

ROAD SAFETY, MAINTENANCE AND CLAIMS FOR DAMAGES

Lessons from cases and investigations

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ABSTRACT

Engineers and road safety experts widely recognise poor road condition as contributory factor to crashes. Claims against road authorities have escalated since the capping of the Road Accident Fund payouts. Authorities are reluctant to disclose the number of claims and the cost involved. They frequently settle claims to avoid legal precedents. Road engineers thus do not learn from these claims. Claims for damages reduce the funds available for roads. The aim of this paper is to sensitise road authorities and engineers involved in road management to the legal perspectives on road safety and claims for damages. It gives an engineer's view of aspects of the law that affect road safety management. It discusses the legal duty (duty of care) of road authorities and gives an overview of the principles of Law of Delict. Recent judgments and investigations are discussed to illustrate the lessons to be learnt. Lessons learnt include the society's expectation of high engineering standards, safe facilities including sidewalks and the need to warn of specific hazardous conditions. The general approach is that "*A duty of care towards road users should apply to the controlling public authority unless there is a valid basis for its exclusion.*" Where this legal duty is breached and negligence is proven, damages will be awarded. Typical road failures are surface failures such as potholes and edge drops. However, the failure of services in the road reserve and violated expectation in the road environment can also cause crashes. The paper concludes that road authorities and engineers must understand the legal implications of hazardous road conditions. These often develop due to inadequate systems for inspections and lack of proactive maintenance management. It recommends that all road authorities and engineers involved in design, maintenance and management acquire appropriate legal knowledge, understand the importance of road safety and seek adequate funding to mitigate hazardous conditions instead of paying claims for damages.

1 INTRODUCTION

Engineers and road safety experts widely recognise poor road condition as contributory factor to crashes. Claims against road authorities for defects have escalated since the capping of the Road Accident Fund payouts. Authorities are reluctant to disclose the number of cases and the cost involved. They frequently settle claims to avoid legal precedents. Road engineers thus do not learn from past mistakes.

The aim of this paper is to sensitise road authorities and engineers involved in road management to the legal issues regarding road safety and claims for damages. It gives an engineer's view of aspects of the law that affect road management. It discusses the legal duty of road authorities and elaborates on the principles of Law of Delict.

Recent case rulings – mostly against provincial road authorities – and investigations are discussed to illustrate the lessons to be learnt from such rulings. It is the function of road engineers to provide safe roads and such findings and rulings are of great importance to them.

The paper concludes that road authorities and engineers must understand the legal implications of inadequate systems for inspections and lack of proactive maintenance management, including fixing failures in a rational order of priorities. It recommends that all involved acquire appropriate legal knowledge, understand the importance of road safety and seek adequate funding.

Road authorities are liable for faults that cause damage through negligent acts or omissions. Gone are the early days of motorisation when the concept of sovereign immunity (i.e. the ruler / state can do no wrong) guided the views of engineers and politicians with respect to road safety. Damages suffered from faults and failures of roads were then not claimable from the road authorities. Use of a public road was considered a privilege, not a right.

The road users are also liable for faults that lead to crashes. In civil litigation, the Court considers all the facts and allocates contributory negligence to the parties involved. The cases discussed in this paper do not reflect the proportions of crashes that can be attributed to human, road and vehicle factors, but explores the overlap of human and road factors.

Since the 1970s society has come to accept road safety as its right and the responsibility of authorities. Internationally, road crashes are considered to be a burden on health and financial systems, as well as having grave psychological impact on the community. Society assesses the cost of road crashes in terms of health services, loss of production and opportunities. In 2010 the World Health Organization (WHO) declared the Decade of Action for Road Safety 2011 – 2020 to reduce road fatalities.

“The most important reason, though, is that road deaths are preventable – and it is our collective responsibility to support every effort possible to curb the carnage on our roads. Leading road safety experts believe that, with the right action, up to 5 million lives could be saved and 50 million injuries prevented during the Decade of Action. This will represent a reduction of about 50% on the predicted global death toll by 2020” (World Health Organization, 2010).

