IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

Case No. **CCT20/2012**

In the matter between:

DUDLEY LEE Applicant

and

THE MINISTER OF CORRECTIONAL SERVICES Respondent

TREATMENT ACTION CAMPAIGN,

WITS JUSTICE PROJECT AND

CENTRE FOR APPLIED LEGAL STUDIES Amici Curiae

AMICI CURIAE'S HEADS OF ARGUMENT

I INTRODUCTION

1. On 2 August 2012, the Amici filed an application for admission in these proceedings. On 6 August 2012, the Court granted an order admitting the Amici.

2. These proceedings are of extreme importance to the Amici as the judgment by the Court will have an impact on their ability to fulfil their objectives in relation to combatting the spread of tuberculosis (TB). In particular, the Treatment Action Campaign and the Wits Justice Project have been providing assistance to a potential claimant whose claim may be dependent on the outcome of these proceedings.

II SUMMARY OF THE AMICI'S LEGAL ARGUMENT

3. The purpose of the Amici's participation in these proceedings is to provide the Court with comparative case law that may assist the Court in considering the application and development of the common law on causation.

4. The Supreme Court of Appeal (SCA) strongly concurred with the High Court on all elements of the Applicant's claim except for the "narrow factual point" of whether factual causation had been established.[1] As a result, despite the violation of the Applicant's rights and the wrongful and negligent omission by the prison authorities, the Applicant was denied a remedy that, we submit, would be just and equitable in the circumstances.

5. We submit as follows: first, that the SCA erred in its application of the 'but for' test by creating a higher standard of proof for factual causation than is ordinarily required and by failing to take account of the minimum standards contained in the Standing Orders, which detail the specific duty upon the Respondent. Had the SCA not required a higher standard of proof for factual causation, the court may have found that the negligent omission of the prison authorities probably caused the harm to the Applicant.

6. Second, that if the Court were to find that the SCA applied the accepted standard of proof required by the 'but for' test, and therefore

[1] SCA judgment para 64, record page 54.

correctly dismissed the Applicant's claim, that the Constitution requires the common law to be developed in order to harmonise it with the spirit, purport and objects of the Bill of Rights. We do not call for the wholesale abandonment of the common law test, but only for its adaption in this context.

III THE INTRODUCTION OF FACTUAL EVIDENCE

7. The Amici wish to introduce two documents of a factual nature that are germane to this matter. The first is an extract from the latest annual report of the Judicial Inspectorate for Correctional Centres (Judicial Inspectorate), *"Annual Report 2010/2011: Treatment of Inmates and Conditions in Correctional Centres*" (the "Annual Report"). The second is a scientific study on the risk of TB contagion at Pollsmoor Prison that was published in the South African Medical Journal, *Tuberculosis in a South African prison—a transmission modelling analysis* Johnstone-Robertson *et al* (2011) 101 SAMJ (the "Pollsmoor study").

8. The Applicant has consented to the admission of these documents whereas the Respondent has objected. At the outset, it is of the utmost importance to clarify that the purpose of this evidence is not to expand the factual ambit of the case, but only to draw the Court's attention to the impact that its decision will have beyond the parties before the Court.

9. Constitutional Court Rule 31 (Rule 31) defines the circumstances in which the introduction of factual evidence before the Court may be permitted. Rule 31 permits the introduction of new factual material where such facts:

> *a. are common cause or otherwise incontrovertible; or*
> *b. are of an official, scientific, technical or statistical nature capable of easy verification.*

10. The Annual Report is an official document and its veracity has not been contested. The Respondent's sole basis for contesting its admission is that, as it pertains to the "2010 / 2011 period, and was published more than seven years after the Applicant contracted tuberculosis in June 2003"[2], it is not relevant to the determination of

[2] Respondent's affidavit in terms of directions dated 6 August 2012 para 6.

the issues before the Court. However, the founding affidavit of Ms Khumalo made clear that " … the Annual Report will allow the Court to develop a better understanding of the impact its decision will have beyond the parties in this case".[3] Therefore, we respectfully submit that the Respondent has misinterpreted the purpose of the Annual Report. The Annual Report is not intended to speak to the Applicant's individual experience. Rather, it supports the Amici's legal argument that the Constitution requires the law to be developed in order to promote the spirit, purport and objects of the Bill of Rights. The Amici submit that an understanding of the impact of its decision is necessary in order for the Court to properly engage with the question as to whether the Constitution requires the law to be developed.

11. The content of Prof Wood's affidavit has only been disputed in one respect. This respect is in relation to the summary of the findings of the Pollsmoor study, which is addressed below. The rest of the content is therefore common cause and falls within the permissible ambit of Rule 31(1)(a).

[3] Founding affidavit of Nonkosi Alvira Carmen Khumalo para 45, record page 608.

12. The evidence that the Amici wish to introduce and the circumstances in which they wish to do so are distinguishable from cases in which the Court has rejected evidence in terms of Rule 31. In *Volks NO v Robinson and Others* the Court declined to admit material that related to the " … vulnerability of women in existing relationships between unmarried cohabitants".[4] The Court reasoned that the material was not incontrovertible, specifically pointing to the fact that the study was not statistical or quantitative as it was, in its own words "qualitative" and "not representative".[5] The Court also noted that the conclusions and solutions offered by the study were not incontrovertible.[6] In contrast, the solutions offered in the Pollsmoor study are not opinions but statistical facts. Furthermore, the Pollsmoor study is published in the South African Medical Journal, a peer reviewed medical journal of considerable repute.

13. Finally, the Court in *Volks* declined to accept the evidence because it was not directly relevant. The Court wrote that "the admission of the evidence would impermissibly broaden the case before us".[7] In

[4] *Volks NO v Robinson and Others* 2005 (5) BCLR 446 (CC) para 31.
[5] *Volks NO v Robinson and Others* 2005 (5) BCLR 446 (CC) para 33.
[6] *Volks NO v Robinson and Others* 2005 (5) BCLR 446 (CC) para 35.
[7] *Volks NO v Robinson and Others* 2005 (5) BCLR 446 (CC) para 34.

contrast, the evidence the Amici seek to provide the Court in this matter is directly relevant to the issue of whether the Constitution requires the law to be developed and does not broaden the case beyond what the Court has already condoned by admitting the Amici and directing them to make written submissions.

14. The Amici were not a party to the litigation in the lower courts and therefore could not have canvassed the new material at that stage.[8] However, the Respondent has had an opportunity to consider the material and to respond to it through their own expert report. In response to the Pollsmoor study, the Respondent filed an affidavit setting out the concerns in relation to the two new documents. The expert report on the Pollsmoor study is entitled the "*Report Prepared for the Constitutional Court Case: Dudley Lee v Minister of Correctional Services"*, which is the Respondent's annexure "KD2", and will be referred to as such.[9]

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[8] Compare *In Re: Certain Amicus Curiae Applications; Minister of Health and Others v Treatment Action Campaign and Others* 2002 (5) SA 713 (CC).

