



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

**Case number no: 20111/2012**

In the matter between:

**CHRISTIAN JACOBUS VAN STADEN**

Plaintiff

and

**DEPARTMENT OF INFRASTRUCTURE, WESTERN CAPE**

Defendant

**Coram** : Nziweni, J

**Heard** : 04 September 2025

**Delivered** : 08 June 2026

**Summary** : Delict – Public Authority Liability — Road maintenance — Omission to repair road surface — Motorcyclist striking large pothole — Hazard measuring approximately 600 mm by 500 mm and existing on roadway for several weeks — Pothole constituting a hidden trap difficult for road users to detect. — Public authority deemed to have constructive notice of the defect due to the substantial size of the pothole and the prolonged period of its existence- Wrongfulness — Failure of defendant to maintain public road under its control — Public authority possessing a positive legal duty to keep roads in a reasonably safe condition for public use — Failure to detect and repair severe road defect over several weeks constituting a wrongful omission. Negligence — Proof of — Diligens paterfamilias — Reasonable foreseeability of harm to road users — Failure by public authority to execute a

proper, routine road inspection and maintenance system — Incomplete maintenance logbooks indicating deficient operational protocols — Negligence established.

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## **ORDER**

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1. The defendant is liable for the plaintiff's proven or agreed damages.
  2. The claim against the first defendant is dismissed.
  3. The second defendant is to pay the costs of the plaintiff on attorney and client scale, such costs to include counsel fees and the costs of the expert witnesses called by the plaintiff.
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## **JUDGMENT DELIVERED ELECTRONICALLY**

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**Nziweni, J**

### **Introduction**

[1] On the afternoon of 1 January 2012, under clear and bright weather conditions, the plaintiff was riding his motorcycle northbound, toward George, on the main road ("MR347"), between Blanco and George Airport, near the Geelhoutboom turn-off in George. The plaintiff contends that while driving, without any fault or negligence on his part, but due to the negligence of the defendant in permitting the road to remain in an unsafe and dangerous condition unknown to him; he hit a pothole about the size of a size 11 Crock shoe, measuring 600 mm by 500 mm, and he lost control of his motorcycle. As a result, he sustained severe leg injuries that necessitated amputation, resulting in the permanent loss of his limb.

[2] The plaintiff alleges, inter alia, that the defendant who owed him a duty of care as a motorist breached that duty of care through wrongful commissions that were the proximate cause of his injury. Thus, this is a delictual action for personal injury that originates from a pothole which the plaintiff alleges caused the accident that occurred.

[3] According to the evidence offered by the plaintiff, the impact damage occurred when the vehicle struck the far exit wall of the pothole. Conversely, the defendant contends that; had a pothole been present at the location, the motorcycle would have safely cleared it.

[4] To this end, the plaintiff launched this action to recover damages for personal injuries sustained in an accident while riding his 2002 BMW R 1150 GS motorcycle [also classified as an adventure motorcycle] on the main road ("MR347"), near the Geelhoutboom turn-off in George.

[5] The defendant acknowledges in its plea a duty of care to properly maintain public roads within its jurisdiction, including the MR347. This includes a duty to ensure that these roads do not pose actual or potential dangers to road users.

[6] The defendant, moreover, called several witnesses who were employees of the George Municipality at the critical time. Their evidence was led to substantiate the defendant's denial of any failure or negligence regarding its duty of care in respect of the public road in question.

[7] The parties agreed that the merits of the matter should be separated from the quantum aspect; consequently, an order was granted separating the two. This trial, therefore, relates solely to the liability portion of the dispute.

[8] Notwithstanding, this was a rather protracted trial [the transcript contains more than 1251 pages] that involved at least three expert witnesses and several other witnesses. This case, in my view, was also of extraordinary complexity. A proper analysis of the questions presented by this trial required this Court to delve deep into the facts of the matter.

[9] The matter involved a fact-intensive inquiry, as both parties presented extensive evidence during trial to demonstrate their positions. As such, I had to write an exhaustive judgment, in which I discuss and interrogate in detail, the facts and the law applicable to each of the issues. Once again, I wish to thank the parties for their patience.

[10] During the argument stage the defendant submitted that the existence of the pothole was no longer in dispute. In the defendant's heads of argument, the following is stated: "it is common cause that that the alleged pothole was located at approximately km 5.490 at the intersection with Division Road 1599 (DR 1599) in the right-hand side lane (RHS), north bound lane travelling from George Airport towards Blanco" ("km 5,490 pothole") . . .

(1) . . .

9. It is respectfully submitted that the Defendant **disputed**, from inception of the matter, that the km 5,490 pothole existed on the MR347 on the day of the accident.

10. Although these **dispute/issues** will be fully traversed below under **costs heading**, it is respectfully submitted that Defendant's opposition to the pothole had **initially** stemmed from Plaintiff's **non-compliance** with the rules in respect of proper discovery or relevant

documents and artifacts which would have **limited issues** and **possibly prompted settlement**, namely, the accident report statement, police sketch plans, accident scene photographs, and software/digital equipment and data, inter alia.

11. Notwithstanding the above, Defendant respectfully submits and highlights the testimony of Defendant's witness, Ms Alta Nigrini, who was a traffic officer with the George Traffic Department at the time of the accident, and who testified on the **03 December 2024**, a year after the trial commenced, that she had **seen** the **pothole** depicted in the photographs in Photo Bundle (: pp P1 - P16), on the day of the accident.

12. in light of Ms Nigrini's testimony, Defendant's further submissions will be premised on the km 5, 490 pothole **being present** on the **MR347** at the time of the accident." Underlining added.

[11] Another critical factor that shapes the determination of this case; is that the defendant's concession has drastically narrowed the issues in dispute.

[12] The real controversy here is whether the plaintiff has established wrongfulness, causation, and negligence on the part of the defendant. Thus, the plaintiff bears the onus of proving both fault and causation.

## **The evidence**

### **Plaintiff's testimony**

[13] On the morning of 1 January 2012, the Plaintiff, who resided in Heather Park, was with his family at Glentana Beach. To travel to Glentana Beach, he had used the MR 347, a road commonly referred to as Airport Road.

[14] The family then decided to leave Glentana Beach and go back home to George for a braai. He drove behind his family on his motorcycle. Whilst driving his motorcycle he was wearing a full-face helmet, his motorcycle jacket, leather hand gloves and Khaki short pants.

[15] He was driving toward George from the airport side, travelling down a slight incline. Because he only used this road two or three times a month, with a motor vehicle, he did not know it well.

[16] He had bought the motorcycle from his father four months before the accident and had it serviced at a BMW dealership. The motorcycle's dual-purpose tyres were brand new, having been purchased two to three weeks before the accident. Prior to the accident, he possessed approximately 15 years of experience operating both dual-purpose and off-road motorcycles. However, he had only obtained his licence three months earlier so that he could ride with his wife.

[17] While driving toward the Geelhoutboom turn-off, he monitored the intersection to scan the road ahead. According to him, motorcycle riders generally look well beyond two metres ahead on a tarred road. He states that he was travelling at a speed of approximately 80 kilometres per hour. He was not in a rush to get home and was simply cruising.

[18] As he proceeded, he suddenly experienced a severe jolt to the handlebars of his motorcycle. His initial assumption was that he had struck or ridden through an object. The incident unfolded rapidly; immediately after hearing the wheel rim make

contact with the tarred road, he experienced what he characterised as a tank slapper and began losing control of the motorcycle. He testified that he could not confirm feeling a significant dip. It is his testimony that he ultimately collided with a yield sign pole before coming to rest on the grass verge of the embankment.

[19] During cross examination he testified that he cannot say where exactly he felt the jolt, but he would say he felt it near the pothole when he travelled through it. When shown a photograph of the pothole and its location during cross-examination, he confirmed that it was the point where he felt the impact.

[20] He was seen at the scene by Lourens Steytler, who immediately came to his assistance and called an ambulance. He had no prior acquaintance with Steytler nor that of his mother. He asked Steytler to call his wife, but Steytler could not reach her. Subsequently, members of his family, including his father, arrived at the scene of the accident. His father then returned to the site the following day to take photographs. As a direct result of the injuries he sustained in the collision, his leg had to be amputated.

[21] He has no recollection of telling the police that he had a tyre burst, but it is possible that he said so. It was his testimony that he was experiencing a lot of pain at that moment. He remains adamant that at the time of the incident, there was an absence of warning signs alerting road users to the presence of potholes. He did not see any open potholes; he only observed dark patches that appeared to be potholes that had been repaired.

[22] When he was recalled by Ms Pillay SC to be confronted with the statement he had made when charged with reckless and negligent driving, he testified that he could not recall whether that police statement had been read back to him.

[23] He was also cross-examined regarding why he did not tell the police about the pothole. It was also put to him that Captain Meyer would testify that the plaintiff made no reference to a pothole at the time.

[24] **Lourens Steytler** testified that at the time of the incident, he was 19 years old and working at Haygrove Eden Farm. He stated that on the day in question, he witnessed the accident. He testified that he was on his way back to the farm. The motorcycle was travelling in the opposite direction to him, in the opposite lane. He then witnessed a lot of movement, a dust cloud and the motorcycle travelling across the island ending up in the embarkment. He called the emergency service. He rushed to where the Plaintiff was and in the process he picked up his bank cards and wallet on the road. At that time, he did not know the plaintiff. When he enquired from the plaintiff as to what had happened; the plaintiff said he had either hit something or drove over something in the road.

[25] His initial thought was that he hit an animal or another vehicle. But he saw nothing and then he thought he had hit a pothole that was located just before Geelhout turnoff. The pothole has existed for a while before the accident. He testified that he travelled that route almost every single day.

[26] It was his testimony that the pothole has been a point of discussion amongst him and his colleague and his mother. When the plaintiff's family arrived on the scene, he

had told them about the pothole. He testified that the plaintiff's father had on 02 January 2012, come back to the farm and took photographs and one of the photographs that the father took also depicted him [Steytler]. He was present when the photographs were taken. He disputed that what is contained in the police report was what he told the police. It was his testimony that the pothole was difficult to spot. He says it is difficult to spot the pothole because it is almost the same colour on the inside as the road surface.

[27] When Mr Steytler was recalled by the defendant, it was put to him by Ms Pillay that his version of the events at the scene, specifically regarding his reporting of the pothole to the police, was entirely uncorroborated by the objective findings contained in the police report.

[28] He replied that he had absolutely no reason to lie and stood to gain nothing from the proceedings. He maintained that the events occurred exactly as he had explained. According to him, he witnessed the accident, arrived at the scene, and provided his version directly to a police officer. He also testified that he felt his character was being attacked by assertions that his testimony was untrue, he emphasised that he could not account for what other individuals chose to record in their reports. He concluded by stating that his version of events would not change because it represented the truth.

