# THE TORT LIABILITY OF LOCAL GOVERNMENT BODIES*

The unit of local government is the municipality. It is constituted by the inhabitants of the municipal district and is by statute a body corporate.[1] It may be a city, a town or a shire and whatever it may be, its executive body is its council and its powers may be exercised and its obligations shall be discharged by its council. It may sue and subject to s. 660 of the Local Government Act (to be considered) it may be sued in tort.

When a question arises as to the tort liability of a local authority and whether the liability is said to arise out of an act or out of a failure to act, one makes the provisional assumption that the answer to the question will in no way be affected by the character of the defendant. But the truth of that assumption must be tested having regard to the particular legislative provisions (if any) which have relevance to the facts. When this is done it may appear and more likely than not it will appear that the assumption made is in some way to be qualified or altogether displaced. And whether this be so or not is in itself a question of construction. It may be a threshold question or it may give the complete answer. If there is no relevant statutory provision, then the tort liability of the local authority for acts and for omissions is the same as that of any other corporation and it will be liable for the acts or for the torts, depending upon the true basis of the vicarious responsibility,[2] of its servants in the same way and to the same extent as any other corporation. Its servant when going about the corporation's business as by driving its motor vehicles must exercise reasonable care and both he and the local authority employer will be liable for any damage caused by his failure to do so. And the corporation in such a case owes to its servants exactly the same duty of care as to system and plant and generally as does any other employer.

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1 S. 9, Local Government Act 1960-1970 (Western Australia).

2 See Darling Island Stevedoring & Lighterage Co. Ltd. v. Long (1956) 97 C.L.R. 36.

A local authority is to be distinguished from a trading corporation in that it is an arm of government and as such is possessed of powers and of duties the source of which is to be found within the statutory or positive law. In very many cases the liability of the local authority in tort is based upon an assertion that damage has been caused to the plaintiff by its failure to exercise a power which it should have exercised or by its negligent or incompetent exercise of a power. Such cases necessarily draw in the statutory source of the power and hence each case has its own peculiar legislative setting. Each case to this extent raises a question of construction. One can only discuss such cases in general terms by formulating four propositions as follows:—

(1) If the power, whatever be its character, is exercised by the local authority then unless the statute conferring it says otherwise it is under the ordinary common law duty to use reasonable care in doing the acts constituting the exercise of that power.[2a] So if a local authority as a road authority exercises its powers to repair a road, it is under a duty to do the work with due care and skill and by warning or lighting or otherwise to render harmless sources of danger which by the acts done in the exercise of the power, it has created. It will be liable in damages to anyone who suffers an injury by reason of its failure to do so.[3] And in the same way if the local authority in the exercise of a statutory power to do so generates and distributes electricity it will, unless the empowering or some other statute says otherwise, have laid upon it a duty

> to avoid doing or omitting to do anything the doing or omitting to do which may have as its reasonable and probable consequence injury to others, and the duty is owed to those to whom injury may reasonably and probably be anticipated if the duty is not observed.[4]

And the degree of care required to satisfy the criterion that it be reasonable will as always depend upon the likelihood of an accident happening and upon the gravity of the consequences if an accident should occur.[5]

(2) If the exercise of a power to do an act is in the terms of its grant discretionary, and if nothing more appears, no one can com-

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2a Dutton v. Bognor Regis U.D.C. [1972] 1 Q.B. 373 was decided after this paper was delivered.

3 See Buckle v. Bayswater Road Board (1937) 57 C.L.R. 259; also s. 302 (2), Local Government Act.

4 Bourhill v. Young [1943] A.C. 92, 104 per Lord Macmillan, quoted with approval by Dixon C.J. and Williams L.J. in Thomson v. Bankstown Corporation (1952) 87 C.L.R. 619, 630.

