ANGLIN, J.—I find it will not be necessary in this case for me to further reserve judgment. I have had an opportunity of carefully considering by-law 624 of the city of Hamilton, and, in my opinion, the proper construction of that by-law is such that it is conclusive against the claim of plaintiffs. Before, however, disposing of the case upon that ground, I think it proper to make findings of fact upon the evidence, and contingently to assess the damages, in order that plaintiffs, if advised to prosecute this matter further, may have the benefit of this trial, to which they are entitled.

I find in the first place that the road on Barton street where the accident happened was in a bad state of repair and in a highly dangerous condition. I find that the depression between the tracks and immediately against the rail which caused the accident, was from 3 to 3½ inches in depth, and that this depression existing there causing this accident constituted a danger of a serious character, and such, owing to its duration and to the notice which the parties responsible for it must have had, of its condition, as to constitute negligence for which the proper parties would certainly be responsible in an action for damages. I find there was no sufficient proof of contributory negligence on the part of the deceased which would disentitle plaintiffs to recover if otherwise entitled. The damages which plaintiffs sustained I would assess at $600, if giving judgment in their favour, basing this upon a reasonable expectation of continued receipt by the parents for a period of four years after the death of the son of the same proportion of his wages which the evidence shews they had received for some time before his decease. The plaintiffs would be entitled to judgment for this amount jointly, if they should so elect, or if they should prefer to have the damages apportioned I would apportion them $450 to the mother and $150 to the father.

Upon the legal question involved, however, as already intimated, I think plaintiffs must fail. They have seen fit to bring their action, not against the municipal corporation, upon whom the primary liability to maintain the roadway in a suitable condition rests, but against the railway company. The railway company, unless the duty which primarily rests upon the city is imposed upon them by legislation, owe no duty to plaintiffs. The fact that there is anything in the nature of an agreement between the railway company and the city, by which the company assume the responsibility of maintaining any portion of the highway, is something of which plaintiffs may not take advantage—is something upon which plaintiffs might not succeed. But, even assuming that