



**IN THE HIGH COURT OF SOUTH AFRICA
WESTERN CAPE DIVISION, CAPE TOWN**

REPORTABLE

CASE NO: 7407/16

In the matter between:

TIAAN BOSHOFF

Plaintiff

and

THE CITY OF CAPE TOWN

Defendant

Coram: P.A.L.Gamble, J

Date of Hearing: 4 & 5 September; 23 October 2018

Date of Judgment: 27 February 2019

JUDGMENT DELIVERED ON WEDNESDAY 27 FEBRUARY 2019

GAMBLE, J:

INTRODUCTION

[1] On a chilly winter's night on Monday 11 August 2014, the plaintiff, Mr. Tiaan Boshoff (a 40 year old man from Port Elizabeth) fell into a stormwater channel near a neighbourhood shopping centre in Durbanville. He sustained serious

orthopaedic injuries and claims damages from the City of Cape Town as a consequence thereof.

[2] The plaintiff accepts that he was negligent in not keeping a proper lookout while he was walking across a public area adjacent to the channel belonging to the City, but he claims that the City created the source of the harm and that it too was negligent in the circumstances. The parties agreed that the court was only required to hear the merits of the claim with the quantum standing over for later determination.

SETTING THE SCENE

[3] To evaluate the plaintiff's claim fully it is necessary to describe the area in some detail. In the vicinity of the channel Langeberg Road runs through Durbanville from west to east¹. It bisects a residential area to the west which is where the plaintiff was staying with friends. As the road heads eastward it traverses a wide area of public open space which has been reserved for the future development of the R300 highway, a ring road around the City's southern and eastern suburbs which terminates several kilometres to the south of Langeberg Road. I shall adopt the parties' description of this area as "*the road reserve*"

[4] The road reserve runs in a broad swathe, generally from south to north, on either side of Langeberg Road and is a couple of hundred metres wide. The evidence is that due to the topography there is the potential for the run-off of

¹ While Google Maps suggests that the direction might more properly be described as north-west to south-east it is convenient to rely on east and west as the compass points.

stormwater on the road reserve, generally in a southerly direction. To accommodate the passage of such water under Langeberg Road the City installed a culvert in 1998 when it attended to the upgrade of the road. On the upstream side of the culvert there is a wide ditch choked-up with grass and reeds which runs into a large, exposed cement channel and headwall which is intended to funnel the water into the culvert. At its deepest the base of the channel is more than a one and a half metres below ground level. This is where the calamity occurred. For the sake of convenience a recent photograph of the scene is attached to this judgment as Annexure A.

[5] The plaintiff testified that at about 20h00 on the night in question he ventured up Langeberg Road (in an easterly direction) in search of a box of aspirins. He said that the friends with whom he was staying directed him to a neighbourhood convenience store (*“the 7/11”*) which was located in a small shopping centre to the north of Langeberg Road and about 20 - 30m beyond the channel. As he walked up Langeberg Road the plaintiff would have set off on the southern sidewalk for that is the side on which his friends' house is located. To reach the 7/11 the plaintiff would at some stage or other have had to cross over to the northern sidewalk of the road.

[6] At the point where Langeberg Road traverses the road reserve it is bounded on either side by tall blue gum trees which create additional shadow at night. At that point there is a tarred sidewalk on the southern side of the road (Annexure A depicts 2 men in orange overalls standing there), while on the northern side of the road there is a large gravel area which is accessible to pedestrians who have, over the years, carved out a number of paths under and next to the trees. As fate would have it, the plaintiff crossed Langeberg Road before he got to the road reserve and so

he proceeded up the northern sidewalk along a well-worn gravel path rather than along the formally constructed sidewalk on the southern side of Langeberg Road.

[7] Contemporaneous photographs of the area (as also Annexure A) show that the City had planted a series of wooden bollards adjacent to the gravel footpath. This would afford pedestrians ample space (more than 4m) within which to proceed up the road but would prevent motor vehicles from accessing the road reserve or adjacent areas. A pedestrian wishing to patronize the 7/11 would walk up the path with such bollards a couple of metres to his left. He could proceed about 50m further up the road to the intersection of Langeberg and Goedemoed Roads, turn left and then enter the parking area of the shopping centre from the latter road.

