so exceptional, the onus is on the employer to show that the workman's labour is saleable. The practical result in this exceptional case is that the employer must find the man a job or continue to pay him compensation as for total incapacity. As the facts of the present case plainly show that the appellant is not an "odd lot" in this sense, there was no onus on the respondents to prove that he could obtain employment. The main contention urged in support of the appeal is therefore not well founded.

The arbitrator has perhaps laid undue stress on the circumstance that the appellant failed to test the market. On the authorities this circumstance does not seem to be determinative one way or another. On the one hand, an award may be reduced where no attempt to get work has been made by the workman (*Anglo-Australian Steam Navigation Company* v. *Richards*, (1911) 4 B.W.C.C. 247; *Williams*, (1914) 7 B.W.C.C. 202). On the other hand, it is open to the arbitrator to reduce the award although the market has been unsuccessfully tested—(*Cardiff Corporation, supra; Gaffney*, (1922) 15 B.W.C.C. 158). Reduction of compensation as for total incapacity will be refused only if the facts show that improved physical capacity does not import improved earning capacity. The way in which the arbitrator has regarded the question of onus seems, however, to be supported by the case of *Duris*—(1912) S.C. (H.L.) 74, [1912] A.C. 513. The view of the arbitrator appears to be this—that where the proved facts point to improved earning capacity it is for the workman to show that nevertheless his labour is unsaleable in point of fact.

The question of whether or not an injured workman is an "odd lot" is always one of fact depending upon the particular circumstances of each case, and no general rule as to this matter can be formulated. We were referred to cases in which it was held that the workman was an "odd lot" (*Proctor*, [1911] 1 K.B 1004; *Ball*, (1919) 12 B.W.C.C. 312; *Kirkby*, (1920) 13 B.W.C.C. 168; *Yates*, (1921) 14 B.W.C.C. 80; *Kear*, (1921) 14 B.W.C.C. 121), and to decisions in which it was held that the workman was not an "odd lot" (*Richards, supra; Cardiff Corporation, supra; Carlin*, 1911 S.C. 901; *Williams, supra; Silcock*, [1915] 1 K.B. 748; *Pearson*, 1916 S.C. 536; *Gaffney, supra; Middleton*, (1922) 15 B.W.C.C. 166).

But each case falls to be decided on its own facts, and the findings in the present case satisfy me that the arbitrator was right in holding in effect that the appellant was not an "odd lot," and that there was therefore no onus on the employers to show that work was available for him. I therefore agree that the question of law should be answered in the affirmative.

The Court answered the question in the affirmative.

Counsel for the Appellant—Mackay, K.C. —D. Jamieson. Agents—Carmichael & Miller, W.S.

Counsel for the Respondents—Dean of Faculty (Sandeman, K.C.)—Normand. Agents—J. & J. Ross, W.S.

Friday, June 1.

SECOND DIVISION.

[Sheriff Court at Glasgow.

BUCHANAN *v.* GLASGOW CORPORATION.

Reparation—Negligence—Burgh—Street—Defect in Pavement—Injury to Child when at Play—Averments—Relevancy—Glasgow Police Act 1866 (29 *and* 30 *Vict. cap. cclxxiii*).

In an action of damages against the Corporation of Glasgow at the instance of the mother of a child of seven, who was injured while playing in a public street, the pursuer averred that the child's foot caught in a broken part of the corner of the pavement, which formed a triangular depression between four and six inches in length and over an inch in depth, with the result that she fell, sustaining a compound fracture of the leg. The pursuer further averred that the defect had existed for a considerable time. The defenders admitted that it was their duty to inspect the pavement, and in the event of its being dangerous to have it repaired. *Held* (*diss.* Lord Hunter) that the pursuer had stated a relevant case for inquiry, and issue *allowed*.

Mrs Nathalie Keegans or Kennedy or Buchanan, Glasgow, as tutrix and administratrix-in-law of her pupil daughter Annie Kennedy, aged seven years, residing with her, *pursuer*, brought an action against the Corporation of the City of Glasgow, *defenders*, for payment of £250 as damages for personal injuries sustained by her daughter through falling on a pavement in Wemyss Place, Glasgow.

