IN THE DISTRICT COURT
AT KAITAIA

I TE KŌTI-Ā-ROHE
KI KAITAIA

CIV-2019-029-000157
[2020] NZDC 12171

BETWEEN	ROGER ERNEST TOMBLESON Plaintiff
AND	FAR NORTH DISTRICT COUNCIL Defendant

Hearing: 19 May 2020

Appearances: Plaintiff appears in Person
G Swanepoel for the Defendant

Judgment: 30 June 2020

RESERVED DECISION OF JUDGE D J McDONALD

Background

[1] Mr Tombleson and his family live on Parapara–Toatoa Road. It is a gravel public road. It is a formal road vested in the Far North District Council.

[2] On 21 January 2019 Mr Tombleson was driving his Alpha Romeo 147 motor vehicle along the road. He alleges that the FNDC had allowed the Parapara-Toatoa Road fall into such a state of disrepair, through excessive rutting, that it resulted in the lower engine tray of his motor vehicle being torn off. He claims that the road had been degenerating for some time prior to the damage to his Alpha Romeo.

Disputes tribunal

[3] He filed an application to the Disputes Tribunal. The referee found he did not have jurisdiction to hear the dispute as it was brought under, in part, the Occupiers' Liability Act. The referee said he could hear the other causes of action if Mr Tombleson forfeited his right to the claim under that Act. Mr Tombleson declined to do so. The matter was transferred to this Court for hearing.

Application

[4] The defendant, FNDC, seeks summary judgment against the plaintiff or alternatively for the Court to strike out the plaintiff's claim.

The defendant's position

[5] Mr Swanepoel submitted that the plaintiff put forward four causes of action:

(a) Breach under s 23(b) of the Health Act;
(b) Breach of statutory duty under s 353 of the Local Government Act;
(c) Breach of s 191 of the Local Government Act; and
(d) Breach of duties under the Occupiers' Liability Act.

[6] Road maintenance in the northern part of the Far North is contracted to Fulton Hogan under the contract numbered 7/18/100, "Roading Maintenance and Renewals FNDC North" ("the Contract"). The Contract requires regular inspection of the roads at different intervals for different roads. Where there is an issue this will be logged and is to be performed in the recommended amount of time for the type of job. Grading of roads is a routine job which does not require approval. The obligation to inspect, log and rectify incidents is with Fulton Hogan.[1] The FNDC submits it has not breached any obligation under the contract, and if they did this is not something the Plaintiff can enforce or seek a remedy for because he is not a party to the Contract.

[1] Page 3 of the Respondent's submissions to the Disputes Tribunal.

[7] Mr Swanepoel said there is no breach of the Health Act because it does not apply generally in this case. Section 23 requires the local authority to improve, promote and protect public health by doing the actions it is authorised to do under that section. Public health is defined in the Health Act as that contained in the New Zealand Public Health and Disabilities Act 2000. It is, "The health of all the people of New Zealand, the community, or sections of such people." Therefore, the local authority is not required to do those actions in order to protect the vehicles of all the people of New Zealand, the community or sections of such people, because that is not within the scope of public health.

[8] There is no breach under s 353 of the Local Government Act because the FNDC contracted with Fulton Hogan for road maintenance and repairs, and the process and time frames set out in that contract were met in this case. Mr Tombleson reported the road on 7 January, it was inspected on 15 January and logged, and then the road was graded on 24 January. The total time between Mr Tombleson calling the FNDC and the road being graded was two and a half weeks. The inspector from Fulton Hogan regarded the situation as routine and did not believe there was any risk to safety.

[9] There is no breach under s 191 of the Local Government Act because the Defendant did not create a nuisance. The rutting was normal wear and tear of a road. There is a common law rule that local councils are not liable for the ordinary wear and tear, or disrepair, of a road. Even if this were not ordinary wear and tear the FNDC emphasises that the disrepair was created by the public's use of the road and not any action by the FNDC.

The plaintiff's position

[10] The Plaintiff relied on Salmond on Torts, 11th Edition at page 309, which said that:

> In the absence of an expressed statutory provision to that effect, no action will lie against any local authority intrusted with the care of highways for damage suffered in consequence of the omission of the defendants to perform their statutory duty of keeping the highway in repair; but this exemption from liability extends only to cases of pure non-feasance, and the local authority is responsible in damages for any active misfeasance by which the highway is rendered dangerous.