5 Paris v. Stepney Borough Council [1951] A.C. 367.

plain of damage sustained by a delay in its exercise or by a failure to exercise it at all. In such a case it is said that:

> The section creates a power. It does not impose a duty.[6]

The word "duty" is used as meaning a duty enforceable at the suit of an individual. In so far as such a statute imposes a duty it is, as is so often said, a duty of imperfect obligation.

The distinction between (1) and (2) may lie in the notion of causation and it may not in all cases be as simple as it appears. It may be that the local authority does exercise a power which is discretionary in the sense of (2) and does so, so as to prevent damage which would or might otherwise be caused as by strengthening retaining walls to prevent flooding. In such a case, if the power is exercised incompentently or carelessly so that a flooding which a competent exercise of the power would have prevented, nevertheless takes place and causes damage, the local authority is not liable. This is a case within (2) and not within (1), it being a case in which the incompetent exercise of the power has *caused* no "fresh injury". The principle is that:

> Where a statutory authority is entrusted with a mere power, it cannot be made liable for any damage sustained by a member of the public by reason of a failure to exercise that power. If, in the exercise of their discretion, they embark upon an execution of the power, the only duty they owe to any member of the public is not thereby to add to the damages which he would have suffered had they done nothing. So long as they exercise their discretion honestly, it is for them to determine the method by which, and the time within which, and the time during which, the power shall be exercised, and they cannot be made liable, except to the extent which I have just mentioned, for any damage which would have been avoided had they exercised their discretion in a more reasonable way.[7]

(3) If in the terms of the granted power and in the context of the established facts a duty is laid upon the local authority to exercise it and if the terms of the grant are such as to confer a correlative right upon a person in the situation of the plaintiff, then if the power be not exercised and if the plaintiff thereby suffers damage, a local authority will be liable in damages. The distinction between this proposition and proposition (2) is the existence of the correlative

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6 Gorringe v. Transport Commission (Tasmania) (1950) 80 C.L.R. 357, 363 per Latham C.J.

7 East Suffolk Rivers Catchment Board v. Kent [1941] A.C. 74, 102 per Lord Romer; see also Administration of Papua and New Guinea v. Leahy (1960) 105 C.L.R. 6 applying East Suffolk, and s. 303, Local Government Act.

right in the plaintiff. Such a grant creates the power and, in the context of the established facts, imposes a duty to exercise it and it is a duty owed to the plaintiff. As always, whether it does so or not, is primarily a question of construction but it is not entirely so. It is the facts operating upon the power granted which creates the duty to the plaintiff to exercise it and hence the duty may arise notwithstanding the fact that the granted power is in terms discretionary.

(4) If in terms the granted power is discretionary as in proposition (2), it carries with it an obligation upon an application for the exercise of the power being made to it by a person having a sufficient interest to call for its exercise, to consider the application and to exercise the discretion with reference to it according to law and a "malicious" failure to do so in a case where the applicant for the exercise of the power has satisfied all the criteria which are necessary to be satisfied so as to entitle him upon the proper exercise of the discretion to an exercise of the power in his favour will, if damage be thereby caused, give rise to a liability in the local authority in an action on the case. The idea of "malice" is central to this cause of action. In every case where the granted power is discretionary in the sense of this proposition, an exercise of the power adversely to the plaintiff and the refusal to exercise the power in favour of the plaintiff when it can be shown that the decision to act as it did was based upon grounds irrelevant to or extraneous to the power, will enable the plaintiff to obtain mandamus to compel the local authority to do its duty. But if nothing more appears, that duty is to consider the plaintiff's application for the exercise of the power and to deal with it according to law. The law is clearly stated by Dixon J. in *Swan Hill Corporation v. Bradbury*:

> The clause of the by-law now in question [a power to approve the erection of a building] is of the same description. If it were valid, a person giving notice of intention to build would be entitled to insist that his application should receive the consideration of the council, and, if it were refused and he were able to show that the refusal was not bona fide or was actuated by motives or reasons which fell outside the scope and purpose of the by-law, then he would be entitled to insist on its reconsideration. But here his legal rights would stop. So often as he could show that the refusal of approval arose from reasons foreign to the discretion given to the authority, he might by mandamus enforce a reconsideration of his case. But he would never be able to compel the council actually to decide his application in his favour. And unless and until it should do so and give its approval, he

would commit an offence against the by-law, supposing it to be valid, if he proceeded to build.[8]

But this does not exclude the possibility that a failure to exercise such a power according to law will sound in damages. For more may appear. And it seems that the local authority will be liable if the exercise of such a power or failure to exercise it has not only been based upon irrelevant criteria but in addition has been "maliciously" exercised—which in the context I would understand to mean that the power has been used or not used with the motive of injuring the plaintiff. In such a case the local authority in truth did not even intend to exercise its power and had no desire "to discharge its duty to the public"—nor to the plaintiff.[9] In short, a failure to exercise such a power according to law coupled with malice will render the local authority liable in damages in an action on the case. So the malicious refusal to issue a licence to a person who has done all that is required of him to qualify him for a grant of the licence will, if damage be caused, sound in damages.[10] The difficulty of proof is obvious enough and the idea of malice when applied to a group decision has its own difficulty. But if these difficulties be overcome, one has revealed a "deliberate unlawful positive act" causing damage.[11]

It is however basic to the cause of action that the plaintiff be able to show that he "has done all that is required of him to qualify him for a grant of a licence". In other words the power must be such as in the circumstances to confer a correlative right upon the plaintiff. It is this requirement which points up the distinction between a statutory and a complete prohibition upon the carrying on of a particular activity coupled with an unconditioned discretionary power to relax that prohibition subject to the activity being carried out upon certain conditions on the one hand and the right subject to satisfying conditions to call for a licence or permit on the other hand. In the first case the plaintiff can never show any right to have the discretion exercised in his favour and hence can never lay the foundation for his case.[12] An application for a building permit may on the other hand be a case of the second kind and since *David's case*,[13]

8 (1937) 56 C.L.R. 746, 758.
9 Cf. Trobridge v. Hardy (1955) 94 C.L.R., 162 per Kitto J.
10 Asoka Kumar David v. M.A.M.N. Abdul Cader [1963] 3 All E.R. 579 (P.C.).
11 Cf. Beaudesert Shire Council v. Smith (1966) 120 C.L.R. 145.
12 See Campbell v. Ramsey [1968] 1 N.S.W.R. 425.
13 See note 10.

*Davis v. Bromley Corporation*[14] can no longer be accepted as having established:

> the proposition . . . that an applicant for a statutory licence can in no circumstances have a right to damages if there has been a malicious misuse of the statutory power to grant the licence.[15]

Proposition (4) has been formulated upon the authority of and is an attempt to state the proposition to be extracted from *David's* case.[16] The proposition, if on the authority of that case it is correctly formulated, is not an easy one to grasp, and for these reasons. It is formulated with reference to a discretionary power which in the circumstances of the case as pleaded (and the case as reported turns entirely on the pleadings) the plaintiff was "entitled" to have exercised in his favour. But if this be the case, it denies in the particular circumstances and in its application to the plaintiff that the power—notwithstanding the discretionary terms of its grant—was in truth discretionary. In other words, it denies that in a mandamus situation the Court could only "enforce a reconsideration of his case" and asserts that it could order that the power be exercised by issuing the licence. So if it be the case as it was pleaded in *David's* case that: "he had done everything required to qualify him for a grant of a licence and that he was *entitled* (emphasis mine) to have one issued",[17] then why is it not a case within proposition (3), and if this is so, why should it be necessary for the plaintiff to establish "malice"?

