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THE LIABILITY OF TRAFFIC OFFICERS IN TORT FOR FALSE IMPRISONMENT

Submitted for the LL.B (hons) degree at the Victoria University of Wellington

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I. INTRODUCTION

A traffic officer is a common sight on the highways and byways of New Zealand. Setting forth, resplendent in uniform as a visible presence of law and order in our society, a traffic officer is charged with the task of ensuring the efficient and safe progress of traffic over our roads.

To perform these tasks, a traffic officer is given a number of powers in the Transport Act 1962. The more important of these powers can be briefly listed.

Section 66, which gives a traffic officer the power to stop moving vehicles.

Section 58A, which gives a traffic officer the power to administer breath tests to motorists, and require motorists to accompany an officer to undergo further tests.

Section 68B, which gives a traffic officer the power to inspect vehicles, issue notices requiring people to remove their vehicles from the road, require a name and address, and order vehicles to be towed away.

Section 62, which gives an officer the power to arrest drivers under the influence of drink and drugs in certain situations.

Except where a traffic officer has been given special powers by statute, an officer is in the same position as a normal citizen. Thus if an officer interferes with the rights of a motorist when acting outside the ambit of the powers given, then the officer is answerable to the law.

There are two consequences for a traffic officer who does act unlawfully and infringes the rights of a motorist, other than the possibility of a criminal charge. The first is that the officer becomes liable to a tort action in respect of the wrong. The second is that any evidence in relation to an offence committed by a motorist gained while the officer was acting illegally, may be excluded in court at the judge's discretion.

Comparatively few tort actions are brought against the Ministry of Transport or its officers. This is predominantly a result of the fact that many motorists who do have a grievance against a traffic officer will also be charged with an offence. They will therefore use any illegality on an officer's part as a means to

escape conviction, rather than as the basis for a tort action. But Courts have recognised tortious conduct on the part of a traffic officer when it has occurred. Thus in Ministry of Transport v. Payn[1] the Court recognised that an officer committed a trespass; in Ministry of Transport v. Edwards[2] the officer was held to have made an illegal forced entry; in Connolly v. Ministry of Transport[3] the officer's conduct in requiring a person to accompany him when he had no power to do so was held to be illegal; in White v. Ministry of Transport[4] an officer was stated to have illegally detained a motorist; and in Stowers v. Auckland City Council[5] an officer was recognised as having assaulted a person.

These events illustrate that it is necesary to examine the limits of an officer's powers to see how far they extend, and in what situations a tort is committed. As it is a traffic officer's role in stopping and detaining moving vehicles which is most contentious, this paper will concentrate solely on the issue of false imprisonment. In particular, it will deal with false imprisonment which may arise in the drinking-driving and random stopping areas.

II. FALSE IMPRISONMENT

(A) The Tort of False Imprisonment Defined

False imprisonment is a somewhat misleading name for the tort. False does not mean 'fallacious' here, but rather is used in the sense of 'wrongful' or 'unjustified'. Also, there is no need for actual imprisonment to occur for the tort to arise. The unlawful detention can be either custodial or non-custodial[6], and it is enough that the plaintiff has been in any manner completely deprived of liberty.

The emphasis in false imprisonment does not seem to be as much on whether the plaintiff actually was imprisoned, as on the plaintiff's state of mind - did the plaintiff believe on reasonable grounds that he or she was imprisoned? Thus false imprisonment will include a situation where[7]

> submission to the control of another is procured by assertion of legal authority, as when a store detective or (even more) a policeman without actually laying hands on the plaintiff or formally arresting him, gives him to understand that he must submit or else be compelled.

This view of false imprisonment is especially relevant to the case of a traffic officer, whose standing as a law enforcement agent ranks somewhere between a store detective and a policeman.

False imprisonment will thus occur any time when a plaintiff is actively confined or prevented from exercising the privilege of leaving the place where he or she is. False imprisonment must necessarily be detention against the will of the plaintiff.

(B) Blundell v. The Attorney General : Ramifications for False Imprisonment

This case[8] established that in order for someone to be lawfully detained, the person detaining them (in that case a constable) must be able to point to a specific legal power authorising the detention. If there is no legal power authorising the detention, then the detention is unlawful and will be actionable in tort. False imprisonment, it was noted in the case, occurs when there is actual physical custody over a person. But it also includes[9]

> the much rarer case of a restraint in liberty of movement ... extending possibly

> over only a brief time, but nonetheless by definition an imprisonment, a notional imprisonment and, if wrongful, actionable as false imprisonment.

It is often this latter type of brief detention a traffic officer may exercise over a motorist, which forms the basis of the tort actions discussed in this paper.

(C) Consent as a Defence to False Imprisonment

The major bar to a successful false imprisonment action in tort is the question of consent. If it can be shown that a person chose voluntarily to remain with another, while at all times both being free and believing himself or herself to be free to leave, then there is no false imprisonment[10]. However consent must be genuine. That is to say that it is not consent where a person submits because that person believes that any protest made would simply be ignored. Nor is it consent if the submission is gained by a trick or if the purported 'consent' is given to avoid a worse consequence - perhaps it is given under threat of physical violence or arrest, or to avoid an embarrassing scene[11].

The issue of consent in relation to a traffic officer who detains a motorist will be dealt with in more detail later. It is only necessary to note here, that if a motorist believes there is no choice but to do as a traffic officer instructs, then this "consent" will not be a bar to a successful false imprisonment action.

(D) False Imprisonment in Traffic Situations

False imprisonment arises in the traffic context in primarily two situations.

The first is where an officer 'interrupts' a motorist's journey. That is, an officer stops a motorist pursuant to section 66 and keeps that motorist there for a short time, before allowing him or her to resume the journey. The key point to note is that the 'imprisonment' is for a relatively short time, and that section 66 is the only power which an officer purports to use. Thus if section 66 is used invalidly, an officer's actions will amount to a false imprisonment.

The second situation where a false imprisonment can arise is when an officer 'detains' a motorist.

This is where an officer has either used section 66 to stop a vehicle or has come across an already stationary vehicle and is using another power (perhaps section 58A or section 68B) to keep a motorist present. If the power used to detain a motorist is used unlawfully, then again a false imprisonment action will lie against the officer.

III. THE POWERS OF THE TRAFFIC OFFICER

(A) Powers Under the Transport Act 1962

In order to deal with the issue of false imprisonment, it becomes necessary to examine the specific statutory authorities under which a traffic officer operates. For as Blundell v. Attorney General[12] implied, unless an officer can point to one of these specific powers, then there is no authority to stop or detain anyone.

The most important of a traffic officer's powers is section 66 of the Transport Act 1962, here set out in full:

> S.66. On demand by constable or traffic officer, user of vehicle to stop and give name and address - (1) The user of a vehicle shall stop at the request or signal of a constable or traffic officer in uniform or of a traffic officer who is wearing a cap, hat or helmet which identifies him as a traffic officer, and on demand give him his name and address and state whether or not he is the owner of the vehicle, and, if he is not the owner of the vehicle, shall also give the name and address of the owner. (2) Any person commits an offence who fails

> to comply with any provision of subsection (1) of this section, and may be arrested by any constable without warrant.

This is the only power a traffic officer has to stop a moving vehicle, and as such it is the cornerstone of all an officer's powers. It is also the section which allows an officer to obtain the driver and vehicle owner's details. This is important because it allows the officer to acquire information which is needed to issue a traffic infringement notice in respect of an offending motorist. Thus section 66 is the starting point of most of the prosecutions which the traffic department will bring.