The pursuer, *inter alia*, averred—"(Cond. 2) On or about 12th April 1922, at 9·30 p.m., while pursuer's said pupil daughter Annie was playing in Wemyss Place near No. 4, her foot caught in a broken part of the pavement there, whereby she fell with her left leg under her, sustaining a compound fracture of the left femur. The said pavement was and is in the possession and under the control of the defenders. (Cond. 3) The said pavement is of Caithness flags, one of which is broken at the corner, forming an irregular triangular depression in said pavement between four and six inches in length on each of its sides and over an inch in depth. The said pavement had been in the dangerous state of disrepair mentioned for a considerable time prior to the accident, and it is believed and averred that the defenders have since done nothing to repair it. (Cond. 4) The said injuries to the pursuer's said pupil daughter were due to the fault and negligence of the defenders or of those for whom they are responsible, in allowing the said pavement to be and to remain in such a state of disrepair that its condition was highly dangerous to foot-passengers. It was the duty of the defenders to inspect the said pavement at reasonable intervals, and if such was found to be

in a state of disrepair and dangerous to foot-passengers, as was the case here, to have had it repaired within a reasonable time and made reasonably safe for foot-passengers. The defenders, however, failed in their said duty in this respect notwithstanding the knowledge they had or ought to have had of the dangerous condition of the said pavement, and the said accident to the pursuer's pupil daughter and the injuries and disabilities and loss, more particularly hereinafter mentioned, arising therefrom were the direct and probable result of the fault and negligence of the defenders or those for whom they are responsible in failing timeously to put the said pavement into a reasonable state of repair."

The defenders pleaded, *inter alia* — "1. The averments of the pursuer being irrelevant and insufficient to support the conclusions of the action it should be dismissed."

On 11th December 1922 the Sheriff-Substitute (LYELL) sustained the first plea-in-law for the defenders and dismissed the action.

The pursuer appealed to the Sheriff (A. O. M. MACKENZIE), who on 19th January 1923 refused the appeal.

Note.—"I agree with the Sheriff-Substitute in this case for the reasons he has stated.

"A public authority vested with the control of the streets of a great city is apt to be made the target of many claims, some of which are well founded and some unfounded, and it is only right, I think, that courts of law should insist that when an action is brought against such a body on the ground that it has negligently failed to carry out the duty of keeping streets and pavements in a safe condition, the averments should be such as clearly to show that there has been negligence on the part of the public authority. In the present case the ground of action is that the defenders failed in their duty of keeping the pavements of the city in a safe condition for foot-passengers, in respect that they failed to repair within a reasonable time an alleged dangerous defect in the pavement of Wemyss Place, with the result that the pursuer's daughter sustained a serious injury.

"Now in order to show negligence on the part of the defenders in a case of this kind, I think that it is necessary for the pursuer to show by his averments, first, that there was a dangerous defect in the street or pavement, and second, that that defect had existed for such a time prior to the occurrence of the accident as to afford reasonable opportunity to the defenders to have it repaired. In the present case the averment on the first point is that one of the Caithness flags in the pavement was broken, 'forming an irregular depression in said pavement between four and six inches in length on each of its sides and over an inch in depth.' I confess that I entertain some doubt as to whether that averment is sufficient to show that there was any defect in this pavement from which danger to foot-passengers might reasonably be apprehended, but I am not prepared to hold the pursuer's averments irrelevant on that ground. I agree, however, with the Sheriff-Substitute that they are irrelevant on this other ground, namely, that they do not show that the alleged dangerous state of disrepair had continued prior to the accident for such a time as to allow reasonable opportunity for the execution of the necessary repairs. All that the pursuer says is that the dangerous state of disrepair had existed 'for a considerable time prior to the accident,' and that they failed to have it repaired within a reasonable time. But I agree with the Sheriff-Substitute that vague and general averments of this character are not sufficient in a case of this kind. The pursuer should in my opinion have made a definite statement as to the length of time during which the pavement was in the state of disrepair of which she complains, and the Court could then have determined whether the time mentioned could reasonably be considered adequate for the execution of the necessary repairs, but the averments as they stand do not supply the necessary data to enable the Court to form a judgment on that question, and I accordingly agree with the Sheriff-Substitute that the action should be dismissed.

