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THE CORPORATION OF THE CITY OF KINGSTON (DEFENDANTS)..... } APPELLANTS;

AND

JENNIE C. DRENNAN (PLAINTIFF).....RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Municipal corporation—Negligence—Snow and ice on sidewalks—By-law—Construction of statute—55 V. c. 42, s. 531—57 V. c. 50, s. 13—Finding of jury—Gross negligence.

A by-law of the City of Kingston requires frontagers to remove snow from the sidewalks. The effect of its being complied with was to allow the snow to remain on the crossings which therefore became higher than the sidewalks, and when pressed down by traffic an incline more or less steep was formed at the ends of the crossings. A young lady slipped and fell on one of these inclines, and being severely injured brought an action of damages against the city and obtained a verdict.

The Municipal Act of Ontario makes a corporation, if guilty of gross negligence, liable for accidents resulting from snow and ice on sidewalks; notice of action in such case must be given, but may be dispensed with on the trial if the court is of opinion that there was reasonable excuse for the want of it, and that the corporation has not been prejudiced in its defence.

Held, affirming the decision of the Court of Appeal, Gwynne J. dissenting, that there was sufficient evidence to justify the jury in finding that the corporation had not fulfilled its statutory obligation to keep the streets and sidewalks in repair; *Cornwall* v. *Derochie* (24 Can. S. C. R. 301) followed; that it was no excuse that the difference in level between the sidewalk and crossing was due to observance of the by-law; that a crossing may be regarded as part of the adjoining sidewalk for the purpose of the act; that "gross negligence" in the act means very great negligence, of which the jury found the corporation guilty; and that an appellate court would not interfere with the discretion of the trial judge in dispensing with notice of action.

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*PRESENT:—Sir Henry Strong C.J., and Gwynne, Sedgewick, King and Girouard JJ.

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APPEAL from a decision of the Court of Appeal for Ontario (1) affirming the judgment of the Common Pleas Divisional Court in favour of the plaintiff.

The plaintiff, who was a medical student attending college in the City of Kingston, on the eighth day of February, 1896, was descending Princess street in said city, and was crossing Montreal street, which intersects Princess almost at right angles, when she fell at the lower or east end of the street crossing on a declivity formed by the difference in level between the crossing, which was covered with snow, and the sidewalk which, under a by-law of the city, was kept clear of snow or nearly so by the tenant of the shop adjoining. The plaintiff was injured in her hip by the fall.

The action was brought under section 531 of the Municipal Act of the Province of Ontario passed in the year 1892, being 55 Vict. ch. 42. This act was amended in the year 1894 by 57 Vict. ch. 50, section 13, so that at the time of the accident subsec. 1 of the main section read as follows:—S. 531, (1) "Every public road, street, bridge and highway shall be kept in repair by the corporation, and on default of the corporation so to keep in repair, the corporation shall, besides being subject to any punishment provided by law, be civilly responsible for all damages sustained by any person by reason of such default; but the action must be brought within three months after the damages have been sustained."

"Provided, however, that no municipal corporation shall be liable for accidents arising from persons falling, owing to snow or ice upon the sidewalks, unless in case of gross negligence by the corporation; and provided also that no action shall be brought to enforce a claim for damages under this sub-section unless notice in writing of the accident and the cause thereof has

(1) 23 Ont. App. R. 406.

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been served upon or mailed through the post office to the mayor, reeve or other head of the corporation, or to the clerk of the municipality, within thirty days after the happening of the accident; and provided also that in case of the death of the person by whom the damages have been sustained, the want of notice shall be no bar to the maintenance of the action; nor in other cases shall the want or insufficiency of the notice be a bar to the action if the court or judge before whom the action is tried is of opinion that there was reasonable excuse for the want or insufficiency of such notice; and that the defendants have not thereby been prejudiced in their defence."

At the trial the defendants' counsel at the close of the plaintiff's case moved for a nonsuit substantially on the following grounds which are set up by the statement of defence, and which the appellants put forward as their grounds of this appeal.

1. That the crossing was not out of repair within the meaning of the statute, and that the defendants had not been shown to have been guilty of negligence in respect thereof.

2. That the accident had not happened on a sidewalk, and the defendants had not been guilty of gross negligence required by the statute to make them liable.

3. That the plaintiff had not given the notice required by the statute or proved circumstances sufficient to form a reasonable excuse for want of notice so as to justify the judge presiding at the trial in dispensing with notice.

