The *Dudley Lee* Case: A new approach to factual causation and its implications for transformative jurisprudence*

Abstract

The Constitutional Court (CC) judgment of *Lee v Minister of Correction Services* 2013 2 SA 144 (CC) is a recent contribution to transformative constitutional jurisprudence in the field of the law of delict. This matter turned on the issue of factual causation in the context of wrongful and negligent systemic omissions by the state. In this case note, I explore the law relating to this element of delictual liability with specific regard to the traditional test for factual causation – the *conditio sine qua non* ('but-for') test. In particular, I note the problems occasioned by formalistic adherence to this test in the context of systemic state omissions as evidenced by the SCA judgment in the same matter. I also consider the manner in which English courts have addressed this problem. Thereafter, I analyse the CC's broader approach to the determination of factual causation as one based on common sense and justice. I argue that this approach endorses a break from a formalistic application of the test and constitutes a step towards an approach which resonates with the foundational constitutional values of freedom, dignity and equality. Furthermore, it presents an appropriate solution to the problems associated with factual causation where systemic omissions are concerned. I then consider the transformative impact of the *Lee* judgment. In particular, I argue that the broader enquiry favoured by the CC facilitates the realisation of constitutionally guaranteed state accountability, and amounts to an extension of the existing norm of accountability jurisprudence. Hence, I contend that the judgment presents a further effort by the Constitutional Court to effect wholesale the constitutionalisation of the law of delict, as well as a vindicatory tool to be used by litigants who have been adversely affected by systemic state omissions.

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1 Introduction

The law of delict has developed considerably to make room for the inclusion of the norms and values espoused by the Constitution, pursuant to the mandate contained in section 39(2) of the Bill of Rights.[1] Of fundamental importance is the development and endorsement of the norm of state accountability in landmark cases, such as *Carmichele v Minister of Safety and Security (Centre of Applied Legal Studies).*[2] The latest addition to our constitutional delictual jurisprudence comes in the form of *Lee v Minister of Correctional Services.*[3] While some elements of a delict, such as wrongfulness, have been considerably re-imagined in order to give effect to the constitutional vision, other elements have attracted relatively little attention. The element of factual causation falls within this latter category and it is this element that receives the attention of the Constitutional Court (CC) in this recent judgement.

The traditional test for factual causation has long been problematic. The potential of this test to give rise to unjust results is evident in the jurisprudence of both South African and foreign courts. Nevertheless, the test has been adhered to formalistically. Given its potential to give rise to injustice, the test was an ideal candidate for re-evaluation to bring it in line with our new society, founded upon the values of freedom, dignity and equality. This is precisely what the Constitutional Court did, thereby continuing its efforts to effect a wholesale constitutional transformation of the law of delict.

In this note, I consider the *Lee* case more carefully. In part II, I will set out the basic factual background of the case, as well as the findings by the relevant courts. In part III, I critique the judgment and evaluate pertinent issues in two respective sections: in the first I consider the impact of the judgment on the element of factual causation as it operates in a constitutional context, and in the second, I discuss the transformative impact of the judgment, with particular reference to the norm of state accountability.

2 *Lee v Minister of Correctional Services*

The matter, which eventually made its way to the Constitutional Court, arose out of the following factual matrix. Mr Dudley Lee, the plaintiff, was incarcerated at Pollsmoor Prison ('Pollsmoor') from November 1999 to September 2004 on a number of criminal charges including fraud, counterfeiting and money laundering.[4] Mr Lee was detained in the E-Section of the maximum security prison for the

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[1] Davis 'Transformation: The constitutional promise and reality' (2010) 26 *SAJHR* 85 at 87.
[2] 2001 4 SA 938 (CC).
[3] 2013 2 SA 144 (CC).
[4] *Minister of Correctional Services v Lee* 2012 3 SA 617 (SCA) para 1.

duration of his trial. During his incarceration he became infected with pulmonary tuberculosis ('TB'), a dangerous and highly prevalent disease, which was discovered and diagnosed in June 2003 after an unrelated admission to a nearby hospital. Mr Lee was treated for and cured of the disease in the months that followed. He was subsequently acquitted of all charges against him, which secured his discharge from detention in 2004.

Upon his release, Mr Lee instituted action in delict against the state, represented by the Minister of Correctional Services. Essentially, he claimed that the state's wrongful and negligent omission had caused him to contract TB, thereby violating a number of his fundamental constitutional rights. Specifically, Mr Lee claimed that these violations resulted from systemic failures by the prison authorities to take adequate preventative and precautionary measures, which would have prevented or substantially reduced Mr Lee's risk of contracting the disease.[5]

