HIGH COURT OF AUSTRALIA

FRENCH CJ,
GUMMOW, HAYNE, CRENNAN AND BELL JJ

SYDNEY WATER CORPORATION APPELLANT

AND

MARIA TURANO & ANOR RESPONDENTS

Sydney Water Corporation v Turano [2009] HCA 42
13 October 2009
S104/2009

ORDER

1. *Leave to file the amended notice of appeal dated 9 July 2009 granted.*

2. *Appeal allowed.*

3. *Set aside the following orders of the Court of Appeal of the Supreme Court of New South Wales:*

   (a) orders 4, 6, and 8 of the orders made on 31 October 2008;

   (b) that part of order 5 of the orders made on 31 October 2008 which set aside orders and declarations stated at [155] of the judgment of Delaney DCJ numbered 2 and 3; and

   (c) order 1 of the orders made on 2 July 2009.

   In lieu thereof, order that the cross-appeal to the Court of Appeal be dismissed with costs.

4. *First respondent to pay the costs of the appellant in this Court.*

On appeal from the Supreme Court of New South Wales

Representation

J T Gleeson SC with N J Owens for the appellant (instructed by DLA Phillips Fox Lawyers)

B M Toomey QC with M J McAuley and E G Romaniuk for the first respondent (instructed by Paul A Curtis & Co)

Submitting appearance for the second respondent

CATCHWORDS

Sydney Water Corporation v Turano

Negligence – Duty of care – Liability of statutory authority – Water main installed under statutory power – Altered subsoil drainage leading to compromise of root system of roadside tree – Approximately 20 years later tree fell on passing vehicle during storm resulting in death to an occupant and personal injury to other occupants of vehicle – Whether death and injury a reasonably foreseeable consequence of installation of water main – Significance of temporal relation between allegedly negligent conduct and injury occurring – Significance of statutory authority's lack of control over the tree in interval between installation of water main and injury – Section 43A of *Civil Liability Act* 2002 (NSW) addressing civil liability in tort of public or other authorities exercising a "special statutory power" not relied upon.

Words and phrases – "reasonable foreseeability".

Civil Liability Act 2002 (NSW), ss 5B, 5C, 43A.
Metropolitan Water, Sewerage, and Drainage Act 1924 (NSW), ss 30, 32.

FRENCH CJ, GUMMOW, HAYNE, CRENNAN AND BELL JJ.

Introduction

1 On 18 November 2001 Mr Napoleone Turano sustained fatal injuries when a eucalyptus tree fell onto the car that he was driving. His wife, Mrs Turano (the first respondent), and their two children were travelling in the car at the time and each sustained injury in the incident. Mrs Turano brought proceedings in negligence in the District Court of New South Wales on her own behalf and on behalf of the two children against the second respondent, the Council of the City of Liverpool ("the Council"), and the appellant, Sydney Water Corporation ("Sydney Water"), claiming damages for physical and psychological injury and for loss of dependency.

2 The liability of the defendants was determined as a separate issue by the primary judge (Delaney DCJ). His Honour found that the Council was liable in negligence, directing a verdict for Mrs Turano, and that Sydney Water was not liable, directing a verdict for Sydney Water. He considered that in the circumstances Sydney Water did not owe a duty of care for the benefit of Mrs Turano. Cross-claims brought by the Council and Sydney Water against each other were dismissed.

3 The Council appealed to the New South Wales Court of Appeal against the primary judge's order and Mrs Turano cross-appealed against the dismissal of her claim against Sydney Water. It was not clear whether the trial of the separate issue had been confined to the determination of the defendants' liability to Mrs Turano only, or to Mrs Turano and the two children. The Council and Sydney Water each stated that it considered itself bound in all three cases by the determination of the separate issue[1]. In these reasons, a reference to a duty owed to Mrs Turano is to be understood as including a duty owed to the two children.

4 The Court of Appeal (Beazley, Hodgson and McColl JJA) upheld the Council's appeal, set aside the orders made by the primary judge and substituted a verdict for the Council. By majority (Beazley and Hodgson JJA) the Court of Appeal upheld Mrs Turano's cross-appeal. The verdict in favour of Sydney Water was set aside and a verdict for Mrs Turano against Sydney Water on the

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1 *Liverpool City Council v Turano* (2008) 164 LGERA 16 at 21 [4]; [2008] NSWCA 270.

issue of liability was directed. The proceedings against Sydney Water were remitted to the District Court for the assessment of damages.

The case against Sydney Water

5 Mrs Turano's case against Sydney Water was that the tree fell because its root system had been compromised by the intermittent water-logging of the surrounding soil over an extended period. This environment created the conditions in which a pathogen entered the root system and flourished. The installation of a water main by Sydney Water was said to have diverted drainage from a nearby culvert causing the periodic water-logging. Sydney Water's negligence was said to lie in its failure to take into account the impact of the installation of the water main on drainage in the area, which required that it depart from its usual method of laying water mains in order to avoid adversely affecting the surrounding vegetation including the tree.

