

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

VICTOR MALLEN

-v-

THE DEPARTMENT FOR REGIONAL DEVELOPMENT

DEENY I

[1] This judgment relates to the surprisingly eventful life of the gully beside street light number 1 on Cappy Street off the Ravenhill Road, Belfast.

[2] The plaintiff Mr Mallen, who was born on 25 December 1952, contends that on 27 October 2001 in the early afternoon, he was about to cross Cappy Street, on his way from his own home nearby at 32 London Street, when he stepped into an uncovered gully and fell. He sustained a fracture of his right clavicle.

[3] His claim against the Department alleges a failure on their part which, although pleaded alternatively in negligence and nuisance, substantially relates to an alleged failure to maintain a road and grating therein in breach of Article 8 of the Roads (Northern Ireland) Order 1993. It was not disputed that a missing gully lid would constitute a failure to maintain. The plaintiff's first task therefore is to establish, on the balance of probabilities, that the accident happened in the way that he alleges. The second thing that the court must establish, if he gets over that first hurdle, is whether or not the Department has made out a defence under Article 8(2) and (3) to which I shall return in due course.

[4] Although he lived very close by he said he had not noticed that the gully lid was missing before. His partial explanation for that was that he was usually away all day working. However that was somewhat inconsistent with other answers he gave which emphasised the rather part-time and irregular nature of his work as a chimney sweep. Indeed, although he claimed to have been off work for about two years with either only one week

back or three weeks back in that time, no claim, was made for special damages. Mr Fintan Quinn, for the defendant, put to him that he must have seen this gully if, as his witness was to contend, it had been missing a lid for some six weeks but he said that he never noticed it. He returned about a week after the accident with his brother and took certain photographs of the gully which show the lid missing.

[5] Counsel for the defence pointed out that, by chance, the annual cleaning of the gullies on that street took place on 30 October ie between the accident and his photographs. No record had been made that any gully lid was missing at that inspection. The plaintiff said those workmen must have been mistaken.

[6] Mr Joseph Knox of Carlingford Street was returning from walking his dog in Ormeau Park with a Mr Michael Connolly on 27 October. He had seen the plaintiff before but did not know him. At a distance of about 40 or 50 yards he saw him falling and going down when stepping off the kerb. As he reached the plaintiff he was getting up holding his arm and his glasses were on the ground. It does seem a little surprising that the plaintiff was able to get up so quickly given that his foot had gone into a two and a half feet deep gully and that he had fractured his clavicle.

[7] Mr Knox said that he knew there was no grate there. Although at one point he said he could not really remember what happened before, at another point he said that he remembered that there were pieces of wood in the gully instead of a grating, before the accident.

[8] He was cross-examined at length by counsel. His account of how he came to give his name and address to the plaintiff differed a little from the recollection of his friend Mr Michael Connolly.

[9] The plaintiff also called Mr McCaughey, of Ravenhill Street, to give evidence that he passed Cappy Street daily and that he had noticed the lid of this gully missing "for a while". He said it might have been six to eight weeks but was not sure exactly how long. Mr McNulty QC, with whom Mr Colm Keenan appeared, for the plaintiff, sensibly raised the issue with him as to why he did not report the missing lid over such a period of time. He said that he did not do so because it was not outside his door.

[10] It is a very striking fact that neither Mr Knox nor Mr McCaughey did report this missing gully lid. All agreed that it was a patent danger to anyone using the road. Mr McKnight of 21 London Street, the nearest householder to the gully, had reported that the lid was missing in May 2001 and again in January 2002 and on both occasions it was expeditiously replaced. It is equally or even more surprising that the plaintiff himself did not report the missing lid in the weeks after his own accident, although he was not detained

in hospital and he, like the other witnesses had the use of a telephone. The plaintiff's letter of claim of 4 January was in the standard form and did not expressly relate or refer to a gully lid either and yet an inspection by the Department on 16 January 2002 (as well as the gully cleaning on October 30 2001) found the lid in place. The plaintiff said it was replaced within four to five or six to seven weeks of him taking photographs but he does not know by whom.

[11] Although this point was not taken by counsel I could not help noticing that the plaintiff's account to me of being off work for a year and then trying for a week and going back off work differed from the history which he gave to Mr Yeates FRCS on 6 June 2002 ie that he was off work for 17 weeks and then went back for three weeks before he gave up again.

[12] In his report of 20 August 2002 Mr Yeates, who was the plaintiff's witness, did say that the plaintiff's continued complaint of stiffness in his shoulder was difficult to understand. He did not comment one way or the other on the consistency of this particular injury with the mechanism of the fall.

[13] It must be said that there was one medical piece of evidence strongly in favour of the plaintiff. That was the admission note from the Mater Hospital, the Accident and Emergency Department of which the plaintiff attended on 27 October at 15:31. He told the Triage nurse: "that he fell down into a manhole." The doctor recorded a history of: "walking along and fell down drain ? Cover broke or absent. (No alcohol)." Mr Keenan in closing strongly and understandably relied on this note supporting the credibility of the plaintiff. The only explanation for it, if the plaintiff's case is not an honest one, is that he had fallen and hurt his clavicle shortly beforehand but chose to allege it was caused by a missing lid in this gully near his home.