The broader issue in the High Court and on appeal to the Supreme Court of Appeal was whether the state could be held liable in delict for Mr Lee's contraction of TB and the attendant infringement of his constitutional rights. The constituent elements of a delict are well-established in our law, all of which must be present in order to establish liability.[6] When based upon negligence these elements may be summarised as follows. First, the law requires conduct, in the form of either an omission (failure to act) or a commission.[7] It must constitute a breach of a legal duty to act reasonably (in other words, it must be wrongful) and must fall short of a standard of reasonableness that is legally required, as measured against the standard of the reasonable person.[8] Finally, the claimant must have suffered harm/prejudice, which is caused by the wrongful and culpable conduct, that is, there must a 'causal nexus' between the conduct and the harm.[9] The correctness of this standard, as applied by our courts in establishing causation, is contentious given the formalistic approach that is traditionally adopted. Indeed, by the time the *Lee* matter reached the Constitutional Court the only element that remained in contention was that of factual causation.[10]

The issue of causation was briefly dealt with by De Swardt AJ in the Western Cape High Court. She asked simply whether the prevailing conditions in the prison in which Lee was incarcerated probably resulted in his contracting TB. She

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[5] *Id* para 3.
[6] Neethling and Potgieter *Law of delict* (2010) 4; *First National Bank of South Africa Ltd v Duvenhage* 2006 5 SA 319 (SCA) para 1).
[7] Neethling and Potgieter (n 6) 30.
[8] *Duvenhage* (n 6) para 1; Neethling and Potgieter (n 6) 30 and 131; *Minister of Safety and Security v Van Duivenboden* 2002 6 SA 431 (SCA) 12.
[9] *Duvenhage* (n 6) para 1; Neethling and Potgieter (n 6) 175; Mukheiber, Niesing and Perumal 'Factual causation' in Loubser and Midgley (eds) *Law of delict in South Africa* (2012) 66.
[10] *Lee* (n 4) para 2.

considered the factual conditions of his detention, including the length of time spent in detention and the fact that previously Lee had never been ill with TB.[11] Based on these considerations, she held that 'it is more probable than not that the plaintiff contracted TB as a result of his incarceration at Pollsmoor'.[12] Accordingly, the High Court held the state liable in delict for the harm suffered by Lee.

The Supreme Court of Appeal (SCA), however, overturned the High Court's decision on the basis that causation could not be established.[13] Nugent JA found that, despite the systemic omission being negligent, Lee could not meet the test for factual causation.[14] The first difficulty was the fact that he could not establish the source of his infection and therefore could not link it to specific conduct. Secondly, the SCA found that even in a reasonably adequate system, infections might go undetected for any length of time and single instances of transmission would still occur.[15] Therefore, the risk of infection would never be entirely eliminated; accordingly, it could not be said that the state's negligent systemic omission caused Mr Lee's infection.

On appeal to the Constitutional Court, the appropriate approach to factual causation was canvassed by Nkabinde J, writing for the majority. The formalistic application of the test for factual causation was criticised and firmly rejected.[16] The overarching principle was that our law has never required a strict and inflexible application of the test for causation.[17] Such an approach would inexorably lead to injustice in certain cases and consequently, our law made room for flexibility even in pre-constitutional days.[18] Hence where the traditional test proves inadequate, recourse must be had to other standards. What the court ultimately required is the establishment of a probable causal connection between the omission and the consequent prejudice.[19] Adopting this flexible approach on the basis of justice and common sense, the court reverted back to the High Court's finding.[20] Accordingly, the majority of the Constitutional Court found in favour of Mr Lee, ultimately holding the state accountable for its wrongful and negligent systemic failure.

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[11] *Lee v Minister of Correctional Services* 2011 6 SA 564 (WCC) paras 230-235.
[12] *Ibid.*
[13] *Lee* (n 4) para 64.
[14] *Id* para 57.
[15] *Lee* (n 4) paras 61-64.
[16] *Lee* (n 3) paras 42-44.
[17] *Id* para 43.
[18] *Id* para 41; see *Siman and Co (Pty) Ltd v Barclays National Bank Ltd* 1984 4 SA 888 (A)*; Portswood v Svamvur* 1970 4 SA 8 (RAD)*; Minister of Police v Skosana* 1977 1 SA 31 (A).
[19] *Lee* (n 3) paras 55 and 58.
[20] *Lee* (para 3) para 55).

3 Analysis

The Constitutional Court's judgment in this matter holds considerable implications for the manner in which factual causation is to be approached. It reflects a transformative attitude in the implicit recognition that factual causation, like wrongfulness and negligence, is sensitive to the norms and values espoused by the Constitution. As such, the judgment makes yet another important contribution to the broader constitutional transformation of the common law of delict. In evaluating the significance of the *Lee* judgment, I shall consider two pertinent issues. First, I shall consider in some detail the implications of the judgment for factual causation. This will entail a discussion of the traditional mechanism for its determination, as well as the challenges occasioned by the formalistic application of such mechanism, with specific reference to systemic state omissions. Thereafter, I shall analyse the manner in which the Constitutional Court addressed these challenges by its endorsement of the more flexible approach that has long been underlying in our law. Ultimately, I present this approach as a solution particularly in the context of systemic failures by the state. While the majority's approach has attracted considerable academic criticism,[21] I attempt to analyse the majority judgment in a more positive light. Second, I shall assess the significance of the judgment insofar as the constitutional guarantee of state accountability is concerned. This evaluation will entail a discussion of the norm of state accountability and the manner in which the *Lee* judgment contributes to its satisfaction. I discuss the judgment as an extension of existing delictual jurisprudence on state accountability and, ultimately, as a tool to be used by litigants who have fallen victim to systemic state omissions to vindicate their constitutional rights.

