

The Role of Resource Constraints in State Liability for Omissions

Mila Harding

<https://orcid.org/0000-0002-0749-1274>

University of the Witwatersrand

harding.mila.d@gmail.com

Abstract

The ambit of delictual liability against the State for negligent omissions resulting in physical harm has extended dramatically since the Constitutional Court case of *Minister of Safety and Security v Carmichele*. In such expansion, the courts have often mentioned that considerations regarding resource constraints play a role in the imputation of liability on the State, as well as in determining whether the State has been negligent. In examining four Constitutional Court cases from the period of 2013–2017, this article argues that the Constitutional Court’s approach to the State alleging resource constraints has largely been correct. Although many have seen the rapid expansion of liability as cause for concern (as public funds are increasingly being spent paying damages instead of improving public services) the Constitutional Court is correct in refusing to allow bald statements of resource constraints to defeat delictual claims or reduce damages in cases where the negligent omissions of the State have resulted in physical harm. In accordance with the value of accountability, where the State alleges it does not have the resources to fulfil its duties and prevent harm, the State must prove it.

Keywords: Constitutional law; State liability; resource constraints; feasibility constraints; delict; common law; negligent omissions

Introduction*

It is clear that the number of delictual claims against the State have increased over the past several years.¹ There are many possible reasons for this,² which include the inadequate standard of health services, particularly in the public sector.³ Another possible reason is the trend of the courts to find liability on the part of the State, where it may not have been found before the infusion of the Constitution of the Republic of South Africa, 1996 (the Constitution) into the common law of delict.⁴ This trend has raised concerns because when damages are awarded against the State, resources may be redirected from potentially fixing the problems at the root of the claims, thus making future claims more likely.⁵ The purpose of this article is to provide a broad evaluation of the Constitutional Court's (CC) engagement with resource constraints in several high-profile cases regarding State omissions resulting in physical harm.

Davis and Klare described the extension of delictual liability to the State from 1996 to 2010 as generally 'resource-lite',⁶ meaning that the solutions to the root causes of the delictual claims would not require a large amount of resources to address. However, the courts were not unaware of the potential hazard in terms of resources in extending delictual liability for State failures. In *Rail Commuters Action Group v Transnet Ltd t/a Metrorail*,⁷ O'Regan J recognised that the translation of public-law rights into private-law damages may place '... heavy financial burdens on the [S]tate'.⁸

In a time of increasing austerity,⁹ and increasing delictual claims against the State, the State may find itself caught in a destructive cycle.¹⁰ State intervention may be in the best interest of the public.¹¹ In this regard, the most immediate change could be the enactment of legislation regulating claims against the State—such as the State Liability

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1 AB Wessels, 'The Expansion of the State's Liability for Harm Arising from Medical Malpractice: Underlying Reasons, Deleterious Consequences and Potential Reform' (2019) TSAR 1.

2 *ibid.*

3 Centre for Economic and Social Rights, Institute for Economic Justice, SECTION27 & SPII, 'Austerity in the Midst of Inequality Threatens Human Rights' (CESR, November 2018) <<https://www.cesr.org/sites/default/files/FACTSHEET-Artwork-Online-Nov%206%20FINAL.pdf>> accessed 29 July 2020.

4 Christopher Roederer, 'The Transformation of South African Private Law after Ten Years of Democracy: The Role of Torts (Delict) in the Consolidation of Democracy' (2006) 37 *Columbia Human Rights Law Review* 520–521.

5 Wessels (n 1) 8.

6 Dennis Davis and Karl Klare, 'Transformative Constitutionalism and the Common and Customary Law' (2010) 26 *SAJHR* 484.

7 2005 (2) SA 359 (CC).

8 *ibid* para 30.

9 CESR (n 3).

10 Wessels (n 1) 9.

11 *ibid* 9–10.

Amendment Bill.¹² Claims could also be reduced through interventions aimed at improving public services—taking meaningful steps against foreseeable harm against the public.¹³ There are numerous routes that the State could follow in this regard, but a full analysis of all options at the State’s disposal is beyond the scope of this article. One strategy that the State appears to have been following to escape liability for damages in delictual suits over the past few years is to present the courts with bald statements of resource constraints.

This strategy, and the courts’ responses to this strategy, will be evaluated in this article. More specifically, this article will examine cases where negligent omissions have resulted in physical harm and the infringement of constitutional rights, as the courts tend to reject the extension of State liability where the loss suffered by plaintiffs is purely economic.¹⁴ Davis and Klare rightly noted that State liability in ‘cases concerning state protective duties’ became a ‘burgeoning field of law’ between the period of 1996 to 2010.¹⁵ This article will examine the general response of the Constitutional Court after that period. Through an examination of a series of cases from the period of 2013 to 2017, namely *Lee*,¹⁶ *Oppelt*,¹⁷ *Mashongwa*,¹⁸ and *DZ*,¹⁹ I will argue that the CC has been correct to disallow the State to escape delictual liability based on bald statements of resource constraints. This is because disallowing such bald statements, without further evidence, is consistent with the value of State accountability as infused into delict since the case of *Van Duivenboden*.²⁰ Before embarking on such analysis, I will first explain what is meant by ‘state liability’ in the next part.

Direct and Vicarious State Liability

According to section 1 of the State Liability Act,²¹ the State will be held liable for the actions of an employee if that employee is acting in their capacity as an employee of the State and within the scope of their employment when the harm occurs. It was believed in the past that the State could not be held directly liable for its actions or omissions, except in the case of municipalities.²² Therefore, where harm had resulted from a

12 GG 41658 (25 May 2018).

13 WT Oosthuizen and PA Carstens, ‘Medical Malpractice: The Extent, Consequences and Causes of the Problem’ (2015) 78 THRHR 12. The authors state that the most ideal way to reduce medical negligence claims would be to decrease malpractice.

