

BRIEFING NOTE ON *DUDLEY LEE v MINISTER OF CORRECTIONAL SERVICES*

28 August 2012

1. This note summarises the issues presented by *Dudley Lee v Minister of Correctional Services*, an important case related to tuberculosis (TB) in prisons. The Constitutional Court will hear the case on 28 August 2012. The Treatment Action Campaign (TAC), Wits Justice Project (WJP) and the Centre for Applied Legal Studies (CALs), represented by SECTION27, are participating in this matter as Amici Curiae (friends of the Court). The Treatment Action Campaign is dedicated to advocating for the rights of those with HIV and TB and for the implementation of effective and comprehensive HIV and TB prevention, diagnosis, treatment, care and support programmes. The WJP forms part of the Journalism Department at the University of the Witwatersrand. It combines the use of journalism, advocacy, law and education to improve the criminal justice system and assist individuals affected by miscarriages of justice. CALs is a human rights centre at the University of Witwatersrand. CALs seeks to strengthen constitutional democracy. Its vision encompasses a country where human rights are respected, protected and fulfilled, the dismantling of systemic harm, and a rigorous dedication to justice.

Basic facts and background

2. When Dudley Lee entered Pollsmoor Prison in November 1999 he was in “reasonable health”.¹ TB was prevalent in the prison and conditions in the prison facilitated the spread of TB.² Indeed, when the matter came before the Western Cape High Court, prison authorities were unable to prove that they took “any steps whatsoever to guard against the spread of TB”.³ The failure to do so was negligent. A few years later, Mr Lee requested to be tested for TB after noticing symptoms associated with TB, such as coughing and weight loss. In June 2003, he was diagnosed with TB.
3. In September 2004—over four years after entering prison—Mr Lee was acquitted of the charges against him and released. Mr Lee then sued the Minister of Correctional

¹ SCA judgment at para 2

² High Court judgment at para 213, 229

³ Ibid at para 258

Services (Minister) in the High Court. In essence, Mr Lee claimed that prison authorities caused him to become infected with TB.⁴

4. Mr Lee won his case in the High Court, but the Minister then appealed to the Supreme Court of Appeal (SCA). Mr Lee lost in the SCA.
5. An understanding of why Mr Lee lost in the SCA requires a basic understanding of the law of “delict”. Delict is an area of law. The typical delict case involves a person or entity, in this case the Department of Correctional Services, that has acted negligently, or failed to act when it had a duty to do so, and thereby harmed another person or entity. The harmed party sues in court in order to win compensation for the harm. The most common delictual claim is a car wreck. For example, Driver A failed to stop at a red robot and hit Driver B’s car causing a dent in Driver B’s car door.
6. To win a delictual claim, one must prove four “elements”. These are: duty, breach of duty, causation and damages.
 - 6.1. “Duty” refers to a legal obligation to either do or not do something. In the above example, Driver A had a legal duty to stop at the red robot.
 - 6.2. “Breach of duty” refers to a failure to comply with the obligation to either do or not do something. In the above example, Driver A’s failure to stop at the red robot was a breach of duty.
 - 6.3. “Causation” is the element of a delictual claim that is at issue in this matter. One must prove that the breach of duty resulted in a certain harm. Typically, in order to prove the causation element, a court will apply the “but for” test. In the above example, a court would ask whether it is more probable than not that “but for” Driver A having run the red robot Driver B’s car would not have been damaged?
 - 6.4. “Damages” simply refers to the harm suffered. In the above example, the damage is the dent in Driver B’s car door.
7. The SCA found that Mr Lee had proven each of these four elements except for “causation”.
8. The SCA identified two ways in which Mr Lee could have proved the causation element. First, he could identify the source of his infection and prove a causal connection between it and some specific negligent conduct or omission on the prison authorities’ part. Second, he could show that he would not have been infected with TB

⁴ Ibid at para 2

if the prison authorities had done everything they were supposed to do. In other words, Mr Lee would have to prove that there would be a zero percent chance of contracting TB “but for” the prison authorities’ negligence.

