BARLOW LYDE & GILBERT

London Borough of Ealing v Thames Water Utilities Ltd

November 2008

Following the widely reported highway trip appeal of Atkins v London Borough of Ealing (17 October 2006), we are pleased to report that after commencing proceedings for an indemnity by Ealing from Thames Water, a full recovery has now been made in respect of Mrs Atkins' claim.

The underlying claim

Mrs Atkins' claim arose out of a tripping accident which occurred on 3 December 2003. Whilst walking along a footway in a busy shopping street in Acton, she stepped onto a Thames Water meter cover which tilted, causing her to fall and sustain injury. Quantum was agreed subject to liability at £2,750. The matter was heard by HHJ Oppenheimer in the Brentford County Court on 22 April 2006. The claim succeeded.

It was the defendant's case that there was no visible defect to the cover which caused Mrs Atkins to trip.

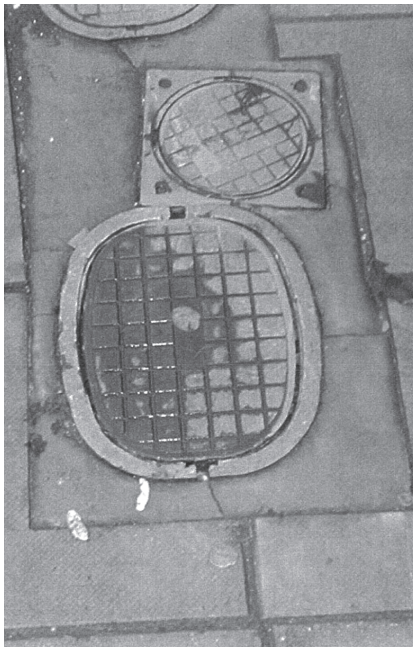
It was conceded before the trial judge that a cover which tipped was a danger within the meaning of Section 41 of the Highways Act 1980. The defendant relied upon the statutory defence provided by Section 58 of the Highways Act. There was a system of visual monthly inspections on foot. The defendant's inspections, which were carried out by contractors, applied an intervention level of 19mm. The defendant's witnesses gave evidence that the subject defect could only be recognised as a defect when it was actually trodden upon. HHJ Oppenheimer commented:

> **"I can foresee cases where the Borough might bring evidence, if this should ever happen again, giving some indication to the Court as to the sheer number of these covers and/or the difficulty or impossibility of inspection ..."**

The appeal

Ealing, with the backing of Thames Water, sought to appeal the decision. The appeal was heard before Teare J in the High Court on 17 October 2006. Noting the defendant's witness evidence that the consequences of a cover tipping could be "rather catastrophic" and that the defendant's inspections were only concerned with trips of 19mm and above, Teare J agreed that the trial judge had correctly balanced the private interests (the risk of very serious injury being caused to a person who stood on a cover which tilted) against the public interest (the burden on the defendant in terms of costs and impracticality in inspecting manhole covers to check that they were secure). The Court held that Crown Street was a busy shopping street and the defendant ought to carry out more than mere visual inspections of manhole covers. Teare J said:

> **"It seems to me that the standard of maintenance appropriate for a**



The offending meter cover

manhole cover on a pavement in a shopping street is a standard which ensures, so far as is reasonable, that pedestrians are not at risk of falling into a hole which may be large and contain pipes, cables and other items."

He agreed with the judge's findings that, in the absence of evidence to the contrary, it was necessary to have some system of checking the security of the cover in question.

Whilst the Court was not, on this occasion, prepared to accept that the defendant had made out a Section 58 defence, it gave guidance as to the kind of evidence which a defendant may require in similar circumstances which would include evidence as to the number of similar accidents, details of the number of such similar manhole covers within a particular authority, and the cost and impracticality of inspecting such covers. A further issue arises as to how these covers could be inspected safely.

On the face of it, this decision may appear unhelpful to defendants but it is, in our view, limited to its own particular facts.

The position under Nolan

In Nolan v Merseyside County Council and North West Water Authority (1982), the Court of Appeal considered the question of apportionment in similar circumstances. The case involved a missing lid of a stopcock box which caused the claimant to fall and sustain injury. At first instance, judgment was given against the Water Authority alone. On appeal, the Court of Appeal held both defendants equally liable; the Highway Authority under the then absolute duty under Section 44 of the Highways Act 1959 (now Section 41 of the 1980 Act), and the Water Authority for breach of Section 44 of the Water Act 1945.

