

HOW SAFE SHOULD A SIDEWALK BE? THE EVERGREEN QUESTION OF A MUNICIPALITY'S LIABILITY FOR NEGLIGENT OMISSIONS

Butise v City of Johannesburg 2011 6 SA 196 (GSJ)

1 Introduction

One can safely postulate that the issue of determining the wrongfulness of an omission on the part of a municipality in respect of damage suffered by a member of the public as a result of a dangerous situation which arose due to the fact that roads and sidewalks under its control have fallen into a state of disrepair, finally stabilised slightly more than ten years ago when the supreme court of appeal handed down its seminal judgment in *Cape Town Municipality v Bakkerud* (2000 3 SA 1049 (SCA)). Before that time, the pendulum had swung from a position of strong immunity for municipalities (see eg *Halliwell v Johannesburg Municipal Council* 1912 AD 659; *Moulang v Port Elizabeth Municipality* 1958 2 SA 518 (A)) to a high-water mark of an almost blanket liability for omissions (eg in the judgment of Brand J in the court *a quo* in the *Bakkerud* case: *Cape Town Municipality v Bakkerud* 1997 4 SA 356 (C)).

Although one would not expect a case involving a typical set of facts associated with so-called “municipality cases” – such as one involving a pedestrian injuring himself by tripping over a loose tile on a sidewalk or falling into a construction hole – to land up in the high court easily nowadays, due to the apparent relative certainty of the legal position in this regard and the astronomical costs associated with modern litigation, the present case would appear to be quite “standard” in the context of the traditional municipality cases. It would therefore appear that the following concluding academic comment on the judgment of the supreme court of appeal in the *Bakkerud* case was rather too optimistic: “It is improbable that money will be spent in the immediate future to reopen this issue in our highest court, if one bears in mind that ‘*Roma locuta est, causa finita est!*’” (Scott “Re-affirmation of the doctrine of immunity of municipalities against liability for wrongful omissions assessed and rejected – *Cape Town Municipality v Bakkerud*” 2001 *THRHR* 502 511). Where one would not expect the supreme court of appeal to be easily burdened again with a case of this nature, *a fortiori* a local division’s involvement with such an issue raises the eyebrows all the more. The question that now arises, is whether the set of facts and *ratio decidendi* reflected in the judgment of Mokgoathleng J in

Butise v City of Johannesburg (2011 6 SA 196 (GSJ)) contain some novel factual or peculiar legal element distinguishing it from the precedent set by the supreme court of appeal in the *Bakkerud* case.

2 Facts and judgment

One stormy night at about 22:30 the plaintiff went jogging at a brisk pace along the city sidewalks, with the ultimate intention of paying a friend of his a visit. Near an intersection he fell into an uncovered valve chamber, in the process fracturing his right leg. (If the following dictum (198F) were to be taken literally, Mr Butise's injuries must have been truly horrendous: "On investigation, he established that his right leg had fallen into an uncovered four-cornered valve chamber." However, it would seem that a less serious fracture of the plaintiff's right-leg *tibia* had occurred, and that it had not been severed completely!) No warning signs were posted near its opening, nor were barricades of any kind erected as precautionary measures to ensure the safety of members of public.

It was common cause that the defendant city council (the first defendant; the second and third defendants were entities created by the first defendant and all parties were in agreement that the relevant issues involved only the first defendant) had for a considerable period been experiencing massive problems as a result of the theft of the metal inspection covers of valve chambers. To remedy the situation, the council had adopted a proactive policy for the replacement of stolen covers, which resulted in the relatively low amount of about R1 million being budgeted for that purpose. In spite of these budgetary constraints, the defendant adopted a two-pronged approach in respect of the replacing of stolen or missing inspection covers, namely: (a) reactively, *viz* in the event of the reporting of damaged, stolen or missing inspection covers by members of public; and (b) proactively, on an ongoing basis, where the city council conducted periodical surveys to determine where inspection covers were missing. In terms of the city council's policy regarding reports or complaints of missing covers, it only replaced those covers which, in its opinion, constituted an immediate threat to public safety. The court also pointed out that the reactive policy, dependent upon information supplied by the public, had the effect that an inevitable delay occurred between reporting of a missing inspection cover, its identification and eventual replacement (199A; but, certainly, the same would hold true in respect of its proactive policy, unless the city council's employees arrived at an uncovered valve chamber seconds after the lid had been removed). A further relevant detail of the city council's approach to the problem was the fact that it demarcated only those uncovered chambers that it regarded as posing an immediate threat to the public; all other missing covers were merely recorded. According to its records, no recent survey of the area where the plaintiff sustained his injuries had, however, been conducted (for more details, see 198A-199C).

In evaluating the evidence presented and applying the relevant principles of the law of delict in respect of negligence, the court held that the plaintiff had established a negligent omission on the part of the defendant, as the plaintiff's injuries were clearly foreseeable and preventable in terms of the normal principles governing negligence in particular (*cf* 205D-205G). The defendant's plea that, in the event of a finding of negligence on its part, a 50:50 apportionment of damages should be ordered in terms of the provisions of the Apportionment of Damages Act 34 of 1956 was also rejected (205I-J).

Mokgoatlheng J therefore issued an order in terms of which the defendant city council had to pay the plaintiff's proven damages arising from the physical injuries sustained by him as a result of his fall.