"It was further contended by the defenders that the pursuer's averments did not show that the Corporation of Glasgow was responsible for a dangerous defect in the pavement of Wemyss Place, however long it had existed. I do not find it necessary to express any opinion upon this contention. I would only make two observations. The first is that actions of this kind against the Corporation in regard to the pavements of public streets—and Wemyss Place is alleged by the pursuer to be a public street—have very frequently been entertained in this Court, and the second is that the responsibility of the Corporation as the authority vested with the control of public streets, including the foot-pavements thereof, was affirmed by Lord Hunter in the case of *Gray* v. *Corporation of Glasgow*, 1915, 2 S.L.T. 203, and more recently, as I was informed at the debate, by Lord Morison."

The pursuer appealed, and argued—The pursuer's averments were relevant to infer fault on the part of the defenders—*Lawrie* v. *Magistrates of Aberdeen*, 1911 S.C. 1226, 48 S.L.R. 957; *Gray* v. *Glasgow Corporation*, 1915, 2 S.L.T. 203. Further, the period of time during which the alleged defect in the pavement had existed had been sufficiently specified. The matter ought not to be disposed of without inquiry, and it was no answer to say that the child was not making an authorised use of the pavement but was merely playing. Counsel also referred to *Law* v. *Glasgow Corporation*, 1917 S.C. 160, *per* Lord Salvesen at p. 163, 54 S.L.R. 125; *Blackie* v. *Leith Magistrates*, 1904, 12 S.L.T. 529; and *M'Kinlay* v. *Darngavil Coal Company*, January 25th 1923, S.C. [H.L.] 34, 60 S.L.R. 440.

Argued for the defenders—There was no relevant averment of fault in this case. The pursuer's averments did not disclose a danger of such a character that it would have been an inspector's duty to report it. The fact that there was an inequality in the

surface of the pavement was not in itself evidence of fault on the part of the defenders — *Higgins* v. *Glasgow Corporation*, 1901, 4 F. 94, *per* Lord Young at p. 96, 39 S.L.R. 84. It must also be shown that the defenders had a duty to repair, and that they failed to discharge that duty—*Blackie, cit. sup.* Moreover, *Blackie's* case could be distinguished because that was a case of proper user—this was not. (2) The time during which the alleged defect had existed was not sufficiently specified. Merely to say that it was a "considerable time" was not enough. (3) *Esto* that the defenders had a statutory duty towards pedestrians, that duty did not extend to children using the pavement merely for purposes of play. Putting it at the highest the child here was in the position of a licencee. And it could not be contended that there was anything in the nature of a trap in this case—*Latham* v. *R. Johnson & Nephew*, [1913] 1 K.B. 398; *Barker* v. *Herbert*, [1911] 2 K.B. 633.

LORD JUSTICE-CLERK—This is an action of damages against the Corporation of the City of Glasgow at the instance of the mother of a child aged seven years who was injured while playing on a pavement in the city. The pursuer avers that the pavement was in a defective state and that the defect caused the injury to her child. The defect is thus described by the pursuer —"The pavement is of Caithness flags, one of which is broken at the corner, forming an irregular triangular depression in said pavement between four and six inches in length on each of its sides and over an inch in depth." The defect is said to have existed "for a considerable time." The Sheriff-Substitute and the Sheriff in concurring judgments have dismissed the action as irrelevant. The Sheriff-Substitute, as I read his opinion, has held (1) that there is no relevant averment by the pursuer of a defect in the pavement, and (2) that in any event the duration of the defect—assuming it to be relevantly averred—is too vague. The Sheriff, while not prepared to hold that a defect has not been relevantly averred, has held that the averment of its duration is irrelevant from want of specification and has accordingly affirmed the judgment of the Sheriff-Substitute.

