[HIGH COURT OF AUSTRALIA.]

AIKEN . . . . . APPELLANT;
PLAINTIFF,

AND

THE WARDEN, COUNCILLORS AND ELECTORS OF THE MUNICIPALITY OF KINGBOROUGH . . . . RESPONDENT.
DEFENDANT,

ON APPEAL FROM THE SUPREME COURT OF TASMANIA.

H. C. OF A. 1939.

HOBART, *Feb.* 22-24.

MELBOURNE, *May* 22.

Latham C.J., Starke, Dixon, and McTiernan JJ.

Negligence—Public authority—Occupation of property—Jetty to which public have right of access—Municipality having control and management—Duty of municipality to person going on jetty to moor vessel thereto—Notice of injury—Local Government Act 1906 (*Tas.*) (6 *Edw. VII. No.* 31), *sec.* 231 (2), (3).*

A public authority in control of a wharf to which members of the public have access as of common right is (unless its duty is otherwise defined by statute) under a duty to make the wharf reasonably safe for those who use it.

A jetty the control of which, pursuant to the *Roads and Jetties Act* 1935 and the *Local Government Act* 1906 (Tas.), was vested in a municipality was damaged, and the municipality, though aware of the damage, failed to repair it and took no steps to guard or warn users against the defect. The plaintiff,

* Sec. 231 of the *Local Government Act* 1906 (Tas.) provides: Sub-sec. 2: "No person shall be entitled to recover against a council . . . any damages in respect of any injury to the person . . . alleged to have been sustained by himself . . . by reason of the negligence of the council . . . in respect of any local work . . . unless the following conditions are complied with by him or on his behalf namely: (1) Notice in writing that injury has been sustained shall be given to the council . . . within three months and the action shall be commenced within six months from the date on which the injury was sustained." Sub-sec. 3: "Non-compliance with all or any of the conditions herein imposed shall be no bar to the maintenance of such an action for negligence if the court or the judge before whom the action is tried is of opinion that there was reasonable excuse for such non-compliance."

H. C. OF A. 1939. AIKEN v. KINGBOROUGH CORPORATION.

who was unaware of the defect, was injured because of it, and without any lack of reasonable care on his part, while attempting to moor his boat to the jetty at night. The plaintiff brought an action against the municipality, claiming damages for negligence.

Held:—

(1) The jetty was not part of a highway and was not vested in the municipality as a highway authority; accordingly, the defence of non-feasance was not available either at common law or by virtue of the special provisions of the *Local Government Act* 1906 (Tas.).

(2) The municipality, having, on the findings of the jury, been guilty of negligence in failing to make the jetty reasonably safe, was liable in damages to the plaintiff.

The duty of public authorities (as compared with occupiers of private premises) in respect of premises under their control considered.

Observations on the effect of sec. 231 of the *Local Government Act* 1906 (Tas.) and on the circumstances constituting reasonable excuse thereunder for failure to give notice of injury.

R. v. *Williams*, (1884) 9 App. Cas. 418, applied.

Decision of the Supreme Court of Tasmania (Full Court) reversed.

APPEAL from the Supreme Court of Tasmania.

Robert Stuart Aiken brought an action in the Supreme Court of Tasmania against the Municipality of Kingborough alleging negligence on the part of the municipality in the management and control of a public jetty at Woodbridge, a village on D'Entrecasteaux Channel. The Hobart Marine Board and the Attorney-General of Tasmania were also joined as defendants, but, as hereinafter appears, the plaintiff discontinued as against the board and the Attorney-General was dismissed from the action.

The jetty was erected in 1882 out of moneys provided by Parliament. It was used by the public as a pier or wharf where craft might be moored, passengers might embark and disembark, and goods might be shipped or unshipped. The approach thereto on the land side was by way of a public highway. The control and management of the jetty was vested in the defendant municipality.

On Monday, 3rd May 1937, during a storm a vessel called the *Dover*, in attempting to berth at the jetty, pulled the pile at the northern seaward corner of the jetty some few feet away from the waling and decking, leaving a cavity. The plaintiff, who lived on

Bruni Island, crossed to Woodbridge on 6th May 1937 and moored his motor boat alongside and outside a vessel called the *Mary*, which was then moored at the jetty. It remained there until the evening of 7th May, that is, for more than twenty-four hours. On the evening of 7th May, in consequence of a change in the weather, the plaintiff went down to the jetty for the purpose of moving his boat to the other side of the jetty. After doing so, the plaintiff stepped on to the jetty, and, as he approached the pile at the northern seaward corner of the jetty for the purpose of placing his mooring line over the displaced pile, he fell into the cavity and was injured. The weather was rough and the night dark.

The jury found that the council of the defendant municipality did not exercise reasonable care to keep the jetty reasonably safe for persons who went on to it for the purpose of mooring vessels to it: that, although the existence of the cavity had become known to the council, the plaintiff did not know of the cavity; and that the council had not taken reasonable care in the way of lighting or guarding the cavity.

Sec. 231 (2) of the *Local Government Act* 1906 (Tas.) provides that no person shall recover against the council of a municipality by reason of negligence in respect of any local work unless notice in writing that injury has been sustained shall have been given to the council within three months from the date on which the injury was sustained.

No such notice was given by the plaintiff until 13th September 1937, although the accident happened on 7th May 1937. To a plea that the notice had not been given in compliance with the section, the plaintiff replied that there was reasonable excuse for non-compliance based upon the following facts:—

The plaintiff first consulted his solicitors with reference to his injuries on 22nd May 1937, at a time when he was still in hospital. The solicitors took a short statement and thereupon engaged in a consideration of the various statutes which determined the body in whom the control of the jetty was vested.

Sec. 12 of the *Roads Act Amendment Act* 1885 (Tas.) provided: "The control, management, and maintenance of all jetties now constructed, or hereafter to be constructed, shall be vested in the

H. C. OF A. 1939.

AIKEN v. KING BOROUGH COR-PORATION.

trustees for the time being of the road district in which the same are situated, upon the publication in the *Gazette* of a requisition from the trustees to the Minister of Lands and Works for the time being applying for such control, management, and maintenance: Provided that every such requisition shall be approved of by the Governor in Council before publication as aforesaid."

By sec. 8 (1) of the *Local Government Act* 1906, road districts were abolished and superseded by municipalities in which were vested all the rights and liabilities of the road districts. By sec. 53 of the *Roads and Jetties Act* 1935 it was provided: "Where the control and management of any jetty was, at the commencement of this Act, vested in the council of any municipality, such control and management shall continue to be so vested."

Sec. 62 of the *Marine Act* 1921 provided: "Every board shall, within its own jurisdiction—(1) maintain and repair the wharves within its jurisdiction not vested in any other authority or belonging to any private person."

Therefore the question whether the responsibility for the condition of the Woodbridge jetty lay with the defendant municipality, or the Hobart Marine Board, depended upon whether a requisition had been made and published in the *Gazette* under sec. 12 of the *Roads Act Amendment Act* 1885 and thus vested the control and management of the jetty in the municipality.

On 24th May 1937 the plaintiff's solicitors asked the secretary of the Hobart Marine Board if the board knew whether the jetty was vested in the council of the defendant municipality. The secretary said that the position was very obscure and that the board did not know anything about the matter, that the Premier of Tasmania had raised the question and that the board was obtaining an opinion on it. The secretary further stated that his board did not "touch" the jetties on D'Entrecasteaux Channel by way of repairs or otherwise.

On 25th May 1937 the solicitors interviewed the secretary of the Public Works Department, the government department responsible for the administration of the *Local Government Act* 1906. The solicitors informed the secretary that there had been an accident on the jetty and referred to the statutes above mentioned and stated

that the liability rested with the Hobart Marine Board or the defendant municipality according to whether or not there had been a proclamation under the *Roads Act Amendment Act* 1885; the solicitors then asked the secretary whether any requisition under sec. 12 of that Act had been received.

The secretary after consulting his records said that no requisition had ever been received and no proclamation had been made under that Act.

The solicitors then formed the opinion that the Hobart Marine Board was the responsible party and advised the plaintiff to that effect. On 25th June the plaintiff's solicitors wrote the Hobart Marine Board claiming damages; on 2nd July the Hobart Marine Board replied denying liability.