The trial judge held that there was reasonable excuse for not giving notice of action and that the defendants were not prejudiced in their defence for want of it. Under his charge the jury found the corporation guilty of gross negligence and judgment was entered for the plaintiff with $1,500 damages. This judgment

was affirmed by the Court of Appeal from whose decision the corporation appealed to this court.

Walkem Q.C. for the appellant. The difference in level between the sidewalk and crossing was unavoidable if the by-law for removing snow on sidewalks was carried out. It could not, therefore, be deemed negligence on the part of the corporation. *Goldsmith* v. *City of London* (1); *Burns* v. *City of Toronto* (2).

Allowing snow and ice to remain on a sidewalk is not of itself evidence of negligence. *Ringland* v. *City of Toronto* (3); *Forward* v. *City of Toronto* (4).

At all events there was no evidence of gross negligence to be submitted to the jury.

Notice of action was not given and the discretion of the judge in dispensing with it is subject to review. *Hayter* v. *Beall* (5); *Jones* v. *Tuck* (6).

Hutcheson for the respondent. As to liability for accidents caused by snow and ice on the streets see *City of Halifax* v. *Walker* (7); *Caswell* v. *Corporation of St. Mary's* (8); *Gordon* v. *Belleville* (9); *Town of Cornwall* v. *Derochie* (10).

The discretion of the judge as to notice will not be reviewed unless it has led to a miscarriage of justice. *Ormerod* v. *Todmorden Mill Co.* (11); *In re Martin* (12); *In re Oriental Bank* (13).

The judgment of the majority of the court was delivered by:

SEDGEWICK J.—On the 8th of February 1895 the plaintiff, then being a student attending the medical

(1) 16 Can. S. C. R. 231.
(2) 42 U. C. Q. B. 560.
(3) 23 U. C. C. P. 93.
(4) 15 O. R. 370.
(5) 44 L. T. 131.
(6) 11 Can. S. C. R. 197.
(7) 4 Russ. & Geld. 371; Cass. Dig. 2 ed. 175.
(8) 28 U. C. Q. B. 247.
(9) 15 O. R. 26.
(10) 24 Can. S. C. R. 301.
(11) 8 Q. B. D. 664.
(12) 20 Ch. D. 365.
(13) 56 L. T. 868.

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school in connection with Queen's University, Kingston, while walking in an easterly direction down Princess street and upon the crossing at its intersection with Montreal street, fell upon the slope of the crossing and sustained an injury to her hip so severe that she was laid up in the hospital for twenty-four weeks, and has been lame ever since. She brought this action against the municipality, and upon trial before Meredith C.J. and a jury a verdict was entered in her favour for $1500 damages. A motion to set aside the verdict was unsuccessful in the Divisional Court, and upon the case coming before the Court of Appeal there was an equal division of opinion, Hagarty C.J., and Maclennan J. thinking the verdict should not stand; Burton and Osler JJ. contra. From the judgment in the plaintiff's favour resulting from this equal division the City of Kingston has brought this appeal.

The substantial question is as to whether the City of Kingston in the present case has fulfilled the obligation imposed by the statute 55 Vict. ch. 42, s. 531, s.s. 1, which is as follows:

> Every public road, street, bridge, and highway shall be kept in repair by the corporation, and on default of the corporation so to keep in repair, the corporation shall, besides being subject to any punishment provided by law, be civilly responsible for all damages sustained by any person by reason of such default, but the action must be brought within three months after the damages have been sustained.

Further questions arise from an amendment of this subsection, 57 Vict. ch. 50, sec. 13, which is as follows:

> Provided, however, that no municipal corporation shall be liable for accidents arising from persons falling owing to snow or ice upon the sidewalks unless in case of gross negligence by the corporation; and provided also that no action shall be brought to enfore a claim for damages under this subsection, unless notice in writing of the accident and the cause thereof has been served upon, or mailed through the post office to, the mayor, reeve, or other head of the corporation, or to the clerk of the municipality, within thirty days after the happening of the accident; and provided also that in case of the death of

the person by whom the damages have been sustained, want of notice shall be no bar to the maintenance of the action, nor in other cases shall the want or insufficiency of notice be a bar to the action if the court or judge before whom the action is tried is of opinion that there was reasonable excuse for the want or insufficiency of such notice and that the defendants have not thereby been prejudiced in their defence.

