41/01; [2001] VSC 438

SUPREME COURT OF VICTORIA

BORG v CEHNER

Balmford J

29 October, 19 November 2001

CIVIL PROCEEDINGS – CLAIM FOR DAMAGES – INJURIES RECEIVED WHEN PERSON STEPPED INTO AN UNCOVERED SEWER INSPECTION SHAFT – INSPECTION SHAFT ON FOOTPATH OUTSIDE BUSINESS PREMISES – LIABILITY OF OCCUPIERS – RESPONSIBILITY FOR MAINTENANCE OF INSPECTION SHAFT – WHETHER DUTY OF CARE ON OWNER/OCCUPIERS OF PREMISES – WHETHER DUTY OF CARE BREACHED: *MMBW ACT* 1958, SS3, 129, 132; *WATER INDUSTRY ACT* 1994, SS3, 63; *WRONGS ACT* 1958, S14B.

C. was injured when he stepped into an uncovered sewer inspection shaft located on the footpath outside the boundary of a shop owned and operated by B. The inspection shaft was connected to the house connection branch from the main sewer which ran beneath the footpath. C. claimed damages from B. and City West Water Ltd. At the hearing the magistrate ruled that B., as the occupier of the premises did not take reasonable care to see that C. was not injured by reason of the missing cover and an order was made against B. on the claim. Upon appeal—

HELD: Appeal allowed.
1. City West Water Ltd was not responsible for the maintenance of the inspection shaft nor was it the occupier of the shaft.

2. Pursuant to the *Wrongs Act* 1958 ('Act'), s14B, the occupier of premises owes a duty to take such care as in all the circumstances is reasonable to see that any person on the premises will not be injured. The passage of drainage from B's property through the pipe did not render B. an occupier of the pipe or the inspection shaft. The pipe and the attached inspection shaft together constituted a fixture and thus formed part of the freehold of the footpath. It could not be said that B. was the owner of the footpath or the occupiers of the inspection shaft. Accordingly, B. owed no duty of care to C. under section 14B of the Act.

BALMFORD J:

1. This is an appeal under section 109 of the *Magistrates' Court Act* 1989 ("the Magistrates' Court Act") which provides that a party to a civil proceeding in the Magistrates' Court may appeal to this Court, on a question of law, from a final order of the Magistrates' Court in that proceeding. The final order the subject of the appeal was made on 15 May 2001 by the Magistrates' Court at Sunshine, whereby the appellants ("the Borgs") were ordered to pay to the first respondent ("Mr Cehner") the amount of $17,610.00 damages plus interest and costs.

2. On 7 August 2001 Master Wheeler ordered that the questions of law shown by the appellants to be raised by the appeal were:

> (i) Should the Magistrate have held that, pursuant to section 129 of the *Melbourne and Metropolitan Board of Works Act* 1958, the secondnamed respondent ("City West Water") had the responsibility to maintain and have charge, supervision and control of the sewer inspection shaft into which Mr Cehner fell?
>
> (ii) Having regard to the whole of the evidence could a reasonable Magistrate properly instructed have found that the Borgs were the occupiers of the relevant sewerage inspection shaft, and/or were responsible for Mr Cehner's injuries?
>
> (iii) If the Borgs were the occupiers of the relevant sewerage inspection shaft, or were otherwise responsible for Mr Cehner's injuries, were the Borgs entitled to an indemnity for or contribution towards the damages payable to Mr Cehner from City West Water?

3. In *Spurling v Development Underwriting (Vic) Pty Ltd*[1] Stephen J said:

> In the case of decisions of magistrates the position in Victoria is well established by a line of decisions

> culminating in *Taylor v Armour & Co Pty Ltd* [1962] VicRp 48; [1962] VR 346; (1961) 19 LGRA 232, in which the Full Court of this State held that in the case of any question of fact the Court should treat the matter as an appeal from the verdict of a jury and should not make up its own mind upon the evidence but rather confine itself to seeing whether there was evidence upon which the magistrate might, as a reasonable man, come to the conclusion to which he did come. In saying this the Full Court stated that it was following the view of Herring CJ, in *Young v Paddle Bros Pty Ltd* [1956] VicLawRp 6; [1956] VLR 38; [1956] ALR 301. The Chief Justice, in that case, adopted as the test whether "on any reasonable view of the evidence that decision can be supported"; a party aggrieved can thus only succeed if a decision contrary to the view of the magistrate is "the only possible decision that the evidence on any reasonable view can support" (see at VLR p41).