3 Critical evaluation

3.1 Preliminary remarks

The set of facts in question falls squarely within the ambit of the law of delict. Being a human act or omission accompanied by wrongfulness and fault on the part of the perpetrator who causes damage to another, a delict requires certain "elements" to be present before liability can attach to the latter. It is trite law that a plaintiff, suing on the basis of delict, has to establish the elements of conduct, wrongfulness and fault (intent or negligence) on the part of the defendant or some other person for whose delicts the defendant is liable (eg an employee for whose delicts his or her employer is vicariously liable if certain requirements have been met), a causal nexus between the act or omission in question and, finally, damage sustained by the plaintiff. (See eg Neethling and Potgieter *Neethling-Potgieter-Visser The Law of Delict* (2010) 3-4. Somewhat belatedly (seeing that this is the sixth edition of this sterling work) it is suggested here that where these authors refer to a delict as "the act of a person ...", it would have been better to utilise the word "conduct", seeing that the term "act" is in legal practice, case law and academic works usually contrasted with the word "omission". "Act" is therefore generally associated with positive conduct. See the preferable definition of Van der Walt and Midgley *Principles of Delict* (2005) 1. Compare the cautious approach of Loubser, Midgley *et al The Law of Delict in South Africa* (2010) 6-8.) Where even one of the stated elements is found wanting, there would usually be no delictual liability on the part of a defendant (barring a few exceptions in the event of strict liability). In the so-called "municipality cases" the element that normally emerges for discussion is that of wrongfulness.

Regarding the delictual element of human conduct in the form of an omission, the customary way of considering it is in the context of wrongfulness: at the heart of the matter was the question whether the first defendant bore a duty to take positive measures to avoid the plaintiff's harm and, if so, whether such duty was breached. In respect of causation, the court obviously accepted without further ado that a causal *nexus* had been established between the first defendant's omission and the plaintiff's harm, because it featured nowhere in the judgment. (However, see my comments in this respect under § 4 below.) Nor did any issue arise as to (the quantum of) damages, in view of the fact that the parties agreed to separate the question of liability from quantum in terms of rule 33(4) of the High Court Rules.

3.2 The wrongfulness issue – the court's (lack of) approach

When a court has to determine whether an omission on the part of a municipality giving rise to damage to a member of public is a so-called "mere omission", entailing no liability at all, or an "actionable omission" which can lead to the municipality's delictual liability, the main thrust of its examination would normally be to ascertain whether the omission in question was wrongful, or not. For this purpose the court will either apply the general yardstick of the *boni mores*, or legal convictions of the community (for the application of which the seminal judgment of Rumpff CJ in *Minister van Polisie v Ewels* 1975 3 SA 590 (A) presents the undisputed pinnacle and basis of later development), or one of the crystallised practical rules for establishing wrongfulness in the case of an omission, based on the broad *boni-mores* basis, such

as where a legal duty to act positively to avert danger or damage has arisen by virtue of prior conduct, control of a dangerous object, rules of law, a particular office, contractual undertaking for the safety of a third party etc (for a discussion of the relevant legal position, as well as for ample references to case law see *eg* Neethling and Potgieter 58 *et seq*; Van der Walt and Midgley 86 *sqq*; Loubser *et al* 215-219). As will be pointed out (see § 3.2.2 below), the court considered three of these specific rules – *viz* those dealing with prior conduct, control over a dangerous object and a special relationship between the first defendant and the plaintiff – in the context of the test for negligence (where the reasonable preventability of the harm in question had to be evaluated). At its best, such an approach is not only unorthodox, but clearly confusing from a theoretical perspective.

Mokgoatlheng J did not direct an enquiry into the wrongfulness question *eonomine*, although it was specifically submitted on behalf of the defendant municipality that the onus rested on the plaintiff to establish that the municipality was under “(a) [a] legal duty to repair or warn; and (b) that the failure to do so is blameworthy” (201A). Notwithstanding his extensive quote (201B-G) from the judgment of the supreme court of appeal in the *Bakkerud* case (at pars 29-31), on the strength of the fact that counsel for the defendant had cited this in support of the submission quoted immediately above, the court refrained from commenting on the theoretical aspects of the judgment of Marais JA in that case, apart from adding emphasis by way of italics to two sentences, the object of which is far from clear to the present author. What the court (and probably also the legal representatives of the defendant) unfortunately failed to realise, is that Marais JA did his utmost to distinguish the preliminary wrongfulness issue from the subsequent negligence issue, in the process emphasising the importance that a court should deal specifically with the question of wrongfulness in a case of this nature. It is apparent that Mokgoatlheng J failed to notice the distinction drawn in the paragraphs quoted by him from the *Bakkerud* case between the “first enquiry” (*viz* that of wrongfulness) and the “second enquiry” (*viz* that of negligence) where Marais JA expressed himself as follows:

“It is so that some (but not all) of the factors relevant to the first enquiry will also be relevant to the second enquiry (if it be reached) but that does not mean that they must be excluded from the first enquiry. Having to discharge the *onus* of proving both the existence of the legal duty [referring to the wrongfulness issue] and blameworthiness in failing to fulfil it [the negligence issue] will, I think, go a long way to prevent the opening of the floodgates to claims of this type of which municipalities are so fearful.”