[29] **Ms Rina Bryston** testified that she had migrated to New Zealand, where she was a permanent resident at the time of her testimony. She is the mother of Mr Steytler. On the day of the incident, she resided at Golf Park, Witteplaat, George,

and was employed at Haygrove Farm. According to her, the MR347 is the main road linking George with the George Airport and also leads to the farm where she was employed. The main gate of the farm where she worked is on Geelboom Road.

[30] On 1 January 2012, while she was at home on the farm, she received a call from her son. She testified that her son, who was 19 years old at the time, was distraught when he called her. His son told her that he witnessed a motorcycle accident that was serious.

[31] She testified that when her son telephonically reported the accident to her, he referred to a 'damn pothole'. She further testified that she subsequently proceeded to the scene and captured a photograph of the pothole in question on 1 January 2012, with her cell phone. It was her testimony that when her son showed her where the accident happened, she realised that the pothole involved was the same one they had complained about and had warned her children about several times.

[32] She testified that because her children frequently drove her vehicle, she had warned them to avoid that specific pothole so they would not disrupt the wheel alignment due to its size. She testified that she had never met the plaintiff before and stated that she had no incentive to lie.

[33] According to her, the pothole was originally quite small but continuously expanded, causing frustration. It had remained at its current large size for approximately six weeks and was a regular topic of discussion among herself, her colleagues, and her family.

[34] **Mrs. Van Staden** testified that she viewed the photographs of the scene, which form part of Exhibit P, on 2 January 2012. She stated that her father-in-law had borrowed her professional camera to take photographs of the accident scene. It was her testimony that the camera's metadata indicates that the photographs taken by her father-in-law were captured on 2 January 2012.

[35] Plaintiff's **expert witness, Mr Willie Du Preez**, testified that he is a civil engineer and he has experience in testifying in a number of matters that involve potholes. The expert noted that he had previously compiled investigative reports for other motorcycle accidents. He testified that he based his opinion on the photographs of the scene that were provided to him. This is so because he only received instruction in 2020, and by that time the layout of the road in question had changed.

[36] He also testified that warning signs are used to alert drivers to hazardous and potential hazardous conditions. It is his testimony that warning signs indicate a need for extra caution by road users and may require a reduction in speed or other manoeuvres in the interest of their safety and that of other drivers. He also testified regarding causes of a pothole.

[37] He opined that the growth of a pothole is mainly accelerated by moisture and the traffic across it because overtime a vehicles' wheels hit the pothole and loosen and break up further pieces of the road surface. He testified that; depending on the traffic

and the rain, a pothole can take some time to form. And it is not something that forms overnight.

[38] It is his testimony that; as soon as a pothole forms and it is noticed it is critical for it to be repaired as quickly as possible. He supported the evidence of Mr Steytler and Ms Bryston that a pothole of such size is consistent with an existence of 2 weeks.

[39] The expert classified the defect as a "degree five" pothole because its diameter exceeded 300 millimetres and its depth was greater than 15 millimetres. To demonstrate its scale, he juxtaposed the pothole against a Croc shoe placed next to it by Miss Bryston (as shown in photo TB20). Operating on the conservative assumption that the shoe was a size 10; even though it was a size 11; the expert calculated that the pothole's diameter actually exceeded 600 millimetres. Consequently, according to him, the pothole was twice the minimum threshold required for a degree five classification.

[40] The expert further testified that because the pothole exceeded 600 millimetres in length, the motorcycle's front wheel could not have crossed it without dropping in and hitting the rear face. He explained that the black marks on one side of the pothole in photograph TB20 represent tyre rubber residue. This residue occurs when a tyre impacts the rear side of a defect, marking what is known as the pothole's exit side. In contrast to Mr Craig's [defendant's expert witness] evidence, Mr Du Preez testified that the plaintiff's motorcycle tyre would fit completely inside a pothole of the dimensions that the plaintiff says he struck.

[41] The expert noted that this impact mechanism is consistent with the damaged rim, which caused the tyre to deflate immediately. He explicitly ruled out the possibility that the front wheel was damaged when the motorcycle travelled across the ramp onto the island. Furthermore, he testified that the pothole caused both the sudden deflation and the indentation on the motorcycle's rim. He concluded that the overall damage perfectly aligns with the impact of striking a large pothole.

[42] Pertaining the faint black mark on the tarmac beyond the pothole's circumference (shown in Exhibits P7 and P8), the expert testified that it was caused by numerous vehicles driving across the defect over time.

The expert noted that this stretch of road surface was in poor condition and required remedial action. To support this, he quoted the defendant's expert witness, Mr John Craig, whose report stated that potholes had previously been patched in the immediate area. And that the overall pavement condition was "fair to poor." Consequently, the plaintiff's expert testified that Mr Craig's findings directly aligned with his own finding that the condition of the relevant road was poor.

[43] The expert testified that the roads authority should have erected warning signs regardless of the immediate presence of potholes. He emphasised that the road's ongoing susceptibility to defects is clearly borne out by the exhibits, which reveal a history of numerous past repairs.

[44] The plaintiff's expert also testified that a prudent roads authority would have acted upon the reports and complaints [as testified to by Ms Bryston] regarding the pothole that had been lodged prior to the accident.

[45] The expert further testified that the "Priority A" maintenance classification in Mr Schoeman's report signified defects that required urgent, continuous remediation on the very stretch of road.

[46] The plaintiff's expert concluded that the roads authority failed in its duties by neglecting to erect warning signs and failing to conduct adequate visual inspections. In his view, bi-monthly inspections are insufficient to identify dangerous potholes. He further noted that the authority failed to take proactive, preventative action when the defects first emerged. Furthermore, he criticized the authority's administrative record-keeping:

- a. Daily Worksheets: These are contractually or forensically worthless because they fail to specify the exact location or nature of the maintenance. General claims of patching somewhere along a 13,000-metre stretch fail to prove that work was done at the actual accident site.
- b. Accident Report (AR) Form: This document is unreliable due to a lack of diligence and Captain Meyer's failure to conduct an in loco inspection. The omission of critical details, such as the pothole itself, means the AR form cannot reliably assist in determining the cause of the accident. The plaintiff's expert noted that his conclusions were based on the evidence available at that time.

[47] The **next expert witness called by the plaintiff** was **Mr Grobbelaar**, a mechanical engineer. He testified that one of his master's degree topics was the optimisation of vehicle suspensions using numerical integration techniques. Part of his professional experience also includes designing and developing engineering solutions in respect of vehicle suspension systems from 1984 to 1987.

[48] He indicated that throughout his career, he has gained expert knowledge as a motor vehicle accident reconstruction expert, having investigated in excess of 4,800 motor vehicle accidents. And that also includes motorcycles.

[49] He testified that when he inspected the front wheel of the motorcycle there was no cut in the tyre. He thus concluded that, the tyre wasn't cut through by whatever impact occurred.

[50] The Mr Grobbelaar, further testified on the importance of warning signs placed at a sufficient distance to caution road users about potential potholes. According to him, the warning signs would give a motorcyclist a chance to adjust speed.

[51] Mr Grobbelaar is of the opinion that the exit edge of the pothole forms a sharp, vertical face. He testified that colliding with such an edge is structurally similar to striking a vertical curb of the exact same height. He invited the court to imagine the impact of travelling at 80 or 100 kilometres per hour straight into a curb of that height without taking evasive action. This mechanism is illustrated by the three sketches provided in paragraph 9.3 of his investigative report. Consequently, he concluded

that colliding with such a sharp edge would probably cause the observed indentation and damage to the rim of the motorcycle's front wheel.

[52] He further testified by illustrating this mechanism by drawing an analogy to an 80-millimetre vertical curb. He explained that if a rider is aware of the curb's presence, they can anticipate the impact, lift the front of the motorcycle, and clear the obstacle without sustaining damage. Conversely, if the rider is unaware of the curb and riding blindly at the same speed, they will strike it directly. The expert testified that the latter scenario mirrors the incident involving the pothole; because the plaintiff could not anticipate the hazard, he struck it at full speed, resulting in the rim damage.

[53] The expert noted that both sides agreed that the tyre would compress first upon impact. In response to the defendant's expert's theories, he explained that even if the depth of the pothole is roughly equal to the profile height of the tyre, rim damage remains highly probable. He testified that the defendant's hypothesis fails to account for three combined critical factors: first, the dynamic compression and severe pinching of the rubber tyre and tread between the wheel rim and the hard road surface; second, the specific height of the rim's lip; and third, the fact that the motorcycle's front wheel drops into the hole on a downward trajectory, accelerated and forced downward by the suspension system.

[54] When confronted by Ms Pillay SC, defendant's counsel with the defendant's erstwhile position that no pothole at the scene caused the accident, Mr Grobbelaar testified that, in the absence of a pothole, alternative explanations would have to be

found for three critical objective facts: the deep indentation in the wheel rim, the sudden deflation of the tyre, and the subsequent reason why the plaintiff lost control of his motorcycle. In other words, he emphasised that a cause entirely unrelated to a pothole impact would have to be established to explain the full sequence of these objective physical findings.

**Defendant's witnesses:**

[55] **Mr Deon Jansen** testified that on the day of the accident, just before 12: 00 p.m., he was on his way to visit his son when he heard a motorcycle approaching. Suddenly, he then heard a sound resembling a tyre bursting.

[56] Upon looking up, he observed two distinct objects; a man and a motorcycle, airborne. This was followed immediately by a loud thud as both objects impacted a traffic sign. The cyclists ultimately landed in a roadside ditch. He immediately ran to the scene of the crash. On the scene he saw that the plaintiff was injured. He then went to look for help.

[57] He ran after a passing vehicle and asked the driver to phone for an ambulance, but no vehicle stopped to assist him. Consequently, he returned to the crash scene, where he remained the only person present at that material time. He testified that he was very shaky at the time because he thought the plaintiff was dead. Regarding his state of mind during the aftermath of these events, the witness testified: "On that day I was so much confused".

[58] While remaining at the scene, he observed Mr Steytler giving a statement to the police. Although Mr Jansen had no independent recollection of Mr Steytler speaking with the plaintiff at the scene, he did not dispute that this interaction occurred or that it was Mr Steytler who ultimately summoned the ambulance. Eventually, the ambulance and emergency services arrived at the scene.