At this stage, it appears there are no prerequisites placed on an officer before he can exercise the power to stop under this section.

A traffic officer also has a range of other powers which can be used to detain motorists and their vehicles in various situations. The majority of these powers, as stated earlier, are set out in sections 58A, 68B, and 62 of the Transport Act 1962. As they are particularly relevant, parts of section 58A and section 68B are set out below.

S.58A. Breath tests - (1) Where an enforcement officer has good cause to suspect that -

(a) The driver of a motor vehicle on any road has recently, before driving the vehicle, or has, while driving the vehicle, consumed drink; or

(b) Any person attempting to drive a motor vehicle on any road has recently, before attempting to drive the vehicle, or has while attempting to drive the vehicle, consumed drink; or

(c) Any person has recently committed an offence against this Part of this Act, or against any regulations authorised by section 77 of this Act and made under section 199 of this Act, that involves the use of a motor vehicle -

he may require that driver or person to undergo forthwith a breath screening test.

(3) If -

(a) It appears to an enforcement officer that a breath screening test undergone by a person pursuant to a requirement under this section indicates that the proportion of alcohol in the person's breath exceeds 400 micrograms of alcohol per litre of breath; or

(b) A person, having been required by an enforcement officer pursuant to this section to forthwith undergo a breath screening test, fails or refuses to do so; or

(c) An enforcement officer could, pursuant to this section require a person to undergo forthwith a breath screening test, but a breath screening device

is not readily available or for any person a breath screening test cannot then be carried out -

the enforcement officer may require the person to accompany him to any place where it is likely that the person can undergo either an evidential breath test or a blood test, or both.

68B. Powers of constable and traffic officers - (1) Every constable or traffic officer, if for the time being in uniform or in possession of any warrant or other evidence of his authority as a constable or traffic officer, is hereby authorised to enforce the provisions of this Act and the Road User Charges Act 1977 and any regulations or bylaws in force under those Acts and section 148 of the Public Works Act 1981 and any regulations in force under section 243(1)(a) of that Act, and in particular may at any time -

(a) Direct any person being in charge of or in any vehicle, whether on a road or not, or any person on any road to furnish his name and address and information as is within his knowledge and as may lead to the identification of the driver or person in charge of any vehicle:

(b) Inspect, test, and examine the brakes or any other part of any vehicle on any road or any equipment thereof;

(2) Any such constable or traffic officer, if he believes on reasonable grounds that any vehicle does not comply with the provisions of any regulations for the time being in force under this Act, may, by notice in

> writing given to the driver or owner of the vehicle, direct that the vehicle be not used on any road, and that notice shall continue in force until the vehicle has been made to comply with the provisions of any such regulations as aforesaid:
> Provided that any such notice may be subject to a condition to the effect that the vehicle may continue to be used to reach any specified place for repair or may continue to be used for a given time or under limitations as to speed or route or otherwise.

It is to be noted that there is no power in these sections to stop moving vehicles. They apply solely in relation to stationary vehicles. However there is implicit in these sections a duty on the motorist to remain for a reasonable time while a traffic officer exercises these powers, in situations where the officer is entitled to use them.

It is submitted that where a motorist commits an offence, a traffic officer can use section 66 to stop the motorist and ascertain the motorist's name and address. It is also submitted that where an officer "comes across" a stationary vehicle, then the officer is entitled to exercise powers such as those given in sections 58A and 68B, and the motorist must remain while the officer does so.

But two problems emerge. The first is whether the officer can use section 66 to stop a vehicle when

no offence has been committed, and therefore where the officer can have no desire or need for the motorist or vehicle owner's name and address. The second is, if a vehicle is stopped pursuant to section 66, in what circumstances is an officer entitled to go on and use other powers in relation to stationary vehicles?

These problems manifest themselves, in particular, in the contentious drinking-driving area. Can section 66 be used to stop vehicles at random, when the officer has no suspicion that an offence has been committed, and thus has no need for the motorist's name and address? The purpose of the stop in this situation is to see if the motorist has been drinking. Also, can a traffic officer who stops a motorist under section 66 then go on and use powers under section 58A to require a breath test?

(B) The Ministry of Transport's Practice

The Ministry of Transport have regarded section 66 as a general all-purpose stopping provision. They believed that it was open to an officer to use section 66 at any time, and that there were no prerequisites needed, (such as suspicion that an

offence had been committed), before the power to stop could be invoked. The Ministry further believed that once an officer had stopped a vehicle under section 66, then that officer was in all circumstances entitled to go on and exercise other powers available under the Transport Act. In particular, the Ministry believed that section 66 gave them the power to stop vehicles at random to check on drinking drivers, and to then go on and demand breath tests under section 58A if the circumstances warranted.

The Ministry's view of the way their officers' powers could be used was backed up by two cases in particular. These two cases are Felton v. Auckland City Council[13] and Maxwell v. Police[14], both of which have been cited in Parliament by the current Minister of Transport in support of random stopping[15].

These cases are important in that they deal with both points of contention stated earlier. Both Felton's[16] case and Maxwell's[17] case clearly state that a traffic officer does not need any prerequisites (except those of uniform as set out in section 66) in order to exercise the power to

stop moving vehicles. To quote Chilwell J in Felton's case:[18]

> there is nothing in the Act which requires as a condition precedent that the Traffic Officer must have some reason for stopping the motorist.

The cases go on to say that once a motorist has been stopped pursuant to section 66, a traffic officer can then go on and exercise other powers in the Transport Act, and in particular the power to demand a breath test under section 58A. However both cases simply assume that section 58A can be used in conjunction with a stopping under section 66. No authority is cited in support of the proposition, except in Maxwell's case[20] where O'Regan J cites the High Court decision of Police v. Roper[21].

In 1984 the Court of Appeal overturned the High Court decision in Roper's case[22]. As a result of this, both points made in Felton's case and Maxwell's case must now be open to doubt.

(C) The Effect of Roper v. Police

(i) The facts of the case

The Court of Appeal's decision in Roper v. Police[23] places new limits on a traffic officer's ability to use section 66 in all situations, and to use other powers following on from a stopping under section 66. However because of the highly peculiar and singular fact situation that arose in the case, it is unclear where the exact limits on the use of section 66 lie.

The facts of the case can be simply stated. Two police constables requested Mrs Roper to stop the car she was driving. They did so pursuant to section 66 of the Transport Act. Mrs Roper gave her name and address to the constables and stated that she owned the car. After inspecting the car and discovering three bald tyres, the constables informed Mrs Roper she should remain where she was until a traffic officer was located to issue a notice "writing her off the road", pursuant to section 68B(2) of the Transport Act[24]. Mrs Roper refused to wait where

she was, and drove off. She was later arrested and charged with failing to stop under section 66.

After differing decisions in the District Court where she was acquitted[25], and the High Court where a conviction was entered against her[26], the case came to the Court of Appeal. On the very precise facts given, the Court of Appeal was able to rule that the police constables did not have any power to detain Mrs Roper once she had given her name and address, and had thus contravened the basic principle in Blundell's case[27] that a person may not detain anyone, except where that person has specific statutory authority to do so.

But because of these very precise facts, it is not exactly clear where Roper's case[28] places the limit on the ability to use the section 66 stopping power, and the ability to use other powers in conjunction with it. The case appears open to two interpretations.

(ii) The strict interpretation

The first interpretation that could be taken

from Roper's case is a strict one, which places severe limits on the use of section 66.