The main inquiry then is: Was Princess street at the place of the accident "kept in repair" by the municipal authorities within the meaning of the principal enactment?

The following facts appear to be undisputed. (*a*) The plaintiff fell not on what is usually known as the *sidewalk*, but on the *crossing*, and just before it joined the sidewalk. (*b*). Princess street goes easterly on a down grade. (*c*). A by-law of the city requires frontagers to remove snow and ice from sidewalks and in the present case the sidewalk was so cleared. (*d*). The snow is of course allowed to remain on crossings and on the remaining portions of the streets as it falls. The removal of the snow from the sidewalk, and its remaining on the crossing, must necessarily cause a difference of level between the sidewalk and the crossing and the injurious effect of the interference with travel and locomotion is modified or obviated by removing a portion of the snow from the crossing where it joins the sidewalk, making at that point a declivity or incline which may be greater or less according to the depth of the snow upon the crossing and which may be as gentle or precipitous as the authorities may choose to permit. Where a street is not on the level the angle of inclination would in ordinary cases be accentuated, and travel upon it more hazardous. It was at such a point and upon a declivity caused in some such way that the accident in the present case occurred. There is of course much question as to the dangerous character of this slope, the plaintiff contend-

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ing that the ordinary grade or slope was very greatly increased, forming a steep smooth icy declivity from two to four feet long, descending to the sidewalk, at an angle of from twenty-five to forty-five degrees.

The witness Atwood describes the slope as being at an angle of at least thirty degrees with the adjoining sidewalk, and thought this declivity extended a yard at least on the crossing, and described the surface of the incline as being highly polished, principally by footwear.

The witness Boyd describes the place as being "very slippery, a kind of deep incline; and although he worked in the adjoining store he had only seen the crossing cleaned off once all winter." In speaking of the incline, he said: "It came down very sharp just for probably two feet, back; it came down very steep."

The witness Brickwood says that the snow and ice were removed from the pavement but allowed to accumulate on the crossing, thereby leaving the crossing much higher than the adjoining pavement; and speaks of the approach from the pavement to the crossing being very sudden, and slippery, and illustrates it by a large book showing an angle of about forty degrees; while this place was in the same condition he says he saw a great many people slip there, and he says he saw two or three people fall, and speaks of one particularly bad fall.

The witness Garbutt says the accumulation on the crossing caused a steep incline extending about four feet from the pavement, and illustrated by the same large book, showing a slope at an angle of twenty-five degrees or thirty degrees, and describes the surface as being "icy, almost impossible to go down it with safety."

One White fell himself at the same place on the same day and was partially stunned by the fall, not

recovering for some hours. He describes the place as being "quite a drop from the snow down to the edge of the sidewalk where it had been cleaned"; and says the surface of the slope was "very glare, had been worn off; people, it seemed, stepping on it had made it smooth."

One Johnston fell at the same place within two or three days of the day in question, and describes the crossing as being in "a very slippery condition," and as being very much higher than the pavement or sidewalk.

Mr. Justice Osler in his opinion in the court below thus speaks:

The only question, therefore, as I have said before is whether there was evidence of such neglect proper to be submitted to the jury. The defendants are no backwoods township or small straggling village, but an ancient busy and populous city and the place where the accident happened was on the crossing of two of its principal and most frequented streets—Princess and Montreal—on one of the most important thoroughfares. The condition of this crossing, where it joined the sidewalks in the direction in which the plaintiff was going, is thus described in the evidence. The dip to the sidewalk was by reason of the ice and snow which had accumulated in it considerably more abrupt than the natural inclination of the crossing, a dip of 30 or 40 degrees in three feet, very slippery,—a kind of deep incline where the crossing joined the pavement—came down very sharp for probably two feet back,—approach very sudden—came down very sudden on a jog of 40 degrees—quite a drop from the snow to the edge of the sidewalk—it was dangerous—almost impossible to go down it with safety—a very bad crossing—many people had been seen to slip there and two or three to fall—had been more or less all the winter in a slippery and dangerous condition—in the condition in which it was when the plaintiff fell, for two weeks at least. There were three aldermen for the ward in which the crossing was, and the mayor lived "up that way." That the defendants recognised what ought to be done in respect of such a crossing there is the evidence of the city engineer who said that every time he saw it it was in good condition, if not, would send men to make it so; kept men cleaning snow off these crossings, maintained a general supervision on the streets and there was also a foreman; was often up and down Princess street in the winter; often went to look up and down it in icy weather to see

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if anything could be done; frequently got ashes and sand sprinkled on the whole surface of road and especially on the crossings; kept barrels of sand in the tool house for the purpose, and would send men to get ashes from the stores. One of plaintiff's witnesses said that ashes had been put on the street once during the winter.