3.1 The implications of the Lee judgment for factual causation

3.1.1 Causation in general

In order for delictual liability to arise, it must be shown that there is a causal connection between the negligent conduct complained of and the harm suffered. The matter of determining causation involves a two-stage enquiry as authoritatively expressed by the Appellate Division in *Minister of Police v Skosana*.[22] The first stage establishes whether the culpable conduct can be said to have caused or materially contributed to the harm upon which the claim is

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[21]See, eg, Price 'Factual causation after *Lee*' (2015) 131 *SALJ* 491 (forthcoming); Davis 'Where is the map to guide common-law development?' (2014) *Stell LR* 3; and Harms 'The puisne judge, the chaos theory and the common law' (2014) 131 *SALJ* 3 at 8.

[22](N 18).

based.[23] This is referred to as factual causation. If this enquiry is answered in the affirmative, the second question is considered, since a culpable act or omission may have a wide range of factual consequences.[24] This question presents a juridical problem, involving a more normative inquiry into remoteness: it must be shown that the conduct is sufficiently closely connected to the harm suffered.[25] If both of these elements are satisfied, the element of causation is met. The factual causation component was addressed in detail by both the SCA and the CC. However, their application yielded opposite results, ultimately determining the outcome of the matter.

3.1.2 Determining factual causation: the '*conditio sine qua non*' test

The method traditionally employed to assess whether the requisite factual link exists is the *conditio sine qua non* (or the 'but-for') test.[26] This test is used to determine whether the defendant's conduct is a necessary condition for the prejudice suffered to occur: the conduct is only a factual cause if it is a necessary condition.[27] According to the test, the specific act or omission in question is a necessary condition if, but for that conduct, the prejudice would not have ensued.[28] The 'but-for' test is regarded as the general test for the determination of factual causation, particularly where there are no supervening causes.[29]

It is however widely accepted that the test is flawed: it has been criticised by various authors on a number of grounds.[30] As Midgley states,[31]

> There can be no doubt that in some instances ... the application of the 'but-for' test leads to absurd results – in logic as well as from experience – and in many cases a strict application of the test, although logical, would offend one's sense of justice and violate society's norms and values.

Nevertheless, South African courts formalistically adhere to the test as much more than a convenient starting point, so much so that it is treated as the sole test

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[23] *Id* 34 E-F.
[24] Snyman *Criminal law* (2008) 83.
[25] *Skosana* (n 18) 34G; Neethling and Potgieter (n 6) 187-191; and Mukheiber (n 9) 67.
[26] *Skosana* (n 18) 35B-D; *Minister of Finance v Gore NO* 2007 1 SA 111 (SCA) 32.
[27] Midgley 'Revisiting factual causation' in Glover (ed) *Essays in honour of AJ Kerr* (2006) 277 at 278.
[28] Midgley and Van der Walt (n 26); *International Shipping Co (Pty) Ltd v Bentley* 1990 1 SA 680 (A) 700 E-G; *S v Van As* 1967 4 SA 594 (AD).
[29] *Siman* (n 18) 914H-915A; Midgley and Van der Walt (n 26) 130.
[30] See Neethling and Potgieter (n 6) 180-181; Mukheiber (n 9) 72-74; Van Rensburg 'Nog eens *conditio sine qua non*' (1977) *JSAL* 101 at 102.
[31] Midgley (n 27) 284-285.

for this element of liability.[32] This is the case even where *Minister of Police v Skosana*,[33] which made provision for more than one test, is cited as authority.[34] Accordingly, where a defendant's conduct does not qualify as the necessary condition by the traditionally strict logic of the test, delictual liability will not attach despite proven wrongful and negligent conduct.

3.1.3 *Minister of Correctional Services v Lee*: The Supreme Court of Appeal

The SCA in *Lee* took exactly this approach. In testing for factual causation, Nugent JA applied a strict formulation of the 'but-for' test in determining whether the systemic failure was a necessary condition for Lee's harm. In line with the current test for factual causation the SCA engaged in a hypothetical substitution exercise.[35] However, Lee could not establish the systemic conditions as a necessary condition for the harm that he suffered due to the indeterminacy of the source of his infection. The SCA's formalistic insistence on absolute proof of the systemic state omission as a necessary condition proved to be an insurmountable obstacle in establishing factual causation.[36] The difficulty with this finding becomes apparent when one considers the court's findings on the remaining elements of delictual liability. Here, the SCA displayed more sympathy towards Lee. Nugent JA found the systemic state omission to be wrongful, given the positive duty on the state to act in protection of prisoners, as vulnerable members of society.[37] The SCA further held the systemic omission to be negligent, since even minimal preventative measures were not taken, despite the known risk of contagion.[38]

