*1490 Burnside and Another v Emerson and Another

1966 B. No. 667

Court of Appeal

3 July 1968

[1968] 1 W.L.R. 1490

Lord Denning M.R. , Diplock L.J. and Goff J.

1968 July 1, 2, 3

Highway—Non-feasance—Repair—Storm-water across highway—Danger to traffic resulting from failure to maintain adequate system of drainage—Collision between vehicles using highway—Highway authority failing to establish statutory defence—Liability of authority for damage caused to traffic—Onus on highway authority— Highways (Miscellaneous Provisions) Act, 1961 (9 & 10 Eliz. 2, c. 63), s. 1 (1) (2) (3) (d) .

[1]

The plaintiffs, a man and his wife, were driving along a main road at a safe speed during a torrential rainstorm on a September evening when the driver of a Rover car coming from the opposite direction ran into a pool of storm-water across the road and as a result swung right across the path of the plaintiff's car. He was killed instantly and the plaintiffs were seriously injured. In their action against the executors of the dead driver, who joined the highway authority as second defendants, the trial judge found that although the highway authority had installed a good system of drainage their servants had not operated it properly; and he held the highway authority wholly to blame in that the water on the road constituted a danger to traffic resulting from failure to maintain the highway.

On appeal by the highway authority:—

Held, (1) that the plaintiffs had established their civil cause of action under section 1 of the Highways (Miscellaneous Provisions) Act, 1961 , by showing that the presence of water at that point in the highway was a danger to traffic likely to cause injury and resulting from the authority's breach of the statutory duty to maintain the highway (which included the duty to repair); and that as the highway authority had not established any of the defences available under subsections (2) and (3) of section 1, they were liable in damages.

Per Lord Denning M.R. Where there is a permanent danger in the highway by reason of non-repair, failure to maintain may be inferred; but a transient danger due to the elements is not in itself evidence of a failure to maintain (post, p. 1494D–E).

(2) But that although the water was a danger, anyone driving with reasonable care in the prevailing conditions would have got through it safely, and on the evidence of impact and speeds the deceased driver must have driven negligently. Accordingly, ***1491*** liability should be apportioned as to two-thirds on the dead driver and one-third on the highway authority.

Order of Wrangham J. varied.

APPEAL from Wrangham J. sitting at Nottingham Assizes.

The plaintiffs, James Gordon Bennett Burnside, and his wife, Kathleen Eunice Burnside, brought an action against the executors of the will of John William Charles Emerson, who was killed in a road collision with the plaintiffs' motor car on the night of September 3, 1965, claiming damages for personal injuries, loss and damage caused to them by the negligent driving of the deceased Mr. Emerson on the A606 Melton Road at Upper Broughton, Nottinghamshire, on the Melton side of Station Road, Upper Broughton. The executors denied that the deceased was negligent and joined the highway authority, the Nottinghamshire County Council, as second defendants.

By their statement of claim, as amended, the plaintiffs claimed that the accident, injuries, loss and damage suffered were caused by the misfeasance, non-feasance and negligence of the highway authority in the repair of the road whereby it became covered in water to a dangerous

depth which caused the collision and which became a nuisance. By their particulars they alleged, inter alia, that although the highway authority knew or ought to have known that water was apt to collect on the road to a depth dangerous to traffic they failed to take any or any adequate steps to ensure that the water was allowed to drain away or to give any warning to persons approaching the water. Alternatively they relied on the fact that water always collected on the same road after heavy rainfall to a depth that was dangerous to traffic as raising a presumption against the authority of misfeasance, non-feasance and negligence.

By their defence the authority claimed first that the collision was caused by the negligence of the deceased and/or alternatively of the first plaintiff. They denied misfeasance, non-feasance and negligence and that their failure to repair the road caused it to be covered in water to a dangerous depth or at all and that the water caused the collision. They claimed that if the road or part of it became covered in water to a depth or at all, it was caused by exceptionally heavy rainfall; and that if the plaintiffs suffered damage resulting from their failure to maintain the highway, they had nevertheless taken such care as in all the circumstances was reasonably required to secure that the road was not dangerous for traffic.