14 Chuks Okpaluba, ‘The Law of Bureaucratic Negligence in South Africa: A Comparative Commonwealth Perspective’ (2006) *Acta Juridica* 156–157.

15 Davis and Klare (n 6) 467.

16 *Lee v Minister of Correctional Services* 2013 (2) SA 144 (CC) (*Lee* 2013).

17 *Oppelt v Head: Health, Department of Health Provincial Administration: Western Cape* 2015 (12) BCLR 1471 (CC) (*Oppelt*).

18 *Mashongwa v PRASA* 2016 (3) SA 528 (CC) (*Mashongwa*).

19 *MEC, Health and Social Development, Gauteng v DZ obo WZ* 2018 (1) SA 335 (CC) (*DZ*).

20 *Minister of Safety and Security v Van Duivenboden* 2002 (3) All SA 741 (SCA) para 21.

21 Act 20 of 1957.

22 Leo Boonzaier, ‘State Liability in South Africa: a More Direct Approach’ (2013) 130 SALJ 334.

systemic failure that could not be attributed directly to any one employee of the State, it would be difficult to recover damages.²³ However, the jurisprudence emanating from the Supreme Court of Appeal (SCA) and CC over the past two decades has indicated that the conceptual differentiation between vicarious and direct liability for the State has arguably been blurred.²⁴

Zitzke states that in cases where the State is the wrongdoer, there is an unavoidable overlap between vicarious and direct liability.²⁵ This is because the State can only act through its employees, thus such employees will inescapably assume some of the duties prescribed to the State.²⁶ Despite the conceptual issues that arise in terms of whether the courts have been holding the State vicariously or directly liable for wrongful omissions, the pertinent issues in the cases engaged with in this article do not deal with principles of vicarious liability *per se*. Therefore, when referring to ‘State liability’, in line with the overlap between direct and vicarious liability in cases involving the State, this article denotes both vicarious and/or direct liability. With the terminological concerns regarding the meaning of ‘State liability’ having been addressed, in the next part of this article I will discuss the extension of State liability.

Notable Developments Regarding the Extension of State Liability for Omissions from 1996 to 2010

Common Law Development

There are five elements in delict that must be satisfied for an alleged wrongdoer to be found liable and be made to pay damages for harm suffered by another.²⁷ The alleged wrongdoer must have caused harm to the claimant through their actions (or inaction), which must be wrongful and culpable.²⁸ The five elements to be proven are thus conduct, wrongfulness, fault, causation, and harm.²⁹ Wrongfulness occurs when a ‘legally protected interest’ has been harmed by an act that is deemed ‘legally reprehensible’.³⁰ An omission, however, can only be considered wrongful where a defendant had a legal duty to prevent the harm arising from that omission.³¹ In the early twentieth century the courts would only find an omission actionable if there had been prior-conduct on the part of the wrongdoer relating to the subsequent omission.³²

23 *ibid* 341–343.

24 *ibid* 342.

25 Emile Zitzke, ‘A New Proposed Methodology for Effecting Transformation in the Law of Delict’ (LLD thesis, University of Pretoria 2016) 205.

26 *ibid* 204.

27 Johann Neethling, JM Potgieter, and PJ Visser, *Neethling-Potgieter-Visser Law of Delict* (7th edn Lexis Nexis South Africa 2015) 4.

28 *ibid*.

29 *ibid*.

30 *ibid* 33–34.

31 *ibid* 58.

32 Duard Kleyn and Emile Zitzke, ‘The Omissions in *Oppelt*’ (2018) 24 *Fundamina* 67.

However, the test for determining wrongfulness broadened over the years and the ‘orthodox approach’ for determining wrongfulness, according to *Minister van Polisie v Ewels*,³³ became to determine whether the legal convictions of the community viewed the failure to act as wrongful, and that the result of such failure should be compensation by the wrongdoer.³⁴ Rules such as the prior-conduct rule were factors to consider in determining wrongfulness but were not necessarily decisive.³⁵ Before the CC developed the common law regarding wrongfulness in *Carmichele*,³⁶ the court would engage in a proportionality exercise, evaluating the interests of both parties and the norms and values constituting the legal convictions of the community without considering the Constitution.³⁷

Before *Carmichele*, wrongfulness had often been used to exclude State liability for negligent omissions.³⁸ This tendency was first eroded by *Ewels*,³⁹ when policy considerations were introduced,⁴⁰ and substantially altered by *Carmichele*, a case concerning the negligent failure of a prosecutor and the police to protect a woman from harm caused by a third party.⁴¹ *Carmichele* developed the formulation for determining wrongfulness in delict by determining that the ‘legal convictions of the community’ cannot be determined outside the context of the Constitution.⁴²

The CC stated that relevant factors in terms of wrongfulness in a case must be analysed in the context of a State founded on dignity, equality and freedom, and in which the State has positive duties to protect and promote these values in terms of the Constitution.⁴³ The CC held that a general ‘public interest immunity’ would be contrary to the Constitution, and that the fears of the harm delictual liability may bring on the State are tempered by the safeguards provided against limitless liability by other requirements for damages.⁴⁴

Carmichele thus developed delict in terms of the willingness of courts to recognise claims that are based partially on constitutional rights and values, and concomitant State

33 *Minister van Polisie v Ewels* 1975 (3) SA 590 (A).

34 Zitzke (n 25) 216.

35 Kleyn and Zitzke (n 32) 68.

36 *Carmichele v Minister of Safety and Security* 2001 (4) SA 938 (CC).