On 16th July the solicitors took a detailed statement from the plaintiff; and, on 9th August 1937 for the purpose of preparing a case for counsel's opinion wrote to the council clerk of the defendant municipality asking whether the control of the jetty had been vested in the council under sec. 12 of the *Roads Act Amendment Act* 1885 by publication in the *Gazette* on requisition from the council or otherwise, and whether the council had prescribed wharfage rates in respect of the jetty. On 10th August the council clerk replied saying that his records would not show whether any requisition had been published in the *Gazette* and referring the solicitors to certain Gazettes in which appeared by-laws made by the defendant municipality prescribing wharfage rates pursuant to the *Roads Act Amendment Act* 1885 and the *Local Government Act* 1906.

On 11th September counsel's opinion was received. On 13th September the plaintiff's solicitors served notices of action on the defendant municipality, the Hobart Marine Board and the Attorney-General, against whom on 2nd November the appellant issued his writ.

On 14th January 1938, the date upon which the statement of claim was delivered, the plaintiff's solicitors wrote to the three defendants suggesting that they should agree among themselves as to which of them exercised control of the jetty in question; in reply, the Crown Solicitor referred to the *Gazette* of 15th January 1889 in which appeared a requisition by the trustees of the Gordon

H. C. OF A. 1939. AIKEN v. KINGBOROUGH CORPORATION.

Road District that the control of the Woodbridge jetty should be vested in the trustees and the Governor's approval thereof.

The plaintiff discontinued his action as against the Hobart Marine Board.

The case went to trial against the defendant municipality and the Attorney-General. At the close of the evidence the trial judge ruled that there was no case to go to the jury as against the Attorney-General.

After taking the jury's verdict as against the defendant municipality *Clark* J. reserved the whole case as against the defendant municipality, including the question whether the above facts constituted a reasonable excuse for not giving the notice of injury required by sec. 231 (2) of the *Local Government Act* 1906, for the opinion of the Full Court of the Supreme Court of Tasmania. *Crisp* C.J. was of the opinion that the jetty was part of a highway and that the non-repair of the jetty did not therefore involve the respondent in liability. *Clark* J. did not agree with this view, but he was of the opinion that the notice of action required by sec. 231 of the *Local Government Act* 1906 had not been given in due time and that no reasonable excuse for the failure to comply with the section had been established. *Hall* A.J. was of opinion that the plaintiff should have judgment. Judgment was therefore entered for the defendant municipality.

From that decision, the plaintiff, by special leave, appealed to the High Court.

R. C. Wright and *S. C. Burbury*, for the appellant.

R. C. Wright. The respondent was in control of the jetty. That means that it owed a duty in reference to the condition of the jetty according to whether the appellant went on the jetty (*a*) as of right, (*b*) as invitee, (*c*) as a licensee, or (*d*) as a trespasser. The appellant was not a trespasser, and it is immaterial to consider into which of the other three classes the appellant falls, because on the findings of the jury he should succeed under any of the three heads. It is submitted that the appellant entered upon the jetty as of common right and that as stated by *Salmond* on *Torts*, 9th ed. (1936), p. 512.

" on principle . . . those who enter as of right should be entitled as of right to have the premises made safe for them and not merely to be warned of danger." [He referred to *Glasgow Corporation* v. *Taylor* (1); *Purkis* v. *Walthamstow Borough Council* (2); *Ellis* v. *Fulham Borough Council* (3); *Pettiet* v. *Municipal Council of Sydney* (4).] The council is under a common-law duty " to take reasonable care so long as they keep " the jetty " open for public use " that the public may use it without danger (*Lancaster Canal Co.* v. *Parnaby* (5)). The same duty applies to a public body in whom the control of property is vested not for profit (*Mersey Docks Trustees* v. *Gibbs* (6)) and to an executive government in control of a harbour or wharf (*R.* v. *Williams* (7)). The jetty is not a highway. [Upon this point he was stopped.] There was reasonable excuse for failing to give notice of injury. Such failure was induced by a misstatement of a public executive Act by the responsible government department. There is nothing in sec. 231 to warrant the contention that the matter of the excuse must be something personal to the plaintiff. [He referred to *Leeder* v. *Mayor &c. of Ballarat East* (8).]

S. C. Burbury. The appellant's boat did not occupy a berth at the jetty for more than twenty-four hours, but even if it did, the appellant would not thereby become a trespasser.

[LATHAM C.J. referred to *Henwood* v. *Municipal Tramways Trust (S.A.)* (9).]

[*E. W. Turner*, for the respondent. We abandon the contention that the appellant was a trespasser.]

[Counsel was stopped.]

E. W. Turner and *H. S. Baker*, for the respondent.

E. W. Turner. There was no reasonable excuse for not giving notice of injury. The excuse contemplated by the section is something personal to the party and cannot consist in a default of

(1) (1922) 1 A.C. 44.
(2) (1934) 151 L.T. 30.
(3) (1938) 1 K.B. 212.
(4) (1936) 36 S.R. (N.S.W.) 125; 53 W.N. (N.S.W.) 52.
(5) (1839) 11 A. & E. 230 [113 E.R. 400].
(6) (1866) L.R. 1 H.L. 93.
(7) (1884) 9 App. Cas. 418.
(8) (1908) V.L.R. 214; 29 A.L.T. 192.
(9) (1938) 60 C.L.R. 438.

H. C. OF A. 1939. AIKEN v. KINGBOROUGH CORPORATION.

solicitors. [He referred to *Lingley* v. *Thomas Firth & Sons Ltd.* (1); *Re Harriot* (2); *Roles* v. *Pascall & Sons* (3); *Hillman* v. *London, Brighton and South Coast Railway Co.* (4); and *Ex parte Hannan* (5).] In this case the mistake made by the Public Works Department cannot prejudice the respondent's defence. That mistake was not a reasonable excuse for not giving notice of injury. The appellant's advisers should not rely upon a public department but should themselves have looked in the *Gazette*.

H. S. Baker. The question is whether any duty to repair has been imposed upon the respondent by the Act by which the control of the jetty was vested in it or by common law. *Parnaby's Case* (6) was the case of a company conducting a canal for profit. A duty to take care arose from the business nature of the undertaking. Here a jetty was a public utility thrown open for the use of the public; there was no purpose of profit. This case is to be distinguished from the case of *Mersey Docks Trustees* v. *Gibbs* (7) on the ground that the municipality is only the statutory custodian of property of which the Government is proprietor. This is supported strongly by *Sanitary Commissioners of Gibraltar* v. *Orfila* (8): Cf. *Stretton's Derby Brewery Co.* v. *Derby Corporation* (9) and *Blundy Clark & Co.* v. *London and North Eastern Railway Co.* (10).

[LATHAM C.J. referred to *Halsbury's Laws of England*, 2nd ed., vol. 23, p. 647; *Sheppard* v. *Glossop Corporation* (11).]

But in any case the duty is not any higher than that owed to a licensee. Appellant must take the jetty as he finds it. [He referred to *Latham* v. *R. Johnson & Nephew Ltd.* (12); *Robert Addie & Sons (Collieries)* v. *Dumbreck* (13); *Hayward* v. *Drury Lane Theatre and Moss' Empires* (14); *Coleshill* v. *Manchester Corporation* (15); *Lipman* v. *Clendinnen* (16).]

[STARKE J. referred to *The Neptun* (17).]

(1) (1921) 1 K.B. 655.
(2) (1906) 6 S.R. (N.S.W.) 635; 23 W.N. (N.S.W.) 190.
(3) (1911) 1 K.B. 982.
(4) (1920) 1 K.B. 294.
(5) (1897) 18 L.R. (N.S.W.) 422.
(6) (1839) 11 A. & E. 230 [113 E.R. 400].
(7) (1866) L.R. 1 H.L. 93.
(8) (1890) 15 App. Cas. 400.
(9) (1894) 1 Ch. 431.
(10) (1931) 2 K.B. 334.
(11) (1921) 3 K.B. 132, at p. 150.
(12) (1913) 1 K.B. 398, at pp. 405, 411.
(13) (1929) A.C. 358, at p. 367.
(14) (1917) 2 K.B. 899, at p. 914.
(15) (1928) 1 K.B. 776, at p. 793
(16) (1932) 46 C.L.R. 550.
(17) (1938) P. 21.