Wrangham J., in his judgment, on December 11, 1967, found on the evidence that at the moment of the accident there must have been on the road at the point of the collision a pool of water somewhere about 16 or 17 feet long and some three or four inches deep on the nearside of the deceased's car and that it constituted a serious danger to a motorist; that the highway authority had not taken such care as in all the circumstances was reasonably required ***1492*** to secure that that part of the highway was not dangerous to traffic because although a system of grips or gullies for draining the road existed they had not been properly cleaned out so that they could not take the storm-water away. He held that the authority's servants had failed to operate an adequate drainage system properly, first, by originally failing to secure that the drain was at the lowest point; secondly, by failing to keep the grips or gullies in such condition that they would take the water from the road; and, thirdly, by failing to see that the ditch was properly cleaned out so that it would take the water from the gullies; that as a result the water backed onto the road, there was a pool of water on the road, and the accident was the result.

The judge went on to exonerate the deceased driver from all blame and concluded that the accident was due to the presence of a danger on the highway and that the highway authority's defence failed. He awarded the male plaintiff £10,500 and his wife £3,000.

The highway authority appealed on the grounds that the judge was wrong in holding that there was a danger on the highway and that it arose from the authority's breach of their duty to maintain the highway; in holding that a pool of water on the highway caused the accident and in holding that the authority had failed to take such care as was reasonable in all the circumstances to secure that the highway was not dangerous for traffic; in holding that the authority had not taken such steps as were reasonably required to drain the highway and that they failed to operate the system of drainage properly; that he misdirected himself in law in failing to decide the extent of the highway authority's duty under section 44 (1) of the Highways Act, 1959 , and whether they were in breach of that duty; and also in failing to pay regard to the matters set out in section 1 (3) of the Highways (Miscellaneous Provisions) Act, 1961 ; that he was wrong in rejecting the defence of inevitable accident; and alternatively that he was wrong in holding that the accident was not wholly caused or contributed to by the negligence of the deceased driver, Emerson.

Representation

Kenneth Mynett Q.C. and J. P. Harris for the highway authority.

H. A. Skinner Q.C. and J. Malcolm Milne for the deceased's executors.

The plaintiffs did not appear and were not represented.

The cases cited in argument are referred to in the judgments.

LORD DENNING M.R.

This is an action for non-feasance against a highway authority. It has only been available since the Highways (Miscellaneous Provisions) Act, 1961 .

On September 3, 1965, at about 9 p.m., Mr. Burnside was driving his Jaguar motor car along the main road from Melton Mowbray to Nottingham. It had been pouring all day. At this moment, the rain was coming down harder than ever. Mr. ***1493*** Burnside was driving his Jaguar car at quite a reasonable pace, only 25 miles an hour. On that night no one should have done any more. Mr. Emerson was coming in the opposite direction, driving his Rover motor car. As Mr. Emerson drove along, his car ran into a pool of water which was halfway across the road: and in the result his Rover car went right across the road into the path of the oncoming Jaguar car. There was a collision. The Rover swung right round in the road facing the other direction and forced the Jaguar into the kerb. Mr. Emerson, the driver of the Rover, was killed. Mr. Burnside, the driver of the Jaguar, and his wife suffered such serious injuries that the damages have been agreed at £10,500 for Mr. Burnside and £3,000 for his wife.

Mr. and Mrs. Burnside brought an action at first against the executors of Mr. Emerson, claiming damages on the ground that it was Mr. Emerson's fault because he pulled right across onto his wrong side of the road. But then in answer the executors said that it was not Mr. Emerson's fault. It was the fault, they said, of the Nottinghamshire County Council because they had not done their duty in regard to the highway, in that they had not drained the road properly. So Mr. and Mrs. Burnside joined the Nottinghamshire County Council as defendants. After hearing the evidence, the judge found that it was all due to the fault of the highway authority. The highway authority appeal to this court. Mr. and Mrs. Burnside are not concerned. They will get their damages from one side or the other. The contest is between the two defendants. Are the highway authority liable for the condition of the road as it was that night? If they are liable, was Mr. Emerson himself at all to blame?

