

# Liability for the wrongful transmission of communicable diseases in South African prisons: What about HIV?

## 1 Introduction

Much has been written about prison conditions in South Africa.<sup>1</sup> Overcrowding, violence, poor sanitation and inadequate access to health care are the order of the day in most prisons.<sup>2</sup> These conditions provide the ideal setting for the spread of disease. In the words of Anton van Niekerk: 'Viral diseases, as we know, do not all become epidemics. To become an epidemic, a niche or social context is required'.<sup>3</sup>

Although the exact prevalence<sup>4</sup> in South African prisons of communicable diseases, such as the Human Immunodeficiency Virus (HIV) and Tuberculosis (TB), is unknown, we may draw inferences from regional epidemiological studies. According to one study, HIV prevalence in sub-Saharan African prisons is two to 50 times

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<sup>1</sup>See eg *Annual Report of the Judicial Inspectorate of Prisons, 2011-2012*, available at <http://judicialinsp.pwv.gov.za/Annualreports/annualreport.asp> (accessed 2013-03-10) 26-31; Centre for the Study of Violence and Reconciliation *Prison overcrowding and the constitutional right to adequate accommodation in South Africa* (2005) available at [http://www.issafrica.org/crimehub/uploads/Prison overcrowding%28Steinberg%29.pdf](http://www.issafrica.org/crimehub/uploads/Prison%20overcrowding%28Steinberg%29.pdf) (accessed 2013-03-10); Gear 'Behind the bars of masculinity: Male rape and homophobia in and about South African men's prisons' (2008) *Sexualities* 387-396; and Pieterse 'Access to medical care in South African prisons' (2006) *Journal of African Law* 121-122.

<sup>2</sup>Jürgens, Nowak and Day 'HIV and incarceration: Prisons and detention' (2011) *Journal of the International AIDS Society* 26 available at <http://www.jiasociety.org/content/14/1/26> (accessed 2013-03-10); Johnstone-Robertson *et al* 'Tuberculosis in a South African prison: A transmission modelling analysis' (2011) *SAMJ* 809; and United Nations Office on Drugs and Crime (UNODC) 'HIV and prisons in sub-Saharan Africa: Opportunities for action' (2007) available at [http://www.unodc.org/documents/hiv-aids/Africa%20HIV\\_Prison\\_Paper\\_Oct-23-07-en.pdf](http://www.unodc.org/documents/hiv-aids/Africa%20HIV_Prison_Paper_Oct-23-07-en.pdf) (accessed 2013-03-10).

<sup>3</sup>Van Niekerk and Kopelman (eds) *Ethics and AIDS in Africa: The challenge to our thinking* (2005) 55.

<sup>4</sup>There are two measures of the occurrence of communicable diseases such as TB and HIV: prevalence and incidence. The prevalence of TB or HIV refers to the proportion of persons in a specified population who are infected with TB or HIV at a specified point in time. The incidence of TB or HIV refers to the proportion of persons in a specified population who become newly infected with the disease over a specified period of time (Nelson *et al Infectious disease epidemiology: Theory and practice* (2000) 97).

greater than that of the general population.<sup>5</sup> The high prevalence rates of HIV exacerbate the TB infection rates among inmates, as TB is the most common opportunistic infection among people living with HIV in Africa.<sup>6</sup> TB incidence in prisons worldwide has been estimated at more than 20 times higher than in the general population.<sup>7</sup> Consequently, it is not surprising that, according to the Department of Correctional Services' *Annual Report* for the years 2011 to 2012, the most common causes of natural deaths among inmates were TB, pneumonia and AIDS.<sup>8</sup>

There are several reasons for the high incidence of communicable diseases in prisons.<sup>9</sup> UNAIDS, for example, ascribes the high rates of morbidity and mortality relating to HIV and TB in prisons to overcrowding, poor hygiene and poor nutrition, violence, lack of access to basic health care services and the higher prevalence of various other communicable diseases which weaken prisoners' immune systems, making them vulnerable to infection.<sup>10</sup>

Given that there is a high burden of disease in South African prisons, it is surprising that so few cases concerning the wrongful or unlawful transmission of communicable diseases in prison have reached the courts. This dearth is due to a variety of factors but, most importantly, probably to the fact that it is difficult to prove the element of causation – specifically factual causation – required for delictual (and criminal) liability in the context of the transmission of communicable diseases such as TB and HIV.