37 *ibid* para 43.

38 Francois du Bois, ‘State Liability in South Africa: a Constitutional Remix’ (2010) 25 *Tulane European and Civil Law Forum* 162. See also *Moulang v Port Elizabeth Municipality* [1958] 3 All SA 8 (A) 10 regarding the ‘... establishment of the general immunity of municipalities in relation to accidents caused by potholes and the like in the surface of streets.’ The Appellate Division stated the predominant factor for the refusal to recognise liability on the part of the municipality was ‘... expense to municipalities.’

39 *Ewels* (n 33).

40 Kleyn and Zitzke (n 32) 69.

41 *Carmichele* (n 36) para 25.

42 *Loureiro v iMvula Quality Protection* 2014 (3) SA 394 (CC) para 34.

43 *Carmichele* (n 36) para 43.

44 *ibid* para 49.

duties.⁴⁵ Courts are now not as willing to permit, as in the past, the requirement of wrongfulness to result in the State escaping liability omissions resulting in physical harm.⁴⁶

Since *Carmichele*, the test for wrongfulness has somewhat evolved.⁴⁷ In *Le Roux v Dey*,⁴⁸ Brand AJ stated that the test for wrongfulness has come to depend on a court's determination of whether it is 'reasonable' to impose liability, which would result in damages, for the relevant conduct in a case.⁴⁹ What is considered 'reasonable' is determined through '... considerations of public and legal policy in accordance with constitutional norms.'⁵⁰ Wessels argues that both the traditional approach (which focuses on what the legal convictions of the community regard of the conduct) and the 'so-called new approach' (which focuses on the reasonableness of imposing liability) are both reflected in our case law, and are sometimes used together.⁵¹

Resources and the 'Norm of Accountability' in *Van Duivenboden*

Following the ruling in *Carmichele*, several SCA judgments extended the ambit of State liability specifically regarding omissions by the police that caused the infringement of constitutional rights through violence committed by third parties.⁵²

In the seminal case of *Van Duivenboden*, another case regarding a negligent omission committed by the police resulting in harm from a third party,⁵³ the SCA highlighted the 'norm of accountability' as a factor in determining whether a legal duty exists for the State to act.⁵⁴ The SCA stated that although this norm will not always translate into private-law damages, where there is no other effective remedy to hold the State accountable and vindicate the victim's rights, then the norm of accountability will ordinarily mandate that a legal duty in delict is recognised.⁵⁵

However, the SCA stated that there may be exceptions to this rule, where it is shown that '... there are other considerations affecting the public interest that outweigh that

45 Sandra Liebenberg, *Socio-economic rights: Adjudication under a Transformative Constitution* (Juta 2010) 439.

46 Okpaluba (n 14) 117–118.

47 AB Wessels, 'Wrongfulness in Pure Economic Loss Cases: the "Traditional Approach" and the "New Approach"' (2020) 83(2) THRHR 158.

48 2011 (3) SA 274 (CC).

49 *ibid* para 122.

50 *ibid* para 122.

51 Wessels (n 47) 162.

52 Bernard Wessels, 'Reconsidering the State's Liability for Harm Arising from Crime: The Potential Development of the Law of Delict' (2019) 30 *Stell LR* 365.

53 *Van Duivenboden* (n 20) para 2.

54 *ibid* para 21.

55 *ibid*.

norm.⁵⁶ The SCA commented that in cases where the negligent conduct relates to policy, or where it affects a ‘broad and indeterminate segment of society,’ the norm of accountability may point towards resolving the issue through a public-law remedy or through political, rather than judicial, process.⁵⁷

The SCA pointed to two more factors that may be relevant considerations against imposing liability in terms of the norm of accountability.⁵⁸ These were whether the imposition of a duty would hamper the effective functioning of the police, and whether additional resources were required.⁵⁹ The role of resources was not discussed beyond this, because the SCA stated that in the case the government had not actually suggested that imposing a legal duty would require additional resources.⁶⁰

Negligence in *Van Duivenboden*

After considering wrongfulness, the SCA then stated that resource considerations are also relevant in considering whether the State was negligent in its omission.⁶¹ A defendant is negligent when a reasonable person in the position of the defendant would have foreseen the reasonable possibility that the harm would occur, and would have taken reasonable steps to guard against it, and the defendant fails in both respects.⁶² In *Van Duivenboden* the SCA postulated that the enquiry into negligence could ensure undue demands are not placed upon the State.⁶³ This is because the available resources of the State and ‘... the manner in which they have ordered their priorities will necessarily be taken into account in determining whether they acted reasonably.’⁶⁴ Therefore, resource constraints also feature as a consideration in the negligence enquiry. However, it is important to maintain the conceptual differentiation between wrongfulness and negligence, which the courts have often failed to do.⁶⁵

After *Van Duivenboden*

Following *Van Duivenboden*, the SCA generally continued extending State liability for police negligence resulting in harm from third parties.⁶⁶ Generally, the solutions for the problems at the root of the delict were, on the whole, ‘resource-lite’,⁶⁷ meaning that the solutions to the problems the claims were based on were mostly inexpensive to fix.

56 *ibid.*

57 *ibid.*

58 *ibid* para 22.

59 *ibid.*

60 *ibid.*

61 *ibid* para 23.

62 *Kruger v Coetzee* 1966 (2) SA 428 (A) 430E-F.

63 *Van Duivenboden* (n 20) para 23.

64 *ibid.*

65 Neethling and others (n 27) 57.

66 See *Minister of Safety and Security and Another v Carmichele* [2003] 4 All SA 565 (SCA) and *Van Eeden v Minister of Safety and Security* [2002] 4 All SA 346 (SCA).

