Financial cost, safety, and the size of the employer's operations are frequently invoked by employers, and legal decision-makers have treated them with some consideration.

Provisions of a collective agreement have been given an intermediate importance, as have the legitimate operational requirements of a workplace. Relatively little regard has been given to the defence of employee morale. The issue of the interchangeability of the workforce and operations has generally been subsumed within the size of the employer factor.

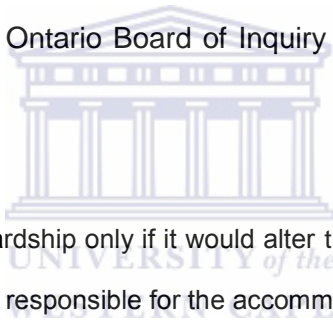
As noted earlier, the amount of hardship to satisfy the accommodation duty must be substantial. *Renaud* involved a case of religious accommodation, but the ruling applies equally to issues of disability. The Supreme Court emphasized that an accommodation request which involved some inconvenience or operational upset would be insufficient to meet the test. In *Renaud*, the Court said:

More than mere negligible effort is required to satisfy the duty to accommodate. The use of the term 'undue' infers that some hardship is acceptable; it is only 'undue' hardship

that satisfies this test....Minor interference or inconvenience is the price to be paid for religious freedom in a multicultural society.<sup>255</sup>

The various factors have been commented upon in various accommodation decisions during the past 10 years:

Financial cost is the most common factor cited by an employer when raising an undue hardship defence. Cost is a factor very much tied to the size and viability of the enterprise. As with the other factors, the employer would have to prove that the cost would be substantial in order to be found to be “undue.” In *Quesnel v. London Educational Health Centre*, an Ontario Board of Inquiry under the *Human Rights Code* stated that:



“...cost would amount to undue hardship only if it would alter the *essential nature* or *substantially affect the viability* of the enterprise responsible for the accommodation.”<sup>256</sup>

And in *Re Zettel Manufacturing Ltd.*

Arbitrator Reilly stated that:

“If the Employer was able to show a high level of pervasive, irresolvable financial distress and corporate insecurity attributable to the accommodation, the level of harm may then be such that the business could no longer accommodate the Grievor’s illness...”<sup>257</sup>

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<sup>255</sup> Renaud (n67)

<sup>256</sup> (1995), 28 C.H.R.R. D/474 (Ont. Bd. Inq.).

<sup>257</sup> (2005), 140 L.A.C. (4th) 377.

The Supreme Court of Canada, in *Grismer v. British Columbia Superintendent of Motor Vehicles*<sup>258</sup> has recently offered a more imprecise assessment of cost, but warned that the courts must be cautious about accepting a low threshold:

...one must be wary of putting too low a value on accommodating the disabled. It is all too easy to cite increased cost as a reason for refusing to accord the disabled equal treatment.

Furthermore, an employer seeking to argue that a proposed accommodation could not have been accomplished without substantial costs amounting to undue hardship must be prepared to detail their case with detailed financial and accounting evidence. The Supreme Court of Canada stated in *Grismer* that

“impressionistic evidence of increased expense will not generally suffice.”

Finally, factors such as the financial cost of methods of accommodation are to be applied with common sense and flexibility in the context of the factual situation of any particular case. The Supreme Court of Canada observed in *Chambly v. Bergevin*<sup>259</sup> that what may be entirely reasonable in times of prosperity could impose an unreasonable financial burden upon an employer in times of economic restraint.

In sum, costs will only amount to an undue hardship if they can be established to be:

- Related to the accommodation;
- Provable, and not based on surmise or speculation; and

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<sup>258</sup> [1999] 3 S.C.R. 868

<sup>259</sup> [1994] 2 S.C.R. 525, at p. 546

- So substantial that they would either change the essential nature of the operation, or
- Substantially impact upon its financial viability.

In conclusion, the argument in this chapter demonstrated in stark contrast, the approach to disability that the Canadians adopt. It is an approach that is grounded in substantive equality; premised on a purposive interpretive approach that highlighted the need for a wide interpretation of disability; which emphasized the discrimination that the disabled person rather than being focused on whether the person is disabled or not as a first enquiry. This chapter also, served to show the social model orientations of Canadian disability jurisprudence which addressed the attitudes and stereotypes that society constructs when discriminating against disabled people, therefore squarely locating the discrimination of disabled people within the realm of society. An exercise in method was employed by utilizing the *Levac* case to illustrate how, in the main, Canadian jurisprudence approached disability discrimination not as an enquiry about whether a person was impaired or not; but rather whether a person has suffered discrimination as a result of an impairment which in the final analysis amounts to a disability. And, finally, the concepts reasonable accommodation and undue hardship were investigated which distinguished the Canadian approach markedly from the strict American approach which downplays the discrimination that the disabled person suffered.



## CHAPTER 6: THE IMPLICATIONS FOR A SOUTH AFRICAN DISABILITY LAW.

### 6.1 INTRODUCTION

Statistics show illuminatingly the discrepancy between the prevalence of disabled people and their access to the open labour market. In its survey of October 1995 the Central Statistical Services reported that the prevalence of disabled people in South Africa was 5% of the total population of 40 million and of this 5% it was estimated that 99% of them were excluded from the open labour market i.e. roughly 1.9 million people.<sup>260</sup>

The Development Bank of Southern Africa in their research on the employment of disabled people made some interesting discoveries with regard to the plight of disabled people in the work place. Although, the aim of the research was not statistically representative, their sample of major corporations<sup>261</sup> in South Africa and their responses to how able-bodied employees perceived disabled people in the work place was illuminating.

In the words of the report:

“Disabled respondents indicated the response that able bodied employees and managers frequently have a judgmental and rejecting attitude towards disabled people. This perception has lead to disabled people feeling isolated and separate. Thus 60% of disabled people interviewed have not been integrated into the mainstream work environment despite many years of service. As a result feelings of anger and frustration emerge from their lack of acceptance as people first and then as people with disabilities. This in turn reinforces the sense of failure. As there seems

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<sup>260</sup> Statistics South Africa Census 2001 Prevalence of Disability in South Africa p6

<sup>261</sup> Standard Bank, Nedbank, Old Mutual, Woolworths, South African Revenue Services, Eastern Cape Provincial Department.

little room for expression, respondents seem either to avoid challenging the status quo or become disconnected from the work place as a coping mechanism. Depression is prevalent . . . [and] may be ascribed, not to their disability but to a lack of emotional connection and accommodation at work.<sup>262</sup>

This chapter sets out to address what the possible implications are for disabled people in the workplace particularly around the question of dismissal. What needs to be understood at the outset is that the experiences of disabled people in the workplace are deeply rooted in society, it is an issue with deep rooted social consequences. And some of those consequences are the dismissal of disabled people in the work-place. Because of the economic and social structure of South African society which is capitalist in orientation, employers constantly need to increase their profit margins, and to do this they need a constant supply of able-bodied workers. Hence, people who become incapacitated in that they could not perform the essential requirements of the job were dismissed after half-hearted attempts at accommodation<sup>263</sup> were summarily dismissed, or, were just summarily dismissed based on a pretext after discovering that the person in question suffered from epilepsy.<sup>264</sup>

The point of this chapter is that dismissal, because of the disabling of an impaired person is discriminatory and unfair in the extreme given the hurdles and obstacles they have to overcome to become gainfully employed.