[9] *Report Prepared for the Constitutional Court Case: Dudley Lee v Minister of Correctional Services.*

15. Importantly, the Respondent's expert report limits the dispute in relation to the new material considerably.[10] KD2 largely confirms the findings of the Pollsmoor study. Prof Dheda writes " … subject to the caveat below, the overall conclusions of the paper are robust and valid within the context of prisons in SA".[11]

16. The caveat referred to is that the Pollsmoor study is restricted to transmission of TB occurring in cells. It therefore does not account for "random transmission events" that take place outside the cell.[12] KD2 posits that these events "would impact on the reduction in transmission risk".[13] The 'random transmission events' that Prof Dheda refers to include "collecting meals, taking exercise, attending clinic and being transported to and from court." Accepting this critique for the sake of argument, the Amici submit that the conclusions that are common cause between the experts are extremely helpful to the Court and ought to be admitted.

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[10] Compare the evidence of Cotlands Baby Sanctuary in *In Re: Certain Amicus Curiae Applications; Minister of Health and Others v Treatment Action Campaign and Others* 2002 (5) SA 713 (CC) para 8. See *Hoffman v South African Airways* 2001 (1) SA 1 (CC) para 3.

[11] *Report Prepared for the Constitutional Court Case: Dudley Lee v Minister of Correctional Services* para 2.4.

[12] *Report Prepared for the Constitutional Court Case: Dudley Lee v Minister of Correctional Services* para 2.5.

[13] *Report Prepared for the Constitutional Court Case: Dudley Lee v Minister of Correctional Services* para 2.5.

IV FACTS IN THE NEW MATERIAL THAT ARE COMMON CAUSE

17. The following is agreed to, as stated by the Respondent's expert in KD2:

17.1. *" … The overall conclusions of the paper are robust and valid within the context of prisons in SA*."[14]

17.2. "*The only way to definitively prove that somebody acquired infection from another individual is to obtain DNA material acquired from the organisms from both individuals and show that there was an exact match using DNA fingerprinting techniques. As such material is not available from <u>all</u> the individuals who acquired TB in prison, <u>this is impossible to prove.</u>"*[15] (Emphasis added)

17.3. " … TB transmission in prisons is extremely high, the incidence of active tuberculosis in prisons is substantially higher than in the civilian population, and much more needs to be done to reduce tuberculosis incidence and transmission in prisons."[16]

17.4. "*Currently prisoners are not screened upon entering detection facilities, either with symptom screening or chest x-rays, annual chest x-ray screening is not carried out, access to diagnostic*

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[14] *Report Prepared for the Constitutional Court Case: Dudley Lee v Minister of Correctional Services* para 2.4.
[15] *Report Prepared for the Constitutional Court Case: Dudley Lee v Minister of Correctional Services* para 6.
[16] *Report Prepared for the Constitutional Court Case: Dudley Lee v Minister of Correctional Services* para 9.

> *laboratory testing is not readily available, there is a shortage of nurses and doctors within prisons, there is prevalent overcrowding within cells … All of these factors contribute to a very high incidence of tuberculosis infection and active disease in prisons."*[17] (Emphasis added)

18. As all of these facts are common cause, the Amici submit that, at the least, these facts ought to be admitted in terms of Rule 31(1)(a). The remainder of the affidavit of Prof Wood and the Annual Report are likewise not in dispute and ought to be admitted.

19. KD2 argues that, accounting for the caveat explained above:

> *However, even if [the minimal South African standards of incarceration were implemented thereby leading to substantially less overcrowding] (and I have been specifically asked to comment on this), there would still be an appreciable risk of transmission in the order of more than 50%. Accordingly, it cannot be said that it is more likely than not, if the South African minimal standards of incarceration had been applied, that Mr Lee would not have had TB transmitted to him.*[18]

20. The Amici submit that, even accepting KD2's conclusions for the sake of argument, this passage shows that the experts agree that the prison authorities' failures to properly screen prisoners for TB and

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[17] *Report Prepared for the Constitutional Court Case: Dudley Lee v Minister of Correctional Services* para 9.
[18] *Report Prepared for the Constitutional Court Case: Dudley Lee v Minister of Correctional Services* para 8.

maintain recommended cell occupancy, inter alia, cause a material increase in the risk of TB transmission.

21. Several statements in KD2 appear to be aimed toward proving that the Applicant cannot succeed on the traditional 'but for' test of causation on the logic that, as a statistical matter, he would more probably than not have been infected with TB regardless of the prison authorities' negligence.

22. The significance of the precise percentages is exaggerated. We submit that the percentage is useful only as an indication as to the degree of the risk to which prisoners were exposed. For the purposes of factual causation, which we address in detail below, the determination of probability of harm is not based on statistical probability or a 'formulaic quantification'. As the court in *Minister of Finance and Others v Gore* made clear:

> *This … is not how the process of legal reasoning works. The legal mind enquires: what is more likely? The issue is one of persuasion, which is ill-reflected in formulaic quantification. The question of percentages does not arise.* [19]

[19] *Minister of Finance and Others v Gore* NO 2007 1 All SA 309 (SCA) para 33. See also *Sienkiewicz v Greif* [2011] 2 All ER 857.

V THE DUTY THAT RESTS ON THE RESPONDENT

23. The SCA unambiguously affirms the finding of the trial judge that the Respondent (through the relevant prison authorities) bears a legal duty to take reasonable precautions in order to contain the spread of contagion in prisons. This duty derives from sections 27 and 35(2)(e) of the Constitution, from section 12(1) of the Correctional Services Act 111 of 1998 (the Act), from the subordinate legislation that aims to give effect to the Act, and from what a "civilised and humane society demands when the state takes away the autonomy of an individual by imprisonment".[20] In recognising the duty, the SCA gave effect to the norms, values and notion of justice that it is contained in the Constitution.

24. We do not seek to re-argue the existence of the duty here. However, we do wish to emphasise that the nature of the duty in this case is one that is delineated by the context in which it arises.

[20] See *Minister of Police v Skosana* 1977 (1) SA 31 (A); SCA judgment para 36, record page 43.

25. The duty to protect the welfare of prisoners arises in a context where the parties to whom the duty is owed are readily identifiable, in which a prisoner is taken into the custody of the state, into an environment which poses a known and manageable threat to the prisoner's health, and where the prisoner loses his or her autonomy to manage that threat to the control of the state.