[11] Mr Tombleson then argued that there are two categories of non-feasance: active and passive. He submits that the difference is that active misfeasance is where a person suffers loss and passive non-feasance is where they are no worse off after the incident than before.

[12] The FNDC created the nuisance by breaching their contract. This creates liability under s 191 of the Local Government Act.

[13] Mr Tombleson submits that he is a visitor to the Fulton Hogan contract due to the Occupiers' Liability Act. He submits that there is no common law right to drive on roads and so he is a visitor under the Occupiers' Liability Act.

[14] Nuisance would include the rutting and the Council is under an obligation to inspect for nuisances or conditions which are likely to be injurious to health or offensive under the Health Act 1956.

The Law

Strike out and summary judgment

[15] Summary judgment can be given for the Defendant if none of the causes of action in the statement of claim can succeed.[2] The Privy Council in *Attorney-General v Jones* said that use of the procedure will be rarely, if ever, appropriate where the outcome may depend on disputed issues of fact.[3] However, if the defendant can show on the balance of probabilities that none of the claims can succeed then judgment can be given.[4]

[16] Alternatively, the Court can strike out all or part of the proceeding where it discloses no reasonably arguable cause of action.[5]

[17] Which course is appropriate will depend on the defect in the plaintiff's case. If it is possible for the plaintiff to amend the claim to remedy the defects, then

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2 District Court Rules 2014, r 12.2.
3 *Attorney-General v Jones* [2004] 1 NZLR 433 at [5].
4 At [10].
5 DCR, r 15.1(1)(a).

summary judgment is not appropriate. Summary judgment "should only be used where the defendant has a clear answer to the plaintiff which cannot be contradicted."[6]

[18] When considering an application for both strike out and summary judgment for the defendant, *Burley v Samoilov* suggests that the strike out application should be determined first, and then summary judgment addressed for claims still surviving. [7]

The Health Act 1956

[19] Section 23 creates a duty for every local authority to improve, promote and protect public health within its district. It is empowered and directed to do the acts in paras (a) to (f) for that purpose.

[20] The Plaintiff focuses on para (b). This is that the local authority is empowered and directed:

> To cause inspection of its district to be regularly made for the purpose of ascertaining if any nuisances, or any conditions likely to be injurious to health or offensive, exist in the district.

[21] Paragraph (c) follows on and states that:

> If satisfied that any nuisance, or any condition likely to be injurious to health or offensive, exists in the district, [it is empowered and directed] to cause all proper steps to be taken to secure the abatement of the nuisance or the removal of the condition.

[22] Although para (c) creates an obligation to remedy a nuisance, that obligation would only arise where the local authority is satisfied that a nuisance exists.

[23] A nuisance is defined in s 29 of the Health Act. Section 29 lists a series of situations where a nuisance will be created, but this is not to limit the meaning of the term nuisance. Paragraph (o) includes where a street, road, right of way,

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6 Roderick Joyce (ed) *Civil Procedure: District Courts & Tribunals* (online looseleaf ed, Thomson Reuters) at [DCR12.2.05].

7 *Burley v Samoilov* HC Tauranga CIV-2003-070-123, 19 October 2006 and *Civil Procedure* at [DCR 15.1.04].

passage, yard, premises, or land is in such a state as to be offensive or likely to be injurious to health.

[24] Offensive is not defined in the Act. In *Adams v Napier CC*, "nuisance" in s 29 was held to have its full natural and ordinary meaning free of any specialised meaning it may have had historically in the law.[8]

[25] Since the Health Act is intended to protect public health and prevent threats to public health from arising, the nuisance must be a threat to public health and safety. For example, a pile of rubble which is offensive to the eye is not within the meaning of offensive in s 29.[9] In *Roberts v Hall* the judge stated that: [10]

> The threat to health and the offensiveness must go beyond the occupier of the premises on which the nuisance arose and must involve a significant proportion or number of the public…The nuisance must be a nuisance which affects public health.[11]

[26] However, the noise from an extractor fan has been held to be a nuisance under para (ka) because it was objectively offensive.[12]