The learned Chief Justice Meredith (a recognized authority on municipal law) in addressing the jury said:

> Now I may say this to you as applied to the facts of the case. If you think that owing to the condition of that crossing—the snow upon the slope, the condition of the snow, if you think it was dangerous—that that danger was a manifest danger to anybody who was caring to look—if that state of things had existed in a central portion of the city where many people were passing—in one of the most frequented parts of the city—if that condition had existed for many days; if the means of preventing that condition of things was simple; if the corporation neglected to discharge the duty of applying that simple remedy—then I think the case would be one of gross negligence. I will ask you therefore to say whether you think there was negligence on the part of the corporation or whether you think there was gross negligence.

This charge was not objected to, nor has misdirection been made a ground of setting aside the verdict. Upon the charge the jury found as I have said for the plaintiff and that the corporation was guilty of "gross negligence," bringing the case within the amending statute above set out.

Such being the evidence and such the charge and findings we are asked to set aside these findings substantially upon the ground that there was no evidence of negligence that could properly be presented to a jury.

It is not of course for me to say whether I believe the evidence—whether I would upon the evidence have found as the jury did. That is their function, not ours, and even if I disagreed with the result at which they arrived that is no reason why I should disturb it, unless I find that there was no evidence of negligence at all, or the finding so shocks my reason

as to convince me that the jury in coming to it were bereft of theirs.

The obligation of the city was to keep the streets and sidewalks in a reasonable state of repair—in such a condition that the traveller using them with ordinary care might do so with safety. There was evidence (and I think sufficient evidence) to justify the jury in finding a breach of that obligation. That evidence—a portion of it above set out—showed that the slope was unnecessarily, unreasonably, and unsafely steep; that its existence and character must have for some time before the accident been brought to the knowledge of the authorities, or at least they must be presumed to have had such knowledge; and that it was a feasible, simple and inexpensive matter to remove all occasion of injury.

There has been much difference of opinion in Canadian and United States courts as to municipal liability for accidents occasioned by snow or ice upon highways. That there is liability in certain cases in those provinces of Canada whose legislation imposes a civil liability for accidents occasioned by "default of repair," is unquestioned. That at least was held by this court in the late case of *Cornwall* v. *Derochie* (1).

This difference has been occasioned it seems to me more than a divergence of view as to facts than as to law. The learned Chief Justice of the Court of Appeal says in his able opinion:

> We have so often had to comment on and review cases in which recoveries have been held for accidents on highways that it is hardly necessary again to discuss the subject in general. We are now face to face with the question whether the presence of snow on a road or street raised by the action of vehicles and partly by the law compelling sweeping or clearing of sidewalks, so as to be raised as here to a higher level than the sidewalk presenting a slippery descent of six or seven inches in the distance of from three to two feet creates a cause

(1) 24 Can. S. C. R. 301.

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of action against the city by an accident to a passenger slipping thereon.

This statement of the question it seems to me (and I say it with the utmost deference and respect) minimizes the result of the evidence as found by the jury. Had he added to his description a statement to the effect that by reason of the premises the place was made unnecessarily and unreasonably dangerous, a defect that by the exercise of proper diligence might easily have been removed, he would have introduced an element which must have had its effect upon the mind of the jury and which likewise must affect ours, since we must assume it to be the fact. Admit the presence of a defect by reason of changed conditions in a highway,—admit that this defect is dangerous to life and limb—admit that its removal may be accomplished without an unreasonable call upon municipal revenue and you have a case of municipal obligation and, in the event of accident from default, of municipal liability.