6 The tree was growing on the grassed section of a road reserve. Property in the tree and the road were vested in the Council[2]. The tree fell approximately 20 years after the installation of the water main. There had been no complaint relating to the water main, or its effect on drainage in the surrounding area, in the intervening years.

A concession by Sydney Water?

7 Sydney Water appeals by special leave from the orders of the Court of Appeal. At the hearing of the leave application Sydney Water submitted that Mrs Turano's claim raised consideration of the nature and extent of any duty of care owed to members of the public by a public authority arising out of the impact of infrastructure installed under statutory power on things growing on another's land[3]. On that occasion Mrs Turano did not submit that Sydney Water was precluded by its conduct of the proceedings below from contending that it did not owe a duty of care to her. In written submissions filed on the appeal Mrs Turano asserted that the existence of a duty of care owed to her by Sydney Water had not been in issue before the Court of Appeal and that Sydney Water ought not to be permitted to depart from that position in this Court.

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2 *Local Government Act* 1919 (NSW), ss 232(1), 233(3). The relevant reprint is as at 15 October 1980.

3 *Sydney Water Corporation v Turano* [2009] HCATrans 085 at 30-97.

8 The primary judge said that there had been no dispute that each defendant owed Mrs Turano a duty to take reasonable care[4]. The making of such a concession was disputed by the Council in the Court of Appeal[5] and by Sydney Water in this Court. Sydney Water denied that it owed a duty of care to Mrs Turano in its notice of grounds of defence[6]. It maintained this position throughout the trial. In closing submissions Sydney Water's counsel addressed the "conceptual difficulty facing the plaintiff … in respect of just the existence of the duty".

9 In the Court of Appeal, Sydney Water submitted that:

> "[I]t is unrealistic to contend that the duty cast upon Sydney Water surrounding the installation of its mains, is such that in circumstances where there is no failure in a pipe nor leak, Sydney Water ought visit each roadway above where the mains are laid … to see if a tree might have a pathogen infecting it as part of the duties of Sydney Water."

10 Read in context, this submission is not a concession that Sydney Water owed a duty of care to Mrs Turano.

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4 *Turano v Liverpool City Council* unreported, District Court of New South Wales, 2 May 2007 at [113] per Delaney DCJ.

5 *Liverpool City Council v Turano* (2008) 164 LGERA 16 at 35 [109] per Beazley JA.

6 Mrs Turano's claim proceeded on her second amended statement of claim, which was filed in the District Court on 3 October 2006, which was the first day of the trial. Counsel for Sydney Water informed the Court that its amended defence was understood to cover the pleading in the second amended statement of claim but that a further amended defence had been prepared. The materials before this Court do not establish that the further amended defence was filed. However, the pleading of the duty of care in the second amended statement of claim, par 14, that the defendants were under a duty to exercise reasonable care for the safety of the deceased, is in the same terms as par 14 of the amended ordinary statement of claim. By its defence to the amended ordinary statement of claim, Sydney Water denied par 14.

11 The primary judge found that in the circumstances Sydney Water did not owe a duty of care for the benefit of Mrs Turano[7]. It was against this determination that Mrs Turano brought her cross-appeal. The conduct of the proceedings below does not preclude Sydney Water from contesting that it owed a duty of care to her.

Sydney Water's statutory powers

12 Sydney Water is a corporation established under s 4 of the *Sydney Water Act* 1994 (NSW)[8]. It is the successor in liabilities to the Metropolitan Water Sewerage and Drainage Board, which was established under the *Metropolitan Water, Sewerage, and Drainage Act* 1924 (NSW) ("the MWS&D Act")[9]. References in these reasons to Sydney Water include reference to its predecessors. Under the MWS&D Act, Sydney Water was at all material times, relevantly, charged with the conservation, preservation and distribution of water for domestic and other uses[10], the construction of any new, additional, or supplementary works of water supply[11], and the extension of its services to areas or districts not served with its mains[12]. Sydney Water was given the power to

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7 *Turano v Liverpool City Council* unreported, District Court of New South Wales, 2 May 2007 at [150] per Delaney DCJ.

8 The *Sydney Water Act* 1994 (NSW) was formerly called the *Water Board (Corporatisation) Act* 1994 (NSW).

9 The Metropolitan Water Sewerage and Drainage Board was established under s 7 of the *Metropolitan Water, Sewerage, and Drainage Act* 1924 (NSW). The *Water Legislation (Repeal, Amendment and Savings) Act* 1987 (NSW) repealed that Act (Sched 1) and provided that the Water Board, as established under s 5(1) of the *Water Board Act* 1987 (NSW), was a continuation of and the same legal entity as the Metropolitan Water Sewerage and Drainage Board (Sched 3, cl 2(1)). The *Water Board (Corporatisation) Act* 1994 (NSW) dissolved the Water Board (Sched 9, cl 4(1)) and provided that, on the dissolution of the Water Board, Sydney Water is taken for all purposes to be a continuation of and the same legal entity as the Water Board (Sched 9, cl 6(1)).