In the light of the difficulty this journal note examines the implications of the recent Constitutional Court decision in *Dudley Lee v Minister of Correctional Services*<sup>11</sup> for potential claims regarding the wrongful transmission of HIV in prison. In *casu*, the Constitutional Court had to decide whether the applicant had succeeded in establishing factual causation in order to establish the prison authorities' liability for the wrongful transmission of TB. I begin the discussion with a short outline of causation as a delictual element as it is pertinent to the facts of the case. Next follows a discussion of the Constitutional Court's treatment of factual causation in the case of *Dudley Lee v Minister of Correctional Services*,

<sup>5</sup> UNODC, UNAIDS and World Bank 'HIV and prisons in sub-Saharan Africa: Opportunities for action' (2007) available at [http://www.unodc.org/documents/hiv-aids/Africa%20HIV\\_Prison\\_Paper\\_Oct-23-07-en.pdf](http://www.unodc.org/documents/hiv-aids/Africa%20HIV_Prison_Paper_Oct-23-07-en.pdf) (accessed 2013-03-10).

<sup>6</sup> *Ibid.* In fact, it is accepted that the HIV pandemic has contributed to the resurgence of TB. TB has become the leading cause of morbidity and mortality among HIV infected patients worldwide (see Todrys and Amon 'Criminal justice reform as HIV and TB prevention in African prisons' (2012) *PLoS Medicine*, available at <http://www.doi:e10011205/journal.pmed.1000381> (accessed 2013-03-10).

<sup>7</sup> Baussano *et al* 'Tuberculosis incidence in prisons: A systematic review' (2010) *PLoS Medicine* 7 available at e1000381. doi:10.1371/journal.pmed.1000381 (accessed 2013-03-10).

<sup>8</sup> *Judicial Inspectorate for Correctional Services Annual Report 2011-2012* (n 1) 54-55.

<sup>9</sup> Goyer *HIV/AIDS in prison: Problems, policies and potential* (2013) 13.

<sup>10</sup> WHO/UNAIDS *Technical guidance template for GF HIV proposals R11 (and GF TB proposals) UNAIDS I World Health Organization Comprehensive HIV and TB programmes for people in detention* (2011-08-18) 1.

<sup>11</sup> *Dudley Lee v Minister of Correctional Services* Case CCT 20/12 [2012] ZACC 30.

and thereafter the question is asked whether this judgment has opened a door for establishing liability for the wrongful transmission of HIV in prison. I conclude with further observations regarding the implications of the case.

## 2 A few notes on causation

To establish delictual liability, the claimant has to prove that the wrongful action caused the loss.<sup>12</sup> Both factual and legal causation have to be present.<sup>13</sup> In *Minister of Police v Skosana*,<sup>14</sup> Corbett JA outlines these requirements:<sup>15</sup>

Causation in the law of delict gives rise to two rather distinct problems. The first is a factual one and relates to the question as to whether the negligent act or omission in question caused or materially contributed to ... the harm giving rise to the claim. If it did not, then no legal liability can arise and *cadit quaestio*. If it did, then the second problem becomes relevant, *viz* whether the negligent act or omission is linked to the harm sufficiently closely or directly for legal liability to ensue or whether, as it is said, the harm is too remote.