Directly after having quoted from the *Bakkerud* case, under the heading of “The analysis of evidence”, Mokgoatlheng J referred to the fact that the defendant had conceded “that it owed a legal duty to the public to guard against such harm ...” (201H), which makes it quite incomprehensible why he referred in detail to the twofold submission on behalf of the defendant, referred to above, and quoted so extensively from the *Bakkerud* case. On the strength of the defendant’s concession, it is submitted that one could simply assume that the latter had made a concession that its omission was wrongful, on the basis of which the next issue – namely that of the defendant’s negligence – could next be addressed. However, this is clearly not the way in which the court approached the matter, for Mokgoatlheng J concluded his sentence, quoted immediately above, as follows: “consequently, the first leg of the test, reasonable foreseeability, is established”. The issue of negligence will be addressed in some detail under the next heading, but at this stage it needs to be pointed out that the court’s approach displays utter confusion between establishing the elements of wrongfulness and negligence. This is borne out even more clearly

where a quote from the judgment of Scott JA in *McIntosh v Premier, KwaZulu-Natal* (2008 6 SA 1 (SCA) par 11), dealing essentially with *wrongfulness*, is prefaced as follows (2021): “Scott JA in dealing with negligence opined:” The probable reason for Mokgoathheng J’s misunderstanding of the exposition by Scott JA in that judgment is to be found in the latter’s approach, where he had stated: “[A] negligent omission, unless wrongful, will not give rise to delictual liability” (*loc cit*). Various commentators have criticised that way of formulation in view of the generally held belief that an omission cannot be described as negligent without having established its wrongfulness beforehand – *viz* that the test for wrongfulness is anterior to that of negligence (for support of which approach see *eg* Boberg I *The Law of Delict: Aquilian Liability* (1984) 271; Van der Merwe and Olivier *Die Onregmatige Daad in die Suid-Afrikaanse Reg* (1989) 111; Van der Walt and Midgley 67 and 155; Neethling and Potgieter 159 and especially case references in n 211; Scott 2001 *THRHR* 506; and *cf* Gowar “Wrongfulness – still getting it wrong?” 2011 *THRHR* 682). However, Van der Walt and Midgley correctly point out that “[t]he supreme court of appeal appears to be vacillating on the issue as to whether wrongful conduct on the part of the defendant is logically an indispensable prerequisite for the existence of fault” (155), with specific reference to the judgment in *Minister of Safety and Security v Van Duivenboden* (2002 6 SA 431 (SCA)) (as well as some judgments of the supreme court of appeal of more recent origin, for which their references in n 6 may be consulted). In my opinion the confusion displayed by Mokgoathheng J in the case under discussion can be directly attributed to this “new trend” in the ranks of judges of the supreme court of appeal to abandon the purer academic approach in predetermining wrongfulness before turning to the issue of fault (negligence). An extensive discussion of this issue unfortunately cannot be undertaken in a note of limited ambit, such as the present. All that may be said in conclusion on this issue, is that lower courts can easily be confused by a deviation from long-standing doctrine by higher courts. A victim certainly fell in the present instance.

Another feature of this judgment suggesting that the wrongfulness issue had slipped the court’s mind, is to be found in the fact that Mokgoathheng J commenced his *ratio decidendi* by quoting from the old case of *Stewart v City Council of Johannesburg* (1947 4 SA 179 (W)), a judgment in which the court had to decide an almost identical set of facts where an elderly man had fallen into an excavation dug in the pavement alongside a busy street. Price J simply approached the issue on a basis of determining the presence or absence of negligence, although his judgment is quoted in some standard textbooks as an example of the application of the so-called “prior conduct rule” (*omissio per commissionem*) (Boberg 221; Van der Merwe and Olivier 34; Neethling and Potgieter 59 n 151). Van der Walt and Midgley (189 n 17), interestingly, mention the *Stewart* case only in the context of the standard of care expected from someone to escape the blame of negligence, under the heading of *legitimate assumptions*. It is suggested that in this context that case is authority for the proposition that the plaintiff lacked contributory negligence. (This is, in fact, the approach followed by Goldstone J in *Langley Fox Building Partnership (Pty) Ltd v De Valence* 1991 1 SA 1 (A) 15E-F, quoted in the judgment under discussion (199E) as a second reference after the *Stewart* case, when he opined as follows in finding that the plaintiff could not be blamed for contributory negligence: “[P]edestrians walking on a city sidewalk are entitled to assume that, in the absence of adequate precautions or warning, the way is clear and safe.”) To my mind the true drift of the following quoted *dictum* from the *Stewart* case is to establish an assumption of a positive duty on the part of a local authority to keep sidewalks under its control

safe – thus, to lay the foundations for testing the wrongfulness of an omission to observe such duty:

“The purpose of a sidewalk is to enable pedestrians to pass to and fro along the streets of towns and cities in safety shielded from the street traffic. ... Pedestrians are entitled to regard sidewalks as safe and to proceed accordingly unless they are plainly warned to the contrary” (186).

However, as already stated above, in view of the court’s finding that the defendant had conceded that it owed the public a legal duty in the present circumstances, which duty had clearly been breached, the court need not to have treated the wrongfulness issue in detail at all. However, its references to the relevant wrongfulness sources in the context of establishing negligence on the defendant’s part is the true reason for the critical remarks contained in this section.

