03/03; [2003] VSCA 72

SUPREME COURT OF VICTORIA — COURT OF APPEAL

CEHNER v BORG & CITY WEST WATER LTD

Batt, Chernov and Eames JJ A

24 April, 12 June 2003

CIVIL PROCEEDINGS – NEGLIGENCE – CLAIM FOR DAMAGES – INJURIES RECEIVED WHEN PERSON STEPPED INTO AN UNCOVERED SEWER INSPECTION SHAFT – SHAFT ON FOOTPATH OUTSIDE BUSINESS PREMISES – LIABILITY OF OCCUPIERS – WHETHER SHOPOWNERS AND/OR WATER SUPPLY COMPANY LIABLE AS OCCUPIERS OF THE SHAFT – WHETHER OCCUPIERS BREACHED DUTY OF CARE: *MMBW ACT* 1958, SS3,129,132; *WATER INDUSTRY ACT* 1994, SS3, 63; *WRONGS ACT* 1958, S14B.

C. was injured when at about 7pm on 10 June he stepped into the uncovered opening of an inspection shaft of a sewerage pipe located in the footpath immediately outside B's shop. C. sued B. and City West Water claiming damages (1) on the basis that they (or one of them) was or were the occupiers of the shaft; (2) in negligence. At the hearing before the magistrate, C. said that whilst walking along the footpath he was distracted by an argument which was taking place in an adjacent car park and in these circumstances put his foot in the hole. The magistrate found that City West Water was under no obligation to maintain the pipe and thus was not its occupier and dismissed the claim against them. The magistrate found that B. was liable to C. as owners and occupiers of the shaft and liable in damages. On appeal to a judge of the Supreme Court (MC 41/01; [2001] VSC 438) the order made against B. was set aside. Upon appeal in relation to the order setting aside the order in relation to B.—

HELD: Appeal dismissed.

1. The principal question for the magistrate to decide was whether the defendants were liable to C. as occupiers of the shaft under the *Wrongs Act* 1958 (Act) or in negligence.

2. (By the Court) B. was not the occupier of the shaft. Assuming that one of B.'s predecessors caused the domestic pipe to be installed, that did not show that B. was responsible for it or was the occupier of it for the purposes of the Act, particularly bearing in mind that the pipe was located outside the boundary of B.'s shop. Whilst the *Plumbing Code and Sewer Regulations* required B. to ensure the effective and hygienic operation of the fittings, fixtures and appurtenances connected to the Board's sewers, these provisions did not form the basis for the claim that B. was the occupier of the domestic pipe. In those circumstances the judge was correct in concluding that it was not open to the magistrate to find that B. was the occupier of the domestic pipe.

3. (Batt and Chernov JJ A, Eames JA doubting) It was not open to the magistrate to have found that B. breached a duty of care to C. in respect of the uncovered sewerage pit. Liability attaches to an occupier of a footpath only where the relevant danger is not an obvious one for example, where there was inadequate lighting or the concealment of a hole. The circumstances whereby C. was distracted by argument nearby failed to establish in accordance with accepted principle that B. breached the duty of care to C.

***Brodie v Singleton Shire Council* [2001] HCA 29; 206 CLR 512; (2001) 180 ALR 145; (2001) 75 ALJR 992; (2001) 114 LGERA 235; [2001] Aust Torts Reports 81-607; (2001) 33 MVR 289; (2001) 22 Leg Rep 13, applied.**

BATT JA:

1. I agree with Chernov JA.

CHERNOV JA:

2. This is an appeal[1] from the decision of a judge of the Trial Division, given on 19 November 2001, whereby her Honour allowed the appeal of the first respondents, Paul and Doris Borg ("the Borgs"), which they brought pursuant to s109 of the *Magistrates Court Act* 1989, against the decision of a magistrate, given on 15 May 2001, in which he ordered them to pay the appellant damages in the sum of $17,610.00 plus interest and costs. The damages were awarded in respect of an injury that the appellant suffered at approximately 7p.m. on 10 June 1998 when he stepped into the uncovered opening of an inspection shaft ("the shaft")[2] of a sewerage pipe which was located in the footpath immediately outside the Borgs' shop in Alfrieda Street, St. Albans.

3. On 5 April 2000 the appellant brought a proceeding in the Magistrates' Court against the second respondent ("City West Water"), which was the first defendant, and the Borgs, who were named as the second defendant, claiming damages in respect of his injury under the *Wrongs Act* 1958 on the basis that the defendants or one of them were or was the occupier of the shaft, as well as in negligence and nuisance. As I have mentioned, the appellant succeeded in the Magistrates' Court against the Borgs, but he failed against City West Water. The Borgs' appeal against the magistrate's decision was upheld by the judge, who did not, however, disturb the magistrate's conclusion that City West Water was not liable to the appellant in respect of his injuries. Although the notice of appeal does not seek to have City West Water made liable to the appellant, it was nevertheless served with the notice of appeal and thus became a respondent to it[3].