The test used generally by South African courts to establish factual causation is the *conditio sine qua non* theory, according to which an act is the cause of a result if it is a necessary precondition of that result.<sup>16</sup> In *International Shipping Co Ltd v Bentley*,<sup>17</sup> Corbett CJ explained the test for factual causation as a 'but-for' test to establish whether a cause can be identified as necessary for the loss in question. This enquiry sometimes involves mentally eliminating the 'unlawful conduct' and substituting for it a hypothetical course of 'lawful conduct', after which one asks whether the loss would have occurred anyway. If that question is answered in the affirmative, the 'wrongful conduct' was not the cause of the plaintiff's loss and no liability arises.<sup>18</sup>

In the case of an omission, such as the prison authorities' failure to prevent the transmission of a communicable disease, an additional hypothetical test is employed, with the omitted act which should have been performed being added to what had in fact happened.<sup>19</sup> If the harm would not have occurred had the act been performed, factual causation is present.<sup>20</sup>

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<sup>12</sup>Van der Walt and Midgley *Principles of delict* (2005) 198-199; Neethling, Potgieter and Visser *Law of delict* (2006) 161-162.

<sup>13</sup>*Ibid.*

<sup>14</sup>1977 1 SA 31 (A).

<sup>15</sup>*Skosana* (n 14) paras 34E-34F.

<sup>16</sup>*Ibid.*

<sup>17</sup>1990 1 SA 680 (A) 700.

<sup>18</sup>*Id* F-G.

<sup>19</sup>Van der Walt and Midgley (n 12) 199; Neethling, Potgieter and Visser (n 12) 162; *Siman and Co (Pty) Ltd v Barclays National Bank Ltd* 1984 2 SA 888 (A) 915E-F; *Minister van Veiligheid en Sekuriteit v Geldenhuys* 2004 1 SA 515 (SCA).

<sup>20</sup>Neethling, Visser and Potgieter (n 12) 161; Van der Walt and Midgley (n 12) 200.

Delictual liability does not require that the wrongful conduct be the sole cause of the loss that ensued. In *Minister of Police v Skosana*, the court held that an act or omission that 'materially contributed' to the harm suffered may suffice.<sup>21</sup> Furthermore, it may very well be that the *conditio sine qua non* theory is not actually applied in all cases by the courts as a test, but that courts are really using probabilities deduced from the evidence presented to determine whether an act or omission is the factual cause of the loss.<sup>22</sup> In this regard, Van der Walt and Midgley state that the *conditio sine qua non* test 'is in general only used as a means of expressing an *a priori* conclusion, based on knowledge and experience, regarding the existence of factual causation'.<sup>23</sup>

The liability of South African prison authorities for the negligent transmission of a communicable disease in prison was considered by the Constitutional Court in the case of *Dudley Lee v Minister of Correctional Services*.<sup>24</sup> In this case, in order for liability to be proven, Lee had to establish causation, in that the prison authorities' breach of their duty of care resulted in his becoming infected with TB. Below, the facts of the case as well as the Constitutional Court's judgment in the matter are discussed, followed by conclusions regarding the potential impact of the Court's judgment on claims regarding the transmission of another communicable disease, namely, HIV.

Note that it is not the aim of this discussion to analyse the Constitutional Court's treatment of the delictual requirement of factual causation in detail, but rather to examine the implications of the Court's judgment for future litigation regarding the transmission of HIV. Suffice to say that Neethling's criticism of the Supreme Court of Appeal's approach to the issue of factual causation probably, to a very large extent, holds true for the Constitutional Court's reasoning.<sup>25</sup>

### 3 Constitutional Court's judgment in *Dudley Lee v Minister of Correctional Services*

The case concerned an appeal to the Constitutional Court from the Supreme Court of Appeal.<sup>26</sup> Lee contracted TB while imprisoned in Pollsmoor and upon his release from prison claimed damages from the Minister of Correctional Services on the basis that the prison authorities, by their conduct, whether acting with *dolus*

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<sup>21</sup>*Skosana* (n 14) 34E-34F.

<sup>22</sup>Neethling, Potgieter and Visser (n 12) 160; Visser 'Gedagtes oor feitelike kousaliteit in die deliktereg' (2006) *TSAR* 585.

<sup>23</sup>Van der Walt and Midgley (n 12) 200.

<sup>24</sup>See n 11.

