

the curb, and 31 feet from the place where persons were in the habit of crossing. The trial Judge found that the accident was due to defendants' negligence in allowing the pavement to be and remain dangerously out of repair, considering the fact that the road is one of the busiest streets in Hamilton, and one over which hundreds of people are daily hurrying in all directions; that plaintiff had not been negligent; that the street was not sufficiently out of repair to be at all dangerous to horses or vehicles; and gave plaintiff \$150 damages.

J. P. Stanton, Hamilton, for defendants.

J. H. Long, Hamilton, for plaintiffs.

Judgment was delivered on February 15th, 1902.

BRITTON, J.—I agree fully with the statement of the Chief Justice, *infra*, that the finding of fact by a Judge ought to be viewed with at least as much respect as such a finding by a jury. What is actionable negligence under sec. 606 of the Municipal Act, by reason of default of a corporation to keep a street in repair, must be a question of fact depending upon a variety of circumstances. A general rule as to the kind or size of hole cannot be laid down. See as to kind of defects which do not constitute want of repair, *Ewing v. Toronto*, *supra*, and *Messenger v. Bridgetown*, 31 S. C. 379 But this case turns on the finding of the trial Judge that "the roadway was not sufficiently out of repair to be at all dangerous to horses and vehicles." That is what the roadway was for. . . . Unless municipal corporations are to be insurers against accident, they ought not to be held liable for such a defect, and upon the facts as found by the Judge below. Upon this point I agree with my brother Street. The appeal should be allowed.

STREET, J.—It has been well settled by a long line of cases, that the duty imposed upon municipalities by R. S. O. ch. 223, is to keep highways in a reasonable state of repair, having regard to their situation, and the travel upon them. That is, that the highway is to be kept in such a state of repair, as that persons using it might reasonably expect to do so without danger: *Castor v. Uxbridge*, 39 U. C. R. 113, *Lucas v. Moore*, 3 A. R. 602, *Foley v. Flanborough*, 29 O. R. 139. The repair need not be perfect, nor the safety of persons using it insured. . . . A finding of fact by a Judge is to be treated with great respect, but, in the present case, we are not embarrassed in considering it by any conflict of evidence upon the really material questions. Besides, courts are in the habit of more freely reviewing findings of fact in