Sewerage system

4. It is necessary to explain briefly the location of the shaft and the drainage system to which it is connected in relation to the Borgs' premises. It seems that the shaft connects with and forms part of an underground sewerage drain or domestic pipe ("the domestic pipe")[4] that runs out from the Borgs' shop premises and beneath the footpath, and connects into a branch of the main sewer ("the sewer branch") which, in turn, joins the main sewer.

5. It is also convenient to refer briefly to the terms of the relevant legislation and to put in context the position of City West Water in relation to the sewerage system that existed in the locality of the Borgs' premises. The principal legislation which deals with sewers is the *Melbourne and Metropolitan Board of Works Act* 1958 ("*MMBW Act*") which charges the Melbourne Water Corporation[5] ("the Board of Works") with, *inter alia*, control of sewers and associated works.[6] So far as is relevant for present purposes, City West Water is a statutory retail licensee under the *Water Industry Act* 1994[7] and stands effectively in the shoes of the Board of Works in relation to its responsibility in respect of, *inter alia*, the sewer into which sewage from the Borgs' premises eventually drains[8]. "Sewer" is defined in s129 of the *MMBW Act* to include "any sewer ... which is not a drain within the meaning of this Part and any drain ... laid between the sewer and the boundary of any allotment".

"Drain" is defined to mean "any drain used for the drainage of one building ... and leading therefrom into a cesspool or other receptacle for drainage or into a sewer ...". Division 4 of Part III of the *MMBW Act* deals with private sewers and drains; in particular, ss152, 157 and 159, to which reference will be made again later, contemplate the construction of private sewers and drains, albeit only with the consent of the Board of Works. The other legislative provisions to which reference should be made are ss8 and 198 of the *Local Government Act* 1989. So far as is relevant, s198 provides that sewers and drains "in and under roads[9]" that are *not* vested in any public body[10] are vested in the relevant municipal council and are under its management and control. See also s8 which charges the council with the responsibility of managing, *inter alia*, footpaths[11] arguably including in this case the sewer pit. Consequently, if the domestic pipe was not vested in City West Water, it is at least arguable that it was vested in the local council and that it was responsible for its maintenance.

Magistrate's decision

6. A principal issue before the magistrate was whether the defendants were liable to the appellant as occupiers of the shaft under the *Wrongs Act* or in negligence. The claim in nuisance seems not to have been pursued. The critical matter agitated before the magistrate, however, was which of the defendants was the occupier of the shaft. It seems to have been accepted at the hearing that the domestic pipe constituted "premises" for the purpose of s14B of the *Wrongs Act* and that liability for the appellant's injury would rest with whoever was the "occupier" of it for the purposes of that Act. In that context, one of the matters that was canvassed was, which of the defendants was responsible for its maintenance and repair. It was common ground that, at all relevant times, City West Water, as retail licensee of the main sewer, had control of the sewer and the sewer branch. It claimed, however, that it had no responsibility for the maintenance of the domestic pipe and was not an occupier of it.

7. The magistrate decided, as I have said, that City West Water was under no obligation to maintain the domestic pipe and thus, was not its occupier. He found that the domestic pipe had been installed by one of the Borgs' predecessors in title and that, as a consequence, the Borgs were its owners and occupiers. The magistrate also considered that the Borgs knew that the cover of

the shaft had been off for some time before 10 June 1998 and that, as occupiers of the "premises", they failed to take reasonable care to prevent the appellant from being injured. Consequently, he gave judgment for the appellant as against the Borgs.

Appeal from magistrate

8. On 7 August 2001 a Master of the Supreme Court ordered that three questions of law be set down for determination in the appeal against the magistrate's decision but, as will become apparent, it is only necessary to consider the second question:

> "(b) Having regard to the whole of the evidence could a reasonable Magistrate properly instructed have found that [the Borgs] were occupiers of the relevant sewerage inspection shaft, and/or were responsible for the [Appellant's] ... injuries?"

Her Honour answered this question in the negative and, in light of that, found it unnecessary to answer the other two questions.

9. Essentially, there were two bases on which her Honour answered in the negative the first part of the second question. First, her Honour decided, in effect, that there was no evidence before the magistrate on which he could find that the Borgs were the occupiers of the domestic pipe. The judge said:

> "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", to which the inspection shaft gives access, is laid under 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."

Although the magistrate's reasons are far from clear, it seems that a key basis for his conclusion that the Borgs were responsible for the maintenance of the domestic pipe and thus, were its occupier, was his finding that the domestic pipe was laid by or on behalf of the previous owner of the Borgs' premises.