The jetty is a place where the public can pass and repass and is therefore a highway. The respondent is not liable for non-feasance. [He referred to *Tyne Improvement Commissioners* v. *Imrie* (1); *Hammerton* v. *Dysart (Earl)* (2); *East Riding of Yorkshire County Council* v. *Selby Bridge Co.* (3); *Halsbury*, 2nd ed., vol. 16, pp. 181, 187; *R.* v. *Inhabitants of the District of Lordsmere* (4); *Skilton* v. *Mayor &c. of Epsom and Ewell Uurban District Council* (5); *Buckle* v. *Bayswater Road Board* (6); *Clarkbarry* v. *South Melbourne* (7).]

R. C. Wright, in reply. Upon the question of notice of injury, the appellant was the victim of a positive misstatement as to the existence of a proclamation. It is idle to suggest that reference to the index to the *Gazette* should have been made; the index is useless. *Clark* J. in the court below was in error in inferring that the appellant at no time abandoned his intention of suing the respondent; the proper inference is that the appellant did so until the fact was revealed that the municipality had made by-laws in respect of the jetty which suggested *de-facto* control. [He referred to *Shotts Iron Co.* v. *Fordyce* (8); *Harris* v. *Howden & Co. (Land) Ltd.* (9); *Kitchen* v. *C. Koch & Co.* (10).] "In the absence of something to show a contrary intention, the legislature intends the body, the creature of the statute, shall have the same duties, and that its funds shall be rendered subject to the same liabilities as the general law would impose on a private person doing the same things" (per *Blackburn* J., *Mersey Docks Trustees* v. *Gibbs* (11); *Beven, Negligence in Law*, 4th ed. (1928), p. 264). The immunity of highway authorities in respect of non-feasance is an exception to the general rule; it is not the rule. All the cases decided in relation to liability for the condition of places of public resort show a consistent tendency to impose on the public authority a duty analogous to the duties of private occupiers. [He referred to *The Neptun* (12), *Purkis* v. *Walthamstow Borough Council* (13) and *Ellis* v. *Fulham Borough Council* (14).]

Cur. adv. vult.

(1) (1899) 81 L.T. 174.
(2) (1916) 1 A.C. 57.
(3) (1925) Ch. 841.
(4) (1866) 54 L.T. 766.
(5) (1937) 1 K.B. 112.
(6) (1936) 57 C.L.R. 259.
(7) (1895) 21 V.L.R. 426, at p. 436; 17 A.L.T. 197, at p. 200.
(8) (1930) A.C. 503, at p. 515.
(9) (1938) 4 All E.R. 167.
(10) (1931) A.C. 753.
(11) (1866) L.R. 1 H.L. 93, at p. 110.
(12) (1938) P. 21.
(13) (1934) 151 L.T. 30.
(14) (1938) 1 K.B. 212.

H. C. OF A. 1939.

AIKEN v. KINGBOROUGH CORPORATION.

May 22.

The following written judgments were delivered :—

LATHAM C.J. Two questions arise upon this appeal from the Full Court of the Supreme Court of Tasmania : (1) whether the defendant municipality is liable to the plaintiff for damages in respect of an injury suffered by him owing to what has been found to be the negligence of the municipality in the management and control of a jetty which the plaintiff was using, and (2) whether there was reasonable excuse for the failure of the plaintiff to give a notice of action required by the *Local Government Act* 1906, sec. 231 (2).

The jetty at Woodbridge where the plaintiff received injury was built by the Government of Tasmania in 1882 under powers conferred by the *Public Works Execution Act* 1882. The control, management and maintenance of the jetty was vested in the trustees of the Gordon Road District, pursuant to sec. 12 of the *Roads Act Amendment Act* 1885, by a proclamation dated the 15th January 1889. Road districts were abolished by sec. 8 of the *Local Government Act* 1906. The defendant municipality of Kingborough succeeded to the trustees of the Gordon Road District and under sec. 130 (iv) of the *Local Government Act* 1906 the control and management of the jetty became vested in the defendant. Sec. 205 (16) of that Act enables the council of the municipality to make by-laws as to the use of the jetty and to fix tolls therefor. This power has been exercised. The *Roads and Jetties Act* 1935, sec. 53, continues the control and management of the jetty in the defendant, and sec. 54 provides that the council of any municipality may repair, maintain and extend any jetty under its control or management.

During a storm on 3rd May 1938 a vessel which was being moored to the jetty pulled a pile out of place, creating a dangerous gap or hole between the pile and the decking of the jetty. The council clerk informed the State Public Works Department of the necessity for repairing the jetty, but nothing had been done in this direction before 7th May. The council did not guard the hole or provide a light so as to give warning of danger in darkness. On the night of 7th May the plaintiff went to the jetty to change the position of his boat, which was lying alongside a vessel berthed at the jetty. The night was dark, and, while he was attempting to moor the boat, he

fell into the hole and was injured. The jury found that he was not guilty of any negligence and that the council did not exercise reasonable care to keep the jetty on 7th May reasonably safe for persons who went on to it for the purpose of mooring vessels. *Clark* J. put a number of questions to the jury, decided some questions of fact by the agreement of the parties, and reserved a case for the Full Court, which, by a majority, gave judgment for the defendant.

The council contended that the plaintiff was a trespasser upon the jetty. This argument depended upon the allegation that he had moored his boat at the jetty for a longer period than the by-laws allowed, but this defence was not relied upon at the hearing of the appeal. The learned Chief Justice was of opinion that the jetty was a highway, that the plaintiff's injury arose from the failure of the council as a highway authority to repair the jetty and that this failure was a non-feasance for which the council as a highway authority was not liable (*Buckle* v. *Bayswater Road Board* (1)). Mr. Justice *Clark* dealt very fully in his judgment with the contention that the jetty was a highway and arrived at the conclusion that it was not a highway. I agree with his reasons and his conclusion and it is unnecessary to repeat them.

The plaintiff went on to the jetty in the exercise of a right as a member of the public in order to use the jetty for mooring his boat. In the case of private property which is in a dangerous condition, the liability of the occupier of the property has been treated in English law under three heads. There is no general duty to observe a particular standard of care irrespective of the character of the person who claims to have been injured owing to a failure to perform such a duty. The duty varies, where the injured party "is not there as of right," according to whether the person so complaining is a trespasser, a licensee or an invitee (*Latham* v. *R. Johnson & Nephew Ltd.* (2)).

These standards of liability have been applied to persons entering upon private premises where the only relation between the occupier of the premises and such persons is that they are either trespassers or that they have his permission, by way of licence or invitation, to enter the premises. If a person has a contractual right to enter

(1) (1936) 57 C.L.R. 259.

(2) (1913) 1 K.B., at p. 410.

H. C. OF A. 1939.

AIKEN v. KINGBOROUGH CORPORATION.

Latham C.J.

premises, there may be an express or implied term of the contract which entitles him to expect from the occupier of the premises the exercise of a particular degree of care (*Francis* v. *Cockrell* (1)). But there is another class of person not comprehended within the classifications mentioned—persons who enter premises which are not private premises and enter them as of right as members of the public. There has not been established any general principle of law which is applicable to all such persons. Discussions of the questions which arise will be found in *Salmond, Law of Torts*, 8th ed. (1934), pp. 508, 509, and *Winfield, Text-book of the Law of Tort* (1937), pp. 596 et seq. Such a person is certainly not a trespasser. It would appear to be equally plain that, if he observes any conditions which are attached to his right to enter, he is not a bare licensee. In *Purkis* v. *Walthamstow Borough Council* (2) the view of *Greer* L.J. that the plaintiff was only a bare licensee was apparently based on the fact that the plaintiff was over the age of twelve years and that the use of the municipal playground on which he was injured was restricted to children under the age of twelve years. The view that such a person is an invitee appears also to be unreal. It may be that the standard of care to be exercised in his case is the same as that which is to be observed in the case of an invitee, but there is a very large measure of fiction in allowing the liabilities of persons in the category mentioned to be determined upon the basis of a supposed invitation to the community as a whole. An occupier of private premises may give no licences and issue no invitations to any persons, or he may, at will, withdraw any licences given or invitations issued. But the occupier of premises to which members of the public have a right of access cannot, merely at will, exclude them from such premises. If a member of the public entering upon such premises were charged with trespass, his defence would not be that he had been invited by the occupier of the premises to enter upon them, but simply that he was entitled as of right, apart from any invitation, express or implied, to be upon the premises for the purpose for which he had entered them. I therefore conclude that persons who enter premises as of right as members of the public cannot be satisfactorily included in any of the three classes to one

(1) (1870) L.R. 5 Q.B. 184, 501.

