

by the defendant city corporation, and was being operated by their men under the direction of the officers of the defendant Dominion Construction and Paving Co.

The cause was at issue before the 8th October, 1903, on which day the plaintiff served a jury notice.

On the 18th December, 1903, the defendants moved to strike out the jury notice as being irregular under sec. 104 of the Judicature Act.

W. C. Chisholm, for the defendant city corporation, and J. E. Jones, for defendant company, relied on *Clemens v. Town of Berlin*, ante 1115, and cases there cited.

C. Nasmith, for plaintiff.

THE MASTER.—The sole question is, does plaintiff sue for injuries sustained through non-repair of the street? I think the question must be answered in the negative, for the following reasons:—

If the present case falls within the section, then it must extend to every accident happening on the streets or roads of a municipality with which their servants are in any way concerned. . . . [Reference to *Hesketh v. City of Toronto*, 25 A. R. 449.]

So far as I can see, this case is not different from that of any other person negligently using a dangerous vehicle, e.g., riding a bicycle or driving an automobile at an excessive rate of speed. . . .

In other words, if the benefit of sec. 104 is invoked, then the "causa causans," must be the state of the highway, as in *Clemens v. Town of Berlin* and cases cited. Here it is clearly not so. The condition of the highway was not in any way the cause of the accident. It was the alleged improper and negligent use of it by the servants of the city corporation and the company who were operating the roller. . . .

In *Clemens v. Town of Berlin* the roller was left on the highway, as alleged, when no longer required for use. Here it is negligent management of the steam roller itself which is said to have injured plaintiff. It is just the same in principle as if the machine in question had been in a yard off the street and had been making terrifying noises which caused the runaway in Yonge street that is said to have injured plaintiff.

The servants of the municipality are entitled to the same use of the streets as the rest of the public, with precisely the same duties and liabilities. If by their negligence injury is