Therefore the question for this inquiry is to establish how best at a legal level society is able to deal with the particular work problems that disabled people are beset with daily,

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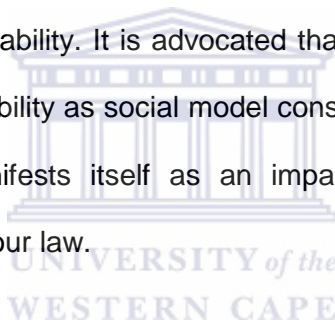
<sup>262</sup> Development Bank of Southern Africa *The Employment of People with Disabilities In South Africa* p35-36

<sup>263</sup> Wylie and Standard Executors & trustees (2006) 27 ILJ 2210 (CCMA)

<sup>264</sup> Strydom/Utopia Café (2002) 12 BLR 1371 (CCMA)

be they structural and systemic in terms of how the work environment is structured, or whether these problems are based on discriminatory perceptions and attitudes from able-bodied workers and employers. Also, if questions around dismissals and the equitable treatment of disabled people in the work –place are to be addressed, then questions of properly defining what it means to be disabled are paramount, and principally and fundamentally this is the objective of this chapter.

And in addressing this question it will be argued that the answer lies in Charles Ngwena’s novel idea of constructing a legal notion of disability. This discussion, however, will first deal with the vexing question that needs clarity and that is the question surrounding incapacity and disability. It is advocated that a clean conceptual break has to be made to understand disability as social model construct, and not as an impairment reduced concept, which manifests itself as an impairment based concept termed incapacity in South African labour law.



## **6.2 DEFINING AND DELIMITING INCAPACITY AND “DISABILITY”.**

To begin the discussion, South African disability law is in its infancy. There are only two reported Labour Court cases<sup>265</sup> that have dealt with questions of disability. Most other cases<sup>266</sup> have been decided on incapacity. Also, South African text book writers<sup>267</sup> have

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<sup>265</sup> Standard Bank of South Africa v Commission for Mediation and Arbitration and Others [2007] ZALC 98; Independent Municipal and Allied Trade Union and Another v City of Cape Town [2005] ZALC 10.

<sup>266</sup> *Van Zyl/Thebe Employee Benefits Risks Group (Pty) Ltd* (2004) 10 BALR 1298 (CCMA); *Strydom Utopia Café* (2002) 12 BALR 1371 (CCMA); *X v Elvey (Pty) Ltd* (1995) 5 BLLR 108 (IC); *Tither/Trident Steel* (2004) 4 BALR 404 (MEIBC); *National Education Health & Allied Workers Union on behalf of Lucas and Department of Health (Western Cape)* (2004) 25 ILJ 2091 (BCA); *National Union of Metal Workers of SA on behalf of Swanepoel and Oxyon Sevices CC* (2004) 25 ILJ 1136 (BCA); *Mambalu v AECI Explosives Ltd (Zomerveld)* (1995) 5BLLR 62 (IC); *SAFRAWU OBO Pienaar/Rainbow Farms* (2002) 2 BALR 215 (CCMA); *SAMWU obo Van Wyngaardt/ City of Cape Town (Tygerburg Administration)* (2001) 9BALR 1015 (CCMA).

not dealt with the understanding of disability in systematic fashion. On the one hand they have emasculated its explanatory power by understanding it as incapacity and on the other hand there is recognition that the two concepts are different. Marylyn Christianson and others, hold this view that there is indeed a conceptual difference between disability and incapacity.<sup>268</sup>

### 6.2.1 INCAPACITY: LABOUR RELATIONS ACT

To begin the discussion it would be important to how incapacity has been used in South African labour jurisprudence generally.

Incapacity in South African labour jurisprudence means that:

“ . . . the employee is not able to meet the standard of performance required by the employer – in other words the employee is not capable of doing the work”<sup>269</sup>

Also, generally there are two broad types of incapacity, namely, poor work performance and ill health and injury, for this inquiry only ill-health and injury will be considered<sup>270</sup>

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<sup>267</sup> P.A.K le Roux and Andre van Niekerk *The South African Law of Unfair Dismissal*; Martin Brassy *Commentary on the LRA*; John Grogan *Workplace Law* (8<sup>th</sup> ed); Fanie Van Jaarsveld and Stefan Van Eck *Principles of Labour Law* (2<sup>nd</sup> ed); D Du Toit et al *Labour Relations Act: A Comprehensive Guide* (4<sup>th</sup> ed); John Grogan *Dismissal, Discrimination and Unfair Labour Practices*; Elize Strydom (ed) *Essential Employment Discrimination Law*.

<sup>268</sup> Elize Strydom (ed) *Essential Employment Discrimination Law* at p161

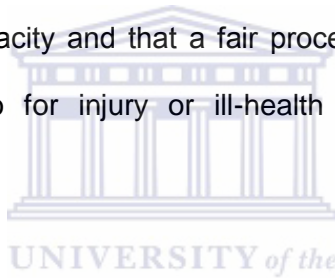
<sup>269</sup> Marylyn Christianson 'Dismissal for Incapacity' in *Essential Labour Law* p 199

<sup>270</sup> Marylyn Christianson (n14) p 200

An employee may be unable to do the work because of ill-health or injury which resulted from a motor vehicle accident, deterioration in sight or hearing, alcohol or drug abuse. Also, the incapacity may be temporary or permanent, total or partial.<sup>271</sup>

In some cases medical intervention by way of a medical practitioner or a psychologist might be needed to establish medically whether in fact the employee is in fact capable of doing the job.<sup>272</sup>

The Labour Relations Act (LRA) states that such a person can be dismissed fairly if there is a fair reason for his dismissal. And a fair reason for the LRA is, if the dismissal is related to the employee's capacity and that a fair procedure had been followed in the dismissal of the person who for injury or ill-health cannot perform the essential requirements of the job.<sup>273</sup>



## 6.2.2 DISABILITY IN SOUTH AFRICAN LAW: EEA APE

The Employment Equity Act<sup>274</sup> defines a people with disabilities as:

"...people who have long term or recurring physical or mental impairments which substantially limits the prospects of entry into, or advancement in employment"<sup>275</sup>

## 6.3 THE CONCEPTUAL ENMESHING OF INCAPACITY AND "DISABILITY".

When one takes into consideration the two descriptions put forward of incapacity and disability in the respectively in the LRA and the EEA, it can be understood why there is

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<sup>271</sup> Marylyn Christianson (n14) p 201

<sup>272</sup> Marylyn Christianson (n14) p 201

<sup>273</sup> sec 188(1)(a)(i)

<sup>274</sup> 55 of 1998

<sup>275</sup> Section 1 of Employment Equity Act 55 of 1998

this inability to see this two concepts as cognitively different. And the crux of the problem is that, there are contained in both of these descriptions clear references to an inability to do something.