The Decade of Action is built on five pillars: Road Safety Management, Safer Roads and Mobility, Safer Vehicles, Safer Road Users and Post Crash Responses. Flowing from the pillar of Safer Roads and Mobility, it is stated that road safety engineering should entail a Roads Development Plan: "a strategy that requires that systematic attention be paid to upgrading the road infrastructure and signage on the basis of continuous audits of hazardous locations and accident red spots" (World Health Organization, 2010).

South Africa has subscribed to the WHO Organization Decade of Action for Road Safety 2011 – 2020 strategy and the goal to reduce road fatalities by 50% by 2020. This is now considered policy. Road safety policies are seen to be the expression of the good values (*boni mores*) or legal convictions of society and the actions of a road authority are measured against these.

2 LEGAL DUTY OF ROAD AUTHORITIES

The question of the legal duty of the road authority and road engineer arises where, in cases of delict, damages have been suffered and claims on the grounds of negligence follow. Legal duty is sometimes referred to a 'duty to care'. The South African courts treat each case on merit, preferring not to prescribe what the legal duty or the standards of care in provision or maintenance should be. The ground for legal duty can be statutory or based on the legal conviction of society. Engineers need to understand the concept of legal duty as they must execute the management of the road system to fulfil this duty.

Loubser and Midley (2010) define legal duty as "a duty to act without negligence or not to be negligent". Legal duty can stem from statutory duty. Neethling, Potgieter, and Visser (2001) state: '*The causing of damage by means of conduct in breach of a statutory duty is prima facie wrongful*'.

The highest authority of this statutory duty in the context of the road environment stems from the Constitution of South Africa as stated in the Bill of Rights:

"24. Environment. – Everyone has the right –
(a) to an environment that is not harmful to their health or well-being;"
(Constitution of the Republic of South Africa, 108 of 1996).

The example given below by Neethling, *et al* (2001) is of the old Divisional Councils Ordinance 18 of 1976, but it could be argued that if the principle was good then it must still apply now.

"In certain provinces a divisional council is compelled by ordinance to build and maintain roads. (Divisional Councils Ordinance 18 of 1976). Consequently, the council has a statutory duty to take care that defects do not develop in the roads. If the council fails to do so and someone is injured as a result of such omission, the council's conduct is *prima facie* wrongful."

The concept of safety was only recently incorporated into legislation. The SANRAL and National Roads Act 7 of 1998 states the functions of SANRAL are, *inter alia*:

“25 (e) to provide, establish, erect and maintain facilities on national roads for the convenience and safety of road users; [-]

39 (3) The Agency must determine its business and financial plan and strategic plan and the standards and criteria for road design and construction and for road safety within the framework of the national roads policy as determined by the Government and published in terms of subsection (1)” (SANRAL and National Roads Act 7 of 1998).

In the KwaZulu-Natal Provincial Roads Act 4 of 2001, the KwaZulu-Natal Province legislated that it would only be liable should loss or damage result from the “*wilful or negligent act or omission of an official*”. Scott JA elaborated on this point in *McIntosh v Premier, KwaZulu-Natal* (632/07) [2008] ZASCA 62 (29 May 2008). (KwaZulu-Natal Provincial Roads Act 4 of 2001).

*“In the present case the second respondent is enjoined in terms of s 3(1) of the KwaZulu-Natal Provincial Roads Act 4 of 2001 to administer the provincial road network in accordance with national and provincial norms inter alia ‘to achieve optimal road safety standards within the Province’ and to ‘protect and maintain provincial road network assets’. In terms of s 3(2) the second respondent’s responsibility is said to be ‘within the Province’s available resources’. However, a public law obligation does not necessarily give rise to a legal duty for the purpose of the law of delict. See *Rail Commuters Action Group v Transnet Ltd t/a Metrorail 2005 (2) SA 359 (CC) paras 79-81*. But in the present case s 9(3) of the Act puts the issue beyond doubt. It provides: ‘9(3) The Minister [ie the second respondent] is not liable for any claim or damages arising from the existence, construction, use or maintenance of any provincial road, except where the loss or damage was caused by the wilful or negligent act or omission of an official.”*