[8] Alternatively, a pedestrian might do what is very much part of human nature and take a short cut. This would involve making a 45 degree left turn towards the shopping centre just past the channel and follow another well-worn footpath towards the parking area of the shopping centre. That footpath too is bounded on its left by wooden bollards albeit somewhat further apart than those adjacent to the road. The channel is located next to these bollards which would serve as a barrier to vehicles which might seek to venture towards the road reserve or the channel. Those bollards would also tend to keep pedestrians a safe distance away from the channel.

THE MATERIAL ASPECTS OF THE EVIDENCE FOR THE PLAINTIFF

[9] The plaintiff said that as he crossed the road reserve he kept left and headed towards the 7/11 taking the short cut. However, instead of safely passing the channel to his left he effectively turned too early and plunged into it, somewhere in between points “G” and “J” on annexure A. He suffered a knock to the head and when he came to found that he had sustained a complete fracture of his left femur. He had evidently been lying in the channel for a couple of hours when he was found by a nearby security guard.

[10] According to the plaintiff he had been to the shopping centre only once before during the day but said that this was the first time that he had walked up Langeberg Road to the 7/11 at night and he was therefore in unfamiliar territory. Under cross examination the plaintiff readily conceded that he was then a recovering drug addict who had abused dagga and methamphetamine (“*tik*”) at the time of his fall. However, he denied that he had used any drug that evening or that his faculties were in any way impaired.

[11] The plaintiff adduced the evidence of Gerhardus Boshoff (who is no relation but will be referred to as “*Gerhard*” to avoid confusion) the friend with whom he had been staying at the time. Gerhard said that he and his wife had stayed at no. 22 Langeberg Road for some time and that the plaintiff had been living with them for about 2 months at the time of the accident. Gerhard said that both he and his wife had regularly walked up to the 7/11 without incident and that during the time that he had stayed with them, the plaintiff had done likewise. Gerhard further testified that he too had been a substance abuser and that he had subsequently ended his friendship with

the plaintiff because he considered that they were a bad influence on each other. In the circumstances it is fair to assume the accuracy of the statement by Gerhard which suggested that the plaintiff was familiar with the area.

THE LIGHTING ON THE NIGHT IN QUESTION

[12] The plaintiff made much of the inadequate lighting and overhead conditions that night, suggesting that certain of the street lights in the area were out of operation and that it was cloudy and overcast, thereby creating the impression that he had ventured into the dark, as it were. This evidence must be considered against the fact that it was full moon the night before and that it had been a so-called “*super moon*” suggesting additional luminance. Also, the case for the City was that it had been only partly overcast with passing clouds on the 11th of August. In regard to the lighting in the vicinity of the road reserve at the time, it is common cause that there were standard street lights on the northern side of Langeberg Road and that these complied with accepted international design standards.

[13] Gerhard testified that when he got to the scene where the plaintiff was lying in the channel, he observed that a single street light immediately to the west of the channel was out. It is common cause that the lamp pole was about 20m from the channel. (It is not visible on Annexure A but is just out of picture to the right). The plaintiff on the other hand said that he remembered that all of the street lights in the area were flicking on and off at the time. This evidence then generated an enquiry and debate all of its own. Initially the City’s case was that there had been a problem with a single light further to the west and down the road towards Gerhard’s house earlier in August 2015 but that this outage had been rectified by 5 August. However, after some

further enquiry the City fairly conceded that the problem might well have only been attended to after the accident.

[14] In regard to the lighting issue the City called Mr. Coetzee van Heerden, a senior municipal official charged with responsibility for lighting in the area. He testified that he lived close by in a street just off Langeberg Road. Mr. van Heerden is a dedicated electrical engineer who takes great pride in his work and the efficiency of his unit. He explained that the street lights in the area of the culvert had been upgraded in 2008 and used 250w high pressure sodium lamps mounted on poles that were 50m apart. Mr. van Heerden said that the lifespan of such a bulb was of the order of 7 years. Mr. van Heerden is a keen motorcyclist and he told the court how he regularly rode around his area of responsibility (which extended as far Mfuleni) and reported non-functional street lights.