For the Labour Relations Act an employee has an incapacity when that employee is not capable of doing the work because of ill-health or injury<sup>276</sup>. The Employment Equity Act and its construction of disability speaks about “long term or recurring physical or mental impairment which substantially limits the prospects of entry into, or advancement in employment”<sup>277</sup>

When the key phrases of the two constructions are juxtaposed “physical and mental impairment” and “ill-health or injury”; “inability” and “substantially limits” “to work” and “advancement in employment” there are clear suggestions that these phrases speak to something about the body in a particular state, (impairment) and because of this state it is not capable of work (inability) or be employed or to advance in the work environment. (work).

When these two constructions are distilled the conclusion that can be arrived at is that they both convey the unambiguous notion that the impaired body, because of the impairment it does not have the ability to work or to advance in the work environment. These notions are decidedly grounded in a notion of impairment and the effects it has on the disabled person’s body in relation to being able to work. And other instances by text book writers, cases and legislation illustrates this point which is restated in the next section.

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<sup>276</sup> Marylyn Christianson (n14) p 200

<sup>277</sup> At (n20)

## 6.4 INSTANCES OF ENMESHING THE CONCEPTUALIZATION OF INCAPACITY AND DISABILITY IN SOUTH AFRICAN LABOUR LAW: A RESTATEMENT

In South African labour jurisprudence incapacity too, is a concept which views the body in a state of impairment. And a notion that starts from that premise is one that has its roots in the medical model of disability which has implications for disabled people in the world of work because the understanding of incapacity in South Africa is that of an inability of the body to work.<sup>278</sup> Adolph Landman underscores this when he says:

“The concept of incapacity is a broad one. It embraces just about any inability arising from any cause...which gives rise to the performance of work which is below the appropriate or expected standard”<sup>279</sup>

Not only is incapacity an inability of the body to work, but an inability to work at an expected standard and that standard being an ability to perform the essential requirements of the job.

According to the Department of National Health and Population Development of the old apartheid state quoted in an unpublished masters thesis<sup>280</sup> (1986:3)

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<sup>278</sup> Van Zyl/Thebe Employee Benefits Risks Group (Pty) Ltd (2004) 10 BALR 1298 (CCMA); Strydom Utopia Café (2002) 12 BALR 1371 (CCMA); X v Elvey (Pty) Ltd (1995) 5 BLLR 108 (IC); Tither/Trident Steel (2004) 4 BALR 404 (MEIBC); National Education Health & Allied Workers Union on behalf of Lucas and Department of Health (Western Cape) (2004) 25 ILJ 2091 (BCA); National Union of Metal Workers of SA on behalf of Swanepoel and Oxyon Seviles CC (2004) 25 ILJ 1136 (BCA); Mambalu v AECI Explosives Ltd (Zomerveld) (1995) 5BLLR 62 (IC); SAFRAWU OBO Pienaar/Rainbow Farms (2002) 2 BALR 215 (CCMA); SAMWU obo Van Wyngaardt/ City of Cape Town (Tygerburg Administration) (2001) 9BALR 1015 (CCMA).

<sup>279</sup> Cited in Marylyn Christianson “Incapacity and Disability: A Retrospective and Prospective Overview of the Past 25 Years”( Industrial Law Journal 25 May 2004 p882

<sup>280</sup> Quinton Walter Williams The Disabled Worker – Career Mobility and Discrimination University of Pretoria 1993 at p3

“a disability in the health context is any restriction or lack (resulting from an impairment) of an ability to perform an activity which would be regarded as within the range of any *normal person*” (my emphasis).

The same thesis<sup>281</sup> quotes Kettle as defining impairment as;

“any loss or *abnormality* (my emphasis) of the physiological, psychological, or anatomical structure ”

For the old Department of National Health and Population Development disability is the result of an impairment which renders the person with a disability unable to work as would a normal person. This construction of disability shows a causal link between disability and impairment. The state of disability is caused by impairment. And this state of being is abnormal. The impairment creates the disability and the abnormality. Hence, the comparison with “normal person” infers that the person with a disability which resulted from an impairment is abnormal.

Kettle reinforces this notion that impairment is about the abnormal body when making these references “abnormality of the physiological, psychological or anatomical structure”. All these references are about the body as not being normal.

Text book writers Van Jaarsveld and van Eck also show the same inability to distinguish between incapacity and disability when they talk about disability as something that inheres on the body and the following phrase lends itself to this kind of conceptualization “...where his disability was caused by a work-related injury or illness”<sup>282</sup>“His disability”

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<sup>281</sup> Quinton Walter Williams (n302)

<sup>282</sup> Fanie van Jaarsveld and Jan van Eck *Principles of Labour Law*; Butterworths; Durban; 2002at p 208



suggests that the disability is present somewhere on his body which was caused by a particular injury. To be in a state of disability an injury must have caused it. Disability is caused by an injury.

The inference that can be drawn from this conceptualization is that the disability is the non-functional hand or foot or the epilepsy. The incapacity, similarly, since it is used interchangeably with disability would also inhere on the body. Again the incapacity is seen as a rendering of a particular healthy limb or mind as impaired. In considering whether the specific requirements have been met before an injured person can be dismissed for not being able to do their work, a consideration that must be taken into account is the “degree of severity<sup>283</sup> of the incapacity”. Once more the idea of incapacity is spoken of as synonymous to how injured the person is. One other aspect of the authors appreciation of disability and incapacity emerges when they refer to the procedural aspects that have to be adhered to before a dismissal can be effected, Van Jaarsveld and van Eck speak about “...an employee suffering from incapacity or disability”. The authors do not distinguish between disability, incapacity and impairment, these concepts are all the same, the real difference is whether disability, incapacity and impairment are physical or mental.