<sup>25</sup>See Neethling 'Delictual liability of prison authorities for contagious diseases among inmates: *Lee v Minister of Correctional Services* 2011 6 SA 564 (WCC); *Minister of Correctional Services v Lee* 2012 3 SA 617 (SCA)' (2013) *TSAR* 177.

<sup>26</sup>2012 3 SA 617 (SCA).

*eventualis* or negligently, had caused him to become infected with TB. Lee alleged that, but for the wrongful conduct on the part of the responsible authorities he would not have been exposed to contagious inmates who were infected with TB, and that, further, he would have been treated and cured earlier.<sup>27</sup>

Lee was in reasonable health and not infected with TB when he entered the prison but, after being in prison for three years, he was diagnosed with pulmonary TB.<sup>28</sup> He was treated for the disease and considered cured after six months' treatment. In the Western Cape High Court Lee alleged that the prison authorities had failed to take adequate precautions to protect him against contracting TB, that he had contracted TB as a result of their omission, and that the omission had violated his rights to physical integrity under the common law, the Correctional Services Act 8 of 1959 and the Constitution of the Republic of South Africa, 1996.<sup>29</sup> The Western Cape High Court found in Lee's favour whereupon the Minister appealed to the Supreme Court of Appeal.<sup>30</sup>

The Supreme Court of Appeal found (per Nugent JA) that Lee had failed to show that Pollsmoor Prison authorities' negligence (in failing to protect him against infection with TB) had caused him to become infected with the disease. Although the Supreme Court of Appeal found that Lee probably became infected while in Pollsmoor<sup>31</sup> and that no effective TB-prevention programme existed during Mr Lee's incarceration, as evidenced by superficial initial screening and the failure to isolate inmates who had TB,<sup>32</sup> and that he was probably infected by a fellow prisoner who had active (and thus transmissible) TB,<sup>33</sup> because Mr Lee could not say precisely how he became infected the Court found that he was unable to prove that the failure of the prison authorities caused his infection. In the words of Nugent JA:<sup>34</sup>

But whatever enquiry might be conducted in that regard it seems to me that Mr Lee confronts at least one insuperable hurdle. From the evidence before us it is apparent *that whatever management strategies* might be put into place, there *will always be a risk of contagion* if only because diagnosis is necessarily a precursor to intervention, and the disease might often be diagnosed only well after the prisoner has become contagious (my emphasis).

Therefore, the particular nature of TB infection placed an 'insuperable hurdle' in Mr Lee's path.

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<sup>27</sup>2011 6 SA 564 (WCC) para 6.

<sup>28</sup>*Ibid.*

<sup>29</sup>*Lee v Minister of Correctional Services* (n 27) 603 paras 1-4.

<sup>30</sup>*Id* 603.

<sup>31</sup>*Id* paras 52-53.

<sup>32</sup>*Minister of Correctional Services v Lee* (n 26) para 53.

<sup>33</sup>*Id* para 54.

<sup>34</sup>*Minister of Correctional Services v Lee* (n 26) para 61.

In the Constitutional Court the question before the Court was whether Lee's detention and the 'systemic failure to take preventative and precautionary measures by the Correctional Services authorities'<sup>35</sup> had caused Lee to be infected with TB.<sup>36</sup> Specifically, the Constitutional Court had to determine '(i) whether the negligent conduct of the responsible authorities was the cause of harm suffered by the applicant; if not, (ii) whether the common law regarding causation should be developed to give effect to the spirit, purport and objects of the Bill of Rights; and (iii) the determination of costs'.<sup>37</sup> In other words, whether the factual causation aspect of the 'common law test for delictual liability was established and, if not, whether the common law needs to be developed to prevent an unjust outcome'.<sup>38</sup>

The Constitutional Court, in line with the SCA's decision, accepted that the Minister of Correctional Services was negligent in failing to maintain an adequate system for the management of TB.<sup>39</sup> The Constitutional Court then had to determine whether it was proven that the negligent omission by the Minister had indeed *caused* Lee to become infected with TB – in other words, whether factual and legal causation were present.<sup>40</sup>