I would with respect adopt that passage as the appropriate basis on which to consider this appeal, in so far as it relates to questions of fact.

4. The facts appear from the reasons for decision of the Magistrate, which, in so far as they relate to liability, are set out below. In the proceeding before the Magistrate, Mr Cehner was the plaintiff, City West Water was the first defendant and the Borgs were the second defendant. In this case the plaintiff seeks damages for injuries received when on 10 June 1998 he stepped into an uncovered sewer inspection shaft at approximately 7pm on that date in Alfrieda Street St Albans. The inspection shaft is located on the footpath outside the boundary of a shop owned and operated by Paul and Doris Borg, trading as St Albans Babyland, they being the second-named defendants.

> The inspection shaft is connected to the house connection branch from the main sewer which runs beneath the footpath. That main sewer is under the control invested in the [firstnamed] defendant, City West Water.
>
> The first question, upon which much debate has centred in this case, is, who is responsible for the maintenance of or is the occupier of the inspection shaft? I have been referred to the *Water Industry Act* 1994 and it is common ground that the first defendant, City West Water Limited, is the relevant retail licensee under that Act and that the second defendant is the owner of the relevant service to property.
>
> Section 19 provides, in effect, that the second defendant is deemed to have entered into a customer contract with the first defendant. The customer contract, Exhibit G, provides at paragraph 10.1 that the second defendant is responsible for maintaining all plumbing and fixtures up to the point of connection with the first defendant's sewer branch.
>
> In my opinion the evidence of Anthony McGregor as service assurance officer with the first defendant, clearly establishes that the inspection shaft is the property side of the point of connection with the first defendant's sewer branch. Nonetheless, as submitted by Mr Moore, who appears for the second-named defendant, the deemed contract between the first and second defendant cannot give rise to the second defendant owing the duty of care to the plaintiff. See *TAL Structural Engineering Pty Ltd v Vaughan & Ors* [1989] VR 545.
>
> The question which still arises is whether either is responsible to maintain or is the occupier? In my view the deemed contract is not relevant to the issue. In this connection I consider the *Melbourne and Metropolitan Board of Works Act* 1958 most relevant. Section 132 of that Act provides, when read together with the *Water Industry Act*, in effect that the first defendant has responsibility to maintain and have charge, supervision and control over all sewers.
>
> In s129 the word 'sewer' is defined to include relevantly any drain or portion of a drain laid between the sewer and the boundary line of any allotment or between the sewer or a drain laid by or on behalf of the owner of the premises. It is common ground that the inspection shaft falls within the definition of the term 'drain.'
>
> I also consider it reasonably clear from the evidence that the drain from the connection to the sewer was laid by or on behalf of the owner of the premises, a subsequent owner, such as the second defendant, being a person on behalf of whom the drain was laid.
>
> I agree with the submission of Mr Forsyth for the first defendant that s129 extends the term 'sewer' to a drain between the sewer and either the property boundary or the drain laid by or on behalf of the owner, the word 'or' in the definition merely introducing an alternative to the drain between the sewer and the boundary.

> Accordingly, in my opinion, the first defendant is not responsible for the maintenance of the shaft nor is it the occupier of the shaft. Pursuant to s14B of the *Wrongs Act* 1958, the occupier of premises owes a duty to take such care as in all the circumstances is reasonable to see that any person on the premises will not be injured or damaged by reason of the state of the premises, or of things done or omitted to be done in relation to the state of the premises.
>
> I agree with the submission of Mr Williams who appears for the plaintiff that it has not been suggested in any of the submissions that the shaft does not fall within the term 'premises' within the *Wrongs Act*.

After consideration of some of the evidence as to the events which led to Mr Cehner's injuries and as to Mr Borg's knowledge that the cover to the sewer inspection shaft ("the inspection shaft") was missing, His Worship continued:

> I think it likely in the circumstances he knew the cover was missing when the plaintiff entered his shop and told him that he fell in the hole and the lid was off. …
>
> In my opinion Mr Borg, as the occupier of the premises, being the shaft, did not take reasonable care to see that the plaintiff was not injured by reason of the missing cover of which he was aware. I turn to the question of damages.