To show a pattern which converges with text book writers van Jaarsveld and van Eck, A Metal and Engineering Industries Bargaining Council arbitration award to illustrate this

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<sup>283</sup> Fanie van Jaarsveld and Jan van Eck *Principles of Labour Law*, Butterworths; Durban; 2002at p 209

phenomena. In Tither/Trident Steel<sup>284</sup> the arbitrator R Lyster, citing Mambalu v AECI Explosives Ltd (Zomerveld)<sup>285</sup> had this to say:

“It is now established law that the substantive fairness of the dismissal depends on whether the employer can fairly be expected to continue the employment relationship, bearing in mind the interests of the employee and the employer and the equities of the case. Relevant facts include the *nature of the incapacity*, the *cause of the incapacity*...the *effect of the employee’s disability* (my italics) ...*consulting with the employee about his ailment*...”

Once more with the introduction of the term ailment<sup>286</sup> there is a further suggestion that incapacity and disability are seen as an illness that once again suggests that it is found on the body. For the arbitrator incapacity, disability and ailment are the same. And the reduction of disability to an “ailment” again suggests that the conceptualization of disability has been clothed in a language that is associated with the medicalisation of disability that in South African labour law translates into incapacity.

When one has regard to instances of legislation that deal with access to social security like the *Social Assistance Act No 59 of 1992* a disabled person is considered to be:

“...any person who has attained the prescribed age and is, owing to his or her *physical or mental disability* (my italics), unfit to obtain by virtue of any service, employment or profession the means needed to enable him or her to provide for his or her maintenance”

It has also been suggested that:

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<sup>284</sup> [2004] 4 BALR 404 (MEIBC)

<sup>285</sup> [1995] 5 BLLR 62 (IC)

<sup>286</sup> Illness The Concise Oxford Dictionary 9<sup>th</sup> edition; Clarendon Press; Oxford; 1995; p28

“The Social Assistance Act determines eligibility for a disability grant for persons who suffer from a physical and mental disability...which renders them unable to sufficiently provide for their maintenance. Other than linking disability with functional incapacity, these statutes are of limited utility in the determination of disability...The criteria that are used to determine disability under...the Social Security Act ultimately stresses incapacity”<sup>287</sup>

In these two quotes once more the same ill defined constructions appear with regard to incapacity and disability where the two terms are not clearly defined. They are linked to a bodily inability to work .

Marylyn Christiansen when referring to items 10 and 11 of the Labour Relations Act’s Code of Good Conduct: Dismissal states that:

“The use of ‘disability’ in items 10 and 11 would suggest that it is used interchangeably, or synonymously, with incapacity. No real distinction has been made between the two concepts. It is submitted that there are indeed distinct differences between disability and incapacity”<sup>288</sup>.

Charles Ngwena and Loot Pretorius agree with the observation made by Marylyn Christianson when they say that:

“Employer’s views about disability are often rooted in stereotypic assumptions about the incapacities rather than the capacities of people with disabilities. The tendency has been to view disability as coterminous<sup>289</sup> with incapacity...”<sup>290</sup>

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<sup>287</sup> <http://butterworths.uwc.ac.za/nxt/gateway.dll/bc/8m6r/jn6r/14as> at p1 accessed 27 March 2006

<sup>288</sup> Marylyn Christiansen “Incapacity and disability: A retrospective overview of the last 25 years” Industrial Law Journal vol 25 May 2004 p889

<sup>289</sup> Having the same boundaries or extent ( in space, time or meaning) The Concise Oxford Dictionary 9th edition 303

Ngwena and Pretorius are correct in their assumptions about how disability has been reduced to a notion of incapacity

It cannot be disagreed with Marylyn Christiansen in her assertion that there is a distinct difference between disability and incapacity. However, her following observation is not well founded when she states that:

“The code used the concepts of incapacity and disability interchangeably . . . and this is confusing . . . when disability has a very specific meaning for the purposes of equity in the work-place ...a closer examination of the issues, however, indicates that incapacity and disability may lie together along a continuum [my emphasis] for the purposes of deciding whether a person is indeed capable of performing the required work to the standards set by the employer”<sup>291</sup>

Christianson posits a theory that incapacity and disability could be seen to be two concepts on a continuum. The concepts may lie on a continuum but there is no qualitative distinction made between incapacity and disability,

It is also, not entirely clear whether Christiansen is talking about a medical understanding of disability or a social model understanding of disability. If she spoke about disability in the medical sense then there would be no difference between incapacity and disability because they would conceptually arise from the same premise, namely, impairment.

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<sup>290</sup> Charles Ngwenya and Loots Pretorius “Code of Good Practice on the Employment of People with Disabilities: An Appraisal” Industrial Law journal vol 24 October-December 2003 p1816-1839 at p1818

<sup>291</sup> Marylyn Christiansen at p894

If, on the other hand, Christiansen spoke about disability from the social model standpoint then there are definitely patent differences between the two concepts since they arise from two very different premises. As stated before incapacity is premised on impairment whilst disability is premised on the inability of society to reconstruct itself so that its systems and discourses are altered to accommodate impaired people. Ultimately, it is these rigid social structures and discourses that are the actual disablers of impaired people.

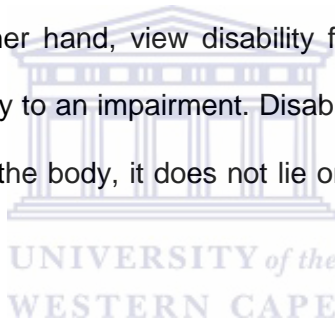
On the face of it for Christiansen, the two concepts are different. However, she does not subject these two concepts to rigorous analysis to establish their essential difference. By suggesting that the two concepts are on a continuum she inadvertently opens up the possibility to construe these two quantitatively. In that she sees a person going from incapacity, and over time when the incapacity cannot be medically corrected the person approaches the point of permanent incapacity or “disability”.

The problem with this assumption is that there is a qualitative difference between incapacity and disability. Incapacity is rooted in a bio-medical orientation of disability namely, impairment. Disability on the other hand is rooted in how society perceives and responds to impaired people. These perceptions usually manifest themselves in notions of marginalization, stigmatization and discrimination. Therefore there is a conceptual imperative to define these concepts correctly otherwise the chances are that the understanding of disability will remain medically grounded. When this is perpetuated the role that society plays will not be addressed in its disabling of impaired people.

Disability, in the final analysis, has become a particular discursive understanding of incapacity, the discourse of incapacity, that is, the particular language used to

reconstruct disability (as illness, ailment, impairment) which is a conflation of bodily impairment with a particular societal interpretation and construction of disability that is impairment, illness etc. In effect a societal interpretation is reduced to a bodily impairment and then discursively termed disability. The point is that when people speak about a bodily impairment they reduce it to a common sense meaning of disability. But, as argued before disability is what society does structurally and discursively in relation to the impairment. Disability is not the impairment. Disability starts and ends in society. Impairment starts and ends on the body or in the mind or both.