The state escaped liability only because Lee failed to establish the negligent omission as a necessary condition for the harm suffered.[39] The SCA in fact notes that his claim failed 'on a narrow factual point'.[40] The formalistic application of the 'but-for' test yielded an unjust result: the SCA's application of a 'rigid deductive logic'[41] denied Lee a remedy required by justice given the state's patently wrongful and negligent conduct. Formalism has been cautioned against, since it is

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[32] *Id* 278.
[33] (N 18).
[34] Midgley (n 27) 279; *International Shipping Company v Bentley* [1990] 1 All SA 498 (A) 516-517; Mukheiber v Raath 1999 3 SA 1065 (SCA) para 35.
[35] *Lee* (n 4) para 56.
[36] For greater detail, see *Lee* (n 4) paras 49-64, especially paras 61-64.
[37] *Lee* (n 4) para 42; see regarding wrongfulness *Minister van Polisie v Ewels* 1975 3 SA 590 (A) 597A-C; *Van Duivenboden* (n 8) para 17; Neethling and Potgieter (n 6) 36-40 and 57-58.
[38] *Lee* (n 4) paras 44 and 57.
[39] *Id* para 64.
[40] *Id* para 68.
[41] *Id* para 44.

irreconcilable with the aspirations of the democratic era.[42] The SCA's narrow reasoning and the consequent denial of a remedy evidence the dangers of a formalistic approach. The constitutional values of justice and fairness were not served by such a 'mechanistic and technical style of reasoning'.[43] Apart even from constitutional values, rigid focus on logic and the necessary condition may have obscured the causal relevance of the conduct in question, thus giving to an incorrect factual result.[44]

The Constitutional Court points out that, on the approach taken by the SCA, a plaintiff who is the victim of systemic inadequacy will almost never be able to claim recompense.[45] The question thus arises as to how the courts should test for factual causation where the exact source of the damage is unknown, or where we are concerned with conduct which only increases the risk of harm.[46] Such a test must give effect to the constitutional duty to facilitate the realisation of values of fairness and justice, which is hampered by a formalistic approach.

3.1.4 English jurisprudence

This very question has caused foreign jurisdictions to 'grapple with new approaches to the test for causation'.[47] The jurisprudence of the United Kingdom has greatly influenced the South African law of delict.[48] As such, it may still provide useful guidance insofar as the development of our law of delict is concerned. Indeed, it has been particularly significant in respect of the test for causation in the context of negligent omissions. This issue arose in *Mcghee v National Coal Board*.[49] In this matter, the claimant was employed by the National Coal Board, during which time he worked in a brick kiln under extremely hot and dusty conditions. It was contended that the conditions caused the development of dermatitis, due to the negligent failure of the employer to provide shower facilities to employees to wash the brick dust off their bodies.[50] However, scientific limitations made it impossible to prove that the omission was a necessary condition for the injury. On appeal to the House of Lords (HL), Lord Wilberforce remarked famously:[51]

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[42]Hoexter 'Contracts in administrative law: Life after formalism?' (2004) 121 *SALJ* 595 at 598; see also in general Klare 'Legal culture and transformative constitutionalism' (1998) 14 *SAJHR* 146.
[43]Hoexter (n 42) 599.
[44]Midgley (n 27) 278.
[45]*Lee* (n 4) paras 65 and 93-94.
[46]*Id* para 94.
[47]*Ibid.*
[48]Van der Merwe and Olivier *Die onregmatige daad in die Suid-Afrikaanse reg* (1989) 18-20; see also Neethling and Potgieter (n 6) 4).
[49][1973] 1 WLR 1 HL.
[50]Summary of facts taken from *Fairchild v Glenhaven Funeral Services Ltd* 2002 3 WLR 89, 2002 3 All ER 305 (HL) para 17.
[51](N 49) para 7.

> [F]rom 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 facts sustains exactly that injury or disease, have to assume the burden of proving more ...?

He went on to say: [52]

> 'And if one asks which of the parties, the workman or the employer, should suffer from the inherent evidential difficulty, the answer as a matter of 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.

Accordingly, the increase in risk caused by the employer's negligent omission was found to be sufficient to establish factual causation, despite the problem faced by the HL that the exact source of the disease could not be established.

The decision in *Mcghee* was approved and taken further in the pre-eminent case of *Fairchild v Glenhaven Funeral Services Ltd*.[53] This matter concerned three dependents' claims that were simultaneously heard by the House of Lords (HL). The dependents' respective breadwinners contracted mesothelioma, a fatal disease caused by exposure to asbestos dust. The exposure occurred due to the negligent omissions of two consecutive employers. Since mesothelioma can be caused by a single asbestos fibre it is impossible to prove which employer caused the disease: The single causative fibre could have been inhaled during either course of employment.[54] Formalistic application of the 'but-for' test would result in both employers being absolved from liability, despite their negligence.[55] The HL recognised that in special cases, where an unjust result is yielded, it would be appropriate to reconsider the applicability of the traditional 'but-for' test.[56] In solving the problem Lord Bingham decided the matter on the basis of the increased risk of contracting the disease resulting from the employers' negligent omission, as was the case in *Mcghee.* He held:

> [I]t seems to me just and in accordance with common sense to treat the conduct of A and B [(the employers)] in exposing C to a risk to which he should not have been exposed as making a material contribution to the contracting by C of a condition against which it was the duty of A and B to protect him.[57]

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[52] *Ibid.*
[53] (N 50).
[54] *Fairchild* (n 50) para 7; Midgley (n 27) 285.
[55] *Fairchild* (n 50) para 9; Midgley (n 27) 286.
[56] *Fairchild* (n 50) para 18; Midgley (n 27) 286.
[57] *Fairchild* (n 50) para 34.

Therefore, the scientific impossibility of proving a necessary condition, and the resulting injustice of neither employer's liability, necessitated a deviation from the ordinary test for factual causation. On this approach, the plaintiffs could establish a factual matrix in which the harm could have occurred. The approach in this matter has famously become known as the '*Fairchild* Principle'. It is however clearly characterised as an exception to be used only where the 'but-for' test is unable to establish causation.[58] There is a general recognition by courts in the UK that the strict 'but-for' test is inadequate in certain situations. These jurisdictions have developed mechanisms to address the problem, including alternative tests and exceptions.[59] The question of the manner in which South African courts are to approach the matter was canvassed by the Constitutional Court in the *Lee* case.

3.1.5 *Lee v Minister of Correctional Services*: The Constitutional Court's flexible approach

The problem that arose in the *Lee* case was similar to that which arose in *Fairchild* (although it has been argued that the two matters are distinguishable).[60] Therefore, it was necessary for the Constitutional Court (CC) to address the problem, pursuant to the formalistic reasoning adopted by the court below. An analysis of the case reveals that Nkabinde J advances a flexible approach to the establishment of factual causation. At the outset Nkabinde J notes that '[t]here are cases in which the strict application of the ['but-for'] rule would result in an injustice, hence a requirement for flexibility'[61] and further that 'there is no magic formula by which one can generally establish a causal nexus'.[62] Thus, what needs to be asked is a broad question, aimed simply at establishing the 'more probable cause'.[63] This is a much more open question, which is supported by underlying notions of policy and common sense.

Despite the formalistic adherence of South African Courts to the 'but-for' test, the CC judgment makes it clear that the test for factual causation should not be adhered to rigidly. In fact, a measure of flexibility has always been inherent in our law.[64] In *Minister of Police v Skosana* Corbett JA stated that, while the 'but-for' test is generally used, there may be exceptions to it as the only accepted test, since

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[58] *Sanderson v Hull* [2008] EWCA Civ 1211 (CA) at 52.
[59] *Lee* (n 4) para 73; see,eg, *March v E and MH Stramere Pty Ltd* [1991] HCA 12 paras 1 and 22; *Athey v Leonati* [1996] 3 SCR 458 para 15; *Snell v Farrell* [1990] 2 SCR 311; *Resurfice Corp v Hanke* [2007] 1 SCR 333.
[60] See Price (n 21) 495.
[61] (N 3) para 41.
[62] *Ibid*.
[63] *Id* para 55.
[64] *Id* para 45.

strict adherence to logic will not always yield satisfactory results.[65] Several courts have specifically noted the value of the use of a common sense standard.[66] Accordingly, conduct may be a factual cause without being a necessary condition per se, where common sense and human experience suggest that this is the case.[67] Such a flexible approach has further been affirmed in *Minister of Finance v Gore*,[68] where it seems Nkabinde's J broad question of probable causation also found expression in the ultimate question: 'What is more likely?'[69] The 'but-for' test is not based on mathematics or science, but on common sense and human experience.[70] Again, in *Minister of Safety and Security v Duivenboden*[71] Nugent JA held '[a] plaintiff is not required to establish the causal link with certainty'.[72]

It is on the basis of the above jurisprudence that the CC poses a question based on probable factual causation in light of common sense, as opposed to the strict substitution exercise engaged in by the SCA.[73] Hence the CC's move away from the exacting requirement that a necessary condition must be established with certainty. The focus ought no longer to be on the narrow issue of the existence of a definite necessary condition, since this approach tends towards formalism which, in certain circumstances, yields unjust results. In other words, it may give rise to an outcome that offends common sense, as well as the values of fairness and justice espoused by the Constitution. The 'but-for' test is a universally-accepted and familiar test, which will still be employed by courts as a useful starting point.[74] However, where the test for a necessary condition yields unjust results, often due to factual complexity or evidential difficulties, the test must give way to common sense. This elastic approach favoured by the CC makes it possible to move beyond the traditional 'but-for' test, since the enquiry is not limited to the existence of a necessary condition. As long as the reasoning employed provides a suitable answer to the issue of probable causation, the test is satisfied. Accordingly, the test adopted by the High Court was held to be apposite since it was consistent with the broader and more flexible question posed by the CC.[75] The simple question of whether it is more probable than not