The comment of Wallace P. and Homes J. A. with whom Walsh J. A. agreed in *Campbell v. Ramsey*[18] that: "It seems to us therefore that what David's case at least suggests is that an applicant for a licence may be entitled to have his application considered fairly and that some aspects of malice towards him *in the consideration of his application* (emphasis mine) may, if damage ensues therefrom entitle him to sue on an action on the case", does not, with respect, appear to be correct. The plea in *David's* case was that the plaintiff having "fulfilled all necessary and/or reasonable conditions entitling him to the issue of a licence, the respondent had nevertheless wrongfully and maliciously refused and neglected to issue the required license". And the plaintiff claimed damages not because of the respondent's malice towards him in the consideration of his application but because of its malicious refusal to exercise the power. He was he asserted entitled

14 [1908] 1 K.B. 170.
15 [1963] 3 All E.R. 579, 582 per Viscount Radcliffe.
16 Idem.
17 Idem.
18 See note 12.

to a licence, not simply to the chance of a licence. He was not claiming damages for the lost chance.[19]

A potential head of Tort liability which has not yet been developed in the cases arises out of advice which the executive officers of a local authority frequently give to persons bearing upon zoning permitted uses to which land can be put and the like. It seems clear enough that neither the local authority nor its officers is under any obligation to warn persons who are expending money on the development of land that the development being embarked upon is unlawful.[20] But does liability result if advice is given, is acted upon and is wrong? This question, following the rule in *Hedley Byrne*,[21] has been answered in the affirmative by the British Columbia Court of Appeal.[22]

Before finally parting with Tort liability which arises out of the exercise or non-exercise, or misuse of power one can note the case of *Bell Bros. Pty. Ltd. v. Shire of Serpentine-Jarrahdale*.[23] The case is not strictly speaking a "tort" case and hence is outside the scope of this paper. Basic to the reasoning in and to the decision in the cases the proposition that if by statute an activity is prohibited unless permitted by licence then to do the act without the licence offends against the statute, and this is so whether the licensing authority has dealt with the application for the licence according to law or not. It may be that it has not done so. In such a case the applicant for the licence may obtain mandamus, but in the meantime the doing of the act without the licence is an offence. So much appears from that part of the reasons of Dixon J. in the *Swan Hill* case[24] which I have reproduced in this paper. Suppose in such a case the licensing authority as the price of its permission demands a payment of money which it has no authority to exact and that the demand is met so that the applicant can lawfully get on with the job, can he, the applicant, then recover the payment? That was the question in the *Bell Bros.* case, and the answer to it was, Yes, the rule being that.

> . . . where a person or body having power to grant or to withhold a permission for another to pursue a course which he cannot lawfully pursue without that permission has used the power in

19 Cf. Chaplan v. Hicks [1911] 2 K.B. 786.
20 See Miller & Croak Pty. Ltd. v. Auburn Municipal Council (1960) 60 S.R. (N.S.W.) 398.
21 Hedley Byrne & Co. Ltd. v. Heller & Partners Ltd. [1964] A.C. 465.
22 Windsor Motors Ltd. v. District of Powell River (1969) 4 D.L.R. (3d) 155; noted 43 A.L.J. 627.
23 (1970) 44 A.L.J.R. 26.
24 See note 8.

> order to exact a payment which he or it is not authorised to exact, the case is entirely different. The law holds that the involuntariness of the payment is established because the parties were not on equal terms.[25]

And being an involuntary payment, it can be recovered.

The liability of the local authority in the area of what is generally referred to as "occupier's liability" merits particular consideration.

If the local authority establishes a relationship between a place occupied by it and a person coming upon that place then and in the absence of any relevant statutory provision, it will owe to that person a duty of care, the measure of which will depend upon the right in which the person enters, or, as it is generally said, upon the category of the entrant.[26] This being so, while that relationship exists, the local authority if it is to avoid liability may be obliged to exercise a power such as a power to repair the building which in terms is discretionary—proposition (3).