The Court noted in Roper's case that "the duration of the duty under s.66(1) to remain stopped is governed by the associated obligation to supply information."[30]. This implies that once the information required by section 66 is given, a motorist may leave and an officer cannot detain this motorist to exercise other powers under the Transport Act. As the judgement states later[31]

> Once the driver has stopped and has supplied the information thereafter sought, that obligation to stop (and remain stopped) has been exhausted, and there is no authority under that section for the constable or traffic officer to make any further demands on the driver at that time.

By looking at the content and language of section 66 and section 68B(2) (which it was argued in Court might have entitled the constables to keep Mrs Roper present), the Court concluded that the two sections were independent and stated[32]

> it is not possible to import s.68B into s.66 in order to enlarge the time during which a vehicle must remain stationary, once it has been stopped as a result of

> the exercise of the entirely different functions described by s.66."

The Court appears to state that section 66 gives an officer the right to stop a vehicle and require the driver and vehicle owner's details, and that is all. It cannot be used as a means or gateway to the exercise of an officer's other powers. The corollary of this is that if a traffic officer does stop a motorist under section 66 and then detains that motorist while going on to use other powers, then this will be a false imprisonment.

(iii) The effect of the strict interpretation

The effect of the strict interpretation of Roper's case[33] is to severely limit the use a traffic officer can make of section 66 as a starting point for the exercise of other powers. There is no reason to suppose that it is only section 68B which cannot be used in conjunction with a stopping under section 66. The reasoning of the Court would imply that no other power can be used following a section 66 stopping where "there is no textual link between the two sections"[34].

One area where this strict interpretation will limit a traffic officer, is the area of

breath testing. An officer's power to require a breath test is given in section 58A[35]. Under a strict interpretation of Roper's case[36] it would not now be possible to stop a motorist under section 66 and then go on to require a breath test under section 58A. There is no textual link between section 58A and section 66; nothing which implies they are to be used together. Further, a relevant factor in Roper's case[37] in determining that section 66 and section 68B operated independently, was that there was a different uniform requirement for each of them respectively. That point indicates that section 58A must also be seen as independent of section 66. The powers under section 58A can be used according to the Court in Quirke v. Ministry of Transport[38] and Kinder v. Ministry of Transport[39], as long as the officer is in possession of his or her warrant. In contrast, section 66 itself requires that an officer be in uniform or wearing a cap or helmet before powers under this section can be exercised.

The result of this is that if a strict view is taken of the decision in Roper's[40] case,

it will prevent a traffic officer exercising any other powers (including the power to breath test) pursuant to a section 66 stopping. Therefore if a motorist is detained while such a power is exercised, this amounts to a false imprisonment.

(iv) The wide interpretation

A strict interpretation of Roper's case[41] will severely restrict the role of a traffic officer. It will render an officer virtually powerless in respect of a moving vehicle, because while there is a power to stop it, nothing can be done once the vehicle is stopped, except the requiring of the driver or vehicle owner's details. The strict interpretation also has the effect of making the powers given to an officer by section 58A and section 68B almost redundant, if they can only be exercised when an officer 'comes across' a stationary vehicle.

For these reasons a later Court may seek to take a broader interpretation from Roper's case[42]. It may be held that other powers

can be used following a stopping under section 66, as long as the section 66 power is not abused.

There is some support for this wider view when the real focus of the Court's concern in Roper's case[43] is examined. As noted, Roper's case[44] is a case with a very unusual fact situation. It involved both the Police and the Traffic Department when there was really no need to do so. The Police could have issued the notice under section 68B(2) themselves - they did not need to call in a traffic officer. Further, the Police did not purport to use section 68B(2) to hold Mrs Roper, although it was argued in Court that they might have been able to. What the Police did do was use section 66 as a general holding provision to try and detain Mrs Roper until a traffic officer arrived - and it was this which the Court objected to. They did not feel that section 66 could be used - or abused - in this way. Perhaps if the Police had made a stopping under section 66, and then having gained the belief on reasonable grounds as to the car's condition immediately gone on

to use section 68B(2) to write the car off the road themselves, then the Court would have held this was a valid exercise of their powers. It was not so much the use of section 68B pursuant to a section 66 stopping that concerned the Court, as the way section 66 itself was used.

A further example of the Court's concern that the section 66 stopping power should not be abused, is the case of Winter v. Auckland City Council[45]. There, a motorist was stopped pursuant to section 66 because he was breaking the speed limit. His name and address were requested by the traffic officer who stopped him. It is unclear whether Winter complied with the request or not, but he departed shortly afterwards. In a bizarre chase which followed, Winter was stopped three further times and eventually detained. The Court held that[46]

> there is no power vested in a traffic officer or traffic officers in similar circumstances to pursue and detain a motorist who either fails to give his name, address or the registered owner of the vehicle which he is driving or refuses to produce a motor driver's licence.

Again the Court was determined to ensure that section 66 was not used as a general holding provision, but only in the manner which its wording and purpose allows.

In light of this, it is open to a later Court to give Roper's case[47] a wider interpretation, and to hold that other powers can be used following on from a stopping under section 66, as long as section 66 itself is not misused.

(v) The effect of the wide interpretation

Under a wide interpretation of Roper's case[48] the use of section 66 is not so restricted. Thus if a motorist is stopped by an officer under section 66, and during the time the requisite information is being sought - or prior to the actual stopping - that officer forms the intention to exercise another power, then that officer may do so, as long as the power is exercised immediately. There is no abuse of section 66 here, because the officer does not 'detain' a motorist by using it. Rather, the officer detains the motorist under the implied

authority given by the later power - perhaps section 68B or section 58A. In such a situation there is no abuse of section 66 as there was in Roper's case[49], and therefore it may well be a valid exercise of an officer's powers.

In relation to the right to breath test a driver who has been stopped under section 66, the situation under the wide interpretation of Roper's case[50] was well summed up by Hardie-Boys J in Gifford v. Ministry of Transport, when he said[51]

> Once the vehicle has stopped, the officer must obviously speak to the driver, if only to obtain the information which s.66 entitles him to recieve. If in speaking to the driver, the officer becomes aware that the driver has been drinking, then he is entitled to require a breath test because he has good cause to suspect that the circumstances contemplated by para (a) of s.58A(1) apply.

However even under this wider interpretation of Roper's case[52] there are still problems for a traffic officer who wishes to breath test a driver who has been stopped under section 66. This is especially so in the checkpoint random stop situation, where an officer will not have acquired any suspicion

that an offence has been committed, prior to the decision to stop under section 66.

The problem is that even on the widest interpretation of Roper's case[53], section 66 cannot be used as a general holding provision. Therefore if an officer stops a motorist under section 66, the motorist cannot be detained to see if he or she has been drinking - that is, to allow the officer time to obtain the 'good cause to suspect' that is needed to invoke section 58A powers. All the officer can do is ask for the driver's or vehicle owner's details, and then the motorist is entitled to leave. If during this time the officer gets the good cause to suspect in terms of section 58A(1), then a breath test can be demanded. But if the information is forthcoming too quickly, then the officer will not have time to see if there is "good cause to suspect" - particularly as there is no obligation on the motorist to wind down the car window. At this point the motorist may leave, because the right under section 66 to detain has ended. If the officer attempts to keep the motorist present in order to ascertain if the motorist has

been drinking, then this detention will allow the motorist to bring an action against the officer for false imprisonment.

Similarly, if an officer stops a motorist under section 66 and then delays seeking the information allowed under that section - in order to gain time to see if there is good cause to suspect a breath alcohol offence - then this casts doubt on the good faith in using section 66 at all. Here section 66 would be used not as a means of getting information, but as a general holding provision until it could be ascertained if an officer was entitled to use the section 58A powers to demand a breath test. Such a use of section 66 does not seem lawful since the decision in Roper's case[54], and the detention it involves may be actionable in tort as a false imprisonment.