[59] **Mr Steenkamp** explained that his core responsibility was to oversee the maintenance of the road network under his jurisdiction, ensuring that the work was executed by the operational teams under his command. As the head of his division, he directly managed four superintendents: two routine maintenance superintendents [one for the George area and one for the Riversdale area], one reseal superintendent, and one re-gravel superintendent. His role required him to assist and guide these subordinates in prioritising maintenance schedules for their respective field teams based on weekly and monthly routine inspection protocols.

[60] Following the incident, Mr Steenkamp was tasked with conducting a targeted inspection of the scene on Main Road 347. When questioned regarding what he looked for during this specific site visit, he testified that he sought to identify the exact location of the accident and examine the road for defects. Based on the accident reports he received, he walked approximately 100 metres up and 100 metres down the road to inspect the immediate area.

[61] He testified that during this inspection, he could not find any potholes or structural defects of any kind along the 200-metre stretch he examined. While he recalled seeing some small patches on the centre line of the road on the northern

side the intersection [the Blanco side], he maintained that there were no signs of active potholes or recent pothole repairs on the southern side of the intersection.

[62] Mr Steenkamp concluded from the plaintiff's letter of demand that when the accident occurred on Sunday, 1 January 2012, a municipal standby team was on duty. He noted that this team remained operational during the holiday closure period to attend to major hazards or issues reported by the public, emergency services, or senior management. However, after consulting with both the relevant superintendent and the field teams, he confirmed that none of them had received any complaints regarding a pothole at the scene prior to the accident.

[63] Regarding the maintenance history of the MR347 from 1 July 2011 to 30 June 2012, a daily log (TB31) was required to be completed by team supervisors, documenting the date, road, section, and work performed. These records were captured into the municipal system. According to him, inspections were done on the following dates: 15 August 2011 – 18 October - 09 November -19 January 2012.

[64] He disputed the timeline of the pothole as testified by Ms Bryston and Mr Steytler. He testified that the pothole could not have been present weeks prior to the accident. To support this, he cited his own personal use of the road and the formal inspection schedule. The witness further testified that a pothole of that size would not go unnoticed by the community.

[65] He asserted that if a defect of that magnitude had developed on the road, the municipality would have received public complaints or queries notifying them of the

hazard. During cross examination, he acknowledged that a pothole of the size and nature in question does not form overnight, conceding that its development requires a period of time. He further stated that that if they had been aware of the pothole, they would not have left it in that condition.

[66] When explicitly asked during cross-examination how they managed to miss the pothole during his inspections, Mr Steenkamp, admitted that he did not know.

[67] The plaintiff's counsel also put it to Mr Steenkamp that allowing a pothole to grow to such a large size constitutes clear negligence. The witness rejected this assertion, testifying that a pothole on a heavily trafficked road like the MR347 can expand very quickly.

[68] The witness further testified that he conducted a post-accident inspection on 10 February, just over a month after the incident occurred. During this particular inspection, he did not observe the alleged 600 mm by 500 mm pothole at kilometre 5.6.

[69] In his official report, Mr, Steenkamp, strongly rejected the possibility of oversight. He asserted that it was impossible for him to have missed a pothole of that size without directing the maintenance team to repair it. He emphasised his extensive oversight role, which covered the entire region stretching from Plettenberg Bay to Heidelberg on the coastal side of the Outeniqua mountain range.

[70] Mr Steenkamp explained the municipality's policy regarding decision to place warning signs, testifying that they do not install signage specifically for individual potholes. He explained that if a road deteriorates to a condition where routine maintenance is no longer sustainable, the municipality's protocol is to escalate the matter to the provincial authority. The province is then requested to conduct an investigation and determine whether traffic warning signage should be deployed.

[71] The next defendant's witness to be called was **Mr Anthony Cupido**, he testified that at the time of the accident, he was employed by the Garden Route District Municipality as a Superintendent for Maintenance in the George division. At the critical time, MR347 fell under his control.

[72] He testified that his work entails conducting monthly inspections. Pursuant to the inspections, reports are submitted to management, who evaluate the data to verify and check the quality and completion of the road maintenance work performed during that month.

[73] He testified that on 19 January 2012 he did an inspection from kilometre 4 to kilometre 12 [includes MR 347]. During this inspection, amongst others, he was checking for obvious defects, specifically potholes and general surface degradation.

[74] He denied that a pothole measuring 600 mm by 500 mm existed at kilometre 5.6. It was his testimony that the pothole wasn't there on the 1st of January 2012. He testified that had the pothole been present on that date, it would have been recorded

as repaired. He admitted that according to the municipal system, the pothole was officially recorded as repaired on 19 April 2012.

[75] He further testified that had he seen the pothole, he would have reported it directly to the area supervisor and sent him to execute the necessary repairs. According to him, a pothole ranks as one of the highest priority maintenance activities within the municipality's operational framework.

[76] He conceded that for the period spanning from 1 July 2011 to 30 June 2012 he conducted only one planned inspection which took place on 19 January 2012. During cross-examination, Mr Cupido admitted that he could not remember the exact reason he conducted his inspection on 19 January 2012. He conceded to the proposition that someone may have phoned in to report an edge break or a pothole, prompting his visit to the site.

[77] According to him, when he came back from the inspection, he told his colleague, Mr Xalisa, that there were problems on kilometre 4 to kilometre 12, and Mr Xalisa went out the next day to go and fix the problems within the area where the pothole was.

[78] **Mr Xalisa** testified that he used to work for the George District Municipality. He started to work there from 2003 and retired in 2023. In 2012 he was working as a supervisor of the road maintenance. He testified that they used a logbook to give each report related to road maintenance. It was his testimony that his team was responsible, amongst others, for the patching of potholes.

[79] He also testified that once they become aware of a pothole, they either repair it or erect a warning sign. Regarding potholes of which they are unaware of, they rely on inspections done by the superintendent and the manager, as well as reports from municipal drivers patrolling the area and the members of the public. It was his testimony that there were a lot of potholes forming on this MR347 during end of 2011 and in the first few months of 2012.

[80] He testified that he did work on the MR347 on 20 January 2012. It was also his testimony that the accompanying logbook is materially incomplete. According to him, the logbook only indicates that the maintenance began at kilometre 4 but fails to reflect where the work ended or the total distance covered. He testified that the omission left him unable to determine the exact extent of the roadwork completed.

[81] **Mr Konstable** was also called to testify on behalf of the defendant, he testified that on 1 January 2012 [the date of the accident], he was employed and working at the George South African Police Service (SAPS), as a constable taking complaints. He testified that he attended the scene of the accident on the same day it occurred. He drew the official sketch plan [Exhibit F] of the accident. It was his testimony that he did not see a pothole there.

[82] **Ms Elise Meyer** testified that; on the day of the accident she was employed at the financial division of the South African Police Service in George. She testified that she went to the scene of the accident and she is the one who completed the accident report.

[83] She stated that she wrote in the Accident report the following:

“Accident report: Attended accident seen at 12:00 hours on Geelhoutboom Road, Blanco. Colonel Lang and Captain Meyer. Motorcycle registration number CAW . . . , silver and blue BMW motorcycle involved, front tyre burst, lost control.”

[84] She testified that she obtained the information from eyewitnesses as well as from her own observations. It was her testimony that the specific individuals who provided her with the information to complete the accident report were Mr Jansen as well as Mr Lourence Steytler. It was her testimony that the version of Mr Jansen and Mr Steytler were basically corroborating each other.

[85] She also denied that Mr Steytler told her about a pothole and added that according to the version that she got from both witnesses and her own observations: the road was smooth, and she did not observe any pothole. She further testified that while driving to the scene of the accident, she travelled directly past the specific section where the pothole was alleged to be located. However, she did not observe any pothole on the road surface.

[86] When it was put to her during cross examination that it is common cause between the plaintiff and the defendant that he was travelling on the R347 coming from the airport towards George when the accident happened. And that it was not on the Geelhoutboom Road.

[87] When she was presented with the photographs, which the parties agreed that they depicted the defect identified by the plaintiff's witnesses as the cause of the accident. Upon reviewing the images, she stated that the defect did not look like a pothole to her, asserting that a genuine pothole typically goes deeper into the road surface.

[88] The next witness to be called by the defendant was **Mr Cutshe**, who was tasked with the investigation of the criminal aspect of this case. He received the docket of this case for further investigation on 02 January 2012, and he took the plaintiff's warning statement, as he [the plaintiff] was a possible suspect, for reckless driving. He did not do further investigation because he was only told that he should take the warning statement. He did not take photographs of the scene. He speculated that perhaps photographers were not sent to the scene because only one driver was involved.

[89] The next defendant's witness was **Ms Kleyn**, who works at Haygrove Farms and also worked there during the the time of the incident. She testified that on the farm she only remembers the tunnels built in 2018, which are still there today. According to her, the tunnels reflected on exhibit P1 were definitely not on the farm in 2012. No pothole reports were submitted to the municipality by her.

[90] **Lieutenant Colonel Laing**, testified on behalf of the defendant that she works as at the George SAPS. She testified that she attended to the accident scene. Although she verified her attendance through her statement, she has no independent recollection of receiving the radio control call or traveling to the scene.

[91] The only thing she recalls is a man lying next to the road when she got to the scene.

[92] Defendant then called **Ms Alta Nigrini** to the stand. She testified that she was employed at the George Municipality Traffic Department when the accident occurred, as a traffic officer. She did a sweep of the scene, and that's where she could see where the point of impact was. She testified that during the sweep, they also inspect the road surface for damage, including the area where the pothole was located. Because there were no vehicle fragments, physical marks, or points of impact, they concluded that a tyre burst did not occur. Consequently, no scene markings were made.

[93] She testified that she remembered seeing the pothole at the scene on the day of the accident. As such she confirms that it was there.

[94] After Ms Nigrini, the defendant called **an expert witness Mr Schoeman**. He testified that he started his working career, with the Department of Transport, Western Cape Government. He started off with road construction. From there, he transferred to the Oudtshoorn regional office, where he primarily handled road maintenance. Later, he was promoted to Chief Engineer of Construction and Maintenance, overseeing 21 in-house projects for the department. He has since left the Department and currently operates as an independent consultant.

[95] He testified that repairing a centreline pothole carries a higher priority rating than servicing a road sign. He also testified that as the road is approaching the end of its life, more maintenance needs to be done. According to him, the maintenance regime must pick that up. He also testified that a road coming towards the end of its life would be susceptible to potholes.

[96] It is his testimony that the Department tries to extend the life of the asset as far as possible while keeping it functional and safe by doing maintenance on it. According to Mr Schoeman, based on the reports or information he had at his disposal related to the maintenance of the road in question, confirms that regular maintenance and inspections were conducted on this road section. Consequently, according to him, it is highly improbable that the alleged pothole existed at the time of the incident.

