plaintiff, he is the sole person by whom services rendered under such a contract should be paid.

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O'SULLIVAN v. HARTY.

Gwynne J.

Appeal dismissed with costs.

Solicitor for appellant: *Edward Mahon.*

Solicitors for respondents: *Britton & Whiting.*

THE TOWN OF PORTLAND (DEFENDANTS)..... APPELLANTS;

AND

MIRIAM GRIFFITHS (PLAINTIFF)..... RESPONDENT.

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*May 7.

*Nov. 16.

ON APPEAL FROM THE SUPREME COURT OF NEW BRUNSWICK.

Negligence—Defective sidewalk—Lawful use of street—Contributory negligence.

In an action against the town of Portland for damages arising from an injury caused by a defective sidewalk, the evidence of the plaintiff showed that the accident whereby she was injured happened while she was engaged in washing the window of her dwelling from the outside of her house, and that in taking a step backward, her foot went into a hole in the sidewalk, and she was thrown down and hurt; she also swore that she knew the hole was there. There was no evidence as to the nature and extent of the hole, nor was affirmative evidence given of negligence on the part of any officer of the corporation.

The jury awarded the plaintiff $300 damages, and a rule *nisi* for a new trial was discharged.

Held, Per Taschereau and Gwynne JJ., that there was no evidence of negligence to justify the verdict of the jury, and there must be a new trial.

Per Henry J.—That there was evidence of negligence on the part of the officers of the corporation, but the question of contributory negligence was not properly submitted to the jury and there should, therefore, be a new trial.

Per Ritchie C.J. and Fournier J.—That the plaintiff was neither walking nor passing over, travelling upon, nor lawfully using the said street as alleged in the declaration, and she was therefore not entitled to recover.

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*PRESENT—Sir W. J. Ritchie C.J., and Fournier, Henry, Taschereau and Gwynne JJ.

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APPEAL from a judgment of the Supreme Court of New Brunswick, discharging a rule *nisi* for a new trial.

The declaration in this case, after alleging that it was the duty of the defendants to keep in repair the streets in the town of Portland, stated that the plaintiff was walking and passing over and along Main street in said town, and, owing to the negligence of the defendants, was injured; and, in the second count, that she was travelling upon the said street and was injured; and, in the third count, that she was lawfully using the said street and was injured.

The evidence of the plaintiff at the trial showed that she was engaged on a certain day in washing the windows of her house on Main street; that being on the street in order to wash them from the outside, she had occasion to step back, and in doing so her foot went into a hole in the sidewalk and was caught there; her slipper came off, and she fell with her shoulder on the sidewalk adjoining the gutter; she also swore that she knew the hole was there.

This fall caused the injury to the plaintiff for which the action was brought, and the jury awarded her $300 damages; a rule *nisi* for a new trial was granted by the Supreme Court of New Brunswick, which was afterwards discharged. The defendants then appealed to the Supreme Court of Canada.

Dr. Stockton for the appellants:

It was misdirection in the learned judge telling the jury that it was the duty of the town to keep the streets in repair so that all persons could pass in safety. The sidewalk where respondent says accident happened was put there by the parish; it was there when the town was incorporated. The street was not recorded. There was no proof that it was fifty feet wide, and unless recorded and fifty wide, by 38 Vic. ch. 92, the

town could not spend money on it. In *Dwyer* v. *The Town of Portland* (1) it was held that no greater duty is cast upon the town since incorporation than existed before when the district was a parish.

I contend also that the corporation is not liable because the Act 34 Vic. ch. 11, secs. 83, 84 and 85, only transferred to the corporation the powers formerly vested in the general sessions and commissioners and surveyors of highways on the streets in question, and left it discretionary with the town to make and repair the streets. The town only possesses the powers formerly exercised by the parish authorities.

This case is different from *Borough of Bathurst* v. *Macpherson* (2). The municipality there had original powers, and it was authorized to levy tolls as well as rates and taxes, and it does not appear there was any limit to that power. Yet in that case it is distinctly laid down that liability attaches only for misfeasance, not for non-feasance. In the present case the town did nothing; there was no duty by law cast upon it to do anything. On the contrary, it was prevented by law from expending money at the place where the accident is alleged to have happened. See also *McKinnon* v. *Penson* (3); *Gibson* v. *Mayor of Preston* (4); *Blackmore* v. *Vestry of Mile End Old Town* (5); *Hill* v. *City of Boston* (6); *Burns* v. *City of Toronto* (7); Dillon on Mun. Cor. (8).