I say 'while the relationship exists' because if the entrant comes on the premises in the exercise of a right which is derivative from the local authority—by way of contract, invitation or licence—the local authority has a choice in the matter. The law does not in effect say that the discretionary power to repair is one which must in the circumstances be exercised. The local authority has a choice; it can spend rates on the exercise of the power to repair or it can, subject in the case of the contractual entrant to the terms of the contract, terminate the relationship. It may shut up the shop.

The type of case so far discussed is that in which the duty situation has been established by the local authority's own act. There remains the other case, it being when the local authority has been placed in occupation of a place by the act of a superior authority and under circumstances in which people may enter upon the place in the exercise of a right which is not derivative from the local authority. Such people are said to enter in the exercise of a "common right". *Aiken v. Kingborough Corporation*,[27] was such a case and it, particularly in the judgment of Dixon J. reveals the correct approach to the discovery of the duty owed by the local authority to such a person and the measure of it:

> If in any statute any intention can be discovered that the Council's control and occupation of the jetty shall or shall not carry

25 44 A.L.J.R. 26, 29 per Kitto J.
26 See Voli v. Inglewood Shire Council (1963) 110 C.L.R. 74.
27 (1939) 62 C.L.R. 179.

> with it a duty towards persons lawfully using it to take reasonable care by guarding, lighting or warning for their protection from such a danger as befell the plaintiff, the intention is of course decisive. But, though it is often said that the liability of a public authority in such a matter depends upon the intention of the statute, the truth is that in most cases the statute stops short after establishing the relation of the public authority to the structure or work with which it is concerned and goes no further than defining or describing the nature and degree of its control, authority or occupation, the function it is to perform and the powers it may exercise. It leaves to the general law the definition of the duty of care for the safety of the individual which flows from the position in relation to the structure or work in which it has placed the public authority. The conclusion that such a duty does or does not result and the measurement of the duty thus become matters of principle, and, however much reliance may be placed upon processes of interpretation, except in the rare case of an actual intention appearing on the face of the statute, to give any answer to the problem necessarily means that some general principle of liability is applied, or, what amounts to the same thing, that some presumption has been invoked in favour of a recognised head of liability.[28]

It being the case that "the definition of the duty of care for the safety of the individual . . . flows from the position in relation to the structure or work in which it (the statute) has placed the public authority" it would seem to follow that one cannot assert a single measure of the duty in terms of what the occupier knew or ought to have known (the category entrant duty) which will be applicable to all cases in which it appears that the plaintiff has entered as of right. The general duty it seems is to take reasonable care and its further and more precise definition for the purposes of the case in hand will arise from the nature of the "work" or "structure" and from the established relationship.

> It may well be that a higher duty exists in the case where the 'premises' are artificially constructed premises such as a public jetty and (sic) or a wharf, or a swimming pool, but where the property occupied and into which members of the public may enter as of right is, for example, a reserve or park, different considerations seem applicable.[29]

And one must look to the terms of the statute to see what the "work" or "structure" is and what the relationship is. This gives rise to such

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28 Idem 204.

29 Barr v. Manley Municipal Council [1968] 1 N.S.W.R. 378, 379 per Wallace P.

considerations as whether the relationship is of a "business character";[30] for what purpose has the occupation been established; what powers has the local authority with reference to control and management; and, what is the nature of the thing placed in the control of the local authority—is it a jetty, a national park, or a public highway? In particular, and it would seem to be a consideration of paramount importance, does the power to control and manage extend to a power to deny entry, that is to say, to withhold the "common right" either permanently or for a time?