67 *Davis and Klare* (n 6).

However, a case where resource constraints managed to defeat the extension of liability on the State is *Minister of Safety and Security v Rudman*.⁶⁸ In this case, the SCA examined whether the failure of a police officer to continue with CPR on a child was wrongful.⁶⁹ The SCA found it was not, as there were public policy reasons militating against imposing such a duty on officers.⁷⁰ Such a duty, according to the SCA, does not fall within the purview of the primary functions of the police service, and to hold that such a duty existed would require the training of all police officers, resulting in significant additional State expenditure.⁷¹ However, despite *Rudman*, the general trend of extending State liability for negligent omissions continued in the CC, as is shown in the next part.

Constitutional Court Cases on State Liability for Omissions Post-2010

Lee v Minister of Correctional Services

The state of prisons in South Africa constitute blatant violations of the rights of persons detained in them.⁷² Prisons in South Africa are overcrowded and unhygienic and there is a general lack of oversight.⁷³ Communicable diseases are rife and access to healthcare is often tenuous.⁷⁴ These were the conditions that Dudley Lee faced when he was detained in the remand section at Pollsmoor Maximum Security Prison from 1999 to 2004, while awaiting trial.⁷⁵ It was uncontested that Lee entered prison generally healthy and that he had not previously been ill with pulmonary tuberculosis (TB).⁷⁶ However, after three years of incarceration in the prison, Lee became ill with TB.⁷⁷

The Minister had statutory and constitutional duties to take steps to ensure the health and dignity of prisoners.⁷⁸ The High Court and SCA found the Minister was in breach of those duties.⁷⁹ This was because the cells in which inmates were kept were badly ventilated and overcrowded, there were not enough nurses, and prisoners with TB were not regularly being isolated from the rest of the prison population.⁸⁰

68 2005 (2) SA 16 (SCA).

69 *ibid* para 56.

70 *ibid* para 63.

71 *ibid*.

72 Edwin Cameron, 'Our Prisons are Failing. They Need to Become Correctional Facilities' (*GroundUp* 3 March 2020) <<https://www.groundup.org.za/article/our-prisons-are-failing-they-need-become-correctional-facilities/>> accessed 27 July 2020.

73 *ibid*.

74 *ibid*.

75 *Minister of Correctional Services v Lee* 2012 (1) SACR 492 (SCA) paras 6–8.

76 *Lee v Minister of Correctional Services* 2011 (6) SA 564 (WCC) para 230.

77 *ibid* para 232.

78 *ibid* para 263.

79 *ibid* para 268 and SCA para 44.

80 *Lee* 2011 (n 76) para 264.

The High Court and SCA found that the prison authorities had a legal duty to adopt reasonable steps to prevent the spread of the disease,⁸¹ and that the failure to do so was wrongful in delict.⁸² The prison authorities were well aware of the lack of an adequate health system in the prison and did little to remedy it.⁸³ The SCA stated that to the extent that a management system was in place regarding TB in the prison, its implementation was ‘... at best sporadic and in at least some respects effectively non-existent.’⁸⁴

In terms of the element of factual causation, Lee needed to show that ‘but for’ the lack of an adequate system, he would not have contracted TB.⁸⁵ The High Court found that the lack of an adequate system to mitigate the spread of TB was the factual cause of Lee contracting TB.⁸⁶ The SCA, however, disagreed.⁸⁷

In applying the ‘but for’ test in the case of an omission, the court engages in a mental exercise where it substitutes the negligent inaction for reasonable action and determines whether the harm would still have occurred.⁸⁸ While the SCA stated that it was clear that the prison authorities doing nothing to prevent the spread was negligent, and that Lee probably contracted TB in prison;⁸⁹ Lee needed to prove what a reasonable system (that would have prevented him from contracting TB) would be in order to prove factual causation.⁹⁰

Factual causation was difficult to prove in *Lee* on the basis that a reasonable system that would decrease the spread of TB in prisons was difficult to prove.⁹¹ The claim in *Lee* was based on a truly systemic issue.⁹² There was no one State functionary responsible for the breakdown of the healthcare system in the prison, and there was no simple solution for the spread of TB.⁹³ The High Court stated, in determining negligence, that the prevalence of TB could be decreased by hiring more nurses and enforcing measures that included conducting chest examinations of incoming inmates, isolating those showing symptoms of TB or who are vulnerable to TB, providing adequate nutrition to inmates that were malnourished or in another way vulnerable to TB, and ensuring inmates infected with TB took their antibiotics.⁹⁴

81 *Lee* 2012 (n 75) para 35.

82 *ibid* para 42.

83 *Lee* 2011 (n 76) para 264.

84 *Lee* 2012 (n 75) para 44.

85 *Lee* 2013 (n 16) para 40.

86 *Lee* 2011 (n 76) para 234

87 *Lee* 2012 (n 75) para 64.

88 *ibid* para 47.

89 *ibid* para 55.

90 *ibid* para 57.

91 *ibid* para 64.

92 Alistair Price, ‘Factual Causation after *Lee*’ (2014) 131 SALJ 495.

93 *Lee* 2012 (n 75) para 64.

94 *ibid* para 58.