I further contend there was contributory negligence on the part of respondent. She knew full well, as she states, of this defect in the sidewalk. She was not using the street for the purpose of passing to and fro, but for washing the windows by splashing water on

(1) 4 P. & B. (N. B.) 423.
(2) 4 App. Cas. 256.
(3) 8 Ex. 319.
(4) L. R. 5 Q. B. 219.
(5) 9 Q. B. D. 451.
(6) 122 Mass. 344.
(7) 42 U. C. Q. B. 560.
(8) 3 Ed. sec. 981.

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them. She says: "I knew the cracks were there, and stepped back quickly, and my foot went into the hole." In this case the respondent's want of thought or negligence concurred to bring about the accident and she cannot recover. *Tuff* v. *Warman* (1). The question to be considered in every case is not whether the plaintiff's negligence caused, but whether it contributed to the injury. See Shearman & Redfield on Negligence (2).

R. C. Skinner for the respondent.

The respondent held the right to use the sidewalk for the purpose for which she did, and she was not bound to remember there was a hole; it cannot be urged there was any contributory negligence because she forgot there was a hole at that particular spot.

As to the liability of the corporation I contend, outside of the question as to whether the doctrine in *Dwyer* v. *The Town of Portland* (3), by reason of the defence made at the trial of this cause, is applicable or not, that the evidence, at all events, shows that the appellants continued the planked sidewalk on the street, and repaired it from time to time; and that it therefore became their duty to keep it in a reasonably safe condition, just as if they had originally constructed it; and that the law would cast on them the duty of keeping it in such a state, as to prevent it causing danger to persons using it; that the appellants had by their charter the care and management of the street; and that this sidewalk was under their control, and they had no right to leave it (as they did leave it, under the evidence and finding of the jury) in a dangerous condition.

The learned counsel cited the following cases:

Whitehouse v. *Fellows* (4); *Fletcher* v. *Rylands* (5);

(1) 5 C. B. N. S. 585.
(2) 3rd Ed. 39.
(3) 4 P. & B. (N. B.) 423.
(4) 10 C. B. N. S. 765.
(5) L. R. 3 H. L. 330.

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White v. *The Hindley Local Board of Health* (3); *Clarke* v. *The Town of Portland* (4); *Borough of Bathurst* v. *Macpherson* (5); *Blackmore* v. *Vestry of Mile End Old Town* (6); *Kent* v. *Worthing Local Board of Health* (7).

Dr. *Stockton* was heard in reply.

Sir W. J. RITCHIE C.J.—The declaration in this case alleges:

1. That the town of Portland had the care, control, &c., of the public streets of the said town, and it was the duty of the town to keep the same in a safe and proper condition for the passage to and fro over and along the same of the citizens of the said town; that among the streets of said town is one known as Main street; that plaintiff was, on the 23rd of May, 1878, a resident of said town, and was then walking and passing over and along the said street; yet the said defendants, not regarding their said duty in that behalf, negligently, illegally and improperly left the said street in an unsafe, dangerous and improper condition for the passing to and fro over and along the same of the said citizens and other subjects, and thereupon the said plaintiff, Miriam Griffiths, whilst so walking and passing over and along said street, without any fault of her own, but by reason of such negligence and improper conduct of the said defendants, accidentally fell into a hole negligently and unlawfully left by the said defendants in said street, and thereby became and was greatly bruised, wounded and injured, so that the said plaintiff became sick and permanently disabled, and suffered great pain and distress for a long time.

2. And for that the plaintiff says there is, in the town of Portland aforesaid, a certain other public street called Main street, leading from the city of Saint John to Indiantown, which said defendants are bound to keep in repair; that the same was negligently suffered by defendants to be out of repair, whereby the plaintiff, travelling thereon, and using due care, was hurt.

3. And for that the plaintiff says there is, in the town of Portland, a certain other public strect called Main street, leading from the city of Saint John, which said defendants undertook to repair and keep in repair, but did so in so negligent a manner that a certain hole was allowed to be and remain therein, whereby the said plain-

(3) L. R. 10 Q. B. 219.
(5) 4 App. Cas. 256.
(6) 9 Q. B. D. 451.
(7) 10 Q. B. D. 118.
(4) 3 P. & B. (N. B.) 189.

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tiff, lawfully using said street, and without negligence on her part, was hurt.

And the plaintiff claims two thousand dollars.