[14] Neither side called Mr McKnight, the nearest neighbour. The plaintiff says that he would not know him if he walked past him which seems a little surprising as he literally lives across a narrow street from him.

[15] The plaintiff also called Mr Michael Connolly who was walking his dog with Mr Knox. He did not actually see the accident but was nudged by Mr Knox and saw a gentleman lying on the footpath whom he now knows to be Mr Mallen. He did not see a grating in the hole but he does not know if it was there. Counsel pointed out that he seemed to have no visual memory of the plaintiff taking his leg out of this gully which he accepted. Nor did he see any cuts or marks on the leg of the plaintiff.

[16] The plaintiff called as his engineer Mr Laurence McGill. Although the case was opened to some degree on the basis that the Department's system was at fault it has to be said that this case was not really made by Mr McGill.

He gave helpful evidence about the documents which had been discovered by the defendant and also about the general practice. There was in fact a high degree of consensus between him and the Department's engineer when he was called, Mr Ronald Kerr. Both agreed that in the early 1990's a policy had been adopted of replacing gullies in South Belfast with a new design which allowed them to be hinged and thus prevented them being removed by vandals. They used to be made of cast iron which had some value as scrap but nowadays were usually made of polypropylene as they were here. He did point out that three of the surrounding streets had hinged gullies whereas Cappy Street did not but he could not point to any evidence on the records or elsewhere that would suggest that there had been a problem with gully lids at Cappy Street necessitating them all to be changed to hinged lids. His evidence was therefore helpful to the court but did not seem to me to amount to an attack on the system of the Department. The most he could say was that the gully lid was missing twice in May 2001. It may be this was two reports of the same incident of a missing lid or a reference to the fact that the lid was replaced on 10 or 11 May, following a complaint but that the gully was also cleaned on 31 May which would have necessitated it being opened.

[17] The defence called a considerable number of witnesses. The first of these was Mr Jonathan Kinnear, a roads inspector for the Department at the relevant time covering Cappy Street. His evidence is very important. He agreed that a missing gully lid was a matter for top priority which required to be addressed within 24 hours according to the Department's protocols. However he said he did inspect the very gully on 13 September 2001 as part of his inspection of Cappy Street and that it was present according to his record.

[18] It is right to observe that the Department's current inspection cycle for this and a considerable number of other streets is one of four months, rather than the two months which had been normal. This was caused in part by the need to deal with a reduced budget for roads maintenance. In answer to questions in this regard Mr Ronald Kerr for the defendant said that the budget for Belfast South in the year 1993/1994 was £5.2 million whereas in the current year it was only £3.1 million. That fall would be exacerbated by inflation. I observe that it may well be that a court would find that a four month cycle of inspection was not adequate if there was any record of incidences of significant faults developing. This would be especially so if the Department's cycle of replacing footpaths or flagstones had also been lengthened. However it does not seem to me that this is a matter I have to decide here because, as a matter of fact, the departmental inspection took place on 13 September ie six weeks before the accident. Even if the cycle of inspection had been every two months this inspection would have been within that cycle and therefore the longer cycle does not have any causative affect in this action.

[19] Mr Kinnear was ably cross-examined about this matter. It seemed to me that he stood up to that cross-examination well. His position was strengthened by the fact that his brief note not only recorded ponding on the road at Cappy Street but “25% parking.” This might be an indicator of care rather than the absence of care. He starkly maintained that even if a car had been parked over this gully he could have seen if the lid was missing. His colleague Mr Brian O’Neill later, convincingly, made the same point.

[20] Counsel for the plaintiff rightly pointed to the existence on a “RECORD OF MISSING GULLY LIDS” to an entry dated 1 August 2001. Mr Kinnear knew nothing of this. Another witness for the Department later admitted this was his mistake but did not explain how the mistake had arisen. Mr Kinnear’s evidence was that missing gully lids were not a problem in this area, as they were in certain other areas. His view on that appeared to be borne out by the departmental records which showed remarkably few incidences of this in the seven year period before the accident.

[21] Mr Philip Kelly for the Department gave evidence in an unchallenged way that he had attended on 10 May 2001 when there was a report of this gully lid being missing ie five months before the accident. He replaced it that day with a new black lid but of the same type ie not hinged. Furthermore he also attended on 25 January 2002 when there was again a complaint, again by Mr McKnight, that the lid was missing. On that occasion he found the lid actually in the chamber and he reinstated it. Given that there had been an inspection on 16 January which recorded no lid that would suggest that either than inspection was flawed or that the lid had been toppled into the gully between 16 and 25 January.

[22] Mr Martin George gave evidence for the Department about their policy with relation to lids but it did not seem to me to advance the matter for the plaintiff but rather to describe a reasonably rational approach.