It can thus be strongly argued that the decision in Roper's case[55], whichever interpretation is adopted, will place limits on when an officer is entitled to use any other powers possessed, following on from a stopping under section 66. In all probability,

a later Court will favour a wide interpretation of Roper's case[56] in light of both its singular fact situation, and the severe limits it would place on the functions of a traffic officer if the strict view was adopted.

(D) The Limit on Section 66 as a Power to Stop Vehicles at Random

(i) Section 66 : a section for acquiring information

An analysis of Roper's case[57] implies that an even more fundamental limit can possibly be placed on a traffic officer, which can lead to dangers of false imprisonment. It is the question of the right of an officer to use section 66 at all in certain situations. For if section 66 cannot be used, then an officer has no authority to stop and detain moving vehicles, and to do so would be a false imprisonment of the driver.

There is no question that section 66 can be used to stop vehicles if an offence is committed. This is because the purpose of

section 66 is to allow a motorist or vehicle owner's name and address to be acquired, so prosecutions can be commenced.

But can vehicles be stopped at random using section 66? The cases of Felton[58] and Maxwell[59] say that they can. These cases point out that there is no prerequisite required by the section, that an officer must suspect the commission of an offence before the power to stop vehicles can be exercised. On the face of section 66 this is true. But it is certainly not tenable to suggest that Parliament intended section 66 to be used simply to 'interrupt' a motorist's journey. It thus remains to see when the power can be used.

The only power which section 66 confers on an officer upon stopping, is the power to ask for a name and address - Roper's case[60] decides that. So in order for an officer to use section 66, an officer must intend to obtain these details, or else it will amount to stopping a motorist for no purpose at all. This would not appear to be a valid exercise of the power.

An example in point is the stopping of vehicles at random at a checkpoint. During the course of a checkpoint operation, an officer will stop a great many vehicles and in most cases there will be no request for the details which section 66 allows to be sought. Indeed in most cases there will never be any intention to ask for these details, unless an officer later suspects the commission of a drink-driving offence. This does not appear to be a legitimate exercise of section 66. The purpose of section 66 is to allow a vehicle to be stopped in order to ascertain details concerning the driver or vehicle owner, so as to begin proceedings against an offending motorist, or to issue a warning or the like. The purpose of section 66 does not allow it to be used as a general 'stopping and holding' provision, so that an officer can determine on the 'off-chance' if an offence has been committed. Roper's case[61] appears to have decided that section 66 cannot be abused as a general holding power in this way.

It is suggested that the judges in Felton's case[62] and Maxwell's case[63] over-simplified

the question of the use of section 66. It is further suggested that the true position is that a vehicle can be stopped under section 66 even though there is no suspicion of the commission of an offence, but only if the traffic officer has some legitimate desire for the motorist's name and address. Otherwise section 66 would be used for a purpose for which, as Roper's case[64] stated, it was not designed, namely detaining motorists. Any motorist so detained would be able to sue in tort in respect of this unlawful detention.

An analogy exists here with the English cases of R v. Waterfield[65], Beard v. Wood[66] and Hoffman v. Thomas[67]. The former two cases dealt with the validity of a constable's action under a power to stop, while the latter dealt with a constable's right to regulate traffic. The Courts in these cases decided that the powers conferred on the police were very wide, but not unlimited. The powers must be exercised both in good faith, and for purposes contemplated by the respective sections or at common law. Therefore in Hoffman's case[68] a power to

regulate traffic was held not to include a power to force cars to undergo a traffic census, because this was not a function comtemplated by that section or at common law. Similarly in Waterfield's case[69] a power to stop vehicles was held not to include a power to detain a vehicle, unless there was good reason for doing so. Applying this approach to the New Zealand situation, it may be argued that section 66 of the Transport Act must be used both in good faith, and for purposes contemplated by the wording of section 66. Section 66 is not as wide as the powers in the English cases. It gives guidance as to its use - it is to be used by officers to stop vehicles in order to obtain the driver or vehicle owner's details. Any other use of section 66 would be unlawful, just as the use was in Waterfield's case[70] and Hoffman's case[71], because it was not contemplated in the purpose of the section. It may be argued that this does not allow section 66 to be used to stop vehicles in order to check for intoxicated motorists. Also, because the power must be used in good faith[72], it is not open to an officer to stop vehicles and ask for the details

allowed just to satisfy the requirements of the section, when the true purpose of the stopping is to determine if a motorist has been drinking. This would be an abuse of the power. Thus random stopping under section 66 may result in the unlawful detention of motorists, albeit for an extremely short time.

(ii) Limits on the discretion given in section 66

The stopping of motor vehicles is an exercise of discretion by an officer, who has a choice as to which vehicles will be stopped. It is important to determine if the discretion is used correctly, for an incorrect use of the power may cause a motorist to be falsely imprisoned.

A recent decision of the House of Lords may give guidance as to the approach New Zealand Courts will take in the task of reviewing the exercise of discretion by a law enforcement officer. The case is Mohammed-Holgate v. Duke[73]. In that case the courts were concerned with reviewing the exercise of a

constable's statutory discretion to arrest. The Court did so by applying the 'Wednesbury rules'[74], which had predominantly been used only in administrative law cases to examine discretionary areas of governmental and local body activity. Even if a New Zealand Court does not choose to apply the rules themselves to test the validity of the exercise of a discretion to stop vehicles, it is submitted that the Courts may at least consider similar factors.

In applying the Wednesbury rules, the House of Lords made two inquiries. The first was whether the discretion was exercised in good faith. The second was whether the constable included in the consideration of whether or not to exercise the discretion "matters which are irrelevant to what he had to consider"[75].

If these rules or other similar factors are applied to examine the exercise of the section 66 power to stop vehicles at random, the following observations may be made. It may be argued that an officer who uses section 66 as a means to stop and detain drivers to

determine if a drink-driving offence has been committed, does not exercise the discretion in good faith. The power is not designed for this purpose, but rather as a means to enable an officer to acquire information. A more persuasive argument is that an officer in such cases includes in the exercise of the discretion to stop vehicles a factor which is irrelevant to the purpose of section 66 - the possibility that a motorist is intoxicated. Section 66 gives an officer a discretion to stop vehicles so as to acquire the driver or vehicle owner's details, usually so that a prosecution can commence. As Roper's case[76] decided, that is all section 66 allows. Yet the primary consideration in the exercise of the discretion to stop vehicles at a 'checkpoint' is the possibility that a motorist may have committed a drink-driving offence. It is submitted that this is not a relevant consideration for an officer to make in determining when to exercise the discretion given in section 66.

It may be argued that in stopping vehicles at random no discretion is exercised at all, and an officer considers no factors. The

decision is simply to stop the first vehicle to approach an officer when the officer is free. Yet even this will not make the use of section 66 valid. As stated earlier, the use of section 66 in circumstances where there is no intention or desire to seek the information allowed by the section, amounts to stopping vehicles for no purpose at all. It is suggested that this cannot be how Parliament intended the power to be used.

In respect of the question of stopping vehicles at random, courts taking a similar approach to the approach taken in Mohammed-Holgate's case[77] may well conclude that the exercise of the discretionary power to stop vehicles in such circumstances involves an unlawful detention.