The evidence of the plaintiff directly negatives the allegations of the said declaration; her statement is that:

> On the 23rd of May, 1878, I went to wash the windows and was outside, and there was a hole, and as I stepped back my foot went into the hole and held my foot fast. My foot went into the hole in the sidewalk. My slipper came off, and I fell with my shoulder on the sidewalk adjoining the gutter. Somebody helped me into the house; I don't know who.
>
> On cross-examination:
>
> The holes were opposite our house. I knew the cracks were there, and stepped back quickly, and my foot went into the hole. About twelve or fifteen inches; I cannot say how long or how wide; they were wide enough for my foot to enter. The window was the far side. I came out of the shop door. The window was between the shop door and the hall door.
>
> (I was washing the room window. To the judge.)

It is quite clear from this that the plaintiff was not walking or passing along the street, nor, in the language of the second count, travelling thereon, nor, in the language of the third count, lawfully using the street in the way in which streets are provided to be kept in repair, namely, for the passing to and fro of citizens and subjects.

The witness says she knew the cracks were there, and while washing her windows stepped back quickly and her foot went into the hole; if this resulted in any injury to the plaintiff such as she complains of, which to my mind is extremely doubtful under the evidence, I think the accident was the result of her own negligence. Had she been passing along the street, or using it in a legitimate way, as she knew the hole was there, it would have been her duty to have avoided it and the accident would not have happened; as it was, if she chose to avail herself of the use of the street for

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the convenience of washing her windows, and, with the knowledge of the existence of the hole, carelessly stepped back into it and suffered injury thereby, I think she cannot hold the town liable therefor.

Ritchie C.J.

Chief Justice Allen was of opinion that if plaintiff was entitled to recover the damages were excessive, and I agree with him.

Mr. Justice Weldon, who tried the cause, and Mr. Justice Wetmore were of opinion that the evidence did not justify the finding of the jury, and I agree with them.

FOURNIER J.—I think the evidence shows that the plaintiff is not entitled to retain her verdict, and that the appeal should be allowed.

HENRY J.—The plaintiff seeks to recover damages for injuries sustained by a defective sidewalk in the town of Portland. The sidewalk was for the use and accommodation of the people, not merely to go along to and fro, but to use for any lawful purpose. The plaintiff had a right to wash windows, which is a necessary act, and for that purpose could legally use the sidewalk. She was therefore engaged in a lawful act, but required to take proper precautions against accidents. It would be a question of fact for the jury whether due care was used or not. The town would not be liable if the plaintiff, by using ordinary care, could have avoided the accident.

A person walking along the street should, in every case, use ordinary diligence, but if the plaintiff was doing something lawful, with her back to a hole in the sidewalk, was she called upon to reflect upon what was not within her view at the time? I think the evidence sustains the allegations of negligence against the corporation, but the question of contributory negligence was not submitted to the jury as I think it should have

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been; and therefore, they not having decided upon it, I think a new trial should be granted.

TASCHEREAU J.—I think the appeal should be allowed and a new trial granted.

GWYNNE J.—This is an appeal from a rule absolute issued out of the Supreme Court of the Province of New Brunswick discharging a rule *nisi* for a new trial issued at the suit of the defendants.

From the report which is presented to us of opinions of the judges of the New Brunswick Court, it appears that the issue of a rule absolute granting a new trial would have been more in accordance with the opinions of the majority of the court. The rule *nisi* was moved upon several grounds, namely: that the verdict was against the weight of evidence; that the plaintiff was guilty of contributory negligence; that the verdict was against law and evidence and for excessive damages.

The learned chief justice was of opinion that the damages were excessive and that the evidence of the injury, of which the plaintiff complained, was not satisfactory, as she did not appear to have made any complaint about it for nearly two years.

Mr. Justice Weldon, who tried the cause and who was of opinion that the plaintiff's own evidence showed her to have been plainly guilty of contributory negligence, and he so charged the jury, was also of opinion that the evidence did not at all justify the verdict of the jury, and that the case should therefore be submitted to another jury. In this opinion Mr. Justice Wetmore concurred. There are thus three judges out of five of opinion that a new trial should be granted. I am of opinion, also, that this is the mode in which the rule *nisi* should have been disposed of.

The action is for a peculiar injury alleged to have been sustained by the plaintiff by reason of a negligent

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breach by the defendants of a duty which it is alleged they owed to the public.