This is important, it seems to me, because if in modern law the freedom from liability of a local authority for damage caused by its failure to exercise a discretionary power to repair a public highway is to be made capable of rational explanation, it is the lack of power in the local authority to close the public highway which must be that explanation. The history of the rule does not reveal its rationale. It appears from the reasons of Fullagar J. in *Gorringe v. The Transport Commission* that:

> The general principle which is sometimes stated compendiously by saying that a highway authority is not liable for mere non-feasance, seems to have been reached in England by a series of five steps.[31]

The steps are as they appear in His Honour's reasons. Taking a broader view, it might be thought that two steps were enough. The first in a non-statutory context was to say that the local authority, not being a corporation and being no more than the inhabitants at large, there was no one who could be sued.[32] This step having been taken it was, quite wrongly as it seems to me, then assumed that as a general proposition of the substantive common law the duty laid upon local authorities relative to the repair, control and maintenance of highways was a duty of imperfect obligation and hence it so remained notwithstanding the curing of the procedural difficulty by the incorporation of the local authority. And this was the second step which appears as and which is formulated as being taken upon the terms of the statute as a question of construction but which in fact, or so it seems to me, was at least in England based upon pragmatic considerations such as the fear that if the rule were otherwise it would "open an endless flood of litigation" or that if the surveyor be made

30 Mersey Docks Trustees v. Gibbs (1886) 11 H.L.C. 687.

31 See note 6, 80 C.L.R. 357, 373; see also Hart's INTRODUCTION TO THE LAW OF LOCAL GOVERNMENT AND ADMINISTRATION (8th ed. 1968) pp. 430-442.

32 See Attorney-General v. St Ives R.D.C. [1960] 1 Q.B. 312, 324 per Salmon J.

liable for damage caused by non-repair "no persons would be willing to undertake the office".[33] It is true that:

> there is no such history in Australia . . . thus the duties of the authority are to be ascertained from the terms of the statue under which it exists and acts.[34]

But to say that is not to deny that the terms of the statute are construed not in a vacuum but having regard to the position as it was before the statute was enacted and more specifically having regard to the established legal notions bearing upon its subject matter. The history is not to be denied. The importance of this will appear.

Section 300 of the Local Government Act provides that

> a Council has the care, control, and management of public places, streets, ways, bridges, culverts, fords, ferries, jetties, drains and . . . watercourses . . .

And if this were all the statute had to say it would not, I think, be possible to reconcile the following general statement of the law (proposition (2)) relative to the non-liability of the local authority for damage caused by failure to repair the public highway, namely:

> The purpose of giving the road authority property in and control over the road is to enable it to execute its powers in relation to the highway, not to impose upon in new duties analogous to those of an occupier of property. The body remains a public authority charged with administrative responsibilities. It must decide upon what roadwork it will expend the funds available for the purpose, what are the needs of the various streets and how it will meet them. A failure to act, to whatever it may be ascribed, cannot give a cause of action. No civil liability arises from an omission on its part to construct a road, to maintain a road which it has constructed, to repair a road which it has allowed to fall into disrepair, or to exercise any other power belonging to it as a highway authority.[35]

Wtih the following statement of the law relative to the liability of the local authority for damage caused by its failure to repair a jetty:

> I think the public authority in control of such premises is under an obligation to take reasonable care to prevent injury to such a person through dangers arising from the state or condition of the premises which are not apparent and are not to be avoided by the exercise of ordinary care.[36]

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33 See Young v. Davis (1863) 2 H. & C. 197 per Pollock C.V. and Martin B. respectively.

34 See note 3; 57 C.L.R. 259, 269 per Latham C.J.

35 Idem 281 per Dixon J.

36 See note 27.

Unless there be something about a "street' which makes it a thing different from a jetty and unless that difference operates so as to make the relationship between the local authority and the "street" different from the relationship between the local authority and the jetty, the two statements would I think be incapable of reconciliation upon any rational ground because:

> . . . a duty to repair enforceable by action for damages for omission to repair is one thing. A duty to exercise care in control and management enforceable by action for damages for negligent omission to remove a danger known to exist is another thing. The first rule, which I regard as having been established by the first four steps, does not of itself exclude liability for negligence in control and management. Negligence can be a characteristic of an omission as well as of an act, and the first rule, as I have stated it, is quite consistent with the existence of a duty to take reasonable care that a highway shall be in a reasonably safe condition.[37]