Unlike Marylyn Christianson, Charles Ngwena<sup>292</sup> ; Ilze Grobbelaar-du Plessis<sup>293</sup> and Laurentia Truter<sup>294</sup>, on the other hand, view disability from a social model standpoint which does not reduce disability to an impairment. Disability for them is rooted in society and impairment is attached to the body, it does not lie on a continuum as suggested by Marylyn Christianson.



And to illustrate this Laurentia Truter is on point when she criticizes the three ILO concepts<sup>295</sup> of disability when she states:

“All [these] (*my addition*) definitions have in common that they make use of a medical . . . , as opposed to a social concept of disability. . . which defines disability with reference to a . . . medical model of disability. This model focuses on the effect the impairment has on the ability to attain success and be promoted or accommodated in the workplace. No mention is made of the role that structural and attitudinal barriers play in excluding people with disabilities from the open labour market”

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<sup>292</sup> Deconstructing the definition of ‘disability’ under the employment equity act: social deconstruction South African Journal of Human Rights 2006 No 4 22 p630

<sup>293</sup> Ilze Grobbelaar-du Plessis Who are the disabled? The quest for a legislative definition Obiter 2003 Vol 24 p131

<sup>294</sup> Disability the quest for reform Law, Democracy and Development Vol 4 2000(1) at p 76.

<sup>295</sup> At (n314) p 76

## 6.5 LEGAL CONSTRUCTION OF DISABILITY.

Arguments have been made that incapacity as a concept does not assist in the understanding of disability. The reason for this is that incapacity as argued above is premised on the understanding of disability as impairment which does not help to explain disability. And because of its strict focus on impairment it is based on the medical model of disability which does not take into account the role that society plays in disabling impaired people.

Laurentia Truter points to the need for a social model perspective and its importance in the breaking down of physical and attitudinal barriers:

“[t]he inadequacies of a purely medical approach to and definition of disability...is recognized by government in the White Paper on an Integrated National Disability Strategy...the proposal...to adopt a social definition rather than a purely medical formulation should be supported since a social model of disability supports the premise that the integration of people with disabilities entails the removal of physical and attitudinal barriers and not only cure. The necessary legislative changes should therefore be brought about to reflect this”<sup>296</sup>

Ilze Grobbelaar-du Plessis article<sup>297</sup> goes further by suggesting the importance of the promulgation of a comprehensive disability act:

“a comprehensive disability act that would reflect the necessary legislative changes in accordance with the social model...”<sup>298</sup>

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<sup>296</sup> Laurentia Truter “Disability: The Quest for Reform” 2000 Law, Democracy and Development Vol 4 75 at 83

<sup>297</sup> Ilze Grobbelaar-du Plessis “Who are the Disabled? The Quest For A Legislative Definition” 2003 Obiter Vol 24 121 at 131

As these two writers have declared, if a comprehensive approach is to be adopted in correcting the shortcomings of disabled people in society then there should be a conscious programme for the building of social and legal institutions premised on the social model of disability. And the legal response to ensure this shift should be to construct a legal notion of disability premised on the social model of disability.

The central task of constructing a legal notion of disability would be the eradication of discrimination in the work place for disabled people. The method to eradicate discrimination in the work place would be to take into consideration the role that society plays in the disabling of impaired people. Rather than medically diagnosing the type of impairment and the gravity of the impairment; the legal construction of disability should focus on the discrimination suffered by the disabled person. This should be the starting point; not the impairment.

#### **6.5.1 SUBSTANTIALLY LIMITING**

The problems that are experienced in United States disability jurisprudence are precisely because there is an over reliance on focusing on the impairment and the extent of the impairment. And not only is there an over reliance on the impairment as the determinant for disability, but the impairment should “substantially limit” any of the disabled person’s life activities. Only the “substantial limitation” of any life activity will render a person disabled. And the United States Supreme Court has upheld this view on three<sup>299</sup> separate occasions.

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<sup>298</sup> Grobbelaar op cit 131

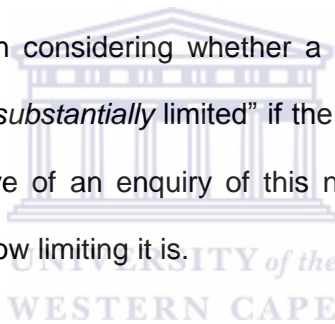
<sup>299</sup> Sutton Trilogy (n 156)



In South African jurisprudence, the Employment Equity Act<sup>300</sup>, section 5.1.(iii) also speaks about a person with disabilities as being disabled when an impairment “substantially limits their prospects of entry into . . . employment.

The problem with this definition is that it lends itself to the possibilities of focusing essentially on the impairment and the degree and extent that an impairment “substantially limits” This reduction of the inquiry to a diagnostic exercise to decide on how impaired a disabled person is, does not assist in protecting disabled people from being discriminated against especially in the work place.

It would seem that being “limited” because of an impairment is not enough to satisfy the extent of the impairment when considering whether a person is disabled or not. The person in question has to be “*substantially* limited” if the person wants to be considered disabled. The primary objective of an enquiry of this nature should not be about the extent of the impairment and how limiting it is.



Rather, the emphasis and focus should start from the discrimination that the disabled person suffered. And as argued in chapter two, discrimination is an activity that arises within society. It is society’s discursive response to a person with an impairment.

Society generally and employers particularly interpret impairment in a judgmental manner which translates into discrimination which ultimately marginalizes impaired people. This process of marginalization is the disabling exercise. The impairment does not disable; society when it practices discrimination disables.

To restate, the reason for a legal construction of disability as anti-discrimination law, is to some extent to correct the asymmetrical power relations that exist between employer

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<sup>300</sup> No 55 of 1998

and the disabled employee. If the disabled employee is to really enjoy the substantive equality enshrined in the Constitution, then an enquiry about discrimination of disabled people should not be about the severity of an impairment, that is, the “substantially limiting” nature of the impairment, but should be leveled at the disabler found in society and in the work-place. As Ngwena so aptly stated:

“To suppress the mischief of disability discrimination the focus should be on the conduct of the perpetrator rather than the degree or level of limitation in physical or mental competence”<sup>301</sup>

The “perpetrator” in Ngwena’s quote is the disabler because of the discriminating conduct when dealing with disabled people. To expand on this view, Christine Overall, states that people are not born as women, Aboriginals, elderly or disabled; rather people become these categories precisely, because of the intervention of human agency. These are identities that are constructed in the course of social discourse; reinforced and sustained through normative conventions and practices which are carried out by people in positions of power and in the employment relationship that power resides with the employer.<sup>302</sup>

However, it must be stated that unlike other discriminated against categories such as women and Black people where membership to the group is clearly defined, with disability it is not always that obvious. A person suffering from bi-polar disorder is not as obviously impaired as a person who needs a wheelchair to get around, hence the need to subject the person claiming disability to a level of scrutiny to establish membership of that category.