[97] Regarding Ms Nigrini's testimony, Mr Schoeman stated that the presence of a pothole was highly unlikely but not impossible. He conceded that since he was never at the accident scene, if Ms Nigrini testified that the pothole was there, her account stands. However, he also maintains that it is very unlikely for him that a pothole of this kind of presence on the road, would be driven over by maintenance teams and not be given attention to.

[98] Furthermore, from the information that was placed before him, he consequently, concluded that pothole P2 [the pothole in question] developed and was repaired between April 2010 and March 2013. However, he also testified that a more precise timeline could not be determined. According to him, it is unlikely that the alleged

pothole was left open from 1 January to 19 April, as suggested by the images in the trial bundle.

[99] It was his evidence that a pothole of the size in question would have taken several weeks to reach the size claimed.

[100] According to him, the defendant was giving special attention to the road in question because they knew that there was extra care needed on the section of road, as it was approaching the end of its life. It is his testimony that more than normal attention was being given to this section of road. And it was given a high priority of maintenance.

[101] He expected repair crews operating in that area around 21 December to have identified the pothole. He further testified that, based on available records and information, there is no evidence that a warning sign was in place on that section of the road during the period in question.

[102] It was also his testimony that if proper and optimal maintenance is done, the encounter of a general warning sign is not expected on an even road surface. According to him, the maintenance team's saying is always that 'a sign doesn't fix a pothole'. As such, a sign is only put up if they are unable to attend to a pothole. Even if the road is prone to potholes.

[103] He also testified that a pothole of that size will most probably prompt public complaints.

[104] The other expert witness called by the Defendant was **Mr John Craig**. He testified that, among his qualifications, he holds a BSc degree in Civil Engineering. Since 1986, he has worked in the fields of road design and construction. Additionally, he has extensive experience, providing advanced driver and riding instruction and is actively involved in motor vehicle accident reconstruction.

[105] The brief he received from the Defendant required him to focus on the accident reconstruction aspects of the matter, specifically the dynamics of the motorcycle.

[106] He testified that the evidence that was placed before him reveals that the plaintiff has provided no fewer than five conflicting versions of how this accident occurred. He testified further that his report systematically addresses each of these contradictions.

[107] Mr Craig testified that his analysis was based on the specific version wherein the plaintiff experienced a 'jolt' to the motorcycle. According to him, in that account, the plaintiff stated: "Being an experienced motorcycle rider, I knew instantly that I must have hit a pothole. However, that was a fleeting thought, as shortly thereafter I heard the rim of the motorcycle scraping against the road. Thereafter I lost control of my motorcycle and as a result myself and the motorcycle proceeded to skid, slide, sideways along the road until I hit the pavement..."

[108] In his testimony, Mr Craig pointed directly to different versions given by the plaintiff regarding how the accident occurred.

[109] Mr Craig testified that the defence took the initiative to definitively settle the dispute [concerning whether the pothole alleged by the plaintiff caused the accident] through empirical testing. This was to ensure that they could not be accused of understating the hazard. They obtained an identical motorcycle and simulated the scene, digging a test hole that was significantly deeper, steeper, and sharper than the pothole in question. During cross examination, Mr Craig testified that the test rider possessed precise knowledge of the pothole's location, whereas the plaintiff was entirely unaware of it.

[110] Mr Craig further noted that one of the advantages of the chosen test area was the presence of guidelines, which ensured the test rider hit the pothole accurately, a task he acknowledged is otherwise difficult to achieve.

[111] They ran the motorcycle over this pothole at 60, 80, and 100 kilometres per hour. According to him, in every single simulation, the front wheel completely skipped over the hole, never even touching the back lip. He further testified that this evidence entirely dismantles Mr Grobbelaar's theoretical 'tyre-in-a-box' demonstration, proving his calculations fail to account for how an adventure motorcycle behaves under real-world conditions.

[112] He also testified that the simulation used an extremely experienced and very competent rider, whereas the plaintiff was far less experienced. He also testified that the test driver was a vastly more experienced rider. It was Mr Craig's testimony that a rider becomes a professional when they receive payment for riding. According to him, the test rider was a former top motorcycle racer and a long-time BMW off-road

instructor who had also raced professionally for Honda in the 1980s. However, Mr Craig stopped short of calling the test rider a professional rider, further testifying that a simulation rider's specialised skill and experience would not affect the test results. He asserted that, a rider skill is not a variable in the simulation. While he acknowledged that the plaintiff and the test rider possessed different skill sets regarding certain types of riding, he maintained that there was no difference in their capabilities regarding the specific skills relevant to this case.

[113] When questioned regarding the comparative capabilities of the riders [the test rider and the plaintiff], Mr Craig admitted that the test rider, would ordinarily travel at speeds exceeding 60 kilometres per hour on a dirt road. It was then put to Mr Craig, and he accepted, that while the plaintiff's maximum operating speed on gravel was capped at 60 kilometres per hour due to his limited skill set, the test rider's capacity to ride faster was a reflection of his more advanced riding proficiency.

[114] Mr Craig further testified that a pothole of that size would not affect a motorcycle traveling at 80 to 90 km/h. It was his testimony that his conclusion in his report stated that the pothole should never have caused damage to the GS1150. It was also his testimony that an adventure motorcycle is engineered to navigate significantly rougher terrain at much higher speeds.

[115] He also testified that the pothole was a very insignificant in depth in relation to the profile of the motorbike involved in the accident. During cross-examination, he specified that his assessment did not change the defendant's duty to fix it [pothole]

and noted he was not implying that the pothole failed to qualify as a degree-five hazard.

[116] According to him, an adventure motorcycle has a larger front wheel than a road motorcycle or a car. While a smaller wheel might drop into a pothole at low speeds, tests show that at higher speeds, a vehicle will glide straight over a 300 to 400 mm pothole because the wheel does not have time to drop into the depression.

[117] He also conceded during cross examination that the test pothole was excavated on a dirt road, unlike the actual pothole in question, that was on a tarred road. The cross-examination revealed that the road at the scene of the accident was slightly curved to the right and sloped downhill. In contrast, the test road was entirely straight.

[118] Regarding the driver's weight, Mr Craig did not dispute during cross examination that the plaintiff is significantly heavier than the test driver. Mr Craig also conceded that, generally speaking, the 1150 motorcycle ridden by the plaintiff is a heavier model than the 1200 motorcycle utilised during the test.

[119] He testified during cross-examination that they made absolutely certain the test motorcycle was not accelerating over the pothole. According to his testimony, the rider reached the required speed well in advance, meaning the motorcycle maintained a steady test speed and was no longer accelerating when it encountered the pothole.

[120] Mr Botha reminded Mr Craig of his earlier testimony; that he testified that had the test driver accelerated, the outcome would have differed. And that he [Mr Craig] previously explained that acceleration reduces front-end weight, allowing the vehicle to clear the pothole more easily. He was reminded that he previously testified there was no evidence of the plaintiff accelerating; therefore, an accelerating test driver would not accurately replicate the plaintiff's actions.

[121] After these above concessions it was put to Mr Craig by Mr Botha that he puts it to him that the test driver was accelerating throughout that test up until he reached the pothole. Mr Botha also put it to Mr Craig that the acceleration is evident from the left-mounted camera and the rev counter, that clearly depict the RPM climbing from just under 4,000 to 4,500. Furthermore, Mr Botha put it to Mr Craig that the test driver accelerated until on the other side of the test. Ultimately, Mr Craig testified that any degree of acceleration would have marginally reduced the load on the front end.

[122] He testified that the damage sustained by the wheel rim of the plaintiff's motorcycle was inconsistent with striking a pothole. Instead, he stated that the rim damage was more consistent with striking a flatter object, such as a curb or potentially a pole. He testified, however, that the edge of the pothole's surfacing was sharp. During questioning by Mr Botha [plaintiffs' counsel] he conceded that in the joint minute, he agreed with Mr Grobbelaar's view that the damage on plaintiff's the rim could have been caused by a sharp edge.

[123] During cross examination Mr Botha posed a question to Mr Craig regarding the jolt felt by the plaintiff. It was put to Mr Craig that if the plaintiff struck the outer lip of the pothole with sufficient severity to damage his wheel rim, such an impact would be consistent with the plaintiff's evidence of feeling a severe jolt. Mr Craig disputed this, responding that such a strike would certainly not cause a severe jolt, but rather only a minor sensation in the handlebars. In other words the plaintiff would have felt a slight resistance in the handlebars as he rode over something. According to Mr Craig, a jolt is too strong a word. Mr Craig doubts there was a jolt.

[124] Furthermore, he testified that the sound heard by Mr. Jansen was the motorcycle impacting that curb and mounting the island. He testified during cross examination that he is not convinced that a sudden deflation of this tyre would probably make a noise; because of the size, the gap through which the air would have escaped, and the fact that this front wheel doesn't contain that amount of air such as a car. He testified that a motorcycle tyre deflation typically produces a low, thudding sound like "boof." While he would be surprised if it caused a loud explosion, he could not entirely exclude the possibility.

[125] It was his testimony that he has never stated to this Court that he rejected the existence of a pothole. According to him, his report merely concludes that it is unlikely. It was also his testimony that, based on his knowledge, derived from working in road maintenance since 1992 for SANRAL, the City of Cape Town, and the Western Cape Provincial Government, he has never seen a pothole of that magnitude left unrepaired on a road of that significance for such an extended duration.

[126] It is his testimony that it is entirely out of character for the Western Cape Government to leave a defect like that unattended. According to him, he cannot comprehend how the maintenance personnel, particularly the Oudtshoorn District Road Engineer and the George Garden Route team, who are typically highly efficient, could have driven past that pothole and ignored it, especially given its location in a holiday area on a route from the airport. He added that; while he found it difficult to understand, it remains within the realm of possibility, as they are human.

[127] Mr Craig conceded that at the time of the accident, the road in question was highly susceptible to potholes and structural deterioration.

[128] Mr Craig testified that in the circumstances of this case, there is no question that a pothole existed. He also testified that the road in question should have been repaired two years earlier as the road was at the end of its life cycle. This oversight, he noted, raises serious questions as to why the relevant authorities failed to invest more effort into maintaining that road.

[129] He further conceded that if the Court finds and accepts the evidence of Ms Bryston, that pothole was present for a significant period. Something which all the experts confirm that the size of the pothole confirms its long-standing existence. And despite the matter being reported, the defect was never attended to. Alternatively, the failure to even set up a warning sign points to only one conclusion; that there was gross negligence.