3 PRINCIPLES OF LAW OF DELICT: IMPACT ON ROAD AUTHORITIES

The liability of road authorities falls under civil law. The Law of Delict (civil wrong) is the part of civil law that sets the standards of behaviour. This is the branch of law under which claims are made against road authorities. It is thus important that road authorities and engineers are familiar with the terms. If wrongful and blameworthy conduct results in harm or damage to someone, there is a right to claim compensation. The Law of Delict comprises five elements: the act, wrongfulness, fault, causation and damage/loss.

The act is the conduct that leads to damage and could be in the form of a positive act or an omission. In the context of roads this may be the erection of misleading signage or not erecting signage where this was required to warn of danger.

Wrongfulness in the context of road safety is the breach of the legal duty owed to the public to ensure reasonable safety, mitigate, reduce or control risks and hazards and warn of danger. As such, wrongfulness is determined with reference to statutory duties as well as the general legal convictions of society. Policies on road safety indisputably prove society’s convictions that road transport safety is important.

In the verdict in *Graham v Cape Metropolitan Council* 1999 (3) SA 356 (C), van Deventer J said:

"The legal principles to be applied in cases of this kind may be summarised as follows: Wrongfulness in terms of the sense of justice and legal convictions of the community now applies to omissions by a public authority. A duty of care towards road users should apply to the controlling public authority unless there is a valid basis for its exclusion. However, as this, is whether the sense of justice of the community would view the failure of the local authority to take positive action as wrongful, subject to the qualification that the local authority is not required to do more than may be reasonably expected."

Fault has two main forms: Intention and negligence. The latter is typically the form present in road maintenance-related claims. These terms refer to the legal blameworthiness of conduct. The criterion established to determine whether a person acted carelessly is relative to the objective standard of the reasonable person. Note that in a technical environment, the reasonable person is not the man in the street, but an appropriately experienced and competent technical person. A person would act with negligence if he were in a position to foresee the reasonable possibility of his conduct injuring another in his person or property and causing him loss and not taking reasonable steps to guard against such occurrence. Negligence must be proven by the plaintiff. The determination of fault as conduct of the defendant can be offset against the contributory fault of the conduct of the plaintiff. The defence of contributory negligence must be proven on a balance of probabilities.

Causation is the requirement that the wrongful act must be the proximate cause of the damage or loss: There must be a plausible connection between the act and the result to be determined from the facts of the case. The series of linked actions cannot, however, be stretched to extreme ends: The wrongdoer is not liable for harm that is "too remote" from the conduct.

Damage: Neethling *et al* (2001) give a definition of damage as the diminution, as a result of a damage-causing event, in the utility or quality of a patrimonial (transmissible or relating to money) or personality interest in satisfying the legally recognised needs of the person involved. The losses typically involved in accidents at maintenance work are real rights (e.g. property), loss of rights (e.g. profit), direct and consequential loss, general (intrinsic e.g. pain and suffering) and specific (e.g. medical expenses incurred up to trial) losses. The loss of future rights such as income, profit or expenses is the subject of prospective patrimonial damages. Mitigation of loss places some obligation on the plaintiff to take all reasonable steps to limit the damage caused by the defendant's delict. A plaintiff who fails to take reasonable steps cannot recover damages in respect of loss that could have been prevented.

4 CASES

Road authorities and road engineers should be aware of the cases decided on the liabilities of roads authorities. The following cases serve as illustration and are not meant to cover all types of road failures or institutional negligence. The cases illustrate society's expectations for safety in broad design considerations, towards all road users and with respect to specific hazards and hazardous conditions.

4.1 Administrator, Natal v Stanley Motors Ltd and Others 1960 (1) SA 690 (A)

One of the oldest cases against a road authority involved a bridge that was washed away during heavy rain and the ensuing flood in the Natal South Coast in October 1956. The judge set a stringent test of duty for the engineers for the design of bridges as critical elements of roads.

