ROADING LAW AS IT APPLIES TO UNFORMED ROADS

B E HAYES

Requests for further copies may be directed to:

Policy Publications
MAF Policy
PO Box 2526
Wellington
New Zealand

Tel: +64-4-894 0252

Email: policy.publications@maf.govt.nz

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About the author

Brian Hayes has spent a professional lifetime in land law. He was Registrar-General of Land from 1980 to 1996, having been a District Land Registrar since 1967. He has published on a wide range of land law topics and was a founding author for Butterworth's *Conveyancing Bulletin*. He is a barrister and solicitor (a graduate of Otago University) and, as an angler and a hunter, has a keen interest in the outdoors.

Preface

When New Zealand became a separate colony in 1840, the law of the United Kingdom became – so far as it would apply – the law of New Zealand (The English Laws Act 1858). No reference to an imperial statute relating to roads passed after 18 January 1840 has any effect in New Zealand. However, the Highways Act 1835, the statutory law in England in 1840, according to Short's *Roads and Bridges*, was held never to have been in force in New Zealand.[1] As a result, the law in New Zealand is based on that part of the English law applicable to the circumstances of the colony in 1840, as altered by the law of New Zealand since 1840.

The concept of a "highway" – a public way – is central to the law on roads, and applies to all roads, whether across land or along water boundaries; whether formed or not; and whether physically usable or not. (Some roads that have been legally constituted but not formed are not suitable for passage,[2] the theory of the law prevailing over practicality.) The focus here is on the law applicable to highways, and any special attributes of the law relating to unformed roads originally laid out over Crown land.

The terms "road" and "highway" date from the earliest recording of English law. As used in New Zealand, the terms generally refer to formed passageways in public use maintained by the Crown or local authorities. However, a road or highway need not necessarily be formed or maintained. Indeed, when the roading network was progressively established from the middle of the ninetieth century hardly any legally constituted roads were formed or made.[3] The essential law relating to roads and highways does not differentiate, and never has differentiated, between formed and unformed roads.

To avoid doubt, the following classes of road, which do not meet the criterion of Crown ownership of the land at the time when first legalised as road, are excluded from discussion:

- road created by the dedication of landowners;

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[1] W S Short, *A Treatise Upon the Law of Roads, Bridges, and Streets in New Zealand.* Timaru Post Newspaper Co Limited, 1907, at p4.

[2] Some paper roads (i.e. roads drawn on plans but not surveyed on the ground) are intersected by cliffs and other natural obstructions. These obstacles do not detract from the legal character of the road so that the ordinary law as is explained, so far as it may be applicable in the circumstances of the case, continues to apply. A cliff may intersect a road but the land above and extending at the foot of it is legally road.

[3] "In nearly every case [in the nineteenth century] where land is Crown-granted, and described as bounded by a road, the road at the time when the land was granted was not made": *Williams J in Mueller v Taupiri Coal Mines Ltd* (1900) 20 NZLR 89 at p110 (parenthesis added).

- road vested under the provisions of the Counties Amendment Act 1961, the Municipal Corporations Act 1954, the Local Government Act 1974, and the Resource Management Act 1991;
- road taken or set apart under the Public Works Act 1981 or any earlier Public Works Act or equivalent Act.

In addition, the term "road" (as described in s 316 Local Government Act 1974 and s 44 Transit New Zealand Act 1989) for present purposes does not include:

- any government road;
- any state highway outside urban areas;
- any roads in respect of which the Minister of Local Government is deemed to be the council;
- any regional road (s 316 Local Government Act 1974 and s 44 Transit New Zealand Act 1989).

This discussion is generally predicated on the laying out of unformed rural roads, for most of these roads are in rural areas. Unformed roads may, however, be laid out in former boroughs and cities. Although municipalities have had title to streets since 1876, before that date the Crown held title to all highways in municipalities, which were then and subsequently called "streets", and unformed streets could be laid out. All highways in former cities and boroughs are now legally roads (see Key Elements of Current Law, below), so in general the same principles apply to former unformed streets in cities or boroughs as apply to unformed roads.

Roads along water are subject to the law on natural boundaries and may be affected by accretion and erosion. Greater detail is provided in *Elements of the Law on Movable Water Boundaries*, Hayes, 2007, Ministry of Agriculture and Forestry, PO Box 2526 Wellington, available on www.walkingaccess.org.nz. The historical relationship of roads to other forms of waterside reservation providing public access is dealt with in *The Law on Public Access Along Water Margins*, Hayes, 2003, also available at the above website.

Brian Hayes

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Summary

In New Zealand almost all roads when first legally constituted were unformed. This was inevitable in a pioneering society where the settlers' demand for services, surveying, and access and title to land outstripped the capacity of both central government and the provincial governments to provide for these needs.

In the era of provincial government (1854–1876) the demand for land was such that the standards originally set for settlement, which were meagre enough, had to be loosened further so that settlement would not be held back. Crown land was subdivided on paper plans rather than plans of survey executed on the ground. A system of sale before survey was introduced. And, as most of the good land was taken up by the settlers, paper roads rather than surveyed roads laid out on the ground were also permitted as part of the subdivisional explosion. It is not surprising that from an historical perspective, the law on formed and unformed roads is in material respects the same law.

This commentary explains:

- the nature of the "Queen's highway";
- what the free right of passage is;
- why the current statute law is dominant in roading practice;
- why the statute law does not differentiate between formed and unformed roads;
- the special character of roads along rivers, lakes and the sea.

In addition, it provides an historical perspective on:

- practices in the early days of settlement and in the provincial government period (1854–1876);
- early uncertainties and recent developments on the ownership of roads;
- how leading decisions of the courts including the Privy Council have clarified the law;
- the exclusion of privately created roads from the legal class of unformed roads.

The commentary also removes some common uncertainties by making clear that:

- no rights may be acquired by occupancy, use, or care over any road whether formed or unformed;
- no public way may be acquired by use, however longstanding.

The role of territorial local authorities (the local councils) is referred to in relation to:

- powers and obligations;
- repairs and maintenance – principles applying to unformed roads and to former highways now in secondary use;
- the stopping of roads by councils and by ministerial authority, and the reason for the separation of these powers to stop roads;
- bylaws, and the limitations inherent in the existing statutory law on bylaws.

Suggestions for reform are focused on local management and control, and advocate an improved role for councils by:

- creating a statutory scheme to empower the creation of bylaws specifically to apply to unformed roads;
- providing for a means to alter access routes in a controlled setting.

Key elements of current law

New Zealand's network of unformed roads was established in the nineteenth century under statutes of the General Assembly and of the Provincial Councils. The origin of the unformed roading network has a special place in New Zealand law which should also be explained. However, for the purpose of discussion, most of the New Zealand statute law in force when the unformed roading network was laid out in the nineteenth century may be discarded in favour of the law now in force.

Section 315 of the Local Government Act 1974[1] and s 43 of Transit New Zealand Act 1989[2] provide the focus of current law applying to roads, formed and unformed.

In *Fuller V MacLeod* (1981) 1 NZLR 390 CA at p395 Richardson J, when dealing with common-law rights of access to the highway, preferred to concentrate on the provisions of the consolidating statute in force at the relevant time, rather than tracing the history of the various sections and the cases decided under them. In support of this observation he quoted Lord Wilberforce, who said in *Farrell v Alexander* (1977) AC 59, 73; (1976) 2 All ER 721, 726:

> …self-contained statutes, whether consolidating previous law, or so doing with amendments, should be interpreted, if reasonably possible, without recourse to antecedents, and … recourse should only be had when there is a real and substantial difficulty or ambiguity which classical methods of construction cannot resolve.

A vast sweep of historic law applying generally to roads becomes largely irrelevant to present-day unformed roads if the observations of Richardson J and Lord Wilberforce are applied. Appendix A offers a simple illustration of this process. The appendix sets out, not exhaustively but nearly so, the statute law relating to roads and streets in force in 1905, when the unformed roading network had largely been established. With the exception of s 3 of the Public Works Amendment Act 1905,[3] the list includes no statutory provisions relating exclusively to unformed roads and does not differentiate between formed and unformed roads or streets. Section 245 of the Counties Act 1886 is the only other provision which specifically refers to unformed roads:

> 245. The County Council shall have the care and management of all county roads within the meaning of "The Public Works Act, 1882."
>
> The said Council shall and may exercise such control over all the said roads, although the same may not have been formed or made.

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[1] See Appendix B.

[2] See Appendix C.

[3] Section 3 provides that a majority of owners adjoining an unformed road may petition the council for formation, but at their own cost.

All the statutes listed in Appendix A are either repealed or subsumed into current legislation and so need not be considered.

However, the theory the judges expound may not be completely applied, for the two principal roading statutes now in force are not self-contained, and to some extent are common-law dependant. In this latter respect some current roading law has an historical origin, and cases decided on the early statutes provide an explanation of the law as it is today.

The right of free passage

In New Zealand as in England, "… the crucial distinction is that a public highway is a public right of way… Though the highway is sometimes described as the Queen's Highway, this refers to the right of all subjects to pass over it and not to any rights of ownership in the Crown".[4] Although from early settlement in New Zealand the Crown was the proprietor of all public roads in counties whether formed or unformed,[5] in 1972 title in county roads was divested in favour of the then territorial local authorities. The rights of citizens were not affected by the change of ownership.

The concept of a "Queen's Highway" is in law more far-reaching than may be generally thought. As the term is the origin of the right of free passage, a brief reference to antiquity may provide an understanding not imparted by any statute old or new, by any modern text, or for that matter by the decisions of the New Zealand courts.

> The term "highway" is of a very ancient date, and the references in the "Book of Numbers" to the road through which the children of Israel are reported to have desired to pass through the land of Edom is translated in our version of the Bible as "The King's Highway". A road was originally called in England "The King's Highway"; for the first roads made in England, of which we have any record, bore that title. The term appears to have arisen in the time of Molincius, a King of the Ancient Britons, who decreed that there should be roads or ways of succour by which persons who had committed some trespass could flee in safety to a temple or other place of security, and such ways were provided accordingly. Those ways were, however, not sufficiently defined, and strife arose in consequence, so that when his son Belinus became King, he defined four great roads, the longest of which was from Cornwall to Caithness; and these roads were called "King's Highways." The term "Highway" was afterwards applied in law to any public road that was of sufficient size to warrant the title, and even now a road is often spoken of in popular language as "The King's Highway". The term "Public Highway" generally meant a public way for carriages and other kinds of traffic; but it did not necessarily have so wide a meaning; and it sometimes meant a bridle road or way for horse traffic only … In English law a road is usually referred to either a "highway", a "turnpike road", a "main road", or a "street", but the term "highway" was the common term applicable to and comprehending all public ways, and

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[4] *Boundaries and Easements*, Colin Sara, Sweet & Maxwell, London 1991 at p111.

[5] There was an early period when ownership was not clear but the matter is now beyond doubt; s 79 Public Works Act 1876 and later legislation – pages 13–15 below.

> it included a way over or through both private or common lands which the public had a right to use, by prescription, dedication, or Act of Parliament. In New Zealand law the term "road" has practically the same meaning as "highway" in English law.[6]

In New Zealand until recently there were two main divisions of public ways: roads and streets. The term "roads" was generally used comprehensively to refer to all roads, streets, thoroughfares, highways, carriageways, bridle paths, footpaths, tracks, and other public rights-of-way outside the limits of cities or boroughs. "Streets" referred to all similar things within the limits of a city or borough. These two terms have generally been used in this way in New Zealand law (see *Borough of Onslow v City of Wellington*, 22 NZLR, p926)

The Local Government Act 1974 as enacted by the local Government Amendment Act 1978 preferred the universal term "road" and discarded "street". At statute law there are now no "streets" except that in an historical sense streets continue to exist as urban highways, and are popularly known as streets in towns and cities. At law all highways are now "roads".

Section 315 of the Local Government Act says:

> **Road** means… land which immediately before the commencement of this Act was a road or street or public highway…

The Local Government Act does not explain the terms "road", "street", and "public highway" further. Section 43 of the Transit New Zealand Act 1989 offers some guidance:

> **Road** means a public highway, whether carriageway, bridle path, or footpath; and includes the soil of —
>
> (a) Crown land over which a road is laid out and marked on the record maps …
>
> (b) Land over which a right of way has in any manner been granted or dedicated to the public by any person entitled to make such grant or dedication:…

Terminology and the law

A consideration of the terms "public highway", "carriageway", "bridle path" and footpath", and for completeness a comment on "streets", form the basis of an understanding of New Zealand law on roads.

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[6] Short's *Road and Bridges*, 1907 (pv above, p4 of his text). Short was a qualified lawyer, a commissioner under the Commissioners Act 1903, the Public Works Act 1905, the Municipal Corporations Act 1900, and other Acts. At the time of publication he was Chief Clerk of the Department of Roads and had specialised in the law relating to roads in New Zealand for 23 years. His text is perhaps the most comprehensive on roads ever written in New Zealand and his style is crisp and authoritative. Regrettably, he does not deal extensively with historic law for his emphasis is on the law in force at the time of writing.

In English law a "public highway" is the common term applicable to all public ways. A road is a public highway providing a right of free passage for the public. The courts have always provided rigorous protection for the right of passage. Recently, in delivering the judgment of the Court of Appeal in *Man O'War Station v Auckland City Council* (2000) 2 NZLR 267 at 272 Blanchard J said:

> Until 1 January 1973 all land becoming road was vested in the Crown (s 111 of the Public Works Act 1928). From that date, with certain exceptions of no present relevance, roads were vested in fee simple in the local authority under s 191A of the Counties Act 1955 and, from 1 April 1979, under s316 of the Local Government Act 1974. Despite the vesting in the local authority the *right of passage over a road is one possessed by the public, not the local authority, which holds its title and exercises its powers in relation to a road as upon a trust for a public purpose (Fuller v MacLeod* [1981] 1 NZLR 390 at p414 quoting from the judgment of Somers J in the Court of Appeal). [Emphasis added.]

The terms "carriageway", "bridle path" and "footpath" appear as alternative components of "public highway" in s 79 of the Public Works Act 1876. This statute was the first having national application to roads, and the forerunner to s 43 of Transit New Zealand Act 1989.

The term "carriageway", which has its origin in English common law, refers to that part of a public highway intended for vehicular traffic.

Bridle paths and footpaths also have a place in English common law. In *Boundaries and Easements* (above at p4), Colin Sara at p123 notes that "in most cases footpaths and bridleways are ancient…". At common law, the owner of private land may dedicate footpaths and bridle paths to public use by allowing public access.

Footpaths and bridle paths have never been established in New Zealand by ancient practice. In its opening words defining the term "road", s 79 of the Public Works Act 1876 is virtually identical to s 43 of the Transit New Zealand Act 1989. The definition has remained materially unabridged in its passage through seven statutes: s 78 of the Public Works Act 1882, s 100 of the Public Works Act 1894, s 101 of the Public Works Act 1905, s 101 of the Public Works Act 1908, s 110 of the Public Works Act 1928, s 121 of the Public Works Act 1981, and thence to s 43 of Transit New Zealand Act.