10 *Metropolitan Water, Sewerage, and Drainage Act* 1924 (NSW), s 30(1)(a).

11 *Metropolitan Water, Sewerage, and Drainage Act* 1924 (NSW), s 30(1)(f).

12 *Metropolitan Water, Sewerage, and Drainage Act* 1924 (NSW), s 30(1)(g).

enter upon any Crown or private land, public road, or street and lay any water main, pipe or drain therein[13]. In the exercise of these powers, Sydney Water was subject to the mandate that it inflict as little damage as may be and that it make full compensation for all damage sustained[14].

The Civil Liability Act

13 Mrs Turano's claim is subject to the provisions of the *Civil Liability Act* 2002 (NSW) ("the CLA"). Part 1A of the CLA (ss 5-5T) applies to any claim for damages for harm resulting from negligence, regardless of whether the claim is brought in tort, in contract, under statute or otherwise[15]. Negligence is defined for the purposes of Pt 1A to mean the "failure to exercise reasonable care and skill"[16]. Section 5B sets out what are described as "[g]eneral principles" and s 5C "[o]ther principles".

14 Part 5 of the CLA (ss 40-46) applies to the civil liability in tort of public and other authorities[17]. It extends to any such liability even if the damages are sought in an action for breach of contract or any other action[18]. A public or other authority includes any public or local authority constituted by or under an Act[19].

15 Section 43A of the CLA applies to proceedings for civil liability to which Pt 5 applies to the extent that the liability is based on a public or other authority's exercise of, or failure to exercise, a special statutory power[20]. A "special statutory power" is a power that is conferred by or under a statute and that is of a

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13 *Metropolitan Water, Sewerage, and Drainage Act* 1924 (NSW), s 32(1)(e).

14 *Metropolitan Water, Sewerage, and Drainage Act* 1924 (NSW), s 32(4).

15 *Civil Liability Act* 2002 (NSW), s 5A(1).

16 *Civil Liability Act* 2002 (NSW), s 5.

17 *Civil Liability Act* 2002 (NSW), s 40(1).

18 *Civil Liability Act* 2002 (NSW), s 40(2).

19 *Civil Liability Act* 2002 (NSW), s 41, definition of "public or other authority", par (e).

20 *Civil Liability Act* 2002 (NSW), s 43A(1).

kind that persons generally are not authorised to exercise without specific statutory authority[21]. Sub-section (3) provides:

> "For the purposes of any such proceedings, any act or omission involving an exercise of, or failure to exercise, a special statutory power does not give rise to civil liability unless the act or omission was in the circumstances so unreasonable that no authority having the special statutory power in question could properly consider the act or omission to be a reasonable exercise of, or failure to exercise, its power."

16 Sydney Water did not plead reliance on s 43A in its notice of grounds of defence. No reference was made to the operation of the provision before the primary judge or in the Court of Appeal. At the conclusion of the hearing in this Court, senior counsel for Sydney Water drew attention to the provision and informed the Court that it had not been argued below and that Sydney Water did not invoke it on the appeal.

17 Following the hearing, the Court raised with the parties whether the existence of a duty of care at common law owed by Sydney Water to Mrs Turano is a hypothetical question in light of s 43A, or not one that can properly be decided without regard to the operation of the provision. The parties were invited, in the event that the answer to either question was "yes", to address the further question of whether special leave should be revoked. They were asked to indicate whether it was desired to have the Court hear further oral argument. Neither party sought to take up the latter invitation.

18 On the hearing of the appeal Sydney Water submitted that in an action in tort in New South Wales a plaintiff is required to establish a legal obligation owed to him or her requiring the defendant to exercise reasonable care and skill before Pt 1A of the CLA is engaged. It followed that the existence and extent of any duty of care owed by Sydney Water to Mrs Turano is to be determined by the application of the common law. In the event that a duty is found to exist, Pt 1A is said to govern the determination of whether the defendant is held to have failed to exercise reasonable care and skill. On this analysis the heading of Div 2 of Pt 1A (ss 5B, 5C), "Duty of care", is a misnomer. In Sydney Water's submission, the provisions of Div 2 are a statutory modification of the principles stated by Mason J in *Wyong Shire Council v Shirt*[22] for the determination of the

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21 *Civil Liability Act* 2002 (NSW), s 43A(2).

22 (1980) 146 CLR 40 at 47-48; [1980] HCA 12.

issue of breach. Senior counsel for Mrs Turano adopted this analysis of the relationship between the common law and the CLA on the hearing of the appeal.

19 In its supplementary submissions, in answer to the questions asked by the Court, Sydney Water maintained (consistently with the stance that it had taken on the hearing of the appeal) that s 43A does not speak to whether a legal obligation is imposed on a public authority to exercise reasonable care and skill for the benefit of another. It also submitted that it is unclear that the installation of a water main under statutory power involves the exercise of a "special statutory power" within the meaning of s 43A(2).