(iii) The view of the Minister of Transport

While statements of Government Ministers have no authority in determining the law, both past and present Ministers of Transport have expressed doubt as to the validity under the existing law of stopping vehicles at random, and breath testing drivers where

appropriate. The previous government went so far as to introduce a clause in the Transport Amendment Bill (No.4)[78] which would have allowed specifically for random stopping and breath testing. The clause was eventually excluded, as the National Government of the time disliked the policy of random stopping. But there was, according to Mr Gair (the then Minister of Transport)[79],

> much emphasis by opponents of the need to change the law on the decision of Mr Justice Quilliam in Police v. Roper,

and the Court of Appeal has since overturned Roper's case. Mr Gair stated in a written question to the Honourable Mr Prebble in the House of Representatives that he had had[80]

> advice given in 1982 and 1983 on the matter [random stopping and breath testing] stressing the desirability of clarifying the legal authority under which the Ministry's officers operate.

Mr Prebble's reply did not show total confidence in the current practice, saying[81]

> if as is always possible with any legislation, the Court rules at some future date that the legislation allowing random stopping is defective, that is the time to ask Parliament for amending legislation. In my view, an early commencement of random stopping will save lives and prevent injuries. Amending legislation will be time consuming ...

Mr Prebble's statements cannot be taken literally. Courts can never rule that "legislation ... is defective," because Parliament is sovereign. But Mr Prebble's statements seem to tacitly acknowledge that in stopping motorists at random and breath testing where appropriate, traffic officers are operating at the very edge of, and perhaps even beyond, the limits of their legal powers. The preceding analysis indicates it is a valid concern.

(E) The Limits of Section 66 - A Summary

If the scope of the section 66 power is not as wide as the Ministry of Transport previously considered, it is necessary to summarise how section 66 can be used, and when false imprisonment will arise.

It is submitted that section 66 can only be used when an officer actually requires a driver or vehicle owner's details. Generally this will occur when the officer suspects the commission of an offence, although conceivably there may be other reasons. Section 66 does not, however,

appear to allow an officer to stop vehicles at random, where the purpose of the stop is not to gain the information which the section permits, but rather to determine if an offence has been committed (particularly that of excess breath or blood alcohol). Further, following the cases of Roper[82] and Winter[83], once a request has been made under section 66 for the relevant details, and that request has been complied with or refused, a motorist may leave. The motorist cannot be subsequently detained under section 66 for purposes such as ascertaining whether he or she has been drinking, or if the vehicle is unroadworthy. It is submitted that an officer may detain a motorist following a stopping under section 66, but can only do so where the officer uses the implied power given in another section. The decision to use the other power must be made during the period in which the information is being sought - or prior to the actual stopping - and section 66 may not be abused to give officers the necessary time to determine if there is good cause to invoke a subsequent power.

If a traffic officer does misuse section 66 - or any of the other powers given in the Transport Act - and in doing so stops or detains a motorist,

then this will be a false imprisonment for which an officer may be liable.

(F) False Imprisonment in Other Situations

(i) False imprisonment during the breath test process

False imprisonment may still occur even when a motorist is validly stopped under section 66 or is validly detained by the exercise of another power. Primarily there are two situations in which the tort may arise. The first is that false imprisonment may occur during the conducting of the breath testing procedures pursuant to section 58A.

Under section 58A[84] a traffic officer can only detain a motorist to undergo a breath screening test[85] where 'good cause to suspect' exists that either the person has been recently drinking, been in an accident or has commited an offence against the Act. If an officer does not have 'good cause to suspect', then by forcing a motorist to remain for a breath test, a false imprisonment will have occurred. Courts have illustrated

though, that 'good cause to suspect' is not a very onerous burden to fulfil, and a later Court will not examine too strictly the criteria on which an officer based his decision.

It is also submitted that the breath testing provisions under section 58A must be exercised in good faith. The provisions could not be used simply as a general power to detain a motorist where no other authority to do so exists. The use of the power in this way would amount to "an ulterior and improper use of the power for purposes outside the object of the legislation"[86]. As such the detention would be a false imprisonment.

Further occurrences of false imprisonment may arise in respect of section 58(3) - the "requirement to accompany" provision[87]. An officer has the power to require a motorist to accompany him or her to a place where it is likely the motorist can undergo an evidential breath test or blood test, in situations where either a breath screening test is positive, or where a motorist refuses to undergo a breath screening test. In such situations the detention is perfectly lawful.

A traffic officer can also require a motorist to accompany him or her for an evidential breath test or blood test,if a breath screening device is not readily available. This will not apply however if an officer has acted in bad faith, perhaps by deliberately setting out without breath screening devices in an attempt to circumvent procedure. According to the Court in R v. Mangos[88] an officer's request in such circumstances would be illegal, and any detention would be likewise unlawful. Further, a motorist cannot be required to accompany an officer to undergo an initial breath screening test. The test can be administered either at the place where a motorist is, or at a nearby patrol car[89]. If no breath screening devices are available, then an officer's only recourse is to require the motorist to accompany him or her to undergo an evidential breath or blood test. As Connolly v. Ministry of Transport[90] showed, a motorist who is compelled on threat of arrest to accompany an officer to undergo a breath screening test, is unlawfully detained.

A person is only required to accompany an officer to a place where it is "likely that

the person can undergo either an evidential breath test or a blood test"[91]. Thus, if an officer takes a person to a place where that officer has no evidence or belief on reasonable grounds that there are such facilities, then it will be a false imprisonment. This is because it is "a journey not contemplated by the Transport Act"[92]. It parallels the decision in Oaten v. McFadyen[93] which found that continued detention after a valid arrest (or in this situation a valid requirement to accompany) is only legal if it is for legitimate purposes, reasonably connected with the original reason for the person's detention. The act of taking a person to a place where it is not likely that there will be breath or blood testing facilities is not detention for a legitimate purpose.

This situation must be distinguished from a mere "broken journey"[94], where an officer who detains a motorist stops briefly at some place for a reasonable purpose, before continuing to the site of the equipment. Under section 58E of the Transport Act this

would probably be "reasonable compliance"[95] with the Act's requirements, and thus would be legally justified.

The other situation to be distinguished, is where an officer takes a person to a place where it is likely that there are testing facilities, but it turns out that no facilities are there. No false imprisonment arises here either, and indeed under section 58A(3)(a) an officer can even require that person to accompany him or her to another place for an evidential breath test.

(ii) False imprisonment arising out of arrest

The second situation where false arrest may occur is when an officer exercises or purports to exercise a power of arrest. A traffic officer has two general powers of arrest, set out below.

> S.58A(5) Every person commits an offence who -
> (a) Having undergone a breath screening test pursuant to a requirement under this section, fails or refuses

to remain at the place where he underwent the test until after the result of the test is ascertained; or

(b) Fails or refuses to accompany an enforcement officer to any place, when required to do so pursuant to this section; or

(c) Having accompanied an enforcement officer to any place pursuant to a requirement under this section, fails or refuses to remain at that place until he is required either to undergo an evidential breath test or a blood test pursuant to this Act or to accompany an enforcement officer to another place pursuant to this section; or

(d) Having undergone an evidential breath test pursuant to a requirement under this section, fails or refuses to remain at the place where he underwent the test until after the result of the test is ascertained, -

and an enforcement officer may arrest him without warrant.

S.62. Arrest of drivers under influence of drink or drugs - Any constable or traffic officer who has good cause to suspect that any person has committed an offence against subsection (2) of section 55, paragraph (c) of subsection (1) of section 58 or section 59 of this Act may arrest that person without warrant.

