

Surely the first element of an action for non-repair must be that some person lawfully using a highway has been injured thereon by its being out of repair. . . .

If a person walking on the highway on a dark and tempestuous night was driven off the road into the ditch and seriously injured, would the action be for non-repair by reason of the existence of the ditch? There might, no doubt, be a recovery on this ground owing to the absence of a guard rail, which, no doubt, would be a breach of duty on the part of the municipality. But that is a different question.

The defendants are not without remedy. Under sec. 609, they are entitled to bring in the corporation of the township of Bayham as third parties, and they may have leave to do so now if so advised.

The words in sec. 609 (1), (2), would seem adapted to such a case as the present.

The costs of the motion will be to plaintiff in the cause.

ANGLIN, J.

APRIL 21ST, 1906.

CHAMBERS.

MONTGOMERY v. SAGINAW LUMBER CO.

Third Party Procedure—Indemnity or Relief over—Claim against Foreign Corporation—Cause of Action—Employers' Insurance Contract—Damages.

Appeal by defendants from order of local Judge at Windsor setting aside his own ex parte order allowing defendants to issue and serve a third party notice, and setting aside the service thereof on the third parties, the Standard Life and Accident Insurance Company.

F. E. Hodgins, K.C., for defendants.

C. A. Moss, for the third parties.

ANGLIN, J.:—Defendants are sued for damages alleged to have been sustained by plaintiff, an employee in their factory. They carried an insurance policy with the company whom they seek to bring in as third parties, by which the insurers undertook to indemnify the assured against loss by