[130] He, however, conceded that an object or obstruction must have been present to launch the motorcycle over the curb, which likely caused the impact sound heard by Mr. Deon Jansen. According to his testimony, how the wheel responds to a pothole impact is determined by a set of variables outlined. These critical parameters consist of the motorcycle's operational speed, the depth of the road defect, and the tyre inflation pressure, which is nominally rated at 2.2 bars for the model in question.

[131] Additionally, Mr Craig opined that a pothole measuring approximately 600 millimetres in diameter and 80 to 100 millimetres in depth was unlikely to damage the front rim of a BMW GS1150, provided the tyre was inflated to the recommended 2.2 bar. He claimed to base this conclusion on his extensive experience riding adventure motorcycles in rough terrain, where he had personally witnessed and experienced similar high-impact forces with larger obstructions at speeds of up to 100 kilometres per hour without sustaining damage to the front wheels.

[132] He testified that the test did not evaluate human reaction, but focused instead on the mechanical response of the motorcycle's front suspension when striking a pothole at 80 km/h. He testified that the evaluation depended strictly on the physics of the motorcycle's front suspension. He noted that, theoretically, a robot could have operated the motorcycle at 80 km/h with identical outcomes.

[133] He testified that the front suspensions of the two motorcycles were identical for all intents and purposes. Both vehicles utilised a Telelever suspension system with identical wheel and tyre dimensions and he noted that the specific condition of the

tyre would have no effect on the test results. While one motorcycle possessed a 50cc larger engine capacity, rendering it faster and slightly lighter, these variances were irrelevant because the test strictly evaluated the mechanical reaction of the front suspension to the pothole. He emphasised that an adventure motorcycle like the GS model [the one that was driven by the plaintiff] is specifically engineered to navigate extremely rough terrain, a fact that directly supported his findings.

[134] He testified that the sound heard by Mr. Jansen was the motorcycle impacting the curb and mounting the island.

[135] It was also his testimony that the simulation objective was not to evaluate Mr. Carr's riding abilities; rather, it tested the capacity of the motorcycle's front suspension to navigate a pothole at 80 km/h. He testified that the asphalt road surface had no bearing on the test results.

[136] He initially testified that the simulation created a more severe conditions than the incident itself, as the test pothole was engineered to be 15 millimetres deeper. Later, however, he corrected his testimony to state that the 15-millimetre depth was probably inaccurate and should instead be 10 millimetres. He also testified that the westerly side of the edge of the pothole is not vertical, it's sloped; it's not as sharp as the one in the test.

[137] When he was asked by Mr Botha as to how does he compare the 2.2 bar of the test motorcycle with an unknown tyre pressure on the 1150, Mr Craig responded by

saying the 1150 must have had sufficient pressure in the tyre for the rider to have ridden it from Herold's Bay comfortably where he was driving. He explained that a motorcycle of that type typically becomes unstable at a minimum pressure of approximately 1.2 to 1.4 bar. Consequently, the rider should maintain sufficient tyre pressure to operate the motorcycle, which should have easily cleared the pothole in question. He clarified that their testing was strictly conducted to ensure all components met specifications to establish a baseline.

[138] It was his testimony that, at a speed of 100 km/h, a vehicle travels at 27.8 metres per second. Therefore, according to him, there was an unobstructed line of sight extending approximately 350 metres before the pothole location. He clarified that from an engineering perspective, this meant no physical structures blocked the view, rendering the road defect potentially visible. He stated with certainty that the pothole was clearly visible to the plaintiff on approach. According to him, the plaintiff had a temporal buffer of approximately 12.5 seconds before reaching the impact point.

[139] Furthermore, he testified that because the BMW GS1150 features an elevated seat and an upright riding posture, the plaintiff would have had a clear, elevated view of the approaching pothole.

[140] He testified that the plaintiff inevitably reached a point of actual visibility during his approach, affording him ample opportunity to observe and avoid the pothole. According to his testimony, given the prevailing conditions and visibility, he concluded that the pothole could have been entirely avoided, as there was no

justification for driving into it. It was also his testimony that it is inexplicable why the plaintiff did not see that pothole.

[141] He explained that total reaction time comprises three distinct sequential phases: perception time, during which the brain detects a hazard; decision time, when the brain determines the appropriate response; and action time, which involves the physical execution of the manoeuvre.

[142] His testimony was that if the Court accepts the plaintiff's account, that he failed to see the pothole and consequently lost control of the vehicle, then he concedes that this scenario would place the plaintiff in a sudden emergency. He, however, maintained that the perception reaction time would be triggered when he hits the pothole. Mr Botha then asked Mr Craig how the perception-reaction time could be triggered or applicable after the emergency had already occurred. Mr Craig testified that the perception-reaction time commences when the rider or the driver perceives he is in a sudden emergency. Mr Craig maintains that something should trigger the perception reaction time. According to him, the period from the trigger to the action is one and a half second.

[143] Mr Craig further testified that if the plaintiff found himself in a sudden emergency yet managed to keep the motorcycle upright with a damaged front wheel onto the island and only crashed there, he actually did quite well.

[144] He concurred with Mr. Grobbelaar that while a definitive scientific calculation of the vehicle's exact speed was impossible, all circumstantial indications strongly suggested either excessive speed or an alternative destabilising factor.

[145] According to him, this road was in that stage where literally it appears they were holding it by doing pothole repairs on it. Mr. Craig also did not dispute Mr. Schoeman's testimony that the pothole likely originated at the beginning of December. Similarly, Mr. Craig agreed with Mr. Du Preez, acknowledging that a road defect of that nature would require several weeks to develop.

[146] Mr Craig was adamant that the plaintiff was riding the GS1150 adventure motorcycle designed to traverse extreme and very rough terrain off road, including rocks, depressions, water and sand. It is a very capable motorcycle used on surfaced roads. It is unlikely that it should be destabilised so seriously by a pothole of the type shown in the photographs and to crash when ridden by a reasonable experienced rider travelling at reasonable speed. He added that he does not say it is impossible, but he maintains that it is extremely unlikely.

[147] He testified that it was highly improbable for the Western Cape Government to have left a road defect of that magnitude unattended for the alleged duration.

[148] During cross examination he admitted that his technical opinions regarding the motorcycle were based entirely on his background as a rider and his private, non-commercial suspension design projects. He testified that he was legally advised

against signing a joint minute with Mr. Du Preez on the grounds that they were not corresponding experts.

[149] Mr. Craig admitted that Mr. Grobbelaar is better qualified academically to testify on suspension systems, given that Mr. Grobbelaar training is in mechanical engineering and his own is in civil engineering.

[150] He was unable to provide any reason for failing to invite Mr. Grobbelaar to the simulation test.

[151] Ultimately, Mr Craig testified that his evidence remains that the pothole should not have caused the motorcycle to crash. And that is the explicit conclusion of his report.

## **Evaluation**

[152] Having reviewed the authorities, it is clear that the plaintiff bears the onus of proving, on a balance of probabilities, each of the following five essential elements of delictual liability to succeed in a claim against the defendant, a public road authority:

- a) Conduct in the form of an omission: The defendant failed to act by omitting to properly maintain the road in question, repair the pothole, or warn road users of the hazard.
- b) Wrongfulness: The omission breached a legal duty to prevent harm, which is established by testing whether public and legal policy considerations require

that it would be reasonable to impose liability on the defendant in the circumstances.

c) Fault in the form of negligence (culpa): Whether the defendant or its employees failed to act as a reasonable person (diligens paterfamilias) would have in the circumstances. This is established if:

1. A reasonable person would have foreseen the reasonable possibility of their conduct [the omission to repair or warn road users about the defect] causing injury to another and leading to patrimonial loss;
2. A reasonable person would have taken reasonable steps to guard against such an occurrence; and
3. The defendant failed to take those steps.

d) Causation: There must be a direct link between the defendant's omission and the incident. This comprises both:

1. Factual causation, determined via the 'but-for' test (sine qua non); and
2. Legal causation, ensuring the connection is not too remote and that the harm was a reasonably foreseeable consequence of the failure to repair.

e) Harm (Patrimonial Loss or Damage): The plaintiff must prove they suffered measurable physical injury resulting directly from the accident.

[152] The law regarding these requirements is well settled and aligns with established principles affirmed by our courts.

**a. Common cause issues**

[153] The following issues are either common cause or not seriously disputed, that:

1. the pothole was officially recorded as repaired on 19 April 2012;

2. It is common cause in this matter that there were no warning signs to warn road users about potholes. It is further common cause that the accident occurred at approximately 12:00 on Sunday, 1 January 2012, on the Main Road 347 ("MR 347") at Geelhoutboom intersection.
3. It is further common cause that the road in question was at the end of its life span or design life. It is similarly common cause that the road was prone to potholes.
4. It is also common cause that a pothole was present in the immediate vicinity of the accident scene.
5. It is not in dispute that the size of the pothole in question was approximately 600 millimetres in diameter and 80 to 100 millimetres in depth.
6. It is further common cause that the motorcycle rim sustained damage upon impact with an object; the dispute pertains solely to the cause of that damage.
7. The Plaintiff had no prior knowledge of the pothole before the incident, nor had he submitted any complaints concerning the condition of the road to any organs of state.
8. MR 347 is located in the George. Local Municipality between Blanco and George airport. At the time of the incident, the tarred road surface was dry.
9. There is also no dispute regarding the fact that the roadway ahead offers a clear sight distance of approximately 350 metres to the pothole. Mr Craig [defendant's reconstruction expert]: Maintained that 350 metres afforded a motorcyclist ample time to detect the hazard, make a decision, and execute an evasive manoeuvre.
10. The simulation exercise did not entirely replicate the exact conditions of the accident in question.

**b. Did the pothole cause the accident?**

[154] At the outset I consider the issue of causation. In the defendant's heads of argument, it is stated that, in light of Ms Nigrini's testimony, the defendant's further submissions will be premised on the kilometre 5,490 pothole being present on the MR347 at the time of the accident. Consequently, as already pointed out, the existence of the pothole is no longer an issue in this matter. To this end, one of the main contested questions, in this case, is whether the accident was caused by the pothole in question. It is important, therefore, to determine first of all whether the pothole is the factor that brought about the motorcycle crash.

[155] The concession made by the defendant followed the testimony of the defendant Ms Nigrini, the traffic officer who attended the scene of the accident and confirmed the presence of the pothole. The credibility and reliability of the plaintiff, Mr Steytler, and Ms Bryston were heavily bolstered by the defendant's ultimate concession that the pothole in question did exist at the material time. The logical corollary of this concession is that plaintiff's testimony, specifically that he felt a sudden jolt through his motorcycle handlebars, was not a figment of his imagination, but an accurate perception of an objective physical reality.