5. Section 14B of the *Wrongs Act* 1958 ("the Wrongs Act") reads:

> **14B. Liability of occupiers**
> (1) The provisions of this Part apply in place of the rules of the common law which before the commencement of the *Occupiers' Liability Act* 1983 determined the standard of care that an occupier was required to show towards persons entering on his premises in respect of dangers to them.
> (2) Except as is provided by sub-section (1) the rules of common law are not affected by this Part with respect to the liability of occupiers to persons entering on their premises.
> (3) An occupier of premises owes a duty to take such care as in all the circumstances of the case is reasonable to see that any person on the premises will not be injured or damaged by reason of the state of the premises or of things done or omitted to be done in relation to the state of the premises.
> (4) Without restricting the generality of sub-section (3), in determining whether the duty of care under sub-section (3) has been discharged consideration shall be given to—
> (a) the gravity and likelihood of the probable injury;
> (b) the circumstances of the entry onto the premises;
> (c) the nature of the premises;
> (d) the knowledge which the occupier has or ought to have of the likelihood of persons or property being on the premises;
> (e) the age of the person entering the premises;
> (f) the ability of the person entering the premises to appreciate the danger;
> (g) the burden on the occupier of eliminating the danger or protecting the person entering the premises from the danger as compared to the risk of the danger to the person.
> (5) Nothing in this section affects any obligation to which an occupier of premises is subject by reason of any other Act or any statutory rule or any contract.

6. Sections 3, 129 and 132 of the *Melbourne and Metropolitan Board of Works Act* 1958 ("the MMBW Act") read as follows, so far as relevant:

> **3. Definitions**
> (1) In this Act, unless inconsistent with the context or subject-matter—
> "Board" or "Melbourne and Metropolitan Board of Works" means the Melbourne Water Corporation constituted under the Melbourne Water Corporation Act 1992;
> …
>
> **129. Definitions**
> In this and every subsequent Part of this Act unless inconsistent with the context or subject matter—
> "drain" means any drain used for the drainage of one building only or of premises within the same curtilage and leading therefrom into a cesspool or other receptacle for drainage or into a sewer, and also any drain for draining any group or block of houses by a combined operation under the order of the Board;
> …
> "sewer" includes any sewer or underground gutter or channel which is not a drain within the meaning of this Part and any drain or portion of a drain laid between the sewer and the boundary line of any allotment or lot or curtilage or between the sewer and the drain laid or to be laid by or on behalf of the owner of the premises;

...

132. Duties and powers of the Board

For the purposes of this Part the Board—
shall construct repair maintain and have charge of all sewers and shall have supervision and control over all sewers within the metropolis;

...

7. Sections 3 and 63 of the *Water Industry Act* 1994 ("the Water Industry Act") read as follows, so far as relevant:

3. Definitions
(2) Expressions used in this Act and in the *Water Act* 1989 that are not defined in sub-section (1) or elsewhere in this Act have the same meanings as in the *Water Act* 1989.

63. Control over connections
(1) A person must not cause or permit—
(a) any works to be connected to the works of a licensee except in accordance with this section; or
(b) the alteration or removal of any works that are connected to the works of a licensee without the licensee's consent; or
(c) anything to be discharged into the works of a licensee without the licensee's consent.
Penalty:
For a first offence — 20 penalty units or imprisonment for 3 months;
For a subsequent offence — 40 penalty units or imprisonment for 6 months;
For a continuing offence — an additional penalty of 5 penalty units for each day on which the offence continues—
(d) after service of a notice of contravention on the person under section 69; or
(e) if no notice of contravention is served, after conviction of the person for the offence.
...

8. Section 3 of the *Water Act* 1989 reads as follows so far as relevant:

3. Definitions
(1) In this Act—
"works" includes—
(a) reservoirs, dams, channels, sewers, drains, pipes, conduits, fire plugs, machinery, equipment and apparatus, whether on, above or under land; ...

9. It is not in issue that City West Water is a statutory licensee, having been issued on 29 June 1999 with a water and sewerage licence by the Office of the Regulator-General under section 9 of the *Water Industry Act*. Section 4 of the MMBW Act provides that where a function or power is given to such a licensee the Board (defined in section 3 as "Melbourne Water Corporation") ceases to have that function or power. Thus City West Water is, for relevant purposes, in effect the successor of the Board.

10. The conclusion of the Magistrate, as appearing from the reasons for decision, was that Mr Cehner's injuries were brought about as a result of the breach by the Borgs of a duty of care imposed on them, as the occupiers of the inspection shaft, by section 14B(3) of the *Wrongs Act*.