In the present case it seems to me the evidence showed that the municipality were not only passively negligent in not removing the defect, but they were actively instrumental in creating it. They were not bound to pass a by-law compelling the removal of snow and ice from sidewalks, but having passed it it became obligatory on them to take all proper precautions, looking to the safety of those points where the crossings and sidewalks meet. Had there been no by-law both would have been on the same level or grade, there would have been no extraordinary slope and probably no accident. The case is not one with special features or involving peculiar principles of law, because it deals with ice or snow. The city was not bound to build sidewalks, but having done so it is bound to keep them in repair to this extent at least

that they are not more dangerous than if they did not exist at all. It is the same case as if it was originally erecting a sidewalk and by defect of plan or specification or otherwise a particular part of it was so much more sloping than the natural way or necessity called for that an accident followed. Then, there would be liability as in any other case of structural defect.

A municipality (I repeat) is not liable for accidents occasioned solely by the presence of snow or ice upon a street or sidewalk. It is not, as a rule, bound to remove either. But if after a heavy rainfall a bridge is swept away there is a liability to replace it; so snow may so accumulate as to make particular places impassable and impose the obligation of removal. As stated in an American work (1)

it is only in such cases as where mounds of snow and ice are negligently allowed to remain on a street or where there is an unreasonable delay in making a road passable or where there is some defect in the way itself that is made more dangerous by the snow that the municipality will be held responsible for injuries occasioned by its presence in the street. In the country entire inaction is sometimes excusable, and the fact that a road was impassable from snow for three months has been held insufficient evidence of negligence.

After referring to the various views as to ice on sidewalks the learned author proceeds (sec. 100).

In a climate where snow and ice exist almost constantly through the winter season, the requirements of the duty to exercise reasonable care to keep the street safe for use would not oblige a corporation to attempt to accomplish that which is practically impossible. In such a climate to keep the sidewalks clear would require extraordinary and unreasonable care, and the common law puts no such obligation on a municipality.

In support of the general rule that mere slipperiness will not give rise to liability he cites *Kinney* v. *Troy* (2), where Danforth J. says:

The situation was one common to all cities in a northern climate and to all sidewalks in such cities. A sidewalk, difficult it may be of pass-

(1) Jones on Mun. Negligence sec. 98.

(2) 108 N. Y. 567.

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age, but if so, from the ordinary action of the elements only, and from a formation of ice which no body of men are competent to prevent nor under any ordinary circumstances to remove. Something more than a slippery sidewalk must be shown to enable one suffering from it to cast the burden of compensation upon the city.

Upon the general question reference may be had to *McGiffin* v. *Palmer's Ship Building Co.* (1), where Field, J., says :—

The case has been put of a way perfectly well constructed, but upon which, on a frosty December morning, water falls so that it gets into a dangerous state. I cannot help thinking that that would be a defect in the condition of the way, because the way is the thing which people walk upon, and the thing itself is actually altered.

In *Leek Commissioners* v. *Stafford* (2), Bowen, L. J., says :—

The repairing of a road includes whatever is necessary to keep it in a proper condition for the traffic, having regard to the character and original manufacture of the road.

The Canadian cases are illustrated by :

Caswell v. *St. Mary's* (3). Per Wilson, J., at page 251.

If a particular part for two or three rods in length happens to be in a very dangerous condition, exceptionally and particularly dangerous as distinct from the rest of the road, and it can be put in a safe state and at a reasonable expense, there is no reason why it should not be made safe for travel although it was caused by rain, snow or ice, or what may be called "natural means."

And again at page 252 :

If the snow collects at a spot, and by thawing and freezing, travel upon becomes specially dangerous and if this special difficulty can be conveniently corrected by removing the snow or ice, or by other reasonable means, there must be the duty of the person or body on whom the care of reparation rests, to make such place safe and fit for travel.

Gordon v. *Belleville* (4). Where the plaintiff was injured by falling on a ridge of ice which had been allowed to form and remain for a long time along the

(1) 10 Q. B. D. 5.
(2) 20 Q. B. D. 794.
(3) 28 U. C. Q. B. 247.
(4) 15 O. R. 26.

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centre of a sidewalk the plaintiff recovered, though he knew of its dangerous condition. The verdict was upheld by the Divisional Court.

Reference may also be had to the Nova Scotia case of *Walker* v. *The City of Halifax* (1), where Mr. Justice (afterwards Sir John) Thompson delivered an elaborate judgment (subsequently affirmed by this court) upon the liability of a city for damage caused by *cahots* on a public street. This case was overruled by the Privy Council in *Pictou* v. *Geldert* (2) but upon another ground.

Upon the whole I am of opinion that the verdict cannot be disturbed upon the question of negligence.