10. Next, her Honour said that the domestic pipe and shaft "together constitute a fixture" and thus the shaft formed part of the freehold of the footpath and was "occupied by the occupier of that freehold". The learned judge noted that, although there was no evidence of who owned or occupied the footpath, it was not suggested that it was the Borgs. Further, her Honour noted that the Borgs were not free to deal with the domestic pipe as they saw fit having regard, *inter alia*, to s63 of the *Water Industry Act* which prohibits the alteration of any works to the sewers without the consent of City West Water. In the circumstances, said her Honour, "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". Her Honour concluded that the only reasonable finding which the evidence could support was that the Borgs were not the occupiers of the shaft and thus, owed no duty of care to the appellant under s14B of the *Wrongs Act*.

11. In answering the second part of the second question, her Honour considered that, on the evidence, it could not be said that the Borgs owed the appellant a duty of care in relation to the sewerage pit. The most that could be put against them in that regard, said the judge, was that they might have had foresight of harm from the fact that the shaft was open and that it might have been reasonable for them to act. But mere foresight of harm, said her Honour, was not sufficient to give rise to a duty of care and she referred to the observations on this issue of Hayne J in *Brodie v Singleton Shire Council*[12] and by Gleeson CJ, Gaudron, McHugh, Hayne and Callinan JJ in *Sullivan v Moody*[13]. Consequently, the learned judge concluded that the second part of the second question should also be answered in the negative.

Appellant's case

12. The appellant's case before us was that, contrary to her Honour's decision, it was reasonably open to the magistrate to find on the evidence before him that the Borgs were responsible for the maintenance of the domestic pipe and, therefore, were the occupiers of it. It was also reasonably open to the magistrate to conclude, it was claimed, that the Borgs breached their duty of care to the appellant. In support of these contentions the following points were made. It was first said

that the domestic pipe was a "private sewer" that fell within the category of sewers contemplated by ss152 and 157 (and, according to the second respondent, s159) of the *MMBW Act*. Thus, it was claimed, the responsibility that was effectively imposed by s132 of the *MMBW Act* on City West Water to maintain sewers did not extend to the domestic pipe and, therefore, it could not be properly regarded as the occupier of it. It was then put that, as the magistrate found, the domestic pipe was installed by or on behalf of a previous owner of the Borgs' shop and consequently, the ownership of the domestic pipe passed to the Borgs when they took transfer of the title to the premises. It was then submitted that the Borgs' use and control of the land extended to the domestic pipe because it was an integral part of their land. Counsel highlighted that it was the Borgs who had the exclusive benefit and use of the domestic pipe which, he pointed out, had the purpose of carrying drainage from their premises. Next, it was claimed, the Borgs were under an obligation in any event to maintain the domestic pipe under the requirements of the *Plumbing Code and Sewerage Regulations*[14], particularly regs 901 and 902. In the circumstances, it was said, it was open to the primary court to conclude that the Borgs were occupiers of the shaft.

13. It was then argued by Mr. Colquhoun for the appellant that the Borgs' duty of care to the appellant arose from Mr Borg's knowledge that the cover of the shaft had been missing for some time prior to the accident and that he must have foreseen that the resulting cavity in the footpath posed a danger to pedestrians. By not taking any step to remedy this situation, it was claimed, the Borgs breached their duty of care to the appellant under s14B of the *Wrongs Act*. Alternatively, they breached their common law duty to him.

14. Counsel claimed that, in any event, the appeal to the primary judge miscarried because her Honour applied the wrong test in determining if the magistrate erred. It was said that, instead of considering the matter before her in accordance with the usual principles, namely, whether there was evidence below on which the magistrate could have reasonably found that the Borgs were liable to the appellant, her Honour effectively conducted a re-hearing of the case contrary to s109 of the *Magistrates' Court Act* 1989. In support of that claim, the appellant's counsel pointed to the following aspects of her Honour's reasons. First, it was said, in the passage of her Honour's reasons to which I have referred earlier[15] the judge made clear that she sought to explore whether she could make a "finding" that the Borgs were the occupiers of the shaft, rather than determining whether it was open to the magistrate to do so. Secondly, her Honour based her decision on the finding that the domestic pipe was a fixture.

15. It was also submitted for the appellant that, by proceeding to determine the case on the basis of the domestic pipe being a fixture, her Honour denied him procedural fairness. Counsel said that this particular issue was not argued in the Magistrates' Court, and that objection was taken to it being considered by her Honour on the basis that the appellant would be materially prejudiced if it were to be a live issue at such a late stage of the proceeding. It was claimed that, had the matter been raised at trial, the appellant could have called evidence as to the circumstances in which the domestic pipe was laid and thus would have had the opportunity of establishing that it was never the intention that ownership of it would pass from the then owner of the land to the council or anyone else.

