The Liability of Water Utility Companies in Tort for Drains Owned on Private Land: *RS -v- Severn Trent PLC* (Nottingham County Court, 24 March 2017, HHJ Coe QC)

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This article relates to a case heard by HHJ Coe QC on 24 March 2017, in which the Court considered a relatively novel point in the context of personal injury law, namely the liability of a water utility company arising out of the failure to maintain a drain that it owned on private land. As was stated by the Defendant in argument, the case "has the potential to have profound consequences for statutory sewerage undertakers." Having had some recent queries relating to the case, the authors considered that it would be helpful to produce the following article.

The Facts

The facts of the case were relatively straightforward. On 4 February 2014 at around 3:30pm the Claimant was walking on pavement outside of a property on Hill View Road in Mapperley, Nottingham. The location where the Claimant was walking was private land. Located on the property was the Defendant's manhole cover, which (on the Claimant's case) was in a dilapidated state.

The Claimant stepped upon the manhole cover and it collapsed. The Claimant fell into the manhole and sustained injuries that were thankfully minor, with quantum being agreed at £1,000.

The Defendant was responsible for the maintenance of the drain cover as a result of the Water Industry (Schemes for Adoption of Private Sewers) Regulations 2011. The effect of these regulations, which came into force on 1 October 2011, was to transfer a huge number of shared drains located throughout the country into the ownership of the utility provider. These drains and their accompanying covers had previously been the responsibility of the landowner.

The Defendant estimated in its original evidence that there were some 1,650,000 drain covers were transferred into the Defendant's ownership alone, however it in fact may have been much higher. The Defendant did not know how many drains that it was responsible for, nor where the drains and their concomitant covers were.

The Parties' Arguments

The matter came before Her Honour Judge Coe QC for trial. The Defendant denied that it owed a common law duty of care to maintain the drain, its duty being merely a statutory duty that was not actionable in civil proceedings. In any event, the Defendant argued that the duty was not breached and that a reactive system by which the Defendant relied upon reports from landowners was reasonable.

For the Claimant, it was argued that a common law duty actionable in civil proceedings to maintain the drain was made out, and that the said duty had been breached, as the Defendant had taken no steps at all to maintain the sewer.

Reliance was placed upon the case of ***Dobson -v- Thames*** [2011] EWHC 3253 at paragraphs 140, 143, 145, 148 and 150, which set out as follows:

140. I consider that there is, in principle, a boundary to be drawn between matters which would fall within the duties under s. 94(1) and are actionable solely under s. 18 and matters which are actionable apart from the existence of any statutory duty. That boundary may be difficult to draw and may depend on such uncertain phrases as matters or decisions relating to "policy" or "capital expenditure" matters or decisions as contrasted with "operational" or "current expenditure" matters or decisions. In Marcic the boundary fell between building new sewers and cleaning and maintaining the existing sewers.

143. There are, in my judgment, two aspects to the reasoning. First, there is the emphasis on absence of fault. Secondly, there is the concept of an inconsistent court process which conflicts with the statutory scheme. If there is fault in the form of negligence and if there is a different cause of action which is not inconsistent and does not conflict then I consider there is nothing to preclude a claim being made on that basis. Policy matters are likely to lead to such inconsistency and conflict whilst operational matters are less likely to do so. It must be a question of fact and degree. Where an allegation is tantamount to requiring major plant renewal that will fall on one side of the line whilst an allegation that a filter should be cleaned will lie on the other side. The mere fact that the effect of the cause of action is to enforce the duty in s. 94(1) does not in itself preclude the cause of action.

145. However, I consider that if the allegation had been that Thames Water had failed to clean and maintain the sewer then Mr Marcic could have based a cause of action on the fact that Thames Water had failed "to carry out the work and conduct the operation with all reasonable regard and care for the interests of other persons".

Summary

148. Whilst the principle in Marcic precludes the Claimants from bringing claims which require the court to embark on a process which is inconsistent and conflicts with the statutory process under the WIA, it does not preclude the Claimants from bringing a claim in nuisance involving allegations of negligence where, as a matter of fact and degree, the exercise of adjudicating on that cause of action is not inconsistent and does not involve conflicts with the statutory process under the WIA.

Negligence

149. The arguments relied on by the Claimants, Thames Water and Ofwat in relation to negligence are the same as those relied on in relation to the cause of action arising from nuisance involving allegations of negligence.

150. Accordingly, the answer to Issue 2c is the same as the answer to Issue 2b: The Claimants are not precluded from bringing a claim involving allegations of negligence where, as a matter of fact and degree, the exercise of adjudicating on that cause of action is not inconsistent and does not involve conflicts with the statutory process under the WIA.

Reference was also made to paragraphs 13-90 to 13-93 of Charlesworth & Percy on Negligence, 13th ed., which supported negligence liability for a failure to maintain drains and sewers.