20 Mrs Turano submitted that the provisions of s 43A operate to confer immunity on a public authority in relation to the exercise of, or failure to exercise, a special statutory power subject only to the proviso in sub-s (3). In her submission, it is plain that the installation of a water main under statutory power engages the immunity. It followed on this view that the proceedings are singular and do not raise a question of general importance concerning the liability of public authorities in tort in New South Wales. She submitted that the grant of special leave should be revoked.

21 Following the final report of the Ipp Committee[23], a number of jurisdictions, including New South Wales, enacted legislation modifying the liability of public authorities in tort[24]. The approach has not been uniform. In New South Wales, Pt 5, dealing with the liability of public and other authorities, was introduced into the CLA[25]. Section 43A was introduced into Pt 5 at a later date, apparently as a reaction to a decision at first instance of the New South Wales Supreme Court[26]. The history of s 43A is referred to in *Precision Products (NSW) Pty Ltd v Hawkesbury City Council*[27]. In that case the Court's

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23 Australia, *Review of the Law of Negligence: Final Report*, September 2002.

24 *Civil Liability Act* 2002 (NSW), Pt 5; *Wrongs Act* 1958 (Vic), s 84; *Civil Liability Act* 2003 (Q), s 36; *Civil Liability Act* 2002 (WA), s 5X; *Civil Liability Act* 2002 (Tas), Pt 9; *Civil Law (Wrongs) Act* 2002 (ACT), Ch 8.

25 *Civil Liability Amendment (Personal Responsibility) Act* 2002 (NSW).

26 *Civil Liability Amendment Act* 2003 (NSW), Sched 1.

27 [2008] NSWCA 278 at [167] per Allsop P (Beazley and McColl JJA concurring) citing, inter alia, the Second Reading Speech for the Bill for the *Civil Liability*

(Footnote continues on next page)

consideration of the operation of s 43A was undertaken in the context of the analysis of breach of duty in circumstances in which the parties had not addressed full argument on the terms of the section.

22 This Court does not have the benefit of the consideration by the New South Wales Court of Appeal of the correctness of the assumption on which the appeal was argued: that the legal obligation on a defendant to exercise care and skill for the benefit of a plaintiff is to be found outside the framework of the CLA.

23 This appeal does not provide the occasion to consider the operation of s 43A. Mrs Turano's submission that laying a water main pursuant to the power conferred under the MWS&D Act plainly involves the exercise of a "special statutory power" is not one that can be accepted in the absence of full argument.

24 Professor Aronson has written of s 43A[28] that it is important to understand its scope, adding[29]:

> "We know from Hansard that the section was intended to apply to doctors performing certification roles under the mental health legislation[30]. By analogy and equally unfortunately, it may also apply in the context of police watch-houses and prisons, but nothing is certain."

25 Professor Aronson refers to the definition of "special statutory power" in s 43A(2), stating that this talks separately of "power" and "authority". He goes on[31]:

Amendment Act 2003 (NSW): New South Wales, Legislative Assembly, *Parliamentary Debates* (Hansard), 13 November 2003 at 4992-4993.

28 Aronson, "Government Liability in Negligence", (2008) 32 *Melbourne University Law Review* 44 at 78-79.

29 Aronson, "Government Liability in Negligence", (2008) 32 *Melbourne University Law Review* 44 at 78.

30 New South Wales, Legislative Assembly, *Parliamentary Debates* (Hansard), 13 November 2003 at 4993.

31 Aronson, "Government Liability in Negligence", (2008) 32 *Melbourne University Law Review* 44 at 78-79.

> "The idea appears to have been to distinguish statutory authority per se … from statutes permitting coercive acts or non-consensual rights-depriving acts. If that is correct, then one of the limits to the section's scope is that the defendant must have received statutory authority to act in a way that changes, creates or alters people's legal status or rights or obligations without their consent."

26 In light of the conduct of the proceedings below and the uncertain reach of s 43A, the question upon which special leave was granted should not be seen as hypothetical.

27 It should be added that at the trial Sydney Water did not lead any evidence of its financial or other resources, so as to raise the operation of s 42 of the CLA with respect to its liability to Mrs Turano. Section 42 lays out certain principles respecting resources and responsibilities of public authorities, which apply in determining the existence or breach of a duty of care.

The facts of the case

28 The evidence at trial largely comprised expert opinion. The Court of Appeal was critical of the primary judge's failure to analyse aspects of the evidence and to record findings in these respects[32]. Each of the Justices reviewed the evidence. Justices Beazley and Hodgson were in agreement as to the factual findings and the legal conclusions that flowed from them. Justice McColl came to a different conclusion on critical questions of fact. It is sufficient to refer to the primary judge's unchallenged findings of fact and to the further findings of the majority in the Court of Appeal in order to demonstrate that Sydney Water did not owe a duty of care to Mrs Turano and accordingly that the appeal should be allowed.