26. The specific nature of this case implicates a further fundamental constitutional principle – that of public accountability. In *Olitzki Property Holdings v State Tender Board and another*, Cameron JA stated:

> *The principle of public accountability is central to our new constitutional culture, and there can be no doubt that the accord of civil remedies securing its observance will often play a central part in realising our constitutional vision of open, uncorrupt and responsive government.*[21]

27. The type of civil remedy that may be appropriate will depend on the facts of the given case. An action for damages for breach of a constitutional duty will gain cogency where other remedies are not

[21] *Olitzki Property Holdings v State Tender Board and another* 2001 (3) SA 1247 (SCA) para 31.

available to the claimant. In *Minister of Safety and Security v Van Duivenboden*, Nugent JA stated:

> *… where the State's failure occurs in circumstances that offer no effective remedy other than an action for damages the norm of accountability will, in my view, ordinarily demand the recognition of a legal duty unless there are other considerations affecting the public interest that outweigh that norm.*[22]

28. The trial court and the SCA agree that the duty owed to prisoners by the state grounds a delictual claim for damages. In rejecting the contrary contention by the Respondent, Nugent JA held:

> *Prisoners are amongst the most vulnerable in our society to the failure of the state to meet its constitutional and statutory obligations. It seems to me that there is every reason why the law should recognise a claim for damages to vindicate their rights. To find otherwise would altogether negate those rights.* [23]

29. The reasoning by Nugent JA is consistent with earlier decisions of our courts that considered delictual claims in the context of constitutional duties on organs of state.[24]

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[22] *Minister of Safety and Security v Van Duivenboden* 2002 (6) SA 431 (SCA) para 21.
[23] SCA judgment para 42, record page 45.
[24] *Olitzki Property Holdings v State Tender Board and another* 2001 (3) SA 1247 (SCA); *Carmichele* v *Minister of Safety and Security* 2001 (4) SA 938 (CC); *Minister of Safety and Security v Van Duivenboden* 2002 (6) SA 431 (SCA).

VI THE SPECIFIC DUTY

30. Nugent JA found that the trial court failed to articulate the reasonable measures that the authorities were required to undertake and that, had they taken such measures, the Applicant would not have contracted TB. The learned judge found so even though the trial court stated:

> *It appears to me that in the context of the maximum security prison at Pollsmoor [reasonable measures] would translate into the proper screening of incoming prisoners, inclusive of a physical chest examination; separating out those who had, or were suspected of having TB, or who were obviously under nourished and vulnerable to TB; the provision of adequate nutrition to those who were undernourished and otherwise vulnerable to TB; regular and effective screening of the prisoner population, inclusive of examinations by means of X-Rays and/or physical chest examinations by means of a stethoscope, to identify possible TB infection; isolation of infectious inmates and effective implementation of the DOTS system over the prescribed period of time.*
> *…*
>
> *According to the evidence given at the trial of the matter, staff shortages remained a problem throughout the time of the plaintiff's incarceration. In my view, a reasonable person in the defendant's position would have realised that adequate staffing was the key to the prevention and control of TB and would have taken steps to ameliorate the staff shortage as a matter of some urgency.*[25] [Emphasis added]

[25] High Court judgment paras 246 – 249, record pages 373 – 375.

31. In this regard, the trial court also stated:

> *Given the prevalence of TB in the maximum security prison, it appears to me that any reasonable person in the position of the defendant would also have realised and appreciated that the measure of overcrowding would facilitate the spread of the disease, especially in circumstances where there was inadequate screening of incoming prisoners, inadequate treatment of those who were ill with TB and inadequate numbers of nursing staff, in addition to overcrowding and the lack of isolation facilities. Once again, it is a matter of logic and common sense, having regard to the nature of the disease and the manner in which it is transmitted*.[26]

32. A key aspect of the evidence before the trial related to staff shortages. Despite a post establishment that determined that 40 registered nurses were required for the Pollsmoor Management area in 2000, the Respondent only filled 22 posts.[27] Over the years, the Respondent failed to fill vacant posts, which resulted in the shortage of nursing staff.[28] The severe consequences to the health of prisoners resulting from the staff shortages were repeatedly brought to the attention of the prison authorities, but to no avail. The Respondent has not justified its failure to comply with its own post establishment.[29]

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[26] High Court judgment para 240, record page 370.
[27] High Court judgment para 59.1, record page 270.
[28] High Court judgment paras 58 – 60, record page 270 – 274.
[29] See *Centre for Child Law and Others v The Minister of Basic Education and Others* (Case No: 1749/2012 in the Eastern Cape High Court; judgment delivered on 03 August 2012).

33. In addition the Standing Orders promulgated in terms of section 134(2) of the Act[30], which were part of the trial record and were referred to in the judgment of De Swardt AJ, are explicit and detailed as to the minimum standards for accommodating prisoners in order to protect their health and to ensure a healthy environment. At no point has the validity of these Standing Orders been put into question, nor has the Respondent justified its failure to comply with them. The parties have included aspects of the Standing Orders in the Statement of Agreed Factual Findings.[31] We add to these below. The relevant pages of the Standing Orders will be provided to the Court together with these submissions.

34. Requirements of the Standing Orders include:

    34.1. "*In every prison provision must be made for sleeping accommodation consisting of single or communal cells which conform to international standards in respect of lighting, air supply and floor space*." [32] Standing Orders 2.1 and 2.2 provide specific measurements for minimum floor space and air supply. [33]

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[30] High Court judgment para 68, record page 279 (confirming that the Standing Orders passed in terms of the Correctional Services Act 8 of 1959 are identical to those passed in terms of the Correctional Services Act 111 of 1998).
[31] Statement of Agreed Factual Findings paras 56 - 60, record pages 424 – 426.
[32] Standing Correctional Orders, Order 2, Chapter 2, Clause 1.1 (a).
[33] Standing Correctional Orders, Order 2, Chapter 2, Clauses 2.1 and 2.2.