After a detailed analysis of South African common and case law regarding causality, the Constitutional Court, per Nkabinde J, held that 'there is a duty on Correctional Services authorities to provide adequate health care services, as part of the constitutional right of all prisoners to conditions of detention that are consistent with human dignity'.<sup>41</sup> The Court further found that in relation to Pollsmoor the responsible authorities were indeed aware that there was an appreciable risk of TB infection and contagion in crowded living circumstances and, being aware of that risk, that they had a duty to take reasonable measures to reduce the risk of contagion.<sup>42</sup>

Nkabinde J proceeds by remarking that although she accepts that a reasonably adequate system may not have 'altogether eliminated the risk of contagion', she does 'not think that the practical impossibility of total elimination is a reason for finding that there was no duty at least to reduce the risk of contagion'.<sup>43</sup>

It seems to me that if a non-negligent system reduced the risk of general contagion, it follows – or at least there is nothing inevitable in logic or common

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<sup>35</sup> *Dudley Lee v Minister of Correctional Services* (n 11) para 2.

<sup>36</sup> *Ibid.*

<sup>37</sup> *Dudley Lee v Minister of Correctional Services* (n 11) para 29.

<sup>38</sup> *Ibid.*

<sup>39</sup> *Dudley Lee v Minister of Correctional Services* (n 11) para 37.

<sup>40</sup> *Ibid.*

<sup>41</sup> *Dudley Lee v Minister of Correctional Services* (n 11) para 59.

<sup>42</sup> *Ibid.*

<sup>43</sup> *Id* para 60.

sense to prevent the further inference being made – that specific individual contagion within a non-negligent system would be less likely than in a negligent system. *It would be enough*, I think, to satisfy *probable factual causation* where the evidence establishes that the plaintiff found himself in the kind of situation where the risk of contagion would *have been reduced* by proper systemic measures (my emphasis).

Nkabinde J further disagreed with the SCA's approach where it found that it is not possible to make the inference of likely *individual* infection from the fact that a non-negligent system would *generally* reduce the risk of contagion.<sup>44</sup> She holds that the implication of that kind of reasoning would be that 'factual causation can never be proved where the specific incident or source of infection cannot be identified'.<sup>45</sup> Nkabinde J refers to *Van Duivenboden*<sup>46</sup> where the Supreme Court of Appeal remarked that 'the state has a positive constitutional duty under section 7(2) of the Constitution to act in the protection of the rights in the Bill of Rights'.<sup>47</sup> Quoting from *Van Duivenboden*, Nkabinde J holds that the state must 'assume the obligation ... inherent in the right ... to "conditions of detention that are consistent with human dignity"' and that "there is every reason why the law should recognise a claim for damages to vindicate [the prisoners'] rights".<sup>48</sup> In Nkabinde J's view to 'suggest otherwise, in circumstances where a legal duty exists to protect Mr Lee and others similarly placed, will fail to give effect to their rights to human dignity, bodily integrity and the right to be detained in conditions that are consistent with human dignity under the Constitution, including at least exercise and the provision, at state expense, of adequate accommodation, nutrition, and medical treatment'.<sup>49</sup>

Having found that a factual causal link exists, Nkabine J next examines whether the Minister of Correctional Services should be held liable – in other words, whether there exists legal causation between the breach and the harm done.<sup>50</sup> In this regard, finding that there is a probable chain of legal causation between the negligent omissions by the prison authorities and Mr Lee's infection with TB, Nkabinde J finds that:<sup>51</sup>

The rule of law requires that all those who exercise public power must do so in accordance with the law and the Constitution [...] This, including the requirements of accountability and responsiveness, provides 'additional' reasons for finding in favour of the applicant and imposing delictual liability [...] This would enhance the responsible authorities' accountability, efficiency and respect for the rule of law.

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<sup>44</sup>*Id* para 62.

<sup>45</sup>*Id* para 63.

<sup>46</sup>2002 6 SA 431 (SCA).