3.3 The negligence issue

3.3.1 The negligence test revisited

Immediately following upon his quoting the *dicta* from the *Stewart and Langley Fox* cases, Mokgoatheng J initiated his crucial investigation into the negligence issue by venturing to paraphrase the time-honoured test for negligence formulated by Holmes JA in *Kruger v Coetzee* (1966 2 SA 428 (A) 430E-G). There is probably no *dictum* in our case law on negligence quoted more frequently than those words that set out the test for negligence step by step, for which reason most teachers of the law of delict would probably expect their students to know the definition formulated in that judgment by heart. The court’s paraphrased version of the negligence test reads as follows:

“The issue of negligence essentially involves a threefold enquiry. The first is whether the harm was reasonably foreseeable. The second is whether the *diligens paterfamilias* would have taken reasonable steps to guard against such occurrence. The third is whether the *diligens paterfamilias* failed to take those steps” (199F-G).

In essence the *Kruger v Coetzee* test for negligence comprises *two* broad tiers: In the first place there is the question whether the *diligens paterfamilias* (formerly the reasonable man, nowadays in a politically more correct form, the reasonable person) would reasonably have foreseen the harm in question and would have taken reasonable steps to guard against such harm. The second question is whether the *defendant* failed to take the required steps. It is not erroneous to refer to three questions in this regard, as the court did, because the first tier, as explained, in fact contains two sub-questions, *viz* firstly on foreseeability and, subsequently, on preventability. (In the original formulation Holmes JA numbered the two main questions (a) and (b), while the sub-questions under (a) were denoted as (i) and (ii).) If these considerations are kept in mind, it would appear that the first question posed by Mokgoatheng J lacks a reference to the *diligens paterfamilias*. It would be more accurate to insert the phrase “by the *diligens paterfamilias*” after the word “foreseeable”. One could possibly argue that this omission is not so serious, as it could be implied that the first question deals with foreseeability *by the reasonable person*, but then the court’s formulation of the second question does in fact pertinently refer to the *diligens paterfamilias*, which is in perfect conformity with Holmes JA’s original wording. The conclusion would thus seem inevitable that the court in this instance did not express itself as accurately as one would have expected. However, in respect of its paraphrasing of the “third question”, Mokgoatheng J’s effort misses the mark completely, as he in fact proceeds to test the conduct of the *diligens paterfamilias* himself against the

criterion of the *diligens paterfamilias*! It is sincerely hoped that this was a mere slip of the pen – a *lapsus calami* in the true sense – for otherwise this exposition is totally incomprehensible. One can only imagine the confusion created in the mind of any ordinary third-year student reading this part of the paraphrase. (For this reason alone it is definitely not recommended as part of the reading materials prescribed to undergraduate students in a course on the law of delict!)

As a precursor to the latter part of its judgment in which the steps taken by the defendant city council to address the theft and destruction of inspection-hole covers were evaluated, the court then immediately referred (199G) to a *dictum* from the *McIntosh* case to elaborate on the issue of preventability of the harm by the reasonable person (the second question, or sub-question referred to above) where the supreme court of appeal had held that a reasonable prioritising by a local authority of demands in view of its limited resources would not lightly be found to be unreasonable, but, on the other hand, that if foreseeable harm was suffered by another as a result of a local authority's failure to take reasonable steps to guard against its occurrence, the authority in question should not escape liability (the *McIntosh* case 9H-10A). It is suggested that this reference to the *McIntosh* case is rather out of place, because a part of this reference – dealing with the identical question – is later repeated (201J-202C) when the court considers in more detail whether the defendant's conduct conformed to the preventability requirement of the negligence test.

3.3.2 Application of the negligence test – substantive issues

As stated above (see § 3.2), the court interpreted the defendant's concession that it owed the plaintiff a legal duty as establishing reasonable foreseeability for purposes of determining negligence. Apart from the fact that the breach of a legal duty is a first pointer to wrongfulness (see Van der Walt and Midgley 80), it would appear that invoking the technical term of "duty" here is in fact an application of the "duty of care" approach to establishing delictual liability. Van der Walt and Midgley point out that one owes a duty of care only to those to whom harm may be reasonably foreseen, but that the foreseeability formula for the determination of such duty comprises the two separate but related enquiries into reasonable foreseeability and reasonable preventability. Thus, a concession on behalf of the defendant that it owed the plaintiff a duty, would, according to those authors' interpretation, in fact amount to a concession of negligence in terms of the classical duty of care approach. This is obviously not what the intention behind such concession had been, having regard to the defendant's arguments which were aimed at pointing out that the damage *in casu* could not reasonably have been prevented by the defendant city council acting as a *diligens paterfamilias*. However, if the explanation of Neethling and Potgieter (152) is kept in mind, the defendant's concession would be relevant only to the first question and the court would then have been correct in making a finding that the foreseeability requirement had been dispensed with in favour of the plaintiff. In view of the utter confusion – in particular between the delictual elements of wrongfulness and negligence – brought about by an application of the English doctrine of "duty to take care" (see *eg* the stern warnings issued by Brand JA in *Local Transitional Council of Delmas v Boshoff* 2005 5 SA 514 (SCA) 522 and Harms JA in *Steenkamp NO v Provincial Tender Board, Eastern Cape* 2006 3 SA 151 (SCA) 160; *cf* *McCarthy t/a Rent a Car v Sunset Beach Trading 300 CC t/a Harvey World Travel* 2012 6 SA 551 (GNP) par 14; see further Neethling and Potgieter 153 n 183) it is suggested that courts should stringently refrain from adopting the "duty (of care)" approach when applying the negligence test, in order to avoid the type of uncertainty and confusion which emanates from this part of the judgment.