16. I now turn to consider various arguments put forward on behalf of the appellant.

Her Honour applied the correct test

17. It is convenient to deal first with the appellant's contentions that her Honour applied the wrong test in determining whether the magistrate's decision can stand and that procedural fairness was denied to him. If he succeeds in either claim her Honour's decision may have to be set aside. In my view, however, it is apparent that, notwithstanding that it was the judge who first raised the question whether the domestic pipe was a fixture, her Honour well understood the test by which she had to resolve the matter before her. At the very outset of her reasons, the learned judge said that, for the purpose of determining the matter before her, she would adopt the approach that was formulated by Stephen J in *Spurling v Development Underwriting (Vic) Pty Ltd*[16], namely, that 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, [or, put another way,] whether `on any reasonable view of the evidence that decision can be supported' ...". It seems to me that, on a fair reading of her Honour's reasons, she not only

appreciated the content of the test but also applied it in the resolution of the appeal before her. In speaking of whether she could make a "finding" that the Borgs were the occupiers of the shaft, it seems clear enough that, in context, her Honour meant only that she could not conclude that the magistrate had a "basis" for *his* finding on that issue. Furthermore, for reasons given later, her Honour's conclusion that the pipe was a fixture did not vitiate her decision. In any event, it is plain that her Honour was conscious that she was seeking to answer the second question which was worded in accordance with the principles laid down in *Spurling*. In my view, whatever may be said as to the correctness of her Honour's decision that the domestic pipe was a fixture, it seems clear enough that, in answering that question, the learned judge did so by adopting the approach that was sanctioned by *Spurling*.

18. I now turn to consider briefly the criticism made of her Honour's finding that the domestic pipe was a fixture and the complaint that the appellant was denied natural justice in relation to that issue. It seems to me that, as was submitted by Mr Santamaria for the first respondent and as I have already mentioned, there were two bases for her Honour's decision. Thus, if it was not open to the magistrate on the evidence to conclude that the Borgs were the occupiers of the domestic pipe, the question whether the judge was correct in characterising the domestic pipe as a fixture would cease to have relevance. Much the same can be said about the appellant's claim that her Honour denied him procedural fairness. Consequently, I turn to analyse the arguments of the appellant's counsel, which I have already summarised, in support of the contention that the domestic pipe was relevantly under the control of the Borgs and that, therefore, they were the occupiers of it.

On evidence Borgs not occupiers of shaft

19. In my view, counsel's arguments do not support the conclusion for which he contends. First, contrary to the appellant's contentions, ss152, 157 and 159 of the *MMBW Act* do not bear on the question whether the domestic pipe was a private sewer. So far as is relevant, s152 effectively prohibits any person from constructing any sewer or drain without the prior consent of the Board of Works. Section 157 merely empowers the Board to carry out certain works in relation to a private sewer or drain that is located under a street or pavement or other public place and to recover the cost of such work from the occupier of the property "to which such private sewer or drain belongs". Section 159 requires private sewers and drains that connect to a sewer to be repaired and cleansed under the control of the Board of Works but at the cost of the occupier of the relevant land or premises. None of these sections, however, operates to establish that the domestic pipe was a "private sewer", but even if that were the case, they do not resolve the question whether the Borgs were responsible for the maintenance of the shaft. Secondly, there was simply no evidence so called before the magistrate as to the circumstances in which the domestic pipe was installed so as to enable him properly to conclude that it was laid by one of the previous owners of the premises. But even if it is assumed that one of the Borgs' predecessors in title caused the domestic pipe to be installed, by itself, that would not demonstrate that the Borgs were responsible for it or were its occupiers for the purposes of the *Wrongs Act*, particularly bearing in mind that the domestic pipe is located *outside* of the boundary of the Borgs' shop.[17] Although the matter need not be decided, the more likely situation is that, having regard to ss.198 and 8 of the *Local Government Act,* the domestic pipe was vested in the council and that it was relevantly responsible for the sewer pit in the footpath.

20. The appellant relied on *Taylor v Browning*[18] in support of the claim that the Borgs' use and control of the land extended beyond its boundaries to the domestic pipe (which, it was said, was an integral part of the land and for which the Borgs were responsible). But that case is not authority for the proposition advanced by the appellant. The case concerned an easement over an underground pipe and did not deal with an obligation to maintain something that was not part of the relevant property. As Mr Santamaria for the first respondent pointed out in argument, an easement creates rights over someone else's property, and even if the previous owner obtained a right or an easement to lay the domestic pipe, it does not mean that the Borgs became obligated to maintain it or that they became its owners or occupiers for present purposes. Reliance was also placed by the appellant on *Cunard v Antifyre Ltd.*[19] and *Hargrave v Goldman*[20] in support of the contention that the Borgs' relevant obligations as owner and occupier of their property did not cease at its boundary but extended to the domestic pipe. These cases are, however, irrelevant for present purposes. They deal with an obligation of an occupier of property in respect of matters – a guttering in the first case and a fire in the second – passing from *that land* on to the adjoining

land which caused consequential harm. Here, the question is materially different – it is whether the Borgs had a relevant obligation in respect of the domestic pipe which, as I have said, was *outside* their property and which was not put there by them.