"The duty of engineers constructing a bridge across a river is to construct it in such a manner as to be capable of resisting all the violence of weather which in the climate concerned might be expected, though perhaps rarely, to occur."

Lesson: The duty of engineers is construed by the Court to construct safe infrastructure that considers all the factors that can impact on operations.

4.2 Cape Town Municipality v Bakkerud 2000 3 SA 1049 (SCA)

Mrs Bakkerud tripped in a pothole on the sidewalk. Marais JA found the municipality negligent.

"In the present case there is very little in the way of evidence to go on when it comes to deciding whether or not it should be held that the municipality was under a legal duty either to repair these holes or to warn the public of their existence and that its failure to do either was negligent. However, there is just enough to warrant a finding that it was. Sea Point is a densely populated suburb. The pavement abutted on residences and would have been in constant use. There were two holes in close proximity to one another and they were not shallow. There was also a pole near the holes from which a wire cable ran which was attached to the pavement in the vicinity of the holes. It had the effect of shepherding a passer-by in the direction of the holes. The pavement was relatively narrow. The holes had been there for many months. No evidence was given on the municipality's behalf. In this court Mr Binns-Ward adopted the position that unless the immunity conferred by the municipality cases were reaffirmed, the municipality accepted that it would be liable. In the circumstances, it is unnecessary to subject to any further scrutiny the factual foundation for the existence of a legal duty and a finding that there was culpa in failing to fulfil it."

Lessons: Road safety extends to all road users. The road environment and use play an important role in the view that the Court took on negligence.

4.3 Graham v Cape Metropolitan Council 1999 (3) SA 356 CTHC

A rock fell on Mr Graham's vehicle on Chapman's Peak Drive in June 1994, paralysing him. The ensuing court cases lead to what could be regarded as some of the most comprehensive judgements on the duties of the road authority. Not only the condition of the road, but the understanding of the weather and geotechnical conditions of the land adjacent to the road came under scrutiny.

The judgment listed *inter alia* the following aspects from which some principles could be deducted (the judgment is printed in italics, with the author's comments following in normal text):

"Held, that wrongfulness in terms of the sense of justice and legal convictions of the community applied to omissions by a public authority."

Lesson: The act that causes damage is not only an action (positive or negative), but could also be an omission.

"Held, further, that a duty of care towards road users had to apply to the controlling public authority unless there was a valid basis for its exclusion. Such a duty only arose, however, when the injury could have been avoided by reasonably practical means. Put differently, the norm to be applied in cases such as the present was whether the sense of justice of the community would view the failure of the local authority to take positive action as wrongful, subject to the qualification that the local authority was not required to do more than might be reasonably expected."

Lesson: The cost of mitigating measures is a consideration in the determination of the reasonableness of imposing a legal duty, where the legal convictions and sense of justice of the community are taken into account.

"Held, further, that on the above approach it followed that a local authority which was in control of a dangerous road such as in the present case was under a duty to warn intending road users specifically of the nature of the hazard and the risk involved, by special and appropriate road signs or other means".

Lesson: The law acknowledges that a road cannot be perfectly safe. However, where hazards occur, there is a duty to warn."

4.4 MEC for Public Works, Roads and Transport v Esterhuizen [2006] SCA 96 (RSA)

A group of young people were travelling from Dealesville to Bloemfontein in 2001. The driver, Joubert, testified that a small buck tried to cross the road and he swerved to the left, driving off the road. Attempting to return to the road, he drove over an edge drop-off greater than 75 mm and lost control, driving into the veld on the right. Esterhuizen – a passenger in the vehicle - was seriously injured. Cachalia, AJA found that:

"The court found as a fact that the point at which Joubert had attempted to bring the two left wheels back on to the tar had a dangerous difference in height between the gravel and the tar. This, it concluded, was the cause of the jerking action of the steering wheel which resulted in Joubert's loss of control of the vehicle. The appellant was held liable because it had failed properly to maintain the road."