<sup>47</sup>*Van Duivenboden* (n 46) para 20.

<sup>48</sup>*Dudley Lee v Minister of Correctional Services* (n 11) paras 64-65.

<sup>49</sup>*Id* para 65.

<sup>50</sup>*Id* para 68.

<sup>51</sup>*Id* para 70.

As to the question of whether the common law should be developed to include a more flexible approach to factual causation, Nkabinde J finds that in the circumstances of the case – particularly the nature of the omission – she does ‘not consider that our law needs to be developed in accordance with the casuistic approach endorsed by the cases referred to [by Cameron J in his minority judgement]’.<sup>52</sup>

The Constitutional Court therefore upholds the appeal, finding the Minister of Correctional Services liable, and remits the case to the Western Cape High Court for a determination on *quantum*.

#### 4 A door is opened: Implications for liability claims for the wrongful transmission of HIV

As said above, this discussion does not concern itself with the soundness of the Constitutional Court’s approach regarding causation, but rather with its possible consequences for prisoners who are infected with HIV while in prison.

At the outset it is important to note that HIV and TB are transmitted through vastly different routes: TB is an airborne infection; HIV is transmitted through blood and other bodily fluids.<sup>53</sup> Nevertheless, it is submitted that before the judgment in *Lee*, a claimant who wanted to establish a defendant’s liability for the wrongful transmission of HIV in prison met the same obstacles as Dudley Lee regarding factual causation. A claimant either had to 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, or he had to show that he would not have been infected with HIV if the prison authorities had not been negligent. Put differently, a claimant would have had to prove that there would have been no chance of contracting HIV ‘but for’ the prison authorities’ negligence.

Where the wrongful transmission of HIV is concerned, it is evident that it is virtually impossible to accurately establish factual causation. Firstly, it is scientifically impossible to establish a source of HIV infection and connect it to a specific act of negligence.<sup>54</sup> Although the different strands of HIV can be identified it remains scientifically impossible to identify the source of a specific human

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<sup>52</sup>*Id* para 72.

<sup>53</sup>Bodily fluids include semen (contains helper T-cells, macrophages); vaginal/cervical secretions (contain helper T-cells, macrophages); menstrual fluid (contents are the same as blood); and breast milk (contains macrophages). In this regard see, eg, Schoub *AIDS and HIV in perspective* (1994) 82-83; Graham ‘Review of the epidemiology of Human Immunodeficiency Virus infection and Acquired Immune Deficiency Syndrome’ in Nelson *et al Infectious disease epidemiology: Theory and practice* (2000) 524 and Klein and Ho ‘Challenges in the development of an effective HIV vaccine: Current approaches and future directions’ (2000) *Clinical Therapeutics* 295.

<sup>54</sup>Conner, Villarreal and Fan *AIDS: Science and society* (2011) 121 and Schlossberg *Clinical infectious disease* (2008) 742.



immunodeficiency virus.<sup>55</sup> Likewise, a person's chances of being infected with HIV varies with regards to the type of exposure but the risk can rarely be described as one hundred percent per exposure incident.<sup>56</sup> Hence, even if a negligent 'incident' may be identified it remains difficult to prove that HIV was indeed transmitted at that specific instance or point in time.

Secondly, it is equally impossible to prove that there would be no chance of contracting HIV if the prison authorities did not act negligently as, even in cases of well-coordinated prevention strategies (such as extensive counselling regarding condom use, the availability of condoms in the prison, the availability of antiretroviral treatment in prison, the availability of pre- and post-exposure prophylaxis and strategies that prevent violence and coercive or forced sexual intercourse between inmates), HIV-transmission still takes place. In other words, no reasonable system of HIV prevention can altogether eliminate the risk of infection. In the words of the Supreme Court of Appeal in the case of TB, 'whatever management strategies might be put into place, there will always be a risk of contagion'.<sup>57</sup>