On the issue of breach, the following points were made in support of the Claimant's case:

- By taking only reactive steps, the Defendant only acted once there had been a failure. It was argued that this cannot be a reasonable system;
- The risk that the Defendant assumed by taking no positive steps to maintain its drains was potentially catastrophic. A failing manhole cover can cause cataclysmic injury. The Defendant took simply no steps until such a risk realised itself. It only acted once there had been a failure;
- If the Defendant was to rely upon reports from landowners, it was (applying ***Reid -v- British Telecommunications Plc***, The Times, June 27, 1987) to be fixed with the system of inspection or maintenance that the landowner operated;
- If the Defendant wished to rely upon the reporting of defects by landowners, it had to take some active steps with regard to educating those landowners to ensure that defects were appropriately reported. Something as simple as a leaflet or letter to the owners of land upon which the Defendant had manhole covers, with a list of contact numbers and guidance as to what hazards to look out for, would have shown a positive step to discharging their duty;
- The Defendant had plans of the location, and there was no evidence advanced that it was unaware of its responsibilities with regard to the drain cover in question;
- The Defendant maintained that the duty would be "too onerous", but presented no information in support of this. It was argued that the Defendant is a huge organisation and it is a matter of public record that the Defendant's 2015 turnover was £1.8 billion with a group profit before tax of £148.2 million. There was no basis for the Defendant to say that operating even an infrequent system of inspection would be in any way unfeasible.

The Judgment

The Judge held for the Claimant. She noted that the asset was something for which the Defendant was responsible, and that the Defendant had admitted a responsibility to maintain the manhole cover from 2011 within

its Defence. She applied the decision in ***Dobson***, and held that she was satisfied that there was a cause of action and that there was a duty owed. She held that the claim arising in negligence was not inconsistent with the statutory scheme.

If there was a duty, was there a breach?

The Judge noted that when the statutory scheme was introduced in 2011, no steps were taken by the Defendant to identify the extent of its responsibility. She held that the Defendant had failed to establish that it did not know about this particular manhole cover.

The Judge accepted that in 2011 an enormous burden was placed on the Defendant. However, she held that simply not knowing where things were was not an adequate answer where the Defendant had a responsibility to maintain the drain cover. The Judge noted the analogies to be drawn with ***Reid and Nolan -v- Merseyside*** (Court of Appeal, 15 July 1982). She held that a statutory undertaker can abdicate its responsibility to maintain, however its liability will stand and fall with the system of the individual to whom they have abdicated that responsibility.

The Judge held that there had to be a system in place. She held that the Defendant did nothing to notify customers of their liability, nor did it advise customers of warning signs to look for when inspecting the drain covers. She held that there was no information in any leaflet, nor notes with utility bills, and it was clear that the Defendant communicated with customers on a regular basis. The Judge held that a reactive system in those circumstances may have been appropriate, however there was no evidence that that system was properly put into place.

The Judge noted that the Defendant had a maintenance department. No information was provided as to the costs of a system of inspection. No figures were put forward. The Judge held that she could not find that a system of inspection was too expensive. She noted that large numbers of items on the highway are regularly inspected. She noted that if a Local Authority could operate a regular system of inspection, she would have expected some information as to why the Defendant could not.

In the circumstances, the Judge held that she could not be satisfied that a reactive system was appropriate.

Overall, she held that there was a defective item that the Defendant was responsible for. They did not know of the issue with the drain cover, however they took no steps to find out whether there was an issue in the first place.

The Judge accepted that the reactive system (so called) gave rise to a situation where the Defendant only acted when something went wrong. She therefore considered that there had been a breach. She held that a visual inspection would have identified the defective cover immediately.

She therefore entered Judgment for the Claimant.

Comment

The case illustrates a potentially significant extension of the liability of utility providers as a result of the 2011 regulations. Whilst the case itself sets no precedent, it is clearly illustrative of the arguments that arise and the (perhaps unintended) extension of significant common law liabilities to utility companies following the 2011 regulations.

The Defendant was granted permission to appeal to the High Court by the Trial Judge. Such an appeal could have set a legally-binding precedent. It has not made use of that permission.

For Claimants, this case shows the potential for a remedy against the utility provider whereas before their remedies may have been limited to a (potentially uninsured) occupier. Given the sheer numbers of these drain covers, and the fact that it appears that the companies are not operating any proactive system of inspection, problems with such drain covers are highly likely to arise in the future.

For Defendants, the fact that the Court was willing to impose a common law duty upon the Defendant to maintain the drain cover will come as unwelcome news. However, the Court was also willing to apply ***Reid -v- BT***, which enables a statutory undertaker to delegate inspection responsibilities to other parties. The steps that would need to be taken to amount to a reasonable system of maintenance remain unclear, and may be the subject of further litigation. What was clear from the Judgment was that a system of "Nelsonian blindness" was not enough to discharge the duty on the Defendant to maintain its drain covers.

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[1] *Philip Godfrey of Ropewalk Chambers appeared as counsel for the Claimant at the trial and Cristina Parla of Roythornes Solicitors was the file handler responsible for the Claimant's case.*