Yet the non-feasance rule has as a matter of construction been extended so as to cover not only the duty to repair but also the duty to control and manage.[38] This has been done by construing the statute to produce that result and broadly speaking it has been done by saying of anything other than a road of which the local authority has been given power to control and manage that the presumption is that the power creates a duty and a correlative private right and that this is the position if "the statute is silent on the point.[39] On the other hand by saying when control and management relates to a road that the presumption is the other way, and this because an intention to change the law (as it was thought to be) should be spelt out in clear terms and not left to implication. The difference in the result then appears to be but a reflection of

> the attitude of mind in which the express provisions of the Act as to the duties of the trust (the local authority) are to be approached.[40]

But a question remains whether this "attitude of mind" is but the product of a misunderstanding of history or whether there is in fact something essentially different between a public road and all other things of which the local authority has the care and management which can in reason explain the difference in result in terms of duty

37 Gorringe's case, see note 6, 80 C.L.R. 357, 377 per Fullagar J.
38 Sanitary Commissioners of Gibraltar v. Vorfila (1890) 15 App. Cas. 400.
39 Municipal Tramways Trust v. Stephens (1912) 15 C.L.R. 104, 109 per Griffith C.J.
40 Idem 110.

which as a matter of construction of like words the Courts appear to have achieved. I think there is.

The difference in the duty flows I think from the difference in the position in relation to each, a public road and a jetty, in which the Statute has placed the local authority, and as already stated the essence of the difference is that a local authority, unless it is in the course of repairing it,[41] is unable to close a road. It requires the permission of the Minister for Lands to close a road temporarily,[42] and only the Governor can close a road permanently.[43] If one recognises that position and then applies to it the proposition that

> *it* (emphasis mine) must decide upon what road work it will expend the funds available for the purpose, what are the needs of the various streets and how it will meet them

then there remains no basis for liability. It cannot be said that it should have closed the road because it had no authority to do so, nor can it be said that it should have expended its rates in repairs, this being a decision which *it* must take having regard to the competing demands on its revenue. The choice to spend the money or to shut up shop is not available.

Whether the choice is there in the case of a jetty will of course depend upon the vesting statute. It is not clear from the report in *Aiken's* case[44] whether the Kingborough Corporation had power to deny public access to the jetty or not. Counsel for the appellant (plaintiff) formulated the relevant duty in the terms of *Lancaster Canal Co. v. Parnaby*,[45] as if it had such a power, the duty formulated being "to take reasonable care so long as they keep" the jetty "open for public use", and this finds acceptance in the judgment of Starke J.[46] and the same idea is expressed in the reasons of Dixon J.:

> The body to which the Statute has confided the care and management of the place alone has the means of securing the users against such injury, the risk of which arises from *continuing to maintain the premises as a place of public resort* (emphasis mine) and from the reliance which is ordinarily placed on an absence of unusual or hidden dangers by persons making use of structures or other premises provided for public use.[47]

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41 See s. 301 (c) and (d), Local Government Act.
42 S. 292.
43 S. 287 (1) (a) (iii).
44 See note 27.
45 (1839) 11 A. & E. 230.
46 See note 27, 62 C.L.R. 179, 199.
47 Idem 206.

He also said:

> It cannot, of course be disputed that by the manner in which a statute deals with wharves and jetties the measure of duty of a highway authority in respect of roads, streets and passages might be made applicable to a jetty.[48]

And it may well be that if the power of a local authority to close a jetty be denied to it as it is in the case of a public highway, then the measure of its duty with respect to roads could, should and would, by way of implication in the construction of the vesting statute be made applicable to a jetty or to any other place, the control and management of which has been vested in the local authority upon like terms.