The core of the first defendant's plea is to be found in its submission that due to the absence of knowledge of how long the cover of the valve chamber had been missing, it could not have been expected "to have guarded against something it did not know had happened" and consequently that it had not been proven that it should have taken steps to avoid the harm suffered by the plaintiff (200G-H). Furthermore, it was contended on the first defendant's behalf that its replacement policy of inspection cover lids had been adequate (200I), especially in the light of the budgetary constraints facing it (201I). Essentially this was a submission that it had not fallen short of the standard required by the second question (or sub-question) of the negligence test formulated in the *Kruger* case.

Mokgoatlheng J approached his finding in respect of the application of the preventability tier of the negligence test by effectively referring a third time to the same *dictum* of Scott JA in the *McIntosh* case (par 14; see my remarks under §3.2.1 *in fine*), this time in paraphrased form:

"Further regarding the legal liability of a local authority ... where the defendant relies on budgetary constraints if foreseeable harm were suffered by a person as a consequence of the failure on the part of the authority and its servants to take reasonable steps to guard against the occurrence, the authority is liable for the omission" (202D).

Having thus made it clear that no measure of immunity exists to exempt a local authority in cases of this nature, the court immediately proceeded to elaborate on what reasonable steps on the first defendant's part in the instant case would entail:

"There is a positive legal duty on the first defendant to ensure that uncovered valve chambers did not constitute a danger to the public, and because of the endemic massive scale theft of inspection valve chamber covers, *a greater duty rested on the first defendant* to ensure the public's safety through the regular, consistent inspection of valve chambers, more particularly because the endemic theft was a continuous phenomenon" (202E-F, my italics).

The object of the court's immediate subsequent effort to link the exercise of this duty to the invocation to act in conformity with the spirit, purport and objects of the constitution, 1996 with reference to *Minister of Safety and Security v Van Duivenboden* (444), as well as to three of the traditional crystallised rules for the determination of *wrongfulness*, is far from clear. In a sense this part of the judgment is like something "suddenly falling from the sky"; it has no bearing whatsoever on the application of the negligence test. This conclusion is strengthened by the judge's subsequent reliance on a *dictum* from the *McIntosh* case as authority for the method of applying the *negligence* test, whereas Scott JA had in that judgment in fact been treating the question of *wrongfulness*. (See my criticism in this regard at § 3.2 above.) Although "beefing up" an argument by involving a constitutional approach to the issues at hand could certainly go some way in strengthening an argument, one should at least explain how constitutional imperatives concern the issue to be resolved. Unfortunately such an explanation, direct or implied, could not be found by the present author.

Having endeavoured to lay a solid foundation for a decision on the issue of negligence – in particular the question whether the plaintiff's harm was reasonably foreseeable by a *diligens paterfamilias* in the shoes of the defendant city council – Mokgoatlheng J next turned to the practical issue of the onus of proof, immediately stating it to be trite law that the burden of proving negligence on a balance of probability rests with the plaintiff (203D).

3.3.3 Application of the negligence test – evidentiary issues

The logic behind the court's final verdict of negligence on the part of the defendant city council can seemingly be portrayed in the following steps discernable in the judge's thought-pattern. Proceeding from the position of the plaintiffs initial burden of proof in respect of the first defendant's negligence, the court pointed out the following (without reference to any authority): (a) Where the plaintiff is not in a position to adduce sufficient evidence and the facts are particularly within the sphere of knowledge of the defendant on a particular aspect – like negligence *in casu* – less evidence by the plaintiff will be necessary in order to establish a *prima facie* case of negligence on the defendant's part (203D). (b) Where such initial evidentiary burden has been disposed of by the plaintiff, the onus is then on the defendant to rebut the inference of the defendant's negligence (203E). (c) At what the city council's rebuttal should in the instant case be levelled, is to show that it had taken the reasonable steps that a *diligens paterfamilias* would have taken under the same circumstances (203F-G). (d) The evidence adduced on behalf of the city council was then assessed as follows (203G-204I): (i) The evidence did not indicate *when* the inspection cover went missing. (ii) No evidence was tendered that a report of the missing cover had been received in terms of the city council's reactive policy. (iii) Likewise, the first defendant was unable to adduce any evidence that it had even inspected the specific sector where the valve chamber in question was located in terms of its proactive policy. (iv) The evidence also revealed that whenever uncovered valve chambers were reported in terms of the reactive policy and subsequently recorded by the council's employees, there had been no practice in place to warn members of public by means of signs, reflective lighting or plastic tape. (v) Furthermore, after a recording of missing inspection covers in terms of either its reactive or proactive policy, the employees assigned to the task would exercise their discretion whether the uncovered holes posed a danger to the public, or not. Only where they were of the opinion that the situation was dangerous, would immediate steps be taken to cover those open valve chambers. (vi) Finally, it was merely stated on behalf of the city council that it had been hindered by budgetary constraints to execute its legal duty towards the public in respect of avoiding the dangers inherent in the uncovered valve chambers.