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<sup>301</sup> C. Ngwena “Deconstruction of the definition of disability” 2007 23 SAJHR p150

<sup>302</sup> C. Overall “Old Age and Ageism, impairment and disability: exploring the conceptual and material connections” NWSA Jnl Vol 18 No 1 Spring p126-p137 at p126

This may be so, but to subject the person to a meticulous diagnosis of the extent of the impairment to establish whether they comply with a bio-medical notion of disability detracts from the intention to eradicate disability discrimination.

And if South African disability jurisprudence is to be mindful of the discrimination that disabled people suffer from, then, how it establishes whether a person is disabled or not should not be based on a searching diagnosis of the extent of the impairment and how it limits the individual. Ngwena supports this formulation when he states that;

“The rationale for anti-discrimination law is to deter as well as to provide remedies for unfair treatment that is rooted in stereotypes, stigma and indifference. To confine disability only to persons who have severe disabilities or are substantially limited in their competence to perform. . . would be to miss the point by a margin. Disability discrimination is not invoked by a certain degree of impairment or limitation in physical or mental competence. Rather it is the result of unfair treatment, negative attitudes and indifferent social structures.”<sup>303</sup>

Hence, the “substantially limits” clause contained in section 5(1)(iii) of the Employment Equity Act which deals with the definition of disabled people, should not be part of South African jurisprudence on disability discrimination.

Ngwena undergirds this when he says:

“What is not essential to the definitional construction of disability under s 6(1), . . . is the additional requirement in s 1 of the EEA and the Code of Good Practice that the impairment be substantially limiting”<sup>304</sup>

Establishing that a person has a physical or mental impairment which is long term and recurring<sup>305</sup> should be sufficient to establish that a particular person is impaired. This

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<sup>303</sup> C Ngwena (n23) at p 151

<sup>304</sup> C Ngwena at p 153

should be the only medical enquiry to establish whether a person claiming disability discrimination should endure.

The crucial leg of the enquiry is the discrimination suffered by the person. And the Employment Equity Act to some extent draws attention to this view point when it stated that:

“ the scope of protection for people with disabilities in employment focuses on the effect of a disability on the person in relation to the working environment, and not on the diagnosis or the impairment.”<sup>306</sup>

The Act draws attention to the effect that the work environment has on a disabled person in relation to their impairment, and downplays the focus on the diagnostic impairment oriented approach. There is an externalization of the disabling process, (the effect that the work environment) rather, than a focus on scrupulously diagnosing whether a person indeed has an impairment and to what degree and extent it limits the individual as far as work is concerned

And this is where the court in *IMATU v City of Cape Town*<sup>307</sup> erred. The facts of the case are that a diabetic was not allowed to take up a position as a fire fighter because of his diabetes. The City of Cape Town viewed his condition as being a risk given the severe conditions under which fire fighters had to work. He went to court alleging that he had been unfairly discriminated against because of his diabetes which he argued was a disability.

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<sup>305</sup> Employment Equity Act, No 55, 1998 section 5.1.ii

<sup>306</sup> Employment Equity Act 55 of 1998 s 5.1

<sup>307</sup> [2005] 11 BLLR 1084 (LC)

The findings of the court were interesting. Murphy AJ, came to the interesting decision that the complainant did not have a disability because he conscientiously controlled his diabetes. By coming to this conclusion Murphy AJ reasoned that since he could mitigate his disability he was no longer disabled. Not only did Murphy AJ conclude that mitigation of a disability trumped the claim to disability, he also, lent a large amount of weight to the substantially limiting leg in defining disability. And Ngwena raises this:

“...the court said that there was no doubt that diabetes was a long term physical impairment, but it was not sufficient for the complainant to merely establish he had an impairment . . . in addition ...it was necessary to show that in terms of its nature, duration or effects, the diabetes substantially limited the ability to perform the essential functions of the position of fire-fighter.<sup>308</sup>

For Murphy AJ what is pivotal in deciding whether a person is disabled or not is whether the impairment is substantially limiting in respect of performing the essential functions of the job in question. He agrees that diabetes is a long term physical impairment but for him what is crucial is whether the diabetes is substantially limiting. If it is substantially limiting then the person is disabled if not then the person is not disabled. In this case because the complainant was able to scrupulously manage his diabetes and it did not substantially limit him he was not considered to have a disability.

It must be submitted that the reasoning is not well founded in that a disproportionate reliance upon one aspect of the definition for disability could raise the possibilities of excluding a large part of the population who indeed have physical or mental impairments which are long term simply because the impairments are not substantially limiting. In *Gill v Canada*<sup>309</sup> a Canadian case the approach to defining disability was quite different. The

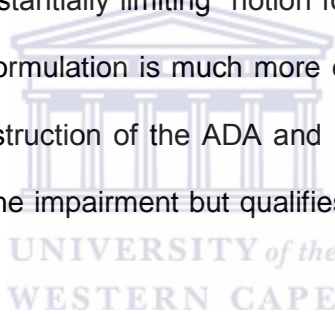
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<sup>308</sup> Charles Ngwena *Deconstructing the definition of disability under the employment equity act: Legal Deconstruction* (2007) 23 SAJHR p 149

<sup>309</sup> (1996) 25 C.H.H.R. D/439, 96 C.L.L.C p230-024 (F.C.T.D)

analysis did not place primary attention on whether the applicant was really learning disabled or not. Nor did the analysis deal extensively with the nature of the bio-medical condition or closely scrutinize the degree of the applicant's disability. Expert evidence regarding the nature of the disability was presented to the tribunal and it was found to be sufficient. The focus of legal argument was not about the nature or degree of the impairment.

And to augment this approach the Ontario Human Rights Code does not contain the "substantially limiting" clause which is found in the Americans with Disabilities Act and in the Employment Equity Act. It rather speaks about "any degree of physical disability" rather than the restricting "substantially limiting" notion found in the ADA and EEA. The Ontario Human Rights Code formulation is much more expansive in interpretation than the "substantially limiting" construction of the ADA and EEA which is not satisfied with just being limited because of the impairment but qualifies that the degree of impairment should be substantial.