[27] Section 23 creates a statutory duty but is not an enforcement provision. The only provision which relates to enforcement or remedies for s 23 is s 123A. This allows the Minister of Health to apply to the High Court for a writ of mandamus to compel a local authority to perform any of its statutory duties under the Act. Section 123 allows the Director-General to carry out any duties not performed by a local authority and recover his or her expenses in doing so.[13]

[28] In the absence of a provision which allows individuals to bring claims under s 23 it is simply a general statutory duty. In relation to a general statutory duty the non-feasance rule applies without express provision to the contrary. This

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8 *Local Government – Associated Legislation* (online loose-leaf ed, Thomson Reuters) at [HA29.05].
9 At [HA29.04] and [30.04].
10 *Roberts v Hall* HC Gisborne M41/85, 5 March 1986.
11 *Local government* at [HA29.04]; paraphrased from *Roberts* at [9].
12 *Health Law – A to Z of New Zealand Law* (online loose-leaf ed, Thomson Reuters) at [30.27.3.3]; *Edwards v Manukau City Council* HC Auckland AP197/92, 5 October 1992.
13 Health Act 1956, s 123(2) and (6).

is a case of non-feasance and the FNDC cannot be liable for damages. The non-feasance rule is discussed in the next section.

[29] The other possibly relevant section of the Health Act is s 33. Section 33 allows for orders to abate a nuisance and/or prohibit its recurrence. However, it does not allow a person to seek damages for loss caused by a nuisance. In *Geiringer v Attorney-General* the Court said that:[14]

> The general scheme of Part II of the Health Act 1956 precludes an application by a private individual with no personal grievance to initiate proceedings under s. 33 thereof.

[30] Here the Plaintiff has a personal grievance but the judge in *Geiringer* was of the view that the local authority should be the one to pursue proceedings under s 33. I found no examples of claims brought by an individual under that section against a local authority.

The Local Government Act 1974

[31] Section 353 of the Local Government Act creates a general statutory duty on "the council" to take all sufficient precautions for the general safety of the public and traffic and workmen employed on or near any road. The paragraphs provide particular requirements but none of those apply in this case. Therefore, the only obligation acting on the FNDC under s 353 was the general duty.

[32] Some discussion was dedicated to the common law exemption from liability for non-repair of roads by a local authority. Mr Tombleson brought up a distinction between non-feasance and misfeasance. As a result, I note the following:

(a) "Although a council as a road authority may be immune from liability for damage caused as the result of nonfeasance through deterioration to a public highway, once it decides to reconstruct or repair a road or bridge, it may be liable for misfeasance or negligence. The principles are stated in *Hocking v Attorney-General*…"[15]

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14 *Geiringer v Attorney-General* [1969] NZLR 278.
15 *Local Government Key Legislation* (online looseleaf ed, Thomson Reuters) at [LO353.01].

(b) In *Hocking* the roading authority was doing repair work on a section of road.[16] They put in a culvert, but it was insufficient to prevent the road being eroded. The long-standing "non-feasance rule" provided immunity to highway authorities for passive non-repair.[17] However, this was not an act of non-feasance and so the Court found that the roading authority may be liable for damages, but only on proof of negligence.[18] A new trial was needed for determining the existence of any negligence.[19]

[33] Mr Tombleson is correct that there was a distinction in the New Zealand law between non-feasance and misfeasance by an authority in charge of repairing the roads. However, this would be a case of non-feasance. The rutting was clearly passive non-repair and not a situation like in *Hocking*, where the authority had made an insufficient repair job. Therefore, that distinction does not help the Plaintiff. Whether loss was suffered or not makes no difference to the exemption from liability for non-repair of the road under the non-feasance rule. The Plaintiff seems to have confused the meaning of misfeasance.

[34] As a result, the statutory duty to keep the road in repair does not, in the absence of express reference otherwise, create liability for damage caused by failure to meet that duty where the failure is by non-feasance. Section 353 does not have an express exception and, therefore, the FNDC cannot be liable to an individual for damage suffered by not grading the road.

The Local Government Act 2002

[35] Section 191 states:

"This subpart does not entitle a local authority—

(a) to create a nuisance; or

[16] *Hocking v Attorney-General* [1963] NZLR 513 (CA).
[17] At 519.
[18] At 532-533 and 540 (North J); headnote.
[19] At 540 (North J).

(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."