An assessment of the above-mentioned thought-process initially reveals (in terms of (d)(i)-(v) above) that the defendant city council failed to rebut the inference that it omitted to take the reasonable steps expected from a *diligens paterfamilias* under similar circumstances. The court came to the following conclusion in this respect:

“No rational explanation was presented by the first defendant as to why the uncovered valve chambers not considered as posing an immediate danger to the public were left uncovered, nor was any reason advanced by the first defendant for the failure to proffer such explanation. There was absolutely no explanation as to what rational criteria were used to identify certain uncovered valve chambers as posing an immediate danger to the public and others not, neither was there any explanation as to what rational criteria predicated the identification and selection of sectors where surveys were conducted.

In the absence of any cogent, credible rational explanation, the first defendant's random selection of sectors to be surveyed, and its designation of uncovered valve chambers considered to pose a danger to the public, was irrationally and arbitrarily executed; consequently, within the constraints of reasonable prudence this policy was inadequate and ineffectual” (par 32-33).

It is suggested that these paragraphs are sufficient to reveal that the second defendant also fell short of the second tier of the negligence test. However, Mokgoathheng J went further by concluding that the mere alluding to its budgetary constraints by the

defendant city council ((d)(vi) above) did not affect his finding on the aforementioned factors. He formulated his opinion in this regard as follows:

“There is an obligation on the first defendant to adduce cogent, credible evidence explaining how its priorities impacted on its budgetary constraints, relative to its legal duty to the public to install inspection covers on all open valve chambers, by showing that the budgetary costs for such venture were so ‘astronomical’ that they warranted the inference that such costs should not reasonably be incurred by the first defendant in replacing all missing inspection covers in order to avoid liability where serious harm could occur to the public” (204H).

In my opinion this merely shows that the judge, *ex abundanti cautela*, went out of his way to point out that the evidence adduced on behalf of the first defendant (or the lack thereof) on the basis of its financial-constraints argument also fell short in the sense that it did not provide enough evidence to rebut the *prima facie* inference of negligence.

After having disposed of both foreseeability and preventability in the context of the negligence test in respect of the case at hand, it is absolutely unclear why the court then returned to the aspect of foreseeability (the first tier of the negligence test) (see 204J-205A). Even more baffling are two further aspects of this judgment: First, the court’s conclusion that “[b]y its selection policy, it can fairly be said that the first defendant must have decided to accept the risk of liability in those cases arising from uncovered valve chambers ...” (205B). Voluntary assumption of risk is a topic which deals either with consent as a ground of justification (“consent to risk of injury”) – a unilateral act – which is normally utilised on behalf of a defendant, and not a plaintiff, or with contributory negligence (*cf* Neethling and Pogierer 104 *et seq*, 171 *et seq*); Van der Walt and Midgley 140 *et seq*). To my mind it is manifestly unclear to which element of delict the conclusion that the first defendant *had accepted the risk of liability* refers. The court’s reference would appear to be more in the nature of an afterthought – something to “add to” the arguments supporting the conclusion of negligence already reached earlier. Of the self-same nature is the judge’s final shot at an apt argument as *ratio* for his judgment, *viz* that “[i]n the circumstances of this matter, it is therefore justifiable to invoke the legal maxim *res ipsa loquitur*, and infer a prima facie case of negligence on the part of the first defendant ...”. No references to decided cases were quoted and there is an overwhelming impression that this line of reasoning was also in the nature of an afterthought – in reality, to support an alternative basis for a finding that the first defendant had been negligent. On the other hand, the judge may have referred to the *res ipsa loquitur* precept simply to support his thought-processes described under (a)-(c) above. If that were the case, it is indeed strange that he referred to such basis in such a disjointed way, in the fashion of an afterthought. The proper way would have been to proceed from the premise that the *res ipsa loquitur* rule should be applied and then to follow it up with an exposition of the conclusions described above.

However, it is extremely doubtful whether the instant case contains facts on which the *res ipsa loquitur* adage can properly be applied. Van der Walt and Midgley (170) draw attention to the fact that “[i]t is invoked when the occurrence itself is the only known fact from which the conclusion of negligence can be drawn and the incident does not ordinarily occur in the absence of negligence conduct” (with reference to cases such as *Goode v SA Mutual Fire & General Insurance Co Ltd* 1979 4 SA 301 (W) 305; *Madyosi v SA Eagle Insurance Co Ltd* 1990 3 SA 442 (A) 444 445; *Mostert v Cape Town City Council* 2001 1 SA 105 (SCA) par 40; see also Zeffertt and Paizes *The South African Law of Evidence* (2009) 218-222; Schwikkard, Van der Merwe *et al Principles of Evidence* (2009) 211-212; Schmidt, Zeffertt and Van