The conclusion that can be drawn for disability jurisprudence is that if the jurisprudence is about protecting disabled people in the work-place then restrictive clauses like "substantially limiting" should have no place in our jurisprudence. If we are to heed the call by Ilze Grobbelaar-du Plessis that there is a need for a comprehensive disability act to govern the protection of disabled people then the framers of this legislation should heed the need to exclude restricting concepts such as "substantially limiting" in the definition of disability. The lessons in American disability jurisprudence are instructive.

Since the EEA has fore-grounded the focus on the external environment as a key factor in dealing with disability discrimination rather than the diagnosis of the extent of the impairment as overridingly important; and together with Ngwena's reasons for anti-

discrimination law being formulated to provide remedies for unfair treatment, a factor that comes into play for dealing with discrimination and the correction there of is the concept of reasonable accommodation and its correlative undue hardship.

For an employer to avoid the charge of discriminating against a disabled person, it will have to be seen to have made more than an effort to reasonably accommodate the disabled person in question. Proper effect must be given to the substantive equality that is enshrined in the Constitution by putting a disabled people in the position where they can enjoy the right to employment.

In the *Standard Bank of South Africa v Commission for Conciliation, Mediation and Arbitration and Others*<sup>310</sup> the Labour court decision clearly set disability jurisprudence in South Africa on the correct path in how it approached disability by correctly focusing its attentions on the discrimination that was experienced by the person claiming disability discrimination and also locating the remedying of the discrimination in the use of the concept of reasonable accommodation. How did the court approach this issue?

At the outset the court raised the issue around defining disability by stating that it should not be focused around the diagnosis of the disability (impairment). It was also of the view that a restrictive interpretation of disability rather than a purposive, wide interpretation would prevent the eradication of discrimination.

The court used examples of job applicants who respectively mitigated their disabilities by using spectacles to correct eye problems or diabetics which took medication to mitigate the symptoms of diabetes to illustrate its claim.

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<sup>310</sup> (JR 662/06)[2007] ZALC 98

The commitment to a wide purposive interpretation in defining disability is to be welcomed. The examples that the court used to explain the discrimination experienced should be treated with caution. It is not so much the restrictive interpretation of disability that brings about the discrimination but rather the mitigation of the myopia and the diabetes. What is the reason for saying so? If the myopia and the diabetes were not mitigated then the two persons claiming disability would be substantially limited. And since they are substantially limited they would be considered to be disabled.

The test for disability is that the person claiming disability must have a physical or mental impairment, which is long term or constantly recurring and which substantially limits<sup>311</sup>.

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- 311 (i) having a physical or mental impairment;
- (ii) which is long term or recurring; and
- (iii) which substantially limits their prospects of entry into, or advancement in employment.



#### 5.1.1 Impairment

*Section 1 of the Act defines people with disabilities as "people who have a long-term or recurring physical or mental impairment, which substantially limits their prospects of entry into, or advancement in, employment"*

- (i) An impairment may either be physical or mental or a combination of both.
- (ii) 'Physical' impairment means a partial or total loss of a bodily function or part of the body. It includes sensory impairments such as being deaf, hearing impaired, or visually impaired.
- (iii) 'Mental' impairment means a clinically recognized condition or illness that affects a person's thought processes, judgment or emotions.

#### 5.1.2 Long-term or recurring

- (i) 'Long-term' means the impairment has lasted or is likely to persist for at least twelve months.
- (ii) 'Recurring impairment' is one that is likely to happen again and to be substantially limiting (see below). It includes a constant chronic condition, even if its effects on a person fluctuate.

(iii) 'Progressive conditions' are those that are likely to develop or change or recur. People living with progressive conditions or illnesses are considered as people with disabilities once the impairment starts to be substantially limiting. Progressive or recurring conditions which have no overt symptoms or which do not substantially limit a person are not disabilities. (HIV-AIDS)

#### 5.1.3 Substantially limiting



Diabetes and myopia are clearly physical impairments they are long term or constantly recurring and they do substantially limit.

In the United States two cases dealing with mitigated impairments are instructive. In the *Sutton*<sup>312</sup> case the plaintiffs, two sisters suffered from myopia and wanted to become airline pilots and because they mitigated their myopia by wearing spectacles they were not “substantially limited” in the performance of a life activity, namely working. When they do not wear their spectacles they are disabled once they mitigate their imperfect vision by wearing spectacles they are not disabled anymore.

This also applied in the *Murphy v United Parcel Service*<sup>313</sup>. The court upheld the plaintiff’s dismissal on the basis that the hypertension that the plaintiff suffered, that when mitigated and controlled by the taking of medication which helped the plaintiff function normally on a daily basis, could not be considered to be an impairment that substantially limited the plaintiff in a major life activity because of the assistive effect of the medication.

The point of the argument is that the “substantially limiting” clause in the definition of disability is the key to being considered disabled. The impairment must be substantially limiting; once it is mitigated it trumps disability.

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(i) An impairment is substantially limiting if, in its nature, duration or effects, it substantially limits the person’s ability to perform the essential functions of the job for which they are being considered.

<sup>312</sup> *Sutton v United Air Lines* 527 U.S. 471, 119 S Ct 2139, 144 L Ed. 2d 450 (1999)

<sup>313</sup> 527 U.S. 516, 119 S.Ct 2133, 144 L.Ed. 2d 484 (1999)

## 6.6 REASONABLE ACCOMMODATION

On the point of reasonable accommodation the court<sup>314</sup> was quite clear with regard to the centrality of the concept in respect of achieving substantive equality and in so doing preventing discrimination against disabled people. Accommodating disability as difference operates to prevent adverse effect discrimination flowing from employment rules, procedures or standards.

It also brought to the fore that reasonable accommodation was any modification or adjustment to a job or to a working environment that would enable a person from a designated group (disabled) to have access to or participate or advance in employment.

It warned that the Constitution and the EEA prohibited discrimination on the grounds of disability. Dismissal on a prohibited ground of discrimination was automatically unfair and implicit, therefore, in the duty to accommodate an employee is the employer's obligation to prevent discrimination. Hence, the consequences that flowed from an employer's failure to reasonably accommodate a disabled employee are that the dismissal of that employee is not merely unfair but automatically unfair.

The point of making modifications or adjustments should be under-girded by a pragmatic common sense approach to explore, perhaps even to experiment, in the effort to establish what will work best in the particular circumstance of the employee, the nature of the post and the configuration of the workplace. Then to sharpen its point the court was of the view that the standard adopted in Ontario was worth importing into our jurisprudence:

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<sup>314</sup> See (n55)

“The most appropriate accommodation is one that most respects the dignity of the individual with a disability, meets individual needs, best promotes integration and full participation and ensures confidentiality.”<sup>315</sup>

It again warned that the process should be interactive, a dialogue, an investigation of alternatives conducted with a give and take attitude. An outright refusal to accommodate showed a degree of inflexibility which was contrary to the spirit and purpose of the duty to accommodate.