Section 79 of the 1876 Act begins: "The word 'road' means a public highway, whether carriage way, bridle path or footpath, and includes the soil of…"

On the basis of the statutory definition, the term "road" has been interpreted to mean:

> a public highway, whether *used* as a carriage way, bridle path, or footpath, or *intended* to be used as such, and it includes the soil thereof…[7] [Emphasis added.]

[7] Short's *Roads and Bridges*, 1907 (pv above), at p8 of his text.

In the nineteenth century the Crown, as the original subdivider of land, invariably laid off roads at a width suitable for carriageways, that is, one chain.

> The Government is not bound by any law in sub-dividing Crown lands for sale or lease to make the roads or streets giving access to such lands of any specified width, and the section of the Public Works Act referring to the matter cannot therefore be enforced against the Crown. As a matter of practice, however, the roads giving access to Crown Lands are usually laid off one chain wide, except in special cases, such as in townships, where the main street may be wider. In a few cases also of the subdivision of land under the Lands for Settlement Act, owing to special circumstances, the roads are less than one chain wide. The Crown also is not bound to form or metal the roads or streets so laid out; and, although the Crown frequently does form such roads, and sometimes metals them, or makes grants of money for such purposes, the local authority cannot compel the Government to do so, or, in fact, to form or metal a road or street in any specified way whatever.[8]

Towards the end of that century, private developers were able to subdivide land without formally dedicating roads as legal highways, and began laying off narrow roads. The Public Works Amendment Act 1900 required private subdividers to provide legal roads to any allotment intended for sale. Any road fronting new allotments had to be one chain wide. The policy of the Government at that time was to prevent the private establishment of narrow roads: New Zealand was to be a land of broad highways. That policy was subsequently modified to allow narrower roads to be laid off in urban areas.

The terms “bridle path” and “footpath” as used in New Zealand statutes are most likely a codification of the English common law. In the provinces there are examples of specific statutory provisions for bridle paths and footpaths.[9] Such roads in New Zealand if laid off over Crown land would be specifically laid off and noted as such on the Crown grant record plans.

However, roads laid off over Crown land, whether across land, alongside rivers, around lakes, or along the coast, are almost always of the carriageway width of one chain. Unless a road is positively documented as a bridle path or a footpath, a full right of passage with or without vehicles may be assumed. No other solution appears workable, given that notations on the original Crown grant record plans for bridle paths or footpaths rarely exist.

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[8] Short’s *Roads and Bridges*, 1907 (pv above), at p196 of his text.

[9] Section 28 of the Westland Waste Lands Act says:

28 Reserves for public highways bridle-paths and foot-paths shall be made by the Waste Lands Board and shall be set forth on the authenticated maps in the Land Office of the County.

See also Section XVII Southland Waste Lands Act; and The Bridle Road Protection Act 1860, Nelson Province.

In the context of unformed roads, a somewhat unusual provision referring to "roads or tracks" over Crown land or Māori land may have greater significance than the question of bridle paths or footpaths. Section 245 of the Counties Act 1886 provides that:

> …all lines of roads or tracks passing through or over any Crown lands or native lands, and generally used without obstruction as roads, shall, for the purposes of that section be deemed to be public roads under the control of the County Council in whose district they may be situated, notwithstanding that such lines of roads have not been surveyed, laid off, or dedicated in any special manner to public use.

This is a peculiar enactment. No other Act contains a provision whereby such roads are "deemed to be public roads". And as they are not apparently public roads within the meaning of the Public Works Act (now s 43 Transit New Zealand Act 1989), they are public roads in a restricted sense only.

This provision was brought forward as s 153(3) of the Counties Act 1908, s 155(3) of the Counties Act 1920, and s 191(3) of the Counties Act 1956, but it expired when the Local Government Amendment Act 1978 repealed s 191 of the Counties Act 1956. Any such road created prior to the enactment of the Local Government Amendment Act 1978 would continue to exist as a public road.

What is an unformed road?

As the focus of this commentary is on unformed roads, some reference should be made at the outset to the physical nature of "unformed roads". There is no statutory definition, but s 2 of the Local Government Act 1974 provides a definition of formation:

> **Formation**, in relation to any road, has the same meaning as the construction of the road, and includes gravelling, metalling, sealing, or permanently surfacing the road; and **form** has a corresponding meaning:

So an unformed road is one which neither the Crown nor the council has formed in accordance with the definition. There may be some formation, as of a track, say, running alongside a river, but if no work of the kind indicated in the definition has been undertaken, the road is "unformed".[10] A comprehensive definition of "unformed road" is suggested at (below at p48).

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[10] There are some cases which provide limited assistance in establishing the meaning of "formation": *Mayor of Palmerston North V Casey* (1925) NZLR 879 (CA), and *Jones v Lower Hutt City Council* (1966) NZLR 879.

The law applies to formed and unformed roads

The generality of the definitions in both the Local Government Act and the Transit New Zealand Act points to a universal application of statutory principles for all roads whether formed or unformed. On the face of it, "Crown land over which a road is laid out and marked on the record maps" would include all roads including unformed or paper roads. For a road to be "laid out" on Crown land, the road-line must be demarcated on the ground – that is, generally pegged.

However, many early roads were simply shown as roads on the plan of Crown subdivision – there was no physical laying out on the ground. Section 43 of the Transit New Zealand Act 1989 clearly establishes that roads which are demarcated on the ground and marked on the record maps are legal roads. *Snushall's* case (below at pp10, 22) establishes on the authority of the Privy Council that roads shown on a plan of Crown subdivision under the authority of a statute or provincial ordinance or regulations but not physically laid out on the ground – in other words, "paper roads" – equally may be legal roads.

From early times all public roads whether formed or not were shown as burnt sienna (brown) on the Crown grant record sheets, providing instant confirmation of their legal status. When a road has once been made or has become a public road, the right of the public to use it as a public road continues forever unless it has been legally stopped by process of law, for "once a highway, always a highway".[11] (See *Mackay v Lynch*, 3, NZLR, SC, 425; and also *Cherry v Snook*, 12 NZLR, 54; *Martin v Cameron*, 12, NZLR, 769; *Hughes v Boakes and another*, 17 NZLR, 113; *Borough of Onslow v Rhodes and another*, 23, NZLR, 653; 6, Gaz. L.R., 336; and *Borough of Lower Hutt v Yerex*, 24, NZLR, 697.)

An unformed road is a highway and as good as any other road. Any doubt that unformed roads were in some way inferior to formed roads has long been dispelled by the decisions of the Supreme Court (then the High Court) and the Court of Appeal, both of which were confirmed by the Privy Council in *Snushall v Kaikoura County* (1840-1932) New Zealand Privy Council Cases 670 (below at p22).

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[11] This historic aphorism which cites a fundamental principle of roading law – the perpetual nature of highways – was most recently referred to in the judgment of the Court of Appeal in *Man O'War Station v Auckland City Council* (above at p6) delivered by Blanchard J at p272 of the report.

Roading in the early days

Much if not most of the unformed roading network in New Zealand was created in the early days of settlement – in particular, in the period of provincial government (1854–1876). There was no large-scale Crown granting of rural land in the early colonial period 1840–1853. In *New Zealand in the Making*,[1] J B Condliffe said:

> The first sales in New Zealand were of town sections, for which speculative prices were paid. The revenue derived from land sales in 1841, indeed, though relatively small (£28,540), was more than the total received from sales for the eight years following. After 1842, sales were negligible until they began slowly to pick up in 1848. At the lowest depth of the economic difficulties of the first decade, in 1845, the revenue from this source was only £155. It is to be remembered that land was obtainable also from the Company in its various settlements, but even so, the areas taken up must have been small. In 1852 the total area fenced was only 40,625 acres and the area under crop 29,140 acres … As far as land sales were concerned, therefore, in this period before self-government, the areas disposed of were small. Both in the Company lands and the Crown lands outside the Company areas, the principle was adhered to of sale at a price not below £1 per acre. No statistics exist which make possible any accurate estimate of the area so alienated.

Roading practices in nineteenth-century New Zealand were of paramount importance to the new society being established. There clearly would have been some roading laid out and formed in a rudimentary sense in the period 1840–1853 on Crown land and on land administered by the New Zealand Company. In the light of the law now expressed in s 43 of the Transit New Zealand Act 1989 as interpreted in *Wellington City Corporation v McRea* (below at p22) and in *Snushall's* case (below at p22), it may not be a matter of any significance whether these roads were merely shown on early Crown plans or were formally laid out on the ground as well.

Each of the provinces administered either provincial regulations or statute law provided by central government to apply in a specified province for the sale of Crown land. These regulations and statutes were not wholly consistent. In addition, the provinces could enact regulations for the conduct of surveys, and through the chief surveyor for the province could control survey practice.

In some provinces roads may have been laid out in accordance with the current statutorily authorised practice, and the lines of road pegged on the ground. In other provinces, road lines may have been shown on record plans but not pegged or demarcated on the ground. There may have been a combination of practices.

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[1] J B Condliffe D.Sc (Research Secretary, Institute of Pacific Relations, formerly Professor of Economics, Canterbury College, Christchurch, New Zealand; sometime Sir Thomas Gresham student, Gonville and Caius College, Cambridge) in his text *New Zealand in the Making*, 1927, George Allen & Unwin Ltd, London.

Sale practices in the provincial period

Alienation of Crown land on a large scale began early in the period of provincial government subject to the statutory oversight of the General Assembly. The roading network was established as the provinces were settled. Each of the provinces had similar but not necessarily consistent statutes relating to the sale of Crown land. The statutes of the Province of Auckland provide a satisfactory example.

In 1858 the Provincial Council of Auckland passed the Auckland Waste Lands Act 1858. This Act was validated by the General Assembly in the Waste Lands Act 1858. The Provincial Act (ss 8–10) provides that:

> (8) No land shall be offered for sale or disposed of by auction or otherwise until it shall have been properly surveyed and marked off on the ground, and a map thereof deposited as a record in the office (hereinafter called “the Land Office”) of the Commissioner.
>
> (9) Every allotment of country land shall have a frontage to a road, and the Commissioner shall use all due diligence in causing to be selected the most suitable lines for roads with reference to their practical utility as means of communication, and not as mere boundary-lines of allotments: he shall also as far as practicable lay off the allotments in such manner as to give to each in proportion to its extent equal advantages as nearly as may be in respect to practicable roads and to wood and water.
>
> (10) All reserves, streets, roads sections, allotments, and other divisions of the land shall be so marked off on the ground and distinguished on the map thereof by numbers or otherwise as to be easily identified.

The law was clear. Before land was offered for sale by the provincial government it must be surveyed and marked off on the ground; every allotment of country land should have a frontage to a road; roads should be selected “with reference to their practical utility as a means of communication”; and all roads should be marked on the ground and distinguished on the map.

After this legislation came into force, the demand for land soon outstripped the capacity of the provincial council to survey the land before sale. To avoid retarding settlement, the General Assembly passed the Auckland Waste Lands Act 1866 to provide a system of sale before survey. The general regulations as to surveys and record maps contained in ss 8–10 of the Provincial Act of 1858 were left unrepealed. Roads were to continue to be shown on record maps but no longer needed be marked out on the ground. The era of the paper road had arrived.

The Auckland Waste Lands Act 1858 and the Auckland Waste Lands Act 1866 were repealed by the Auckland Waste Lands Act 1867, but the provisions of ss 4–25 of the 1866 Act were repeated in the same

words in ss 31–52 of the 1867 Act. The only difference, as far as survey practice is concerned, is that the statutory provisions as to survey contained in ss 8–12 of the Auckland Waste Lands Act 1858 ceased to have effect as statutory provisions. Edwards J in The King v Joyce (1900) 25 NZLR 78 at p107 of the report on the case noted that:

> These provisions are, however, merely of the nature of departmental regulations, and they have been acted upon as such ever since. It was evidently considered that such matters might properly be left to departmental control, and that statutory provisions upon the subject were unnecessary. That there was no intention to alter the practice is shown by the provisions of section 23 of the Act of 1866, reproduced in the Act of 1867 as section 50, which are designed to insure prompt and accurate surveys, and by the fact that that practice has never been altered.

An ancillary effect of placing survey and related matters under departmental control was that officials dealing with the sale of Crown land in the land office of the provincial land commissioner could create paper roads.

Ownership of roads

Notwithstanding the period 1840–1876 when the statute law was silent, roads in New Zealand have belonged to the Crown from the beginning of colonial times. No roads laid out before 1876 are owned by adjoining owners to the centre line as provided by English common law.

Early uncertainties

A pioneering society puts a great deal of attention and effort into providing roads. Whilst the statutes of the General Assembly, and in the provincial period (1854–1876) the ordinances of the provinces, extensively authorised roads, the issue of ownership did not receive early statutory attention.

Aspects of management of highways as streets in towns were first dealt with by statute in 1867, and aspects of ownership in 1876[1]. Roads in counties were similarly dealt with in 1876[2]. Streets in towns were vested in the council and managed by the council. Roads in counties were vested in the Crown and managed by the county council or roads board.

On the face of it, the common law of England, under which the adjoining landowner was assumed to own the road to the centre line, applied in New Zealand from 1840 until 1876. There appears to be no early case law which might have clarified the matter.

In 1895 in *Clemison v Mayor of West Harbour* (1895) 13 NZLR 695 at p699 Williams J ruled on the application of the common law. Williams J decided on the peculiar facts of the case that the common law doctrine as to when ownership in a highway passes by a conveyance of adjacent lands was applicable to Crown grants and conveyances in New Zealand that were made before highways were vested in the Crown or local authorities. Where, in such a case, a road was closed and the rights of the public over it were extinguished, the ownership of the closed road vested in the adjoining owners.

The opening passage of Williams J's judgment so clearly sets out the colonial application of the common law as it may apply to roads and rivers that it is instructive to repeat it here in full.

[1] Municipal Corporations Act 1867, s 266; Municipal Corporations Act 1876, s 185.

[2] Public Works Act 1876, s 79; s 80.

> The Crown grant… must be construed according to the doctrine of the common law, subject to any statutes of the colony modifying the common-law doctrines. The Crown grant was dated on the 2nd of March, 1863. At that time, so far as I am aware, there were no colonial statutes in force declaring that public highways were to be or to remain vested in the Crown or in local bodies. The common-law doctrines as to when the property in a highway passes by a conveyance of the adjoining lands are set forth in the case of *Lord v The Commissioners for the City of Sydney* (12 Moo PCC473) and *Micklethwait v The Newlay Bridge Company* (33 Ch D133). The latter case was decided in 1886 in the Court of Appeal by Cotton, Lindley, and Lopes, L J. The result of the authorities is stated by Lopes, L J, (at p155) to be as follows: "If land adjoining a highway or a river is granted, the half of the road or the half of the river is presumed to pass, unless there is something either in the language of the deed, or in the nature of the subject-matter of the grant, or in the surrounding circumstances sufficient to rebut that presumption; and this though the measurement of the property which is granted can be satisfied without including half of the road or half of the bed of the river, and although the land is described as bounded by a river or a road, and notwithstanding that the map which is referred to in the grant does not include the half of the river or the road." What circumstances are sufficient to rebut the presumption are discussed in the judgments in the case. The earlier case of *Lord v The Commissioners for the City of Sydney* decides that the doctrine is applicable to grants from the Crown as well as from private persons, and to grants from the Crown in a colony. The case of *The Plumstead Board of Works v The British Land Company* (LR 10 QB 16), decided by the Court of Queen's Bench in 1874, was cited in argument in the case of *Micklethwait v The Newlay Bridge Company*, but was not referred to in the judgment in the latter case, and seems to some extent inconsistent with it. It was not, however, expressly overruled; and if it be law it would follow that the ordinary form of the Crown grant of a section abutting on a road would not convey the half of the road. This was also decided in Victoria in the case of *The Garibaldi Mining &c, Company v The Craven's New Chum Company* (10 VLR (L) 233), and, apart from any statute, would probably be held to be law in this colony.