[15] With reference to the plaintiff's allegation that the lights were flickering on and off at the time, Mr. van Heerden explained what he termed "*cycling*". He said that it sometimes happened that shortly before a street lamp's life expired it would flicker on and off. This is called cycling and is a relatively rare occurrence. With more than 30 years' experience in the field of street lighting Mr. van Heerden said he had never encountered 2 street lights adjacent to each other cycling, thereby refuting the plaintiff's evidence that a whole string of street lights was flickering. However, after persistent questioning by Mr. Nel (who appeared for the plaintiff) the witness eventually accepted that the light closest to the culvert may well have been out of order, thereby corroborating Gerhard's evidence.

[16] Mr. van Heerden went to great lengths to assess the degree of luminance in the immediate vicinity of the channel. Using a properly calibrated lux meter he found that the available light there was sufficient for one to be able to read a newspaper, as the witness so optimistically put it. But this evidence is undermined somewhat by Mr. van Heerden's fair concession that the nearest street light was non-functional. It was also pointed out that the area was partially illuminated by the headlights of passing traffic (and Langeberg Road is said to be a busy arterial route) and spillage from the shopping centre where the 7/11 was located.

[17] There can be little doubt that the area in the vicinity of the road reserve is dark – it is after all an area of land which lies fallow in anticipation of being converted into a highway one day. But when one wanders up the northern sidewalk adjacent to Langeberg Road, particularly where it traverses the road reserve, one's path is illuminated by the street lights along that side of the road. And, common sense tells one that if the path is poorly lit (perhaps because a streetlight is out or cycling) one would have to proceed with extra caution lest one was exposed to injury through a trip or fall.

[18] In the circumstances I am satisfied on the available evidence that the area in the vicinity of the channel was adequately illuminated on the night of 11 August 2014 and that the City was in no way remiss in failing to afford pedestrians seeking to use the well-worn footpath on the northern sidewalk of Langeberg Road sufficient lighting to enable them to proceed safely at night.

[19] What of the non-functional street light? As Mr. van Heerden explained, the City is responsible for a huge metropolitan area much of which is illuminated by

street lights under its auspices. It has put suitable reporting mechanisms in place to enable it to respond to electrical breakdowns (other than of course the euphemistically termed “outages” which the national power supplier visits on its users from time to time) and aims to address faults within time frames (a maximum of 14 days) that seem to me to be fair, given the City’s budgetary constraints, personnel and available resources. The fact that it took the City about 2 weeks to replace the street light which had fused does not, in my view, constitute negligence if regard is had to the extent of the duty of care it owes to its citizenry. In the circumstances, I am satisfied that the City has established that there was sufficient light to illuminate Langeberg Road in the vicinity of the road reserve. And, after all, the City is entitled to assume that people using its roads and particularly its sidewalks will exercise reasonable care and diligence.

[20] Under cross examination by Mr. Greig for the City the plaintiff boldly asserted that he was not negligent because he could not see where he was going. Mr. Nel, prudently in my view, did not seek to make much of this statement in argument and immediately conceded that the plaintiff was negligent in failing to keep a proper lookout, observe the channel and walk around it. After all, as Annexure A reflects, the channel adjacent to the culvert is made up of a large hole in the ground – probably about 3m wide, 5m long and 1,5m deep – and is comparable to a small plunge pool. The plaintiff’s suggestion that he was finding his way in pitch dark conditions does not withstand scrutiny.

THE CITY'S ALLEGED FAILURE TO SECURE THE AREA AND OTHER ALLEGED
GROUNDS OF NEGLIGENCE

[21] In his amended particulars of claim the plaintiff alleged, in addition to alleging a failure to ensure that the locality was sufficiently lit, the following grounds of negligence on the part of the City.

