IN THE SUPREME COURT OF JUDICATURE

COURT OF APPEAL (CIVIL DIVISION)

ON APPEAL FROM THE HOLYWELL COUNTY COURT

(MR RECORDER GLYNMORE JONES)

Royal Courts of Justice

Tuesday 16th June 1992

Before:

LORD JUSTICE STOCKER

and

LORD JUSTICE BELDAM

PAMELA PRITCHARD

-v-

CLWYD COUNTY COUNCIL

and

DELYN BOROUGH COUNCIL

(Transcript of the Shorthand Notes of the Association of Official Shorthandwriters Limited, Room 392, Royal Courts of Justice, and 2 New Square, Lincoln's Inn, London, WC2A 3RU.)

MR TIMOTHY O. TROTMAN, instructed by Messrs Lovell Son & Pitfield (London Agents for Messrs Walker Smith & Way, Wrexham), appeared for the Appellants (First and Second Defendants).

MISS TANIA GRIFFITHS, instructed by Messrs Clement Jones & Co. (Llandudno), appeared for the Respondent (Plaintiff).

J U D G M E N T

(Revised)

LORD JUSTICE STOCKER: I will ask Lord Justice Beldam to give the first judgment.

LORD JUSTICE BELDAM: On 14th April 1986 the plaintiff, Miss Pritchard, met with an accident whilst she was crossing Lloyd Street in Flint in unusual circumstances. Lloyd Street was under three to nine inches of water following a heavy storm. While wading through this water, Miss Pritchard slipped and fell and in trying to reach the opposite pavement she fell again and hurt her left knee. She had already suffered from depression and anxiety, which was aggravated by the pain and distress of the injury to her knee and the restriction which it imposed on her movements.

In August 1988 she issued proceedings claiming damages against Clwyd County Council as the highway authority for Lloyd Street and the Delyn Borough Council, who were responsible for the maintenance and upkeep of the storm water and foul water sewers which ran under the road. She contended that her accident was the fault of each of them because they had failed to fulfil their several duties under statute or were negligent.

Her claim was heard on 10th May 1991 by Mr Recorder Glynmore Jones. He found that both of the defendants were at fault, but also found that the plaintiff had failed to take reasonable care for her own safety and he reduced her damages by one quarter having regard to her responsibility for the injury which she had sustained. He awarded her in total £6,801.35. This sum he arrived at in the following way. He said that if the defendants had been wholly responsible for the psychological condition from which she suffered after the accident he would have assessed their liability at £10,000. But having regard to the medical evidence which was before him he concluded that the

defendants were only 50 per cent responsible for her continued suffering and that her pre-accident condition was also 50 per cent responsible for that suffering. Consequently he said that the responsibility of the defendants should be £5,000. For the injury to the plaintiff's knee he awarded her £3,500, and adding that to the £5,000 arrived at a figure of £8,500 of which three-quarters (that is to say the sum reduced by one quarter) amounted to £6,375, and with interest that made up the total of £6,801.

Each of the defendants now appeals against his finding that they were in breach of duty or that she had proved any fault on their part. The plaintiff for her part cross-appeals by a respondent's notice, contending that the learned judge was wrong to hold that she was to any extent to blame for the accident, and she says that her damages were inadequate having regard to the suffering which she had sustained for six years following the accident.

The facts of the matter are that the plaintiff lives at 7 Salisbury Street in Flint. She was a lady in her early forties in April 1986 and she had a friend Mrs Marley who lived in a house at the junction which Salisbury Street makes with Lloyd Street. On 14th April in the evening she decided to visit her friend Mrs Marley. There had been showers, she said, during the day and some heavy rainfall, but the pavements had dried in the course of the day. The extent of the rainfall was in dispute between the parties at the trial.

Having arrived at the pavement of Lloyd Street, which is shown in the first of the coloured photographs before us and before the learned judge, she found that the pavement, which is that shown on the left-hand side of the photograph, was

partially under water and in fact was up around her ankles. But undeterred by this she set off across the mouth of Lloyd Street to reach Mrs Marley's house, which can be seen in the photograph actually on the corner on the opposite side of Lloyd Street. It was her impression that as she crossed the road she fell into a hole of some kind up to her chest, but that was clearly not the case. It seems that she had that impression because she fell over and her clothes got wet, and then in struggling to get up to reach the opposite pavement she missed her footing on the pavement, fell over again and hurt her left knee.