21. As to the *Plumbing Code and Sewer Regulations* on which the appellant relied to show that the Borgs were under an obligation to maintain the domestic pipe, they do no more than require the owner or occupier of the relevant property to ensure the effective and hygienic operation of the fittings, fixtures and appurtenances connected to the Board's sewers and to clear any stoppage or obstruction in respect of any sewerage drain located within or appurtenant to the boundary of the land in question. It seems to me that, on any view, these provisions do not form a basis for the claim that the Borgs were the occupiers of the domestic pipe.

22. Before leaving the issue of the occupancy of the shaft, I should mention that there is much force in Mr Santamaria's argument that it is a mistake to speak of the occupancy of the *shaft*. Counsel submitted that the relevant question is, who was the owner or occupier of the *land* on which the shaft opening, or the sewerage pit, was located. It was said that it was that owner or occupier who was relevantly the "occupier" of the shaft or sewerage pit. We were told from the Bar table that, generally, sewerage outlets, such as that of the domestic pipe, were located in the footpath only in relation to premises that had been constructed *in the first place* without a sewerage connection and where the connection was made available to them *later*. In such circumstances, the outlet of the shaft or the sewer pit was placed adjacent to those premises, usually in the footpath. In more recent times, however, it was said, where sewerage facilities were made available to premises at the time of their construction, the shaft outlet, or the sewerage pit, has usually been located on the subject land itself, immediately below its surface. In those circumstances, said Mr Santamaria, it would be sensible to speak of the occupier of the land as being responsible for the sewerage pit for the purposes of the *Wrongs Act*. In the present case, Mr Santamaria said, the opening of the shaft was clearly in the footpath which was under the control of the municipal council pursuant to the *Local Government Act,* more particularly, ss.8 and 198 of that Act. Thus, it was said, it was the council that was responsible for the sewerage pit and was its "occupier" for relevant purposes. There is, as I have said, much force in this argument but in view of my above conclusions, it is not necessary finally to pronounce on the correctness of it.

23. It follows that, in my view, her Honour was correct in concluding that it was not open to the magistrate to find that the Borgs were the occupiers of the domestic pipe. In the circumstances, therefore, it is unnecessary to consider whether her Honour erred in characterising the domestic pipe as a fixture or whether the appellant was denied procedural fairness in relation to that issue.

Borgs' duty of care did not arise from their knowledge

24. But even if I am wrong in my above conclusions and it was open for the magistrate to find that the Borgs were the occupiers of the domestic pipe, I consider that the magistrate could not have properly found that the Borgs breached a duty of care to the appellant in respect of the uncovered sewerage pit. As Mr Bick for the second respondent submitted, in order to attribute liability to the Borgs under s14B(3) of the *Wrongs Act* (or at common law), the appellant was required to show, *inter alia*, that if the Borgs were occupiers of the shaft, they breached their common law duty to the appellant. Mr Bick submitted that the appellant failed to establish this. And consequently, he claimed, the Borgs could not have been found liable by the magistrate for breach of the *Wrongs Act* or of a common law duty of care.

25. It was acknowledged by Mr Bick that his submission was not the subject of a notice of contention.[21] Nevertheless, his argument was set out in summary form in the outline of supplementary submissions that was filed on behalf of the second respondent. In the circumstances, he sought leave to have this outline treated as a notice of contention and he also sought an extension of time for the filing of it. Mr Colquhoun opposed this course but, in the end, could not point to any prejudice if the Court treated the outline of supplementary submissions as an informal notice of contention and gave leave to file it out of time. In my view, given that the appellant will not be prejudiced by this course, I would favour granting Mr Bick's application.

26. Mr Bick went on to submit that, in essence, the appellant's case was an ordinary tripping case that occurred on a public footpath, and he pointed to *Brodie*, and the subsequent cases that have applied it, whereby it has been held that liability attaches to an occupier of a footpath

only where the relevant danger is not an obvious one. The High Court in *Brodie* reasoned that, ordinarily, pedestrians will be expected to exercise reasonable care for their own safety by avoiding such obvious hazards as "uneven paving stones, tree roots or holes". The view was expressed in that case that liability for negligence in such circumstances would arise if the danger was not an obvious one, for example, where there was inadequate lighting or the concealment of a hole.[22] Here, the accident occurred, as I have said, at approximately 7p.m. and the appellant's evidence in that regard did not give any indication what led him to "fall into the hole" other than that he was distracted by an argument that was taking place in the adjacent car parking area and, in those circumstances, put his foot in the hole. The appellant said that he fell into the hole "because there was [sic] people arguing [in] ... the parking area and I just turned around there and all of a sudden bang I went into the hole." It follows, said Mr. Bick, that this evidence failed to establish, in accordance with accepted principle, either at common law or under s4B(3) of the *Wrongs Act*, that the Borgs breached their duty of care to the appellant. I agree. The appellant's evidence fell short of demonstrating that his injury occurred because of a breach of any duty that the Borgs might have owed him.