Williams J in the concluding sentence quoted above pressed, more faintly than he clearly would have preferred, the view that the usual form of Crown grant in New Zealand would not convey half of the adjoining road.

Five years later, when next he had the opportunity, Williams J robustly stated a more considered opinion in his judgment in the decision of the Court of Appeal in *Mueller v Taupiri Coal-mines Ltd* (1900) 20 NZLR 89 at p110.

> I had occasion, in the case of *Clemison v Mayor of West Harbour* (13 NZLR 695), to consider the question of a grant abutting on a highway, and I expressed a doubt (at p699) whether, taking the ordinary form of Crown grant of land, when the land was described as bounded by a road, the road would pass ad medium filum to the grantee. I am now entirely satisfied that it would not. In nearly every case where land is Crown-granted, and described as bounded by a road the road at the time the land was granted was not made. It might be necessary, in order to construct and maintain the road, to alter the level of it and interfere with the soil in all kinds of ways. It would therefore be necessary and desirable that the Crown – that is, the public authority – should retain the road in its hands.

Williams J, supported by Mr Justice Edwards in a characteristically vigorous judgment in *Mueller*, goes on to say that legislation in New Zealand has always proceeded on the assumption that the Crown has not given up the ownership of the soil of roads or highways, although it might have given up the land adjacent to them.

Some years later, in 1936, Ostler J in the leading Court of Appeal decision in *Wellington City Corporation v McRea* confirmed the retrospective nature of Crown ownership of roads. (An extract from his judgment is set out below at p22). The durability of the observation of Williams J in *Mueller*, noted above, is emphasised by the adoption of this quote in 1950 by Mr Justice Hay in the *King v Morison* (1950) NZLR 247 at p259.

Recent developments

Until 1 January 1973 when roads in counties, with certain exceptions of no relevance here, were transferred to the then county councils, the Crown was the proprietor of roads. This was in spite of the fact that district roads boards and then county councils controlled and managed roads outside of cities and boroughs. Section 191 A(1) of the Counties Amendment Act 1972 effected the change of ownership by adopting as a precedent the section which from 1900 governed the vesting of streets in cities and boroughs in the council.[3] So it was the law relating to streets which formed the basis of the new law relating to roads, even though the law on streets had developed in a different and more specialised way from the law on roads, as is illustrated in a quote from Somers J at p16 below.

The original vesting of roads in the Crown is stated in s 80 of the Public Works Act 1876:

> 80. All roads are hereby declared to be and are hereby vested in Her Majesty.

This principle was maintained in each of the Public Works Acts subsequently enacted.

Section 111 of the Public Works Act 1928 was the vesting in force immediately before the enactment of s 316 of the Local Government Act 1974. It reads:

> 111. *Roads vested in the Crown* and the soil thereof are hereby declared to be and are hereby vested in the Crown, together with all materials and things of which

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[3] At the relevant time in 1972, s170(1) of the Municipal Corporations Act 1954 was in force. This is identical to s 212 (1) of the Municipal Corporations Act 1900 and each of these sections is otherwise identical to s191 A (1) of the Counties Amendment Act 1972 and s 316 of the Local Government Act 1974 if the word "street" in the Municipal Corporations Act is read as "road" in the Counties Amendment and the Local Government Act.

> such roads are composed, or which are capable of being used for the purposes thereof, and are placed or laid upon any such roads.

Section 316 of the Local Government Act 1974, replacing s 111 of the Public Works Act 1928, introduced the current law in 1978:

> 316. **Property in roads** – (1) Subject to section 318 of this Act, all roads and the soil thereof, and all materials of which they are composed, shall by force of this section vest in fee simple[4] in the council of the district in which they are situated. There shall also vest in the council all materials placed or laid on any road in order to be used for the purposes thereof.

In other words, the council owns the fee simple of roads, the materials they are made of, and any new materials that may be added to them.

Somers J, in his judgment in the decision of the Court of Appeal in *Fuller v MacLeod* in 1981 (above at p6) in discussing this form of vesting states at p411 of the report:

> The common law and statutory history sheds some light on the reasons for enactment in this form. At common law the owners of land fronting a highway owned such highway, as in the case of rivers, ad medium filum… Section 266 of the first Municipal Corporations Act 1867 provided that the management of streets and the pavements and materials "shall belong to" the Council. That did not vest the fee simple in the Council: *Mayor etc of Christchurch v Attorney-General ex rel Gould* [1931] NZLR 137, 149… In *Mayor of Tunbridge Wells v Baird* [1896] AC 434 a similar statute was held not to vest the subsoil. And in *Municipal Council of Sydney v Young* [1898] AC 457 a statute which provided that "All public ways in the city of Sydney now or hereafter formed shall be vested in the Council, who shall have full power…" did not vest any property in the Council beyond the surface of the streets and such portion as was necessarily incidental to proper repair and management. The Council was not the owner of the land… Meanwhile in New Zealand s185 of the consolidating and amending Municipal Corporations Act 1876 provided that all streets "with the soil and materials thereof …" should be vested in the corporation. In *Plimmer v Loughrey* (1886) NZLR 4 CA 73 the reference to the vesting of the soil, and the powers of sale given the Corporation in the event of a closure of a street, suggested to the Court, although it did not decide the point, that the vesting was in fee… When therefore in s 212 of the Municipal Corporations Act 1900 Parliament adopted provisions identical with those of s 170(1) of the Municipal Corporations Act 1954 [and with s 316 above[5]] it is clear that it intended to confer the full estate in the Council with correspondingly greater rights than resulted from statutes such as those considered in *Mayor of Tunbridge Wells v Baird* [1896] AC 434: … But it

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[4] Fee simple: An estate in fee simple is the largest estate known to the law. It confers upon its owner the fullest powers of alienation, and the right to exercise, in respect of the land, the most extensive rights of use and enjoyment permitted by our legal system. The historical fee simple estates are: (1) fee simple; (2) fee simple conditional; (3) fee simple determinable; and (4) fee simple subject to a condition subsequent.

Only the term fee simple is generally used in New Zealand today. The fee simple determinable may, however, be demonstrated to apply to unformed roads given the power of the Crown to require a council to return unformed road to the Crown (s323 Local Government Act 1974).

[5] Parenthesis added.

> is not clear that the legislature intended to do more than vest in the Council the fee simple of the part of the land described as street and soil thereof and materials of which it is composed. It may be arguable that the Council's estate is in the nature of a stratum estate only, perhaps variable as levels may be altered… The need to confer power to alter levels may support that.

He goes on to discuss several authorities which describe the interest of the council as a determinable fee, that is, a fee simple which may cease in certain circumstances. He went on to say at p412:

> It may also be noticed that in *Tithe Redemption Commission v Runcorn Urban District Council* [1954] Ch 383; [1954] 1 All ER 653 (in which *Municipal Council of Sydney v Young* [1898] AC 457 was referred to in argument but not mentioned in the reasons for judgment) the Council's interest was held to be of the nature ascribed to it in *Rolls v Vestry of St George the Martyr, Southwark* (1880) 14 Ch D 785 and in quality a determinable fee.

Sir Edward Somers is regarded as the leading equity lawyer of his generation and so his opinion deserves great respect. When the Court of Appeal next considered the legal nature of a highway, some 20 years later in *Man O'War Station Ltd v Auckland City Council* (2000) 2 NZLR 267, it was to the opinion of Somers J that the Court looked for authority. *Man O'War* at p272 referred to *Fuller* at p414 where Somers J said:

> I conclude that the vesting of streets in a corporation is in their character as highways and that the general powers conferred, as in s 170(4)[6], are for the purpose of enabling the corporation in the interests of citizens to facilitate that passage which the word highway itself imports. And it is because that is the Council's primary function, and the purpose of the vesting and the conferring of general powers, that it was necessary to give particular power to permit what might otherwise be obstructions on the highway. The primary purpose of a street is passage. The Council holds the land and its general powers as upon a trust for a public purpose.

Some of Somers J's observations on the nature of the vesting in the council may be given as asides[7], but he clearly bases the conclusion set out immediately above on his observations at p410–414. His view is that the legislature may allow the council ownership of only as much land as is required for a street or road, as well as its soil (in practice the surface)[8], and the materials it is made of.

The materials which make an unformed road are generally provided by nature, or, when the road is occupied by a farmer, by the pasture (or crop) that the farmer has cultivated. To that extent, an unformed road is physically very different from a formed road.

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[6] Now s 319 Local Government Act 1974.

[7] Technically, "obiter" – i.e. an opinion that is not necessary for the decision of the case; a remark of the court that does not directly bear on the issue before it and therefore is not binding as precedent.

[8] Parenthesis added.

In addition, the legislature has laid four major inhibitions on unformed roads.

- Unformed roads are subject to return to the Crown, when the land returned becomes subject to the Land Act 1948, i.e. available for sale.
- Roads along rivers and the coast, if stopped, must be made esplanade reserves vested in the council.
- Roads in rural areas cannot be stopped without the consent of the Minister of Lands.
- Unformed roads intersecting or adjoining Crown land may be closed.

The Local Government Act 1974

Under the Local Government Act 1974, unformed roads are subject to return to the Crown, on the request of the Crown, when the land returned will become Crown land subject to the Land Act 1948, i.e. available for sale.

> **323. Unformed roads in the district**— (1) Where the land comprising any unformed road existing at the commencement of this Part of this Act was immediately before the commencement of this Part of this Act vested in the Corporation of the district by section 191A (1) of the Counties Act 1956, the Minister of Lands may, by notice in writing to the council given at any time while the land, or, as the case may be, the part of thereof specified in the notice, continues to be an unformed road, require the council to transfer that land or that specified part thereof to the Crown without consideration, and that council shall transfer it to the Crown accordingly.
>
> (2) On the publication in the *Gazette* of a notice by the Minister of Lands declaring that any land or part thereof referred to in subsection (1) of this section has been transferred to the Crown pursuant to this section, the land transferred shall cease to be a road and shall be deemed to be Crown land.

If unformed roads along rivers and the coast are stopped, the land must be made esplanade reserve vested in the council. (Note, however, the provisions of s 77 of the Resource Management Act 1991, at p28 below.)

> **345** (3). Where any road or any part of a road along the mark of mean high water springs of the sea, or along the bank of any river with an average width of 3 metres or more, or the margin of any lake with an area of 8 hectares or more is stopped, there shall become vested in the council as an esplanade reserve (as defined in section 2 (1) of the Resource Management Act 1991) for the purposes specified in section 229 of the Resource Management Act 1991—
>
> (a) A strip of land forming part of the land that ceases to be road not less than 20 metres wide along the mark of mean high water springs of the sea, or along the bank of any river or the margin of any lake (as the case may be); or
>
> (b) The full width of the land which ceases to be road—

whichever is the lesser.

Roads in rural areas cannot be stopped without the consent of the Minister of Lands.

> **342** (1). The council may, in the manner provided in the Tenth Schedule to this Act, —
>
> (a) Stop any road or part thereof in the district:
>
> Provided that the council (not being a borough council) shall not proceed to stop any road or part thereof in a rural area unless the prior consent of the Minister of Lands has been obtained; or
>
> (b) The full width of the land which ceases to be road—
>
> whichever is the lesser.

"Rural area" is defined in s 2 as "an area zoned rural in proposed or an operative district plan".

The Land Act 1948

Unformed roads intersecting or adjoining Crown land may be closed under the Land Act 1948.

> **43** (1). In any case where any unformed and unused road intersects or is adjacent to any private land or interest in Crown land purchased under this Part of this Act and is not suitable to the subdivision of the land, the Governor-General may, by notification in the Gazette, close such road or portion thereof and declare the land comprised therein to be Crown land subject to this Act.
>
> (2) No road or portion thereof adjacent to any land purchased under this Part of this Act shall be closed under the last preceding subsection without the prior consent in writing of the owners of all lands having a frontage to the portion of the road intended to be closed.

Does occupation confer ownership?

Many unformed roads have now been occupied by, and incorporated into the holding of, the owner of the surrounding land for very long periods – in some cases more than a hundred years. Questions have often been raised about ownership, and opinions expressed about supposed rights to the land so occupied.

The law, however, is very clear. There is no possibility of the occupier acquiring any rights of ownership or possession through occupancy, use, or care of any unformed road.

Section 172(2) of the Land Act 1948 provides that:

> Notwithstanding any statutes of limitation, no title to any land that is a road or street, or is held for any public work, or that has in any manner been reserved for any purpose, or that is deemed to be reserved from sale or other disposition in accordance with section 58 of this Act, or the corresponding provisions of any former Land Act, and no right, privilege, or easement in, upon, or over any

> such land shall be acquired, or be deemed at anytime heretofore to have been acquired by possession or user adversely to or in derogation of the title or Her Majesty or of any local authority, public body, State enterprise referred to in the Second Schedule to the State-Owned Enterprises Act 1986 or person in whom the land has been at any time vested in trust for the purposes for which it has been reserved as aforesaid.

Firstly, this section is not restricted to roads, whether formed or unformed, laid out after the Land Act 1948 came into force. It applies to roads (and other public land) established before or after the coming into force of the Land Act 1948.

Secondly, the section protects from adverse possession[9] roads or streets, land held for public works, public reserves, and land reserved from sale along water margins under the Land Acts dating back to 1892. It makes no difference whether the land is in the name of a State-owned enterprise, Her Majesty the Queen, a person or persons, or a council.

The statute law further protects the legality of roads which may have been included in a certificate of title through error, misunderstanding, or otherwise without authority when the title document was issued by the Registrar-General of Land. Section 77 of the Land Transfer Act 1952 provides:

> **77. No right to public road or reserve where unauthorised registration**— No right to any public or reserve shall be acquired, or be deemed to have been acquired, by the unauthorised inclusion thereof in any certificate of title or by the registration of any instrument purporting to deal therewith otherwise than as authorised by law.

Blanchard J when delivering the decision of the Court of Appeal in *Man O'War Station Ltd v Auckland City Council* (2000) 2 NZLR 267, at p286 said:

> The clear intent of the section is to render ineffective the registration of any instrument in so far as it purports to deal with a road in a manner not authorised by law.