[23] Mr Arthur Morrow for the Department was the witness who had made a mistake in referring to a report of a missing lid on 1 August 2001. When he double-checked his records he could not find any basis for this. Mr Brian O’Neill carried out the annual cleaning of the gullies in Cappy Street. Entirely by coincidence this took place on 31 October 2001 some four days after the plaintiff said he had fallen at the gully. There were two columns on the form which Mr O’Neill filled in to indicate if there was a missing gully lid but neither of those were ticked. Mr O’Neill was adamant that there would have been if the lid had been missing and he was adamant that the lid was there. In answer to counsel he did say that he would have got a very small bonus for replacing the lid but this was only 50 pence. His evidence is almost impossible to fit in with that of the plaintiff. It will be recalled that the plaintiff said he fell on 27 October and that he came back a week later with his brother (whom I did not hear from) to take photographs of a gully with a

missing lid. Either Mr O'Neill is wrong or Mr Mallon is fabricating a case and removed the lid for the purposes of the photograph. That theory, which is all it is, would be consistent with the known fact that neither Mr Mallon nor Mr Knox or Mr McGahy nor the neighbour Mr McKnight reported any missing lid over the period from mid September to late January. It should be noted that Mr O'Neill's job was actually to clean out this gully. Unless he did not do that at all it is hard to see how he could have missed a missing lid.

[24] As previously indicated I heard from Mr Ronald Kerr and he was convincing in his demonstration that no trend had been established at Cappy Street which warranted changing the gully lids on the street to hinged lids. The lids that were there conformed to British standards. While the hinged ones were preferable there was no significant problem with vandalism in this precise area whereas he had demands on his budget elsewhere.

[25] It can be seen that this gully lid had indeed had an eventful life at the period in question. Among the records were records of a visit on 28 November 2000 when it was noted that the manhole at this gully needed opening to allow cleaning out of the gully. There was again a report of the gully being blocked on 7 April 2001. As previously mentioned it was reported that the lid was missing on 10 May and this was replaced on 10 May (although one document indicated the 11th). The gully was cleaned on 31 May 2001. There is the suggestion in a record, which Mr Morrow said was his mistake, that some gully in Cappy Street had a lid missing on 1 August 2001 but no other evidence to point to that. We then come to the crucial period. Mr Kinnear says that he did inspect the street on 13 September 2001 and no lid was missing according to his record which he was sure was correct. This seems to me to be the crux of this matter.

[26] As previously indicated the plaintiff has not made out a case that the failure to have hinged lids in this street was a failure to maintain in itself on the part of the Department. It can be seen that the plaintiff faces some real difficulty in establishing the first leg of his case ie that he fell on a gully on the day in question, chiefly because of the evidence of Mr O'Neill and Mr Kinnear as well as some discrepancies in the plaintiff's own case. However even if the plaintiff had satisfied me on the balance of probabilities that he had fallen in the way he described, on which I do not rule, he would also have to deal with the defence mounted by the Department.

[27] I refer to the relevant statutory provision in the Roads (NI) Order 1993; and I quote:

“Duty to maintain roads

8(1) The department shall be under a duty to maintain all roads and for that purpose may

provide such maintenance compounds as it thinks fit.

(2) In an action against the department in respect of injury or damage resulting from its failure to maintain a road it shall be a defence ... to prove

(a) that the department had taken such as in all the circumstances was reasonably required to secure that the part of the road to which the action relates was not dangerous for traffic ...

(3) For the purposes of a defence under paragraph (2)(a) the court shall in particular have regard to the following matters -

(a) the character of the road, and the traffic which was reasonably expected to use it;

(b) the standard of maintenance appropriate for a road of that character and used by such traffic;

(c) the state of repair in which a reasonable person would have expected to find the road;

(d) whether the department knew or could reasonably have been expected to know, that the condition of the part of the road to which the action relates is likely to cause danger to users of the roads; ..."

[28] It is clear the Department did not know that the lid was missing prior to 27 October. The second hurdle therefore which the plaintiff must get over is to show that they could reasonably have been expected to know that. They could establish that by showing that there had been a failure to inspect timeously prior to the accident but that is not the case here for there was an inspection on 13 September 2001. The Department therefore is entitled to succeed if it satisfies me on the balance of probabilities, but with the onus on it as Mr Keenan pointed out, that the lid was in fact on on 13 September as the

Inspector said and that nobody had otherwise reported its absence to them between then and 27 October. I prefer the evidence of Mr Kinnear to the rather vague estimate of time by Mr McCaughey and the even vaguer estimate by Mr Knox. I should say that I find it very difficult to believe that if this lid, in a residential area, really had been missing for a period of some 6 weeks that none of the witnesses nor anybody in the locality had reported it to the Department. This is particularly so when we know that Mr McKnight did report it, apparently promptly and saw it dealt with promptly in May of 2001 and in January of 2002. It may be that somebody was interfering with this gully lid but the problem was not so marked as to require the Department to install a hinged lid prior to this accident and was not so marked to cause any of the local residents to report any such interference with the lid. In reaching that conclusion it seems to me unnecessary to resolve the credibility issue between the plaintiff's evidence and the defendant's evidence as to whether the lid was missing so as to cause the plaintiff's fall on 27 October. I find that the defendant has made out the statutory defence available to it. I dismiss the plaintiff's action.