However, the SCA stated that the matter was more complex and would require a balancing of factors including ‘... the security demands of the prison; the financial resources that are available to the prison authorities; generally accepted practice amongst prison authorities; the extent to which trained personnel are available; the space available for isolation; the incidence of the disease.’⁹⁵ Further, the SCA stated that because diagnosis inescapably precedes treatment, any system mitigating the transmission of TB would not eliminate the risk altogether.⁹⁶ Therefore, Lee had failed to prove that, but for the negligent system, he would not have contracted the disease.⁹⁷

The CC overturned the SCA’s decision and penned a controversial judgment in terms of factual causation.⁹⁸ The CC stated that the ‘but for’ test, in terms of the substitution of an omission with reasonable action, is not inflexible.⁹⁹ The CC stated that the High Court was not incorrect in determining factual causation solely by asking whether the prevailing conditions in the prison were more likely than not the cause of Lee contracting TB.¹⁰⁰ The CC stated that Lee thus did not need to tender evidence to prove what a non-negligent system for the prevention of TB would be.¹⁰¹

The CC found that the negligence of the prison authorities was the factual and legal cause of the harm caused to Lee,¹⁰² and therefore found in favour of Lee.¹⁰³ Price argues *Lee* may indicate a willingness on the part of the CC to relax the factual causation requirement in cases of systemic omissions.¹⁰⁴ Fixing systemic issues generally has large budgetary implications and thus, effectively, *Lee* obliges the State to allocate resources to fix the problem lest it may be liable to pay damages to plaintiffs in similar scenarios in future. However, despite the potential of this being seen as a breach of the separation of powers, the case may be an example of delict being used as a tool to ensure State accountability.¹⁰⁵ It would be difficult and expensive for plaintiffs to prove what a reasonable system would be,¹⁰⁶ and *Lee* indicates that the burden is on the state to prove this, even in circumstances of limited resources.

95 *ibid* para 50.

96 *ibid* para 61.

97 *ibid* para 64.

98 See Price (n 92), Anton Fagan, ‘Causation in the Constitutional Court: *Lee v Minister of Correctional Services*’ (2014) 5 Constitutional Court Review 104, Malcolm Wallis, ‘Revel without a Cause – Delictual Liability after *Lee*?’ (2019) 136 SALJ 165.

99 *Lee* 2013 (n 16) para 41.

100 *ibid* para 55.

101 *ibid* para 57.

102 *ibid* para 71.

103 *ibid* para 77.

104 Price (n 92) 497.

105 *ibid* 491.

106 *ibid* 496–497.

Oppelt v Head: Health, Department of Health Provincial Administration: Western Cape

In this case, Oppelt alleged that he had become paralysed due to a four-hour delay in the provision of emergency medical care in the public healthcare system.¹⁰⁷ Oppelt contended that the State owed duties to all victims of injuries similar to his to ensure they were transferred to the appropriate hospital as quickly as possible, that they received treatment at such a hospital as quickly as possible, and that the hospital staff were aware of the need to treat patients with the same injury as quickly as possible.¹⁰⁸

The State conceded that it had a duty in delict to provide reasonable medical care.¹⁰⁹ However, the State contended it did not have a duty to do so within the four-hour cut-off period.¹¹⁰ The State had contended that it has ‘vast public responsibilities and limited resources,’¹¹¹ and that it could not be expected to mobilise such resources to treat potential victims of that specific injury during a particular season.¹¹²

After consideration of the elements of delict, the CC found that the State was liable to pay damages to Oppelt.¹¹³ In the case, the treatment needed was not expensive, the hospital had the necessary equipment, and medical personnel were available.¹¹⁴ The CC accepted that the availability of treatments, even in cases of emergency, is informed by resources.¹¹⁵ However, the CC stated that the State had not shown that it had inadequate resources to provide treatment to Oppelt.¹¹⁶ Therefore, the State was not able to avoid liability on the basis of a bald statement of general resource constraints.

Mashongwa v PRASA

Mashongwa,¹¹⁷ conveys a potentially more problematic message regarding the willingness of the courts to accept bald statements of resource constraints. Prior to *Mashongwa*, in the case of *Metrorail*, O’Regan J confirmed that Metrorail (PRASA’s predecessor) had a public-law duty to ensure reasonable measures were in place to ensure the safety of passengers in terms of the South African Transport Services Act and the Constitution.¹¹⁸ O’Regan J stated that what may be considered reasonable would be case-specific, but factors which would normally be relevant include the nature of the duty, the circumstances in which the duty arises, how closely related the duty is to the

107 *Oppelt* (n 17) paras 1–3, 10.

108 *ibid* para 52.

109 *ibid* para 53.

110 *ibid*.

111 *ibid* para 15.

112 *ibid*.

113 *ibid* para 86.

114 *ibid*.

115 *ibid* para 63.

116 *ibid*.

117 *Mashongwa* (n 18).

118 *Metrorail* (n 7) para 84.

‘core activities of the duty-bearer,’ factors which are relevant to the performance of the duty, as well as the degree of the potential threat to fundamental rights and the intensity of the harm that would result from the failure to perform such a duty.¹¹⁹ Finally, the court will need to consider resource constraints and will need evidence regarding such constraints ‘... in the context of the overall resourcing of the organ of state.’¹²⁰

In 2011, Mashongwa was attacked and thrown off a moving train operated by PRASA.¹²¹ The CC was thus tasked with a question left open in *Metrorail*—whether the failure to provide reasonable measures to protect the safety of passengers, in terms of PRASA’s public-law duty, could translate into delictual damages where such failure had resulted in harm.¹²²

Mashongwa argued that his attack was caused by PRASA on the basis of two omissions.¹²³ First, there were no security guards deployed on the train.¹²⁴ Second, PRASA had not ensured that the train doors were closed when the train left the station.¹²⁵ In terms of wrongfulness, the CC stated that determining whether an omission is wrongful is a challenging exercise that necessitates the consideration of many factors, especially with regards to public-law obligations.¹²⁶ These include the purpose of the legislation from which the duty arises, whether such legislation provides for delictual claims, whether the powers conferred in the legislation are discretionary, whether the imposition of damages will have a ‘chilling effect’ on the effectiveness of the State, whether the harm was foreseeable, and whether alternative remedies are available.¹²⁷

The CC confirmed that where a constitutional duty had been breached, the value of accountability was an important consideration in the imposition of delictual liability.¹²⁸ However, this would only be an option if there were no other appropriate remedies ‘... to enforce accountability.’¹²⁹ The CC noted that there may be cases relating to policy matters where the effectiveness of the State could be undermined by the imposition of liability.¹³⁰ Further, the CC stated that where more resources would be required by the State to fix the problem at the root of the delictual claim, it may be inappropriate for the court to impose liability.¹³¹

119 *ibid* para 88.