In other words the existence of a legal road will prevail over a certificate of title even if the road is not shown on or referred to in the title document.

Blanchard J also observed in his judgment on behalf of the Court at p286:

> The integrity of the roading infrastructure is of such importance to the economic and social welfare of any society that it is to be anticipated that the public right to the use of roads will be given a measure of priority when it comes in conflict with private claims.

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[9] Note the explanation of "adverse possession" in footnote 1 at p24.

Prescription over private land

Prescription is a right or title by authority of law that derives its force from use and time. In New Zealand, public access rights over private land may not be established by historical use. Although the Prescription Act 1832 (UK) is in force in New Zealand (Section 3(1) and First Schedule to the Imperial Laws Application Act 1988 NZ), prescriptive rights may be acquired only over land not subject to the Land Transfer Act. Since for practical purposes all private land is now subject to the Land Transfer Act, this limitation alone rules out the possibility of prescriptive rights arising.[10]

[10] The Land Transfer Act 1952: s 64. *Garrow's Law of Real Property* 5th ed, 1961, Butterworths, Wellington, at p415.

Leading decisions in roading law

Authoritative decisions by the courts on the state of the roading law enacted by statute in the nineteenth century were not delivered until the first part of the twentieth. The time taken to explain the law may be seen in retrospect to be of advantage, for when the opportunity arose the courts provided emphatic rulings on the status of roads.

The leading judgment in the Court of Appeal of Ostler J in *Wellington City Corporation v McRea* (1936) NZLR 921 at 932 places s 79 of the Public Works Act 1876 (noted above at p6) in perspective as requiring that a road be laid out on the ground to be a legal road. The judgment also shows that laying down a road on the surveyor's map alone may also, if authorised by statute or provincial ordinance, be sufficient to make the road legal.

> Section 79 of the Public Works Act 1876, provided that the word "road" "means a public highway, whether carriage way, bridle path, or footpath, and includes the soil of … waste lands of the Crown over which a road is laid out and marked in the survey maps," &c. Section 80 provided that all roads should be vested in the Crown. That definition of "road" and the provision that all roads should be vested in the Crown have been repeated with immaterial variations in every subsequent Public Works Act, and are now to be found in ss 110 and 111 of the Public Works Act 1928. The law had been the same ever since 1876. A perusal of the whole of s79 of the Act of 1876, a part only of which I have quoted, will show that it is retrospective in operation, and it has always been so treated by the Courts: see the decision of the Court of Appeal in *Kaikoura County v Snushall*. In that case there was a difference of opinion as to the meaning of the words "laid out and marked on the survey maps" or "on the record 'maps'" as the words appear in later statutes. Stout CJ held that the words "laid out" as there used meant "laid out on a record map", and that it was unnecessary that there should be a laying-out on the ground in order to constitute a legal road. The other members of the Court, without expressly deciding that "laid out" meant "laid out on the ground," declined to adopt the opinion of Stout CJ. The case went to the Privy Council and Lord Haldane, in delivering the judgment of the Court, made it plain that in the opinion of the Privy Council "laid out" means "laid out on the ground": see *Snushall v Kaikoura County Council*, where he said, "It is clear that under the Nelson Land Regulations the vital matter is only the laying down on the surveyor's map, as distinguished from the land itself, the reserves for roads. There is no provision in the Regulations, analogous to that in s101(a) of the Public Works Act of 1908, pointing to the necessity of the road being laid out on the land itself." In view of this clearly expressed opinion of the Privy Council, I think this Court must hold that "laid out" in s79 of the Act of 1876, and in the subsequent Public Works Acts, means "laid out on the ground".

The fountainhead of case law on paper roads is *Snushall v Kaikoura County* (1923) AC 459 (1840-1932) New Zealand Privy Council Cases 670, (1920) NZLR 783 (CA). It provided advice on the decisions previously reached in the Supreme Court (now the High Court of New Zealand) and in the Court of Appeal, noting the unanimity of opinion in the three courts.

The judgment of the Privy Council noted at p671 (1840-1932) NZPCC said:

> The roads in question are strips of land, about a chain in width, which either form the boundaries of or intersect land now belonging to the appellant. The land was formerly the property of the Crown, and was granted to a predecessor in title of the appellant. The particular strips of land have never been in fact fenced off or made up, or actually used as roads by the general public. Strips of this kind are not uncommon in the Dominion, and are commonly referred to as "paper roads" or as subdivisonal roads. The strips in controversy contain an area of about 70 acres, and there is said to be a total acreage in the County of Kaikoura of about 2,000 of such acres.

The headnote to the case at p670 states the decision of the Council:

> The requirements of regulations which had statutory authority, for the sale and disposal of waste lands of the Crown within the Province of Nelson, the vital matter in which was the laying-down on the surveyor's map as distinguished from on the land itself, the reserves for the roads, were carried out…
>
> …
>
> 2. That what had taken place was equivalent in point of law to a dedication under s101(b) of the Public Works Act 1908[1].

The *Snushall* decision removed any doubts concerning the status of roads that were shown on plans of Crown subdivision but were not pegged on the ground. It confirmed that if an ordinance or statute authorised the laying out of a road on the surveyor's plan, such a road is a legal road.

The Privy Council in that decision also made it plain that the provisions of the Public Works Act requiring a road to be laid out meant "laid out on the ground", i.e. generally pegged by the surveyors. The decision of the Court of Appeal in *Wellington City Corporation v McRea* was therefore to confirm the advice of the Privy Council in *Snushall* concerning the meaning of the words "Crown land over which a road is laid out and marked on the record maps".

A legal road established over Crown land, whether formed or unformed, may therefore be constituted by being:

- authorised by a statute or ordinance to be shown only on a surveyor's plan;
- laid out on the ground and shown on the record plan, i.e. the plan prepared for the Crown grant.

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[1] The current equivalent to s 101(b) is the definition of "road" set out as paragraph (b), s 43 Transit New Zealand Act 1989 at p5 above.

Private subdivision

In the first phase of settlement, roads were laid off by the Crown. Subsequently, private subdividers created new roads. Before 1900, road lines could be privately laid out without being dedicated to the public. Unformed roads may be shown on private subdivisional plans deposited in the land titles office before this date.

If land shown as road on these early plans of subdivision was not accepted as a road by the territorial local authority, the land never became a legal road. It remains in the paper title of the subdividing owner, until vested in the adjoining owner generally to become part of the adjoining farm property after at least 20 years of adverse possession.[1] These were never legal roads and so are not "unformed roads".

After 1900, whenever land was privately subdivided a road had to be dedicated if new access was required, and formed to statutory standards in accordance with s 20 of the Public Works Amendment Act as set out below. Therefore no question of unformed roading on private subdivision arises after 1900. As a result, none of the subdivisional law applying to private subdivision after 1900 has any bearing on unformed roads.

The Public Works Amendment Act 1900

Section 20 of the Public Works Amendment Act 1900 was the cornerstone of our roading law to apply after the first phase of settlement.

> 20. In every case where the owner of land hereafter subdivides the same into allotments for the purpose of disposing of the same by way either of sale or of lease for any term which (with the term of any renewal thereby provided for) is not less than fourteen years it shall be his duty to provide that each such allotment has, when so disposed of, a frontage to a public road or street, and for the purposes of this section the following provisions shall apply:
>
> (1) The owner shall, in the case of every allotment which is to be disposed of as aforesaid, and which does not possess such frontage as aforesaid, provide, and by instrument in writing under his hand registered by him in the office of the District Land Registrar, or, as the case may require, of the Registrar of Deeds, irrevocably dedicate, as a public road or street a strip of land not less than sixty-six feet in width.

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[1] Adverse possession refers to occupation by one person of land in the documentary title of another, with the intention of excluding everyone including the documentary owner. After a minimum of 20 years possession the person in occupation may apply to the Registrar-General of Land for legal title to the land. For a full consideration of the nature of adverse possession see Hayes, "Adverse Possession: a Question of Quality" (1968) 1 Otago L Rev 314 at 316-322. See also Hinde, McMorland and Sim, *Land Law*, Vol 1. Butterworths, Wellington, 1978 at p285.

(2) If in a county or road district, such road or street, if not within three miles of the boundaries of a borough, shall be formed and shall be connected with an existing road or street in such manner and in such position as may be agreed upon between the local authority and the owner.

(3) If in a borough, township, or town district, or within three miles of a borough, the owner shall form and metal the road or street so dedicated, and shall also construct in connection therewith such drains and footpaths as may be agreed upon between the owner and the local authority.

(4) The District Land Registrar or Registrar of Deeds, as the case may require, shall refuse to register any instrument of sale or lease of the allotment unless and until he is satisfied that the owner has complied with the foregoing provisions of this section.

Roads along water

Until the enactment of the Land Act 1892, general waterside reservations were shown as roads on the plans prepared for the sale of Crown land. From 11 October 1892 the Land Act[1] provided for a strip of Crown land to be reserved alongside water on the sale of land by the Crown. Public reserves of various kinds were also established along rivers and the coast in the early days, but roads formed by far the bulk of early public land along waterways.

The practice of showing reservations as road continued inconsistently until 1913. In some provinces the depiction of a road was thought to comply with the Land Act 1892. Then the practice of setting aside a margin of Crown land, rather than a road, along water was introduced on a national basis. As so much of the land adjoining major rivers and along the coast was Crown granted prior to 1892 legal roads form a critical component of public access along water.

A more detailed analysis of the development of riverine roading is provided in *Elements of the Law on Moveable Water Boundaries*, Hayes, 2007 at p6. This commentary will focus on the special statutory protection provided for access along water.

Statutory protection for access along water

After the abolition of provincial government, the legislative structures which have influenced public administration to the present time began to emerge as consolidated statutes. The first Public Works Act of 1876 consolidated and repealed some 109 Acts and ordinances.

Section 92 dealt with the stopping of roads, and reads:

> **92**. No road shall be stopped unless and until a way to the lands adjacent as convenient as that theretofore afforded by the said road is left or provided, unless the owners of such lands give consent in writing to such stoppage.

The Act of 1876 was repealed by the Public Works Act 1882, in which s 92 was re-enacted as a new s 93 to say:

> **93**. No road shall be stopped unless and until a way to the lands adjacent as convenient as that theretofore afforded by the said road is left or provided, unless the owners of such lands give consent in writing to such stoppage, *and no road along the bank of a river shall be stopped either with or without consent.* [Emphasis added.]

Section 93 of the Public Works Act 1882 was re-enacted four times (in each case without amendment): first as s 121 of the Public Works Act 1894, then successively as s 129 of the Public Works Act 1905, s 130 of the Public Works Act 1908, and s 147 of the Public Works Act 1928.

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[1] Section 110 Land Act 1892.

The section is a unique legislative provision providing roads along rivers with quasi-constitutional protection; that is to say, nothing less than an Act of Parliament which amended s93 or specifically enabled such a road to stopped could authorise the stopping of a riverside road.

The death knell for this unique provision concerning roads was sounded by the Public Works Amendment Act 1952. Section 12 states:

> **12**. (1) Section one hundred and forty-seven of the principal Act is hereby amended by omitting the words "and no road along the bank of a river shall be stopped either with or without consent".

Restrictions on stopping waterside roads

The power of the council to stop any street in a borough that runs along the bank of a river, or along the margin of the sea was restricted by the Municipal Corporations Act 1900 (s 212 subs 4(h)). The restriction was re-enacted in s 172(4)(h) of the Municipal Corporations Act 1920, then in s 175(h) of the Municipal Corporations Act 1933.

The restricting subsection was omitted from the corresponding s 170 Municipal Corporations Act 1954. However, immediate protection of public access was assured by s 190(3) of the Municipal Corporations Act 1954. This subsection provided that if a street along the bank of a river or along the margin of any lake or the sea were stopped it would become a public reserve for public convenience or utility, vested in the council. It could not be used for any other purpose or disposed of without the consent of the Minister of Lands.

Roads along rivers in counties which lost protected status in 1952 had the protection of Crown ownership until they were vested in the county councils by the Counties Amendment Act 1972. Crown ownership may have been thought to be sufficient protection for public access. Section 191F(3) of the Counties Act 1956, which was inserted by the amending the Act in 1972, applying to roads vested in councils, provided that where any road (or part of a road) along water is stopped or reduced, the land which was no longer road would become a public reserve for esplanade purposes subject to the provisions of the Reserves and Domains Act 1953.

Section 2 of the Counties Amendment Act 1977 repealed s 191 F(3) of the Counties Act 1956 and substituted a new subsection (3). Under the new Subsection (3) a stopped road became a recreation reserve (rather than an esplanade reserve). With the consent of the Minister of Lands the council could waive the requirement for a recreation reserve and sell or lease the former road.

The Local Government Amendment Act 1978 introduced a common standard for roads and streets both of which thereafter became "roads".

A stopped road along water under s 345(3) of the Local Government Act was to be held by the council as a public reserve vested in the council. The purpose of such a reserve under the Reserves Act 1977 was to provide access to the water and to protect the environment. However, the Minister of Lands could waive this requirement and the council could then sell or lease the stopped road.

Section 345(3) of the Local Government Act 1974 was amended by s 362 of the Resource Management Act 1991 and again by s 226(6) of the Resource Management Amendment Act 1993 to become the current law:

> **345(3)** Where any road or any part of a road along the mark of mean high water springs of the sea, or along the bank of any river with an average width of 3 metres or more, or the margin of any lake with an area of 8 hectares or more is stopped, there shall become vested in the council as an esplanade reserve (as defined in section 2 (1) of the Resource Management Act 1991) for the purposes specified in section 229 of the Resource Management Act 1991—
>
> (a) A strip of land forming part of the land that ceases to be road not less than 20 metres wide along the mark of mean high water springs of the sea, or along the bank of any river or the margin of any lake (as the case may be); or
>
> (b) The full width of the land which ceases to be road—
>
> whichever is the lesser.
>
> (4) The obligation under subsection (3) of this section to set aside a strip of land not less than 20 metres in width as an esplanade reserve is subject to any rule included in a district plan under section 77 of the Resource Management Act 1991.

Section 77(3) of the Resource Management Act 1991 says:

> (3) A territorial authority may include in its district plan a rule which provides—
>
> (a) That esplanade reserves, required to be set aside under section 345 (3) of the Local Government Act 1974, shall be of a width greater of less than 20 metres:
>
> (b) That section 345 (3) of the Local Government Act 1974 shall not apply.

Protection modified

From 1882 to 1952 roads along rivers were statutorily protected and could not be stopped. At various times subsequently, a road along water if stopped became:

- if in a municipality, a public reserve for public convenience or utility (1954);
- an esplanade reserve (1972);

- a recreation reserve (1977);
- a reserve for the purpose of providing access to the river, stream, lake or sea (1978);
- an esplanade reserve (1991, 1993).

Now, the stopping of a road along water may be governed by s 77 of the Resource Management Act 1991 which empowers a territorial authority in its district plan to provide that s 345(3) of the Local Government Act 1974 will not apply. In that event, public access to the water may be lost when a waterside road is stopped. Roads along water, which once had unique statutory protection, are now (in theory but hopefully not in practice) the least protected form of public access.