11. The Magistrate gave no basis for his finding that the Borgs were the occupiers of the inspection shaft, and no submission was made by counsel which could enable me to find that that was the case. The evidence is that the Borgs are the owners and occupiers of a shop; and that what I will refer to as a "pipe"[2], to which the inspection shaft gives access, is laid in the footpath outside the shop, as is the inspection shaft itself. It cannot be said, and was not suggested, that the passage of drainage from the Borgs' property through the pipe renders them the occupiers of the pipe or the inspection shaft.

12. It is trite law that the test of whether a chattel has become a fixture so as to form, for legal purposes, part of the freehold, turns on the degree and object of its annexation thereto.[3] In *Monti v Barnes*[4] the English Court of Appeal found that dog-grates, resting in a house by their own considerable weight, but not physically attached to the structure, were placed there with the object of improving the inheritance, and were therefore fixtures which passed to the mortgagee. AL Smith MR said at 207:

> The question which has to be considered in such a case is whether, having regard to the character

> of the article and the circumstances of the particular case, the article in question was intended to be annexed to the inheritance or to continue a mere chattel, and not to become part of the freehold.

13. I note that in *Reid v Smith,*[5] the facts of which are not relevant to the issue before me, all three members of the High Court considered that the matter turned on the intention with which the object in question was brought on to or annexed to the land, and Griffith CJ[6] relied on Blackstone's presumptive equation of the common law with common sense.

14. The plan and photographs in evidence show that the pipe and the inspection shaft are buried under the footpath outside the shop, the lid of the inspection shaft being level with the pavement. The degree of annexation of the pipe and inspection shaft to the freehold of the footpath is thus complete. As to the object of that annexation, it may be said that it is to enable the transmission of sewerage from the shop to the drain operated by City West Water, and that it is in the public interest first, that that sewerage be transmitted by an underground pipe rather than in an open channel, which would not only be offensive, but also dangerous, and second, that an inspection shaft be provided to that pipe in case of any blockage or other problem arising in the pipe. One object of the burial which constitutes the annexation may therefore be described as the improvement of the freehold of the footpath. I find that the pipe and the attached inspection shaft together constitute a fixture. The inspection shaft thus forms part of the freehold of the footpath, and is occupied by the occupier of that freehold. The fact that the pipe and the inspection shaft were constructed by a previous owner of the shop is not relevant to that question.

15. The issue of whether the pipe and inspection shaft could properly be described as "premises" for the purpose of section 14B of the *Wrongs Act* was not argued before me, and it is not necessary that I make any finding thereon. I would note only that many of the matters set out in section 14B(4) would seem inappropriate for consideration where the "premises" in question are part of what appears to be a public footpath.

16. No evidence was before the court as to the ownership or occupation of the freehold of the footpath, and it is not necessary, for the resolution of the issues before me, that I make any finding as to who was the owner or occupier of the footpath, save that there is no suggestion that it was owned or occupied by the Borgs. There is no evidence on which I could find that the Borgs are the occupiers of the inspection shaft.

17. Mr Moore referred me to a passage in the eighteenth edition of *Clerk and Lindsell on Torts* at 10-09 which reads, referring to the common law position which is expressly preserved by section 14B(2) of the *Wrongs Act*:

> Apart from owners and lessees, a person is likely to be regarded as an "occupier" if he has a sufficient degree of control over premises to be able to ensure their safety, and to appreciate that a failure on his part to use care may result in injury to a person coming on to them.

He drew my attention to section 63 of the *Water Industry Act*, which forbids *inter alia* the alteration of any works connected to the works of a licensee without the licensee's consent, and imposes substantial penalties, including imprisonment. (The relevant definition of "works" appears from [7] and [8] above.) In the face of that provision, it would be difficult to find that the Borgs had a sufficient degree of control over the inspection shaft to be able to ensure its safety.

18. Accordingly, considering the first part of the second question in the Master's order on the basis of the passage cited from *Spurling* in [3] above, I am satisfied that a finding that the Borgs were not the occupiers of the inspection shaft, and thus that they had no duty of care to Mr Cehner under section 14B of the *Wrongs Act*, is the only reasonable finding which the evidence can support.

19. The second part of that question remains to be answered. However, I did not understand counsel for either respondent to have submitted that Mr Cehner's injuries were caused by any breach by the Borgs of any general duty of care imposed on them by the common law, although there was a claim to that effect in the original Complaint filed in the Magistrates' Court.

20. If I have misunderstood their submissions, I would in any case adopt with respect the passage from the judgment of Hayne J in *Brodie v Singleton Shire Council*[7] where His Honour

said:

> So long as the common law stops short of imposing a duty of care on any person who has power to act and foresight of harm, and for whom it would be reasonable to act, no such duty of care should be found to be owed by a highway authority.