34.2. "*In cases of continuous wetness/dampness in cells, cell doors and windows must be left open during the day and prisoners should not be housed in them during the day. Should it be necessary, however, to house prisoners in them during the day due to for instance security reasons, only the grill door should be locked*." [34]

34.3. "*The Head of the Prison/Division Head: Operational Services must conduct inspections in the prison on a weekly basis to ensure that every cell conforms to the minimum requirements for the incarceration of prisoners. All Section Heads must conduct these inspections on a daily basis.*"[35]

34.4. "*Where prisoners with a suspected or confirmed diagnosis of, for example, tuberculosis and/or other contagious diseases, epilepsy, respiratory problems . . . are identified in the prison, the Head of the Prison in consultation with the Division Head: Nursing Services (and, if necessary the medical doctor) must arrange for the detention of these prisoners in the prison/prison hospital in a single or communal cell. If these prisoners, of necessity, have to be accommodated in a single cell, arrangements must be made for continued observation and supervision, including measures to allow for unhindered access to these prisoners during a crisis situation, also after hours*." [36]

34.5. "*Similarly prisoners suspected or diagnosed after admittance, to be suffering from a communicable or contagious disease must, on recommendation of the registered nurse or medical officer/practitioner, be detained separately (also with regard to participation in any communal activity, e.g. meal times, exercise, showering, visits, programme participation, etc.). Thus implying the absolute minimum/restricted movement of the prisoner outside his/her cell in an attempt to prevent/contain the spread of the disease to the perceived healthy prison population at all times, until such time that the registered nurse*

[34] Standing Correctional Orders, Order 2, Chapter 2, Clause 2.5.3.
[35] Standing Correctional Orders, Order 2, Chapter 2, Clause 5.1.
[36] Standing Correctional Orders, Order 2, Chapter 2, Clause 7.1.15.

or medical officer/practitioner is able to certify that the prisoner does not pose a risk for the spread of the disease anymore."[37]

34.6. "*Heads of Prisons/Area Managers, in conjunction with the Provincial Commissioners, are responsible for the management of overcrowding of prisons. It must be ensured that certain prisons/sections of prisons are not highly overpopulated while other prisons/sections of prisons are under-utilised and the even distribution of prisoners must be ensured."*[38]

34.7. "*Specific correctional officials (not only nursing staff) in different sections should be appointed in writing … to become environmental [health] management supervisors."*[39]

34.8. *"Each province must provide for access to a 24-hour health care service providing for a structured system of referral … "*[40]

34.9. "*All admissions must be screened by a registered nurse on admission using a screening form.*"[41]

34.10. "*Following screening at the reception, all admissions must be taken to the prison health facility by the unit manager or reception manager within 24 hours, for a medical examination by the registered nurse or medical officer/practitioner."*[42]

34.11. *"Health care workers must adopt a multi-disciplinary (discipline staff, social workers, psychologists) approach to provide health education to all prisoners in prisons for the purpose of preventing diseases, and promoting good health and well-being practices."*[43] These include "weekly health education sessions."[44]

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[37] Standing Correctional Orders, Order 2, Chapter 2, Clause 7.1.16.
[38] Standing Correctional Orders, Order 2, Chapter 2, Clause 8.1.
[39] Standing Correctional Orders, Order 3, Chapter 2, Clause 5.0.
[40] Standing Correctional Orders, Order 3, Chapter 3, Clause 1.4.
[41] Standing Correctional Orders, Order 3, Chapter 3, Clause 4.4(a).
[42] Standing Correctional Orders, Order 3, Chapter 3, Clause 6.1.
[43] Standing Correctional Orders, Order 3, Chapter 3, Clause 8.1.
[44] Standing Correctional Orders, Order 3, Chapter 3, Clause 8.2.

34.12. "*All prisoners with communicable conditions must be isolated in strict accordance with the medical officer's/practitioner's and registered nurse's orders issued in each case."*[45]

34.13. *"Each prison must have written order on infection control which must be monitored and reviewed annually."*[46]

35. These are some of the measures that the prison authorities are required to implement, but which were not implemented in this case.

36. We submit that the steps required to be taken to manage contagious diseases and maintain a healthy prison environment are precise and the specific duty that rests on the prison authorities is clear.

VII THE SCA AGREES WITH FACTUAL FINDINGS OF THE TRIAL COURT

37. While Nugent JA comes to a different conclusion from the trial court on the law, the learned judge agrees with the analysis of the evidence by the trial court in several crucial respects:

[45] Standing Correctional Orders, Order 3, Chapter 3, Clause 15.1.
[46] Standing Correctional Orders, Order 3, Chapter 3, Clause 15.3.

37.1. Prisons present a “favourable environment” for the transmission of TB[47]:

> *Dank and poorly ventilated living conditions, close contact with those who have active disease, and an immune system compromised by poor nutrition or other causes, are all conducive to transmission of the disease.*[48]

37.2. The Applicant was incarcerated at a prison that presented the hallmarks of a favourable environment for the spread of TB. These include poor ventilation, low sunlight, severe overcrowding and congestion in shared cells where prisoners, some of whom were actively infectious, would cough and spit, as well as congestion in police vans, which were used for transportation to court and in which prisoners were “packed like sardines”.[49]

37.3. Effective management of TB is dependant on adequate staff.[50]

37.4. The Pollsmoor authorities were ‘pertinently aware’ of the risk to prisoners of contracting TB.[51]

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[47] SCA judgment para 11, record page 35.
[48] SCA judgment para 10, record page 35.
[49] SCA judgment para 12, record page 36. See eg SCA judgment para 11, record page 35.
[50] SCA judgment para 17, record 37.

37.5. The evidence of Drs Craven and Theron and Mr Muller (a professional nurse who worked at Pollsmoor for 10 years) demonstrated the poor state of health care and that numerous efforts were made exhorting various relevant authorities, including the prison authorities, the Inspecting Judge as well as the parliamentary portfolio committee, to address these circumstances.[52]

37.6. Mr Gertse, a witness for the Respondent, testified that there were procedures in place at Pollsmoor prison for screening of prisoners, that facilities for isolation were available and that there was a system for administering medication to prisoners. The SCA found that this evidence was patently unsustainable, and noted that Mr Gertse eventually conceded that the scenario he described was 'the theory' but not the practice.[53]

37.7. The system for management of TB, to the extent it existed, was not properly applied in practice:

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[51] SCA judgment para 18, record page 38; see also SCA judgment para 44, record page 46
[52] SCA judgment para 22 – 23, record page 39.
[53] SCA judgment paras 25 – 32, record pages 40 – 42.

> *The prison authorities were well aware that the prisoners might contract tuberculosis if reasonable steps were not taken to prevent it. I think I have made it clear earlier in this judgment that the evidence establishes convincingly that that to the extent that any system existed at all for the proper management of the disease its application in practice was at best sporadic and in at least some respects effectively non-existent.*[54]

37.8. It is a "probable fact" that the Applicant contracted TB while in prison.[55]

38. On the basis of the factual findings, the SCA was in agreement with the trial court that the Respondent owed a legal duty to the Applicant, that the harm of contracting TB in the prison was reasonably foreseeable and that "the prison authorities failed to maintain an adequate system for management of the disease and in that respect they were negligent".[56]

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[54] SCA judgment para 44, record page 46.
[55] SCA judgment para 52, record page 49; SCA judgment para 54, record page 50: "[the applicant] was probably infected by a prisoner who had active tuberculosis while under the control of the prison authorities"; Statement of Agreed Factual Findings para 90, record page 435; *Report Prepared for the Constitutional Court Case: Dudley Lee v Minister of Correctional Services* para 7.
[56] SCA judgment para 44; record page 46.