9. Both of these methods of proving causation are unrealistic, especially in a prison setting. The first is unrealistic simply because it asks Mr Lee to do that which is impossible given the limits of science; one cannot use current TB diagnostic technologies and methods to isolate a source of TB and connect it to a specific act of negligence. If the Court chooses to allow evidence that the Amici wish to introduce, this will be established by an affidavit from Professor Robin Wood, who is an international expert on TB.
10. The second option is equally implausible: one cannot prove that there would be a zero percent chance of contracting TB if the prison authorities did everything right because no reasonable system of TB prevention could altogether eliminate the risk of infection. This was acknowledged by the SCA itself when it wrote “ ... whatever management strategies might be put into place, there will *always* be a risk of contagion”.⁵ Professor Robin Wood’s affidavit also shows this.

Why are the Amici Curiae involved?

11. TAC has an interest in this matter because the issue being decided by the Constitutional Court will impact on its ability to realise its core vision and mission. TAC is committed to advocating for the rights of people with TB and for the implementation of an effective and comprehensive TB prevention, diagnosis, treatment, care and support programme. TAC also focuses on TB because people living with HIV are at an especially high risk of contracting TB.
12. TAC has also worked extensively with the NSP 2012-2016. The NSP 2012-2016 identifies prisoners as a key population at high risk of TB infection and identifies specific interventions in relation to them. Moreover, a recent article published in the SAMJ found that conditions prevailing in Pollsmoor Prison, which is the prison at issue in this case, create an extremely high risk of TB transmission, including drug-resistant TB, and result in annual TB transmission risks of 90% per year.⁶

⁵ *Ibid* para 61, emphasis added

⁶ *Tuberculosis in a South African prison – a transmission modelling analysis*, Johnstone-Robertson *et al* (2011) 101 SAMJ

13. The WJP has a particular interest in and focuses on issues concerning remand detainees, including the conditions of their detention and violations of their human rights. The WJP has a direct interest in ensuring that the rights of remand detainees, such as the right to health and the right to dignity, are safeguarded and maintained.
14. CALS is a human rights centre with long experience in advocating for human rights. More particularly, CALS works extensively on the rights of detained people. Currently, the CALS is working on the conditions of remand detention across its focus areas of research, advocacy and litigation.
15. The Amici Curiae are participating in this case in order to make two main arguments to the Court.
16. First, that the SCA applied a higher standard of proof for proving causation than the one it was supposed to. Normally, the standard of proof is “more probably than not”. Here, the TAC argues, the SCA applied a higher standard by requiring Mr Lee to show that there was no way he would have gotten TB if the prison authorities had acted correctly.
17. Second, TAC will argue that the Court must develop the law in a way that gives effect to the rights that prisoners hold, specifically those found in section 27 and 35(2)(e) of the Constitution. Section 27 entrenches the right to access to health care services and places an obligation on the state to progressively realise that right. This obligation places on duty on the state to take reasonable measures to prevent the spread of TB. Section 35(2)(e) entrenches the right to conditions of detention that are consistent with human dignity, including, “adequate medical treatment”.
18. The decision that Mr Lee is appealing is a very unjust one because it negates the possibility of a remedy and thereby negates the rights at issue. If the decision is not overturned, it is unlikely that any prisoner will ever be successful in a claim in delict against the prison authorities for negligently causing him or her to become infected with TB. The impossibility of success creates the following results:
 - 18.1. Mr Lee and many similarly situated people are left without the possibility of a remedy despite the violations of their rights;
 - 18.2. The prison authorities are permitted to violate the rights of prisoners and awaiting trial detainees and to neglect constitutional and statutory obligations with impunity; and

18.3. Public health will continue to decline because of the failure to minimise TB transmission.

19. For these reasons, the law must be developed in order to give effect to the rights at issue.

For more information

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