

# Legal liability for harm caused by potholes and manholes

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## INTRODUCTION

This article examines the liability of a municipality for harm caused by manholes on the sidewalks and potholes on public roads and whether there is a legal duty on the municipality to repair or warn the public of the manholes and potholes.

## THE ROLE OF THE LAW OF DELICT

It is the function of private law (specifically the law of delict) to recognize individual interests, determine their limits in relation to each other, the circumstances under which the interests are protected against infringement and how disturbances in the balance of such interests may be restored.

There are certain legally recognized instances in terms of which the burden of damage is shifted from one person to another with the result that the one party incurs an obligation to bear the other's damage or compensate the person for such damage. This is where the law of delict comes in. A delict is a 'civil wrong' – a situation where one person (or entity) has caused harm to another in a way that the law recognizes deserves sanction in the form of compensation for the harm or protection from future harm.

However, the mere fact that a person has caused another person to suffer damage is insufficient to constitute a delict for which one may be held liable for. All requirements, otherwise known as 'elements' of a delict (namely an act, wrongfulness, fault, causation and harm) must be met prior to the conduct complained constituting a delict. Save for certain exceptions, there is no delict and consequently no liability in a situation where 1 (one) of the elements is not met.

The general criterion in determining whether a particular infringement of interests is unlawful is the *boni mores* (the legal convictions of the community).

The *boni mores* test is objective test based on the reasonableness criterion. The question is whether, in terms of the legal convictions of the community and in

light of all the circumstances of the case, the defendant infringed the interests of the plaintiff in an unreasonable manner.

There are circumstances in which it is more appropriate to determine wrongfulness by inquiring whether a legal duty has been breached. In cases of an omission, wrongfulness is normally determined not by asking whether the plaintiff's subjective right has been infringed but rather by asking whether, in terms of the *boni mores* or reasonableness criterion, the defendant had a legal duty to prevent the harm (i.e. whether the defendant could reasonably have expected to act positively to prevent the harm from occurring).

As a general rule, a person does not act wrongfully for purposes of the law of delict if he omits to prevent harm to another person. Liability for an omission only follows if the omission was in fact wrongful and this will be the case only if a legal duty rested on the defendant to act positively to prevent harm from occurring and he failed to comply with that duty.

Prior conduct by way of a positive act which creates a danger of harm to another person may be an indicator of the existence of a legal duty to take steps to prevent against the damage from materializing.

## MUNICIPALITIES' DELICTUAL LIABILITY

Municipalities were previously not compelled to build and repair streets but merely possessed permissive powers to do so. No general duty rested on them to repair roadways constructed in a proper manner, but which had become dangerous because of poor maintenance.

Accordingly, they could not be found wrongful and delictually liable for failure to repair or provide signs of warnings. A municipality could only be held liable if it created a new source of danger by prior conduct. This state of affairs changed, however, when the Constitution came into force.

Section 152(1)(b) of the Constitution of the Republic of South Africa, 1996 (the “**Constitution**”) provides that one of the objects of local government is “to ensure the provision of services to communities in a sustainable manner”. Schedule 5 Part B of the Constitution further provides for “municipal road” as one of the responsibilities of local government making it one of the services the municipality must perform on a sustainable basis. The New Shorter Oxford English Dictionary defines “sustain” as “to cause to continue in a certain state; maintain at the proper level of standard. Maintain or keep going continuously; sustainable as ‘being able to be maintained at a certain rate or level’”.

In the case of Cape Town Municipality v Bakkerud 2000 3 SA 1049 (SCA) (“**Bakkerud**”) the Supreme Court of Appeal (“**SCA**”) stated that “*There can be no principle of law that all municipalities have at all times a legal duty to repair or to warn the public whenever and whatever potholes may occur in whatever pavements or streets may be vested in them.*”

Further, the SCA stated that “It is not necessary, nor would it be possible, to provide a catalogue of the circumstances in which it would be right to impose a legal duty to repair or warn upon a municipality.”

In Bakkerud, a woman stepped into a pothole on a pavement and injured herself. The SCA held that a legal duty rested on the municipality to prevent the woman’s harm, taking into account the following factors:

- the length/period of time in which the danger (the pothole) was in existence;
- the area where the injuries occurred; and
- the resources required by the municipality to maintain the pavement in a safe condition.

The SCA held that the legal convictions of the community can, even in the absence of prior conduct (or statutory duty), place a legal duty on a municipality to repair roads or sidewalks or to warn against danger, but that this naturally depends on the circumstances of each case.

In the case of Moqhaka Munisipaliteit v Claassens (A180/2012) [2013] ZAFSHC 51, Ide Claassens instituted proceedings against the Moqhaka Municipality for damages caused to her motor vehicle in Kroonstad which occurred when her motor vehicle hit a pothole on the tarmac which damaged two of her vehicle’ tyres and a stone guard.

Before the appeal was heard, Moqhaka Municipality applied for an extension of the grounds of appeal to include the fact that the trial court erred in finding for Ms. Claassens in that she failed to allege and prove that the municipality had a legal duty to keep the said road in a state of good repair; that failure on the municipality’s

part to repair the road was wrongful and resulted in the Ms. Claassens suffering damages; and that as a result, the trial court ought to have granted absolution from the instances.

Furthermore, the municipality was aware of the conditions of the roads in Kroonstad at the time of occurrence of the incident and had been aware of that for a number of years prior to the incident. However, despite the existence of the dangerous situation which resulted in damages to road users’ motor vehicles and the municipality’s prior knowledge, the municipality allowed the situation to persist and worsen which resulted in potholes multiplying and becoming bigger and deeper.

In the circumstances, the Free State High Court held that “*a prudent municipality would ensure that potholes in its roads were covered as soon as it became aware of their existence and not place a burden on the road users to take evasive action to avoid hitting them and consequently damaging their vehicles.*”

Our courts thus do recognize the existence of a legal duty on municipalities to take reasonable measures to ensure that persons do not suffer harm as a result of potholes and manholes. However, each case must always be decided on its own facts and although this can be considered as a general rule, there are exceptions to every rule and it is not always going to find application.

## CONCLUSION

With the above in mind, it is clear that in a situation where a municipality has prior knowledge of existing potholes and manholes on public roads, pavements and sidewalks, the municipality has a legal duty to maintain the road in a good state of repair, and that where it fails to do so and others suffer harm as a result, the municipality ought to be held responsible to make good that harm, unless exceptional circumstances exist as to why this should not be the case.

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