Section 58A(5) is the most commonly used arrest power. This is because it sets out clearly the exact situations in which it can be exercised, and is only used when a motorist has first been required to participate in the breath test process. Thus when an arrest is made pursuant to section 58A(5), there is very little chance that it will turn out to be a false imprisonment, unless an officer has acted in blatant disregard for procedure.

There is more scope in an arrest under section 62 that it may amount to a false imprisonment. This is because it may involve the officer making a subjective analysis, in respect of one of the offences named in section 62, that a person is under the influence of drink or drug "to such an extent that he is incapable of having proper control of the vehicle"[96]. As a result of the need to make this judgement, officers will use section 62 only when a person is extremely intoxicated or a dangerous situation has developed, preferring instead to rely on the breath test procedure set out in section 58A.

Even if an arrest is made under section 62, an officer only has to have had "good cause to suspect" that one of the offences had been committed. This is not a very difficult burden to fulfil, and Courts will not usually rigorously scrutinise a traffic officer's decision to arrest. Unless it is blatantly unjustified, a Court will not seek to determine from hindsight whether the decision to arrest was correct in the circumstances.

The main possibility of false imprisonment in the area of wrongful arrest occurs because a traffic officer has such limited powers of arrest. The powers given in section 62 and section 58A only allow an officer to arrest in situations where alcohol or drugs are involved. If another situation arises, no matter how serious - be it dangerous driving causing death, driving at a dangerous speed or even assault on a traffic officer - then an officer has no power to arrest under the Transport Act. A purported arrest in these situations will be a false imprisonment, unless the action can be justified under the Crimes Act 1961.

Generally a traffic officer will not be able to rely on the Crimes Act "justification for arrest" sections[97] when arresting. The sections only justify or authorise arrests for offences against the Crimes Act, and a traffic officer will usually only arrest for offences against the Transport Act. Yet if an officer is assaulted in circumstances that amount to aggravated assault[98], or witnesses an act amounting to manslaughter[99], then he or she could arrest the offender and rely on section 35 of the Crimes Act. This section justifies (that is, protects from civil and criminal liability) everyone who arrests either "any person whom he finds committing an offence against this Act for which the maximum punishment is not less than 3 years"[100] or, "any person whom he finds by night committing any offence against this Act"[101].

There are problems though, in relying on this justification section. The main problem is that if a person arrested by an officer can only be charged with a lesser offence under a different Act, or is acquitted of the charge,

then section 35 offers the arresting officer no protection. Section 35 only justifies the arrest of persons found committing offences against the Crimes Act 1961. This is subject to the possibility that a Court in New Zealand will follow the Wills v. Bowley[102], Wiltshire v. Barrett[103], Regina v. Biron[104] line of cases, which say that these words in such sections are read as "found apparently committing" an offence. If this interpretation was adopted, section 35 of the Crimes Act could still protect an officer from a tortious false imprisonment charge in the above situations.

It is also possible that an officer who was assaulted could restrain an attacker and rely on section 48A of the Crimes Act as a protection. This allows anyone to use "in the defence of himself or another, such force as, in the circumstances as he believes them to be, it is reasonable to use". If the restraint could be seen as reasonable force in protecting himself or herself, then this would provide an officer with a defence to a false imprisonment charge.

(G) The Defence of Consent

A false imprisonment action can always be defeated by showing that the plaintiff consented to remain and was at all times free to leave. In the traffic situation it is necessary to see if a motorist who is stopped and detained by a traffic officer is consenting, and is free to leave at all stages. For if so, there can be no false imprisonment. The possibility of false imprisonment only arises if a traffic officer uses legal powers to stop and detain a motorist, so that a motorist must remain on threat of further sanction. In such a situation, a misuse of power by the traffic officer would amount to a false imprisonment.

There is always some consent when an officer stops and detains a motorist. When a traffic officer flashes the lights on the patrol car or waves a torch at a motorist, that motorist does "consent" to pull over. Similarly, when an officer, having stopped a vehicle, asks a motorist a few questions (perhaps to see if the motorist has been drinking) or inspects the tyres on the vehicle, then the motorist does "consent" to remain. But this consent will not necessarily

defeat a false imprisonment action. In the situations mentioned, a motorist does not believe there is any choice in either stopping, or in remaining once he or she has stopped. As such, the consent is no more than a motorist saving time and effort, because it is believed that even if a desire to leave is expressed (or if the motorist refuses to stop at all) then the officer will simply force the motorist to do so.

The need for this element of 'choice' before consent could be regarded as genuine, was recognised in the case of Ambler v. Ministry of Transport, where it was held that[105]

> if the driver had voluntarily agreed to comply, no objection could be taken, but unless the driver had been made aware of the absence of any requirement to accompany the traffic officer, than the element of voluntariness would disappear.

Thus the operative factor in a motorist stopping and remaining - or accompanying an officer - is not consent, but a traffic officer's exercise of power. If the power is misused, then a motorist will be unlawfully detained.

At this stage an analogy can be drawn with the interrogation cases. These cases also sought to determine whether a person was in the custody of the police (although not arrested), or was merely consenting to remain with the police, while at all times being free to leave. The purpose of the inquiry in those cases was to determine if a person was in custody, in order that the Police should conduct interrogation in accordance with the Judges Rules[106]. But as the cases deal with a similar issue to the one arising in traffic situations, they offer some guidance as to the approach a later Court may adopt.

A common theme runs through the cases in this area, and according to Savage J in R v. Kurupo[107]

> the cases show that a person can be in custody in terms of this rule [Rule one of the Judges Rules] if on reasonable grounds he considers that he would not be allowed to leave and is being held against his will.

This follows the approach taken in the two Australian cases R v. Amad[108], and Smith v. R where it was said[109]

> Any person who is taken to a police station under such circumstances that be believes he must stay there is in the custody of the police. He may go only in response to an invitation from the Police that he should do

> so and the Police may have no power to detain him. But if the Police act so as to make him think they can detain him, then he is in their custody.

Similarly McCarthy J noted in R v. Convery[110]

> Certainly if a suspect is under physical restraint, or is led by Police conduct reasonably to believe that he may not leave, then to my mind he is in custody."

These findings of the Courts seem to apply to a motorist who is stopped by a traffic officer. Where a traffic officer flashes the patrol car's lights, or waves a motorist over, this is conduct which will reasonably cause that motorist to believe that there is no choice but to stop, and to remain stopped until the officer permits the motorist to go - therefore it is a form of "custody". Similarly, when an officer asks a motorist questions or inspects the car, then again the officer purports to act with legal authority, and the motorist reasonably believes that he or she must remain.

In some situations an officer's conduct will add to this. Often a patrol car will be parked behind a motorist, while an officer stands alongside or in front of the motorist's vehicle. In such situations it becomes almost physically impossible for the motorist to leave. This is most evident

at a 'checkpoint', where a motorist is virtually "surrounded" by traffic officers. Here the physical act of departing is almost impossible until the inquiring officer permits it, and so the officer appears to be actively detaining the motorist.

Two questions are raised by the interrogation cases. The first is that in all of them it was held that a person was in "custody" because the person was in police premises. However this fact does not appear conclusive. If a person is in police premises, it is simply one more factor - albeit a very strong one - which causes the person to believe that he or she cannot depart, even if expressing a desire to do so. It adds to the feeling that there is no choice but to stay. In many cases the presence of one or more officers and a strategically positioned patrol car will have a similar effect. Particularly at a checkpoint, which virtually establishes a mobile "traffic station", the presence of officers and vehicles "en masse" will cause a similar feeling that a motorist must stay until an officer allows the motorist to go.