I note also the statement by Gleeson CJ, Gaudron, McHugh, Hayne and Callinan JJ in *Sullivan v Moody*[8] that foreseeability of harm is not sufficient to give rise to a duty of care. As Mr Moore submitted, no more could be said of the Borgs than that they might have had foresight of harm and that it might have been reasonable for them to act. Any power they might have had to act would be inhibited by section 63 of the *Water Industry Act*, as appears from [17] above. I am satisfied that they were not subject to any duty of care imposed by the common law.

21. The answer to the second question is accordingly No. That being so, it is not necessary to deal with questions 1 and 3.

22. That finding should be sufficient to dispose of the appeal before me. However, much of the hearing was devoted to the effect of the definition of "sewer" in section 129 of the MMBW Act, the subject of question 1 in the Master's order, and it is appropriate that I say something about that matter. The relevance of the definition is that section 132 provides that the Board shall construct, repair, maintain and have charge, supervision and control of all sewers as defined. It is not in issue that City West Water is the successor of the Board for this purpose.[9]

23. Counsel for Mr Cehner and City West Water submitted that, as the Magistrate appears to have found, the pipe and inspection shaft do not fall within what the definition describes as a "sewer", for which City West Water would have responsibility. The extent of the debate at the hearing of the appeal demonstrates that that definition is not without difficulties of interpretation. However, assuming, without deciding, that that submission is correct, I am not clear as to the legal ground on which it is claimed that an absence of responsibility in City West Water to maintain the pipe and the inspection shaft gives rise to a responsibility in the Borgs to do so, so as to impose a duty of care on them.

24. I was not directed to any provision of the MMBW Act or the *Water Industry Act* which would have that effect. Sections 58 and 68 of the *Water Industry Act* establish responsibility in an owner of land for compliance with notices served by a licensee, but go no further than that. Section 164 of the MMBW Act, to which Mr Scott referred, gives certain powers to the Board to enter upon premises and serve notices on owners, but again goes no further than that. It was not suggested that any notice under any of those provisions had been served on the Borgs. In any case, as the Borgs are not the owners of the pipe or the inspection shaft those provisions have no relevance to their situation. No point was made as to any deemed contract under section 19 of the *Water Industry Act*, and I note that the Magistrate found any such contract to be not relevant to the issue.

25. Mr Moore, for the Borgs, submitted that if the Borgs were in law responsible for the inspection shaft so as to have a duty to ensure that it was not left open, the only way in which they could ensure that the lid was not removed would be to arrange for the manufacture of a lid which could only be removed by the use of some special tool, which they would control. However, that action would constitute a breach of section 63 of the *Water Industry Act*, referred to in [17] above. Indeed, it might be thought that if the Borgs, being aware that the lid of the inspection shaft was missing, had sought to remedy the problem by fitting any other kind of lid, they might have been open to a charge under that provision.

26. I say no more than that it does appear that there are ambiguities and inconsistencies in the scheme of the legislation, which it may be appropriate for Parliament to consider.

27. For the reasons stated, the appeal will be allowed. I invite submissions as to the appropriate orders to be made.

---

[1] [1973] VicRp 1; [1973] VR 1 at 11; (1972) 30 LGRA 19
[2] To avoid the need to employ a statutory description
[3] *Holland v Hodgson* (1872) LR 7 CP 328 at 334.
[4] [1901] 1 QB 205.

[5] [1905] HCA 54; (1905) 3 CLR 656; 12 ALR 126.
[6] At 660.
[7] [2001] HCA 29; 206 CLR 512; (2001) 180 ALR 145; (2001) 75 ALJR 992 at [324]; (2001) 114 LGERA 235; [2001] Aust Torts Reports 81-607; (2001) 33 MVR 289; (2001) 22 Leg Rep 13.
[8] [2001] HCA 59 at [25]; (2001) 207 CLR 562; (2001) 183 ALR 404; (2001) 75 ALJR 1570; (2001) 28 Fam LR 104; [2001] Aust Torts Reports 81-622; (2001) 22 Leg Rep 2.
[9] See [9] above.

APPEARANCES: For the Appellants Borg: Mr JP Moore, counsel. Philips Fox, solicitors. For the first Respondent Cehner: Mr J Williams, counsel. Agricola, Wunderlich & Associates, solicitors. For the second Respondent City West Water Ltd: Mr MR Scott, counsel. Blake Dawson Waldron, solicitors.