“6.1 *By failing to ensure that the stormwater channel was properly cordoned off and secured;*

6.2 *By failing to ensure that the location were (sic) kept in a safe condition for use by the public and the Plaintiff in particular;*

6.3 *By failing to ensure that the location did not constitute a source of danger when used by the public and the Plaintiff in particular;*

6.4 *By failing to ensure that the stormwater channel was properly marked and/or obstructed to draw the attention of the public and the Plaintiff in particular to the fact that the stormwater channel was not cordoned and therefore constituted a source of danger to the public;*

6.5 *By failing to ensure that the public and the Plaintiff in particular were properly aware of the presence of the open stormwater channel.*

6.6 *By failing to ensure that a proper system was in place to inspect the location on (sic) regular intervals.*

6.7

6.8 *At all material times of the Defendant owed a duty to the members of the public, including the Plaintiff to perform the act as described in one or more of paragraphs 6.1 to 6.7 above, and its failure/omission (as pleaded) constitutes a breach of its duty and was wrongful in the circumstances.*

7. *By reason of the foregoing, the defendant and/or its employees knew or ought to have known by failing to ensure that the location was properly maintained and inspected and the drain and/or stormwater channel was properly cordoned off and secured, it constituted a danger to the public, and to the Plaintiff in particular.”*

[22] I agree with Mr. Greig’s approach in argument that the essence of the plaintiff’s case on this leg, shorn of its elaborate verbiage, is based on the City’s alleged failure to warn of, or cordon off, the culvert. The plaintiff adduced no evidence on this score while the defendant presented the evidence of Mr. Johan Snyman, a civil engineer employed by the City as the area manager responsible for maintenance of roads and stormwater systems.

[23] Before considering this evidence, however, it is apposite to deal with one historical development subsequent to the plaintiff’s accident. Recent photographs of the channel (including Annexure A) show the erection of a simple agricultural-type fence made up of so-called “dropper” poles and 3 or 4 horizontal strands of wire. The location of the fence in the vicinity of the channel now renders a calamity such as the

plaintiff's a near impossibility. To get to the channel one would have to climb over, or through, the fence.

[24] Mr. Snyman pointed out (and the photographs confirm) that this rudimentary fence stretches along either side of Langeberg Road over the entire width of the road reserve. Mr. Snyman said that his department was directed to erect the fence about 2 or 3 years ago to restrict access to the road reserve to motor cyclists who were becoming an increasing source of noise and irritation to the local residents. The fence was not a response to the plaintiff's claim. In fact, said Mr. Steyn, he only came to hear of the injury to the plaintiff fairly recently when called upon by the City's lawyers to attend a consultation in relation to this trial.

[25] Mr. Steyn pointed out under cross examination that urban roads are not ordinarily fenced off by the municipality. Rural roads however are something different and might need to be fenced off to prevent livestock wandering onto the road surface. In the result the subsequent erection of the fence next to (and partially around) the channel is a red-herring in this matter: it has nothing to do with the plaintiff's claim and most certainly was not erected in response thereto.

[26] The purpose of Mr. Steyn's evidence was to demonstrate to the court what the risks were that were required to be evaluated by the City when it constructed a culvert such as that in question and what reasonable steps were required to be taken to ensure that it did not pose a danger to the public. He came across as a very intelligent and thoughtful witness who fully appreciated the risks which were required to be evaluated. He approached the case scientifically pointing out that there were

6663 headwalls² within the jurisdiction of the City and explaining what the cost would be of enclosing each of them. That cost was then compared to the City's overall budgetary constraints and, in particular, the budget made available to the department in which he was employed. The testimony highlighted not only the City's budgetary constraints but stressed the prioritization of the limited funds made available to the roads and storm water department. As Mr. Steyn explained, in the current financial year (2018/19) his department had only been allocated R78m to spend and this represented a mere 15% of what the department's actual budgetary requirements were.

[27] Mr. Steyn stressed that his department's main aim was to ensure a functional storm water system and that this was where much needed resources ought to be allocated. He testified that he would at all times assess the risk inherent in any particular culvert, its location, its depth and design and the incidence of accidents before deciding whether some form of protective barrier or fence was called for. This witness' evidence falls to be evaluated against the backdrop of the City's legal duties and obligations and it is to that which I now turn.