29 Edmondson Avenue, Austral, runs in a generally north/south direction. It is located in a semi-rural area. On either side of the sealed road surface is a grassed shoulder forming part of the road reserve. The tree was standing on the western grassed shoulder, about 4 metres from the western outlet of a culvert. The culvert had been installed under Edmondson Avenue in the 1960s and was designed to drain water from east to west. Water flowing from the culvert pipe

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32 *Liverpool City Council v Turano* (2008) 164 LGERA 16 at 52-53 [220] per Beazley JA, 56 [236] per Hodgson JA, 64 [278] per McColl JA.

on the western side drained into an outlet pit and from there it had been designed to drain by means of a scalloped area of excavation (a "tail-out drain") to pasture land lying to the west.

30 In about 1981 Sydney Water laid the water main, a cast iron pipe, 900mm below ground in a trench which ran parallel to Edmondson Avenue, under the western grassed shoulder. The water main transversed the outlet pit of the culvert. It was laid at a higher level than the invert of the culvert pipe and this caused it to obstruct the free flow of water from the culvert pipe. The earth of the outlet pit was impermeable clay. The water main was laid on a bed of sand 300mm deep.

31 The sand that was laid in the trench was much more permeable than the clay of the outlet pit. One consequence of this difference was that the trench acted as a drain for the water that periodically collected in the outlet pit. It was probable that excess water reached the roots of the tree by travelling north along the sand-filled trench[33].

32 On the day of the accident there was a strong windstorm, which was the immediate cause of the tree's fall. An underlying cause of the fall was that the tree's root system had been compromised by the presence of phytophthera, a root pathogen. The intermittent water-logging of the root system had facilitated the introduction of the pathogen[34].

33 The water main had been laid in accordance with standard engineering practice.

34 A consultant engineer, Mr Burn, gave uncontradicted evidence that a person installing a water main in a bed of sand in this location would have appreciated that the sand-filled trench would probably create a north/south drain. He considered that this result could have been avoided by installing a drain to the west, although this would have required Sydney Water to work on private land. Alternatively, Mr Burn pointed out that the water main could have been laid under the bed of the culvert.

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33 *Liverpool City Council v Turano* (2008) 164 LGERA 16 at 51-52 [214] per Beazley JA.

34 *Liverpool City Council v Turano* (2008) 164 LGERA 16 at 51-52 [214] per Beazley JA.

35 At the time of the accident there were about 64,000 trees planted along roads under the Council's control. The Council's risk management co-ordinator gave evidence that the Council did not carry out routine inspections of trees and culverts located on its land; it would only do so in response to a complaint or report in respect of the condition of a particular asset.

36 The Council was not notified of the installation of the water main and it had no knowledge that the water main was laid in a sand-filled trench. In November 1999 the Council surveyed the area in the course of undertaking preparatory work for a road-widening proposal of Edmondson Avenue. The survey identified the water main and recorded its height relative to the invert of the culvert pipe.

37 The tree had white marks which were on the trunk located about one metre above the ground. These were indicative of the presence of phytophthera, within the trunk or lower root system. The crown of the tree did not show signs of distress. It was not clear that the white marks on the tree would have been visible from a passing car.

The primary judge's reasons

38 The primary judge referred to the evidence that the installation of the water main interrupted the flow of water from the culvert, which was likely to lead to water pooling from time to time. His Honour appears to have accepted that it was probable that water which was partly dammed in the outlet pit reached the tree's root system by travelling along the sand-filled trench[35]. He observed that there was no evidence that Sydney Water had obtained or was required to obtain an arborist's opinion before installing the water main. He found that it was not foreseeable by Sydney Water that water travelling along the sand-filled trench would undermine the tree to such an extent that it would eventually become unstable and fall. It followed that Sydney Water did not owe a duty of care for the benefit of Mrs Turano when it laid the water main[36].

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35 *Turano v Liverpool City Council* unreported, District Court of New South Wales, 2 May 2007 at [144] per Delaney DCJ.

36 *Turano v Liverpool City Council* unreported, District Court of New South Wales, 2 May 2007 at [148]-[150] per Delaney DCJ.

The Court of Appeal's reasons

39 Justice Beazley identified two errors in the primary judge's analysis of Sydney Water's liability. First, her Honour considered that the primary judge had wrongly focussed on foreseeability of the precise sequence of events in determining the question of the duty of care[37]. She pointed out that it is sufficient that the class of injury, as distinct from the particular injury, be foreseen as a possible consequence of the conduct[38]. Justice Beazley formulated the question in this way[39]:

> "[W]hether it was foreseeable that, by laying the water main in sand which acted as a conduit for water, in circumstances where the water main was installed in a position that both breached the existing drainage system and obstructed the drainage of water from the culvert, that there could be an effect on the surrounding area such as might cause harm."