There are however three subsidiary questions still to be referred to, all arising under the amendment of 1894 above set out.

First, the appellants allege and the respondent denies that this amendment applies. The accident in question happened upon a "crossing." Was the crossing at that particular place a "sidewalk" within the meaning of the statute? The statute of which this amendment forms part in several places refers to sidewalks and crossings, and it is argued that these terms are mutually exclusive of each other. I have also in this opinion referred to them as different things. I am however of opinion that "sidewalks" here includes "crossings." In the case before us the street area covered by Princess and Montreal streets intersected has two names. Looking at it east and west it is Princess, north and south it is Montreal street. Here at the two sides of the first are walks or granolithic pavements for the special use of foot passengers walking up or down Princess street; they are called crossings but they are sidewalks *quoad* or in relation to Princess street. So also to the walks on each side of

(1) 16 N. S. Rep. 371. (2) [1893] A. C. 524.

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Montreal street. So far as my general observation goes a crossing is usually a sidewalk and I think that in the present case the statute should be so construed. We are doing no violence to the statute in so holding. On the contrary we are giving effect to what appears to me to have been the legislative intent.

Secondly it is contended that although there may have been negligence here there was no gross negligence such as the amendment requires to create a liability.

I am not bold enough to enter upon a detailed investigation as to the difference between gross and other kinds of negligence. That question has been discussed by civilians and text-book writers to such an extent that judges have been found to say that there are no degrees of negligence. However this may be we must, I suppose, give some meaning to this expression of the legislative will and the meaning I give to it is "very great negligence." The jury have found that species of negligence in this concrete case. The trial judge did not attempt, as I do not, to define. He merely put to the jury the contentions of fact and the supporting evidence stating that if these contentions were true there was gross negligence present here. That I think was the proper course and the jury's finding should not be disturbed on that ground.

Finally. The amendment provides that no action shall be brought unless notice in writing has been served within thirty days after the happening of the accident, but that the want or insufficiency of the notice should not be a bar if the court or judge before whom the action is tried is of opinion that there was reasonable excuse for the want or insufficiency of such notice and that the defendants have not thereby been prejudiced in their defence. Notice was not given, but at the trial

the appellants admitted that they were in no way prejudiced by the plaintiff's failure to give notice and the trial judge decided under the statute that there was reasonable excuse for the want of it. The appellants, although admittedly in no way prejudiced by want of notice, seek to set aside the verdict on that account. I do not feel called upon to decide whether in the present case the certificate of the trial judge is reviewable. The rule is universal however that when a statute gives a judge discretion to do a particular act his decision will not be interfered with by an appellate court unless he has made a palpable mistake or has acted upon a manifestly erroneous principle. That cannot be the case here. The main object of notice is to give the defendant a chance of getting at the facts while evidence is available and fresh in the minds of witnesses. For this purpose no notice in the present case was necessary as admitted by counsel. It was proved that the plaintiff was in the hospital twenty-four weeks, during the first thirty days enduring great physical pain. Little during that time would she think of her court remedies. She would probably not dream that she had any. Under the circumstances I am not disposed to question the discretion of the trial judge in dispensing with the notice.

The appeal should be dismissed with costs.

GWYNNE J.—In *The Municipality of the town of Pictou* v. *Geldert* (1), it was held by the Judicial Committee of the Privy Council that the default of a municipal corporation or other public body in keeping in repair a highway or bridge, the obligation to maintain which in repair was imposed upon such corporation or public body by statute or common law, does not give to any person injured by such default any cause of action to

(1) [1893] A. C. 524.

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recover damages in respect of such default and injury, and that such an action can only be maintained by force of some legislative provision indicating an intention upon the part of the legislature to give to a party injured by such default an action for the damages by him sustained in respect thereof. In the present case, however, we have such a legislative provision, for by "The Municipal Institutions Act" of the province of Ontario, 55 Vict. ch. 42, which was but a consolidation of previous Acts, having like provisions, it was enacted in sec. 531, that:

> Every public road, street, bridge and highway, shall be kept in repair by the corporation, and on default of the corporation so to keep in repair, the corporation shall, besides being subject to any punishment provided by law, be civilly responsible for all damages sustained by any person by reason of such default, but the action must be brought within three months after the damages have been sustained.