In the old days a highway authority was never liable in a civil action for non-feasance in not repairing a road. Even if they put in a system of drainage which turned out to be inadequate, they were not liable for the failure of the system. That was held to be non-feasance: see *Burton v. West Suffolk County Council* . [2] That law has been altered by the Highways (Miscellaneous Provisions) Act, 1961 , which must be read with the Highways Act, 1959 . Under those Acts the rule exempting a highway authority for non-feasance is abolished. There is a duty on a highway authority to maintain the highway; and “maintain” includes repair. If it is out of repair, they fail in their duty: and if damage results, they may now be made liable unless they prove that they used all reasonable care. The action involves three things:

First: The plaintiff must show that the road was in such a condition as to be dangerous for traffic. In seeing whether it was dangerous, foreseeability is an essential element. The state of affairs must be such that injury may reasonably be anticipated to persons using the highway. I said as much in 1956 in *Morton v. Wheeler* , [3] which was accepted as correct by the *Privy Council in Overseas Tankship (U.K.) Ltd. v. Miller Steamship Co. Pty* . [4] In applying this test after the Act of 1961, the courts at first were too much inclined to find a danger when there was none, or, at any rate, none that could reasonably be foreseen. In Liverpool people used to claim damages from the Liverpool Corporation whenever they tripped on a flagstone which might be half-an-inch higher than the next. In the first case which reached this court, *Griffiths v. Liverpool Corporation* , [5] the corporation admitted that there was a danger, and, accordingly were held liable. This court, however, threw a great deal of doubt on the finding of danger. In the next case, *Meggs v. Liverpool Corporation* , [6] the court made it clear that the highway was not to be regarded as dangerous simply because there might occasionally be a ridge of half-an-inch or three-quarters of an inch. So those actions in Liverpool began to diminish. Very recently Cumming-Bruce J. added a useful footnote in *Littler v. Liverpool Corporation* . [7] He hoped that those sitting on legal aid committees would remember that it is not every trifling defect in a footway which makes it dangerous.

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*[8] :

> "An occasional flooding, even if it temporarily renders a highway impassable, is not sufficient to sustain an indictment for non-repair."

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.

Third: If there is a failure to maintain, the highway authority is liable prima facie for any damage resulting therefrom. It can only escape liability if it proves that it took such care as in all the circumstances was reasonable: and in considering this question, the court will have regard to the various matters set out in section 1 (3) of the Act of 1961.

I turn to consider these three matters here. The first point is ***1495*** whether at this moment the road was dangerous. The area surveyor was asked this question:

> "(Q). And would you agree too that the combination of a pool of water at the point we have been talking about, plus this bend, plus bad weather conditions, plus rain, would make this a particularly dangerous hazard to a motorist? (A). Yes, I would."

So the first point was proved. The road was dangerous.

The second point is whether there was a failure to maintain. The mere presence of this pool of water on that night does not by itself show a failure to maintain. It had been raining all day. The pool of water had not been very deep for very long. Mr. Bailey, a farmer, who drove along at 8 o'clock had had no difficulty. It had become deep at 9 o'clock. Later on, at 10 o'clock, the pool was there, but was going down. But the evidence did not rest merely on the presence of the pool of water. There was additional evidence which showed that this stretch of road was not kept properly drained. It was quite often flooded when there was rain. A bus-driver gave evidence. He had been going up and down the road for some years. He said the road was always flooded there after rain. Mr. Broughton, who had been chairman of the parish council for many years, said that in the old days, when there were lengthmen who walked this length of road, he used to complain to them, and they would scrape out the debris. But in recent years the lengthmen had been replaced by a gang who visited at longer intervals. He used to complain to the surveyor then when the road was flooded: but it took them a good deal longer to put it right. After this accident had occurred, the parish council themselves wrote to the local authority, saying:

> "At a recent parish meeting complaints were made regarding water lying on the main Nottingham/Melton road opposite the school and between the two gravel-pit hills. This is considered very dangerous and I was instructed to request you to deal with this hazard as soon as possible."