The declaration alleges that the defendants had the care, control and management of the public streets of the town of Portland, and that it was the duty of the defendants to keep the said streets in a safe and proper condition, for the passage to and fro over and along the same, of the citizens of the town of Portland, and of other good and worthy subjects of Her Majesty, and that the plaintiff on the 23rd May, 1878, a resident of the said town, was then walking and passing over and along a street called Main street in the said town, yet that the defendants, not regarding their said duty, negligently, illegally and improperly left the said street in an unsafe, dangerous and improper condition for the passing to and fro, over and along the same, of the said citizens and other subjects, and that thereupon the plaintiff, whilst so walking and passing over and along the said street, without any fault of her own, but by reason of such negligence and improper conduct of the defendants, accidentally fell into a hole, negligently and unlawfully left by the defendants in the said street, and thereby was bruised, injured and permanently disabled.

The gist of this species of action is negligence upon the part of the defendants in committing such a breach of a duty which they owed to the public as subjected them to conviction on an indictment as for a public nuisance, from which breach of duty the plaintiff suffered the peculiar private damage complained of, without any negligence on her own part contributing to the happening of the injury. The defendants pleaded the general issue, and at the trial it was agreed between the parties that under this plea the defendants should be at liberty to adduce any evidence, and urge any defence, which they might adduce or urge under any

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plea they could have properly pleaded. The object of this was, I presume, to enable the defendants to contest the alleged duty, the general issue having opened up every other ground of defence. At the trial the plaintiff, who was herself the only witness called to establish the breach by the defendants of the duty alleged to have been owed by them to the public, and of the happening of the injury of which the plaintiff complained, said merely that when washing the windows of the house in which she lived on Main street, from the outside, she stepped quickly backwards and her foot caught in a crack, or aperture, in the plank sidewalk, of the existence of which crack she was aware, but of the length and breadth of the crack, save that it was wide enough for her foot to catch in it, or of its being at all dangerous to persons walking along the sidewalk in the ordinary manner, or that it was of such a nature as to be a defect in the sidewalk, constituting a public nuisance, or that the plaintiff herself or any person had ever complained of the existence of the crack, or that any officer of the defendants had any knowledge of its existence, or that it had existed in the sidewalk for any length of time, there was no evidence whatever. It might, for all that appeared, have been a space between two planks not more than two inches wide and eight or ten inches long, which to any person seeing it would not appear to be at all dangerous to the public, or a nuisance. In short, the fact of the occurrence of the accident as stated by the plaintiff herself (when stepping quickly backwards where she knew the crack was), constituted the sole evidence of the negligence and breach of duty which constitute the foundation of the action.

Maule J. in delivering the judgment of the court in *Brown* v. *Mallett* (1) says :

(1) 5 C. B. 620.

The duty of the defendants (for the breach of which, causing damage to the plaintiff, the action was brought) is of a public nature, and the plaintiff, in order to succeed, must show a breach of a public duty as well as special injury to himself.

To the like effect are the observations of Park J. when delivering to the House of Lords the opinion of the judges in *Lyme Regis* v. *Henley* (1).

In order to make the declaration good it must appear: 1st. That the corporation lay under a legal obligation to repair the place in question; 2nd. That such obligation is a matter of so general and public concern that an indictment would lie against the corporation for non-repair; 3rd. That the place in question was out of repair; and lastly, that the plaintiff sustained some peculiar damage beyond the rest of the Queen's subjects by such want of repair.

So in the *General Steam Navigation Co.* v. *Morrison* (2) Williams J. asks:

Is there an instance of an action sustained for a specific injury to a plaintiff from the breach by the defendant of a duty imposed on him by statute where the party could not have been indicted for a misdemeanor?

And Jervis C.J., delivering judgment in that case, says:

It was contended that here is a statutable duty cast upon the defendant for the breach of which an action lies against him; no instance, however, could be shown of an action for a breach of duty imposed by a statute for which the party might not have been made responsible in another form.

That is by indictment.

The breach of duty therefore which gives to a plaintiff a private action for peculiar damage arising therefrom sustained by him, must be such as to warrant a conviction of the party guilty of the breach of duty upon an indictment.

In *Merrill* v. *Inhabitants of Hampden* (3) it is laid down as a principle of general application that such a state of repair as would exempt the defendants from liability in an indictment, will also exempt them from

(1) 1 Bing. N. C. 235. (2) 13 C. B. 591.
(3) 26 Maine 234.