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[65]Page 223. See also *Kakamas Bestuursraad v Louw* 1960 2 SA 202 (A) 220B-C; see, eg, *Portswood* (n 18).
[66]*Siman* (n 18) 917-918; *Ncoyo v Commissioner of Police, Ciskei* 1998 1 SA 128 (Ck) 137G*; Thoroughbred Breeders' Association of South Africa v Price Waterhouse* 2001 4 SA 551 (SCA) para *52;* and see also Midgley (n 27) 278).
[67]Midgley (n 27) 279.
[68](N 26).
[69]*Lee* (n 3) para 33.
[70]*Gore* (n 26) para 33.
[71](N 8).
[72]*Id* para 25.
[73](N 3) paras 49-50.
[74]Midgley (n 27) 300.
[75](N 3) para 55.

that the conditions of Lee's incarceration caused his illness was therefore sufficient, because its result resonated with common sense and lead to a justifiable outcome, which in turn gave effect to the constitutional values of fairness and justice.

While this flexible, common sense approach is championed by the CC, one must enquire what it entails. It is often said that such open standards are subject to idiosyncratic interpretation, based on an individual's subjective paradigm.[76] In this regard, two points may be made in this regard at the outset. First, the employment of an open-ended standard such as common sense to assess the outcome of a test for factual causation enables a court to import constitutional values of fairness, justice and reasonableness into the enquiry for factual causation.[77] Hence, these values must be brought to bear in the determination of factual causation, thereby allowing the Constitution to permeate yet another element of the law of delict in accordance with the section 39(2) mandate. Thus, any content that is given to the concept of common sense must accord with the spirit, purport and objects of the Constitution and the Bill of Rights.

Secondly, this approach must not entail '*ad hoc* exercises of discretion' based on the particular facts of the case, but must merely, as Midgley suggests, allow judges to adopt a mode of reasoning that is appropriate in light of the circumstances of a particular case.[78] In order to avoid the disintegration of the test for factual causation into a mere subjective, discretionary exercise, it is necessary that parameters of this approach be delineated. In other words, the concept of common sense must be delimited by the development of certain guidelines or factors to assist future courts in applying it. It is unfortunate that the CC did not go so far as to develop such guidelines. Indeed, this oversight has occasioned considerable academic criticism.[79] Nevertheless, it might at this stage be useful to speculate as to the appropriate content of the common-sense approach in this context. In my view, at least two factors are pertinent to a common-sense approach to factual causation. First, the constitutional guarantee of state accountability may have an indirect role to play in determining whether factual causation is satisfied. More specifically, a court must have appropriate regard to the broader consequences of systemic failures by the state. Thus, the question of "what is more likely?" may be answered with reference to the reality of the state's systemic omissions. If such an omission is likely to give rise to a particular outcome, the test for factual causation may be satisfied. It must be noted that a plaintiff may be required to adduce evidence as to the likelihood of a specific outcome in order to discharge the civil onus of proof. However, where a plaintiff faces evidential difficulties, such as in the present case,

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[76]See *Chester v Afshar* [2004] 3 WLR 927 HL.

[77]The issue of whether it is doctrinally correct to consider normative concepts such as fairness and justice at the factual causation stage of the enquiry falls beyond the scope of this essay.

[78]Midgley (n 27) 294.

[79]See Price (n 21) 491-493; Davis (n 21) 9-13.

a court must take considerations of policy and justice into account. Hence, in accordance with Lord Wilberforce's dictum in *McGhee*,[80] the state must bear the consequences of such evidential hurdles since it is the creator of the risk through its wrongful omission. Alternatively a court must be prepared to take judicial notice of the potential harm that may result from systemic omissions. This approach would enable a plaintiff to establish factual causation despite inherent evidential challenges.

Second, while the outcome must be just, a court must not lose sight of the nature of factual causation: ultimately, a probable factual link must exist between the state's systemic omission and the prejudice suffered by the plaintiff. Thus, it remains important to bear in mind the nature of the harm suffered by the plaintiff, as well as the nature of omission on the part of the state, in determining whether there is such a logical connection. The difference is that a rigid causal chain need no longer be the focus of the enquiry. Hence, through the employment of such factors in the application of the common sense approach, a court may be able to reach an equitable outcome while remaining true to the nature of factual causation.