The parties put in evidence, for what they were worth, meteorological records as being indicative of the extent of the rainfall of the day. They were provided by the meteorological office and have to be read with the reservation that rainfall is not necessarily even over the whole of the area which is described in the report. But the particular rain gauge upon which reliance was placed was that which was nearest at Moel-y-Crio. According to the records for the day in question, at about 5 o'clock, which was when the accident occurred, the rainfall amounted to 1.6 millimetres in a period of 18 minutes, and for the following hour was 2.5 millimetres for the period of one hour. That in itself did not necessarily indicate an excessively heavy rainfall, although it was clearly substantial, as was pointed out to us by Mr Trotman.

The plaintiff's evidence, as I have said, was that there were some heavy showers but with drying in between. Witnesses for the defendants, including a fire officer, Mr Griffiths, who was called out to deal with flooding in the area, described the situation as "freak weather with torrential rain". Mr Evans, who was a chartered engineer employed by the second defendants,

described widespread flooding and severe thunder storms. In addition there were before the learned judge by agreement photographs taken from the local paper of the time which clearly show substantial flooding not just in this area but in other areas. But in particular they showed a substantial collection of water at the mouth of Lloyd Street.

On the basis of that evidence the learned judge found that there was a substantial flood at the mouth of Lloyd Street, that water was over the footpath and was up to the plaintiff's ankles before she started to cross. He went on in the course of his judgment to say:

> "That there was water in the road is not disputed and I have regard to a photograph that was taken by a news photographer and published in the local paper which shows some children playing in the water in their wellington boots."

He then said:

> "Well, it is submitted to me and I agree that the fact that this depth of water calls for an explanation from the Defendants."

He then went on to review the evidence of the defendants, to which I have already referred, about the weather and the torrential rain. He appears to have been impressed by the fact that although Mr Evans and Mr Pugh, who gave evidence, were experts in their field, they were not asked to express any expert opinion of the cause of this flooding. However, the recorder did not appear to be handicapped by that fact for he supplied the absence of expert evidence with his own knowledge of sewer systems and he went on to describe what the system was under Salisbury Street and Lloyd Street. Broadly speaking it was this.

There was a combined storm water sewer and foul water sewer which ran the length of Salisbury Street and also of Lloyd

Street and the surface of the road was drained, as one can see from the coloured photographs, by gulleys. There were two gulleys in the mouth of Lloyd Street itself. One can see them clearly in the photographs. They appear to be of entirely conventional design and shape. There were further gulleys which one can see in photograph number 5 in Salisbury Street almost at the junction. Certainly from those photographs there was no basis for any finding that either the gulleys themselves or the surface of the road was in any way in need of repair.

Having considered the nature of the drainage system, the learned judge reminded himself of the evidence that the second defendants were responsible on behalf of the water authority for the maintenance of the storm water and foul water sewer, and that the first defendants, the highway authority, were responsible for the maintenance of the drains which served to carry water from the gulleys into the storm water and foul water sewer. The learned judge went on to say that there was some evidence that the combined sewer was not surcharged - in other words, that the combined sewer was not in a state in which, if the water from the gulleys via the drains had been draining into the sewer, it would have been incapable of carrying it away. He went on as follows:

> "So I must ask myself why then did the surface water not drain from the gulleys and in my view and on the evidence that I have before me the reason is that either the gulleys were blocked or the gulley grid was blocked by debris or the pipe leading from the gulley to the sewer was blocked. It doesn't have to be entirely blocked. If the silt is building up it may be that there was sufficient opening in the pipe to take what might be regarded as a small amount of water without any problem whatsoever but when you have rain of these figures you need the full capacity of the pipework."

Criticism is made by Mr Trotman of that part of the judgment since he has pointed to agreed notes of evidence from

which it is clear that in fact not only was there no evidence that the gulleys were blocked or the gulley grid was blocked by debris or of the pipe leading from the gulley to the sewer being blocked, on the contrary there was evidence from Mr Griffiths, the fire officer, that there was no obstruction to the hose when it was put down the gulley and that after this incident there was no necessity for any de-silting or other scouring or cleaning operations to be carried out by the first defendants. The learned judge dealt with that part of the evidence by saying:

> "Now if the gulley grid was blocked by debris then of course the Fire Service in lifting the gulley grid and putting its suction hose in would remove the debris from the grid. It seems to me that in using their suction hose they would remove to some extent some of the silt in the gulley. They didn't have to remove it at all."