To which the local authority simply said: "The points mentioned are being investigated." Yet, according to the evidence, nothing further was done.

I will not go further into the details of the evidence. The judge examined it all. He found that although the system which the Nottinghamshire County Council had installed was a good system and would have been sufficient if it had been carried out, nevertheless their servants failed to operate this system properly. He said they failed in three ways: (i) by failing to secure that the drain was at the lowest point (it appears that there was a dip in the road at this point. A six-inch drain had been put in. But then the highway authority had raised the road two or three inches: and when they did so, the drain had not been put at the lowest point. It had been partly obstructed by the making of the road); (ii) by failing to keep the grips or gullies in such a condition that they would take the water from the road. (In coming to that finding it is plain that the ***1496*** judge rejected the evidence of the foreman and the workmen of the highway authority. According to them, everything was perfect; every month their entries said: "Satisfactory" — that nothing needed doing. The judge rejected their evidence. He thought it was too good to be true); (iii) by

failing to see that the ditch was properly cleaned out so that it would take the water from the gullies. I think these findings by the judge were borne out by the evidence, and show a failure to maintain.

The third point is whether the defendants showed that they used all reasonable care. Mr. Mynett relied on subsection (3) (d) of section 1 of the Highways (Miscellaneous Provisions) Act, 1961 , which says that regard must be had to

> "whether the highway authority knew, or could reasonably have been expected to know, that the condition of the part of the highway to which the action relates was likely to cause damage to users of the highway."

The judge did not mention subsection 3 (d) of section 1 of the Act, but I am sure he had it in mind. It is plain on his findings that the authority could reasonably have been expected to know that the road always flooded after rain. They did not discharge the burden of proving that they had taken all such care as was reasonably required. Their servants had failed to operate the system properly, as they should have done. This failure was a cause of the pool of water, and undoubtedly, damage resulted therefrom.

Then the final point arises: Was it all the fault of the highway authority, or was it in some part the fault of Mr. Emerson? This pool of water was three to four inches deep at the edge by the kerb, but only about a quarter of an inch in the middle of the road. I should have thought that any driver driving at a reasonable pace and with reasonable care should have got through with safety. If he had been driving at a reasonable pace, he would not have swung across right into the path of an oncoming car, as did Mr. Emerson that evening. The nature of the impact and of the damage done leads inevitably to the inference that Mr. Emerson must have been driving far too fast in the conditions then prevailing. An expert thought that the combined pace of the vehicles must have been 70 miles an hour, or more. If that was right, it would mean that Mr. Emerson was going at 50 miles an hour, which was far too fast in the circumstances. I fear that he was considerably to blame.

What should the proportions be? After discussion with my brethren, I come to the conclusion that the fault was two-thirds on the part of Mr. Emerson and one-third on the part of the highway authority. I would allow the appeal to that extent, and alter the judgment accordingly.

DIPLOCK L.J.

I agree with the order proposed by my Lord, and have very little to add. 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 ****1497*** 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* , [9] "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. I think that on the evidence, for the reasons given by Lord Denning M.R., he was entitled to make that finding.

A mere failure to repair gives rise to no cause of action unless the failure to repair results in a danger to the traffic using the road and damage caused to some user of the highway by the existence of that danger. In this case the highway surveyor of the defendant council himself conceded that the existence of a pool on the highway of the kind which was proved to have existed in this case did constitute a danger; though I am bound to say I myself doubt whether any driver driving with reasonable care at a proper speed in the conditions of the night which were described in the evidence would have sustained any injury as a result of the pool of water. However, in view of that concession and of the judge's finding, I must, I think, accept that the plaintiff here made out a good cause of action against the council under section 1 (1) of the Highways (Miscellaneous Provisions) Act, 1961 .