(2) (1934) 151 L.T. 30.

of which it is necessary to assign a plaintiff who sues for negligence associated with the control and management by an occupier of dangerous private premises.

But it does not appear to me to be necessary in this case to endeavour to lay down rules for all cases where persons enter upon premises in the exercise of a right as members of the public. Different considerations may be important in different cases. There is clear authority with respect to the responsibility in relation to wharves which are open to the public. The law is stated in *Halsbury, Laws of England*, 2nd ed., vol. 23, at pp. 647, 648, in the following terms :—" The duty of wharfingers and dock-owners with respect to persons using their premises is to have those premises reasonably safe for those coming on to them on business. But the duty is limited to those places to which persons visiting the dock may reasonably be expected to go in the belief, reasonably entertained, that they are entitled or invited to do so."

The case of *R. v. Williams* (1), a decision of the Privy Council, is binding upon this court. My brother *Starke* sets out the facts of the case and examines it in detail, and I do not repeat in detail what he says in his judgment. It was there held that the Government of New Zealand, which had the management and control of a public wharf, was subject to the same duty as in the case of other proprietors of wharves which were open to the public. The Government was bound to take reasonable care that the wharf was fit for use. The Government was under a duty to protect persons lawfully using the wharf from dangers of which the officers of the Government were aware. The Government was not bound to make the wharf safe for all persons who elected to use it, but, if it did not make the wharf safe, it was bound to give adequate warning of the danger which to the knowledge of the Government existed (2).

In the present case the defendant council had the management and control of the jetty. The council clerk was aware of the danger which existed. Nothing was done to prevent persons from walking into the hole by providing any barrier on the jetty, and no light was placed on the jetty so that they could avoid the danger when otherwise they could not see that it existed.

(1) (1884) 9 App. Cas. 418. (2) (1884) 9 App. Cas., at p. 431.

H. C. OF A. 1939. AIKEN v. KINGBOROUGH CORPORATION. Latham C.J.

It has sometimes been argued that, if a person chooses to walk where he cannot see, he takes the risk of the existence of any danger which would have been obvious to him in daylight. In my opinion an adequate answer to any such contention in this case is to be found in the reasoning of my brother *Dixon* in the case of *Lipman* v. *Clendinnen* (1).

Upon any view of the facts, as the plaintiff was not a trespasser, he must, even if the recognized threefold classification were applied in this case, be regarded as being at least in the position of a licensee. Even if he was only a licensee, he was entitled to be protected against concealed dangers of which the defendant was aware. The hole in the jetty was, at night-time, a concealed danger against which a licensee was entitled to be warned if it were not repaired. The defendant was aware that the danger existed. Accordingly, even upon this basis, the plaintiff was, in my opinion, entitled to recover.

It is objected, however, that the plaintiff cannot succeed in this action by reason of a provision contained in the *Local Government Act* 1906, sec. 231 (2). This section provides that no person shall be entitled to recover against a council any damages in respect of injury to the person or to property sustained by him by reason of the negligence of the council in respect of any local work vested in or under the control of the council unless notice in writing has been given within three months and the action is commenced within six months from the date of the injury so sustained. In the present case the required notice was not given within the specified time, but sec. 231 (3) provides that non-compliance with the requirement mentioned shall be no bar to the maintenance of the action if the court is of opinion that there was reasonable excuse for such non-compliance. The plaintiff contends that in the present case there was reasonable excuse for non-compliance, even if the jetty was a "local work." The facts upon which he relies are that his legal advisers had a considerable amount of difficulty in determining whether the government, the Marine Board, or the municipality was responsible for the control and management of the jetty. Inquiries were made from the Government and from the Marine Board, and in each case responsibility was disclaimed. The council

(1) (1932) 46 C.L.R., at pp. 566, 567.

could be liable only if the control and management of the jetty had been vested either directly in the council or in the trustees of the Gordon Road District by a proclamation. An officer of the Public Works Department informed the plaintiff's solicitors that no such proclamation had been made, and the matter was then allowed to rest so far as the council was concerned. But, after the period of three months mentioned in the section had expired, the plaintiff's advisers telephoned to the council clerk and were immediately informed that the council had made by-laws for the management of the wharf. These by-laws were in fact displayed upon the jetty itself. Such by-laws could be made only if a proclamation had been made under the *Roads Act*. Subsequently the proclamation of 1889 was discovered. The contention for the plaintiff is that the fact that he was misled by a public department which ought to have known the facts (and which professed to know the facts) is a sufficient excuse for failing to give notice of action to the municipality. I have had a considerable degree of doubt upon this matter. In my opinion there was a lack of vigour in prosecuting necessary inquiries, but I am not prepared to dissent from the unanimous opinion of my colleagues that these facts constituted a reasonable excuse. I desire, however, to add that the fact that the defendant was not prejudiced, as to obtaining evidence or otherwise, by the failure to give notice does not appear to me to be a relevant matter in determining whether or not there was reasonable excuse. The operation of the statute does not depend in any degree upon prejudice to the defendant. Prima facie the municipality is entitled to suppose that it is free from the risk of actions in relation to any particular event to which sec. 231 (2) applies as soon as three months from the event have expired. If prejudice to the defendant is an element in the consideration of the matter, then the loss of the protection afforded by the section is always prejudicial. But, as I have said, the protection given by the section does not, in my view, depend upon any such considerations.

For the reasons stated the appeal should be allowed, the judgment of the Full Court and of *Clark* J. pursuant thereto set aside, and judgment entered for the appellant for £295, which was the amount awarded to him by the verdict of the jury.

H. C. OF A. 1939. AIKEN v. KINGBOROUGH CORPORATION.

STARKE J. The appellant, Aiken, brought an action against the respondent, the Warden &c. of the Municipality of Kingborough, in the Supreme Court of Tasmania, alleging negligence on the part of the respondent in the management and control of a public jetty at Woodbridge, a small village, we were told, in the D'Entrecasteaux Channel.

The jetty was erected in 1882 by the Government of Tasmania out of money provided by Parliament. It is approached on the land side from a public highway which gives unobstructed access. It was for the use and accommodation of the public and apparently for vessels of light draught. Under the *Roads Act Amendment Act* of 1885 (49 Vict. No. 38: See secs. 12, 13 and 14) the control, management and maintenance was vested in the trustees of the Gordon Road District. The *Local Government Act* of 1906 abolished road districts but carried over their powers, authorities, obligations and liabilities to municipalities incorporated pursuant to that Act (6 Edw. VII. No. 31 : See secs. 12, 130). The control and management of the jetty thus became vested in the respondent. The *Roads and Jetties Act* 1935, No. 82, now provides: "Where the control and management of any jetty was, at the commencement of this Act, vested in the council of any municipality, such control and management shall continue to be so vested" (sec. 53). The council of any municipality may repair, maintain or extend any jetty under its control or management (sec. 54). And the municipality has power as to any wharf, pier or jetty under its control to make by-laws regulating their use and to fix rates, tolls and charges (*Local Government Act* 1906, sec. 205 (16)—Cf. *Roads Act Amendment Act* 1885, sec. 14, now repealed by *Roads and Jetties Act* 1935). In 1914 the municipality, pursuant to these Acts, duly made by-laws for the control and management of all jetties within its control and fixed certain rates and charges for their use. The council has expended moneys from time to time on small repairs to the Woodbridge jetty, but all other repairs have been effected by the Government of Tasmania on notice from the municipality of the need for such repairs. The revenue from the jetty is small; apparently under £8 per annum. It is open to all the public; anyone can moor to it, but the practice is to charge regular traders only.

On 3rd May 1937 a vessel called the *Dover* attempted to berth at the jetty in rough weather but pulled out a mooring-pile on the north side of the jetty and did not succeed in mooring. An open space was thus left between the pile and the decking of the jetty. On 4th May the clerk of the council was informed of the damage to the jetty and immediately telephoned to the Public Works Department.

The appellant was accustomed from time to time to use the jetty. He brought cargoes of fruit to it and made free use of the jetty. No charge or toll was collected from him. On 7th May the appellant's motor boat was moored alongside a vessel called the *Mary*, which was berthed on the southern side of the jetty. In the evening the wind changed, and the appellant decided to take his boat to the northern side of the jetty. The weather was rough and the night dark. The appellant used his motor engine and took his boat to the northern side of the jetty and with the aid of another man proceeded to make fast to the piles on the jetty. He took a rope to the pile that had been pulled out by the *Dover*, and he fell through the space between the pile and the jetty and was injured.