Now, the true construction of this section is, as it appears to me, that the action which this statute gives to a private person injured by the default of a municipality to keep in repair the roads &c., under its control, is one founded upon the same precise default as would subject the municipality to criminal proceedings, and that therefore the same evidence of the *fact of the default* of the corporation is as necessary for the maintenance of the private action as for the maintenance of a criminal prosecution. This, as it appears to me, is the plain construction of the statute. I dwell upon this point no further than to refer to the cases cited by me in my judgment in *The Town of Portland* v. *Griffiths*, in this court (1).

It must, however, be, I think, admitted that juries, moved no doubt by sympathy for the sufferers, have rendered verdicts for damages in private actions which have been upheld by the courts upon evidence which

(1) 11 Can. S. C. R. 341.

would not have been for a moment entertained as sufficient to support an indictment for the same alleged default.

In a recent case of *The Town of Cornwall* v. *Derochie* (1), a verdict obtained by the plaintiff in an action like the present was upheld by this court, but in that case the judgment of the majority of the court, in which I was unable to concur, proceeded wholly upon this, that in their opinion the evidence sufficiently showed that the sidewalk, by falling upon which the plaintiff there received the injury complained of, was either originally improperly constructed, or by age and use had so sunk down as to allow water to accumulate upon it, in consequence of which the ice which caused the accident was formed. That judgment does not at all affect the present case, for there is not a tittle of evidence upon which could be rested a suggestion of any defect in the construction of the crossing by falling upon which the plaintiff sustained damage. That crossing, it is true, was higher in the centre of the street than at its sides, it was rounded off in the centre and sloped downwards to the sides of the street, and more, perhaps, on the side at which the plaintiff fell, because Princess street where it crossed Montreal street had itself a considerable natural descent of grade in that direction, but such formation of the crossing could not be, and has not been, relied upon as having been a defect in its construction, nor is the plaintiff's injury in any respect attributable or attributed to such construction. The whole of the plaintiff's case is, as it is put by the learned Chief Justice of Ontario in his judgment, as follows:

Princess street, in Kingston, which runs east and west, is crossed by Montreal street, and a granolithic pavement crosses the latter street on a down grade from west to east. At the southeast corner the

(1) 24 Can. S. C. R. 301.

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pavement joins or connects with the south sidewalk of Princess street. At that point the snow, under a city by-law, is habitually swept from the sidewalk adjoining the crossing, and the passage of sleighs had the effect of pushing or forcing the snow on or at the crossing upon or to the end of the sidewalk which sloped somewhat from north to sonth. The result was that where the sidewalk met the crossing the snow and ice had accumulated, and for from 3 to 2 feet back there was a descent in the crossing of 6 or 7 inches in the yard, and this descent was slippery. * * We are now, he added, face to face with the question whether the presence of snow on a road or street raised by the action of vehicles and partly by the law compelling the sweeping or clearing of sidewalks so as to be raised as here to a higher level than the sidewalk, presenting a slippery descent of 6 or 7 inches in the distance of from 3 to 2 feet, creates a cause of action against the city by an accident to a passenger slipping thereon.

The evidence given on behalf of the plaintiff for the purpose of establishing that default of the corporation in keeping the street, where the accident happened, in repair, which is made by the statute the foundation of the action, is in substance as follows. The day itself was very cold and stormy; it was snowing a little at the time of the accident. During that and the previous day it had been snowing off and on, while within the six days preceding there had been a very heavy fall of snow. All the plaintiff's witnesses concurred in saying that upon the crossing there was formed by snow and ice accumulated there an abrupt incline or dip down to the sidewalk at the junction of the crossing with which the plaintiff slipped and fell. This incline, according to one witness, commenced at the distance of about three feet, according to another, at about four, from the sidewalk; and one witness said that it was highly polished by traffic, by foot-wear principally, and, as he thought, by the wind that day. All proved that the sidewalk was kept almost without any snow upon it, it being required to be so kept by a by-law of the corporation. Upon it there was about an inch of snow, while upon the incline in the cross-

ing there was 6 or 7 inches, or perhaps more. The sidewalk being kept clear of snow the snow on the crossing accumulated by reason of the passing sleighs sweeping round the corner having the tendency to sweep the snow on to the crossing. This and the snow falls caused the incline to be formed. One witness who resided at the corner where the accident happened said that there is always, in winter, a certain amount of snow on the crossing, and that there will naturally always be a dip there which cannot be prevented.