[36] This section is clearly aimed at ensuring the rights *under the subpart* are not used to allow nuisances or deprivation of rights and remedies owed to the Crown or any person. It does not limit any rights, abilities, indemnities or otherwise that the local government may have beyond that subpart. It is not a statutory duty of general application.

[37] This clearly cannot be used to claim damages for harm suffered as a result of the local government's acts or omissions outside of the scope of the subpart. The maintenance of roads is completely unrelated to subpart 3 which is titled "powers in relation to private land." The subpart allows:[20]

(a) construction of works on private land for certain purposes;
(b) entry to check utilities;
(c) approving an occupier to do work where the owner fails to do so;
(d) executing work where both owner and occupier fail to do so;
(e) recovery of costs;
(f) acquisition of land for public works; and
(g) payment of compensation for land taken or injuriously affected.

[38] Section 191 does not create liability for nuisances created by outside of the subpart and therefore does not assist the Plaintiff.

The Occupiers Liability Act 1962

[39] The duties under the Occupiers' Liability Act are owed to visitors to the property. There is no specific definition of visitor under the Act but s 3(2) means that the Act does not change who the duties are owed to and from compared to the common law. A visitor is someone who would be the occupier's invitee or licensee.

[20] Local Government Act 1974, ss 181 – 190.

[40] In *Greenhalgh v British Railways Board,* in the context of the UK Occupiers' Liability Act 1952, Lord Denning said that

> A person is a "visitor" if at common law he would be regarded as an invitee or licensee; or be treated as such, as for instance, a person lawfully using premises provided for the use of the public, *e.g.* a public park, or a person entering by lawful authority, *e.g.* a policeman with a search warrant. But a "visitor" does not include a person who crosses land in pursuance of a public or private right of way. Such a person was never regarded as an invitee or licensee, or treated as such.[21]

[41] The same approach to users of a public road or right of way has been taken in later UK cases.[22] In the *Clutterham* case, after deciding the plaintiff was not a visitor to the Court went to the non-feasance rule. It found that no misfeasance had occurred by the authority allowing snow to collect and then rut on the road, so the authority was not liable.

[42] This is the same as the current case. Mr Tombleson cannot be a visitor because the public is not a visitor on a public road or right of way. Therefore, the Occupier's Liability Act 1962 would not apply and the common law non-feasance rule precludes liability.

Conclusions on each cause of action

[43] Section 23 of the Health Act 1956 creates duties and rights on a local authority but does not provide for enforcement. In the absence of an enforcement provision for individuals, and without express words to limit or prevent application of the non-feasance rule, the common law exception to liability for non-repair of roads applies.

[44] Section 353 of the Local Government Act 1974 is a general statutory duty and the common law non-feasance rule prevents it from creating liability for damage caused by non-feasance, as opposed to misfeasance, unless the section expressly states otherwise. This is mere non-feasance and the Plaintiff cannot claim for damage caused by it.

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[21] *Greenhalgh v British Railways Board* [1969] 2 QB 286 at 292-293.
[22] *Maureen Clutterham v Anglian Water Authority* 1986 WL 1255324 (EWCA (Civil)); *McGeown v Northern Ireland Housing Executive* (1995) 70 P. & C.R. 10 (HL).

[45] Section 191 of the Local Government Act 2002 is a limit on the powers under subpart 3 of that Act and not a limit on the wider rights, powers and abilities of a local authority. Therefore, it does not apply to the current situation.

[46] The Occupiers' Liability Act provides protection for visitors to a property. Mr Tombleson is not a visitor. A visitor is the same as a licensee or invitee under the common law, and this did not include people using a public road or right of way.

Result

[47] It is clear that none of the causes of action advanced by Mr Tombleson can succeed. This is not a case where the defect could be remedied in relation to the first and second cause of action because the FNDC has an answer to those causes of action through the non-feasance rule.

[48] Causes of action three and four cannot apply to the factual situation here.

[49] I grant summary of judgment in favour of the defendant in relation to each of the causes of action. It may well be that for causes of action three and four a strike out would be more appropriate because they fail on the basis that they cannot be made out at all, rather than the defendant having to answer or a defence to the claim. However, I am satisfied that the claim could not be remedied in relation to those causes of action and summary judgment is appropriate.

Costs

[50] If the FNDC seeks costs it is to file and serve memorandum within 10 working days of receiving this decision.

D J McDonald
District Court Judge