

Can a Water Undertaker Be Liable in Nuisance or Negligence to Property Owners?

In the recent case of *Oldcorn v Southern Water Services Limited* [2017] EWHC 62 (TCC), despite the fact that Southern Water was a statutory sewerage undertaker under the Water Industry Act 1991 (the Act), the High Court has held that a duty in negligence and nuisance could still arise out of the performance of its statutory functions.

The case concerned a low-lying property located close to the sea, which was prone to flooding. In accordance with its statutory duties, Southern Water had constructed a storm water system to reduce the risks of flooding, including fitting a new valve to the system following flooding in 2009. However, it was claimed that Southern Water had poorly maintained the system and no proper assessment had been conducted before it had installed the new valve, which subsequently caused further flooding in 2012.

In considering the previous case law in which claims in nuisance had been made against statutory undertakers, the High Court acknowledged that where a claim has the effect of enforcing the undertaker's statutory duty in a way that was inconsistent with the Act, a claim in nuisance will not succeed. For example, a claim that intends to enforce the undertaker's duty to build more sewers could not succeed, as the Act provides a mechanism for complaint to OFWAT to seek resolution, not the launch of proceedings for a failure to build sufficient sewers.

However, in this case, the Claimant's claim did not involve any changes to Southern Water's maintenance and inspection routines forming part of its normal statutory functions and, therefore, Southern Water did owe the Claimants a duty of care and the standard of care was that of the reasonable water authority. A reasonable statutory sewerage undertaker would have carried out a proper assessment prior to fitting the valve to consider the alternative options and risks involved.

Nevertheless, owing a duty and being in breach of that duty was not enough, and the Claimants were required to prove that but for the breach of that duty, the flooding to the property would not have occurred. The Claimant's evidence failed at this final stage and Southern Water was, therefore, not ultimately held liable in negligence.

Although the High Court found that Southern Water was not liable in this case, the case highlights the risk for statutory undertakers that they are not wholly immune from being held liable in nuisance and negligence, in addition to the need for compliance with their statutory duties.

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