Under Nolan, Thames Water and other utility companies frequently agree an apportionment on liability on a 50/50 basis. What is clear from Nolan is that where defendants are both liable without negligence then a 50/50 split is appropriate. However, Nolan does not and ought not to have strict application. Consideration must be given to the degree of culpability by each party. In determining the proper apportionment of contribution, a court is entitled to take into account not only the blameworthiness of the conduct in question but also the causative potency of that blameworthy conduct. In the circumstances of Atkins, on the evidence Thames Water were more blameworthy than the highway authority.

The recovery action

Thames Water were notified of the original claim. However, it was considered that it was unlikely that the claim would succeed so, on the evidence available and bearing in mind its limited value, they were not joined in the initial action. Agreement was reached with Thames Water to fund the defence on a 50/50 basis with the issue of liability as between Thames Water and Ealing remaining live in the event that Mrs Atkins' claim succeeded.

Consequently, Ealing commenced a recovery action against Thames Water for an indemnity. Thames Water sought to rely upon the decision of Reid v British Telecommunications PLC (1987), arguing that, following Reid, they were able to rely upon Ealing's system of inspection and, under Nolan, their liability was limited to a 50 per cent contribution.

Proceedings were commenced against Thames Water for a full indemnity or contribution under the Civil Liability (Contribution) Act 1978 in respect of Mrs Atkins' claim.

The claim was made in common law negligence and for breach of statutory duty under Sections 81 and 82 of the New Roads and Street Works Act 1991. Ealing argued that, pursuant to Section 81(1), Thames Water were obliged to ensure that their apparatus (the cover and the water meter chamber) was maintained to the reasonable satisfaction of Ealing. By Section 81(2) of that Act, maintenance is defined as meaning the carrying out of such works as are necessary to keep the apparatus in sufficient working condition.

Expert evidence obtained for the purpose of the recovery action (which was not available in relation to Mrs Atkins' underlying claim) revealed that the water meter chamber had been installed with a gap between the two sides of the cover frame which resulted in

the cover not being supported properly and being liable to tip and fall into the chamber underneath if it was positioned in one particular way. Evidence revealed that the two sides of the frame had not been bolted properly upon installation.

Expert evidence also confirmed, as argued at first instance, that no reasonable Highways Inspector could spot the defect which caused the cover to tip. The expert's opinion was that the cover would only tip when positioned in a particular way and a particular part of the cover was trodden on.

Moreover, further evidence produced by Thames Water during the proceedings confirmed that, between the date of installation and the date of Mrs Atkins' accident, the meter in the chamber had been read on their behalf on at least eight separate occasions. It was accepted that meter readers do not receive any formal training to identify defects with meter chambers, and it was confirmed that they were instructed to use "common sense" to report defects that they saw. No such reports had been made prior to Mrs Atkins' accident.

Pointers for the future

We have now made a complete recovery on behalf of LB Ealing from Thames Water in respect of Mrs Atkins' claim. Where does this now leave us?

1 When a claimant seeks to use Atkins to postulate an argument that a highway authority is obliged to do more than visually inspect manhole/meter covers, it can be rejected on the grounds that that argument only applies to the particular facts of Atkins and may not apply where the defendant is able to show, by reference to the number of such covers, the costs involved, and the lack of other similar accidents, the impracticability of carrying out detailed inspections.

2 It should be made clear that the defendant in Atkins made a full recovery from Thames Water and arguably the claim ought to be directed to the relevant utility company.

3 Disclosure should be sought from the relevant utility company as to the inspections/works/meter readings which they carried out involving the cover in question.

4 Disclosure should be sought of policy documents and training records as to the instruction given to the utility company's own employees in relation to the reporting and repair of such covers.

5 This outcome, whilst obviously of great benefit to highway authorities generally, does not alleviate the difficulties which are frequently faced by personal injury litigators as to whether a Part 20 claim should be brought against the relevant utility company on the facts of a particular case, to what extent proportionate investigations can be made to defend such claims, and to what degree the average local County Court will allow expert evidence to be called to investigate the precise cause of an accident. It is difficult to envisage a defendant obtaining the permission of the court to obtain such evidence in a run of the mill fast track tripping case but, without it, it may not be possible to establish the nature of a particular defect.

6 Perhaps the Atkins case initially was a lucky win for the claimant but ,equally, it seems unlikely that the principles of Nolan will be reconsidered by a higher court in the near future - but watch this space! ■ John Palmer represented the London Borough of Ealing in this case.

For further information about any of the issues raised in this briefing note, please e-mail us at publications@blg.co.uk or contact the following:

John Palmer
Associate Director
+44 (0)20 7643 8123
jpalmer@blg.co.uk

BARLOW LYDE & GILBERT LLP
Beaufort House 15 St Botolph Street London EC3A 7NJ
(For online map and SatNav systems use: EC3A 7DT)
tel +44 (0)20 7247 2277 **fax** +44 (0)20 7071 9000
DX 155 London CDE