In argument before us three propositions were maintained for the respondents—(1) That no defect in the pavement was relevantly averred by the pursuer; (2) that in any event its duration was not relevantly averred; and (3) that seeing that the pursuer states that the accident happened while the child was playing, she has averred herself out of Court, inasmuch as there is no duty on the defenders to maintain the streets of Glasgow safe for playing children.

(1) As regards the first proposition I am not prepared to affirm the respondents' contention. The pursuer having averred a defect in the terms which I have already quoted, proceeds to say that the state of the pavement was highly dangerous to foot-passengers, that the defenders knew or should have known this, and that the accident was the direct and probable result of the defenders' failure timeously to repair the pavement. The respondents invite us to hold nevertheless that, for aught that appears on record, the pavement was in a safe condition. I am unable to accede to this request. To do so would, I think, be to ignore and impair the authority of many cases of a similar kind in which inquiry has been allowed; it would be to usurp the functions of a jury.

(2) It is said that, assuming a defect, its duration is indefinitely and irrelevantly averred in respect that the pursuer merely states that it has existed "for a considerable time." I admit that in specification the averment does not compel admiration, and I am at a loss to understand why it was not made more definite. At the same time, speaking for myself, I do not subscribe to the view of the Sheriff that in order to state a relevant case the pursuer must "make a definite statement as to the length of time during which the pavement was in the state of disrepair of which she complains." A pursuer might find it difficult if not impossible to ascertain the precise number of days, weeks, or months during which the defect complained of had existed. But in this connection answer 3 of the defenders is not unimportant. From that answer it appears that the defenders propose to join issue with the pursuer not regarding the duration of the defect but regarding its quality. They make it plain that they knew all about the alleged defect, that they did not regard it as a danger, and that however long it existed they had no intention of repairing it. Moreover, their averment that the condition of the pavement was due to ordinary tear and wear would seem to postulate that the defect—if it be a defect—was of long standing. In view of these considerations I think the Sheriff's ground of judgment too narrow and I am not prepared to affirm it.

Finally Mr Moncrieff maintained that there was no duty on the defenders to make their streets *playproof* for children, and that inasmuch as the pursuer avers that the accident occurred while her child was playing she has destroyed the relevancy of her case. Now while I am far from applauding the precision of the pursuer's pleadings, I think that is to stress nomenclature too far. The argument assumes that the accident was due to the fact that the child was playing, that apart from that fact it would not have occurred, and that the condition of the street—highly dangerous as the pursuer avers it to have been—therefore becomes unimportant and indeed irrelevant. In other words, it is maintained that the pursuer's child had at the time of the accident forfeited all rights and claims open to foot-passengers. I am not prepared at this stage so to affirm, though on the facts that view may turn out to be sound. It may turn out that the fact that the girl was playing at the time of the accident was the sole cause of the accident. On the other hand it may turn out that the girl was injured by reason of the highly dangerous condition of the pavement. For

myself, until I am acquainted with the facts, I own that I am quite unable to decide between these competing contentions. What I *do* know is that the pursuer distinctly avers that the dangerous condition of the street caused the accident, and I see no reason why she should be denied an opportunity of endeavouring to prove that averment. The question is in my judgment for the jury on the facts rather than for the Court on the pleadings. I must add that if the defenders propose on the facts to maintain that the conduct of the child in playing was the effective cause of the accident, it is little less than astonishing that they have neither an averment nor a plea of contributory negligence.

I suggest to your Lordships that the appeal should be sustained and inquiry allowed.

LORD ORMIDALE—I concur in thinking that there should be inquiry here.

LORD HUNTER—On a careful perusal of this record I reach the same conclusion as that reached by both the Sheriffs. It appears to me that the pursuer has stated no relevant case, and that her averments are not such as to justify inquiry.