39. However, according to the SCA, the Applicant's case falls apart at this point because he is unable to pass the final hurdle of causation.

VIII THE APPLICATION OF THE 'BUT FOR' TEST BY THE SCA

40. The SCA found that the Applicant was unable to show that the negligent omission of the prison authorities—that is, the failure to take reasonable steps to prevent the transmission of TB—was the cause of his TB infection. The court held that, in order to prove causation, the Applicant would need to either prove that "reasonable systemic adequacy" would have "altogether eliminated the risk of contagion" or identify the "source" of his infection and establish a causal link between the infection and "specific negligent conduct on the part of the prison authorities".[57]

41. For the reasons set out below, we submit that the approach taken by the learned judge is flawed in two respects: first, the application of the 'but for' test is not consistent with the articulation of the test in *Van Duivenboden*, and second, if on the correct application of the test the

[57] SCA judgment para 64, record pages 54 – 55.

applicant would be not entitled to relief, the court ought to have considered whether these are circumstances in which the 'but for' test should be developed in accordance with the spirit, purport and objects of the Bill of Rights and the norms and values that underlie the Constitution.

IX THE MISAPPLICATION OF THE 'BUT FOR' TEST

42. The test for factual causation is set out in *International Shipping Co (Pty) Ltd v Bentley*:

> *The enquiry as to factual causation is generally conducted by applying the so-called "but-for" test, which is designed to determine whether a postulated cause can be identified as a causa sine qua non of the loss in question. In order to apply this test one must make a hypothetical enquiry as to what probably would have happened but for the wrongful conduct of the defendant. This enquiry may involve the mental elimination of the wrongful conduct and the substitution of a hypothetical course of lawful conduct and the posing of the question as to whether upon such an hypothesis plaintiff's loss would have ensued or not. If it would in any event have ensued, then the wrongful conduct was not a cause of the plaintiff's loss; aliter, if it would not so have ensued.*[58]

[58] *International Shipping Co (Pty) Ltd v Bentley* 1990 (1) SA 680 (A) page 700.

43. Applying the test in *Van Duivenboden*, Nugent JA construed it as follows:

> *A plaintiff is not required to establish the causal link with certainty, but only to establish that the wrongful conduct was probably a cause of the loss, which calls for a sensible retrospective analysis of what would probably have occurred, based upon the evidence and what can be expected to occur in the ordinary course of human affairs rather than an exercise in metaphysics.*[59]

44. However, in this matter, Nugent JA comes to a different interpretation of the burden of proof that is required, and in so doing sets the bar unduly high.

45. The learned judge puts it thus:

> *The difficulty that Mr Lee faces is that he does not know the source of his infection. Had he known its source it is possible that he might have established a causal link between his infection and specific negligent conduct on the part of the prison authorities. Instead he has found himself cast back upon systemic omission. But in the absence of proof that the systemic inadequacy would have altogether eliminated the risk of contagion, which would be a hard row to hoe, it cannot be found that but for the systemic omission he probably would not have contracted the disease. On that ground I think the claim ought to have failed.*[60] [Emphasis added]

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[59] *Minister of Safety and Security v Van Duivenboden* 2002 (6) SA 431 (SCA) para 25.
[60] SCA judgment para 64, record pages 54 – 55.

46. The standard that a plaintiff is now faced with is higher than proof on a balance of probabilities. It is difficult to reconcile the view of the court expressed by Nugent JA in para 64 with the approach taken in *Van Duivenboden*. On the standard application, the postulate is whether the plaintiff would probably not have contracted TB had there been a reasonable system for the management of TB in place. He need not show this as a matter of scientific certainty, but rather only satisfy the court that it is more probable than not that the negligent omission caused his injury. On Nugent JA's current construal of the test, the Applicant must show that a reasonable system for managing TB would have "altogether eliminated the risk" of his becoming infected with TB.[61]

47. The court requires this showing even though it accepts that "…whatever management strategies might be put into place there will <u>always</u> be a risk of contagion … ".[62] Moreover, the SCA requires the showing even whilst acknowledging that the Respondent's duty is only to act reasonably rather than to "<u>guarantee</u> that foreseeable

[61] SCA judgment para 64, record pages 54 – 55.
[62] SCA judgment para 61, record page 53.

harm does not occur".[63] [Emphasis added] What is required of the Applicant is not only to prove the impossible, but also to prove that the prison authorities have not done what they are neither obligated nor able to do. Prof Wood's affidavit confirms that even with the implementation of the best international practices there is a risk of contagion.[64]

48. The alternative is for the Applicant to identify the precise source of his infection. This is a condition that is impossible for the Applicant to meet.

49. The science of TB transmission and the physiological effect of infection is set out in the record and the Statement of Agreed Factual Findings. In essence, it is well known that TB can be transmitted through coughing, spitting or even singing. The bacterium spreads with ease in a closed, congested and poorly ventilated environment.

50. In the prison context, these factors come together to create a favourable environment for TB to spread. As a result, it is not

[63] SCA judgment para 56, record page 51.
[64] Expert Affidavit of Prof Robin Wood para 20, record page 656.

practically possible to establish whether the source of one's infection is, for example, a cellmate, a prisoner standing in a queue at exercise time or sputum on the ground.

51. As Prof Wood shows, and as Prof Dheda for the Respondent accepts, it is also scientifically impossible to identify the source of a particular strain of bacteria.[65]

52. The effect of the SCA judgment is to make it impossible to satisfy the test of causation in these circumstances. The Applicant is left without a remedy even though he was able to prove the facts referred to in paragraph 37 above. At the time of incarceration, the Applicant was in a good state of health, the authorities knew that TB is a contagious illness that thrives in the prison environment, there were detailed Standing Orders setting out how the authorities were required to mange and control contagious illnesses in the prison and to protect prisoners' health, there was a manifest laxity by the prison authorities to implement these measures and the Applicant acquired TB while he was in the custody of the Respondent. Together, and in the absence

[65] *Report Prepared for the Constitutional Court Case: Dudley Lee v Minister of Correctional Services* para 6.

of countervailing evidence, the facts drive toward a conclusion that it is more likely than not that the failure by the prison authorities to implement the required measures caused his infection. In the event that the Court is not inclined to agree with this conclusion, we submit that the Court should have regard to developments to the 'but for' test that have taken place elsewhere and that are pertinent to the issues that the Court is faced with here.