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liability in a civil action. See also to the like effect *Howard* v. *The Inhabitants of North Bridgewater* (1). And this, indeed, is the natural consequence, resulting from the fact that the private action is founded upon the breach of a duty owed by the defendants to the public, for the breach of such duty being cognizable upon an indictment, if the facts adduced in evidence be insufficient to sustain a conviction on the indictment, there cannot be said to have been any breach of duty committed, and so the foundation necessary to support the private action is removed.

Now, in this case, the mere happening of the accident not being even *primâ facie* evidence of negligence, nor indeed of the alleged defect being of that nature and magnitude to constitute a public nuisance, it was necessary for the plaintiff to have given affirmative evidence upon both of these particulars. *Cotton* v. *Wood* (2); *Hammack* v. *White* (3). This she did not attempt to do.

In the American courts the rule, which is a very reasonable one, appears to be that in an action of this nature against a corporation, it is necessary to bring home to some of the officers of the corporation actual notice of the existence of the defect which is relied upon, prior to the happening of the accident, so as to affect them with implied knowledge thereof, by showing the defect to have been so notorious that it is reasonable to fix the corporation with notice of it. See the cases collected in *Castor* v. *Uxbridge* (4), where that rule is followed, and it was held that to make a corporation liable they must have actual knowledge through their servants of the existence of the nuisance, or it must be shown to the satisfaction of the jury that their ignorance of it can be only explained by attributing it to

(1) 16 Pick. 189.
(2) 8 C. B. N. S. 568.
(3) 11 C. B. N. S. 588.
(4) 39 U. C. Q. B. 127.

negligence. In *Boyle* v. *The Town of Dundas* (1), the present Chief Justice of the Court of Appeal for Ontario, then Chief Justice of the Court of Common Pleas, says:

> I cannot understand that it follows necessarily that because there may be a hole in a plank sidewalk, and a person accidentally trips or steps into it and is injured, that damages are recoverable. There must be some clear dereliction of duty, some unreasonable omission to fulfil a statutable requirement.

And again:

> Everyone using a sidewalk must take on himself a certain amount of risk. To acquire a cause of action he must show an injury resulting from the walk being left in a dangerous state of non-repair.

And again he says (2):

> We all know that small breaches in the surface of sidewalks are of every-day existence in every town. It is unreasonable to hold that a corporation neglects its duty, merely because such a breach or hole may be found in some street. The question should, I think, always be as to the general performance of their duty rather than an isolated instance of fault.

In that case a new trial was granted, and upon the second trial questions were submitted to the jury specially pointing to the questions whether the defect complained of constituted a nuisance—whether the corporation had notice of it if it was—and whether when the accident happened the plaintiff, from the knowledge she had of its existence, might have escaped the accident, and have prevented its occurrence if she had been looking where she was going. Similar questions appear to me to have been peculiarly appropriate in the present case, and if they had been put to the jury, and they had found in favor of the plaintiff, it appears to me to be impossible to have sustained such a verdict. So utterly defective was the evidence given by the plaintiff to entitle her to recover, that in my opinion she should have been non-suited if a non-suit had been moved for. To establish the defect in the

(1) 25 U. C. C. P. 424. (2) P. 426.

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sidewalk which was spoken of to be a public nuisance, upon the evidence as given, is a proposition, in my opinion, incapable of being sustained, and upon the point of negligence in the defendants, I am of opinion there was no evidence to go to a jury; while upon the question of contributory negligence, I agree with the learned judge who tried the cause that it was almost conclusive. Upon the question, whether the statute of the corporation of the town of Portland imposes upon the corporation the duty of keeping the streets and sidewalks in a sufficient state of repair, I am of opinion that the effect and intent of the statute creating the municipality, and placing under its exclusive control the public streets and highways, does impose upon the corporation the correlative duty of keeping them in repair. I think it is well laid down in *Castor* v. *Uxbridge* (1), upon the authority of the English and American cases there cited, that:

> Where a public body is clothed by statute with authority to do an act which concerns the public interest, the execution of the power may be insisted upon as a duty, though the statute creating it be only permissive in its terms.

Upon the whole, therefore, I am of opinion that a new trial should be granted, and that if the evidence upon the second trial should not remove the defects existing in that given in the former trial, the plaintiff should be non-suited.

Appeal allowed with costs and new trial granted.

Solicitor for appellants: *A. A. & R. O. Stockton.*

Solicitor for respondent: *C. N. Skinner.*

(1) 39 U. C. Q. B. 121.