Conclusion

27. Thus, even if the Borgs were occupiers of the domestic pipe for the purposes of the *Wrongs Act* and even if they owed the appellant a duty of care in relation to it, it was not open for the magistrate on the evidence to find that the appellant's injury occurred by reason of a breach of that duty.

28. In the circumstances, therefore, I would dismiss the appeal.

EAMES JA:

29. The second of the questions referred to the judge on appeal asked whether on the whole of the evidence it was open to a reasonable magistrate to have found that the Borgs "were the occupiers of the relevant sewerage inspection shaft, and/or were responsible for [the appellant's] injuries". Her Honour held that it was not so open and allowed the appeal against the magistrate's decision. Her Honour found it unnecessary to answer the first and third questions referred to her. The third question only arose if the Borgs were found to be liable to the appellant, as it raised the issue of contribution as between the Borgs and City West Water. That question was predicated on the facts that the Borgs had been held to be occupiers of the shaft "or were otherwise responsible for the [appellant's] injuries". The way in which the questions were framed reflected the fact that the case before the magistrate concentrated attention on the question whether one or other of the defendants was the occupier of the shaft. Insofar as the questions left open the possibility that there might have been liability "otherwise" than as an occupier (whether at common law or under the *Wrongs Act*) the reasons for decision of the magistrate reflect the reality that no other duty of care was identified as creating liability if the Borgs were not occupiers.

30. I agree with Chernov JA, for the reasons he gives, that the evidence before the magistrate did not establish that the Borgs were occupiers of the shaft or pipe which were involved in the appellant's injury, nor was it contended that they were the occupiers of the footpath. However, had the Borgs owed a duty of care as occupiers I do not share his Honour's confidence that the evidence in this case would, in any event, have fallen short of demonstrating that the injury occurred because there had been a breach of that duty. In my view, the decision of the High Court in *Brodie v Singleton Shire Council* and *Ghantous v Hawkesbury City Council*[23] (which were decided together), and the subsequent appellate cases in which its principles had been applied with respect to the liability of public authorities where pedestrians tripped on footpaths under the control of the authority, would not necessarily have imposed a barrier to the establishing of liability.

31. The sole basis for the finding of negligence made by the magistrate appears to have been his finding that "Mr Borg was aware the cover had been missing for some time and had omitted to take remedial action". There were many gaps in the evidence presented before the magistrate and the assumption seems to have been made that the mere fact of the knowledge of a missing cover would have been sufficient to render the occupier liable. Insofar as the situation of a public authority vis a vis an injured pedestrian might be thought to be analogous to that of a shop-owner occupier the decision in *Ghantous* might be thought to cast some doubt on that proposition, but that decision was handed down after the magistrate had made his orders and the issues raised

by that case as to the existence and scope of the duty of care owed in "footpath" cases were not agitated before the magistrate.

32. The content of the duty of care which would have been owed had the Borgs been occupiers would not necessarily have been the same as that discussed in *Ghantous*. As Hayne J noted[24], the content of the duty owed by a private occupier invites examination of the particular and often peculiar circumstances of the individual, whereas the performance of public duties requires consideration of the "myriad competing pressures" which a public authority must address. However, even assuming that the content of the duty of care was the same whether the defendant was a highway authority or a private occupier I do not accept the contention of Mr Bick, for City West Water, that this was the kind of "tripping" case for which liability could not arise because the hazard was an obvious one for a pedestrian exercising reasonable care for his own safety.

33. The relevant question identified by the joint judgment in *Ghantous* was whether there was a reasonably foreseeable risk of harm to a pedestrian exercising reasonable care for his own safety[25]. As the judges stated in the joint judgment, in agreeing with Callinan J, ordinarily members of the public would be expected to look where they were going and avoid "obvious hazards, such as uneven paving stones, tree roots or holes". Their Honours qualified that statement, however, by saying that allowance had to be made for inadvertence, and for the danger not being readily perceived because of poor lighting "or the nature of the danger". A danger in the nature of a trap might present a foreseeable risk of harm which the authority should have perceived.

34. The Court in *Ghantous* was concerned with a footpath which over time had subsided in places so that its verge was about 50mm below the concrete and when the pedestrian stepped to one side she stumbled and fell. That is a very different situation to the present case. As Gleeson CJ observed[26] members of the public are well aware of the fact that not all footpath surfaces are even and free of defects, and as Callinan J observed[27], it is not unreasonable to expect persons when walking in broad daylight to see what lies ahead of them in the ordinary course, and without requiring special vigilance.