120 *ibid*.

121 *Mashongwa* (n 18) paras 5–6.

122 *ibid* para 1.

123 *ibid* para 2.

124 *ibid* para 5.

125 *ibid* para 9.

126 *ibid* para 22.

127 *ibid*.

128 *ibid* para 24.

129 *ibid*.

130 *ibid* para 24.

131 *ibid*.

Despite not going over most of the factors listed,¹³² the CC found that the public-law duty on the part of PRASA had indeed ‘... mutated to a private law duty.’¹³³ This seemed to be primarily on the basis of the special protective relationship between PRASA and its passengers, the constitutional duties of PRASA to protect its passengers, as well as the lack of any other appropriate remedy.¹³⁴

Regarding negligence, the CC examined the omissions separately. In terms of the lack of security guards, the CC implicitly found that the harm faced by Mashongwa was foreseeable and preventable, and moved directly to determining whether the steps taken in terms of preventing violent crime on the trains were reasonable.¹³⁵ The CC stated that as the levels of crime differ across the country, what is reasonable in terms of the resources allocated and the safety measures adopted by PRASA to prevent crime may differ depending on the area where a train is located.¹³⁶ In line with the value of accountability, the CC held that in order to determine whether the measures taken in the specific case were reasonable, the court would need to evaluate the justifications for such measures.¹³⁷

After considering the information offered by PRASA regarding the lack of security guards, which the CC held arguably amounted to bald assertions of resource constraints,¹³⁸ the CC stated that because of the lack of information proffered it could not decide whether negligence had been established.¹³⁹ However, in terms of the failure of PRASA to ensure the train doors were closed, the CC found that such an omission was negligent and that there were no additional resources needed for that task.¹⁴⁰ Therefore, despite finding liability on the part of the State regarding the failure to close the doors of the train, the CC seemed to have inadvertently allowed the State to escape liability for the lack of security guards on the basis of bald allegations of resource constraints.

MEC, Health and Social Development, Gauteng v DZ obo WZ

In *DZ*,¹⁴¹ after accepting liability for a negligent omission in a medico-legal claim, the State argued that it should be able to pay damages in a form other than lump sum monetary compensation.¹⁴² The State argued that it should be able to undertake to pay the medical expenses of the plaintiff to the service provider, as and when they arrive

132 TJ Scott, ‘Revisiting the Elements of Delict: the Mashongwa Judgments’ (2016) 79 THRHR 568.

133 *Mashongwa* (n 18) para 29.

134 *ibid* para 26.

135 Scott (n 132) 573.

136 *Mashongwa* (n 18) para 35.

137 *ibid* para 36.

138 *ibid* para 39.

139 *ibid* para 43.

140 *ibid* para 51 and 61.

141 *DZ* (n 19).

142 *ibid* para 2.

and on an ongoing basis.¹⁴³ Further, the State argued that the amount claimed by the plaintiff was too high, as it was based on prices in private healthcare rather than public healthcare, which is cheaper and just as good.¹⁴⁴

There were two principles regarding damages in delict that were relevant to this case. First, a plaintiff must claim all compensation—past and future—in one action (the ‘once and for all rule’).¹⁴⁵ Second, compensation is monetary.¹⁴⁶ The State argued that the common law, as it stood, allowed them to pay damages in a structure that is not a lump sum monetary payment (arguing that the ‘once and for all rule’ related to determining liability and not quantification of damages).¹⁴⁷ Alternatively, the State argued that the common law should be developed.¹⁴⁸

The CC stated that the contention that the common law allows non-monetary compensation and that the ‘once and for all rule’ related to determining liability and not quantification was ‘... not borne out by an analysis of our current law.’¹⁴⁹ However, the CC stated that arguing for a reduction of monetary damages on the basis that damages have been calculated at private healthcare costs, when public healthcare is just as good and cheaper is an argument that ‘... appears to be on stronger footing.’¹⁵⁰ The CC held that this did not offend the ‘once and for all rule’ and would be relevant to the quantification of monetary damages.¹⁵¹ The State would need to prove, however, that the medical services provided in a public facility were as good as or better than a private facility.¹⁵²

The CC remarked that it is necessary to look at whether monetary compensation, over some form of compensation in kind, is the only form of compensation that can properly redress the harm caused.¹⁵³ In this regard, Froneman J commented that it is important to consider how African conceptions of the values in the Constitution should be utilised to develop the common law.¹⁵⁴ Providing the victim with medical care rather than money would provide redress for the harm caused and compensate the victim.¹⁵⁵ The CC stated that while the principle that damages must sound in money was not per se offensive to

143 *ibid.*

144 *ibid* para 12.

145 *ibid* para 16.

146 *ibid* para 14.

147 *ibid* para 17.

148 *ibid* para 3.

149 *ibid* para 17.

150 *ibid* para 18.

151 *ibid* para 23.

152 *ibid* paras 21–22.

153 *ibid* para 42.

154 *ibid* para 41.