The action was tried with a jury. Several questions were submitted for their consideration, and those that seem material and the answers of the jury thereto were as follows :—

Question 1 : Did the council exercise reasonable care to keep the jetty on the 7th May 1937 reasonably safe for persons who went on to it for the purpose of mooring vessels to it ? Answer : No.

Question 2 : Did the existence of the hole or opening at or near the northern pile render the jetty dangerous for use by a person who used it at the time and for the purpose for which the plaintiff used it, and who (1) did not know of the hole or opening, and (2) should not have expected it, and (3) used reasonable care for his own safety ? Answer : Yes.

Question 3 : Was the period between the time the council clerk became aware of the existence of the said hole or opening and 7 p.m. on the 7th May 1937, reasonably sufficient to have enabled the council or the council clerk or any other officer of the council, if he had had the authority of the council so to do, to provide a reasonably sufficient guard, light, warning notice or other safeguard to prevent

H. C. OF A. 1939.

AIKEN v. KINGBOROUGH CORPORATION.

Starke J.

the existence of the said hole or opening from causing injury to such a person as is referred to in question 2 ? Answer : Yes.

Question 4 (*a*) : Did the council or any officer of the council take reasonable care in the way of providing a reasonably sufficient guard, light, warning notice or other safeguard, to prevent the existence of the hole or opening from causing injury to such a person as is referred to in question 2 ? Answer : No.

Question 5 (*c*) : Would he (the plaintiff) have seen it or become aware of it before he fell into it if he had exercised reasonable care for his own safety ? Answer : No. Not on the night of 7th May 1937.

Question 6 : Did the plaintiff while he was using the jetty use reasonable care for his own safety ? Answer : Yes.

Question 8 : Amount of damages ? Answer : £295.

There was no finding that the appellant saw or knew that the pile had been pulled out or that he was conscious of any danger. Any other relevant questions were left for determination by the judge.

A case was reserved for the opinion of the Supreme Court of Tasmania in Full Court. The Chief Justice was of opinion that the jetty was part of a highway and that the non-repair of the jetty did not therefore involve the respondent in liability. *Clark* J. did not agree with this view, but he was of opinion that the notice of action required by the *Local Government Act* 1906, sec. 231, was not given in due time and that no reasonable excuse for failure to comply with the section had been established. *Hall* A.J. was of opinion that the appellant should have judgment. Judgment was therefore entered for the respondent..

Special leave to appeal to this court was granted, and the appeal so brought is now before us for determination.

" The law takes no cognizance of carelessness in the abstract." In order to determine whether the respondent has been guilty of negligence the " first step to be taken must be to consider what is the duty towards the plaintiff that it is alleged that the defendant has broken—for the ideas of negligence and duty are strictly correlative and there is no such thing as negligence in the abstract, negligence is simply neglect of some care which we are bound by law to exercise

towards somebody" (*Donoghue* v. *Stevenson* (1); *Thomas* v. *Quartermain* (2); *Haynes* v. *Harwood* (3)). The questions put to the jury assume some relationship of duty as between the appellant and the respondent, but the charge of the trial judge to the jury is not set forth in the transcript and so far as appears from it the particular duty of the respondent towards the plaintiff was not explained to the jury and their findings are therefore more or less in the air.

The Government of Tasmania, according to the facts proved, erected the jetty and threw it open to the public. It was of standard type and apparently one of many jetties. Did the public in these circumstances use the jetties at their own risk or was there some and what duty of care on the part of the Government of Tasmania towards the members of the public using the jetties? And, when the control and management of the jetties was transferred to road districts and municipalities, were these bodies in the same position as the government or in a different position? The Government of Tasmania is not immune from action at the suit of the subject. It may be sued in respect of claims founded on or arising out of any omission, neglect or default of the Government or any act, omission, neglect or default of any officer or servant or agent of the Government which would have given ground for an action at law or suit in equity between subject and subject (*Supreme Court Civil Procedure Act* 1932, No. 58, sec. 64).

The learned Chief Justice regarded the jetty as part of the highway —a link between the public road and the sea and in the same category as a bridge. It would follow, I presume, that the Government would not have been responsible for the non-repair of the jetty: Cf. *Buckle* v. *Bayswater Road Board* (4). But I cannot agree that the jetty forms part of the highway. It is not and never was a way for the passing and re-passing of the public which is the characteristic of a highway.

The jetties erected by the Government of Tasmania were for the convenience of the public and must often have been situated in sparsely populated places. It cannot be said that the jetties were

(1) (1932) A.C. 562, at p. 618.
(2) (1887) 18 Q.B.D. 685, at p. 694.
(3) (1935) 1 K.B. 146, at p. 152.
(4) (1936) 57 C.L.R. 259.

H. C. OF A. 1939.

AIKEN v. KINGBOROUGH CORPORATION.

Starke J.

erected for the purpose of profit, though some money may have been collected by way of tolls or charges. Members of the public were under no obligation to use the jetties, but they could do so for their own convenience or for business if they so pleased, but invitation or licence on the part of the Government in any ordinary sense there was none. The public exercised a sort of common right; the jetty was thrown open for public use. Apart from authority I should feel inclined to say that the law should not and does not in these circumstances impose upon the Government any duty towards the public to repair the jetties or to take reasonable care that persons and vessels using them might do so without danger to themselves or their vessels; the public, I should say, use them at their own risk so long as the Government and its officers do no positive act by which any member of the public comes to harm. But this view cannot be supported in the face of the decision of the Judicial Committee in *R.* v. *Williams* (1). In that case the Government of New Zealand had the control and management of a tidal harbour which the public had a right to navigate without payment of harbour dues. It had erected staiths or wharves for the use and accommodation of vessels frequenting the port and received wharfage and tonnage dues in respect of vessels using them. Alongside the staiths or wharves there was a snag lying at or near the bottom of the harbour, and of this snag and the danger thereby occasioned the Government or its officers had notice but suffered it to remain and gave no warning to the public or masters of vessels using the staiths or wharves. Whilst shifting his berth a vessel using the staiths or wharves, whose master had no knowledge or notice of the danger, struck this snag and was damaged. "The present case," said their Lordships, "differs from the *Lancaster Canal Co.* v. *Parnaby* (2) and *Mersey Dock Trustees* v. *Gibbs* (3), in that their are no harbour dues and the public have a right to navigate subject to harbour regulations but the harbour is under the control and management of the Executive Government which has power to remove obstructions in it. The staiths and wharves belong to the Executive Government which receives wharfage and tonnage dues in respect of vessels using them.

(1) (1884) 9 App. Cas. 418. (2) (1839) 11 A. & E. 230 [113 E.R. 400].
(3) (1866) L.R. 1 H.L. 93.

These are collected by the railway authorities appointed by the Government and the manager of the Railway Department directs where vessels which are to load with coals shall be placed. It appears to their Lordships that this case is within the principle upon which the above cases were decided and upon the facts proved they are of opinion that the law imposes a duty upon the Executive Government to take reasonable care that vessels using the staiths in the ordinary manner may do so without danger to the vessel." A relationship of duty arose between the Government and the owner of the vessel damaged inasmuch as the Government controlled and managed the harbour, which the parties had a right to use, also the staiths and wharves belonging to the Government and for which they received wharfage and tonnage dues. The duty cannot be confined to vessels ; it must cover the lives and limbs as well as the property of the owners using the staiths and wharves in the ordinary manner. The fact, however, of a profit being made or not made makes no difference in principle (*Mersey Docks Trustees* v. *Gibbs* (1)). The principles on which *Lancaster Canal Co.* v. *Parnaby* (2) was decided is thus stated by *Tindal* C.J. : " The common law, in such a case, imposes a duty upon the proprietors, not perhaps to repair the canal, or absolutely to free it from obstruction, but to take reasonable care, so long as they keep it open for the public use of all who may choose to navigate it, that they may navigate without danger to their lives or property . . . they are responsible . . . upon a similar principle to that which makes a shopkeeper, who invites the public to his shop, liable for neglect on leaving a trap door open without any protection by which his customers suffer injury " (3) : Cf. *Latham* v. *R. Johnson & Nephew Ltd.* (4).