Repair and maintenance of roads

Responsibility and liability

The territorial local authority has full power under s 319 of the Local Government Act 1974 to do whatever is needed to construct and to maintain in good repair any road under its control. In interpreting these powers, the question arises whether a territorial local authority may be compelled to repair a road vested in it. Two secondary questions also arise:

- What responsibility has a territorial authority for an unformed road?
- What responsibility continues for a legal road that was once used as a highway but which has been largely allowed to revert to secondary status or a state of semi-nature?

The cases which have been decided in New Zealand show that a territorial or other roading authority is only liable for misfeasance in repairing or constructing a road but not for nonfeasance. ("Misfeasance" means doing something in an improper or negligent manner causing damage; "nonfeasance" means doing nothing.) In spite of the breadth of powers to execute works on roads, there is no statutory obligation to do so.

The cases show that to impose by statute an arbitrary general duty on roading authorities to construct and repair roads would be an impermissible intrusion by central government into the sphere of local body discretion and policy. The general rule of the common law is that a roading authority with control of a road is not liable for damage to it arising out of ordinary disrepair. If a roading authority does nothing in relation to a road, no liability arises for the authority.

Before examining the development of the law on misfeasance and nonfeasance in New Zealand, it is timely to point out that from early times, the courts in New Zealand have distinguished unformed roads from formed roads in this respect, in effect extending the common law rule of nonfeasance.

A territorial local authority is not bound to keep in repair roads which have never been formed and remain in a state of nature, and is not liable for injuries caused by defects in such roads to people who may use them: *Inhabitants of Kowai Road Board v Ashby* (1891) 9 NZLR 658; *Tuapeka County Council v Johns* (1913) 32 NZLR 618.

Kowai also decides that the Road Board doing some work on part of a long line of unformed road by filling up some holes, formed under special circumstances, is not sufficient to throw upon the Board the

duty of repairing the whole line of road. Nor does it alter the board's liability in respect to the unformed part of the road that it has not interfered with.

Powers and obligations of councils

The management of roads and streets has been locally based[1,2] ever since the Public Works Act 1876 vested statutory title to roads in the Crown, and the Municipal Corporations Act 1867 provided for management of streets in municipalities.

Part XX1 of the Local Government Act 1974 as enacted by the Local Government Amendment Act 1978 provides the territorial local authority with powers in relation to roads. No distinction is made between formed and unformed roads in s 319 of the Local Government Act 1974 in the exercise of the general powers of the council.

> *Formation, Alteration, Stopping, and Closing of Roads*
>
> **General powers of councils in respect of roads** –
>
> **319**. The council shall have power in respect of roads to do the following things:
>
> (a) To construct, upgrade, and repair all roads with such materials and in such manner as the council thinks fit:
>
> (b) *Repealed by s 39(1) of the Local Government Amendment Act 1985.*
>
> (c) To lay out new roads:
>
> (d) To divert or alter the course of any road:
>
> (e) To increase or diminish the width of any road subject to and in accordance with the provisions of the district plan , if any, and to this Act and any other Act:
>
> (f) To determine what part of a road shall be a carriageway, and what part a footpath or cycle track only:
>
> (g) To alter the level of any road or any part of any road:

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[1] Note the fusion of the terms "road" and "street" into the one term "road" from 1978 as is explained at p5 above.

[2] The term "road" as described in s 316 Local Government Act 1974 and s 44 Transit New Zealand Act 1989 does not for the purposes of this discussion include –

a Any government road:

b Any State highway outside urban areas:

c Any roads in respect of which the Minister of Local Government is deemed to be the council:

d Any regional road: s 316 Local Government Act 1974 and s 44 Transit New Zealand Act 1989.

(h) To stop or close any road or part thereof in the manner and upon the conditions set out in section 342 and the Tenth Schedule to this Act:

(i) To make and use a temporary road upon any unoccupied land while any road adjacent thereto is being constructed or repaired:

(j) To name and to alter the name of any road and to place on any building or erection on or abutting on my road a plate bearing the name of the road:

(k) To sell the surplus spoil of roads:

(l) For the purpose of providing access from one road to another, or from one part of a road to another part of the same road, to construct on any road, or on land adjacent to any road, elevators, moving platforms, machinery, and overhead bridges for passengers or other traffic, and such subways, tunnels, shafts, and approaches as are required in connection therewith.

The Act also provides special powers for the council with the consent of adjoining owners to carry out work on Māori roadways.

324A Power to carry out works on Māori roadway.

The council may from time to time—

(a) Maintain, repair, or improve any roadway laid out in the district in accordance with [Part XIV of the Māori Land Act 1993]; or

(b) Contribute towards the cost of maintaining, repairing, widening, or improving any roadway of the kind described in paragraph (a) of this subsection.

The general powers in s 319 have an origin in the early Public Works Acts of the nineteenth century (s 87 of the Public Works Act 1876) and have variously been included in the Counties Acts and Municipal Corporations Acts of the twentieth century and so have been well tested. While in a procedural sense, say in stopping or closing an unformed road, the council must follow the same statutory practices and procedures as for a formed road, the courts have limited the accountability of the council for unformed roads.

Case law on accountability for roads

Although there were some earlier cases, the true beginning of indigenous case law in New Zealand was the decision in 1894 of the Court of Appeal in *Tarry v the Taranaki County Council* (1894) 12 NZLR 467. The court held that the County Council was not liable for repairing the hole in a road which had caused injury to the plaintiff. The Council was not liable for mere nonfeasance such as the non-repair of roads.

Denniston J in delivering the principal judgment in the Court of Appeal at p471 said:

Before any special legislation on the subject of highways, whatever roads were made and kept must have been so made and repaired by the colony – that is,

> the public. When power as to roads and highways was given by statute to public bodies, it was simply a transfer to some particular section of the public in counties, road districts, or boroughs, as the case might be, of the common-law powers and duties already existing. The words of the provisions in the statutes on which it is sought in the present case to fix the defendants with responsibility are in the usual form. They cannot be said to show "a direct intention" to create greater liabilities than previously existed.

In the *Municipality of Pictou v Geldert*, (1893) AC524 the Privy Council affirmed the principle held by the House of Lords in 1892 in *Cowley v The Newmarket Local Board* (1892) AC345 as applicable to a colony, and held at p527:

> … it must now be taken as settled law that a transfer to a public Corporation of the obligation to repair does not of itself render such Corporation liable to an action in respect of mere non-feasance. In order to establish such liability it must be shown that the Legislature has used language indicating an intention that this liability shall be imposed.

Denniston J went on to say at p472 of *Tarry* that the judgment of the Privy Council in *Pictou*, according to the headnote, does not overrule but distinguishes that judgment of the Privy Council in the earlier case of *Borough of Bathurst v Macpherson* (1879) 4 App Cas256.

In *Bathurst* a barrel drain was constructed on a road by the appellant corporation:

> The judgment of their Lordships was as follows: "Their Lordships are of opinion that, under these circumstances, the duty was cast upon them of keeping the artificial work which they had created in such a state as to prevent its causing a danger to passengers on the highway which but for such artificial construction, would not have existed, or at the least of protecting the public against the danger when it arose, either by filling up the hole or fencing it".

Broadly, the Privy Council in *Pictou* (1893) decided that the transfer by statute of the duty to manage a road to a council does not of itself create a liability if the council does not carry out repairs. Liability arises only if a statute requires that repairs be undertaken. In *Bathurst* (1879), the Privy Council had previously ruled that if a council undertook "an artificial work" that work fell into disrepair, the council must protect the public against risk either by filling up a hole or fencing off a danger. This case generated great controversy. What is an artificial work? Is a culvert part of a road, or an artificial work underneath the surface? – and so on.

Williams J and Denniston J in *Tarry* could not reconcile *Bathurst* and *Pictou*, and preferred *Pictou*. The other judges in the Court of Appeal preferred not to consider the conflict. The headnote to *Tarry* states:

> Per *Williams* and *Denniston JJ* (*Prendergast CJ* and *Richmond J* preferring not to express an opinion): Since the decision in *The Municipality of Pictou v Geldert*, the case of the *The Borough of Bathurst v Macpherson* must be taken to be no longer law.

Denniston J in his judgment in *Tarry* at p472 indicated that many previous decisions of the courts in New Zealand made on the authority of *Bathurst* had made councils liable for non-repairs on roads. These decisions appear to have been made by lower courts, for they are not reported. The law was, however, clearly stated in *Tarry* in 1894: councils were not liable for a failure to repair.

But shortly after the decision in *Tarry's* case came the decision of the Privy Council in *Municipal Council of Sydney v Bourke* (1895) AC433. That case concerned potholes formed in the road through non-repair, and the Privy Council had no difficulty in following the principle laid down in *Municipality of Pictou v Geldert*, and in holding that it was a case of mere nonfeasance. However, the judgment of the Privy Council proceeded to declare that the *Bathurst* case was good law. By this decision the Privy Council seems to have completely eliminated the doubt cast on the *Bathurst* case.

Ostler J in *Hokianga County v Parlane Brothers* (1940) NZLR 315 at p320 observed on *Bathurst*:

> Indeed, so long as the principle of that case is good law, it would seem that a local authority is liable for injury caused by it allowing any artificial structure which it has made on its roads, including a bridge, to become dangerous by falling into disrepair, although this seems to be absolutely contrary to the principle clearly laid down in Municipality of Pictou v Geldert.

Nearly 70 years after *Tarry*, the then Supreme (now the High) Court dealt with a question of misfeasance on a public road in *Hocking v Attorney-General* (1962) NZLR 118. Neither counsel nor Barrowclough CJ referred to the decision of the New Zealand Court of Appeal in *Tarry v Taranaki County Council*. The Chief Justice considered *Borough of Bathurst v Macpherson* to state the law. He acknowledged that it may be "a controversial decision" at p123 and went on to say: "Its authority however is undoubted and I am clearly bound by it."

He nevertheless distinguished *Bathurst* from the facts he was dealing with, so that he did not need to follow it and despite being overruled in the Court of Appeal, arrived at what appeared to be an eminently sound decision set out in the headnote at p118:

> If in the course of the repair of a road already built a roading authority installs a culvert which is of insufficient capacity to prevent flooding and the erosion of the road, that act is not such an act of misfeasance as will give rise to a claim for damages by a person injured as the result of a sudden washout if the injuries are caused before the roading authority has had an opportunity of taking steps to repair the road or give warning of the danger.

Hocking in the then Supreme Court establishes a limitation on misfeasance as a determinant of liability as when the roading authority has not at the material time (say, that of an accident) had an opportunity of taking steps to repair the road or give warning of

the danger. Under this view of the law, for the roading authority to have liability it must be aware of the danger generated by work on a road which has deteriorated, and have done nothing about it within a reasonable time.

Clearly, the rule which the Chief Justice sought to have established would have applied equally and conveniently to formed roads, unformed roads (particularly unformed roads leading to rivers, lakes and the sea where some rough work may facilitate access), and former highways now in occasional use, on which work may have been undertaken when in use as fully formed roads. This ruling did not, however, survive an appeal in the New Zealand Court of Appeal. Although one of the judges of the Appeal Court (Gresson P) would have dismissed the appeal, the majority (North J and Turner J) considered the reasoning of the Chief Justice to be in error, and his judgment was overturned ((1963) NZLR 513).

The doctrine that a roading authority is not liable for mere nonfeasance (as where an authority does nothing or where work may be executed competently but not sufficiently to avoid danger) has its critics. Gresson P in the Court of Appeal in *Hocking* at p519 said:

> The immunity which Highway Authorities have long enjoyed for passive non-repair is of historical origin, but its genesis is irrelevant; the question is whether in the present case it operates to exonerate the two Boards from liability. The rule has been condemned as an archaic and anomalous survival into modern times without any sound reason to justify it (by Salmon J. in *Attorney-General v St, Ives Rural District Council* [1960] 1 Q.B. 312, 323; [1959] 3 All ER 371, 376), and in Northern Ireland Lord Macdermott, when compelled to apply the non-feasance rule in *Quinn v Ministry of Commerce* [1954] N.I. 131, 136 did so regretfully with the comment that it was "behind the times", as conferring an unduly wide immunity in respect of negligent omission, having regard to the gravity of the dangers which such omissions might cause; and further that such measure of relief as had arisen from established exceptions had been obtained at the price of fine distinctions and consequent uncertainty.

In the court below in *Hocking*, Barrowclough CJ at p129 provided an anticipatory answer, to the points raised above by Gresson P, given New Zealand conditions:

> But whatever may be the ground of the doctrine it seems to me that in a new country like New Zealand, suffering as it still does from the effects of forest denudation and excessive flooding, bridges and culverts which could cope with all foreseeable intensities of rainfall would be very costly luxuries and well beyond the financial and other resources of most roading authorities. Many culverts of inadequate capacity and likely to result in washed out and therefore dangerous roads will often be better than no culverts at all. It may well be that we should accept that there may be unexpected hazards on our roads and that the retention of the doctrine of no liability for mere nonfeasance is really in the public interest.

The question of liability for accident damage on defective roads is a vexed one ranging from the difficulties of interpretation indicated in

the Privy Council cases, the fine distinctions that Gresson P speaks of, and the common sense expressed above by Barrowclough CJ. Many a roading engineer for a territorial authority in New Zealand with responsibility of hundreds of kilometres of road might give a wry smile at the deliberations of the court in Northern Ireland in *Quinn v Ministry of Commerce* noted above: "To a further issue asking whether the accident was due to the failure of the defendants to take reasonable care in the manner in which they temporarily repaired the pothole the answer was 'yes'. We consider that the pothole should have been observed more carefully and filled more often."

It is not the purpose of this discussion to delve too deeply into the historic complexities of liability for roadway management. The main concern here is the liability (if any) for unformed roads and roads previously maintained by councils but now used mainly but not necessarily exclusively for recreational purposes (for example, the old "ferry" roads which continue to lead to rivers). However, the general question of liability on formed legal roads needs to be placed in perspective before the liability for "recreational" legal roads may be addressed.

Accountability following Hocking

Undoubtedly, the decision of the majority in the Court of Appeal in *Hocking* is the foundation of our modern law of roading accountability, despite the overturn of the convenient rule which Barrowclough CJ proposed in the court below. The decision of the majority was heavily influenced by Australian and English decisions. Of the three appellate justices, only North J referred to *Tarry v Taranaki County Council* (above), a prior decision of our Court of Appeal and the leading New Zealand authority. Put simply, the decision in *Hocking* changed the law.

North J pointed out at p532 that there were exceptions in respect of roading authority liability, such as when statute imposes a duty on the council from which a private right of action might accrue. Then, too, the essence of the rule he advocated was that the disrepair causing the injury must be on the road itself and not on some artificial structure placed on the road. He went on to say (also at p532):

> But, subject to these exceptions, while a road authority is immune from liability to users of the highway who are injured as the result of the unsafe or dangerous state of the highway so long as it adopts a merely passive role, once it decides to reconstruct or repair a road, then it is obliged, like anyone else, to exercise reasonable care in the performance of its self-imposed task.