[156] As a matter of fact, the defendant's expert, Mr Craig, did not exclude the possibility of a physical sensation being transmitted through the handlebars; rather, he merely disputed its intensity. Mr Craig conceded that the strike felt by the plaintiff would have caused a minor sensation or a slight resistance in the handlebars, even

if he doubted it amounted to a severe jolt. This concession by Mr Craig further corroborates the plaintiff's version that a physical impact did occur.

[157] Another significant aspect of the severe jolt felt by the plaintiff is that his version was never challenged during cross-examination. Indeed, there was no cross-examination whatsoever on this specific point. The corollary of this is that this aspect of the plaintiff's testimony remained unshaken. Its accuracy was not controverted by direct or inferential evidence, nor by the surrounding circumstances. It is difficult to see why, if inaccurate, it could not have been readily demonstrated to be so. The witness was not impeached, and nothing in the record reflects unfavourably upon his credibility. The first time this dispute was raised was during the testimony of Mr Craig.

[158] There are no circumstances tending to cast suspicion upon either the testimony or the witness, save for the fact that Mr Craig doubts the severity of the jolt. There is no reason why this Court should doubt the accuracy and truthfulness of the plaintiff's account regarding this aspect.

[159] Mr Craig testified that the damage sustained by the wheel rim of the plaintiff's motorcycle was inconsistent with striking a pothole, suggesting instead that it was more consistent with striking a flatter object, such as a curb or a pole. However, he significantly admitted that the edge of the pothole's surfacing was sharp. Furthermore, during cross-examination by Mr Botha [plaintiff's counsel], he conceded that in the joint expert minute, he had agreed with Mr Grobbelaar's view

that the damage to the plaintiff's rim could indeed have been caused by a sharp edge.

[160] Indeed, objective physical evidence supports the plaintiff's claim of a significant jolt, rendering the assertion that an impact violent enough to deform a metal wheel rim would merely transmit a "minor feeling" logically unconvincing. The severe damage to the rim demonstrates that the impact force was substantial. As a matter of objective logic, an impact violent enough to permanently deform structural aluminium at the bottom of the mechanical chain must inevitably transmit a massive, instantaneous shockwave up to the rider's hands.

[161] Several witnesses testified that a pothole of the dimensions in question is inherently dangerous to road users. Notably, the defendant's witness, Mr Steenkamp, testified that if a defect of that magnitude had developed on the road, the municipality would have received public complaints notifying them of the hazard. In this regard, Mr Steenkamp's testimony tends to show that he explicitly acknowledges that a pothole of this magnitude constituted an objective hazard on the roadway.

[162] The mechanical reality of this hazard was explained by the plaintiff's expert, Mr Du Preez, who testified that because the pothole exceeded 600 millimetres in length, the motorcycle's front wheel could not have crossed over it without dropping completely inside and striking the rear face. This impact mechanism perfectly aligns with the physical evidence in photograph TB20, which displays black marks on the exit side of the defect. Mr Du Preez explained that this represents tyre rubber

residue left behind when a tyre violently impacts the rear face of a defect. In contrast to Mr Craig's evidence, Mr Du Preez confirmed that the plaintiff's tyre would easily fit inside a pothole of these dimensions. Because the plaintiff could not anticipate this hidden hazard, Mr Grobbelaar noted that he struck it at full cruising speed.

[163] Mr Grobbelaar testified that the exit edge of the pothole formed a sharp, vertical face, making a collision with it structurally identical to striking a vertical concrete kerb of the same height. He noted that the defendant's hypothesis fails to account for the dynamic compression and severe pinching of the rubber tyre and tread between the metal wheel rim and this hard road surface.

[164] This mechanical finding is directly corroborated by the defendant's own eyewitness, Mr Jansen, who was in close proximity to the scene and testified to hearing a loud sound resembling a tyre burst at the critical moment of the incident. This acoustic event provides clear circumstantial proof of a sudden, explosive release of air pressure, caused by the tyre being violently pinched between the pothole's sharp vertical face and the metal rim.

[165] Remarkably, during cross-examination, the defendant's expert, Mr Craig, was forced to make several key concessions that align with this timeline. First, he agreed with Mr Grobbelaar's view that the deep indentation on the plaintiff's rim could have been caused by such a sharp edge. Second, while he stated he would be surprised if it caused a loud explosion, he could not entirely exclude the possibility of the tyre bursting. Finally, Mr Craig conceded that an object or obstruction must have been

present to launch the motorcycle over the kerb, which likely caused the impact sound heard by Mr Jansen.

[166] In light of these cumulative facts, Mr Du Preez testified that the overall damage to the rim perfectly aligns with the catastrophic impact of striking a large pothole, causing the tyre to deflate instantaneously. To find that such a destructive force resulted in a merely negligible sensation would be to ignore basic principles of mechanics and physical cause-and-effect. It is logically unconvincing to assert that an impact violent enough to permanently deform structural aluminium at the bottom of the mechanical chain would transmit a mere "minor feeling" to the handlebars. In the circumstances, Mr Craig's refusal to accept that the impact caused a severe jolt is untenable. As Mr Grobbelaar correctly pointed out, in the absence of a severe pothole strike, alternative explanations would have to be found for three critical objective facts; the deep indentation in the wheel rim, the sudden deflation of the tyre, and the reason why the plaintiff lost control.

[167] Ultimately, in my mind, the distinctive sound heard by Mr Jansen, before he became confused, anchors the exact moment the plaintiff struck this hazard. This acoustic evidence links the pothole impact directly to the immediate loss of tyre pressure, the ensuing tank slapper [uncontrollable handlebar oscillation], and the plaintiff's subsequent loss of control.

[168] It must therefore be concluded that by taking into account of all the foregoing factors, that the evidence to the effect that the initial jolt was severe is further reinforced by the immediate, un-interrupted sequence of events. That illustrate the

following. After feeling the severe jolt, the plaintiff felt the rim making contact with the tarred road, experienced a violent tank slapper, and lost control of the motorcycle. This loss of control is further evidenced by the motorcycle striking a signpost and landing in a ditch, resulting in the plaintiff sustaining serious injuries to his leg that subsequently necessitated its amputation. One point emerging clearly from the above is that the sheer violence of the crash sequence directly mirrors the severity of the initial impact.

[169] Several witnesses in this trial testified that the pothole of the size in question on a road is dangerous. For instance, Mr Grobbelaar [the plaintiff expert witness] testified that because the plaintiff could not anticipate the hazard, he struck it at full speed, resulting in the rim damage. It was also Mr Du Preez's [the plaintiff's expert witness] testimony that because the pothole exceeded 600 millimetres in length, the motorcycle's front wheel could not have crossed it without dropping in and hitting the rear face. He explained that the black marks on one side of the pothole in photograph TB20 represent tyre rubber residue. This residue occurs when a tyre impacts the rear side of a defect, marking what is known as the pothole's exit side. This evidence demonstrates point of contact. Additionally, in contrast to Mr Craig's [the defendant's expert witness] evidence, Mr Du Preez testified that the plaintiff's motorcycle tyre would fit completely inside a pothole of the dimensions that the plaintiff says he struck.

[170] Mr Steenkamp, a defence witness, testified that if a defect of that magnitude had developed on the road, the municipality would have received public complaints or queries notifying them of the hazard. In my mind, in this regard, Mr Steenkamp

explicitly acknowledged that a pothole of the magnitude in question constituted a hazard on the road.

[171] So far as the test done by Mr Craig is concerned, one point only need be discussed. The important and significant features regarding the test that was conducted by Mr Craig is that his evidence reveals that the test pothole was intentionally made deeper, sharper than the original; the test driver was aware of the existence of the pothole and was much more experienced than the plaintiff.

[172] At the core of Mr Craig's evidence, is his reliance on the simulation test he conducted. The irony is that the central theme of his testimony is his concession that this simulation was not a mirror reconstruction of the actual event and failed to achieve a one-hundred percent correlation with the conditions of the accident. Little wonder, then, it was not possible to determine all of the pertinent parameters. Nonetheless, Mr Craig rigidly maintains that the pothole in question did not contribute to the accident.

[173] When regard is had to Mr Craig's testimony, it is important to give regard to the warning that was sounded in *Motor Vehicle Assurance Fund v Kenny 1984 (4) SA 432 (E)*, at 436D-H, when the following was stated:

... "The learned Judge a quo found Tompkins "hesitant and evasive" in certain respects and "somewhat unconvincing" in other. On the whole he came to the conclusion that there were "too many variables and imponderables" in the case, which in the end result, rendered Tompkins' evidence unreliable. In cross-examination Tompkins himself conceded that in practice things often happen which are not always reconcilable with the opinion of experts because of the fact that there are always "unknowns. Because of these unknown factors he conceded that in his

attempt theoretically to reconstruct what had happened he was bound to “speculate a lot”. I agree, with respect . . . “ it is however, a well-known-fact that it is often impossible to explain what happened in a collision on rational, logical grounds” . . . .Direct or credible evidence of what happened in a collision, must, to my mind, generally carry greater weight than the opinion of an expert, however experienced he may be, seeking to reconstruct the events from his experience and scientific training. Strange things often happen in a collision . . . Tompkins’ concession, therefore, that there are too many unknown factors in any collision to warrant a dogmatic assertion by an expert as to what must have happened seems to me to have been a very proper one. An expert’s view of what might probably have occurred in a collision must, in my view, give way to the assertion of direct and credible evidence of an eyewitness. It is only where such direct evidence is so improbable that its very credibility is impugned, that an expert’s opinion as to what may or may not have occurred can persuade the Court to his view.” Emphasis added.

[174] I had already found that the plaintiff was a credible witness and I also found that there is other evidence that supports the plaintiff that his motorcycle tyre dropped into the pothole.

[175] The test done by Mr Craig cannot explain the plaintiff’s immediate loss of control, which culminated in the motorcycle colliding with the signpost and finally landing on an embankment. While the stated objective of the exercise was to determine whether the pothole could cause a crash, it seems to me, that the reconstruction was myopic in its approach. If the simulation were truly a realistic replication of the incident, the test motorcycle's rims should have bent or cracked under the impact force. Particularly, in light of the fact that it is not in dispute that the pothole, that was described by some witnesses as posing a hazard did exist. In the circumstances of this case, the fact that the test motorcycle emerged entirely undamaged, demonstrates that the simulation failed to replicate the severe, localised, vertical edge-strike that the plaintiff experienced.