40 The second error that Beazley JA identified was the primary judge's acceptance that the water main had been laid in accordance with usual practice. This finding overlooked the expert evidence that it was foreseeable that the sand-filled trench would act as a drain. Her Honour considered that it was incumbent upon Sydney Water to have regard to the terrain, including the presence of other installations (the culvert), in which or near which the water main was laid[40]. The uncontradicted evidence was that the sand would act as a conduit for the water and that by laying the water main at this level water would not drain from the culvert as it had been designed to do. After referring to these matters her Honour addressed Sydney Water's liability to Mrs Turano in this way[41]:

> "Given those facts and circumstances, Sydney Water had a duty to install the water main in such a way that the integrity of the culvert drainage system was not compromised. Accordingly, Sydney Water owed Mrs Turano a duty of care of the content or scope that I have described.

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37 *Liverpool City Council v Turano* (2008) 164 LGERA 16 at 50 [201]-[203].

38 *Mount Isa Mines Ltd v Pusey* (1970) 125 CLR 383 at 390; [1970] HCA 60.

39 *Liverpool City Council v Turano* (2008) 164 LGERA 16 at 50 [203].

40 *Liverpool City Council v Turano* (2008) 164 LGERA 16 at 50 [205].

41 *Liverpool City Council v Turano* (2008) 164 LGERA 16 at 51 [210]-[211].

> In my opinion it is also clear on the evidence that Sydney Water breached that duty in two respects. The first was that by laying the drain at a higher level than the discharge drain from the culvert, it caused periodic damming of the drain. Secondly, by laying the drain in sand, it permitted the water to drain northwards, so as to undermine the roots of the tree."

41 Justice Hodgson did not separately discuss the formulation of the duty of care. His Honour expressed substantial agreement with the reasons of Beazley JA[42]. He went on to say that the impact on drainage in the surrounding area created by the installation of the water main would have been readily foreseeable by Sydney Water, whose business involved the management of water. He considered that Sydney Water should have carried out the works differently or that it should have investigated the consequences of the periodic saturation of the sand-filled trench[43]. The latter course should have alerted Sydney Water to the possibility of the roots of the tree being adversely affected. In either case, his Honour concluded Sydney Water should have acted so as to avoid the risk that eventuated[44].

The parties' submissions

42 Sydney Water submits that the majority in the Court of Appeal imposed on it a duty of care without addressing the question of whether injury to a class of which Mrs Turano was a member was a reasonably foreseeable consequence of its conduct. It complains that the class to whom the duty is owed is not confined within reasonable limits. It contends that the formulation of the scope of the duty reflects reasoning with hindsight from the events that occurred leading to the imposition of a duty of strict liability.

43 Mrs Turano submits that the inferences drawn by the majority in the Court of Appeal were open on the evidence and involved the orthodox performance of its function[45]. Her claim is for damages for personal injury arising from Sydney

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42 *Liverpool City Council v Turano* (2008) 164 LGERA 16 at 56 [236].

43 *Liverpool City Council v Turano* (2008) 164 LGERA 16 at 58 [243].

44 *Liverpool City Council v Turano* (2008) 164 LGERA 16 at 58 [243].

45 *Supreme Court Act* 1970 (NSW), s 75A; and see *Fox v Percy* (2003) 214 CLR 118; [2003] HCA 22.

Water's conduct in laying the water main in a manner that created a foreseeable risk of injury to any member of the public present on Edmondson Avenue. In her submission, the lengthy interval between the conduct and the resulting injury does not stand in the way of the imposition of liability. The claim, it is said, is analogous to a claim for the recovery of damages for asbestos-related disease brought many years after the date of exposure to the asbestos fibre. Mrs Turano submits that the conclusion of the majority in the Court of Appeal as to Sydney Water's liability is consistent with the application of settled principle.

Discussion

44 The proposition that at common law a public authority may be subject to a general duty of care arising out of its conduct of works pursuant to a statutory power is not in issue[46]. Sydney Water acknowledged that it may be liable in damages to a person who suffers injury as the result of the rupture of a carelessly installed, defective, water main[47]. Mrs Turano's claim may be understood as arising from her status as a road user. It is a claim for damages for personal injury. While the class to whom the duty is owed is potentially very large, only those members of it suffering injury as the result of the tree's fall would have a cause of action against Sydney Water. Sydney Water's challenge does not turn on the indeterminacy of the class, defined as road users, so much as on the reasonableness of the conclusion that in 1981 Sydney Water should have had in its contemplation, as persons closely and directly affected by its conduct in laying the water main, persons on or near Edmondson Avenue in 2001[48].

45 Reasonable foreseeability of the class of injury is an essential condition of the existence of a legal obligation to take care for the benefit of another[49]. The

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46 *Geddis v Proprietors of Bann Reservoir* (1878) 3 App Cas 430; *Caledonian Collieries Ltd v Speirs* (1957) 97 CLR 202 at 220 per Dixon CJ, McTiernan, Kitto and Taylor JJ; [1957] HCA 14; *Metropolitan Water, Sewerage and Drainage Board v O K Elliott Ltd* (1934) 52 CLR 134; [1934] HCA 57.

47 [2009] HCATrans 135 at 149-151.