THE APPROACH TO MUNICIPAL LIABILITY IN SUCH CIRCUMSTANCES

[28] It is perhaps apposite to revert to first principles in delictual claims as the Supreme Court of Appeal directed in Telematrix³.

² In Annexure A the headwall runs between points K and G.

³ Telematrix (Pty) Ltd v Advertising Standards Authority SA 2006 (1) SA 461 (SCA) at [12]

“[12] The first principle of the law of delict, which is so easily forgotten and hardly appears in any local text on the subject, is... that everyone has to bear the loss he or she suffers..... Aquilian liability provides for an exception to the rule and, in order to be liable for the loss of someone else, the act or omission of the defendant must have been wrongful and negligent and have caused the loss. But the fact that an act is negligent does not make it wrongful although foreseeability of damage may be a factor in establishing whether or not a particular act was wrongful. To elevate negligence to the determining factor confuses wrongfulness with negligence and leads to the absorption of the English law of tort of negligence into our law, thereby distorting it.”

[29] The cases involving alleged municipal liability for injuries through pedestrian trips and falls and the like are numerous.⁴ Butters is probably the *locus classicus*, and its facts are not entirely dissimilar to the present case. A 72 year old man fell into the canalized part of the Liesbeeck River adjacent to a parking area behind a shopping centre in Rondebosch in the dark as he was making his way from his car to a restaurant. The canal was several metres wide and more than 2,5m deep and the plaintiff sustained serious injuries after he slipped and fell.

[30] In finding that the plaintiff was partly to blame for his injuries (25%), the court found the municipality to be far more culpable in the circumstances. Mr. Nel modelled his argument on this decision and asked the court to make a similar

⁴ Butters v Cape Town Municipality 1993 (3) SA 521 (C); Cape Town Municipality v Bakkerud 2000 (3) SA 1049 (SCA); Cape Town Metropolitan Council v Graham 2001 (1) SA 1197 (SCA); Judd v Nelson Mandela Bay Municipality [2010] ZAECPHC 10 (23 March 2010); James v City of Cape Town [2013] ZAWCHC 110 (14 August 2013)

apportionment. In *Butters*, the court conducted a thorough review of all the relevant authorities and cautioned that in each instance where such claims are brought –

*“(E)ach...set of circumstances will have to be assessed on its own merits, and against the background of its own facts, and the question of the defendant’s legal duties and liabilities, if any, in each such situation will have to be decided separately and in the light of the relevant facts pertaining to each such case. The existence or non-existence of duties and liabilities on the part of the defendant in such other hypothetical cases cannot assist this Court in the decision of this case.”*⁵

[31] In *Graham*, a case involving a claim for damages following a rock fall on Chapman’s Peak Drive, the Supreme Court of Appeal restated the approach thus.

“[7] Turning to the question of negligence, it is now well established that whether in any particular case the precautions taken to guard against foreseeable harm can be regarded as reasonable or not depend upon a consideration of all the relevant circumstances and involves a value judgment which is to be made by balancing various competing considerations. These would ordinarily be

‘(a) the degree or extent of the risk created by the actor’s conduct; (b) the gravity of the possible consequences if the risk of harm that materialises; (c) the utility of the actor’s conduct; and (d) the burden of eliminating the risk of harm.’

⁵ At 529 I-J

If a reasonable person in the position of the defendant would have done no more than was actually done, there is, of course, no negligence.”⁶

[32] Bakkerud was a case involving a fall into a long-standing hole in the pavement adjacent to a Sea Point street in which the Supreme Court of Appeal had to consider whether the municipality was to be held liable for its omission to effect repairs to the hole. In the course of a detailed judgment the learned judge of appeal proceeded to review and reconsider the well-established line of cases affording so-called “*municipal immunity*” for the failure by a local authority to repair streets and sidewalks which it was empowered, but not obliged, to build.⁷ The import of those cases, as the law has developed over the years, has led to some now arguing that there was in fact a general immunity for municipalities to claims arising from unrepaired streets and sidewalks and the extrapolation of that principle has led to attempts to broaden the ambit of the exemption even further.