der Merwe “Evidence” IX *LAWSA* (2005) 554 and cases referred to in n 1 and n 2). It is suggested that the surrounding circumstances do not warrant a conclusion that the occurrence itself – the plaintiff’s plunging into the open manhole – is the *only* known fact from which a conclusion of negligence can be drawn, nor that the type of incident in question does not ordinarily occur in the absence of negligence. (It is always important to bear the qualification to the *res ipsa loquitur* maxim – so aptly phrased in Latin by Rumpff JA in *Groenewald v Auto Protection Insurance Co Ltd* 1965 1 SA 184 (A) 187F – in mind, namely “*res loquitur ipsa dummodo una solaque sit*” (the thing speaks for itself, *as long as it is the one and only thing*.) The *res ipsa loquitur* label, representing a rule of evidence and not of substantive law (Jones (ed) *et al Clerk & Lindsell on Torts* (2010) 542), which is of English origin (stemming from the English judgment of Erle CJ in *Scott v London and St Catherine Docks* (1865) 3 H&C 596 601) is, in the words of Morris LJ in *Roe v Minister of Health* 1954 2 QB 66 87, a “convenient and succinct formula [which] possesses no magic qualities: nor has it any added virtue, other than that of brevity, merely because it is expressed in Latin”. According to English law – which is for all practical purposes identical to South African law in this respect (see *eg Naude NO v Transvaal Boot and Shoe Manufacturing Co* 1938 AD 379 396-397) – the three basic requirements for the application of the *res ipsa loquitur* maxim are as follows: (a) The occurrence forming the basis of the plaintiff’s claim should be of a nature that it would not have happened without negligence; (b) the object that inflicted the damage had to be under the sole management and control of the defendant, or of someone for whom he is responsible or in respect of whom he has a right of control; and (c) there should be no existing evidence on why or how the occurrence took place (*Clerk & Lindsell on Torts* 542). The facts of the present case suggest that there is compliance only with requirement (b). The fact that the conduct of third parties (thieves) may have caused the dangerous situation which caused the plaintiff’s injuries rules out any compliance with requirements (a) and (c), thereby effectively rendering the maxim inapplicable.

It is clear that the application of *other* rules pertaining to the drawing of inferences in terms of the law of evidence supported Mokgoathheng J’s thought-process described above ((a)-(d) reflected in § 3.3.3 above). The following *dicta* from the above-quoted leading English textbook on torts (*Clerk & Lindsell* 541-542, referring to *Snell v Farrell* (1990) 72 DLR (4th) 289 and *Wisniewski v Central Manchester HA* 1998 PIQR P324) lend support to this conclusion:

“Courts approach matters of inference on a common sense basis and where the evidence relating to negligence is particularly within the control of the defendant, little affirmative evidence may be required from the claimant to establish a *prima facie* case which it will then be for the defendant to rebut. The failure of the defendant to give evidence, may be regarded as strengthening the claimant’s case.”

It is important to note that these words do not refer to *res ipsa loquitur* at all, but to other evidentiary rules pertaining to negligence (*viz* those rules applicable to the drawing of an adverse inference *vis-à-vis* a litigant who fails to testify, after the opposing party has made out a *prima facie* case: see the leading English case of *McQueen v Great Western Railway Company* (1875) LR 10 QB 569 576; Tapper *Cross and Tapper on Evidence* (2010) 41). However, the court’s confusion in this context could possibly be explained by referring to a fourth requirement that Anglo-American sources sometimes pose for the application of the *res ipsa loquitur* maxim, namely that the explanation of the damage-causing event is more readily accessible to the defendant than to the plaintiff (Shapo *Principles of Tort Law* (2010) 297). A

similar approach is also discernable in terms of South African law, as pointed out by Van der Walt and Midgley (170), where they maintain that the maxim favours a plaintiff who is at a disadvantage to furnish evidence on an aspect which is usually, but not necessarily, peculiarly in the defendant's sphere of knowledge (with reference to *Monteoli v Woolworths (Pty) Ltd* 2000 4 SA 735 (W)). (See my discussion of a more apt application of these rules in the context of the issue of determining factual causation under § 4 below.)

3.3.4 Contributory negligence

A further plea raised on behalf of the defendant was that the plaintiff's conduct had also been blameworthy in that he did not keep a proper lookout and that he should therefore forfeit 50% of his claim (205G-H). The court convincingly rejected this defence in the light of the factual circumstances, *inter alia* that the incident took place late at night when it was dark, rainy and windy. As pointed out earlier (§ 3.2 above), it is suggested that the *dicta* that Mokgoathheng J quoted (199D-F) from the judgments of *Stewart* and *Langley Fox* reflect ample authority for the court's finding on this aspect.

4 Conclusion

The introductory two-fold question (posed in § 1 *in fine*), namely whether this case contains any novel factual or legal element, can ultimately be answered positively regarding the factual situation, but certainly negatively in respect of the legal principles involved. In virtually all previous reported judgments constituting the corpus of "municipality cases" no doubt existed about the fact that the delictual element of factual causation had been established. As will presently be demonstrated, this is not the case in the present case, although this feature of the factual situation never received any attention in this judgment. However, that in itself does not detract in any measure from this distinguishing feature of the present case. On the face of it the final outcome in respect of the application of the legal rules concerned could have been expected, specifically on account of the precedent contained in the *Stewart* judgment – a judgment of the same local division of the high court – which would for all practical purposes appear to be on all fours if the facts of that case are borne in mind (barring the causation aspect, to which the court paid no attention).