So in the case now before us the Government erected a jetty in waters navigable by vessels of light draught and allowed the same to be used by the public under regulation, in some instances possibly without charge and in others subject possibly to various small charges and dues. But in principle the case cannot be distinguished from the decision in *R.* v. *Williams* (5), and when the control and management of the jetties was transferred to the municipalities the same

(1) (1866) L.R. 1 H.L. 93.
(2) (1839) 11 A. & E. 230 [113 E.R. 400].
(3) (1839) 11 A. & E., at p. 243.
(4) (1913) 1 K.B., at p. 412.
(5) (1884) 9 App. Cas. 418.

H. C. OF A. 1939.

AIKEN v. KINGBOROUGH CORPORATION.

Starke J.

relationship of duty arose between these bodies and the members of the public using them. The law imposes a duty on the municipalities to take reasonable care that members of the public who use the jetties might do so without danger to their lives or property. The breach of this duty is established in the present case by the findings of the jury and in the facts which are really undisputed. On the 4th May the clerk of the respondent municipality was informed of the damage to the mooring-pile and at once advised the Public Works Department. But no protection against the danger thus arising was erected around the pile nor was any warning notice of any kind displayed : Cf. *R.* v. *Williams* (1). The standard of care adopted in *R.* v. *Williams* (1) renders consideration of the cases of *Purkis* v. *Walthamstow Borough Council* (2) and *Ellis* v. *Fulham Corporation* (3) unnecessary. It may be that the Judicial Committee did not regard public jetties and wharves in quite the same light as playgrounds and recreation reserves in the later cases.

A further argument must be noticed. Under sec. 231 (6) of the *Local Government Act* 1908 no person is entitled to recover against any municipality in respect of any injury to person or property sustained by reason of the defective condition of any road or portion of any road or land vested in or under the control of the municipality if such road or land were not interfered with by the municipality. But the control and management of the jetty vested in the respondent municipality does not fall within the terms of the section. The jetty is not a road and the land on which the jetty is erected is not vested in or under the control of the municipality. All that is vested in the municipality is the control and management of the jetty.

Finally it was contended that the appellant had not given, within time, the notice of action required by sec. 231 (2) of the *Local Government Act* 1906. Assuming that the jetty may be described as a local work vested in or under the control of the municipality within the meaning of that phrase in sec. 231 (2) as interpreted in sec. 5, still non-compliance with the condition is no bar to the maintenance of an action for negligence if the court is of opinion that

(1) (1884) 9 App. Cas. at pp. 431, 432. (2) (1934) 151 L.T. 30.
(3) (1938) 1 K.B. 212.

there was a reasonable excuse for such non-compliance. On this aspect of the case both the Chief Justice and *Hall* A.J. of the Supreme Court of Tasmania were of opinion that there was reasonable excuse for non-compliance with the section. The notice was somewhat over a month late, but it would have been within time if the *Public Officers Protection Act* 1934, 25 Geo. V. No. 65, had applied to the case. The appellant and his advisers were uncertain as to the authority responsible for the control and management of the jetty and were to some extent misled by information received from the Public Works Department. But they were active in their endeavour to discover the authority responsible for the condition of the jetty and gave notice of action to the municipality and other bodies even before they discovered that the control and management of the jetty was vested in the respondent municipality. In my opinion the appellant had under these circumstances a reasonable excuse for non-compliance with the provisions of sec. 231 (2). The neglect to give the notice within the due time has not in this case, I am glad to note, in any way prejudiced the respondent.

In my opinion the appeal should be allowed, the judgment below set aside and judgment entered for the appellant for £295 in accordance with the verdict of the jury. The appellant should also have his costs here and below.

DIXON J. The question for decision upon this appeal is whether the defendant corporation is liable to the plaintiff in respect of personal injuries sustained by him through falling between a pile or bollard and the decking of a jetty of which the defendant has the control and management. The jetty serves Woodbridge on the D'Entrecasteaux Channel. On Monday, 3rd May 1937, during some heavy weather, a vessel moored to or warping upon a bollard forming the top of a pile at a corner of the jetty pulled the pile a foot or so away from the waling and the decking, leaving a cavity. The plaintiff, who lived on Bruni Island, crossed the channel on 6th May and moored his motor boat at the jetty. On the evening of 7th May, owing to a change in the weather, he decided to move his boat to the other side of the jetty, the side where the pile had been pulled away. It was dark, and in the course of doing so he fell into

H. C. OF A. 1939.

AIKEN v. KINGBOROUGH CORPORATION.

Dixon J.

the cavity and was badly hurt. He says that he was unaware of the existence of the hole, which was neither lighted nor guarded.

The Crown erected the jetty about the year 1882 out of funds appropriated for such purposes. It was erected for the use of the public, that is, as a pier or wharf where craft might be moored, passengers might embark and disembark and goods might be shipped and unshipped. It thus became a lawful wharf or quay for the lading and unlading of goods at Woodbridge ; and, according to what little authority there is, to such a wharf members of the public having occasion for its use are entitled to reasonable access as of common right: Cf. *Bolt* v. *Stennett* (1). Such a right of access is not absolute, and among the conditions to which it is subject is, of course, regulation by or under statute. In 1889, by a proclamation made under the *Roads Act Amendment Act* 1885 (Tas.), sec. 12, the control, management and maintenance of the jetty was vested in the trustees of a road district of which the defendant municipality is the successor in title. The relation of the municipality to the jetty is now governed by Part V. of the *Roads and Jetties Act* 1935 (Tas.). Sec. 53 (1), which is contained in that Part, provides that where (as in the case of the Woodbridge jetty) the control and management of any jetty was at the commencement of the Act vested in the council of any municipality, such control and management shall continue to be so vested. Sec. 54 provides that the council of any municipality may repair, maintain or extend any jetty under its control or management. Under sec. 205 (16) of the *Local Government Act* 1906 the council has power to make by-laws as to a jetty under its control. The by-laws may regulate the time for leaving goods upon the jetty, fix rates and tolls, appoint parts of the jetty for depositing goods and fix charges for vessels visiting the jetty. A by-law had been made by the council under this power.

Although the control and management of the jetty had been so long vested in the council, it appears that in practice all the repairs of any importance which the jetty required were done by and at the charge of the Crown. But repairs of this kind were done at the request of the council, which maintained some sort of supervision

(1) (1800) 8 T.R. 606, at p. 608 [101 E.R. 1572, at p. 1573].

of the jetty and appears to have included among the functions assigned to one of its servants or agents that of caretaker of the jetty. The council clerk was informed on 4th May of the damage done to the wharf, and he communicated with the Director of Public Works on that day. The jury found, however, that the council did not exercise reasonable care to keep the jetty on 7th May reasonably safe for persons who went on it for the purpose of mooring vessels to it and did not take reasonable care in the way of providing a reasonably sufficient guard, light, warning, notice, or other safeguard to prevent the existence of the hole or opening from causing injury to a person using it as the plaintiff did.

It is evident that insufficient time elapsed before the accident for actually repairing the wharf. The repairs needed could scarcely be effected without a pile driver. At all events the delay in the work of repairing the damage was hardly enough to amount to negligence. The failure to light or guard the hole must, therefore, be the ground upon which the defendant's responsibility rests, if the defendant be liable for the plaintiff's injuries. The omission to provide these or any safeguards is a non-feasance, and liability for non-feasance the defendant municipality altogether disclaims. The disclaimer cannot, I think, be supported on the ground that the wharf or jetty is vested in it as a road authority. 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. But prima facie it is outside the category, and there is nothing in Part V. of the *Roads and Jetties Act* 1935 to bring a jetty within it.

The question whether, because the control and management is vested in the defendant council, the municipality fell under a duty of care, by lighting, guarding or warning, to safeguard users of the jetty from the danger caused by the hole must be answered upon general considerations.

The control and management of such a structure spells occupation. The property remains in the Crown, and it might be thought that the occupation of the jetty by the council is merely occupation for and on behalf of the Government. As the Crown is liable for tort, even

H. C. OF A. 1939. AIKEN v. KINGBOROUGH CORPORATION. Dixon J.

so no immunity would be derived from the character of the occupation. But in any case it seems clear enough that the council's control and management gives it an independent authority; in other words, it is an occupier in its own right.

