

**Development of New Zealand Case Law
Related to the public right of passage over roads**

1896

Queen v Mayor, Councillors, and Citizens of Wellington
(1896) 15 NZLR 72

The Court held that every person was not necessarily entitled to unrestricted access to every part of a street... an obstruction by or with the authority of the Corporation was legal unless it was a public nuisance or interfered with individual rights. Whether a structure was a public nuisance, interfering unduly with the reasonable use of the street under the circumstances, was a question of fact.

1977

Lower Hutt City v AG ex Moulder [1977] 1 NZLR 184

...although the roads are vested in the local corporation they nevertheless retain their character as highway so that the ownership of the corporation is in general subject to the rights in respect of highways enjoyed both by the public and by adjoining owners. . Citing Shah: **At common law a permanent obstruction created upon a highway without lawful authority, and which renders the way less commodious than before to the public, is a "public nuisance" provided that the obstruction is an appreciable interference with the traffic in the street.** *Follows* R v. Batholomew [1908] 1 KB 554. It may also be noted that it is no defence that the obstruction, though a nuisance, is in other ways beneficial to the public. ('Traffic' is use in all its forms).

1977

Moore v MacMillan [1977] 2 NZLR 81

[Concerning a substantial **encroachment** on a public road, in the form of catteries, that were removed by the defendant. The plaintiff unsuccessfully sued for trespass and damages].

Subject to the powers of a council, express or implied, the public has the absolute right at common law to pass and repass over the highway without hindrance.

A road is incapable of occupation to the exclusion of the right of every member of the public to assert their right to pass and repass without hindrance over every part of it. This is no mere exercise in theory: Chilwell J

A person who erects cattle-yards on a road cannot maintain an action in trespass against a person who demolishes part of the yards.

Held that ... **the law did not recognise a personal licence as creating any interest in land sufficient to found an action for trespass; likewise the law did not recognise the "right" of any person to occupy a road to the exclusion of the public.**

1981

Fuller v MacLeod [1981] 1 NZLR 390

Held: A frontager's common law rights of access to a highway were applicable in New Zealand subject to any statutory limitations.

The Court held [citing Pratt and McKenzie] that at common law these English principles were applicable in New Zealand:

(i) a frontager had the right of egress and ingress at all points on his or her street boundary

(ii) the right of access encompassed access of pedestrians to the footpath and of vehicles to the carriageway

(iii) the rights of the frontager arose from his or her ownership of land abutting the street and were not dependent on any prior dedication of the land comprised in the street or the ownership of the subsoil and

(iv) The rights of the frontager are not absolute and involved an accommodation of his private rights with the rights of passage of the public. - or as put by by Cozens-Hardy MR in *Tottenham Urban District Council v Rowley* [1912] 2 Ch 633, 644:

“...the owner of adjoining land has a private right attached to his property to gain access to the highway. This is a right that must be reasonably exercised so as not to interfere with the reasonable exercise of the public of their rights of way...the rights of the public are subject to the reasonable exercise by the adjacent owner of his private rights.”

The Court held that the public right of passage was essentially a right to pass along the street and the right of access was a private right. ... The land comprised in the street was vested in the Council for highway purposes and the right of the public to pass and repass along the highway did not include an inherent right to access to and from private property;

Citing *The Queen v Wellington City Council* [1896]

An obstruction by or with the authority of the Council was legal “unless it a public nuisance”, and then added “or interferes with individual rights.”

The common law has drawn a sharp distinction between the private right of the frontager to access to the highway and the right of the public to pass and repass along the highway, and there is no support...for...argument that access to and from private property is inherent in the public right of passage.

Citing *Attorney-General v Thames Conservators* [1862]

“...the right of a man to step from his land onto a highway is something quite different from the public right of using the highway. The public have no right to step on to the land of a private proprietor adjoining the road.”

Citing Lord Cairns in *Lyons v Fishmongers' Company* [1876]

“...a right of immediate access from private property to a public highway, as a private right, distinct from the right of the owner of that property to use the highway itself as one of the public.”

1988

Frecklingham v Wellington City Council [1988] 1 NZLR 72.

Citing *Moore v MacMillan*

A frontager's private right of access to a road involves no more than his right to gain access to the road so as to make it possible for him to exercise his public right, in common with other members of the public, to pass and repass along the road (see p 75 line 48).

1992

Paprzik v Tauranga District Council [1992] 3 NZLR 176; (1991) 1 NZRMA 73

Customary uses of urban streets

**The use of roads has never been confined to travel and transportation...
Wherever people habitually pass or congregate in public there are likely to be social, political, recreational and commercial activities.**

The dedication as a public road gives the public a right of passage over it subject to any limitations in the terms of the dedication and to any applicable legislation.

... the ordinary citizen's common law right to use a publicly dedicated highway is not absolute. In addition to any limitations in the terms of the original dedication, it is qualified by the fact that it is a right of passage only, the reasonable requirements of other road users, and any superimposed legislation. All three are relevant here.

... some degree of obstruction to passage may be acceptable if reasonable in quantum and duration. It is true that a citizen can object to an act which renders the right of passage more difficult... a highway will be obstructed if a trench is dug across it ... But each citizen's right of passage is subject to the reasonable requirements of other road users. Those requirements may extend to temporary and reasonable obstructions

Highways are no doubt dedicated prima facie for the purpose of passage; but things are done upon them by everybody which are recognised as being rightly done and as constituting a reasonable and usual mode of using a highway as such. If a person on a highway does not transgress such reasonable and usual mode of using it I do not think that he will be a trespasser.

The customary uses of such [urban] streets extend well beyond mere passage from one point to another. They include, inter alia, street trading...