It is true that common sense per se should not be regarded as a test for factual causation.[81] Rather it forms the basis of the CC's flexible approach. As explained above, Nkabinde J proposes that common sense be used as a yardstick to determine the suitability of the outcome of any mechanism employed to test for factual causation.[82] Therefore, the answer to the question of whether there is a probable causal nexus between the conduct complained of and the harm suffered, will be acceptable as long as it is in line with common sense, which in turn must be given appropriate content, such as that suggested above. Accordingly, where the 'but-for' test yields such an answer that is in line with common sense in a particular case, the test need not be discarded. It is only when the 'but-for' test offends the common sense *standard* that it must give way to an alternate suitable mode of reasoning, which will yield a just result.[83]

Nkabinde J goes further than simply establishing factual causation on the broader question by further dismantling the formalistic substitution exercise engaged in by the SCA in determining factual causation. First, Nkabinde J clarifies that there is no requirement that the plaintiff must prove what that lawful substituted conduct ought to have been.[84] It merely constitutes the substitution of lawful conduct that is consistent with the facts of the case.[85]

In relation to the degree of certainty that the SCA required in proving a necessary condition, the CC again favours a less formalistic approach. Rather than requiring Lee to accomplish the impossible, the court assumed a more relaxed

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[80](N 49).
[81]See Midgley (n 27) 293–294, *Fairchild* (n 50) 53; comparatively see *Chester* (n 76) para 83.
[82]Midgley (n 27) 294; see also *Siman* (n 18) 917H-819A.
[83]Midgley (n 27) 292.
[84](N 3) para 56).
[85]*Id* para 57.

position of requiring probable causation. It was sufficient to show that a reasonably adequate system would have reduced the risk of infection.[86] In relaxing the 'but-for' test, Nkabinde J takes an approach that largely resembles the reasoning of the HL in *McGhee*[87] and *Fairchild*.[88] The causal connection was sufficiently established by the logic that the risk of individual infection was considerably reduced by the substitution of positive state conduct. It is possible that Nkabinde J is in fact indirectly referring to the 'material contribution' criterion.[89] While the approach taken by the HL in the English cases above is characterised as an exception, Nkabinde J's reasoning must be taken as the application ultimately of a version of the 'but-for' test which accords with the overarching broader enquiry proposed above. Thus again, this is a clear departure from the strict requirement of the necessary condition, even where the 'but-for' test as such is applied.

3.2 The significance of the Lee judgment for state accountability

The implications of the *Lee* judgment are potentially far-reaching and certainly extend beyond the affirmative remedy granted to Lee as an individual. Fundamentally, the judgment breaks away from the formalistic reasoning employed by SCA. Instead, the CC favours reasoning which promotes justice and constitutional values – such an approach is necessary if our courts are truly to give effect to substantive justice as envisaged by the Constitution.[90] Specifically, the decision facilitates the achievement of the constitutional guarantee of state accountability, thus furthering the interplay between public constitutional law goals and the private law of delict.

Section 41(1)(c) of the Constitution explicitly demands a government that is accountable, which means in general, that the state must be able to explain and justify its exercises of power, as well as systemic failures.[91] The norm of state accountability is particularly relevant in a context of systemic omissions by the state, since the state is under a positive duty to give effect to constitutional rights.[92] In this regard, section 7(2) of the Constitution specifically provides that

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[86] *Id* para 60.
[87] (N 49).
[88] (N 50).
[89] See in this regard Midgley (n 27) 295-296.
[90] Hoexter (n 42) 598; Klare (n 42) 156.
[91] Muntingh 'Prisons in the South African constitutional democracy' (2007) 16 available at http://www.csvr.org.za/docs/correctional/prisonsinsa.pdf (accessed 2014-09-09).
[92] *Carmichele* (n 2) para 43; see also Price 'The impact of the Bill of Rights on state delictual liability for negligence in South Africa' 11 available at http://academia.edu/1161166/The_Impact_of_the_Bill_of_Rights_on_State_Delictual_Liability_for_Negligence_in_South_Africa (accessed 2014-09-09).

'[t]he state must respect, protect, promote and fulfil the rights in the Bill of Rights'. Since the Bill of Rights applies to the common law, it too must be applied and developed so as to give effect to fundamental rights and constitutional values.[93] Accordingly, the common law must facilitate state accountability. Indeed, as was remarked in *Olitzki Property Holdings v State Tender Board*:[94]

> The principle of 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 ... responsive government.

The *Lee* case opens up a further avenue of litigation, in terms of which the state can be held delictually liable for its systemic state failures.[95] In so doing, it takes another step towards upholding the norm of accountability and may be an immensely useful and important vindicating tool for victims of systemic failure.

This is particularly true since *Lee* constitutes a further contribution to existing delictual jurisprudence regarding the fulfilment of the goal of state accountability. Pursuant to the realisation that 'our conservative approach to state liability had to be revised in light of the Constitution',[96] the law of delict underwent considerable transformation in order to accommodate state accountability in the context of systemic omissions.[97] Seminal cases such as *Carmichele* and *Van Duivenboden* brought about reform through a novel approach to the requirement of wrongfulness, which made delictual damages an effective portal through which to vindicate constitutional rights against the state.[98] Essentially, the 'constitutional norm of accountability'[99] justifies the imposition of liability in respect of the state, given its duty to promote and protect the rights and interests of others.[100]

The importance of the norm of accountability cannot be overstated. The effect of the *Lee* is such as to extend the recently developed state accountability jurisprudence into the realm of factual causation, although not couched as a development per se. The CC in *Lee* recognised the need to reconsider the traditional approach to factual causation. Indeed, there seems to exist an implicit recognition by the CC that the factual causation enquiry, though rooted in logic,