[33] Cognizant of these developments and conscious of the fact that the case before it fell squarely within the established municipal immunity parameters, the Supreme Court of Appeal stated the following.

“[17]...(W)hen a court is required to consider whether a legal duty should be imposed in a given situation the ‘balance ultimately struck must be harmonious with the public’s notion of what justice demands’...

⁶ 1203H

⁷ See for example Halliwell v Johannesburg Municipal Council 1912 AD 659; Municipality of Bulawayo v Stewart 1916 AD 357; Cape Town Municipality v Clohessy 1922 AD 4; Moulang v Port Elizabeth Municipality 1958 (2) SA 518 (A)

[27] While the Court a quo's conclusion that it was open to it to re-visit the general or relative immunity of municipalities and, if justification existed, to jettison the notion, was therefore correct, I think that, having done so, it was wrong to substitute for it what amounts to a blanket imposition upon municipalities generally of a legal duty to repair roads and pavements. In my view, it has to be recognised that in applying the test of what the legal convictions of the community demand and reaching a particular conclusion, the Courts are not laying down principles of law intended to be generally applicable. They are making value judgments ad hoc.

[28] A minuscule and underfunded local authority with many other more pressing claims upon its shallow purse, and which has not kept in repair a little used lane in which small potholes have developed which are easily visible to and avoidable by anyone keeping a reasonable look-out, may well be thought to be under no legal duty to repair them or even to warn of their presence. A large and well-funded municipality which has failed to keep in repair a pavement habitually thronged with pedestrians so densely concentrated that it is extremely difficult to see the surface of the pavement, or to take evasive action to avoid potholes of a substantial size and depth, may well be under a legal duty to repair such potholes or to barricade or otherwise warn of them. There can be no principle of law that all municipalities have at all times a legal duty to repair or warn the public whenever and whatever potholes may occur in whatever pavement or streets may be vested in them.

[29] *It is tempting to construct such a legal duty on the strength of a sense of security engendered by the mere provision of a street or pavement by a municipality but I do not think that one can generalize in that regard. It is axiomatic that man-made streets and pavements will not always be in the pristine condition in which they were when first constructed and that it will be well-nigh impossible for even the largest and most well-funded municipalities to keep them all in that state at all times. A reasonable sense of proportion is called for. The public must be taken to realise that and to have care for his own safety when using the roads and pavements.*

[30] *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 to warn on a municipality. Obvious cases would be those in which difficult to see holes develop in a much used street or pavement which is frequently so crowded that the holes are upon one before one has had sufficient opportunity to see and to negotiate them. Another example, admittedly extreme, would be a crevice caused by an earth tremor and spanning a road entirely. The variety of conceivable situations which could arise is infinite.*

[31] *Per contra , it would, I think, be going too far to impose a legal duty on all municipalities to maintain a billiard table-like surface upon all pavements, free of any subsidences or other irregularities which might cause an unwary pedestrian to stumble and possibly fall. It will be for a plaintiff to place before the court in any given case sufficient evidence to enable it to conclude that a legal duty to repair or to warn should be held to have existed. It would also be*

for a plaintiff to prove that the failure to repair or to warn was blameworthy (attributable to culpa). It is said 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 and blameworthiness in failing to fulfil it 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.”

[34] I am mindful that we are not dealing in this case with a pothole in a pavement or street *per se*. Nevertheless, the facts of this case do focus on the general use by the public of a sidewalk adjacent to a public road and the facts illustrate the potential pitfalls (if I may be permitted to use the pun) which might confront such a pedestrian in the vicinity of the channel. In the circumstances I believe that it is fair to approach the plaintiff’s claim along the lines suggested in Bakkerud and Graham.

[35] There can be no debate that when it constructed the channel adjacent to the culvert the City was creating a potential source of harm – really a large open pit into which an errant pedestrian might fall. And when referring to pedestrians one would have to include joggers, cyclists, skateboarders and all the other classes of people who tend to occupy our sidewalks these days.

