

was not a common law liability, but a liability under sec. 606 of the Municipal Act of 1903, and if so, plaintiffs' remedy is barred by reason of the action not having been brought within three months from the time of the accident, and by reason of no notice of action pursuant to sub-sec. 3 of the section mentioned.

[Reference to *Pearson v. County of York*, 41 U.C.R. 378; *Minns v. Omemee*, 8 O.L.R. 508; *Anderson v. Toronto*, 15 O.L.R. 643.]

In this case the plaintiffs do not claim for want of repair, but charge negligence in not so filling in the boulevard that the work would remain as a permanent work, as part of the street, and that even if what was done was apparently well done—the result shews that it was not well done—it is no excuse that the hole or depression was caused in the manner indicated by me, because the city should have filled up the space in such a manner, as to prevent such a condition as existed at the time and place of the accident.

[Reference to *Bathurst v. McPherson*, 4 A.C. 256, cited with approval in *Pictow v. Geldert* (1893), A.C., at p. 531, and to *Sangster v. Goderich*, 13 O.W.R. 419.]

In all these cases there was non-repair of the highway, but the cause of the condition of want of repair, which led to the accident, was a work which the municipality had a right to undertake, and in doing it, did it so negligently, that irrespective of any distinct obligation to keep the streets in repair, and whether bound to do that or not, they were responsible, and as for their misfeasance.

Here the streets in Toronto, must be kept in repair by the corporation. The work the corporation did in 1908 was on the line of their duty to repair and keep in repair Elizabeth and Albert streets. There was no outside work, not a work in connection with sewer system or any other of the many things which the corporation is authorised to do—so in my view of it, the liability, if any, is expressly that created, or if liability before, it is a liability continued by sec. 606. The Legislature has chosen to say that for damages resulting from that liability, the notice of action must be given, and the action itself must be brought within three months after the damages sustained, and so this action cannot be maintained. If I am wrong in my conclusion, and if the plaintiffs shall ultimately be held entitled to recover, the damages should be assessed at \$100 for the husband and \$650 for the wife, making in all \$750, and I so assess them, contingently, and if they are entitled to recover they should get costs.