The second problem the cases raise (and the point is emphasised in Kurupo's case[111] and Convery's case[112]) is that there must be very strong

evidence that a person is being held against his or her will before that person can be regarded as being in custody. Such evidence is ideally provided by a person asking to leave, and having the request refused. But again this does not appear to be a conclusive factor. Custody will still exist whether or not a person protests, as long as that person believes on reasonable grounds that such a protest would have been to no avail. Thus in R v. Bass[113] the Court held that a person was in custody because even though he did not ask to leave, a policeman stated in evidence that had such a request been made, it would have been refused.

This does not mean that on every occasion a law enforcement officer stops a member of the public, it will amount to an exercise of custody. The traffic situation, it is submitted, can be distinguished from the situation where a policeman approaches a person in the street to make inquiries, which usually does not involve custody.

In the case of a pedestrian and a constable, there is never any deprivation of liberty. A pedestrian does not need to stop at a constable's request, and can speak with a constable without being

obliged to stop. Thus there is a period of "negotiation", where a pedestrian can see if he or she wants to stay and talk to the constable, and if so, then there is consent to remain.

The situation is vastly different with a motorist. When a traffic officer signals to a motorist, the motorist must pull over, must stop, and must wait to see what the officer requires. As a matter of necessity a motorist's journey must be interrupted. The positioning of the officer and the patrol car, especially at a checkpoint, may make it virtually impossible for a motorist to leave, even if wishing to do so.

It is submitted therefore that a traffic officer does use his powers to stop and detain a motorist, and that the operation does not proceed by virtue of a motorist's consent. Further, a motorist would generally believe there is no choice but to stop and remain. It is not reasonable to expect a motorist to defy an officer's purported use of legal power, and drive off. This is especially true when an officer creates a situation where it is physically difficult for a motorist to depart. Thus if a traffic officer is misusing the powers to stop and detain vehicles, then any motorist stopped as a result, will be unlawfully detained.

IV. CONSEQUENCES OF A FALSE IMPRISONMENT

(A) An Action Against Who?

It is submitted that a motorist who is falsely imprisoned can bring actions against two "people". First, an action can be brought against the individual officer who committed the tortious false imprisonment and is thus personally responsible.

The second action that can probably be brought is one against the Ministry of Transport itself. Despite original Crown immunity[114], there is now no bar to bringing a tort action against a Government department. For the purpose of a tort action, the Ministry of Transport stands in the same position as if it were an ordinary civilian employer of the officer. Therefore, as long as a traffic officer commits the tortious act while in the course of employment, then the Ministry is vicariously liable for it. An officer will be regarded as acting in the 'the course of employment' at any time when he or she is on duty, unless what is done is so outrageous as to clearly involve a traffic officer having departed totally from this duty[115]. Essentially, whether a person is in the

course of employment is a question of fact to be decided by the Court in each individual case. As almost all tortious false imprisonments will arise in respect of a traffic officer purporting to uphold the law and do his or her duty, then there will be little doubt that the officer is acting 'in the course of employment'. In all such cases the Ministry of Transport will be vicariously liable for an officer's tortious acts.

(B) The Duration of the False Imprisonment

It is usually straightforward to determine the length of a false imprisonment. It begins when a person is first unlawfully detained, and ends when liberty is restored. When a traffic officer detains a motorist however, the situation is more complex. The question must be answered as to whether the false imprisonment will only end when the motorist regains freedom, or if there is a point when the unlawful custody becomes lawful.

As was seen in the Privy Council decision in Hussein v. Chong Fook Kam[116], there is no reason why an unlawful detention cannot at some stage

become lawful. It did in that case, where the Court held that an arrest which was illegal because no reasonable grounds for suspicion existed, became lawful when reasonable grounds for suspicion did arise. To quote Lord Devlin in Hussein[117], "it becomes a premature arrest, rather than one which was unjustifiable from first to last."

A motorist who is stopped at random at a checkpoint under section 66 of the Transport Act, is falsely imprisoned if the officer has no intention of seeking the details allowed by section 66. If the motorist is then found to have committed an offence against section 58(1)(c) of the Transport Act (because the motorist is under the influence of drink to an extent that he or she is incapable of having proper control over the vehicle) and is arrested under section 62 of the Act, then this arrest will end the false imprisonment. The very point that is relevant here is the one expounded in Blundell's case[118]. If one person wishes to deprive another of liberty, then that person must be able to point to a specific legal authority to do so. Here the section 62 arrest on reasonable grounds is such an authority, and so the false imprisonment ends when the lawful arrest occurs.

The result is similar if a motorist is either stopped by an improper use of section 66 in other circumstances, or if section 66 is used lawfully initially, but a motorist is detained under its authority for longer than the section permits. The false imprisonment will end either when the motorist's liberty is restored, or when an officer uses another power (perhaps section 68B or section 58A) so that the motorist is lawfully detained by the authority which that section gives. This view is submitted with the possibility still existing that a later Court may adopt a strict interpretation of Roper's case[119] and rule that no other powers can be used following a stopping under section 66. If a later Court ruled this way, then all such exercises of powers following the use of section 66 would be illegal, and damages could be sought for the whole period of the detention.

In most other cases where an officer acts outside the legal power given and in doing so detains a motorist - perhaps during the breath test process - then the length of the false imprisonment can be simply determined on the facts.

(C) Damages

The aim of a tort action generally, is to compensate a victim for loss. There is little point in merely proving someone is liable in tort unless worthwhile damages can be gained. It thus becomes necessary to determine if there is any real chance of gaining reasonable damages from an action in tort in the situations discussed.

In many cases it will be almost worthless to bring an action in tort. If a plaintiff sues the Ministry of Transport for the commission of a minor tort which occurred while the plaintiff was being apprehended for a serious crime, then it is doubtful the Courts will take a sympathetic view of the action. To quote Cumming-Bruce LJ commenting on a situation of this type in Morris v. Beardmore, "whether he [the plaintiff] would expect to get damages of more than a shilling is another matter."[120]

Similarly, if the tort that occurs is not very serious and an officer has acted both reasonably and in good faith, then a Court will not award any substantial sum of damages. Also, should either random stopping or the act of stopping under

section 66 and then going on to use another power be held to be a tortious false imprisonment, then a Court may choose to award only nominal damages, because of the "flood" of claims that would otherwise follow. In these latter cases the false imprisonment arises not out of any deliberately illegal conduct by a traffic officer, but out of a technical mistake made in a very uncertain area of the law. For this reason also, it is submitted that Courts are unlikely to make a significant award of damages.

It must be remembered however, that damage or loss per se is not relevant to a trespass action, and therefore to false imprisonment. Any imprisonment, no matter how short, is prima facie actionable. Damages are assessed for primarily non-pecuniary loss - in the case of false imprisonment "generally it is not a pecuniary loss"[122] which is compensated for, "but a loss of dignity and the like and is left much to the jury's discretion"[123]. The principal heads of damage appear to be injury to liberty, that is "loss of time considered primarily from a non-pecuniary point of view"[124] and the injury to feelings, that is "the indignity"[125]. McGregor on Damages[126] also points out that a jury will not break down the damages into categories, but will give an award of general damages which it

sees as fair. Further, although it is unlikely to occur in false imprisonment cases involving a traffic officer - because the length of the imprisonment will be relatively short - damages can also be claimed for pecuniary loss if it is not too remote to be recoverable. This would include "any loss of general business or employment"[127], while "the plaintiff's costs incurred in procuring his discharge"[128] may also be recoverable as damages.