It is evident therefore that in the case of wrongful HIV-transmission in prison, in the past, establishing factual causation remained an insurmountable hurdle for a claimant. This may also be the reason why there is such a dearth of cases regarding the wrongful transmission of HIV in South Africa despite the very high HIV incidence rate in the country.<sup>58</sup>

It is submitted therefore that the Constitutional Court's judgment discussed above opens a door for the possible liability of prison authorities for the transmission of HIV. In its judgment, the Constitutional Court rejects the 'inexorable logic' that would have the result that factual causation can never be proved where the specific incident or source of infection cannot be identified.<sup>59</sup> If we apply the Constitutional Court's logic to the case of HIV, it is evident that a door is opened for courts to find that factual and legal causation have been established in a scenario where an inmate was infected with HIV due to the negligence of the prison authorities.

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<sup>55</sup> *Ibid.*

<sup>56</sup> With the exception of infection via the transmission of HIV-infected blood. See the sources referred to in n 53 above.

<sup>57</sup> *Minister of Correctional Services v Lee* (n 26) para 61.

<sup>58</sup> One of the few cases based in delict is *Venter v Nel* 1997 4 SA 1014 (SAHC D), where the plaintiff sought damages from a previous sexual partner who had infected her with HIV during consensual sexual intercourse. This case does not provide a good precedent on the difficulties when establishing the element of causation (or even fault) in the case of wrongful HIV infection as the action was unopposed and default judgment was granted. See also *Franks v MEC for the Department of Health, Kwazulu-Natal* unreported case no 2958/02 dated 20 January 2010 (KZP) and Carstens 'Contamination with HIV on the scene of an accident due to the negligence of paramedical professionals: Challenges for determining legal liability' (2010) *THRHR* 665; Van Wyk 'Blood transfusions, HIV and legal liability in South Africa' (2005) *Medicine and Law* 615 and Strauss 'Legal liability for transmission of AIDS virus by means of blood transfusion' (1991) *South African Practice Management* 16.

<sup>59</sup> *Dudley Lee v Minister of Correctional Services* (n 11) para 63.

It is submitted that in the case of the negligent transmission of HIV in circumstances similar to those in the case of *Dudley Lee v Minister of Correctional Services*, by failing to find that both factual and legal causation had been established on a balance of probabilities, a court would fail in its duty to give effect to the rights in the Bill of Rights. In the words of Nkabinde J.<sup>60</sup>

To suggest otherwise, in circumstances where a legal duty exists to protect Mr Lee and others similarly placed, will fail to give effect to their rights to human dignity, bodily integrity and the right to be detained in conditions that are consistent with human dignity under the Constitution, including at least exercise and the provision, at state expense, of adequate accommodation, nutrition, and medical treatment.

## 5 Conclusion

Justice Nkabinde (quoting the Supreme Court of Appeal) further reminds us of the obligations resting upon the state when imprisoning offenders: 'a civilised and humane society demands that when the state takes away the autonomy of an individual by imprisonment it must assume the obligation ... inherent in the right ... to "conditions of detention that are consistent with human dignity"'.<sup>61</sup>

Thus, the practice of subjecting prisoners in South Africa to conditions which in many instances are inconsistent with their human dignity, and, thereafter, denying the claims of those who have been wrongfully infected with communicable diseases, such as TB and HIV, because of their failure to satisfactorily establish factual causation, represent a double affront to these prisoners' dignity. The Constitutional Court's decision to find that there is a probable factual chain of causation between the negligent omissions by the responsible prison authorities and Lee's infection with TB, not only opens the door to claims with regard to the wrongful transmission of HIV, but goes some way towards vindicating prisoners' rights to 'conditions of detention that are consistent with human dignity'.<sup>62</sup>

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<sup>60</sup>*Dudley Lee v Minister of Correctional Services* (n 11) para 65.

<sup>61</sup>*Dudley Lee v Minister of Correctional Services* (n 11) para 65, quoting *Minister of Correctional Services v Lee* (n 26) para 36.

<sup>62</sup>Section 35(2)(e) Constitution of the Republic of South Africa, 1996.