48 *Donoghue v Stevenson* [1932] AC 562 at 580 per Lord Atkin; *Sullivan v Moody* (2001) 207 CLR 562 at 576 [42] per Gleeson CJ, Gaudron, McHugh, Hayne and Callinan JJ; [2001] HCA 59.

49 *Sullivan v Moody* (2001) 207 CLR 562 at 576 [42] per Gleeson CJ, Gaudron, McHugh, Hayne and Callinan JJ.

concept is relevant at each of the three, related, stages of the analysis of liability in negligence: the existence and scope of a duty of care, breach of the duty, and remoteness of damage. At the first stage, the inquiry has been said to involve the assessment of foreseeability conducted at "a higher level of abstraction"[50] than at the subsequent stages. However, to speak of a higher level of abstraction in dealing with that first stage does not support a formulation of duty in terms devoid of meaningful content[51]. It remains, as Gleeson CJ observed in *Tame v New South Wales*[52], that the concept is to be understood and applied with due regard to the consideration that, in the context of the issue as to duty of care, it is bound up with the question of whether it is reasonable to require a person to have in contemplation the risk of injury that has eventuated.

46 It was not necessary that the precise sequence of events leading to Mrs Turano's injury be foreseen[53]. However, it was necessary to show that in 1981 it was foreseeable by Sydney Water that laying a water main in a bed of sand in this location involved a risk of injury to road users. The evidence was that in 1981 it was foreseeable that laying a water main in a sand-filled trench transversing the culvert outlet pit would create a drain carrying water that collected in the pit north/south along its length. There was no evidence that it was foreseeable by Sydney Water that altering sub-surface drainage in this way was likely to undermine the integrity of the roots of nearby trees. The primary judge found that it was not foreseeable by Sydney Water that the water travelling along the trench would undermine the tree to such an extent that it would eventually become unstable and fall[54]. His reasons do not suggest that he misapprehended the nature of the inquiry. The conclusion of the majority in the Court of Appeal, that harm to the tree was a foreseeable consequence of laying

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50 *Vairy v Wyong Shire Council* (2005) 223 CLR 422 at 446-447 [70]-[72] per Gummow J; [2005] HCA 62; *Shirt v Wyong Shire Council* [1978] 1 NSWLR 631 at 639 per Glass JA.

51 *Vairy v Wyong Shire Council* (2005) 223 CLR 422 at 447 [73] per Gummow J.

52 (2002) 211 CLR 317 at 331 [12]; [2002] HCA 35.

53 *Chapman v Hearse* (1961) 106 CLR 112 at 120 per Dixon CJ, Kitto, Taylor, Menzies and Windeyer JJ; [1961] HCA 46; *Mount Isa Mines Ltd v Pusey* (1970) 125 CLR 383 at 390 per Barwick CJ.

54 *Turano v Liverpool City Council* unreported, District Court of New South Wales, 2 May 2007 at [150] per Delaney DCJ.

the water main in this location, was an inference drawn from the fact that Sydney Water was an authority involved in the management of water. In the absence of any evidence, the basis for this conclusion may be doubted. However, accepting that the conclusion was open, there remain difficulties with the majority's reasons leading to the finding of liability.

47 In considering the liability of the Council, Beazley JA referred to the observations of Gummow J (with whose reasons in this respect Callinan and Heydon JJ agreed) in *Roads and Traffic Authority (NSW) v Dederer*[55]:

> "First, duties of care are not owed in the abstract. Rather, they are obligations of a particular scope, and that scope may be more or less expansive depending on the relationship in question. Secondly, whatever their scope, all duties of care are to be discharged by the exercise of reasonable care. They do not impose a more stringent or onerous burden."

48 However, when it came to considering the liability of Sydney Water, Beazley JA stated the duty in absolute terms: not to compromise the integrity of the culvert drainage system. It was a duty called into existence because it was foreseeable that laying a water main in a trench that acted as a conduit for water could have "an effect on the surrounding area such as might cause harm"[56]. Neither the formulation of the duty nor the anterior inquiry as to foreseeability addressed the risk of injury to Mrs Turano or a class of persons of which she was a member. In terms, it was a strict duty requiring that Sydney Water preserve the existing drainage in the vicinity of its installation in order to prevent a foreseeable risk of shortening the life of surrounding vegetation. Stated in this way the force of Sydney Water's complaint, that the scope of the duty was derived by reasoning backwards from the events that occurred, can be seen. It was not a duty requiring Sydney Water to take reasonable care to avoid injury to road users in carrying out its works. The majority's conclusion of breach was inevitable having regard to the formulation of the scope of the duty. Thus, there was no consideration of the general and other principles stated in ss 5B and 5C of the CLA. Consideration of these principles would have directed attention to the question of whether in 1981 a water authority acting reasonably ought to have obtained the advice of an arborist on the impact of its proposed works on vegetation growing in an unpopulated, semi-rural area.

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55 (2007) 234 CLR 330 at 345 [43]; [2007] HCA 42.

56 *Liverpool City Council v Turano* (2008) 164 LGERA 16 at 50 [203].