This duty to exercise reasonable care also formed the basis of the extensive judgment of Turner J, who at p543 summarised his view:

> If the accident was caused as a foreseeable consequence of what was previously positively and negligently done by the Road Authority, then the Road Authority is liable.

While the ratio of *Hocking* clearly establishes liability for an inadequate culvert, for that was the subject of the action, the language used by North J and Turner J suggests a wider duty of care and narrows the scope of immunity for omissions in undertaking construction or repair work on a road.

The scope of the principle established in *Hocking* may be explained by reference to an earlier decision of the English Court of Appeal in *Newsome v Darton Urban District Council* (1938) 3 All ER 93. Although the case was not cited in *Hocking*, on its facts Newsome reinforces the wider principle indicated in *Hocking*.

Newsome was a case where the respondents were not only the local highway authority, but the local sanitary authority. In the latter capacity they had dug a hole in one of their streets to lay a drain. The hole had been filled in and the surface covered with metal, which was sprayed with tar and rolled level by a steam roller. A year later a depression had formed. The jury trying the case found as a fact that this depression was dangerous. It also found that although the original work of rolling the excavation was done without negligence, the local authority was negligent in not discovering and remedying the dangerous condition into which it subsequently declined. It was held by the Court of Appeal that the local authority was guilty of misfeasance, and liable accordingly.

Ostler J in *Hokianga County* at p322 observed that in *Newsome:*

> *MacKinnon L J* lays down a broader rule – viz that where a local authority even in its capacity as highway authority does something to the surface of the highway and that which it does is, in addition to natural causes and traffic, the origin of the defect, and the local authority does not remedy the defect, then the local authority is guilty of misfeasance.

In summary, the common law now imposes a duty of care on a roading authority in executing works, with a requirement of reasonable observation of works after completion. Ordinary wear and tear on a road does not create a liability for the roading authority at common law.

The immunity for "the friction of traffic and the operation of natural causes" was abolished in England by the Highways (Miscellaneous Provisions) Act 1961 (UK) which created an obligation to maintain highways. In New Zealand, immunity for nonfeasance (doing nothing) continues as the law.

Immunity does not, however, extend to the creation of a "public nuisance" on a road which the authority knows about and allows to continue[3]. The general rule is that a local authority is not itself entitled to create a public nuisance in executing public works or any other activity unless authorised by statute. In this respect s 191 of the Local Government Act 2002 provides a code:

> **191 Local authority not authorised to create nuisance**
>
> This subpart does not entitle a local authority—
>
> (a) to create a nuisance; or
>
> (b) to deprive the Crown or any person of any right or remedy the Crown or the person would otherwise have against the local authority or any other person in respect of any nuisance.

In addition, councils must take reasonable precautions for the general safety of the public and workers when carrying out work on or near a road: s 353(a) Local Government Act 1974.

Under s 353 (b) the council must:

> (b) Require the owner or occupier of any land upon which there is any hole, well, excavation, or other place dangerous to persons passing along any road forthwith to fill in, cover, or enclose the same:

And under subsection (c) of that section the council may:

> (c) Whenever the public safety or convenience renders it expedient, require the owner or occupier of any land not separated from a road by a sufficient fence to enclose the same by a fence to the satisfaction of the council.

Principles applying to unformed roads

All legal roads, whether formed or unformed, carry the general status of roads under common law and statute law until formally closed or stopped. The responsibilities of councils in relation to unformed roads are drawn from the general law relating to roads. The general principles can be summarised as follows.

- The council has no obligation to form or maintain an unformed road. [4]
- If the council carries out no work, there is no liability. [5]

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[3] *Mayor of Invercargill v Hazlemore* (1905) 25 NZLR 194 at 204; *Gilchrist v Mayor of Oamaru* (1913) 32 NZLR 902 (drain subsidence); *Invercargill Borough v McKnight* [1923] NZLR 1044 (tramlines); *Ogier v Christchurch City Corp* [1938] NZLR 760 (pole).

[4] *Inhabitants of Kowai Road Board V Ashby* (1891) 9 NZLR 658; *Tuapeka County Council v Johns* (1913) 32 NZLR 618.

[5] *Hocking v Attorney-General* (1963) NZLR 513 (CA).

- The council's immunity from liability on unformed roads has been held to extend to the filling of holes on part of a long line of unformed road, but there is no duty to repair the whole road.[4]
- The council is immune from liability for the operation of natural causes.[6]
- If the council undertakes any artificial work such as a culvert or bridge on a road which is generally unformed it has a duty of reasonable care in construction, and also a duty of ongoing reasonable observation of that work to ensure that any dangerous change in condition is discovered and remedied. [7]
- The council may require the occupier of any land (including a road) that contains a hole or other place dangerous to people passing along it to fill in, cover, or enclose the danger. [8,9]
- Whenever the safety or convenience of the public applies, the council may require the owner or occupier of any land not separated from a road by a sufficient fence to enclose the land with a fence that complies with council requirements. [10]

Principles applying to secondary-use roads[11]

The principles applying to secondary-use roads, such as the old "ferry roads" leading to a river, which were originally formed and maintained by the Council, may be summarised as follows.

- The council is immune from liability for the friction of traffic and the operation of natural causes.[6]

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[6] *Tarry v the Taranaki County Council* (1894) 12 NZLR 487 (CA).
Hokianga County v Parlane Brothers (1940) NZLR 315.
Newsome v Darton Urban District Council (1938) 3 All ER 93.
Hocking v Attorney-General (1963) NZLR 513 (CA).

[7] *Hocking v Attorney-General* (1963) NZLR 513 (CA).

[8] Section 353 (b) Local Government Act 1974.

[9] Although early legislation appears not to have provided territorial local authorities with powers to direct occupiers of unformed roads to observe safety requirements for the benefit of the general public, since 1954 in municipalities (Municipal Corporations Act 1954: ss 201, 202), and since 1956 in counties (Counties Act 1956: ss 208, 209) the councils have had authority to deal with dangers on unformed roads and in addition may require the adjoining owner to fence the boundary. Clearly, councils have exercised the powers with discretion. Sections 353 pf the Local Government Act 1974 states the powers now in force.

[10] Section 353 (c) Local Government Act 1974.

[11] A secondary-use road is one which is generally superceded by another newer road but which retains its legal status as a public road. It reverts to use which is largely recreational, say access to water.

- If any work on the surface or artificial construction along the line of the road is executed by the council, either before or after the road reverted to secondary use, there is a duty of reasonable care in construction, and a duty of ongoing reasonable observation of that work to ensure that any dangerous condition is discovered and remedied. [12]
- The council should put up adequate signage relating to the state of the surface, blind ends, and so on.[13]
- The council may require the occupier of any adjoining land that contains a hole or other place dangerous to people passing along the land to fill in, cover, or enclose the danger.[14]
- Whenever the safety or convenience of the public applies, the council may require the owner or occupier of any land not separated from a road by a sufficient fence to enclose the land with a fence that complies with council requirements.[15]

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[12] *Hocking v Attorney-General* (1963) NZLR 513 (CA). *Newsome v Darton Urban District Council* (1938) 3 All ER 93.

[13] *Oamaru Borough v McLeod* (1967) NZLR 940 (a sign at the end of a blind road); *Meurs v Taieri County* (1954) NZLR 1081. (Facts of each case critical.)

[14] Section 353 (b) Local Government Act 1974.

[15] Section 353 (c) Local Government Act 1974.

Stopping of roads

Powers of the Minister

A power to stop roads (including unformed roads) is contained in s 116 of the Public Works Act 1981. This Act empowers the Minister of Lands, by notice in the Gazette, to declare any road or part of any road to be stopped. If the road is under the control of a regional council or a territorial authority, the consent of that council or authority has to have been previously obtained. If a road as defined in s 315 of the Local Government Act 1974 has been stopped under the Public Works Act, the territorial authority may deal with it as though it had been stopped under the Local Government Act 1974.[1] There are residual powers of disposition which may be exercised by the Crown with the consent of the territorial authority: s 117 Public Works Act 1981.

The powers of the Minister, which may be exercised on the election of the Minister, but not on that of the territorial authority, are indicative of an administrative role which places the public interest as an overriding consideration.

As an alternative to stopping, unformed roads continue to be subject to return to the Crown on the request of the Minister of Lands under s 323 of the Local Government Act 1974.

Powers of territorial authorities

The Public Works Act 1981 discontinued a long line of authority, starting with s 93 of the Public Works Act 1876, dealing with the procedures to be followed by territorial authorities in stopping roads.

Section 93 was later re-enacted as s 94 of the Public Works Act 1882, then subsequently as s 130 of the Public Works Act 1905, s 131 of the Public Works Act 1908, and finally s 148 of the Public Works Act 1928.

These sections established the basis on which territorial authorities could stop roads. Roading authorities were required to prepare a plan for public inspection of the road to be stopped and provide a conspicuous physical notice on the section of the road affected. The roads board was required to call a public meeting of ratepayers, which would decide by a majority whether the road should be stopped, and then a meeting of the council would either confirm or reverse that decision.

The omission of s 148 of the Public Works Act 1928 from the Public Works Act 1981 is explained by the enactment in the Local Government Amendment Act 1978 of s 342 of the Local Government

[1] S 117 (1) Public Works Act 1981.

Act 1974. Together with the tenth schedule of the latter Act, s 342 establishes procedures for stopping roads. Although Schedule 10 provides for updated procedures, the requirements stated there clearly originate in the line of statutory authority encompassed in the Public Works Acts as set out above.

Under s 342(l)(a) of the Local Government Act 1974, a territorial authority may not stop a road in a rural area without the consent of the Minister of Lands.

Section 342 of the Local Government Act 1974 and Schedule 10 of that Act set out the current powers of councils to stop roads whether formed or unformed.

Section 319 says:

> [**319. General powers of councils in respect of roads—**
>
> The council shall have power in respect of roads to do the following things:
>
> …
>
> (h) To stop or close any road or part thereof in the manner and upon the conditions set out in section 342 and the Tenth Schedule to this Act:

Section 342 says:

> **342. Stopping and closing of roads**
>
> (1) The council may, in the manner provided in the Tenth Schedule to this Act, —
>
> (a) Stop any road or part thereof in the district:
>
> Provided that the council (not being a borough council) shall not proceed to stop any road or part thereof in a rural area unless the prior consent of the Minister of Lands has been obtained; or
>
> [[(b) Close any road to traffic or any specified type of traffic (including pedestrian traffic) on a temporary basis in accordance with that Schedule and impose or permit the imposition of charges as provided for in that Schedule.]]

Schedule 10 is set out as Appendix D.

Separation of powers

The separation of territorial powers from ministerial powers may seem to imply two wholly concurrent jurisdictions to stop roads – one on conditions of public notice and public participation, and the other by an administrative process that does not require public notification. However, the legislative history of the separate processes shows that they were intended for use in different circumstances.

The separation of powers to stop roads into those of the Crown and those of territorial local authorities was established relatively early (though not immediately) in the post-provincial era.

In 1876 the first Public Works Act provided for the stopping of roads by territorial local authorities on very prescriptive criteria[2] but made no provision for stopping by ministerial notice or by proclamation of the Governor. The Land Act 1877 provided for the alteration of the course of a road[3] by agreement with the owner of the adjoining land and the Crown, and enabled the Governor to execute appropriate grants or conveyances to adjust title. Under the Land Act 1877 the Governor had power to proclaim roads over rural[4] or urban lands[5] but neither the Minister of Lands nor the Governor had the power to stop roads. The Land Act 1885[6] did not in this respect materially differ from the Land Act 1877 that it replaced.

However, the next re-enactment of the Land Act in 1892 provided the Governor with wider powers. In addition to the power to proclaim roads and streets, the Governor could now by proclamation, with the consent of the territorial local authority, close roads and grant that land in exchange for the land taken for the proclaimed road[7].

The powers of the Crown to stop roads or streets, now expressed in s 116 of the Public Works Act 1981, date from the Land Act 1892. These powers, which were to be exercised with the consent of the territorial local authority, were maintained in the Land Act 1908[8] and enacted in a different form (with similar effect) in s 12 of the Land Act 1924. Section 12(7) empowered the Governor-General by proclamation, subject to the consent of the territorial local authority, to close any road or street.

Section 12 remained in force until repealed by s 29(18) of the Public Works Amendment Act 1948. Under s 29(3) of the 1948 Act, a proclamation by the Governor-General was required. However, s 7(1) of the Public Works Act 1965 substituted the Minister for the Governor-General, the Minister having power to close roads by notice published in the Gazette. The Minister in this context was the Minister of Works.

When the Public Works Act 1981 replaced the Public Works Act 1928 and amendments, s 116 of the new Act, still in force today, provided

[2] Section 93 Public Works Act 1876.

[3] Section 162 Land Act 1877.

[4] Section 160 Land Act 1877.

[5] Section 161 Land Act 1877.

[6] Sections 13, 14, 15 Land Act 1885.

[7] Section 13 Land Act 1892.

[8] Section 11 Land Act 1908.

for the stopping of roads by the Minister by notice in the *Gazette* with the consent of the territorial local authority. Either adequate access has to be provided for adjoining owners, or their consent in writing obtained.

Section 30 of the Public Works Amendment Act 1988 enacts a new s 113 of the Public Works Act 1981. "Minister" in relation to roads now means the Minister of Lands rather than the Minister of Works.

The power of stopping of roads under s 116 of the Public Works Act, which originated under the lands administration of early post-provincial government, has now returned to the custody of the Minister of Lands. This legislation, in force for over a century, has not required that public notice be given. The early inclusion in the statutes of powers to exchange land for roads is strongly suggestive of road closures where the Crown and the adjoining owner have the primary interest. The re-alignment of a public road, when the position of the road as shown on the Crown grant record plan was found in practice to be wrongly placed, was therefore permitted without public notice. The wider interest of the public, when councils stopped roads, was originally catered for in successive Public Works Acts dating from 1876, and latterly in the Local Government Act 1974, by quite aggressive requirements for public notice.

The separate powers of the territorial local authorities to stop roads were set out in s 94 of the Public Works Act 1882 (replacing the Act of 1874), next as s 122 of the Public Works Act 1894, and then as s 130 of the Public Works Act 1905. Section 133(a) of the 1905 Act introduced a new power of supervision by the Governor over all territorial local authorities. Thereafter councils could not stop county or district roads until the consent of the Governor by order in council was gazetted. Section 130 of the Public Works Act 1905 was replaced by s 131 of the Public Works Act 1908 which in turn was superceded by s 148 of the Public Works Act 1928. In 1970 the Minister of Works replaced the Governor-General as the consenting authority. [9]

When the Counties Amendment Act 1972 vested roads in counties in the corporation of the council[10], s 148 of the Public Works Act was repealed[11] and new procedures vesting stopping powers in the council[12] were set out in a new eighth schedule to the Counties Act 1956. Schedule 8 providing for notice of intention to stop, objections and

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[9] Section 2(1) Public Works Amendment Act 1970.

[10] Section 2 Counties Amendment Act 1972 inserting s 191 A (1) in the principal act.

