

## Government liability for poor road maintenance

Liezel Jurrius

Legal manager

Renasa Insurance Company Limited

Can the government be held liable for loss or damages suffered by road users or their insurers when those damages were caused by a negligent act of a government official? In particular, in view of the sorry state of the nation's roads due to poor maintenance, can one recover any resulting loss from the responsible authority? This question was considered in the recent Supreme Court of Appeal Judgment of *McIntosh v Premier, Kwazulu-Natal and Another 2008 (6) SA 1 (SCA)*.

In this matter McIntosh sustained serious injuries when he fell from his bicycle while swerving to avoid a pothole in a public road under the control of the State (in this case the Provincial authority). He instituted action against the State alleging negligence as they failed to ensure that potholes in the road were timeously repaired or signs erected, warning of the danger. The State denied negligence and based their argument on the fact that they had taken steps within their available means to ensure that potholes were brought to their attention and attended to. The Court of first instance decided against McIntosh, reasoning that the fall was as a result of his own negligence for travelling at such a high speed (pursuant to which finding McIntosh instantly became a legend in the KZN cycling community).

During the trial photographic evidence was used to “categorize” a pothole as falling into one of three categories and it was accepted that the pothole in question fell in the most serious category (diameter exceeded 300mm). McIntosh led the evidence of:

- a local farmer who testified that he used that road frequently and that the pothole had been there for about a year prior to the accident;
- a witness who took photographs at the scene of the collision and who testified that the pothole was difficult to detect due to its position and the fact that it was covered with “white chalk-like dust”;
- an accident reconstruction specialist who testified that McIntosh's speed was within the limit to negotiate the bend easily; and
- an ex department official who testified that there was a person allocated by the State to that stretch of road to inspect it on a weekly basis.

On the other hand the State led the evidence of a financial manager in the Department who testified that there had been insufficient funds for road maintenance. Further, the evidence of the contractor who repaired that stretch of road before the accident was led to explain the procedure he adopted when repairing a road, being to begin with those sections he believed to be the most damaged.

On appeal the State was found to have been negligent in that it did not repair the pothole for so long before the accident and before the pothole enlarged to that extent. The Court, in effect, found that, with the resources available to it, the State could have done better.

The Supreme Court of Appeal apportioned negligence at 60/40%, in favour of McIntosh. McIntosh was still considered to be “contributory negligent” in travelling at such a high speed but the State was seen to be more negligent in that the pothole was left unrepaired over a period of time that allowed it to enlarge to such an extent that it was classified as extremely serious and that, notwithstanding the weekly inspections by the State’s officials, the State nonetheless failed to effect the repair.

So, if you suffer damages due to poor road maintenance, do you have a claim against the State? The answer, as always, is “maybe”: the State will only be liable if they cannot show that they maintained the road to the highest standard allowed by their available resources.