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[93] Section 8(1); *Carmichele* (n 2) para 33.
[94] 2001 3 SA 1247 (SCA) para 31.
[95] See Nienaber 'Liability for the transmission of communicable diseases in South African prisons: What about HIV?' (2013) 28 *SAPL* 163.
[96] Price (n 21) 12.
[97] Price (n 21) 12; see also Boonzaier 'State liability in South Africa: A more direct approach' (2013) 130 *SALJ* 330 at 333 and 339; *Carmichele* (n 2); *Van Duivenboden* (n 8).
[98] Price (n 21) 12-13; see also *Fose v Minister of Safety and Security* 1997 3 SA 786 (CC) paras 58, 67 and 97
[99] *Van Duivenboden* (n 8) para 21.
[100] Price (n 21)14.

is sensitive to constitutional norms and values, such as justice and accountability. The break from the formalistic application of the 'but-for' test in favour of a more flexible approach facilitates state accountability by resolving the difficulties that arise where systemic state omissions are concerned.

In the context of systemic omissions by the state, it is likely that wrongfulness and negligence will be established, as discussed above. However, where the stringent requirement of a necessary condition follows, the result will be the denial of a remedy where accountability and justice demand one. The CC's flexible approach therefore serves to bolster the jurisprudence of *Carmichele* and *Van Duivenboden* by bringing the norm of accountability to bear on every element of delictual liability.

Without this re-imagining of factual causation the victim of a systemic omission would meet this obstacle in every case and be unable to claim recompense from the state.[101] Such a situation would counteract the achievement of state accountability, since the state could escape liability for its systemic omissions, simply by relying on a formalistic construction of the 'but-for test'. Without an approach ameliorating this position, the significant work done by the CC in respect of state accountability would be severely undermined in this context – indeed, Cameron J in the *Lee* minority judgment points out that 'duties and standards of care in effect become redundant'.[102] This would further result in little incentive to take the positive steps required by constitutional duties.[103] The flexible approach favoured by the CC avoids such a situation by allowing principles of justice and common sense to guide the factual causation enquiry, therefore facilitating the realisation of the norm of accountability. On this approach, courts need not be concerned with the narrow issue of proof of a necessary condition where systemic state omissions are concerned. Instead, courts can employ a mode of reasoning which accords with common sense, justice and state accountability.[104]

The importance of making available an avenue for delictual liability resonates with another strong consideration which guided the decisions in the wrongfulness cases, that is, the unavailability of other remedies. On an examination of the particular facts of *Lee*, it appears that 'no effective alternative remedy will be available to a person in the position of the applicant'.[105] This is so because Lee was no longer incarcerated, thus any other remedy, such as positive change in prison conditions would not serve to vindicate his rights. Therefore, the only way

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[101] *Lee* (n 3) para 65
[102] *Id* para 92.
[103] *Ibid.*
[104] It should be noted that the CC used the norm of accountability in the legal causation stage to emphasise the state's liability (paras 69-70). However, the correctness of explicitly using the norm of accountability in the causation stage falls beyond the scope of this note.
[105] (N 3) para 65.

to vindicate the rights of this class of litigants, and to hold the state accountable with regards to them, is through a claim for delictual damages.

4 Conclusion

The contribution of the Constitutional Court in *Lee* cannot be gainsaid. It has once again made significant inroads in respect of aligning the law of delict with the constitutional vision of our post-apartheid society. The formalistic requirement of the necessary condition to prove factual causation has proved to be a severe impediment to the desired outcome of a case, specifically where systemic state omissions are concerned. The judgment of the SCA in *Lee* attests to this impact: despite proven wrongfulness and negligence on the part of the state due to the failures of the prison authorities, the inability to prove the exacting requirement of the necessary condition rendered a remedy impossible. The Constitutional Court stepped in at the opportune moment to rectify the situation. The flexible approach favoured by the court lights the path for future courts where similar difficulties arise – although it seems this broad approach, based on common sense and justice, has been inherent in our law for much longer than is immediately apparent. The flexible approach, together with a less formalistic application of the 'but-for' test will enable courts to ensure justice between parties, where the necessary condition requirement would have denied it. Instead, the results of the factual causation enquiry may be tested against constitutionalised notions of common sense, justice and other modes of reasoning engaged in beyond the potentially restrictive 'but-for' test. The *Lee* judgment signifies a fundamental victory of substantive justice over formalism.

The judgment is also an extension of the constitutional norm of accountability jurisprudence, developed in cases such as *Carmichele*[106] and *Van Duivenboden*.[107] The flexible approach to factual causation widens the scope for state delictual liability and develops this mechanism to uphold state accountability in the context of systemic state omissions. The effects thereof may well prompt greater action on the part of the state to fulfil the constitutionally imposed positive duty to protect and promote fundamental human rights. So, in conclusion, the *Lee* judgment constitutes a constitutional reconsideration of factual causation in order to give effect to the norm of state accountability and an effective remedy to litigants where justice demands it.

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[106](N 2).
[107](N 8).