[11] Section 8(1) Counties Amendment Act 1972.

[12] Section 191A(5)(h) Counties Amendment Act 1972.

appeals, has its origin in s 93 of the Public Works Act 1876 and each of the succeeding provisions providing for stopping of roads. In 1972 the councils were freed of any general requirement of Crown approval for road stopping, but were still required to obtain the consent of the Minister of Lands for any road stopping in rural areas.

Subsequently, when the Local Government Amendment Act 1978 repealed the provisions of the Counties Act dealing with roads and inserted part XXI in the Local Government Act 1974, s 342 of the principal Act (i.e. the Act of 1974) provided for a new tenth schedule along the lines of the former eighth schedule of the Counties Act. Section 342 and the tenth schedule to the Local Government Act 1974 set out the law now in force. Of particular relevance to unformed roads is the continuing requirement of the consent of the Minister of Lands before a rural road is stopped.

Section 116 of the Public Works Act 1981 is now administered in Land Information New Zealand. The provision for stopping roads without public notice is appropriately seen by the department as one of very conservative application. Only in very clear cases will the section be applied. This is not to say that it may never be applied to unformed roads, but rather that in almost all road stoppings, s 342 of the Local Government Act 1974 and the procedures in the tenth schedule to the Act which incorporate requirements for public notification will more correctly apply.

Walkways over unformed roads

An unformed road may be included in a walkway with the prior consent of the territorial local authority in which the road is vested: s 6 New Zealand Walkways Act 1990. Before giving consent, the territorial local authority has to consult with every owner who has a frontage on or access to the unformed road. Those owners retain the right to use as a road the unformed legal road after it is incorporated in a walkway. However, the public are restricted to using the road as a walkway. The Minister of Conservation may specify any other conditions of use in the notice designating the unformed legal road as a walkway.

Section 6 is a curious provision which is inconsistent with the common law, the statutory law protecting the status of roads, and the rigorous protection the New Zealand courts have provided for the interests of the public.

Powers to enact bylaws needed

The common-law right to pass and re-pass on roads whether formed or unformed may be restricted by an appropriate bylaw. The existing statutory powers of councils to create bylaws (referred to below), not surprisingly, are clearly more applicable to roads which are formed and in use. The special character of unformed roads which generally are in the occupation of adjoining owners creates a series of special needs not catered for in existing law.

There may be situations where councils should provide bylaws to protect the interests of legitimate users of unformed roads, as well as those of adjoining owners. The fragile surface of some unformed roads could also be the subject of a bylaw. Given the new classes of recreational motor vehicles that are now common – four-wheel-drive vehicles and four-wheel bikes with soft tyres – specific powers for councils to enact bylaws may now be necessary.

Section 72 of the Transport Act 1962, which extensively authorises roading bylaws, seems largely inapt for passing bylaws affecting unformed roads. Subclauses (a) to (l) of subsection (1) are very specific and bylaws directed at unformed roads do not appear to pass the "reasonable" test which all bylaws must meet. For example, when an unformed road is physically incorporated within a farmer's landholding, a bylaw in terms of para (dd) which would prohibit either absolutely or conditionally "the driving of horses, cattle, sheep or pigs along any road" would not be "reasonable". Each of the other subparagraphs in some degree with the exception of subparagraph (i) would similarly create unreasonable bylaws for unformed roads.

The opening words of (i), "prohibiting or restricting absolutely or conditionally any specified class of traffic", would allow vehicles to be excluded in appropriate circumstances. But if the real reason for the bylaw was to exclude four-wheel-drive vehicles, it may not be reasonable to exclude all vehicles. Four-wheel bikes with soft tyres which do not harm the surface could perhaps be permitted. These bikes are extensively used by fishers for access to rivers and lakes.

A difficulty is created by the second arm of (i) which excludes "any specified motor vehicle or class of motor vehicle which by reason of its size or nature or the nature of the goods carried is unsuitable for use on any road or roads specified in the bylaw". Four-wheel-drive vehicles, being of a size and nature suitable for use on unformed roads, may not therefore be excluded under this provision.

A bylaw excluding all motor vehicles may not meet the "reasonable" test if the real intention is to exclude four-wheel-drive vehicles. If the scope of the bylaw excludes vehicles which may reasonably run on an

unformed road for a legitimate purpose, the bylaw may be held to be unauthorised and defective.

Section 146 of the Local Government Act 2002 provides for specific powers of territorial authorities to make bylaws. Paragraph (b) provides for bylaws for the purpose:

> (b) of managing, regulating against, or protecting from, damage, misuse, or loss, or for preventing use of, the land, structures, or infrastructure associated with 1 or more of the following:
>
> …
>
> (vi) reserves, recreation grounds, or other land under the control of the territorial authority:

For a bylaw to apply to unformed roads, such roads would have to come within the category of "other land" in subparagraph (vi). Given the history of the law on roads, the high degree of protection provided by the courts, and the unique public access unformed roads provide to the outdoors, it would appear that any power to make bylaws should be a prescribed power rather than a general power.

»» Considering reform

A constant call on matters of public access is for local solutions to be applied in preference to centralised authority. A highly prescriptive statutory solution to the uncertainties affecting unformed roads – rights, control, obstructions, and occupiers' peaceable use – is unlikely to be popular with either adjoining landowners or recreational users and may not be legally warranted.

Territorial bylaws may therefore be the most appropriate way of:

- regulating good order on an unformed road intersecting private property;
- preventing damage to the surface of the road and any structures on it;
- making sure that people exercising a right of passage do not unreasonably interfere with the occupier's use of the land.

Unformed roads across land or along water boundaries could be subject to management and control through bylaws, to ensure that rights of passage are preserved, obstructions are removed, and dangers which have been artificially created are dealt with.

Given the special character of unformed roads – where public land subject to public rights is almost always occupied by private persons – a statutory framework providing for specific bylaws seems more appropriate in the interests of councils, adjoining landowners, and recreational users. The general power to make bylaws (s 146 Local Government Act 2002) may be inadequate for the purpose.

Suggested statutory framework for bylaws

A definition of "unformed road" may be a first requirement. The term could be defined as:

- any road originally laid out over Crown land and marked on the ground and record maps; or
- any road originally laid out on Crown land under the authority of any Act or Ordinance, on any Crown grant record map, but not marked or laid out on the ground;

where the road has not been constructed by any of gravelling, metalling, sealing, or permanently surfacing the road, and is neither substantially formed or made for the use of the public.

It should be the duty of the territorial local authority to enact and enforce bylaws in relation to unformed roads in order to:

- preserve order[1] and rights of passage;[2]
- prevent damage to the surface land comprising the road or anything on it;[3] and
- ensure that persons exercising the right of passage over any unformed road so behave themselves as to avoid undue interference with the enjoyment of the land comprising the road by other persons and occupiers.[4]

Bylaws may relate to all unformed roads in the district or any particular such roads.

Bylaws should not interfere with:

- the exercise of any public right of way;[5] and
- any authority having under any enactment functions relating to the unformed road to which the bylaws apply.[6]

Exchange for other forms of public access

There are formidable if not insurmountable difficulties in exchanging unformed road for a new unformed road in the same vicinity. The whole network of unformed roads is predicated on the laying out of unformed roads on Crown land whether pegged on the ground or laid out as paper roads. It is not possible to lay out unformed roads in a state of nature over private land; since the enactment of the Public Works Amendment Act 1900 it has been unlawful for the owner to do so when land is subdivided. The Public Works Amendment Act required all new roads to either be formed (in rural areas) or formed and metalled (in boroughs and in proximity to boroughs). Over the last 100 years standards of formation have been progressively increased. A private owner cannot dedicate road without the acceptance of the council. Councils do not accept the dedication of roads which are unformed.

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[1] No boy racers, etc.

[2] No forestry companies planting trees on roads; no artificial obstructions.

[3] For the protection of the surface rather than the express prohibition of classes of vehicles. Protection of utilities such as water and sewage pipes when owned by the council, etc.

[4] Adjoining landowners' occupancy to be respected.

[5] The right of passage must always be preserved.

[6] Utilities rights respected; Telecom, electricity supply, etc.

Since 1 April 1979,[7] the Crown has been bound by the subdivisional law applying to all landowners, and must provide new roads complying with the requirements for formation of the relevant territorial local authority. New unformed legal roads are no longer laid out on Crown land.

There is, however, a mechanism which in appropriate circumstances would help enable the exchange of an unformed road for an alternative form of public access. The exercise of this option would require the co-operation of the adjoining landowner, the Minister of Lands on behalf of the Crown (in practice, Land Information New Zealand), and the territorial local authority. The process is put forward here as a possibility for consideration.

1. The Minister of Lands resumes as Crown land a section of unformed road under s 323 of the Local Government Act 1974. Any such resumption for the purposes of effecting an exchange would prudently be executed on the basis of an agreed policy statement. The former road when transferred by the council to the Crown acquires the status of Crown land subject to the Land Act 1948 and becomes available for disposal by the Crown.
2. The territorial local authority negotiates an access strip (s 237B Resource Management Act 1991) along another route, to be secured by an easement made between the registered proprietor of the land adjoining the former road and the local authority, to be registered under the Land Transfer Act 1952 against the title to the land.
3. When the easement is registered under the Land Transfer Act, the Crown vests the former road in the adjoining owner under the provisions of s 116 of the Land Act 1948.

This result may be achieved under existing legislation. A point to watch, however, is the taking of security over the former road by anyone required to consent to granting an easement under s 237B of the Resource Management Act 1991. That is, if there is a mortgage of the land over which the easement is granted, the mortgagee in giving the required consent should insist on the execution and registration of a fresh mortgage over the new land (the former road). If a new mortgage is not taken, the powers of the mortgagee over the whole of the property would be diminished.

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[7] Part XX and XXI Local Government Act 1974 as inserted by s 2 Local Government Amendment Act 1978.

Observations

Section 146 of the Local Government Act 2002 probably does not authorise the bylaw framework suggested to provide comprehensive but non-prescriptive management and control over unformed roads. New legislation may be required to authorise a complete set of powers.

The proposal for a change in route as indicated above could be implemented under existing statutory authority. If, however, it were to be authorised under amended statutory procedures, it would be desirable to compulsorily amalgamate the former road with the land in the title of the adjoining owner, with all interests on that title automatically spreading to the new land. Given that a road is being exchanged for something less in terms of public rights, there is a case for amending legislation which could make the terms of the easement conditional on the approval of the Minister of Lands, and any surrender thereof subject to Ministerial approval.

»» Summary: preserving the right of passage

The essence of a public road, whether formed or unformed, is that it offers a right of passage to all members of the public who want to use it. The territorial local authority in which a road is vested holds title to the road in trust for the public and is obliged to see that the right of passage is preserved – not for the council or its ratepayers, but for the public.

At one end of the scale, it has been facetiously suggested that in England "the only right of the subject in a public road is to pass at an even pace from one end of it to another, breathing unobtrusively and attracting no attention". [1] However, that is not a fair summary of the law in New Zealand (nor, in fact, in England).

The reality is that a person may use a public road in a reasonable way having regard to the rights of others. If anything, a study of the common law brings out a thread of reasonableness running through most of the law now applying to roads. What is reasonable is generally right. However, the passage of 150 years has heavily imported statute law into the mix.

Statutory title to unformed roads

In an analysis of the law applying to unformed roads, the first principle to address is statutory title. What is the title of the territorial local authority to an unformed road? How should title affect management and control?

When title to unformed roads was transferred from the Crown to county councils in 1972 the vesting was stated to be in fee simple (i.e. the largest estate of freehold known to the law). In practice, however, the Crown retained controls which heavily qualify the title of the council. For example:

- unformed road may be resumed as Crown land;[2]
- if a road along water is stopped, the former road becomes an esplanade reserve; [3]
- roads in rural areas cannot be stopped without the consent of the Minister of Lands; [4]

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[1] *Engheim and Others v The King*; Misleading Cases, A P Herbert 137, 140.

[2] Section 323 Local Government Act 1974.

[3] Section 345(3) Local Government Act 1974.

[4] Section 342(1) Local Government Act 1974.

- an unformed road intersecting or adjoining Crown land may be closed.[5]

Section 316 of the Local Government Act 1974 is the statutory authority which currently vests roads in the council:

> **316. Property in roads** – (1) Subject to section 318 of this Act, all roads and the soil thereof, and all materials of which they are composed, shall by force of this section vest in fee simple in the council of the district in which they are situated. There shall also vest in the council all materials place or laid on any road in order to be used for the purposes thereof.

Somers J in the Court of Appeal in *Fuller v MacLeod* (1981)[6] points out that it is not clear that the legislature in enacting s 316 and earlier equivalent provisions intended to do more than vest the fee simple of the part of the land described as road, including its soil and the materials the road is made of. He said: "It may be arguable that the Council's estate is in the nature of a stratum estate only, perhaps variable, as levels may be altered. The need to confer power to alter levels may support that."

Recently, the Privy Council expressed a view similar to that of Somers J:[7]

> There has been no argument before Their Lordships as to whether s316 effects a complete divesting of the landowner's title to the land over which the public road passes or whether there is only divested so much of the subsoil as is necessary to support and maintain the road. Griffith CJ in Narracan[8] referred to a complete divesting. [*The Chief Justice was dealing with land in Victoria and with a statute, the Local Government Act 1874, containing a similar vesting provision to that in s316.*] Their Lordships are not sure that that is right but do not find it necessary to reach a final decision on the issue. [*Part in brackets added by the author.*]

Clearly, the view of Somers J and the guarded opinion of the Privy Council are deserving of respect and consideration. The fee simple of the surface of a road still in a state of nature, or perhaps in pasture established by the occupying farmer, may not indicate a very substantial legal interest in the land which it comprises. Given the four Crown inhibitions on title indicated above, the territorial local authorities may have a limited interest in ownership, but clearly have a substantial role as local guardians in the public interest.

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[5] Section 43(1)(2) Land Act 1948.

[6] Noted at p6 above.

[7] *Man O'War Station v Auckland City Council* (Judgment No2) 2002 3NZLR 584 at P602.

[8] *Shire of Narracan v Levistion* (1906) 3CLR 846 at p861.

Management of unformed roads

The Crown has preserved an interest as guardian of the unformed roading network by retaining the controls summarised above under the heading "Statutory title to unformed roads". The nature of the vesting of unformed roads in the territorial local authorities confers general powers of management on the councils and a limited form of title. However, given the environment in which local agencies managing access now have to work, the Crown has not done much to equip councils with a range of specific powers. Indeed, as has been shown, many of the management principles concerning the surface of unformed roads are derived from common law as interpreted by the courts, rather than from the Crown.

In most parts of the country local management of unformed roads has probably been largely (though not, of course, completely) left to chance for more than a hundred years. But the environment today is vastly different from when the unformed roading network was laid out in the nineteenth century. In recent years the availability of all-terrain vehicles and global positioning technology have renewed general public interest in unformed roads and generated awareness of the value of the network.