X A FLEXIBLE APPROACH TO THE 'BUT FOR' TEST

53. It cannot seriously be denied that, in general, a plaintiff is required to prove that a defendant wrongfully and negligently caused his loss in order to recover compensation for that loss from the defendant. However, it is also accepted that there are cases in which the strict application of the rule would result in an injustice and therefore requires a flexible approach.[66] In studying the law of tort in various jurisdictions, Prof van Gerven says:

[66] HLA Hart and T Honoré, *Causation in the Law*, 2nd ed (Oxford University Press, Oxford, 2002) page 124; Chief Justice Beverly McLachlin, "Negligence Law – Proving the Connection" published in NJ Mullany and A Linden, *Torts Tomorrow: A Tribute to John Fleming* (LBC Information Services, Sydney, 1998) page 18; W van Gerven, J Lever, P Larouche, *Tort Law* (Hart Publishing, Oregon, 2000) page 441.

> *In many cases, it will be possible for the victim to show that he or she has suffered injury, that has been caused by someone who must have been at fault, but the author of that fault will not be identifiable. The best that the victim will be able to achieve is to define a class of persons of which the actual tortfeasor must be a member. Strictly speaking, however, the basic conditio sine qua non test will not be met, since it cannot be said of any member of the class that the injury would not have happened 'but for' his or her conduct, given that in fact any other member could have caused the injury. Nonetheless, all the legal systems studied here have acknowledged that it would be patently unfair to deny recovery to the victim for that reason.*[67]

54. A classic example is where two hunters (A and B) shoot at the same person at (roughly) the same time with identical guns. The victim could not show that his injury would have resulted 'but for' the conduct of A; nor could he in relation to B.

55. It is for this reason that Fleming has described causation as having "plagued courts and scholars more than any other topic in the law of torts."[68]

56. The Amici's position is not to reject the prudent and fair approach that the common law test is meant to engender. Rather, the Amici are concerned with particular circumstances where the mechanical

[67] W van Gerven, J Lever, P Larouche, *Tort Law* (Hart Publishing, Oregon, 2000) page 441.
[68] C Sappideen and P Vines, Fleming's The Law of Torts 10th ed. (Thomson Reuters, Australia, 2011) page 227.

application of the test has a result that is unjust. Other jurisdictions have grappled with the application of the test where it does not yield a result that is in accordance with the prevailing convictions of what is just. In short, the test is meant to be the servant of justice rather than the reverse.

57. This is a matter that failed, as Nugent JA expresses it, on a "narrow factual point".[69] On all elements of the delictual claim, the Applicant was successful, except the application of the 'but for' test. To the extent that the Court is of the view that the Applicant cannot show factual causation based on this test, we submit that this is a case that calls for the Court to adapt the common law so that it is in harmony with the spirit, purport and objects of the Bill of Rights and the norms established in the Constitution as a whole.

[69] SCA judgment para 64, record page 54.

XI DEVELOPING THE COMMON LAW ON CAUSATION

58. The general obligation flowing from section 39(2) of the Constitution, as well as sections 8 and 173, is well-established.[70]

59. In *K* v *Minister of Safety and Security* Justice O'Regan J stated:

> *The overall purpose of s 39(2) is to ensure that our common law is infused with the values of the Constitution. It is not only in cases where existing rules are clearly inconsistent with the Constitution that such an infusion is required. The normative influence of the Constitution must be felt throughout the common law. Courts making decisions which involve the incremental development of the rules of the common law in cases where the values of the Constitution are relevant are therefore also bound by the terms of s 39(2). The obligation imposed upon courts by s 39(2) of the Constitution is thus extensive, requiring courts to be alert to the normative framework of the Constitution not only when some startling new development of the common law is in issue, but in all cases where the incremental development of the rule is in issue.*[71]

60. The principles laid down by this Court in giving effect to the duty to develop the common law resonate loudly in the current matter before the Court. The SCA was alive to the requirement that norms of the

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[70] *Carmichele* v *Minister of Safety and Security*, 2001 (4) SA 938 (CC) at para 54; S v *Thebus and another* 2003 (6) SA 505 (CC) para 28; *K* v *Minister of Safety and Security* 2005 (6) SA 419 (CC).

[71] *K* v *Minister of Safety and Security* 2005 (6) SA 419 (CC) para 17; *F v Minister of Safety and Security* 2008 (3) All SA 143 (SCA).

Constitution should be given effect in such cases. This is apparent from its reasoning in relation to its finding that the prison authorities acted negligently and wrongfully. It is also evident that the SCA was sensitive to the violation of rights as asserted by the Applicant. According to Nugent JA:

> *Mr Lee has certainly had a hard time of it. For four years he was imprisoned while the state mustered its case against him and then the state failed. Meanwhile Mr Lee knew that he was at risk of contracting tuberculosis in a prison where the health-care regime was breaking down. When it occurred he had to manipulate and cajole at times to ensure that he consistently received medication, conscious that he would suffer adverse consequences if he failed to do so. He had good reason to feel aggrieved when he left prison but his troubles were not yet at an end.*
>
> *When he vented his grievance by suing the state he was met with a defence on every leg of his claim. The state contested that Mr Lee had been infected in prison with no substantial grounds for doing so. It contested the allegations of an inadequate health-care regime when it must have known that it was defending the indefensible. The failing regime had been repeatedly reported by its medical doctors at high level, various reports on the situation had been circulated, newspapers had reported the position, a report of an inspector from the office of the Inspecting Judge that had been prepared some four years before the matter came to trial disclosed that tuberculosis management was virtually non-existent, and so on. Yet the state persisted in contending that all had been well at Pollsmoor and acknowledged no responsibility towards Mr Lee at any time.*
>
> *…*

> *Mr Lee set out to vindicate an important statutory and constitutional right and has done so substantially. It is true that his claim has failed but only on a narrow factual point. The state has important responsibilities to its citizens. It might not always be able to fulfill them but then it ought properly to recognise where it has failed.*[72]

61. The narrow factual point that was the ruin of the Applicant's case was that he could not show that he would have not contracted TB had the authorities implemented a TB control system.