155 *ibid* para 43.

the Constitution, there were considerations in terms of the State's duty to provide access to healthcare that did not exist when this rule was formulated and applied in the past.¹⁵⁶

On the possibility of developing the common law to allow periodic payments, the CC stated that there is nothing to indicate that it would not be inconsistent with the Constitution, and in fact may in some cases be appropriate.¹⁵⁷ However, the CC stated that the State had not provided it with a factual foundation to properly assess whether the common law should be developed—all that was submitted was that medical negligence occurred in a public healthcare facility.¹⁵⁸ Therefore, the CC refused to stray from the usual rules regarding damages on the basis of bald contentions that basing damages on private healthcare and using the 'once-and-for-all rule' were too expensive for the State, but still left the door open regarding the possible development of the common law in future if the State were to make out a proper case.¹⁵⁹

A recent judgment from the High Court—*MSM obo KBM v Member of the Executive Council for Health, Gauteng Provincial Government (MSM)*¹⁶⁰—revisited the 'public healthcare defence'.¹⁶¹ The High Court differentiated between what it called the 'public healthcare defence', which would be damages in the form of compensation in kind (healthcare in a public facility), and the 'mitigation of healthcare costs defence', which would be a lessening of damages based on public healthcare being cheaper or free, and as good as private healthcare.¹⁶² The court held that while the 'mitigation of healthcare costs defence' was in line with existing principles of delict, the 'public healthcare defence' would require the development of the common law.¹⁶³

While in *DZ* the CC stated that the State had not provided the factual basis for the development of the common law, the High Court stated that in this case the State had done so.¹⁶⁴ *MSM*, like *DZ*, concerned a child born with cerebral palsy due to negligence in a public healthcare facility.¹⁶⁵ The State had provided sufficient evidence that showed that the medical services available at Charlotte Maxeke Johannesburg Academic Hospital were as good, if not better, than that which was available in a private facility.¹⁶⁶

Regarding the development of the common law to allow compensation in kind, the court stated that in the context of medico-legal claims against the State it was hard to ignore that the State has limited resources and that when the State is ordered to pay damages

156 *ibid* para 45.

157 *ibid* paras 54 and 56.

158 *ibid* para 57.

159 *ibid* para 58.

160 2020 (2) SA 567 (GJ).

161 *ibid* para 19.

162 *ibid* para 29.

163 *ibid*.

164 *ibid* para 39.

165 *ibid* para 182.

166 *ibid* para 172.

the money that could have been used by the State to meet its constitutional obligations is redirected.¹⁶⁷ The court stated that this was a compelling reason to develop the common law—so as to allow the State to correct the harm it caused while still guarding against a reduction in its resources.¹⁶⁸

The court found that it was appropriate to develop the common law to allow compensation through the provision of medical services in the case.¹⁶⁹ However, the court held that its ruling is not necessarily binding, even in similar cases, and that each case will ultimately depend on the evidence.¹⁷⁰ The question of development was also limited by the court to cases of children suffering from cerebral palsy due to negligence in State hospitals.¹⁷¹ Hopefully, if in other circumstances the State is able to prove that the medical care available in public facilities is truly as good or better than that in private facilities, by proffering actual evidence, then the State may be able to avoid the excessive costs of private healthcare and redirect funds to improving the public healthcare system.

Why the CC is Correct in Rejecting Bald Assertions of Resource Constraints in Delictual Claims against the State

Since *Van Duivenboden*, the concept of State accountability as a constitutional value has played an important role in the extension of State liability in the law of delict in the constitutional era.¹⁷² Many have argued that the extension of liability is hampering the ability of the State to fix its problems, as resources are redirected from potentially fixing the problems to paying damages,¹⁷³ and that delict in itself is not an appropriate avenue of law to address the systemic failures of the State that have led to rights violations.¹⁷⁴

While there are assertions that the increasing claims against the State may hamper its ability to fulfil its obligations,¹⁷⁵ this is not the only cause of declining services.¹⁷⁶ For example, there are multiple reasons that have been advanced for the poor state of

167 *ibid* para 178.

168 *ibid* para 179.

169 *ibid* para 194.

170 *ibid* para 192.

171 *ibid* para 182.

172 Alistair Price, 'State Liability and Accountability' in Michael Bishop and Alistair Price (eds), *A Transformative Justice: Essays in Honour of Pius Langa* (Juta 2015) 327.

173 Wessels (n 1) 8–9.

174 See Francois Du Bois, 'Human Rights and the Tort Liability of Public Authorities' (2011) 127 LQ Rev 598–599. I do not wish to comment on the appropriateness of using public law remedies over delict.

175 See Winnie Maphumulo and Busisiwe Bhengu, 'Challenges of Quality Improvement in the Healthcare of South Africa Post-apartheid: A Critical Review' (2019) 42 *Curationis* 1. In 2015, the government paid out R498 964 916.72 in terms of litigation regarding medico-legal claims against the State.

176 *ibid*.

healthcare facilities in the public sector, which have facilitated the negligence leading to increasing claims.¹⁷⁷ For example, despite propositions of reforming the public and private healthcare system to be more equitable and of better quality, prior to the COVID-19 pandemic funding for public healthcare was decreasing.¹⁷⁸ In terms of restructuring damages in medico-legal claims, whether more cases like *MSM* will occur, or whether progress is made in terms of the State Liability Amendment Bill, remains to be seen.