Section 660 of the Local Government Act provides that no action is maintainable against a municipality or a member, officer, or servant, of a council, of a municipality in his capacity as a member, officer or servant of the council in respect of a tort unless the provisions of the section have been complied with. The heading to Subdivision D of Division I (Legal Proceedings) of Part 28 of which s. 660 is the only section, is: "Actions against Municipalities for Negligence in respect of Streets, Etc.". This is at best misleading. The section is not confined to actions for negligence in respect of streets. It applies to all actions in tort and it is not confined to actions against a municipality. It extends to actions against a member, officer or servant of a Council of the municipality in that capacity. The section in a form which would be fairly consistent with its present heading, but without such a heading, first appeared in the local legislation in s. 223 of the Municipal Institutions Act of 1895. The words "or in respect of any tort" were inserted by s. 412 of the Municipalities Act 1900 and the heading to that section was in general terms, it being "Legal Proceedings by and against Municipalities". The present heading first appears in the 1906 Act and, as the marginal note indicates,[49] was taken from the Victorian Local Government Act of 1893, it apparently not being appreciated that s. 108 of that Act was so far as its application was concerned in the terms of s. 223 of the local Act of 1895. It did not extend to actions in tort generally.

The present section requires that all actions to which it applies—

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48 Idem 203.

49 The marginal note to s. 660 refers to—Conditions under which certain actions may be brought against municipality, members, officers and servants of the council.

(1) should be commenced within 12 months after the cause of action arose;
(2) that at least 35 days before action a notice be given to the local authority containing the information required by sub-s. (1)(b);
(3) that "as soon as practicable after the cause of action arose" a notice be given containing the information required by sub-s. (1)(c);
(4) that if damages for personal injuries are claimed, the plaintiff, if required to do so, submit himself for medical examination;
(5) that if damage to property be claimed, the plaintiff permit the property to be examined by a person or persons nominated by the Council; and
(6) that the person claiming, when required by the Council, "at reasonable times, answers in writing such reasonable enquiries relating to the cause of the action and the claim as are addressed to him by or on behalf of the Council member officer or servant".

If the action is not commenced within the time as in (1) above or if a notice is not given as in (2) or (3) above, one may apply to a Judge who, if he considers that the non-compliance

> was occasioned by mistake or by other reasonable cause or that the prospective defendant is not materially prejudiced in his defence or otherwise, by the failure, . . . may if he thinks it just to do so, grant leave to bring the action, subject to such conditions as the Judge thinks it is just to impose.

The conditions controlling the discretion are expressed in a form now common and it has generated a very considerable amount of reported case law.[50] The emphasis of the cases varies. Sometimes the result would seem to turn on whether the facts reveal a "mistake" and in others upon whether the failure "was occasioned" by the mistake and then upon whether it was occasioned by "other reasonable cause". And then however the failure may have been "occasioned" it is always a question whether the defendant local authority has been "materially prejudiced in his defence or otherwise". How "otherwise" is not easy to imagine. Of course it will always be prejudiced by an order granting leave because it will lose the benefit of what amounts to a statutory defence. But this is not the question. The question is whether it has been "otherwise" prejudiced by delay in commencing the action or

50 The Victorian authorities are noted at (1961) 35 A.L.J. 298.

by the failure to give notice. And if the would-be plaintiff—and one should emphasise the words "would-be" because the application is for leave to commence and not for leave to continue action—there is still a question whether the Judge should exercise the discretion to "grant leave to bring the action". This is a discretion to grant and not a discretion to refuse and in principle the applicant must do more than prove the facts which establish the discretion; he must show some ground calling for its exercise.[51] And this may be important. It will be observed that the mistake or the reasonable cause which occasioned the failure and the question of prejudice are expressed disjunctively. So it may be the case that the failure was occasioned by mistake and that the local authority has been prejudiced in its defence. An occasion for the exercise of the discretion would then arise but whether it would be an occasion in which it should be exercised would be another question.

F. T. P. BURT*

51 Cf. Maine v. Maine (1949) 78 C.L.R. 636, 643 per Latham C.J., Rich and Dixon JJ.; and Reeve v. Fowler [1965] 1 N.S.W.R. 110, 111 per Walsh J.

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