49 The impact of the altered drainage from the outlet pit was such that over a lengthy period the tree's stability was compromised. The conditions that produced its fall in the windstorm took effect after 20 years. It is reasonable to consider that those conditions might have caused the tree to fall in a windstorm after a lesser or greater number of years. The point to be made is that the laying of the water main in this location did not create an immediate risk of harm to road users. The temporal relation between Sydney Water's conduct and Mrs Turano's injury was relevant to the determination of whether the relationship between them gave rise to a duty. A related factor relevant to this inquiry was the circumstance that in the interval between the conduct and the injury the tree was growing on land that was owned by the Council.

50 Sydney Water was empowered to remove trees in the course of carrying out works[57]. Since the tree was not an obstacle to the installation of the water main and the water main did not create an immediate danger of compromise to the tree, its removal may not have been justified pursuant to the power. (It will be recalled that Sydney Water was required in installing the water main to inflict as little damage as may be[58].) Sydney Water had the power to enter upon land in order to carry out an inspection of works[59]. However, no occasion arose for it to exercise this power in the absence of any report concerning the operation of the water main.

51 On the hearing in the Court of Appeal Mrs Turano did not maintain her case that the Council was negligent by its failure to carry out periodic inspections of roadside trees. This was realistic in light of the evidence to which Beazley JA referred, that Edmondson Avenue is located in a semi-rural area, with no houses or buildings in the immediate vicinity, and that the tree population was sparse[60]. The evidence of an arborist, Mr Castor, which McColl JA extracted in her reasons, may also be noted[61]:

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57 *Metropolitan Water, Sewerage, and Drainage Act* 1924 (NSW), s 32(1)(a).

58 See [12].

59 *Metropolitan Water, Sewerage, and Drainage Act* 1924 (NSW), s 38(1).

60 *Liverpool City Council v Turano* (2008) 164 LGERA 16 at 38 [124].

61 *Liverpool City Council v Turano* (2008) 164 LGERA 16 at 66-67 [304].

> "Not all tree failure is predictable. Not all tree failures can be explained even after the event. No tree is completely safe. Trees are living organisms which are anchored to the ground and so are subject, in situ, to activities and stresses from man and nature. … For a tree hazard to exist there must be a potential for failure and a potential for injury or damage to result. Dead trees in remote locations are often less hazardous than healthy trees in built-up areas."

52 Nonetheless, it was necessary in considering the liability of Sydney Water to take into account that, in the years between the installation of the water main and Mrs Turano's injury, the risk of the tree's collapse was one over which the Council and not Sydney Water had control. It is true that the Council was not on notice that the water main was laid in a sand-filled trench. However, it would not be right to characterise Sydney Water as having created a hidden danger by the installation of the water main in this location. Its presence transversing the outlet pit was observable. The adverse impact on vegetation brought about by altered drainage might be expected to be apparent to the owner of land. The circumstance that the presence of the pathogen in the tree was not readily observable does not provide a justification for holding Sydney Water liable after an interval of 20 years for the injury occasioned by the tree's failure.

Conclusion

53 Sydney Water's conduct in laying the water main in this location in 1981 with the consequential alteration to drainage flows from the culvert and any foreseeable risk to the health of the tree did not impose on it a legal duty of care for Mrs Turano's benefit. The reason for this may be expressed as a conclusion that injury to road users as the result of the tree's eventual collapse was not a *reasonably* foreseeable consequence of laying the water main, as the primary judge held. Alternatively, it may be expressed as a conclusion that in the absence of control over any risk posed by the tree in the years after the installation of the water main there was not a sufficiently close and direct connection between Sydney Water and Mrs Turano, a person present on Edmondson Avenue in 2001, for her to be a "neighbour" within Lord Atkin's statement of the principle.

Orders

54 The appeal should be allowed and the following orders made[62]:

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62 In his judgment, delivered on 2 May 2007, Delaney DCJ set out declarations and orders in numbered sub-paragraphs (par [155]). These orders were entered on

(Footnote continues on next page)

1. Leave to file the amended notice of appeal dated 9 July 2009 granted.

2. Appeal allowed.

3. Set aside the following orders of the Court of Appeal of the Supreme Court of New South Wales:

   (a) orders 4, 6, and 8 of the orders made on 31 October 2008;

   (b) that part of order 5 of the orders made on 31 October 2008 which set aside orders and declarations stated at [155] of the judgment of Delaney DCJ numbered 2 and 3; and

   (c) order 1 of the orders made on 2 July 2009.

   In lieu thereof, order that the cross-appeal to the Court of Appeal be dismissed with costs.

4. First respondent to pay the costs of the appellant in this Court.

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22 May 2007. The numbering of the orders entered on that date differs from the numbering set out in par [155] of the judgment. The orders of the Court of Appeal made on 31 October 2008 are expressed by reference to the "orders and declarations stated at [155] of the judgment of Delaney DCJ". Order 3(b) made by this Court reflects this circumstance.