35. In *Richmond Valley Council v Standing*[28] the Court of Appeal held that there was not a reasonably foreseeable risk of harm to a person exercising reasonable care for their own safety when that person had tripped on a crack in a paved concrete surface between a footpath and a driveway. Heydon JA with whom the other members of the court agreed, observed that the defect was an insignificant and common one on pavements throughout the State, and did not represent "a danger, a hazard or a trap".[29] The Council had no duty to undertake inspections to identify such defects, and even if it had identified them it had no duty to alter them "in view of their obviousness". Had there been a duty then it would probably not have been breached, so Heydon JA held, because the degree of probability of the risk of the occurrence was so low as not to justify the expense of taking obviating action, having regard to the council's other responsibilities.

36. In *RTA v McGuinness*[30] the pedestrian tripped on the edge of a manhole cover which had been raised 13mm above the ground. Handley JA, with whom Mason P agreed, held that no duty of care was owed, the hazard being obvious and not constituting a trap. The authority did not know of the danger and even if it had there would have been no obligation on it to have put it right, his Honour held. Foster AJA, whilst agreeing with the outcome did so for reasons which differed from those of Handley JA, Foster AJA, held that even when applying *Ghantous* it was open to the trial judge in that case to have concluded that the tripping hazard was not readily obvious and could be regarded as a trap. His Honour expressed caution about treating the decision in *Ghantous* as though it established a principle that would lead to an adverse outcome for persons injured in all footpath tripping cases. I respectfully agree that such caution is appropriate. Indeed, Handley JA, expressly observed that the assumption that pedestrians had a position of relative advantage (because they generally could protect themselves from danger on uneven public surfaces by keeping a proper lookout) had to give way where the surface contains "something unusual or unexpected which creates a real danger for ordinary pedestrians".[31]

37. In determining whether there had been a breach of the duty of care the "competing or conflicting responsibility or commitments" of a highway authority, as Gaudron, McHugh and Gummow JJ said[32], must be taken into account. No similar considerations would have arisen had the Borgs owed a duty of care. In this case the magistrate found that after the fall had occurred

Mr Borg rang City West Water to report the missing cover and was told to report it instead to the local council. It was not stated whether he did contact the council but soon after he spoke to City West Water a cover was installed, by a person unknown. This suggests that little more would have been required of the Borgs to remove the danger than to have made one or two telephone calls.

38. It is unnecessary that I further traverse the many decisions which have followed after *Brodie* and *Ghantous*. No principle emerges, in my view, that tripping cases must now be approached with a presumption that an injured pedestrian should fail in an action brought against a local authority which has responsibility for maintenance of the surface, let alone when the action is against a private citizen owing a duty of care to a pedestrian. Liability will be determined by a close consideration of the facts in each case, having regard to the principles discussed in *Ghantous* when addressing the content of the duty of care owed by the defendant in the particular case, and as to the factors relevant to proof of breach of the duty which is owed.

39. In the present case there was a high degree of probability of the risk eventuating of a person falling into the hole, given that it was on a footpath adjoining shops, where one might anticipate that the passer-by might be looking in the window of the shop (as shop owners such as the Borgs would no doubt hope to be the case). As photographs showed, the uncovered shaft was very close to the shop window and might well not be noticed by a person walking past the shop windows. The magistrate made no finding about the state of lighting, but the accident happened at 7 pm in June and the appellant gave evidence that it was "very dark" and there were no lights on in the baby shop. He said that after his accident "they" had improved the lighting.

40. The fact that the appellant was distracted by noise and looked behind him immediately before he stepped into the hole is the sort of inadvertence which might be expected of a pedestrian passing by shop windows and would not, in my opinion, excuse an occupier from responsibility for failing to take reasonable steps to have a cover installed or to warn pedestrians of the danger which its absence presented.

41. Had the appellant established that he was owed a duty of care by the Borgs there were, therefore, a number of evidentiary factors which, had they been proved, might have justified a finding that there had been a breach of the duty of care. Having regard to principles as now understood after *Brodie* and *Ghantous,* it may be that not all factors were addressed by the magistrate relevant to the question whether a breach of duty had occurred. Certainly, not all relevant factors were the subject of findings by his Worship, but it may not have been the case that his finding of liability was solely based on the knowledge on the part of the Borgs as to the missing cover. Whether that fact alone would have been sufficient to justify a finding of a breach of duty of care as occupier (or in negligence) may be doubtful, but it is unlikely that his Worship's conclusion did not incorporate additional findings which could have justified his conclusion. The question, however, is academic, since the appellant failed to establish that the Borgs owed him a duty of care whether as occupier or on any other basis. Mere foresight of harm and the capacity to avoid it are not sufficient to impose a duty of care upon a member of the community[33].