If in any statute any intention can be discovered that the council's control or occupation of the jetty shall or shall not carry 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, that 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 recognized head of liability. *Mersey Docks Trustees* v. *Gibbs* (1) established in reference to public authorities set up as substitutions on a large scale for individual enterprise a presumption in favour of a legislative intention that the liability of such authorities should be coextensive with that imposed by the general law on the owners of similar works. But a powerful consideration in forming that conclusion was the business character of the function entrusted to the corporation set up by statute. That consideration is almost absent in the case of the jetties governed by the Tasmanian provisions. Under those provisions the municipality occupies a work or structure

(1) (1866) 11 H.L.C. 687, at p. 707 [11 E.R. 1500, at p. 1508]; L.R. 1 H.L. 93.

which it does not own. Its occupation is for very restricted purposes. It may maintain, repair and extend the jetty or wharf. Under the power to make by-laws, it may regulate the use of the jetty and, for some forms of use, levy tolls and charges. Its control and management enables it to give directions when and where boats should moor and people should go, to exclude persons who go upon it for purposes not belonging to a jetty and to take measures for the safe custody of goods and for the safety of persons. But all this must be done in the public interest, and the council has none of the general rights or privileges of ownership. It is difficult to find in the provision by government of a wharf or jetty for a small coastal or waterside township in Australia any substitution of a public or corporate undertaking for the work of individual enterprise. The Mersey Docks Trustees may, in 1866, have looked like a governmental substitute for a dock company, but at no time could it have seemed possible that a jetty, at such a place as Woodbridge, was anything but a government or municipal work. At the same time the result of the statute is to give into the control and management, that is the occupation, of the municipality premises used by the public as of common right and to arm the municipality with all the powers and authorities needed to make the use of the premises safe. For a public body to stand in such a relation to premises devoted to public use is no longer exceptional. Parks, gardens, playgrounds, shelters, swimming-pools, public picture galleries and public libraries are examples of places which are not highways but to which members of the public may go as of right. More often than not the care and management of, if not the property in, such places have been vested by or under statute in a corporation or in trustees who are obliged to give free access to the public, but who have full powers of maintenance and repair, as well as of management. The nature of the body as well as of the place must be considered, but, speaking generally, unless some other intention can be collected from the statute, a duty of care for the safety of those using the place must, I think, be cast upon the corporation or trustees by the very situation in which the statute has put them. They are in charge of a structure provided for the use of people who must, in using it, rely upon its freedom from dangers which the exercise of ordinary care on their own part

H. C. OF A. 1939.

AIKEN v. KINGBOROUGH CORPORATION.

DIXON J.

would not avoid. Unless measures are taken to prevent it falling into disrepair or dilapidation or becoming defective, or if it does so, to warn or otherwise safeguard the users from the consequent dangers, it will become a source of injury. 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 and from the reliance which is ordinarily placed upon an absence of unusual or hidden dangers by persons making use of structures or other premises provided for public use. The general grounds for regarding the situation as throwing a duty of care upon the public authority appear in the already well-known statement of Lord *Atkin* in *Donoghue* v. *Stevenson* (1), and the more particular application of the principles there formulated to occupiers of premises will be found in a passage in the judgment of *Bowen* L.J. in *Thomas* v. *Quartermaine* (2) :—" The common law imposes on the occupier of premises no abstract obligation at all as to the state in which he is to keep them—provided that he carries on no unlawful business and is guilty of no nuisance. In the case of premises that contain an element of danger, a duty arises as soon as there is a probability that people will go upon them : but it is a duty only towards such people as actually do go. It is not a duty in the air, but a duty towards particular people. The occupier is bound to use all reasonable care to prevent such persons from being hurt. It is obvious that this duty must vary according to the character of the danger, and the circumstances under which the premises are to be visited. It differs in the case of hidden dangers, and the case of dangers that are palpable and visible : it may vary according to the age and comprehension of the visitor : in the case of bare licensees, and of those who come on the premises on the occupier's business and at his invitation. The only obligation on the occupier is to take such precautions as are reasonable in each instance to prevent mischief, and this is but the adaptation to a special case of the general doctrine *sic utere tuo ut alienum non laedas*." But it is one thing to impute in general terms a duty of care and another to define its measure. It is commonly said that the occupier of premises has a distinct and

(1) (1932) A.C., at pp. 579-582. (2) (1887) 18 Q.B.D., at pp. 694, 695.

different measure of duty for three classes of persons coming upon them and three only, invitees, licensees and trespassers. This classification disregards the distinct measure of duty which an occupier incurs to one who obtains admission by paying for it, the typical case of the man who pays for admission to a spectacle or an amusement (*Francis* v. *Cockrell* (1)). It omits the different measure of duty in respect to the safety of the premises which a master owes to his servant: Cf. *Jury* v. *Commissioner for Railways (N.S.W.)* (2). I think it also fails to take into account the duty of care owing by an occupier of premises to members of the public coming thereon as of common right. There has recently been an attempt to refer cases of this sort to one or other of the categories of the threefold classification, an attempt made out of deference to the authority with which it has been declared that no more than three classes can exist. Cases have arisen out of accidents in children's public playgrounds and the like, and these it has been sought to place either in the category of invitor and invitee or of licensor and licensee (*Purkis* v. *Walthamstow Borough Council* (3) ; *Ellis* v. *Fulham Corporation* (4) ; *Coates* v. *Rawtenstall Corporation* (5))—Cf. *Nickell* v. *City of Windsor* (6) (a public library) and *Pettiet* v. *Municipal Council of Sydney* (7) (a park). But in *Purkis*' *Case* (8) the present Lord Chancellor expresses a " strong inclination to hold " that such a case is outside the three categories and involves a separate measure of duty, because the corporation is in a different position, exercising powers in the interests of the public and providing playgrounds upon which children have a qualified right to enter in accordance with the regulations. A consideration of the nature and foundation of the duty of a licensor to a licensee and of an invitor to an invitee appears to me to show that his Lordship's view is clearly right. An occupier who grants a bare licence to enter upon his premises incurs a very low measure of duty for the safety of the licensee, because the former is conceived as voluntarily conceding a benefit or privilege to the latter. I repeat what I said on a former occasion :—" The foundation of the

(1) (1870) L.R. 5 Q.B. 184, 501.
(2) (1935) 53 C.L.R. 273.
(3) (1934) 151 L.T. 30.
(4) (1937) 157 L.T. 380; (1938) 1 K.B. 212.
(5) (1937) 157 L.T. 415.
(6) (1927) 1 D.L.R. 379.
(7) (1936) 36 S.R. (N.S.W.) 125; 53 W.N. (N.S.W.) 52.
(8) (1934) 151 L.T., at p. 34.

H. C. OF A. 1939. AIKEN v. KINGBOROUGH CORPORATION. Dixon J.

doctrine governing the liability to licensees is the view that, as the licensee resorts to the occupier's premises for his own benefit alone, the occupier should not be expected to take any particular precaution to avert the consequences which arise from the nature or condition of the premises of which the licensee seeks gratuitous use, but, on the other hand, that, if the occupier knows that the premises in his control contain a hidden danger as to the existence of which he would expect the volunteer to be deceived when he availed himself of the occupier's permission, then the latter ought to undeceive him or take some reasonable precautions for his safety from the concealed peril. . . . The analogy of gratuitous loans and gifts of chattels which the lender or giver knows to conceal a danger seems to have affected this branch of the law (see per *Willes* J. in *Indermaur* v. *Dames* (1) and in *Gautret* v. *Egerton* (2)). But in such cases it is enough if the giver of the thing 'knew its evil character *at the time*, and omitted to caution the donee (*Blakemore* v. *Bristol and Exeter Railway Co.* (3))'" (4). The duty of care arises from the grant of permission or licence to enter. From the very foundation of the duty it necessarily follows that knowledge of the danger on the part of the occupier and ignorance on the part of the visitor are essential conditions of liability in the case of a bare licence. Though not a few instances may be found where by a slip or through looseness of statement the duty has been judicially described as if means of knowledge as opposed to knowledge of the defect or danger were enough to fix the licensor with liability, to extend an occupier's duty of care for the safety of a licensee beyond precautions against dangers of which the occupier is aware is to depart from principle, principle which, before the present chaos overtook the law of torts, was regarded as settled. "To create a cause of action something like fraud must be shown. . . . Every man is bound not wilfully to deceive others, or to do any act which may place them in danger" (per *Willes* J. in *Gautret* v. *Egerton* (2)). Again, the duty is fully discharged once the licensee is made acquainted with the existence of the concealed danger. The licensor's duty is simply to take reasonable care to prevent the licensee's relying on

(1) (1866) L.R. 1 C.P., at p. 286.
(2) (1867) L.R. 2 C.P. 371, at p. 375.
(3) (1858) 8 E. & B. 1035, at p. 1051 [120 E.R. 385, at p. 391].
(4) (1932) 46 C.L.R., at p. 565.

a deceptive appearance of safety and thus suffering injury from a danger of which the former is aware and the latter is not.