XII ADAPTATION OF THE TEST IN COMPARATIVE JURISDICTIONS

62. As McLachlin puts it, the law of delict is fundamentally about "recognising and righting wrongful conduct by one person or a group of persons that harms others".[73]

63. Courts in other common law jurisdictions have had occasion to consider circumstances under which a strict application of the 'but for' test would yield an unfair result, most notably a line of decisions by

[72] SCA judgment paras 66 – 68, record pages 55 – 56.
[73] Chief Justice Beverly McLachlin, "Negligence Law – Proving the Connection", published in NJ Mullany and A Linden, *Torts Tomorrow: A Tribute to John Fleming* (LBC Information Services, Sydney, 1998) page 16.

the House of Lords in the United Kingdom that came to a head in *McGhee v National Coal Board.*[74]

64. In brief, the claim by Mr McGhee was that he contracted dermatitis as a result of exposure to brick dust during his employment at a brick kiln. He attributed blame to the employer by arguing that the employer negligently omitted to provide shower facilities for the workers in the kiln. This omission materially increased the risk of Mr McGhee contracting dermatitis. Mr McGhee failed in his claim before two courts prior to reaching the House of Lords.

65. The reason for the dismissal of his claim before the first appeal court was as follows: while the evidence showed that the failure by the employer to provide showers materially increased the risk of contracting dermatitis, it did not establish that the omission caused the disease. It could not be said that Mr McGhee would probably not have contracted the illness had provision for showers been made, because it was equally possible that his illness was caused by

[74] *McGhee v National Coal Board* [1972] 3 All ER 1008. However, as far back as 1957 the House in *Nicholson v Atlas Steel Foundry and Engineering CO Ltd* [1957] 1 All ER 776, the court was of the view that exposure to noxious dust in a factory, where the employer was under a duty to provide adequate ventilation but failed to do so, was sufficient causal connection to sustain a claim by an employee who suffers illness from the dust.

brickdust to which he would have been exposed even absent the employer's negligence. As a result, a causal connection could not be established.[75]

66. This was the question that faced the House of Lords: could Mr McGhee succeed even though he could not show that he probably would not have contracted dermatitis had the showers been provided?

67. The House of Lords found in favour of Mr McGhee. The Law Lords agreed that a "broader view of causation" was called for.[76] According to Lord Wilberforce, while logic dictates that a claimant who cannot prove that the increased risk caused his harm should fail, there are other important considerations:

> *First, it is a sound principle that where a person has, by breach of a duty of care, created a risk, and injury occurs within the area of that risk, the loss should be borne by him unless he shows that it had some other cause. Secondly, from the evidential point of view, one may ask, why should a man who is able to show that his employer should have taken certain precautions, because without them there is a risk, or an added risk, of injury or disease, and who in fact sustains exactly that*

[75] *McGhee v National Coal Board* [1972] 3 All ER 1008.
[76] *McGhee v National Coal Board* [1972] 3 All ER 1008 page 1011.

> *injury or disease, have to assume the burden of proving more: namely, that it was the addition to the risk, caused by the breach of duty, which caused or materially contributed to the injury? In many cases, of which the present is typical, this is impossible to prove, just because honest medical opinion cannot segregate the causes of an illness between compound causes. And if one asks which of the parties, the workman or the employers should suffer from this inherent evidential difficulty, the answer as a matter in policy or justice should be that it is the creator of the risk who, ex hypothesi must be taken to have foreseen the possibility of damage, who should bear its consequences.*[77]

68. *McGhee* was affirmed in *Fairchild v Glenhaven Funeral Services Ltd and others*, which is itself rich in its consideration of foreign law. In the main speech by Lord Bingham, he made it clear that the *McGhee* court had not based its finding on a factual inference. The evidence before the lower courts was clear—it could not be said that the omission probably caused the harm. The House of Lords recognised that the claimant faced an insuperable hurdle of proof on the traditional application of the 'but for' test, but that justice demanded that that the claimant should succeed.[78]

[77] *McGhee* v *National Coal Board* [1972] 3 All ER 1008 page 1012.
[78] *Fairchild* v *Glenhaven Funeral Services Ltd and others* [2002] 3 All ER 305 para 21.

69. While the House of Lords in *Wilsher v Essex Area Health Authority*[79] interpreted the *McGhee* decision as a "legitimate inference of fact that the defender's negligence has materially contributed to the pursuer's injury" and that it did not alter the traditional burden of proof, the House of Lords, per Lord Bingham clarified, for the reasons set out in above paragraph, that this interpretation should no longer be treated as authoritative.

70. The cases before the House of Lords related to plaintiffs who had developed mesothelioma caused by asbestos, to which they had been exposed in multiple workplaces. Lord Bingham indentified the evidentiary hole in the case in that:

> *It is accepted that the risk of developing a mesothelioma increases in proportion to the quantity of asbestos dust and fibres inhaled: the greater the quantity of dust and fibre inhaled, the greater the risk. But the condition may be caused by a single fibre, or a few fibres, or many fibres: medical opinion holds none of these possibilities to be more probable than any other, and the condition once caused is not aggravated by further exposure.*[80]

71. Thus, Lord Bingham reasoned,

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[79] *Wilsher* v *Essex Area Health Authority* [1988] 1 All ER 871.
[80] *Fairchild* v *Glenhaven Funeral Services Ltd and others* [2002] 3 All ER 305 para 7.

> *There is no way of identifying, even on a balance of probabilities, the source of the fibre or fibres which initiated the genetic process which culminated in the malignant tumour.*[81]

72. Lord Bingham therefore recognised that, while it was impossible to determine the source of the disease, it could be shown that the negligence of both defendants contributed to the risk that Mr Fairchild would develop mesothelioma.

73. Lord Hoffmann's speech in *Fairchild* is also significant. In a frank assessment of the limits of the 'but for' test, Lord Hoffmann concluded that justice required a departure from the traditional test. In these circumstance, he concluded that:

> *... it is sufficient [to prove causation], both on principle and authority, that the breach of the duty contributed substantially to the risk that the claimant would contract the disease.*[82]

74. Essentially, Lord Hoffmann takes the view that the proposition that causation is a question of fact should not be narrowly construed. This is because the requirements for establishing factual causation depend upon the rules of law. Thus:

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[81] *Fairchild* v *Glenhaven Funeral Services Ltd and others* [2002] 3 All ER 305 para 7.
[82] *Fairchild* v *Glenhaven Funeral Services Ltd and others* [2002] 3 All ER 305 para 47.