42. I agree that the appeal should be dismissed.

---

[1] Leave to appeal was granted by this Court on 8 February 2002.
[2] The opening, which had a diameter of approximately nine inches, is often referred to as the sewerage pit.
[3] See r64.01 of the *Supreme Court (General Civil Procedure) Rules* 1996.
[4] For present purposes, the shaft and the pipe can be treated as constituting the one system of drainage and consequently, unless otherwise stated, a reference in these reasons to the "domestic pipe" should be taken also to be a reference to the shaft.
[5] See the definition of "Board" and "Melbourne and Metropolitan Board of Works" in s3(1) the *MMBW Act.* The Melbourne Water Corporation is constituted under the *Melbourne Water Corporation Act* 1992.
[6] Section 132 of the *MMBW Act.* The Board of Works is, by s3(1) of the *MMBW Act* , in fact the Melbourne Water Corporation.
[7] Section 11 of the *Water Industry Act.*
[8] Section 4 of the *MMBW Act.*
[9] Road includes footpath – see definition of "road" in s3(1) of the *Local Government Act.*
[10] The Board of Works (or City West Water in its place) is a public body - see s.3 of the definition of "public body" in the *Local Government Act.*
[11] See also Schedule 1 to the *Local Government Act.*
[12] [2001] HCA 29; (2001) 206 CLR 512 at 633 (dissenting, although not relevantly for present purposes);

(2001) 180 ALR 145; (2001) 75 ALJR 992; (2001) 114 LGERA 235; [2001] Aust Torts Reports 81-607; (2001) 33 MVR 289; (2001) 22 Leg Rep 13.
[13] [2001] HCA 59; (2001) 207 CLR 562 at 572-573; (2001) 183 ALR 404; (2001) 75 ALJR 1570; (2001) 28 Fam LR 104; [2001] Aust Torts Reports 81-622; (2001) 22 Leg Rep 2.
[14] The regulations form part of By-Law No 202 made by the Melbourne and Metropolitan Board of Works under the *MMBW Act.*
[15] See para.[8] above.
[16] [1973] VicRp 1; [1973] VR 1 at 11; (1972) 30 LGRA 19.
[17] The appellant also relied on ss575(1)(3) and (3A) and s587(1) of the *Local Government Act* 1958 to support the claim that the Borgs owned and were responsible for the shaft. In my view, however, those provisions do not support this claim, particularly since there was no evidence as to the circumstances in which the domestic pipe was laid.
[18] [1885] VicLawRp 38; (1885) 11 VLR 158.
[19] [1933] 1 KB 551.
[20] [1963] HCA 56; (1963) 110 CLR 40; [1964] ALR 377; 37 ALJR 277 (affirmed in *Goldman v Hargrave* [1966] UKPC 2; [1967] 1 AC 645; [1966] 2 All ER 989).
[21] Rule 64.17(5) of the Rules of Court.
[22] At 581 per Gaudron, McHugh and Gummow JJ and at 639 per Callinan J with whom Hayne J agreed at 631. A number of other cases, in which pedestrians have sustained injuries as a result of tripping over uneven footpaths, have applied the principles enunciated in *Brodie*, see, for example, *Burwood Council v Byrnes* [2002] NSWCA 343 at [29]-[38]; *Spencer v Council of the City of Maryborough* [2002] QCA 250 at [13]-[19]; *Garvan v Australian Capital Territory* [2003] ACTCA 4 at [15], [69]-[70]; (2003) 38 MVR 453; *RTA v McGuinness* [2002] NSWCA 210; (2003) Aust Torts Reports 81-688 at [29]-[33].
[23] [2001] HCA 29; 206 CLR 512; (2001) 180 ALR 145; (2001) 75 ALJR 992; (2001) 114 LGERA 235; [2001] Aust Torts Reports 81-607; (2001) 33 MVR 289; (2001) 22 Leg Rep 13.
[24] At [303], [313]
[25] At [162]-[163].
[26] At [6].
[27] At [355].
[28] [2002] NSWCA 359; (2002) 127 LGERA 237; (2002) Aust Torts Reports 81-679.
[29] At [55]
[30] [2002] NSWCA 210; (2003) Aust Torts Reports 81-688.
[31] At [28].
[32] At [151].
[33] *Ghantous*, at [321] per Hayne J.

APPEARANCES: For the appellant Cehner: Mr GP Colquhoun, counsel. Agricola, Wunderlich & Associates, solicitors. For the first respondent Borg: Mr PD Santamaria SC with Mr JP Moore, counsel. Phillips Fox, solicitors. For the second respondent City West Water Limited: Mr PJ Bick QC with Ms SL Fregan, counsel. Blake Dawson Waldron, solicitors.