At common law [councils] can authorise street trading ... so long as it would not conflict with the passage of others to an unreasonable degree.

2002

Re **Ruapehu District Council**

Decision Number **A083/02**

ELRNZ Reference 8 ELRNZ 144

Digest Reference 7 NZED 516

Environment Court [reversal of RCC decision to stop Kokako Road, a former bridle track]

The Court held that uses, even recreational type uses, are a factor to consider provided they are considered in the context of the overall use by the community and the reasonable expectations of such use. Their importance will depend on the facts of a particular case. [para 46]

The Court found that the evidence clearly established that a significant number of the community used the road for a variety of purposes. These included trekking, tramping, camping and use of the road as part of a wider network of linking tourists and recreational passages. These were all uses one would reasonably expect the public to exercise on this sort of road. **There was a need by a significant section of the community for the road, albeit not in the ordinary sense of the right for vehicular passage, but for a wide range of uses including foot and horse passage.** The Kokako Road provided a necessary link in passage across the countryside, fulfilling a range of societal needs now and in the future.

Full text of Ruapehu District Council

Present Use

[31] That the road has fallen into disrepair is not disputed. Roads are seen as those pathways that enable the transport of humans and their cargo be it by foot horse or engine power. **Transport modes change over time and we should not be limited by vision of a road formed and serviced to vehicular standards this is not that sort of road.**

[32] Evidence by all parties acknowledged that in parts the road was difficult to traverse indeed slips and re-growth made some parts hard to find and bulldozer tracks have cut across it. **We do not place too much weight on the present condition of the road. It is clear that access by the public has been curtailed by the land use**

management practices of the proprietor who owns the land on both sides of the road. The road is currently incorporated into the farm property. Surveillance cameras fences and barriers have prevented public usage and continue to do so. It appears that the owner has arrogated to itself a right to close the road.

Alternative Route

[35] We note that this alternative route an access and esplanade strip would not have the same legal status as a road and could be varied or discontinued by agreement between the landowner and the Council. A registered proprietor of any land subject to an esplanade strip may apply to the territorial authority to vary or cancel the instrument creating the strip. The territorial authority may at any time initiate a proposal to vary or cancel the instrument creating an esplanade strip.

2003

Upper Hutt City Council v Akatarawa Recreational Access Committee Inc.
Decision Number **W 21/2003**

Road stopping case - excerpts relating to public use of unformed road:

What is a 'paper road' ?

[9] The unformed section of Johnsons Road in question was referred to as a 'paper road'. That is an informal way of referring to road that has not been formed.

[10] There are many paper roads in this country. Many of them have been fenced and are used as if part of the private property through which they pass. Yet a 'paper road' remains a public road, even if the territorial authority has acquiesced in it being fenced and used as if it is private land. At law the public still have the right to pass along it....

[12] The unformed section of road in the Upper Hutt City district is 20 metres wide. Its route through the Woodhill land is not marked or otherwise evident on the ground. Its position can only be identified reliably by survey, or by use of global positioning system equipment. The only exception is a short section on a saddle in the ridge where a farm track follows the same alignment to cross the ridge.

[21] ...we understand it is the Court's duty to consider objections on any relevant ground, whether of public interest or of private interest. That could include a wish by people to use for recreation the road proposed to be stopped. So with respect we do not follow the decisions based on the earlier law, but follow the decision in the Ruapehu District case in that respect.

[44] ...We find that in its present state the unformed section is passable on foot by determined hikers. We also find that if a track is cut through some dense scrub, a few trees removed, and the occasional steep cross- slope is benched, it would also be passable on horseback, on four-wheel drive quad bikes, mountain bikes, motor bikes and other recreational vehicles. The swampy sections and cross-slopes would be regarded as challenges of skill, rather than as impassable stretches.

[45] In short, the current impediments to passage along the unformed section could readily be attended to if the Council approved. The present condition of the unformed section is not a ground for stopping it as road.

[61] ... we do not accept that the Council would have a duty to ensure that the unformed road reaches the same standard of safety or serviceability as a road fully formed to its standards for roads carrying conventional traffic. The standard of care would be related to the unformed state of the road for recreational use. The Council might even consider it appropriate to erect signs warning that the unformed road is suitable only for defined classes of recreational activities.

[82] A public road, even one that is unformed, may be an asset. It would be difficult to replace. If a public road is valued by the public, or sections of it, for use within the scope of the purpose of a public road, that value deserves to be weighed against whatever cause is shown for stopping it as road and disposing of the land.

[83] In respect of the section of Johnsons Road in question, the Council 's case was that the road is impassable, is not required for road now, and will not be in the future. **We have found that although in its present state the road is impassable by ordinary traffic, it is passable by some users, and could readily be made passable by more members of the public if the Council decides to carry out minor works to remove impediments to passage. We have also found that the section in question is required now as public road by some members of the public for use for recreational purposes. That is likely to continue in future.**

[84] We accept that the existence of the road through the Woodhill land is an impediment to the proposed subdivision of it. **However the road was surveyed some 130 years ago**, long before the present owners of the land acquired it; and **those responsible for designing the subdivision were not entitled to assume that the road would necessarily be stopped. Although the owners of blocks of land to which access might be obtained from this section of public road would benefit if it is stopped, that would be a consequential benefit rather than a substantial ground for disposing of this public asset.**

[85] We do not consider that the Council 's responsibility for the safety of users of public assets under its control provides an independent ground for disposing of this asset.

[87] In short, it is our judgement that there is a public need for this section of road, and a public benefit from it continuing to have the status as public road; and that adequate cause has not been made out for stopping it.