> *… causal requirements are just as much part of the legal conditions for liability as the rules which prescribe the kind of conduct which attracts liability or the rules which limit the scope of that liability.*
>
> *…*
>
> *The concepts of fairness, justice and reason underlie the rules which state the causal requirements of liability for a particular form of conduct (or non-causal limits on that liability) just as much as they underlie the rules which determine that conduct to be tortious. And the two are inextricably linked together: the purpose of the causal requirement rules is to produce a just result by delimiting the scope of liability in a way which relates to the reasons why liability for the conduct in question exists in the first place.*[83]

75. The *Fairchild* exception was considered by United Kingdom courts in several later cases, the most recent being *Sienkiewicz v Greif*.[84] In *Sienkiewicz*, the Supreme Court of the United Kingdom (formerly the House of Lords) was required to consider a claim for damages against an employer where the employee had developed mesothelioma as a result of exposure to asbestos dust during employment. It therefore differed from the facts on *Fairchild* in that there was only a single exposure from a single defendant, rather than multiple exposures from multiple defendants. The main judgment by

[83] *Fairchild* v *Glenhaven Funeral Services Ltd and others* [2002] 3 All ER 305 paras 54 and 56.
[84] *Sienkiewicz v Greif* [2011] 2 All ER 857.

Lord Phillips spent much time considering the degree of risk to which the employee had been exposed and whether liability should be commensurate with a quantified assessment of the risk. This need not detain us here. The court rejected the statistical approach that had been advanced by the defendant and accepted in the lower court. What is relevant is that the court extended the *Fairchild* exception (regarding cases that involve a disease in respect of which it is medically impossible to determine the source of the infection) to cases where there is a single defendant.

76. Lord Phillips also considered what constitutes a "material" increase in risk. The question is whether the risk is so insignificant as to be rejected as a caused on the basis of the principle of de minimis. He was of the view that it is not possible to define a standard for determining when a risk is de minimis. This would depend on the facts of each case.[85]

77. Other jurisdictions have expressed similar concern about the unfair consequences that may result from the 'but for' test in limited

[85] *Sienkiewicz v Greif* [2011] 2 All ER 857 para 107.

situations. In Australia, Mason CJ speaking in *March* v *E & MH Stramare Pty Ltd*, forthrightly rejected that "the 'but for' (causa sine qua non) test ever was or now should become the exclusive test of causation in negligence cases".[86] He went on:

> *The 'but for' test gives rise to a well-known difficulty in cases where there are two or more acts or events which would each be sufficient to bring about the plaintiff's injury. . . The cases demonstrate the lesson of experience, namely, that the test, applied as an exclusive criterion of causation, yields unacceptable results and that the results which it yields must be tempered by the making of value judgments and the infusion of policy considerations.*[87]

78. In Canada, the Supreme Court has similarly required that the 'but for' test should be applied with flexibility and common sense.[88] In *Resurfice Corp*, the Supreme Court accepted (without applying it to the case at hand) that a 'material contribution to the risk' test, and hence an exception to the 'but for' test applies in cases where it is impossible for the plaintiff to prove causation on the 'but for' test and where the defendant breached a legal duty that exposed the plaintiff to unreasonable risk.[89]

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[86] *March* v *E & MH Stramare Pty Ltd* [1991] HCA 12 para 1; (1991) 171 CLR 506 para 508.
[87] *March* v *E & MH Stramare Pty Ltd* [1991] HCA 12 para 22; (1991) 171 CLR 506 para 516.
[88] *Snell v Farrell* [1990] 2 SCR 311.
[89] *Resurfice Corp. v. Hanke*, [2007] 1 S.C.R. 333.

79. In the United States of America, courts have adopted a variety of modifications to the 'but for' test, including reversing the burden of proof of causation[90] the "concerted action" approach against manufacturers[91], the "market-share" approach[92] and the "loss of chance" approach[93]. While it would be an interesting academic exercise to explore these approaches, they are all based on substantially different facts and would not be of assistance to the case at hand. These cases illustrate the range of alternatives to the 'but for' test that have been applied in the United States of America, and serve to show that it is yet another jurisdiction in which the courts have found reason to modify the traditional approach to causation.

XIII WOULD THE IMPOSITION OF LIABILITY OVERBURDEN THE RESPONDENT

80. Whether the legal duty that rests on the Respondent is one that should give rise to potential claims for delictual damages was considered by the SCA. The Respondent advanced three arguments

[90] *Summers* v Tice, 199 P. 2d (Cal. 1948).
[91] *Hall v E.I. Du Pont De Nemours & Co., Inc.* 345 F.Supp. 353 (1972
[92] *Sindell v Abbot Laboratories*, Cal., 607 P. 2d 924 (1980).
[93] *Herskovits v Group Health Cooperative of Pugent Sound* 664 P. 2d 474 (Wash. 1983).

to resist such liability: that it "would impose an inordinate burden on the state", that it "will expose the state to indeterminate liability" and that "there are means other than a claim for damages that enable prisoners to vindicate their rights."[94]

81. The written submissions of the respondent before this Court do not add to these arguments. These arguments were roundly rejected by Nugent JA. [95]

82. The 'floodgates' concern is invariably raised where the question of development of the common law is being considered.[96] In this case, as with the development of the common law in general, the determination is one that is fact and context-specific. It is also a determination that must be based on the objective normative system embodied in the Constitution. This normative system is not limited to the Bill of Rights. It is also contained in the provisions that set out the founding values of the Republic and the emphasis on accountability of government. It is with this in mind that the Court is required to answer the question: upon whom should the burden of loss of fall?

[94] SCA judgment para 37, record pages 43 - 44.
[95] SCA judgment paras 38 – 42, record pages 44 – 45.
[96] See eg *Administrator, Transvaal, and others v Traub and Others* 1989 (4) SA 731.

83. As we submitted earlier, the development of the common law will be circumscribed by the facts of this case. The distinct features of this case are:

83.1. There is a specific duty on the respondent to take reasonable measures to protect prisoners from contagion;

83.2. The Respondent was in negligent breach of that duty owed to the Applicant during the Applicant's incarceration, with the result that the Applicant was exposed to excessive quantities of TB bacteria thus materially increasing his risk of infection;

83.3. The Applicant, being in the custody of the state, was dependent on the Respondent to implement reasonable measures. He had no choice to remove himself from an infectious environment;

83.4. The Applicant probably contracted TB while incarcerated;

83.5. The Applicant developed active TB;

83.6. It is not possible, due to the limits of currently available science, to identify the precise source of the infection and connect it to specific negligent conduct on the part of the prison authorities; and

83.7. The harm that was caused is one of physical injury and not one of pure economic loss.

XIV CONCLUSION

84. To borrow from Lord Hoffman's reasoning in *Fairchild*, the crisp question of principle is this: in a case with these features what would be more in accordance with the Constitution – a rule that places liability on a Respondent who, in breach of its duty, created a significant risk to the Applicant's health even though there may be another cause of the injury? Or a rule that denies the Applicant a remedy by requiring him to show what science is incapable of showing? We respectfully submit that the answer is self-evident.

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17 August 2012