Although it is suggested that the finding in favour of the plaintiff is probably correct if one bears the arguments on behalf of both parties in mind, this judgment is most definitely not an example of clear argumentation, as pointed out at various stages above. Apart from containing a glaring error (the court's paraphrasing of the negligence test in *Kruger v Coetzee* (see § 3.3.1), it neglects to address the primary issue of wrongfulness (see § 3.2), mostly because important references to leading recent judgments of the supreme court of appeal, dealing with wrongfulness, were misinterpreted as dealing with negligence (see § 3.3.2) and, in addressing negligence and the proof thereof, there is a lack of coherence and system (see § 3.3.2 and § 3.3.3). Furthermore, one finds the court's persistent returning to the foreseeability issue, in spite of the first defendant's concession in this regard, hard to digest. Finally, the belated reliance on the "acceptance of risk" approach and the *res ipsa loquitur* maxim (see § 3.3.3) creates the impression of the court's mustering as many legal bases for its judgment as possible to use as ammunition in "firing a salvo of grapeshot" to hit as many "argument targets" as possible.

One may justifiably ask oneself why the first defendant failed to raise the plea of an absence of factual causation between its omission to replace the inspection cover and the plaintiff's falling into the open valve chamber. It is generally accepted that the method of determining such causal *nexus* is to apply a variation of the normal *conditio sine qua non* test, according to which one does not eliminate an antecedent in a set of facts in order to ascertain whether a specific result would have occurred or not, but where one asks whether a specific result would have occurred or not, if one would insert or add something hypothetical to the given facts (see in particular Van Oosten "Oorsaaklikheid in die Suid-Afrikaanse strafreg – 'n prinsipiële ondersoek" 1982 *De Jure* 239 257 describing *conditio sine qua non* as *conditio cum qua non* in this context; see further *eg Minister of Safety and Security v Van Duivenboden* 449; Neethling and Potgieter 184-185; Van der Walt and Midgley 199-200). If one were to argue on the basis of the judgment in the well-known case of *S v Van As* (1967 4 SA 594 (A)), the following hypothetical facts could be added to the facts *in casu*: the defendant city council regularly conducted (probably on a weekly or even daily basis) inspections of all the manhole covers under its jurisdiction, upon finding missing covers recorded such fact immediately and thereafter erected warning signals, barricades and replaces the missing covers as soon as practically possible. Even in the light of such added factual data one would not necessarily be able to tell whether the defendant's injuries would still have occurred, or not. The reason is very simple. According to the evidence, theft was one of the major reasons why those covers went missing. One would be unable to assert that a diligent taking of all practical precautions by the city council would definitely have eliminated the danger completely. For example, a thief may have stolen the cover of the hole into which the plaintiff had fallen a mere ten minutes before he came to grief. However, if this theoretical argument were to be successful under all circumstances, it would imply that a city council experiencing theft problems, as in the instant case, would simply be able to sit back and do nothing, as no plaintiff would ever be able to prove a causal link between such inactivity and damage caused by the removal of covers. As this is from a practical and even from a theoretical perspective an unacceptable situation, a solution must lie elsewhere.

It is suggested that it is in this respect that the evidentiary rules pertaining to the drawing of an inference of negligence (earlier referred to in § 3.3.3 *in fine*) could equally be applied. Where, in terms of those rules, the plaintiff, who has made out a *prima facie* case, is at a disadvantage to furnish evidence on an aspect which is peculiarly in the domain of knowledge of the defendant, the plaintiff is favoured. In *Clerk & Lindsell on Tort* (542 n 791) where the case of *Snell v Farrell* (*supra*) is applied in the context of proving negligence, it is conceded that the judgment deals essentially with the proof of causation (although the distinguished authors maintain that it could with equal justification be applied in the context of proving negligence). My proposal concerning the lack of the element of factual causation in the present instance is thus in fact supported by the *Snell* judgment (in which the court held that it was entitled to take cognisance of the fact that in the majority of cases dealing with medical negligence the facts would lie particularly within the defendant's knowledge and that in such circumstances a small amount of affirmative evidence on the plaintiff's part would justify an inference of *causation*, barring evidence to the contrary). Even the second case referred to by *Clerk & Lindsell on Tort* (542 n 792) in this regard, namely *Wisniewski v Central Manchester HA* (similarly dealing with the determining of medical negligence), dealt with the determination of factual causation and not of negligence – a fact pertinently acknowledged by the authors who wish to extend its application to the determination of negligence – thereby

equally forcefully supporting my suggestion in this regard. The path which the judge's thought-process followed in respect of the proof of negligence can thus with equal logical justification primarily be applied to the issue of ascertaining the presence or absence of factual causation. Therefore, one would on such basis be able to conclude that the defendant had not disposed of the onus of, primarily, proving a lack of factual causation and, secondly, proving the absence of negligence.

Finally, city councils would be wise to consider the impact of this judgment. It is suggested that if the defendant city council *in casu* had been more diligent in formulating a justifiable, rational policy in respect of the treatment of missing inspection hole covers, could substantiate its policy on the basis of its financial capacity and had been able to supply the court with detailed evidence on those aspects, it may well have been able to dispel the primary inference of negligence (as well as factual causation) on its part. In this respect this judgment provides a good illustration of the cardinal importance of aspects of the law of evidence touching upon the onus of proof – or, more correctly, the drawing of inferences – in a case which seemingly deals exclusively with the law of delict – an aspect commonly neglected or even overlooked in the teaching process by teachers of private-law subjects.

JOHAN SCOTT
University of Pretoria