The theory of both the common law and statute law, which together underpin unformed roading, is well enough settled when identified. The principal deficiency in the law for managing unformed roads relates to the undefined relationship between the occupiers of such roads and the recreational users. The territorial local authorities have a role to play in this respect and bylaws (as have been suggested) would clarify rights and duties and provide the council with a better defined jurisdiction. The proposal to allow the exchange of unformed roads for other forms of public access looks towards flexibility in the management of recreational access to be achieved with appropriate safeguards.

Flexible local management would appear to be the key to acceptable and sustainable use of the unformed roading network. In the opinion of this commentator, the ultimate guardian of this unique national asset has always been and should continue to be the Crown.

The wise words of Sir Edward Somers and Blanchard J (above at p6) may be adopted as a fitting conclusion: "Despite the vesting in the local authority the right of passage over a road is one possessed by the public, not the local authority, which holds its title and exercises its powers in relation to a road as upon a trust for a public purpose."

Appendix A: Statutory provisions in force in 1905

Coal Mines Act 1905, Section 16

Counties Act 1886, Sections 145, 245–248, 250, 251, 253–259, 272, 292, 304, 311, and 321

Counties Amendment Act 1904, Section 3

Crown Grants Act 1883, Sections 42, 43, 44, and 45

Defence Act 1886, Section 102

English Laws Act 1858

Fencing Act 1895, Section 26

Government Railways Act 1900, Sections 9, 11, 41, 44

Harbours Act 1878, Sections 142 and 150

Harbours Act 1878 Amendment Act 1904, Section 2

Harbours Act 1894, Section 8

Impounding Act, 1884, Section 2

Interpretation Act 1888, Section 12

Land Act 1892, Sections 13–18, 109, 110, 126, 128, 130, 131, 177, 198, 221, 235 and 249

Land Drainage Act 1904, Sections 17 and 20

Land for Settlement Consolidation Act 1900, Section 69

Land Transfer Act 1885, Sections 57, 171 and 173

Local Bodies Loans Act 1901

Local Bodies Loans Act 1901, Sections 73 and 77

Māori Land Laws Amendment Act 1903, Section 22

Mining Act 1905, Section 66, 200, 201, 204, 205, and 305

Municipal Corporation Act 1876, Sections 184, 185, 189, 190, and 211

Municipal Corporations Act 1886, Sections 231–264

Municipal Corporations Act 1900, Section 203, 209–256, 269, 282, 319, 335, 351, 374, 403–406, and 408

Municipal Corporations Act 1900, Schedule 7

Municipal Corporations Amendment Act 1902, Sections 23, 24, and 32

Municipal Corporations Amendment Act 1903, Section 16

Municipal Corporations Act 1906, Section 13

Native Land Act 1873, Section 106

Native Land Court Act 1894, Sections 69–72

Native and Māori Land Laws Amendment Act 1902

Native Township Act 1895

Native Township Local Government Act 1905, Section 11

Noxious Weeds Act 1900, Section 3

Police Offences Act 1884, Sections 3–6, and 15–17

Police Offences Act 1903, Sections 6 and 7

Public Works Act 1905, Sections 2, 10, 12, 16, 18, 19–21, 23, 24, 26–29, 33, 89, 90, 92–96, 100–119, 122–139, 141–153, 181, 184, 191–199, 222, 223, 239, 275–277, and 287

Public Works Act Amendment Act 1905, No. 10, Sections 2, 3

Rabbit Nuisance Act 1890, Section 5

Road Boards Act 1882, Section 126, 131, 138, 139, 144, and 145

Town Districts Act 1881, Section 3, 32, 33, 35, 36, and 53

Town Districts Act 1906, Section 3

Town Main Streets Act 1902, Section 2

Tramways Act 1894, Section 17, 19–20

Appendix B: 1974 definition of "road"

Section 315(1) of the Local Government Act 1974 defines "road" as follows.

Road means the whole of any land which is within a district, and which—

(a) Immediately before the commencement of this Part of this Act was a road or street or public highway; or

(b) Immediately before the inclusion of any area in the district was a public highway within that area; or

(c) Is laid out by the council as a road or street after the commencement of this Part of this Act; or

(d) Is vested in the council for the purpose of a road as shown on a deposited survey plain; or

(e) Is vested in the council as a road or street pursuant to any other enactment;

and includes—

(f) Except where elsewhere provided in this Part of this Act, any access way or service lane which before the commencement of this Part of this Act was under the control of any council [[or is laid out or construed by or vested in any council as an access way or service lane]] or is declared … by the Minister of Works and Development as an access way or service lane after the commencement of this Part of this Act [[or is declared by the Minister of Lands as access way or service lane on or after the 1st day of April 1988]]:

(g) Every square or place intended for use of the public generally, and every bridge, culvert, drain, ford, gate, building, or other thing belonging thereto or lying upon the line or within the limits thereof; —

but, except as provided in [[the Public Works Act 1981]] or in any regulations under that Act, does not include a motorway within the meaning of that Act:

. . .

Service lane means any lane laid out or constructed either by the authority of the council or the Minister of Works and Development [[or, on or after the 1st day of April 1988, the Minister of Lands]] for the purpose of providing the public with a side or rear access for vehicular traffic to any land:

[[**Survey plan** has the same meaning as in the Resource Management Act 1991:]]

(2) Repealed by s 9(1) of the Local Government Amendment Act 1979.

(3) Nothing in this Part of this Act shall be construed as imposing any obligation on the council in relation to any private road or private way.

(4) Every accretion to any road along the bank of a river or stream or along the mean high-water mark of the sea or along the margin of any lake caused by the action of the river or stream or of the sea or lake shall form part of the road.

(5) Where any road along the bank of a river or stream or along the mean high-water mark of the sea or along the margin of any lake is eroded by the action of the river or stream or of the sea or lake, the portion of road so eroded shall continue to be a road.

Appendix C: 1989 definition of “road”

The definition of “road” in s 43 of the Transit New Zealand Act 1989 that replaced the definition set out in s 121 of the Public Works Act 1981 is here set out in full.

Road means a public highway, whether carriageway, bridle path, or footpath; and includes the soil of—

(a) Crown land over which a road is laid out and marked on the record maps:

(b) Land over which right of way has in any manner been granted or dedicated to the public by any person entitled to make such grant or dedication:

(c) Land taken for road under the provisions of this Act or any other Act or Provincial Ordinance formerly in force:

(d) Land over which a road has been or is in use by the public which has been formed or improved out of the public funds, or out of the funds of any former province, or out of the ordinary funds of any local authority, for the width formed, used, agreed upon, or fenced, and a sufficient plan of which, approved by the Chief Surveyor of the land district in which such road is situated, has been or is hereafter registered by the District Land Registrar against the properties affected by it; and the Registrar is hereby authorised and required to register any such plans accordingly, anything in any other Act notwithstanding, when the plans are presented for registration by or on behalf of the Minister:

(e) Land over which any road, notwithstanding any legal or technical informality in its taking or construction, has been taken, constructed, or used under the authority of the Government of any former province, or of any local authority, and a sufficient plan of which is registered in the manner provided for in paragraph (d) of this subsection; —

and, unless repugnant to the context, includes all roads which have been or may hereafter be set apart, defined, proclaimed, or declared roads under any law or authority for the time being in force, and all bridges, culverts, drains, ferries, fords, gates, buildings, and other things thereto belonging, upon the line and within the limits of the road.

Appendix D: Schedule 10 Local Government Act 1974

Conditions as to stopping of roads and the temporary prohibition of traffic on roads

This schedule and the 11th to 13th schedules were inserted by s 3(1) of the Local Government Amendment Act 1978.

Stopping of Roads

1. The council shall prepare a plan of the road proposed to be stopped, together with an explanation as to [[why the road is to be stopped and]] the purpose of purposes to which the stopped road will be put, and a survey made and a plan prepared of any new road proposed to be made in lieu thereof, showing the lands through which it is proposed to pass, and the owners and occupiers of those lands so far as known, and shall lodge the plan in the office of the Chief Surveyor of the land district in which the road is situated. [[The plan shall separately show any area of esplanade reserve which will become vested in the council under section 345 (3) of this Act.]]

   [The words in both sets of double square brackets were inserted by s.362 of the Resource Management Act 1991.]

2. On receipt of the Chief Surveyor's notice of approval and plan number the council shall open the plan of public inspection at the office of the council, and the council shall at least twice, at intervals of not less than 7 days, give public notice of the proposals and of the place where the plan may be inspected, and shall in the notice call upon persons objecting to the proposals to lodge their objections in writing at the office of the council on or before a date to be specified in the notice, being not earlier than 40 days after the date of the first publication thereof. The council shall also forthwith after that first publication serve a notice in the same form on the occupiers of all land adjoining the road proposed to be stopped or any new road proposed to be made in lieu thereof, and, in the case of any such land of which the occupier is not also the owner, on the owner of the land also, so far as they can be ascertained.

3. A notice of the proposed stoppage shall during the period between the first publication of the notice and the expiration of the last day for lodging objections as aforesaid be kept fixed in a conspicuous place at each end of the road proposed to be stopped:

Provided that the council shall not be deemed to have failed to comply with the provisions of this clause in any case where any such notice is removed without the authority of the council, but in any such case the council shall, as soon as conveniently may be after being informed of the unauthorised removal of the notice, cause a new notice complying with the provisions of this clause to be affixed in place of the notice so removed and provisions of this clause to be affixed in place of the notice so removed and to be kept so affixed for the period aforesaid.

4. If no objections are received within the time limited as aforesaid, the council may by public notice declare that the road is stopped; and the road shall, subject to the council's compliance with clause 9 of this Schedule, thereafter cease to be a road.

5. If objections are received as aforesaid, the council shall, after the expiration of the period within which an objection must be lodged, unless it decides to allow the objections, send the objections together with the plans aforesaid, and a full description of the proposed alterations to the [[Environment Court]].

[[6. The [Environment Court] shall consider the district plan, the plan of the road proposed to be stopped, the council's explanation under clause 1 of this Schedule, and any objection made thereto by any person, and confirm, modify, or reverse the decision of the council which shall be final and conclusive on all questions.]]

[This clause was substituted for the former clause 6 by s.362 of the Resource Management Act 1991.]

7. If the [[Environment Court]] reverses the decision of the council, no proceedings shall be entertained by the [[Environment Court]] for stopping the road for 2 years thereafter.

8. If the [[Environment Court]] confirms the decision of the council, the council may declare by public notice that the road is stopped; and the road shall, subject to the council's compliance with clause 9 of this Schedule, thereafter cease to be a road.

9. Two copies of that notice and of the plans hereinbefore referred to shall be transmitted by the council for record in the office of the Chief Surveyor of the land district in which the road is situated, and no notice of the stoppage of the road shall take effect until that record is made.

10. The Chief Surveyor shall allocate a new description of the land comprising the stopped road, and shall forward to the District Land Registrar or the Registrar of Deeds, as the case may require, a copy of that description and a copy of the notice and the plans

transmitted to him by the council, and the Registrar shall amend his records accordingly.

[[11.The council may, subject to such conditions as it thinks fit (including the imposition of a reasonable bond), and after consultation with the Police and the Ministry of Transport, close any road or part of a road to all traffic or any specified type of traffic (including pedestrian traffic) –

(a) While the road, or any drain water race, pipe, or apparatus under, upon, or over the road is being constructed or repaired; or

(b) Where, in order to resolve problems associated with traffic operations on a road network, experimental diversions of traffic are required; or

(c) During a period when pubic disorder exists or is anticipated; or

(d) When for any reason it is considered desirable that traffic should be temporarily diverted to other roads; or

(e) For a period or periods not exceeding in the aggregate 31 days in any year for any exhibition, fair, show market, concert, film-making, race or other sporting event, or public function:

Provided that no road may be closed for any purpose specified in paragraph (e) of this clause if that closure would, in the opinion of the council, be likely to impede traffic unreasonably.

[[11A. The council shall give public notice of its intention to consider closing any road or part of a road under clause 11(e) of the Schedule: and shall give public notice of any decision to close any road or part of a road under that provision.

[[11B. Where any road or part of a road is closed under clause 11(e) of this Schedule, the council or, with the consent of the council, the promoter of any activity for the purpose of which the road has been closed may impose charges for the entry of persons and vehicles to the area of closed road, any structure erected on the road, or any structure or area under the control of the council or the promoter on adjoining land.

[[11C. Where any road or part of a road is closed under clause 11 (e) of this Schedule, the road or part of a road shall be deemed for the purposes of –

(a) The Transport Act 1962 and any bylaws made under section 72 of that Act:

(b) The Traffic Regulations 1976:

(c) The Transport (Drivers Licensing) Regulations 1985:

(d) The Transport (Vehicle and Driver Registration and Licensing) Act 1986:

(e) The Transport (Vehicle Registration and Licensing) Notice 1986:

[(ea) The Land Transport Act 1998:]

(f) Any enactment made in substitution for any enactment referred to in [paragraphs (a) to (ea)] of this clause—

not to be a road; but nothing in this clause shall affect the status of the road or part of a road as a public place for the purposes of this or any other enactment.]]

[Clauses 11, and 11A to 11C, were substituted for this former clause 11 (as enacted by s.3 (1) of the Local Government Amendment Act 1978) by s.14 (1) of the Local Government Amendment act (No.3) 1986.

[In clause 11C, para. (ea) was inserted from 1 March 1999 by s.215 (1) of the Land Transport Act 1998.

[In Clause 11C the words "paragraphs (a) to (ea)" were substituted for the words "paragraphs (a) to (e)" from 1 March 1999 by s.215 (1) of the Land Transport Act 1998.]

12. The powers conferred on the council by clause 11 (except paragraph (e)) may be exercised by the Chairman on behalf of the council or by any officer of the council authorised by the council in that behalf.

13. Where it appears to the council that owing to climatic conditions the use of any road in a rural area, other than a State highway or Government road, not being a road generally used by motor vehicles for business or commercial purposes or for the purpose of any public work, may cause damage to the road, the council may by resolution prohibit, either conditionally or absolutely, the use of that road by motor vehicles or by any specified class of motor vehicle for such period as the council considers necessary.

14. Where a road is closed under clause 13 of this Schedule, an appropriate notice shall be posted at every entry to the road affected, and shall also be published in a newspaper circulating in the district.

15. A copy of every resolution made under clause 13 of this Schedule shall, within 1 week after the making thereof, be sent to the Minister of Transport, who may at any time, by notice

to the council, disallow the resolution, in whole or in part, and thereupon the resolution, to the extent that it has been disallowed, shall be deemed to have been revoked.

16. No person shall—

(a) Use a vehicle, or permit a vehicle to be used, on any road which is for the time being closed for such vehicles pursuant to clause 11 of this Schedule; or

[[(aa) Without the consent of the council or the promoter of any activity permitted by the council, enter or attempt to enter, or be present, on any road or part of a road that is for the time being closed to pedestrian traffic pursuant to clause 11 of this Schedule; or]]

(b) Use a motor vehicle, or permit a motor vehicle to be used, on any road where its use has for the time being been prohibited by a resolution under clause 13 of this Schedule.

[Para. (aa) was inserted by s.14 (2) of the Local Government Amendment Act (no.3) 1986.]