The case is brought against the City of Glasgow on account of their failure to keep a certain pavement in a safe state of repair, or otherwise to see that the frontager, on whom the responsibility actually to repair is placed, does his duty.

Now I cannot help thinking that in this case the averments as regards the inefficiency of repair are irrelevant and quite insufficient to justify this case being sent to a jury. The allegation is this—"The pavement is Caithness flags, one of which is broken at the corner." I stop there. It does not state which one, or where it was placed in the pavement. Then it is said that this break formed an "irregular triangular depression in said pavement between four and six inches in length on each of its sides and over an inch in depth." I am quite unable to see that that in itself indicates anything dangerous at all. For aught that the pursuer says this may have been mere wearing away of part of the pavement. And is it to be said that every pursuer is entitled to have a case sent to a jury because he makes an allegation that in the pavement in one of the streets of one of the principal cities in Scotland there is this small irregular depression? We are not clearly told on record whether this defect is due to wearing away or to breaking. Nor are we told when it occurred, or what opportunities the defenders had of putting it right. The next sentence of the pursuer's averments seems to me to be equally open to criticism. She proceeds to say that "the said pavement had been in the dangerous state of disrepair mentioned." But there is no mention of any state of disrepair mentioned on record unless you are to accept the unintelligible averment which precedes this averment as sufficient for the pursuer's purpose. It is further said that this dangerous state of disrepair had existed for a considerable time, "and it is believed and averred that the defenders have since done nothing to repair it." On that part of the case alone I should be quite prepared to hold that there was no sufficient specification of alleged fault.

But there is over and above that another reason why, in my opinion, the pursuer ought not to get an issue. It is trite that a mere allegation by a pursuer of fault or some indefinite negligence is not sufficient to make a relevant case. There must also be a connection between the accident that is averred and the fault alleged. Now in this case what is said as regards the accident is this, that the child when she sustained the injury was playing on the pavement at the part of the pavement where this depression was. No statement is made by the pursuer as to what the child was playing at, why it was playing there, or how it came exactly to put its foot on this depression. I think that on this part of the case there is an even greater duty on the pursuer to observe the ordinary rules of pleading as regards stating what is an intelligible case. There is no doubt an obligation upon the Magistrates to keep the pavement in a reasonable state of repair for pedestrians. But I am not aware that there is any duty imposed upon them to protect a child who is engaged in playing upon the pavement. After all, if you are going to protect children who are so employed, I should think that the danger of their tripping at the flagstones near the gutter is infinitely greater than the risk of tripping because of a depression in the pavement; and if they are engaged in playing I do not see that it matters, so far as their safety is concerned, whether the danger arises at one place or another. There is no statutory obligation imposed upon the magistrates to render the streets of a city safe for children as a playground, and that appears to be what the pursuer is contending for in this case.

I quite recognise, of course, that judges are supposed to be ignorant of all facts until they are proved to them. But I think in this particular case this doctrine is being carried to an extravagant extreme. Therefore I must respectfully dissent from the course proposed to be followed by your Lordships.

LORD ANDERSON—The defenders' counsel maintained that the pursuer's averments were irrelevant on three grounds. The pleadings of both parties, and especially those of the pursuer, are far from satisfactory, but I have reached the conclusion that none of the points taken by the defenders is properly raised on the pleadings, although it may be that each of these points may arise on the proved facts.

It was maintained, in the first place, that the pursuer's averments showed that the pavement was obviously safe and not dangerous. It is plain that this suggestion could be adopted only if the averments disclosed a case which was quite illusory and insubstantial. The pursuer's averments do not appear to me to disclose such a case, and therefore it will be for the jury to say whether or not the state of the pavement constituted a danger to those using it.