Lessons: The concept of the forgiving road has been around since the 1970s; when it was acknowledged that even the prudent driver encroach on the shoulders and verges of the road. The edge drop-off is a particularly dangerous hazard that is the leading cause of claims in the USA.

4.5 McIntosh v Premier, KwaZulu-Natal (632/07) [2008] ZASCA 62 (29 May 2008)

McIntosh and friends went cycling on a rural road in the Kamberg district in KwaZulu-Natal in 2004. Riding down a hill, McIntosh encountered a pothole in the middle of the road and swerving to avoid the pothole, the bicycle skidded and he fell on the guardrail, sustaining severe injuries. Scott JA found that:

“But the pothole which resulted in his fall had been allowed to grow to such a size as to be described as creating a dangerous situation. Given that the road was inspected on a weekly basis, the failure to repair the pothole over such a long period is indicative, I think, of a greater degree of negligence than that attributable to the appellant. In the circumstances an apportionment of 60:40 in favour of the appellant seems to me to be fair and equitable in all the circumstances.”

Lessons: Road inspections were done on a weekly basis but the delayed repairs were viewed as negligence.

4.6 Devonport NO v The Premier of the Free State Province and Others, ZASCA A216/2008 (16 November 2009)

Devonport was part of an organised group of cyclists from Johannesburg that went on a tour in the eastern Free State. Devonport was a chartered accountant in his early forties. The first stop was in Fouriesburg and the destination for the next day was Ficksburg. The downhill on which the crash occurred is steep and the group of cyclists were travelling at about 45 km/h. The road between Fouriesburg and Ficksburg was exhibiting failures such as shoving / heaving in the left-hand wheel path, as well as potholes. The failures were being repaired and the preceding section of road was patched to the extent that it appeared that the road had already been fixed. The protrusion that resulted from shoving of material from the wheel track to the side was at least 50 mm high and was formed in a V-shape towards the approaching traffic. The front wheel of Devonport’s bicycle hit the protrusion in the V-shaped groove and probably jerked the wheel to the extent that the front fork twisted. The rider was catapulted over the handle bar and hit the road surface with his face, resulting in fatal head injuries. His widow claimed for loss of spousal support and for the education of the children. The initial verdict in the High Court was that the province had not been negligent and the cyclist had been “the creator of his own misfortune”. The verdict was challenged on appeal. In the appeal, Van der Merwe J concluded that:

“A reasonable provincial government would in my judgment have realised that cyclists such as the group in the present case would use the road from time to time. It would have also realised that some of these cyclists reach relatively high speeds and do not always keep a perfect look-out and are therefore vulnerable to dangers such as the protrusion. A reasonable provincial government would in my view have regarded injury of the kind in question as a reasonable possibility that should be guarded against and could be guarded against by the simple and relatively inexpensive steps of repairing the particular patch of the road or providing an appropriate warning. I am satisfied therefore that negligence on the part of the province was proved.”

Lessons: Road failures that may not seem significant for cars and trucks can be hazardous for cyclists. The cost of repairing failures and providing appropriate warning is a consideration in determining negligence.

5 INVESTIGATED CASES

The following cases further illustrate dangerous conditions on the road that could and should have been corrected.

5.1 Pothole on the edge of Class 2 urban road

In 2009 a Vespa scooter driver drove off from the stop line of a traffic-signal controlled intersection on Jean Avenue in Centurion. A pothole with sharp edges had developed in the bell mouth where a slight depression held water when it rained, weakening the sub-base of the pavement. A late right-turner from the side road drove across the scooter's line of driving, forcing it to the edge of the lane. The scooter tire burst on hitting the sharp far end of the pothole. The rider was flung from the scooter. Despite the crash helmet the driver sustained brain damage. This Class 2 road should have been inspected often, especially as it is dolomite area. In fact, by the time the author's inspection had been completed, the road was closed due to a sinkhole that appeared less than 100 m further on. The case was settled in favour of the plaintiff.

Lessons: Road failures need not be in the normal wheel tracks to be dangerous. Maintain the full width of the lanes.