The nature of that cause of action and of the defences available to the highway authority were

discussed by this court first in *Griffiths v. Liverpool Corporation* , [10] and I do not desire to add anything to the analysis I sought to make in that case of the cause of action.

In my view, again for the reasons given by my Lord, the highway authority did not succeed in establishing that they had taken such care as in all the circumstances was reasonably required to secure that the part of the highway to which the action relates was not dangerous.

Mr. Mynett relied mainly on paragraph (d) of subsection (3) of section 1, and urged upon this court that the highway authority could not reasonably have been expected to know that the condition of the part of the highway at this particular point in the road was likely to cause damage to users of the highway. I agree with my Lord and, I think, with the judge, though he did not deal specifically with this particular matter, that the highway authority did not succeed in proving that. If they did not know — and certainly up to 1968 through their maintenance surveyor they did know that this particular portion of the road was liable to flood unless the gullies were regularly cleaned — they certainly ought to have known it. The ***1498*** surveyor himself said that the drainage system of a highway ought to provide for a fall of one inch of rain in an hour. This portion of the road on the evidence plainly did not do so on this occasion, nor was there any evidence that it had done so on any other occasion. In my view the local authority failed to make out any of the defences available to them under the section.

As I have already indicated, the view which I take of the danger involved in such a pool to a driver driving with due care and attention is that it is not a very high degree of danger. I think Mr. Emerson must plainly have been driving negligently. I agree with my Lord that the blame is much more his than that of the council who allowed the pool to form there, and I agree with the apportionment of two-thirds of the blame to lie on him and one-third on the council.

GOFF J.

I agree with the order proposed and the reasons which my Lords have given for it, and I will only add one comment of my own. It is this: The surveyor, when he put forward a standard of an inch of rain in an hour, was in fact considering modern roads newly constructed; and he thought that in the case of an older road that might be too high a standard, even though it was part of a Class A road. But the judge in his judgment fully allowed for that, and it was quite clear that, even making such allowance, the rainfall on the occasion in question was not anything like as great as that which the defendants' own divisional surveyor said the drainage system ought to be adequate to remove.

M. M. H.

Representation

Solicitors: Sharpe, Pritchard & Co. for A. R. Davis, Nottingham County Council; C. A. Rutland for Alick Altman & Co., Nottingham .

Appeal allowed in part. Order varied to accord with apportionment of liability.

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1. Highways (Miscellaneous Provisions) Act, 1961, s. 1 : “(1) The rule of law exempting the inhabitants at large and any other persons as their successors from liability for non-repair of highways is hereby abrogated. (2) In an action against a highway authority in respect of damage resulting from their failure to maintain a highway maintainable at the public expense, it shall be a defence … to prove that the authority had taken such care as in all the circumstances was reasonably required to secure that the part of the highway to which the action relates was not dangerous for traffic. (3) For the purposes of a defence under the last foregoing subsection, the court shall in particular have regard to the following matters, that is to say —… (*d*) whether the highway authority knew, or could reasonably have been expected to know, that the condition of the part of the highway to which the action relates was likely to cause danger to users of the highway: …”

2. *[1960] 2 Q.B. 72* ; *[1960] 2 W.L.R. 745* ; *[1960] 2 All E.R. 26, C.A.*

3. C.A. No. 33 of 1956, January 31, 1956 (unreported).

4. *[1967] 1 A.C. 617* , 640; *[1966] 3 W.L.R. 498* ; *[1966] 2 All E.R. 709, P.C.*

5. *[1967] 1 Q.B. 374* ; *[1966] 3 W.L.R. 467* ; *[1966] 2 All E.R. 1015, C.A.*

6. *[1968] 1 W.L.R. 689* ; *[1968] 1 All E.R. 1137, C.A.*

7. *[1968] 2 All E.R. 343* .

8. *(1880) 6 Q.B.D. 264, 276, D.C.*

9. (1859) 1 F. & F. 678.

10. *[1967] 1 Q.B. 374* .