[176] Of course, it may be argued that that is why Mr Craig says the pothole did not cause the crash. However, it is significant to remember that the plaintiff's expert, Mr Du Preez, already proved that because the pothole exceeded 600 millimetres in length, a tyre must drop in and strike the rear vertical face of the pothole. Surely, in the circumstances, if Mr Craig's motorcycle 'floated or glided over' the pothole, it proves his simulation was conducted at speed [a focal point that was canvassed with him extensively during his cross examination] that did not simulate the speed that was driven on by the plaintiff. This also shows that the variances adopted by Mr Craig in the test had an effect on the results of the test drive.

[177] Consequently, Mr Craig's explanation that the test motorcycle 'floated over' the pothole serves only to confirm the fatal defect of his simulation; it entirely failed to replicate the mechanical reality of the actual incident. The physical evidence, namely the severely deformed rim and the tyre rubber residue on the pothole's exit face, conclusively proves that the plaintiff's motorcycle dropped into the depression rather than skimming over it. Because Mr Craig's simulation bypassed this critical impact stage, his finding that no impact occurred carries no probative value and must be rejected.

[178] In *Biddlecombe v Road Accident Fund* (797/10) [2011] ZASCA 225 (30 November 2011), the SCA stated the following at para 10:

"The expert tasked with reconstructing what occurred is often dependent for the reconstruction not simply on the application of scientific principle to accurate data but on calculations based on imperfect human observation. The fact that the reconstruction rests on a potentially imperfect factual foundation is the reason for

caution in determining its evidential value. However, whether that is so in any particular case will depend upon an assessment of the degree to which it rests upon ascertainable and measurable facts and the application of scientific principles to those facts. It is undesirable for a court to adopt an a priori approach to its task of weighing eyewitness and expert testimony where the two conflict.” Emphasis added.

[179] The simulated test appears to be unrealistic and distorted. It has been based upon the controlled tests which did not cater for unpredictable real-world variables. Additionally, as previously mentioned, there are several fundamental discrepancies between the actual accident and the simulation test [that are worth repeating in this paragraph], rendering them two completely different occurrences. Crucially, the test driver possessed prior knowledge of the pothole’s exact location, whereas the plaintiff did not. Furthermore, the dimensions of the potholes differed, and the test driver was far more experienced than the plaintiff. Consequently, I find that the simulation failed to mimic the actual occurrence with reasonable accuracy. It even failed to account for the very jolt felt through the handlebars of the plaintiff’s motorcycle. Ultimately, the simulation leaves a critical question entirely unanswered, which is; ‘if the pothole was not the cause, what did account for the severe, objective structural damage to the plaintiff’s wheel rim.

[180] A scenario postulating that the damage to the rim was caused by the embankment or the signpost would be based entirely on conjecture, speculation, and assumption. First and foremost, such a hypothesis fails to account for the physical forces that initially launched the motorcycle toward the signpost. Consequently, this matter does not present multiple plausible proximate causes.

[181] The evidence categorically demonstrates that the pothole was the definitive physical antecedent to the plaintiff's injuries; establishing an unbroken causal nexus between the pothole, the collision with the signpost, and the ultimate landing on the embankment.

[182] Indeed, there is no evidence before this Court to justify a finding that the crash was caused by anything other than the pothole in question. Far from proving that the pothole could not cause a crash, Mr Craig's simulation merely proved the obvious: a motorcycle will not crash if it fails to impact a hazard altogether. This entirely explains why his test vehicle suffered no rim damage. Consequently, the simulation holds no probative value and must be rejected.

**c. Was it reasonable for the plaintiff not to see the pothole?**

[183] There remains, therefore, to be discussed the question which has somewhat puzzled me from the onset, namely, in the circumstances of this case, why would it be expected of the plaintiff to be able to see the pothole.

[184] The plaintiff's case centres around the fact that he did not see the pothole in question, even after falling he did not become aware of the pothole. It is so that the accident happened during broad daylight and on a sunny day.

[185] The plaintiff testified that he only used this road two or three times a month, with a motor vehicle, as a result he did not know it well. In essence, the plaintiff testified that he was not familiar with the road in question. Mr Craig testified that the plaintiff in the circumstances of this matter ought to have seen the pothole.

[186] The undisputed material facts in this matter do not support Mr Craig evidence. First and foremost, there were no road signs warning road users about the existence of pothole hazards. Moreover, it is important to remember that Mr Steytler testified that it was difficult to spot the pothole because it is almost the same colour on the inside as the road surface.

[187] Mr Grobbelaar [the Plaintiff's reconstruction expert], stated something quite significant about early detection of the pothole. He testified that, that depends entirely on the pothole's actual visibility profiles. He emphasised that the theoretical sight distance matters only if the defect is physically discernible from that range.

[188] In contrast Mr Craig testified that the plaintiff had a clear opportunity to see and avoid the hazard because an unobstructed, 350-metre line of sight existed before the pothole. Furthermore, it was his testimony that the BMW GS1150's elevated seat and upright riding posture provided an advantageous view of the road ahead. According to Mr Craig, at a speed of 100 km/h, this 350-metre zone afforded the plaintiff a substantial temporal buffer of approximately 12.5 seconds before impact. Consequently, he concluded that the plaintiff had ample time to react, making it inexplicable why he failed to see and evade the hazard under those conditions.

[189] At first blush Mr Craig's testimony in this regard appears a plausible, but it ignores the evidence from the defendant's side. It is also belied by the objective facts. This I say because, as will by now be well-known, in this matter that during the occurrence of the accident, it is common cause that the pothole in question has been in existence and for a while. For that matter, Ms Bryston and Mr Steytler, who

testified that they worked quite close to where the pothole in question was situated, their testimony reveals that the pothole was a bane of their existence and they were concerned about its existence. Their testimony also attests to the fact that the potholes had existed for a substantial period of time before the accident in question.

[190] Having considered the evidence in this matter, this Court finds no reason to doubt the testimony of Mr Steytler and Mrs Bryston. Both witnesses made an excellent impression on the Court, presenting their evidence in an entirely truthful, candid, and honest manner. Their truthfulness and credibility remained intact under cross-examination, which failed to cast any doubt upon their reliability.

[191] First and foremost, the two plaintiff's witnesses consistently corroborated each other. Furthermore, their evidence regarding the actual existence of the pothole was unexpectedly substantiated late in the proceedings by the defendant's own witness, Ms Nigrini. This corroboration is particularly telling given that the defendant initially maintained that the pothole never existed. Because Ms Nigrini's testimony sufficiently independent-verified the core of the plaintiff's case, there is no reason for this Court to doubt the correctness of the remaining aspects of their testimony.

[192] It is important to remember that it was Mr Steytler's testimony that the pothole was difficult to spot. He says it is difficult to spot the pothole because it is almost the same colour on the inside as the road surface. This evidence strongly suggests that the hazard was effectively camouflaged. When evaluated alongside the uncontested photographs of the scene, Mr Steytler's testimony on this point is cogent and cannot be faulted. When evaluated alongside the uncontested photographs of the scene, Mr Steytler's testimony on this point is cogent and cannot be faulted.

[193] The fact that the pothole was officially recorded as repaired on 19 April 2012, is quite telling, particularly in light of the fact that the accident happened on 01 January 2012.

[194] The defendant's contention that the pothole was clearly visible to a motorist is further undermined by its own operational records. According to Mr Steenkamp, formal road inspections were conducted on 15 August 2011, 18 October 2011, 09 November 2011, and 19 January 2012, yet none of the deployment personnel detected the hazard. This failure is highly telling.

[195] If trained personnel, specifically tasked and equipped to identify road defects, failed to spot the pothole over a period of several months, it is logically untenable to expect an ordinary motorist, navigating at speed, to have easily seen and avoided it. In the circumstances, I cannot find that the plaintiff, who on the evidence was maintaining a lookout commensurate with his surroundings, could or should have seen the pothole prior to striking it.

[196] Accordingly, the defect was unexpected and substantial, and created a sudden emergency for the plaintiff. In the result, I am satisfied that the plaintiff succeeded in proving that external conditions prevented him from seeing the defect.

**d. Was the pothole reported to the municipality or the defendant?**

[197] The question that aptly arises is whether the defendant had notice of the dangerous condition of the pothole. The plaintiff's evidence through Mr Steytler and

Ms Bryston testified that the municipality was alerted to the pothole. As previously mentioned, the evidence in this matter further reveals that, notwithstanding the fact that the incident happened on the 01 January 2012, the pothole was only repaired on 19 April 2012.

[198] At the material time, Ms Bryston and Mr Steytler were employed in the immediate vicinity to the location of the pothole. Ms Bryston's testimony establishes that the pothole had actively developed over a period of six weeks within their immediate view. The evidence of both witnesses demonstrates that this specific pothole was a significant source of concern for them and their colleagues. This is underscored by the fact that immediately after the accident, when Mr Steytler reported the occurrence to Ms Bryston, he explicitly referred to it as 'the damn pothole'. Ms Bryston also harboured personal anxieties that the hazard would damage her vehicle. This body of evidence illustrates how heavily the pothole weighed on the daily routines of the plaintiff's witnesses, rendering it highly improbable that they would have failed to report it.

[199] Ms Bryston's evidence clearly indicates that the pothole constituted an obvious risk and served as a frequent topic of discussion among numerous individuals.

[200] Further and significantly, the timeline of the repairs is telling; it demonstrates that the pothole remained unaddressed at the scene for several months following the accident. Notwithstanding the occurrence of the accident and subsequent road inspections, the pothole remained unrepaired. Consequently, it is disingenuous for the defendant to maintain that the pothole would have been repaired had a formal report been received.

[201] Moreover, it is a point worth considering that Mr Steenkamp testified that on Sunday, 1 January 2012, a municipal standby team was operational to address major hazards reported by the public, emergency services, or senior management during the holiday closure period. He stated that following consultations with the relevant superintendents and field teams, he determined that no complaints regarding a pothole at the scene had been received prior to the accident.

[202] However, it is also significant to note that the defendants' witnesses testified that a pothole of that size will most probably prompt public complaints. Mr Steenkamp further testified that a pothole of that size would not go unnoticed by the community. He testified that if a defect of that magnitude had developed on the road, the municipality would have received public complaints or queries notifying them of the hazard.

[203] Now that it is common cause that the pothole in question did exist, the corollary of the defendant's witnesses that the nature of the pothole would have prompted complaints, in a way supports Ms Bryston's testimony. In light of the fact that it is also common cause that the road in question is frequently used by motorists, it is highly probable that other motorists also informed the municipality about the pothole.

[204] The fact that the pothole remained unrepaired for several months post-accident substantiates Ms Bryston's testimony that previous reports of the defect were met with administrative inaction. This ongoing neglect demonstrates a consistent pattern

of behaviour regarding road maintenance by the defendant. When this systemic failure is considered alongside Ms Bryston's credible evidence, it tips the balance of probabilities in the plaintiff's favour. Accordingly, I find that the defendant was indeed alerted to the existence of the pothole prior to the accident, as testified by Ms Bryston. Even the evidence of Schoeman [defendant's witness] demonstrates that road users would have alerted the municipality about the existence of the pothole.