He then drew upon his personal experience of the construction of gulleys - again a matter which formed some criticism in the notice of appeal in this case. He went on:

> "I find it incredible that on this occasion only, in 1986, was the only one between 1974 and 1991 that this area has experienced rainfall similar to that which occurred on the 14th April 1986 and I simply do not accept that the rainfall that day was to be so extraordinary as to be the sole cause of that flooding had there been negligence on the part of the Defendants.
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> Delyn Borough Council, they are responsible for the water once it gets to the combined sewer. From the road surface and into the gulley and into the drain until it reached the combined sewer it is the responsibility of Clwyd CC."

After saying that he did not find that the sewers had been blocked to the extent that no water at all was getting through, he said:

> "But overall in this case I now find that both Defendants were negligent in one or more of the particulars of the negligence alleged in the Particulars of Claim save for that under paragraph 5(iv) of the allegation of negligence against the First Defendant."

He excluded that allegation because when one refers to the pleadings in the case it is not without interest to observe that the particulars of claim had been specifically amended to include paragraph 3A, which in fact alleged that the drains in Lloyd Street were frequently blocked and that twice a month or so the first or second defendants or either of them or both of them did carry out work on the drains to unblock them; the fact that every time there was a heavy rainfall the drains became blocked and flooding occurred; and the attendances of the first and second defendants and either or both of them in respect of the problem of flooding or blocked drains disclosed by their maintenance and repair records on which the plaintiff intends to rely at trial. At the trial no evidence in support of those allegations was produced, but in fact it had been contended as a matter of fact that water had been seen to be pumping out of the sewer manhole cover and that this was the consequence of the defendants' failure to fulfil their duties.

The learned judge therefore excluded the allegation that water had been pumping out of the main sewer manhole cover because that would have been an indication that the sewer was in fact surcharged and he had previously found that it was not surcharged. I mention that fact because the learned judge, as I have said, had found that both defendants were negligent in one or more of the particulars of negligence alleged in the particulars of claim.

I now return to the way in which the learned judge had begun his judgment by accepting the submission made by Miss Griffiths and repeated here with charm and persuasion, if I may say so, that here was a situation in which the construction of the gulleys and the storm water and the foul sewer had shown

themselves to be adequate over the preceding years, that the judge was entitled to find that this was not such an exceptional rainfall as justified the appellation Act of God, and that therefore since the water had indeed accumulated that was a situation which was more consistent with the failure by the defendants to carry out their duties than not - in other words, that the matter spoke for itself. It was really on the basis of that finding that the judge awarded the plaintiff damages.

Before passing to the further submissions made by the appellants I would refer to the allegations of duty which were set out in the particulars of claim. The first defendants, it is said, were the highway authority responsible for maintenance or repair of the highway, that they were responsible for maintenance and repair of the gulleys and their connection to the carrier drain; they were responsible for the drainage of the water from the highway, and by virtue of section 22(1) of the Control of Pollution Act 1974 were under a duty, as highway authority, to undertake the cleaning of the highways for which they were the responsible authority so far as the cleaning of highways is necessary for their maintenance or safety. The responsibility of the second defendants was stated to be as agents for the water authority responsible for the maintenance and repair of the combined sewer carrier-drain serving Lloyd Street, Flint.

The learned judge based his finding on negligence. He did not consider the statutory duties imposed on the undertakers in this case and indeed, as I understand the position, the allegations under section 22 of the Control of Pollution Act 1974 that the first defendants had failed to fulfil the duty of cleaning the highway were not pursued. So the first question in

this appeal is whether the judge was right to hold that this was a case in which the mere collection of a quantity of water after a heavy storm of rain was in itself a fact indicative of the failure by one or other or both of the defendants to fulfil their obligations, be they obligations of statutory imposition or of the common law duty to take reasonable care.

We were referred to the case of Burnside v. Emerson [1968] 1 W.L.R. 1490. In that case there was clearly established a failure to repair the surface of the highway on the part of a highway authority which allowed the collection of water at a bend in the road and which, as the judge at first instance had found, was responsible for a driver losing control and causing a serious accident in which he was killed. But there is one passage in the judgment of Lord Denning in that case which it seems to me is significant in the context of this case. At page 1494 at letter D, after stating that the plaintiff had to prove that the road was dangerous to traffic, he said:

> "Second: The plaintiff must prove that the dangerous condition was due to a failure to maintain, which includes a failure to repair the highway. In this regard, a distinction is to be drawn between a permanent danger due to want of repair, and a transient danger due to the elements. When there are potholes or ruts in a classified road which have continued for a long time unrepaired, it may be inferred that there has been a failure to maintain. When there is a transient danger due to the elements, be it snow or ice or heavy rain, the existence of danger for a short time is no evidence of a failure to maintain. Lindley J. said in 1880 in Burgess v. Northwich Local Board:
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> > 'An occasional flooding, even if it temporarily renders a highway impassable, is not sufficient to sustain an indictment for non-repair.'
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> So I would say that an icy patch in winter or an occasional flooding at any time is not in itself evidence of a failure to maintain. We all know that in times of heavy rain our highways do from time to time get flooded. Leaves and debris and all sorts of things may be swept in and cause flooding for a time without any failure to repair at all."

On that statement of the law it seems to me that there was no evidence here upon which the learned judge could find that the collection of water on this occasion after a heavy thunder storm and substantial rain was in fact evidence of non-repair or breach of duty by the first defendants. I would only add that the evidence before the learned judge consisted not only of the evidence of the witnesses, but the evidence agreed in the photographs. Those photographs show quite clearly that there was not present on the surface of the highway any trench or dent in the surface or lack of repair in the surface; nor did it show that the gulleys were in any way blocked or unable to cope with the water at this junction. So the failure on the part of the first defendants could only be based on their failure to carry out their duty to keep these gulleys free from obstruction. I shall return to that matter in a moment.

Reverting to the judge's finding that both of the defendants were responsible for the plaintiff's accident, there is, as it seems to me, an inherent difficulty where an allegation is made against two separate authorities each under different and separate duties in respect of different installations in saying that because water collected on the highway that is indicative of a failure of each of them to carry out their public duty. I have always understood that in order to show that the maxim res ipsa loquitur applies it is necessary for it to be shown that the event upon which reliance is placed was first of all more consistent with the failure to carry out a duty or to take care on the part of the defendant, and secondly that it pointed to a particular defendant as having been at fault, and that if all that was shown was that one of a number of persons might have been responsible then the maxim had no

application, for it could not be shown that the event was under the exclusive control of the defendant alleged to be liable.

Against the second defendant it seems to me in addition that the learned judge made an inconsistent finding, for, having found that there was no evidence that the main sewer storm water drain was surcharged, there was, as it seems to me, no basis for a finding that at the time it was blocked; and this highlights, as it seems to me, the difficulty of holding that the event itself was consistent with fault on the part of each of these defendants, for it may have been that the foul water sewer was blocked at some remote place. It may have been that that blockage was due to the second defendants' failure to carry out their duty, but there was no evidence of it. It was a temporary situation, such as Lord Denning described, which occurs from time to time, and it may quite shortly afterwards have cleared itself. It may equally have been due to the carrying down by the rain of debris which was only recently deposited on the surface of the highway. In these days when plastic bags and wrappings of convenience foods are cast down wherever it seems convenient to passers-by to do so, it is not impossible that a blockage may occur of which neither the highway authority nor the sewer authority have any knowledge or any opportunity to deal with. Consequently it seems to me that for those reasons the learned judge was wrong to hold that proof of collection of water at this particular spot in the highway was more consistent with fault, to use a neutral phrase, on the part of the defendants than not.

I return to consider the position of the first defendants, because it is clear that so far as the actual surface of the highway was concerned there had been no breach of their duty to

repair or maintain the surface of the highway. It is true that in the case of Burnside v. Emerson, to which I have previously referred, Lord Diplock at the commencement of his judgment said:

> "The duty of maintenance of a highway which was, by section 38(1) of the Highways Act, 1959, removed from the inhabitants at large of any area, and by section 44(1) of the same Act was placed on the highway authority, is a duty not merely to keep a highway in such a state of repair as it is at any particular time, but to put it in such good repair as renders it reasonably passable for the ordinary traffic of the neighbourhood at all seasons of the year without danger caused by its physical condition. I take most of those words from the summing-up of Blackburn J. in a case in 1859, Reg. v. Inhabitants of High Halden. 'Non-repair' has the converse meaning. Repair and maintenance thus include providing an adequate system of drainage for the road; and it was in this respect that the judge found that the highway authority in this case had failed in their duty to maintain the highway."

As I have said, there was no evidence in this case that the system of drainage provided was inadequate. On the contrary, the learned judge's finding was that it was adequate, but it proved inadequate on this particular occasion, so that the plaintiff in order to succeed would be thrown back upon the duties alleged under section 22 of the Control of Pollution Act 1974.