5.2 Burst water pipe in sag curve

This road, Governor Road in Johannesburg Metropolitan Municipality, is adjacent to a very old suburb with an asbestos cement water pipe reticulation system. Pipe bursts in the area are common. The municipality has not prioritised the replacement of these pipes. A pipe burst in a side road leading to a T-junction on a major collector road. The water ran into a sag vertical curve in the major collector road. The water dammed and ran over the crown of the road to the kerb inlets on the outer side of the road. The road is curved with a radius of about 200 m. A driver was driving second in a platoon and did not see the pond of water in the curve in time. He hit the water as he reached the curve, thus entering the dam with the vehicle's wheels turned. The vehicle aquaplaned and spun out of the curve, hitting an approaching vehicle and then crashed into a tree. The matter was viewed as similar to the damage that would result from a burst municipal water pipe flooding a shop. The case was settled, although the driver accepted the major part of the contributory negligence.

Lesson: municipalities must consider the impact of failure of services on road safety, not only the road conditions.

5.3 See-through effect on road cut off by a freeway in Ekurhuleni

The road is a local road in the Ekurhuleni Metropolitan Municipality on the urban edge between a mixture of smallholdings and townhouse developments. The road has street lights located on the far side of the urban area. The smallholdings were severed by the P157 - 2 (R21) freeways in the 1980s. The freeway is in a cut deeper than 5 m and the vehicles driving on it are not visible when looking down the crossing road. The road traffic signs within the smallholdings have not been replaced since the construction of the P157 and most of the signs are faded or missing. The road on either side of the P157 is straight for distances in excess of one kilometre. The last section of the road on the east side, past the last junction, is gravel. There is no DEAD END sign at this last junction and at the P157 road reserve there are no signs indicating the end of road. Approximately 50 m before the P157 road reserve heaps of soil and rubbish had been dumped. A crash happened at night when a group of young people, not familiar with the area, got lost and travelled westwards. The street lights, shining on both sides of the P157, give the impression of continuity along this historically straight street. Driving down the road, with no warning signs, the driver was surprised by the heaps of soil in the road. He swerved to the left and hit other heaps of rubbish. The car was damaged and the occupants injured. The case has not proceeded since the investigation.

Lessons: hazardous conditions arise from the road environment as a whole, not only road pavement conditions. Warning signs must be maintained even in low traffic areas.

6 CONCLUSIONS

Road safety is an acknowledged problem in South Africa. The statutory duties of road authorities and the convictions of society dictate that safety must be promoted, in line with stated policies. The South African public is becoming more legal-wise and claims against road authorities will increase as a result of poor maintenance and the capping of the Road Accident Fund payouts. To determine if legal duty has been complied with, the conduct of the professional engineer and technician will be measured against that of the reasonable, knowledgeable, experienced engineer.

The standards for the design of road infrastructure are high. Society expects the engineer to understand human behaviour and the interaction with the road and its environment. Road management should reduce or mitigate hazards and promote safety.

Most claims for damages result from poor maintenance and poor warning. Standards for pavement failures such as edge break and drop-off, potholes, and rutting have not been quantified, but guidance from documents such as TMH9 reflects reasonable engineering practice. The Southern African Development Community Road Traffic Signs Manual similarly guides the reasonable engineer on warning of hazardous situations and will be used to evaluate what is acceptable.

7 RECOMMENDATIONS

Road authorities need to have proper and adequate maintenance procedures. Asset management systems should be implemented in all road authorities as best practice. Records of complaints and responses are particularly important to defend against claims of negligence.

Verdicts in recent reported cases were mostly in favour of the claimants. These cases set legal precedents. Many cases are settled before going to court. Operational staff is often not given sufficient feedback on these verdicts and decisions to take corrective actions.

The long-lasting underfunding of roads implies that Ministers and MECs for Transport, executive mayors, politicians, heads of departments, municipal managers and treasurers are often not well informed of the need to prioritise road maintenance and the impact that lack of maintenance has on claims. This is also evident in the diversion of maintenance funds to prestige projects.

Road engineers are the custodians of road safety. We need to act!

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