[205] For that matter, the facts of this matter suggest that the defendant ought to have known about the existence of the pothole, even in the absence of public complaints. This is evident from the fact that the pothole was large and, according to the evidence, had existed for several weeks. It is incomprehensible that a reasonable road authority would fail to detect it during standard inspections. Consequently, the defendant had ample time to discover and repair the hazard, thereby establishing constructive notice.

[206] The question that arises is whether the plaintiffs succeeded to establish that the pothole was of such an obvious nature that defendant, in the exercise of due care, should have discovered the condition and its dangerous character.

**e. Legal duty**

[207] It is settled that without a legal duty there can never be wrongfulness. In *Telematrix (Pty) Ltd t/a Matrix Vehicle Tracking v Advertising Standards Authority* 2006 (1) SA 461 (SCA) at para 12, the court warned that wrongfulness should not be conflated with negligence. The court also in paragraph 13, stated that it is well to remember that the act or omission is not prima facie wrongful and that more is

needed. It was also stated that a conduct is wrongful if public policy considerations demand that in the circumstances the plaintiff has to be compensated for the loss caused by the negligent act or omission of the defendant.

[208] In this matter, it is not seriously disputed that the defendant owed a legal duty to maintain public roads in a reasonably safe condition. It would be contrary to reason and public policy to allow the defendant to escape liability where, through a failure to exercise due care and diligence, it allowed a severe pothole to develop and remain undetected for several weeks on a road known to be in poor condition.

[209] From the onset I would like to state that it is common cause that there were no road signs warning road users about potential potholes or existence of potholes, notwithstanding the fact that the road was at the end of its lifespan.

[210] Of course, as noted above, Mr Schoeman on behalf of the defendant testified that a pothole of the size, of the pothole in question would have taken several weeks to reach the size. He also testified the defendant knew that there was extra care needed on the section of road in question.

[211] Mr Craig conceded that the primary objective of the municipal inspection teams patrolling the relevant section of the roadway was to identify surface defects, explicitly including potholes. Under cross-examination, Mr. Craig also conceded that despite the inspection teams being actively tasked to detect potholes, they clearly failed to identify the road defect in question. During cross-examination, he also testified that the inspection teams should not have missed the pothole. He further

testified that had he been responsible, they would not have missed it. He also opined that missing a pothole of this size clearly indicated a negligent dereliction of duty by the maintenance team. In this regard I allow myself with the testimony given by Mr Craig.

[212] Moreover, Mr D Preez agreed with Mr Craig that the rehabilitation of this section of the road in 2014 and 2015 confirms that it must have been close to the end of its design life in 2012; thus, it was to be expected that potholes could form at various locations. He opined that if a road surface is at the end of its lifespan and potholes are forming regularly, a prudent roads authority is expected to warn road users about possible hazards, as the road is prone to potholes.

[213] I find it telling that Mr Schoeman testified that under conditions of proper and optimal maintenance, a general warning sign would not be expected on an even road surface. According to him, the maintenance team's prevailing maxim is that 'a sign doesn't fix a pothole'. Consequently, a warning sign is only deployed as a temporary measure when the team is unable to immediately repair a pothole. Crucially, this policy applies even where a road is notoriously prone to such degradation. This testimony exposes a severe systemic omission; despite knowing the road was prone to potholes and failing to repair them, the authority further neglected to erect any warning signs, leaving motorists entirely unprotected from a known hazard. Furthermore, because the pothole was not easily visible to approaching motorists maintaining a reasonable lookout, it constituted a hidden trap, thereby creating a duty upon the defendant to erect adequate warning signs

[214] The fact that the road in question was close to the end of its design life at the time of the accident, means that it needed special attention.

[215] In *Municipality of Cape Town v Bakkerud* (311/97) [2000] ZASCA 174; [2000] 3 All SA 171 (A); 2000 (3) SA 1049 (SCA) (29 May 2000), the following was stated:

“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 upon 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.” Emphasis added.

[216] The present case is one of the obvious cases where the circumstances makes it right to impose a legal duty upon the defendant to repair or to warn. Evidently, the defendant failed in its duty of care as such the concession made by Mr Craig was correctly made.

#### **f. Foreseeability**

[217] In terms of South African law, the defendant is liable in delict because the potential for harm to others was reasonably foreseeable at the time, and a reasonable person would have taken steps to guard against it. It is settled now that foreseeability is an element of wrong

[218] In *Standard Chartered Bank of Canada v Nedperm Bank Limited* [1994] ZASCA 146; 1994 (4) SA 747 (A) at 658G, the following was stated:

“In delict, the reasonable foreseeability test does not require that the precise nature or the exact extent of the loss suffered or the precise manner of the harm occurring should have been reasonably foreseeable for liability to result. It is sufficient if the general nature of the harm suffered by the plaintiff and the general manner of the harm occurring was reasonably foreseeable”

[219] In the face of the evidence that was presented in this matter, I fail to understand the assertion made on defendant’s behalf that the defendant had taken all reasonable steps to maintain the road and to warn road users. The age and degraded state of the road, the presence of the pothole, and the evidence that this specific stretch of road was prone to such defects collectively demonstrate the foreseeability of the incident. The harm suffered by the plaintiff was reasonably foreseeable. And this is a fact corroborated by the testimony of the defendant’s own witnesses.

[220] In *McIntosh v Premier of the Province of KwaZulu-Natal and Another* (632/2007) [2008] ZASCA 62; 2008 (6) SA 1 (SCA); [2008] 4 All SA 72 (SCA) (29 May 2008), the Supreme Court of Appeal observed the following as far as foreseeability is concerned:

“In the present case the reasonable foreseeability of harm to users of the road in consequence of potholes was not in issue. Mr George Hattingh, a consulting engineer who gave evidence on behalf of the respondents, readily conceded that quite apart from the damage caused to vehicles by driving over large potholes, their presence in the road was likely to cause drivers to swerve to avoid them which could result in collisions with other vehicles or pedestrians, particularly in wet weather when a swerving vehicle was likely to skid.”

[221] In the instant action, the pothole in question constituted a hidden trap for road users. Consequently, the presence of such an obscured hazard on a main public road satisfies the requirement of foreseeability, as a reasonable person in the position of the defendant would have anticipated that it would cause an accident.

**g. negligence**

[222] In the present case, of course, the plaintiff has been at pains to point out, that the road in question was in a poor condition. Mr Du Preez, [the plaintiff's expert] noted that this stretch of road surface was in poor condition and required remedial action. In this regard, the defendant's witnesses echoed similar sentiments. This piece of evidence is common cause in this case.

[223] The circumstances of the plaintiff's accident were not unusual. Thus, in the circumstances of this case, it is not surprising that Mr Du Preez concluded that the roads authority failed in its duties by neglecting to erect warning signs and failing to conduct adequate visual inspections. In my view, there is no reason that this Court should not accept the evidence tendered by the plaintiff's expert. Indeed, the evidence in this matter has starkly revealed that the bi-monthly inspections done on behalf of the defendant by the municipality are insufficient to identify dangerous potholes. He further noted that the authority failed to take proactive, preventative action when the defects first emerged. Furthermore, he criticised the authority's administrative record-keeping. In this matter, it apparent that the defendant's omission to repair or to warn road users about it, was both wrongful and negligent.

[224] The sheer size of the pothole and the period of its existence are quite telling. Equally, the incomplete logbook of 20 January 2012, by Mr Xalisa, evinces that the maintenance system of the defendant was not as profoundly efficient as they profess. There is no question about it that a diligent municipality conducting routine road inspections is legally expected to detect and immediately repair a major road defects. The evidence in this matter also reveals that the municipality's inspection system was poorly executed. A diligens paterfamilias would have taken reasonable steps to guard against such occurrence and in this case, the defendant failed to take those steps

[225] Plainly, there was fault on the part of the defendant, as a result negligence has been proven.

[226] As such, the defendant is liable for the damages caused by the negligent and wrongful omission.

#### **h. Costs**

[227] The plaintiff asserts that a punitive cost order is justified in this matter. According to the plaintiff, this is warranted due to the defendant's dilatory conduct and tactics, which delayed the conclusion of the trial. It is further argued on behalf of the plaintiff that extensive cross-examination was devoted to issues that ultimately proved to be undisputed, such as the presence of the pothole, the red markings, and the plastic tunnels on Haygrove Farm.

[228] For instance, Ms Kleyn was called to dispute the existence of the tunnels in 2012, yet when she testified, she conceded that the tunnels could have been

temporarily erected during her leave of absence. The plaintiff holds the firm view that the defendant exhibited a pattern of inflating non-issues and abusively invoking witness recall provisions without any substantive purpose.

[229] The plaintiff also asserted that the defendant's handling of the photographic metadata dispute epitomised its unconscionable approach.

[230] The assertions made by the plaintiff regarding the defendant's conduct are not without merit. It is evident from the record that the manner in which the litigation was conducted [by the defendant] left much to be desired, even this Court was not spared.

[231] During closing arguments, accusations of unfairness were levelled against the Court. However, when counsel was asked to direct the Court to the portions of the record containing the basis for these accusations, she could not do so and instead withdrew the assertions. I do not intend to unduly lengthen this judgment by detailing with every conduct by the defendant during the trial.

[232] Save to say, the manner in which the defendant's case was handled did not manifest aggressive lawyering; instead, it manifested ambush litigation that ultimately delayed and protracted the legal process. Most of the tactical decisions taken appeared to be mere afterthoughts and motivated by abuse of court process. That caused costs to be run up. Indeed, the existence of the pothole was not formally conceded until closing arguments. It beggars belief that the defendant only discovered Ms Nigrini was aware of the pothole when she testified in court. Such actions qualify as reprehensible conduct and warrant an order for special costs.

[233] In the result, I make the following order

ORDER

1. The defendant is liable for the plaintiff's proven or agreed damages.
2. The claim against the first defendant is dismissed.
3. The second defendant is to pay the costs of the plaintiff a costs on attorney and client scale, such costs to include the costs of counsel and the expert witnesses called by the plaintiff.

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**CN NZIWENI**  
**JUDGE OF THE HIGH COURT**

**Appearances:**

**Counsel for Plaintiff** : Mr Pieter Botha SC

Instructed by : Lombard and Kriek INC

**Counsel for Defendant** : Ms Deshni Pillay

Instructed by : The State attorney

Ms NH Mhlaba