To my mind none of the considerations upon which this standard of care depends is found in the relation of an occupier of premises held for public purposes to members of the public who come there as of right. The visitor, as I may call him, who comes in exercise of a common right, does not fill the exceptional position of a person seeking the gratuitous use of another's property. He does not gain admission by grace. The occupier is not giving a voluntary permission for the use of what otherwise is his beneficially, throwing no higher duty upon him than to undeceive the visitor about hidden perils he would not expect, or if, and only if, he does not undeceive him, to take measures for his safety therefrom. The member of the public, entering as of common right is entitled to expect care for his safety measured according to the nature of the premises and of the right of access vested, not in one individual, but in the public at large.

On the other hand, the duty of the invitor to an invitee is determined by considerations which are hardly applicable. The governing consideration is found in the character in which an invitee comes upon the premises and in the interest of the occupier in giving the invitation. Whether the invitation be express or implied, general or particular, it arises from reasons of business or is connected with some other actual or potential advantage to the occupier. The object of the visit is incidental to matters in which the occupier has a pecuniary or material interest: Cf. *Lipman* v. *Clendinnen* (1). In such a case it is not fatal to the visitor's claim that he was aware of the danger and the occupier's duty is not conclusively fulfilled by warning him. On the occupier's side, it is enough that the danger is unusual and is one of which he ought to know. But, although the considerations giving rise to the particular measure of duty are somewhat different, the measure itself is thought appropriate to those who enter as of right by Professor *Winfield*, whose work contains a discussion of the problem (*Text-book of the Law of Tort* (1937), pp. 596-600). If, as Lord *Bowen* said in the passage I have set out, the duty varies according to the circumstances in which the premises are to be visited, it seems plain that the exercise of a public

(1) (1932) 46 C.L.R., at pp. 558, 559.

H. C. OF A. 1939. AIKEN v. KINGBOROUGH CORPORATION. Dixon J.

right of access calls for a measure of care in which, on the one hand, knowledge on the part of the occupier of the existence of the danger is not an essential condition, and, on the other hand, the visitor is not entitled to expect that premises shall be provided free even of dangers which are apparent. "The only obligation on the occupier is to take such precautions as are reasonable in each instance to prevent mischief" (1).

What then is the reasonable measure of precaution for the safety of the users of premises, such as a wharf, who come there as of common right? 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.

The findings of the jury in the present case mean that the defendant municipality did not fulfil this obligation.

An attempt was made to show that the plaintiff had broken a by-law or regulation against allowing a vessel to occupy a berth at the jetty for more than twenty-four hours. But, even if he had so offended, he was lawfully upon the jetty in the course of moving his boat when the accident occurred.

When it is intended to bring an action against a council for damages for an injury sustained by reason of the negligence of the council in respect of a local work, sec. 231 of the *Local Government Act* 1906 (Tas.) requires the plaintiff within three months from the date of the injury to give notice in writing that the injury has been sustained. The present plaintiff failed to give notice within this period. A sub-section, however, provides that non-compliance shall not be a bar to the action if the court or the judge before whom the action is tried is of opinion that there was reasonable excuse for such non-compliance. Under the reservation of the case pursuant to sec. 17 of the *Supreme Court Civil Procedure Act* 1932 (Tas.), the question whether there was reasonable excuse for non-compliance became one for the Full Court of the Supreme Court. For I do not think that the reference contained in sec. 231 (1) of the *Local Government Act* 1906 to the opinion of the court or judge at the trial should

(1) (1887) 18 Q.B.D., at p. 694.

be understood as taking the question out of the ordinary course of procedure and confiding it to the individual decision of the judge at the trial to the exclusion of the Full Court hearing a reference or an appeal: Cf. *Powell* v. *Lenthall* (1).

A majority of the Full Court were of opinion that there was reasonable excuse for failure to give the defendant council notice of injury within three months. The circumstances upon which the correctness of that opinion depends are set out in full in the statement of facts upon the reservation. It is unnecessary to do more than mention the chief points. The plaintiff, while still in hospital, instructed his solicitors to claim damages, as I gather, from the responsible authority, whoever that might be. The instructions were given on 22nd May 1937. His solicitors at once set to work to discover in whom the jetty was vested. After finding the relevant legislation, they sought information from the proper officers of the Hobart Marine Board and the Public Works Department. By a responsible officer of the latter, who made a search, they were assured that no proclamation vesting the jetty in the municipality had ever been made. They formed the opinion that the Marine Board was the responsible authority and prepared to sue the board and the Crown. In his judgment *Inglis Clark* J. says that they did not abandon the intention of suing the municipality. It does seem clear, however, that the Marine Board was the defendant whom they proposed to sue as primarily responsible. The Crown had done repairs at the instance of the municipality, which had exercised some *de-facto* control, and it may be that it was thought wise to join these parties in any case so that the board would not attribute the fault to them in their absence. At all events, there can be no doubt that the plaintiff's solicitors believed that no steps had been taken under the statute to vest control and management of the jetty in the municipality. If this was the cause of the failure to give notice of injury within the prescribed time, I feel little doubt that it was reasonable. Against its reasonableness it is said that the council had made by-laws which were exhibited at the jetty and that an inquiry from the council clerk would have shown that the by-law-making power had been exercised and where the by-laws were to be found. In any case, it is said, Gazettes ought to have been searched.

(1) (1930) 44 C.L.R. 471, at pp. 476, 477.

H. C. OF A. 1939. AIKEN v. KINGBOROUGH CORPORATION. Dixon J.

The degree to which reliance might properly be placed on the answer of the Public Works Department is a matter upon which the Supreme Court of Tasmania is in a better position to judge than we can be. If it is ordinarily considered safe to depend on the department's records in matters of such a description and on the searches of a responsible officer, it seems to me that it would be reasonable to rest satisfied without pursuing further the question whether control had been vested in the council.

But the matter upon which I have felt more doubt is whether the real cause of the omission to give the notice was not some view held by the solicitors that the only notice necessary was that required under the *Public Officers' Protection Act* 1934, sec. 4, which specifies somewhat different conditions. Notice complying with this provision was in fact given, but after 7th August 1937, when the three months from the date of the injury had expired. There was an inquiry made of the council clerk on 9th August 1937 about vesting of control and by-laws, but this, it appears, was made for the purposes of a case for counsel's opinion.

If an omission to give notice is brought about by a combination of matters, it may be difficult to disentangle the causes without which the omission certainly would not have occurred. But, if it is satisfactorily made out that, but for the mistaken information from the Public Works Department, notice would have been given within three months, that amounts to cause, and, as I have said, the cause, in my opinion, is reasonable.

A majority of the Supreme Court was satisfied of the operative effect of the mistaken information in causing the omission, and I am not prepared to say that their conclusion was wrong in fact. In my opinion we should adhere to the view of the majority that there was reasonable cause for the non-compliance with sec. 231 (1) of the *Local Government Act* 1906. It is, in this view, unnecessary for me to consider the two further contentions raised on behalf of the plaintiff, namely, (1) that a jetty is not a " local work " within the meaning of sec. 231, and (2), that sub-sec. 1 of that section is impliedly repealed or rendered inapplicable by the enactment of the *Public Officers' Protection Act* 1934. But I am not prepared at present to agree in either of the contentions.

In my opinion the appeal should be allowed with costs. The order of the Full Court should be discharged. The order of *Inglis Clark* J. of 24th August 1938, which depends on that of the Full Court, should also be discharged. In lieu of the order of the Full Court, it should be ordered that judgment be entered for the plaintiff against the defendant municipality for £295 and that the costs of the action and of the reference of the Full Court be reserved for the trial judge to whom the action should be remitted to dispose of all questions of costs.

McTIERNAN J. I agree, and for the reasons given by the Chief Justice, that the appeal should be allowed.

Appeal allowed with costs. Order of the Full Court and judgment of Clarke J. of 24th August 1938 *set aside except as to order that the plaintiff pay the costs of the Attorney-General. Judgment for the plaintiff against defendant municipality for* £295 *with costs including costs of reference to Full Court.*

Solicitors for the appellant, *Simmons, Wolfhagen, Simmons & Walch.*

Solicitors for the respondent, *Finlay, Watchorn, Baker & Turner.*