There were as usual suggestions after the event as to modes by which the accident might have been avoided, some of which, if adopted, would seem to be injurious rather than otherwise. As for example, one witness suggested that a snow plough, which is used in keeping sidewalks clear of snow, should have been run along the crossing, that is, from one side of Montreal Street to the other; but such a proceeding, it is obvious, in a heavy fall of snow, by heaping the snow up on one side of the crossing across the whole width of the street, might cause an obstruction to passing vehicles, and in the case of an accident happening thereby might subject the corporation to actions, not for non-feasance but for actual mis-feasance; and the action of the snow plough on the crossing would naturally press down the edges to an icy, slippery condition more than would the footsteps of passing pedestrians. Another suggested that in lieu of the incline, and at the top of it, that is to say, at the distance of three or four feet from the sidewalk, a step should have been cut perpendicularly down to the level of the sidewalk. The benefit to be derived from such a step was not explained; and indeed while offering no benefit to pedestrians, it might be prejudicial to persons in sleighs coming round the corner. On the close of the evidence, counsel for the defendants moved for

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a non-suit which the learned judge refused to grant, and thereupon the defendants called the meteorological observer of the Dominion at Kingston, who testified as to the state of the weather on the 8th of February, 1895, the day of the accident. It was, he said, a very cold and stormy day; the thermometer at three o'clock in the afternoon stood at eight degrees below zero. It was snowing all day. It began to snow at seven o'clock the previous evening, and, judging from the snow-fall registered in the morning, he thought that it must have snowed all night. There was a snow-fall of four inches registered at eight o'clock in the morning, and between that and three o'clock in the afternoon it snowed 1·8 inches more. It snowed in fact almost continuously from seven o'clock the previous evening until ten o'clock on the night of the 8th February, making a snow-fall during that period of a little over six inches. The defendants called one other witness, the city engineer, who has charge of the streets of the city, who testified that after every snow-fall in the winter men are sent out to shovel snow off the crossings where necessary, but that it is utterly impossible to shovel off every crossing in the city at the same time; that on the day preceding the accident he had ten men, and on the day of the accident, the 8th of February, he had 34 men out shovelling snow off the crossings; that he had frequently during the winter seen the crossing where the plaintiff fell, but had never seen anything wrong with it.

The jury rendered a verdict for the plaintiff with $1,500 damages. Upon a motion to set aside that verdict and to enter a non-suit, or a verdict for the defendants, or that a new trial should be ordered, the Divisional Court of Common Pleas at Toronto discharged the motion, and upon appeal therefrom, the Court of Appeal at Toronto, by a divided court, dis-

missed the appeal, and from that judgment this appeal is taken.

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All the evidence, both that given on the part of the defendants and of the plaintiff, must be taken into consideration for the purpose of determining whether there was any evidence given sufficient to warrant a jury either in a criminal proceeding or in a civil action rendering a verdict against the defendants, as for any default upon their part in keeping the street, where the plaintiff fell, in repair within the meaning of the statute upon which the action is founded, and in my opinion the only conclusion which can reasonably be arrived at, is that there was not. If the verdict rendered in this case could be maintained, it would, I think, be quite useless for a municipal corporation ever to defend any action of this nature for any injury happening upon a street under their control, even though caused by the inclement state of the weather. To that cause, and to that alone, and not any want of repair in the crossing of which, in my opinion, there was no evidence whatever, does the evidence justify the conclusion that the plaintiff's accident was attributable. The evidence would not be entertained for a moment as sufficient to maintain a verdict against the defendants in a criminal proceeding, and it can be no more sufficient in a civil action than in a criminal proceeding. While the plaintiff is entitled to the deepest sympathy in the injury which she suffered, which appears to have been very great, we should be very careful not to suffer our sympathies to get the better of our judgment, as juries, it is to be regretted, in actions of this nature, too often do.

The appeal should, in my opinion, be allowed with costs, and a non-suit be ordered to be entered. It is unnecessary to express any opinion upon other points taken under the provisions of 57 Vict. ch. 50, sec. 13,

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as wholly independently of that Act, I am of opinion that there was no evidence given which was proper to be submitted to a jury as sufficient for the maintenance of the action.

Appeal dismissed with costs.

Solicitor for the appellant: *Donald M. McIntyre.*

Solicitors for the respondent: *Hutcheson & Fisher.*