The next point taken by the defenders had reference to the pursuer's averments of fault. In a case of this sort a pursuer must prove (1) injury, (2) caused by a defective state of the pavement, and (3) that this state of defect was due to the fault of the defenders. Under this last head the pursuer will have to establish (*a*) that there was a duty to inspect, and if necessary repair, the pavement, and (*b*) that the defenders had reasonable opportunity to inspect and repair. The existence of a duty to inspect and repair is admitted by the defenders, but it is said by them that there is no relevant averment by the pursuer of reasonable opportunity to inspect and repair. The pursuer avers that the dangerous condition of the pavement had existed "for a considerable time prior to the accident." This is the averment the vagueness of which is considered by the Sheriffs to be fatal to the relevancy of the pursuer's averments. If the defenders' pleadings had alleged that the condition of the pavement had been recently occasioned, and that there had not been reasonable time for inspection, the pursuer would have been called upon to make her averment of opportunity more definite. As it is, I think the pursuer ought to have been more specific as to this averment, but I am not prepared to hold that it is so vague as to justify the judgments of the Sheriffs. As I read the averments relating to the alleged defects, the condition of the pavement seems to have been caused partly by a fracture of a corner of a flagstone, and partly by that broken corner having been made more dangerous by the wear of foot-passengers. This latter element involves length of time, and explains the sense in which the phrase "considerable time" is used.

The third point taken by the defenders' counsel had reference to the pursuer's averment in condescendence 2 that her daughter was injured while playing in the street. It was maintained that the defenders had no duty to make the pavement of a street safe for children while at play, and that accordingly no case of fault had been relevantly averred against them. As I have already indicated, the facts when ascertained may raise this question for determination, but it does not seem to me to be properly raised on the pleadings. The averments do not disclose what the girl was actually doing when she was injured. It was for the defenders if they wished to raise this point on the pleadings to find out and aver what the girl was doing when injured, but they have not done so, and the averment of the pursuer may mean nothing more than this, that her daughter was not at the time going a message, but was merely sent to the street as to a playground. If it should appear on inquiry that the girl was actually playing a game when injured, the defenders would then have established the necessary foundation on which they would be justified in asking the presiding Judge to direct the jury that the defenders were under no duty to make the street safe for what the injured girl had been doing.

I am therefore of opinion that the appeal should be sustained and issues ordered.

The Court recalled the interlocutor appealed against and approved of an issue.

Counsel for the Pursuer—Aitchison, K.C. —Duffes. Agents—W. G. Leechman & Company, Solicitors.

Counsel for Defenders—Moncrieff, K.C. —Dods. Agents—Campbell & Smith, S.S.C.

Tuesday, June 5.

FIRST DIVISION.

JOHNSON *v.* GRANT AND OTHERS.

Administration of Justice — Interdict — Breach — Imprisonment — Remission of Sentence—Release.

On a petition and complaint for breach of interdict the Court pronounced sentence of two months' imprisonment. The respondents after serving ten days of the sentence presented a note tendering an unqualified apology to the Court, and undertaking to comply with its orders in future. The Court in the circumstances, and in view of the fact that the complainer stated that he no longer required the protection which the original interdict gave him, *pronounced an order* for release.

Observed (*per* the Lord President) that the phrase "contempt of Court" did not in the least describe the true nature of the class of offence committed, viz., interfering with the administration of the law in impeding and preventing the course of justice. Imprisonment for breach of interdict being in vindication of public law, it must not be assumed that an order for release would follow upon an apology and promise of obedience to the orders of the Court, even though such apology was accompanied by a statement on behalf of the complainer that he no longer required the protection which the original interdict gave him.

Walter Lyulph Johnson of Strathaird, Skye, with the concurrence of the Lord Advocate, presented a petition and complaint against John Grant and others, all resident in Skye, founded upon alleged breach by the respondents of interdict pronounced against them prohibiting them from entering upon and in any way encroaching on the lands of Kilmaree, part of the said estate of Strathaird, and of interim interdict pronounced against them prohibiting them entering upon certain other parts of the said estate.

On 26th May 1923 the respondents appeared at the bar of the First Division, when the Court pronounced sentence of two months' imprisonment.

On 5th June 1923 counsel for the respondents tendered to the Court an apology on their behalf with an undertaking that they would comply with its orders, and moved the Court to remit the remaining part of