There are, as it seems to me, a number of difficulties in the way of the plaintiff succeeding in establishing a claim on that basis. First and foremost it seems to me that the section in question did not and was not intended to give a cause of action to an injured user of the highway in respect of a defect arising from a failure to clean the street. That section was in fact the successor to section 77 of the Public Health Act 1936. The remedy provided by that Act for a failure on the part of the local authority to clean the streets was provided under sections 322 to 324 of the Act, and prima facie where an Act of Parliament provides for a remedy that is the only remedy

available for a breach of an obligation imposed by the Act on a local authority. Similarly, under section 22 of the Act of 1974 (the successor), one can see that by section 88 a specific provision is made in certain circumstances for breach by companies or individuals of the provisions against pollution in section 3(3) to provide for civil liability, and of course there are further provisions within the Control of Pollution Act which enable the Secretary of State to enforce the carrying out of functions if a relevant authority has failed to perform them. (See section 97).

Miss Griffiths referred us to the case of Haydon v. Kent County Council [1978] Q.B. 343 as authority for the proposition that the word "maintain", which was contained in section 44 of the Highways Act 1959, the predecessor section to section 41 of the Highways Act 1980, and section 58(1) which made provision for the special defence of a highway authority which had originally been provided by section 1(1) of the Highways Act 1961. She referred us to section 150 of the Highways Act as indicating the extent of the duty to repair the highway and which provides for the highway authority to remove any obstruction which may be caused by snow falling down the side of the highway or accumulating in the highway or from any other cause. I draw attention to that, because subsection (2) of section 150 indicates the remedy under that section is by complaint against a person who fails to remove the obstruction and by an order made by the Magistrates' Court requiring the obstruction to be removed within a specific period. On that very point the case of Haydon v. Kent County Council is, it seems to me, significant.

Lord Denning, though it is fair to point out that the other

two members of the court did not agree with his construction of the words "repair" and "maintain" in the Act, drew attention to the question of removal of an obstruction, which Miss Griffiths said this collection of water was. He said:

> "'Maintain' does not, however, include the removal of obstructions, except when the obstruction damages the surface of the highway and makes it necessary to remove the obstruction so as to execute the repairs."

He went on to consider section 129 of the Act of 1959 and said:

> "If the obstruction is, however, of a transient nature, like snow or ice, or water, or something which does not damage the surface of the highway, then the duty of the highway authority is prescribed by section 129 of the Act of 1959."

He then set out the statutory requirements which are the predecessors of the duty under section 150 of the Highways Act 1980. He went on:

> "That section is very appropriate to deal with highways which get blocked or impeded by snow or ice, or by earth falling down from a bank, or by a tree falling down and straddling the highway. It puts on the highway authority a duty to remove the obstruction; but it leaves it to the highway authority to carry out that duty at such time as it thinks best. To do it 'from time to time'. They have, therefore, a discretion: save that, if they delay too long, they can be brought to book by a magistrate's order. By no shadow of argument can it be called an absolute duty. Nor does it give rise to a civil action for damages if it is not performed."

Thus it seems to me that the plaintiff in this case failed to establish any circumstance which was more consistent with a failure on the part of either of these defendants to carry out their statutory obligations than it was with one of those transient events to which Lord Denning referred which occur from time to time when there is in a very local area such heavy rainfall that the gulleys, drains and storm water system are not capable of carrying it off immediately. It is not, in my judgment, a reasonable inference from such an event that there must have been a failure on the part of each of the defendants,

or indeed of either of them.

I would therefore allow this appeal and hold that the plaintiff failed to make out her case against either of the defendants. It remains only to say that it is therefore unnecessary to deal with the argument by Miss Griffiths on contributory negligence and on the amount of damages.

For the reasons given, I would allow this appeal.

LORD JUSTICE STOCKER: I agree. Although we are differing from the decision of the learned recorder, I do not feel it necessary to add observations of my own, save to say that the main basis for his decision rested upon his view that the fact of the depth of water called for an explanation. This is equating the matter with the res ipsa loquitur situation. This, in my view, it was not, for the reasons given by my Lord. The passage in the case of Burnside v. Emerson [1968] 1 W.L.R. 1490 exemplifies that such a conclusion in a case of this sort is inappropriate. I therefore agree that the judgment cannot be supported and the appeal must be allowed.

Order: Appeal allowed with costs not to be enforced without leave of the court; legal aid taxation of respondent's costs.