The CC and SCA are correct in their contention that the State should not be able to avoid liability based on bald statements of stretched or inadequate resources without any proof. By disallowing the State to avoid liability by simply asserting it has inadequate resources, the courts are forbidding the State to escape accountability in terms of both redressing harm and explaining its actions.¹⁷⁹ Where a party claims compensation from the State and the State pleads that the claim is unfeasible, the State can either prove there were insufficient resources for it to fulfil its obligations or admit liability for negligence—meaning that it cannot use resource constraints as a ‘red-herring excuse’ for poor decision making.¹⁸⁰

O’Regan J, in the context of imputing a public-law duty in *Metrorail*, commented that it would not be enough for the State to simply assert that the measures put in place in terms of its positive duty are reasonable because of resource constraints.¹⁸¹ The court will need to determine the reasonableness of the measures in light of the details given regarding such constraints ‘... in the context of the overall resourcing of the organ of state.’¹⁸² O’Regan J stated that this conforms to the principle of accountability as the State is required to reveal the reasons behind its conduct.¹⁸³ The CC’s judgments in *Oppelt* and *DZ* are consistent with this, in holding that merely asserting that there are resource constraints is not good enough to defeat a delictual claim or to reduce damages.

Mashongwa is potentially problematic. The CC held that negligence was not established in terms of the provision of security guards because it did not have enough information regarding the reasonableness of the measures taken by PRASA to mitigate the possibility of violent crimes on trains.¹⁸⁴ In effect, this allowed PRASA to escape

177 SECTION27 and Institute for Economic Justice, ‘Fact sheet: Funding the Right to Health’ (*SECTION27*, 2019) <<http://section27.org.za/wp-content/uploads/2019/05/2019-IEJ-S27-Health-Fact-Sheet.pdf>> accessed 3 August 2020. See further Oosthuizen and Carstens (n 13) 275.

178 *ibid.*

179 See Price (n 172) 315. Price defines accountability as explaining one’s actions and being held responsible for one’s wrongs.

180 Centre for Economic and Social Rights, SECTION27 and Institute for Economic Justice, ‘Joint Submission to the Committee on Economic, Social and Cultural Rights on the Occasion of the Review of South Africa’s first Period Report at the 64th Session, October 2018’ (CESR, October 2018) <<https://www.cesr.org/sites/default/files/CESR-S27-IEJ%20submission%20FINAL-FINAL.pdf>> accessed 25 July 2020.

181 *Metrorail* (n 7) para 88.

182 *ibid.*

183 *ibid.*

184 *Mashongwa* (n 18) para 43.

liability for an omission based on its own failure to provide enough evidence showing the safety measures were reasonable. This is strange as the CC stated that determining the reasonableness of measures in light of the reasons given for the measures implemented was consistent with the value of State accountability,¹⁸⁵ but then allowed the State to escape a finding of negligence based on what the court essentially described as bald statements of resource constraints.¹⁸⁶

Zitzke states that it is arguable that the CC should have held that a finding of negligence should be inferred in cases like *Mashongwa* if the State does not provide adequate reasons for the way resources are allocated.¹⁸⁷ This seems appropriate because the State is in the best position to provide reasons for its decisions,¹⁸⁸ and it is in accordance with the values of accountability and transparency.¹⁸⁹ This also seems to accord with the ruling in *Lee*, where the CC relaxed the usual test for factual causation in holding that Lee did not need to prove what a reasonable healthcare system in the prison would be,¹⁹⁰ which would have been difficult for him to do.¹⁹¹

There are concerns that the court too closely analysing the budgetary decisions of the State raises issues regarding the separation of powers.¹⁹² However, although there may be a danger in this regard, to refuse to do so would allow the State to claim that nothing can be done regarding current injustices without proof or justification.¹⁹³ Ferreira points out that although claims of resource constraints or ‘feasibility constraints’ on the part of the State appear to be questions of fact, these claims are not unideological.¹⁹⁴ Allowing the State to escape liability based on resource constraints without sufficient justification could allow the State to ‘... mask anti-egalitarian ideology or a lack of political will to comply with the Bill of Rights.’¹⁹⁵

Conclusion

The CC’s stance regarding the rejection of bald assertions of resource constraints can be seen in the *Oppelt* and *DZ*, where the State raised resource constraints, and the CC refused to allow the State to escape liability or reduce damages without evidence

185 *ibid* para 36.

186 *ibid* para 39.

187 Zitzke (n 25) 367.

188 See Nick Ferreira, ‘Feasibility Constraints and the South African Bill of Rights: Fulfilling the Constitution’s Promise in Conditions of Scarce Resources’ (2012) 129 SALJ 289–290. Ferreira argues, in terms of assessing the reasonableness of the State’s actions, that a flexible approach should be adopted.

189 Zitzke (n 25) 367.

190 *Lee* 2013 (n 16) para 57.

191 Price (n 92) at 497.

192 Ferreira (n 188) 275.

193 *ibid* 297.

194 *ibid* 275.

195 *ibid*.

regarding such constraints. Further, in *Lee*, the CC permitted a finding of factual causation without necessitating Lee to prove what a reasonable system would be,¹⁹⁶ which may have been difficult and expensive for him and for future victims in the same position.¹⁹⁷ However, *Mashongwa* may be potentially problematic in that the CC effectively permitted bald statements of resource constraints to allow PRASA to avoid a finding of negligence in terms of not providing security guards.

It is trite that where there is a right there must be a remedy for its violation.¹⁹⁸ After rights were entrenched in the Constitution, and the State was given active duties regarding their fulfilment, delict has been used as a tool to vindicate such rights and ensure State accountability.¹⁹⁹ Although allowing increasing delictual claims against the State may potentially redirect funds from fixing the problems at the root of such claims,²⁰⁰ the CC has been correct in disallowing the State to escape liability or reduce damages based solely on assertions of resource constraints without sufficient corroboration.

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196 *Lee* 2013 (n 16) para 57.

197 *Ferreira* (n 188) 289.

198 *August v The Electoral Commission* 1999 (3) SA 1 (CC) para 34.

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