[36] In Annexure B hereto the channel is depicted in the direction of the 7/11 and the bollards parallel to Langeberg Road are clearly visible. So too are the bollards which go off at an angle and guide one safely past the headwall of the channel

towards the shopping centre. Undoubtedly, both sets of bollards were intended to keep vehicular traffic (be they cars, motorcycles or cycles) from entering upon the sidewalk and ultimately the road reserve. But they also served a useful secondary purpose – to guide pedestrians around the hazard as the footpaths visible on annexure B demonstrate.

[37] The question that then arises is whether it was incumbent on the City to take any further steps to warn the public of the hazard it had lawfully created. Applying the *dicta* in Bakkerud and Graham, the answer to that question requires the court to exercise a value judgment after due consideration of all the relevant factors. In Administrateur, Natal⁸ the Appellate Division cited with approval the following passage from Fleming, The Law of Torts, 4th ed at 136.

“In short, recognition of a duty of care is the outcome of a value judgment, that the plaintiff’s invaded interest is deemed worthy of legal protection against negligent interference by conduct of the kind alleged against the defendant. In the decision whether or not there is a duty, many factors interplay; the hand of history, our ideas of morals and justice, the convenience of administering the rule and our social ideas as to where the loss should fall. Hence, the incidence and extent of duties are liable to adjustment in light of the constant shifts and changes in community attitudes.”

[38] There can be no doubting the necessity and utility of constructing the channel and headwall: it is advisable and reasonable to divert stormwater flowing

⁸ Administrateur, Natal v Trust Bank van Afrika Bpk 1979 (3) SA 824 (A) at 833J - 834A

down the road reserve from the road surface of Langeberg Road. The “*utility*” factor referred to in Graham is therefore readily established, as the evidence of Mr. Steyn demonstrates. Similarly, the degree of potential harm implicit in the construction of the channel is self-evident: the drop is significant and a person inadvertently falling into the channel could be expected to sustain serious injuries, as the plaintiff did.

[39] The burden of eliminating the risk of harm is not extensive in this instance. While a protective barrier made up of some steel piping would not unduly tax the City’s coffers, the subsequent but unrelated installation of a rudimentary fence certainly has significantly reduced the risk of future accidents. The real question in this case is whether it was reasonable for the City to foresee that someone might wander off a well-defined and used path and plunge into the channel.

[40] In considering the answer to that question, a court will have regard to the fact that the channel is located away from a quiet residential area, close to an open field in a locality where not many pedestrians would ordinarily be expected to venture.⁹ But even if that were the case, and it was reasonable to anticipate someone’s morbid fascination with the base of a cement channel, the pit is so large and visible that the City would be entitled to assume that such an adventurer would approach with caution and keep away from the danger, certainly during the daytime.

[41] What of the notional nocturnal wanderer? It certainly is not beyond the realms of speculation that someone may wind his way up the path towards the 7/11 at night. Nor is it unreasonable to anticipate that such a pedestrian might take the short-

⁹ October v Nelson Mandela Bay Municipality [2008] ZAECHC 205 at [26]

cut across to the shopping centre. But a reasonable local authority would, in my view, be entitled to assume that such a person would be guided by the bollards it had installed and keep away from the hazard. After all the large void occasioned by the channel would still have been visible in the available ambient light and would have presented to the reasonable pedestrian as just that – a large dark area where danger might lurk. And, adopting the cautioning words of the Supreme Court of Appeal in Bakkerud, members of the public are expected to have regard for their own safety when using the City's roads and sidewalks and cannot demand that they be protected against their own foolhardiness.

CONCLUSION

[42] In the circumstances I am satisfied that the City had taken adequate steps to expose the source of harm to the public and that the legal convictions of the community would not expect it to cater for heedless behavior by nocturnal pedestrians in a low traffic area well off the roadway. In the result I conclude that the plaintiff has not established that the defendant was negligent as alleged, or at all, and his claim must therefore fail.

Accordingly it is ordered that the plaintiff's claim is dismissed with costs.

GAMBLE, J