

SECTION27 BRIEFING NOTE TO THE TREATMENT ACTION CAMPAIGN ON *DUDLEY LEE v MINISTER OF CORRECTIONAL SERVICES*

8 August 2012

1. This note is an update on the Dudley Lee matter, an important case related to tuberculosis (TB) in prisons. The Constitutional Court will hear the case on 28 August 2012. The TAC National Council took a decision in April 2012 to seek to intervene as “amicus curiae” (friend of the court) in this matter. SECTION27 has agreed to be TAC’s legal representatives. The Wits Justice Project and the Centre for Applied Legal Studies are co-applicants along with TAC in this matter. The WJP forms part of the Journalism Department at the University of the Witwatersrand. It combines the use of journalism, advocacy, law and education to improve the criminal justice system and assist individuals affected by miscarriages of justice. CALS is a human rights centre at the University of Witwatersrand. CALS seeks to strengthen constitutional democracy. Its vision encompasses a country where human rights are respected, protected and fulfilled, the dismantling of systemic harm, and a rigorous dedication to justice.

Basic facts and background

2. When Dudley Lee entered Pollsmoor Prison in April 2000 he was in “reasonable health”.¹ TB was prevalent in the prison and conditions in the prison facilitated the spread of TB.² In court, prison authorities were unable to prove that they took “any steps whatsoever to guard against the spread of TB”.³ The failure to do so was negligent. A few years later, Mr Lee requested to be tested for TB after noticing symptoms associated with TB, such as coughing and weight loss. In June 2003, he was diagnosed with TB.
3. In September 2004—over four years after entering prison—Mr Lee was acquitted of the charges against him and released. Mr Lee then sued the Minister of Correctional Services (Minister) in the High Court. In essence, Mr Lee claimed that prison authorities caused him to become infected with TB.⁴

¹ *Minister of Correctional Services v Lee* (316/11) ZASCA 23 [2012] at para 2

² *Lee v Minister of Correctional Services* (10416/04) ZAWCHC 13 [2011] at para 213, 229

³ *Ibid* at para 258

⁴ *Ibid* at para 2

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

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

Why is the TAC involved?

11. TAC has an interest in this matter because the issue being decided by the Constitutional Court will impact on its ability to realise its core vision and mission. TAC is committed to advocating for the rights of people with TB and for the implementation of an effective and comprehensive TB prevention, diagnosis, treatment, care and support programme. TAC also focuses on TB because people living with HIV are at an especially high risk of contracting TB.
12. TAC has also worked extensively with the NSP 2012-2016. As you know, the NSP 2012-2016 identifies prisoners as a key population at high risk of TB infection and identifies specific interventions in relation to them. Moreover, a recent article published in the SAMJ found that conditions prevailing in Pollsmoor Prison, which is the prison at issue in this case, create an extremely high risk of TB transmission, including drug-resistant TB, and result in annual TB transmission risks of 90% per year.⁶
13. The TAC wants to participate in this case as an amicus curiae in order to persuade the Court to develop the law in a way that gives effect to the rights that prisoners hold, specifically those found in section 27 and 35(2)(e) of the Constitution. Section 27 entrenches the right to access to health care services and places an obligation on the state to progressively realise that right. This obligation places on duty on the state to take reasonable measures to prevent the spread of TB. Section 35(2)(e) entrenches the

⁵ *Ibid* para 61, emphasis added

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

right to conditions of detention that are consistent with human dignity, including, “adequate medical treatment”.

14. The decision being appealed by Mr Lee is a very unjust one. If the decision is not overturned, we believe that no prisoner will ever be successful in a claim in delict against the prison authorities for negligently causing him or her to become infected with TB. The impossibility of success creates the following results:

14.1. Mr Lee and many similarly situated people are left without the possibility of a remedy despite the violations of their rights;

14.2. The prison authorities are permitted to violate the rights of prisoners and awaiting trial detainees and to neglect constitutional and statutory obligations with impunity; and

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

The next steps

15. The Constitutional Court consented to our participation as Amici Curiae on 6 August 2012. We will file our Heads of Argument on 17 August 2012. The case will be heard on 28 August 2012.

16. Three immediate-term goals for the TAC in regard to this case are to:

16.1. Publicise the case widely.

16.2. Educate TAC members about the case and the issues it presents.

16.3. Attend the hearing in large numbers.