## **6.7 UNDUE HARDSHIP or UNJUSTIFIED HARDSHIP**

Undue hardship or unjustifiable hardship as the court chose was the right of recourse that the employer’s had in respect of ameliorating its duty to accommodate disabled employees. The EEA Code defined hardship as:

“Action that requires significant or considerable difficulty or expense. This involves considering, amongst other things, the effectiveness of the accommodation and the extent to which it would seriously disrupt the operation of the business.”

For the court unjustifiable hardship had to go to the heart of the viability of the business, it could not be a minor interference or inconvenience. In *Central Okanagan School District No. 23 v Renaud* a Canadian case which dealt with extent of accommodation in a freedom of religion case the Court was of the view that:

“More than mere negligible effort is required to satisfy the duty to accommodate. The use of the term ‘undue’ infers that some hardship is acceptable; it is only ‘undue’ hardship that satisfies this test....Minor interference or inconvenience is the price to be paid for religious freedom in a multicultural society”.<sup>316</sup>

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<sup>315</sup> Ontario Public Service Employees Union v Ontario (Ontario Human Rights Commission) 2003 CanLII 52924 (ON G.S.B.)

<sup>316</sup> [1992] 2 S.C.R. 970

This however did not mean that the employer first had to be on the verge of bankruptcy before undue hardship could be alleged. It had to be an accommodation made on behalf of disabled employees that coursed significant or considerable expense which would seriously disrupt the business. Hence there needed to be a greater sense of proportionality when weighing up the interests of both parties when accommodations are made on behalf of disabled employees.

To conclude an argument was advanced that the plight of disabled in the work-place is in dire need of legal assistance to protect them from the possible discrimination from employers. An argument was advanced that a conceptual break had to be made between disability and incapacity if the interests of disabled people are to be advanced in the work-place. I was also argued that a social model approach was preferred rather than an impairment focused approach. The reason for this approach was that an impairment reduced approach purely focused on the impairment and its severity rather focusing on the discrimination that the impaired person suffered in the work-place and this was crucial for the advancement of disabled people's rights in the work-place.

And finally, a legal construction of disability was advanced which was critical of the "substantially limits; phrase found in the definition of the EEA because, it was suggested, would restrict the number of disabled people from the protections of the law as was the case in American disability jurisprudence.

## CHAPTER 7: CONCLUSION

The aim of this enquiry has been to posit an understanding of disability that extricated it from the narrow confines of incapacity. It was also, an attempt to engage with the concept, disability at a much deeper level to help chart a progressive approach, namely, a legal construction of disability to combat disability discrimination in the work-place.

In chapter two an attempt was made to show how disability was a socially constructed category with in a particular time –space continuum. And the time-space continuum was capitalism. It was averred and supported by evidence that capitalism creates the social category, disability. Notions of normalcy, the medical model of disability and social model of disability were employed to show the systemic and structural influences capitalism plays in the construction of disability.

In chapter 3 to deepen the understanding of disability discourse analysis was employed to peel away or to peer behind the cultural, linguistic, ideological, discursive veil of oppression that enthralled disabled people. An argument was made that discourse definitely had a role to play in the peeling back of layers of meaning which hid the source of how certain groups with power dominated and ascribed roles and identities to others. The social model of disability which had its origins in a critique of capitalism and its preoccupation with structure could not explain the complex dynamics around identity construction. And it for this reason that discourse analysis was employed with the idea to delve deeper than the common- sense –taken- for- granted conceptualizations that are used to understand disability. Disability was a complex category and it cannot just be explained in purely structural terms there is the discursive element which needs to be drawn into the framework of analysis and deconstruction. The essential structural

analysis of the social model theorist alone cannot explain all the complexities of the construction of disability. And it is hoped that this chapter has brought this element to the construction of disability which is crucial for understanding it with the view to constructing a legal understanding of disability.

In chapter four an argument was made that US disability jurisprudence was interpreted too strictly, resulting in the needless exclusion of a great many disabled people from the protections of the Americans with Disabilities Act. The literal interpretation as to what constitutes a disability with the “substantially limiting” clause being the Achilles heel of persons alleging disability it is suggested should not be the path that South African jurisprudence should take. The use of the mitigation strategy to render disabled people not disabled as decided in the Sutton Trilogy of cases should also not be a part of South African disability jurisprudence. The use of a cost/benefit analysis to under-gird whether reasonable accommodations will be made or not detracts from the duty that employers have towards disabled people in the work place.

In chapter five an argument was made to demonstrated difference in approach that the e Canadians adopt in their approach to disability. It is an approach that is grounded in substantive equality, which speaks to the ethos and tenor of the South African Constitution, and premised on a purposive interpretive approach that highlighted the need for a wide interpretation of disability; which emphasized the discrimination that the disabled person rather than being focused on whether the person is disabled or not as a first enquiry. This chapter also, served to show the social model orientations of Canadian disability jurisprudence which addressed the attitudes and stereotypes that society constructs when discriminating against disabled people, therefore squarely locating the discrimination of disabled people within the realm of society. An exercise in method was

employed by utilizing the *Levac* case to illustrate how, in the main, Canadian jurisprudence approached disability discrimination not as an enquiry about whether a person was impaired or not; but rather whether a person has suffered discrimination as a result of an impairment which in the final analysis amounts to a disability. And, finally, the concepts reasonable accommodation and undue hardship were investigated which distinguished the Canadian approach markedly from the strict American approach which downplays the discrimination that the disabled person suffered. It is in this vein that South African disability jurisprudence should be developed and fostered.

Finally, in chapter six the position advanced that the plight of disabled in the work-place is in dire need of legal assistance to protect them from the possible discrimination from employers. An argument was advanced that a conceptual break had to be made between disability and incapacity if the interests of disabled people are to be advanced in the work-place. I was also argued that a social model approach was preferred rather than an impairment focused approach. The reason for this approach was that an impairment reduced approach purely focused on the impairment and its severity rather focusing on the discrimination that the impaired person suffered in the work-place and this was crucial for the advancement of disabled people's rights in the work-place. And finally, a legal construction of disability was posited which was critical of the "substantially limits"; phrase found in the definition of the EEA, because, it is averred that it would severely restrict the number of disabled people from the protections of the law as was the case in American disability jurisprudence.

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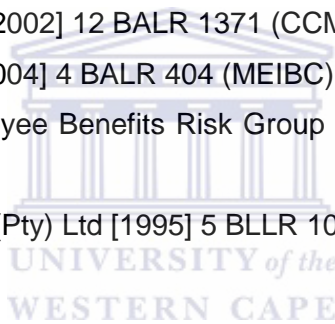
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