How this will be applied in practice is unclear, as there is almost no case law involving claims against the Ministry of Transport. But liberty is a highly prized value in society, and people who interfere with the liberty of another without justification are dealt with strictly by the Courts. This is especially so when it is the very people who symbolise law and order that commit the offence. Thus if a traffic officer commits a serious example of a false imprisonment, acts without care or in bad faith, then it is submitted that a substantial award of damages may be gained, and an action is worthwhile.

A relevant case is Brockie v. Lower Hutt City[129]. There a carrier was stopped by traffic officers

for "no more than fifteen to twenty minutes"[130], while a dispute was sorted out as to whether the carrier was disqualified from driving. It was the third time the carrier had been stopped and he was lawfully entitled to drive. False imprisonment was found by the Court, and there was an award to the plaintiff of ten thousand dollars general damages, and one thousand dollars aggravated damages. In a later motion for a new trial[130A] Quilliam J stated that while this was a very high award of damages, it was not so excessive as to warrant setting it aside.

A close examination of Brockie's case[131] reveals that the Court considered many factors in awarding damages, including: the length of time of the detention; the reasonableness of the traffic officer's conduct; whether the plaintiff asserted his rights and the officer's reaction to this; the attitude of the traffic officer and the hurt to the plaintiff's feelings. Considering the short length of time of the imprisonment, and a finding that the officer acted in good faith, the jury appears to have taken a very severe view of the commission of the tort.

It is submitted therefore that even if a motorist is unlawfully detained for only a short time -

perhaps at a checkpoint or during the breath test procedures - then an action may be worth bringing. This is especially so if the motorist has committed no offence. The jury at least in Brockie's case[132], was willing to award substantial damages to a wrongfully imprisoned citizen.

It is submitted that a motorist who is falsely imprisoned may also seek an award of aggravated damages, because "the manner in which the false imprisonment is effected may lead to aggravation ... of the damage and hence the damages"[133]. In Brockie's case this was stated as circumstances because of which "this deprivation of liberty was made worse for him than it might otherwise have been"[134] and which could not be adequately compensated by general damages. This reflects the idea that false imprisonment may not only cause a loss of liberty and dignity, but may also cause humiliation, and damage to a person's reputation. As noted in Walter v. Alltools[135] a case concerned with factors that may be considered in assessing damages for false imprisonment, an extra (or lesser) amount of damages is to be awarded depending on "any evidence which tends to aggravate or mitigate the damage to a man's reputation which flows naturally from the imprisonment"[136]. Lord

Hailsham confirmed this approach and stated in Broome v. Cassell that aggravated damages may include sums for "loss of reputation, for injured feelings, for outraged morality, and to enable a plaintiff to protect himself against future calumny or outrage of a similar kind"[137]. Therefore aggravated damages may be awarded in situations where the imprisoner's attitude, or the circumstances of the imprisonment, worsen the indignity suffered by a person, or cause his or her reputation to suffer in the eyes of peers.

Aggravated damages are to be distinguished from exemplary damages, which are awarded in far fewer cases and only where the defendant's conduct is extreme. The decision of the House of Lords in Rookes v. Barnard[138] placed strict limits on the awarding of exemplary damages, and Lord Devlin confined the Court's right to award them to three specific situations. Courts in New Zealand however, have been reluctant to limit themselves in the way suggested in Rookes' case. As was stated in Taylor v. Beere[139] and Donselaar v. Donselaar[140] exemplary damages will still be awarded to punish a defendant where the "quality of the conduct"[141] warrants it. If conduct is extreme, and shows an "arrogant disregard for any rights the plaintiff

may have had"[142] or is malicious or oppressive, then as Jamieson Salvage and Tow Company v. Murray[143] illustrated, exemplary damages will still be awarded. Even if a later New Zealand Court was to follow Rookes v. Barnard[144], the second category stated by Lord Devlin where exemplary damages may be awarded was "oppressive, arbitrary or unconstitutional action by servants of the Government"[145]. It is suggested that traffic officers would come within this category and thus exemplary damages could be sought against an officer in a New Zealand Court, where the false imprisonment was of an extreme or oppressive nature.

It is therefore submitted that in circumstances where a traffic officer unlawfully detains a motorist then an action in tort may be worth while, and substantial damages could possibly be awarded. This is most probable when a motorist has committed no offence. However if the tort occurs when an officer is acting reasonably and in good faith, or if it occurs as a result of a technical breach of the law in an uncertain area, it is doubtful that a Court will make a large award of damages against an officer.

(D) Exclusion of Evidence in Criminal Cases

The commission by a traffic officer of a tort such as false imprisonment may have other consequences in addition to giving rise to an action for damages. In certain circumstances Judges will exercise a discretion to exclude evidence in criminal cases where it it gained through tortious conduct, although at least in New Zealand, it is a rare occurrance. Generally the commission of a tort will not lead to the exclusion of evidence. Thus if a traffic officer assaults a person, or unlawfully detains that person, or trespasses on his or her property to make an arrest, evidence will not be excluded unless the evidence was gained while the tort was being committed. Even where evidence is gained during the commission of a tort, the general rule is that the evidence will not be excluded, unless it is unfairly gained (in the sense that it is gained by a trick[146]), or if its probative value is outweighed by its prejudicial effect[147]. Thus even evidence gained by an illegal search[148] will still be admissible.

There is now a tendencey towards excluding evidence gained through illegal means as a way of disciplining the police. Thus in R v. Hannah[149], Casey J excluded physical evidence because it was gained

by the police through an illegal detention - in that case the persons were detained for several days until capsules of drugs concealed in bodily cavities were excreted. The authority of this decision on later cases is unclear. Several recent New Zealand decisions, including R v. Coombs[150] in the Court of Appeal, have implied that R v. Kuruma[151] is still the binding decision on New Zealand Courts, and that consequently, evidence gained by illegal means will still be admitted, subject only to the fairness principle. To quote the Court in R v. Coombs,

> evidence obtained by illegal searches and the like is admissible, subject only to a discretion based on the jurisdiction to prevent abuse of process to rule it out in particular instances on grounds of unfairness to the accused.[152]

Despite the decision in Coombs' case[153], it still must be open to a defendant in a criminal case to ask for evidence to be excluded, if it was gained by a traffic officer through the commission of a tort. By analogy with the principle in R v. Hannah[154], breath test evidence might be excluded as a means of disciplining the Traffic Department, if an officer falsely imprisoned a motorist during the breath test process. The unlawful detention in this situation will be of far shorter duration

than in Hannah's case[155] - a matter of a few hours, often less, as compared with several days. But breath and blood alcohol offences have far less serious penalties than a charge of drug trafficking. It does not seem unreasonable that a Court might balance the seriousness of the crime committed with the seriousness of the tort committed to gain the evidence, in order to determine if evidence ought to be excluded[156]. If such an approach were adopted, then where an officer unlawfully detains a motorist, all evidence gained during the detention may be excluded.

The decision to exclude evidence remains at all times a matter of judicial discretion in individual cases. A judge will not therefore exclude evidence if it would be against the interest of justice to do so. Thus if a strict view of Roper's case[157] was adopted, so that most breath tests taken following a stopping under section 66 involved a false imprisonment, then judges are unlikely to exclude the breath test evidence obtained.

In practice, Courts seem to be reluctant to exclude evidence gained through the commission of a false imprisonment. A relevant example is White v. Ministry of Transport[158] where the decision of

the District Court Judge to admit evidence was not interfered with by the High Court, despite an admitted false imprisonment of White by a traffic officer. Evidence was however excluded in Stowers v. Auckland City Council[159] because of the commission of a tort - in that case an assault of some violence. The decision to exclude evidence is a matter of degree and balance, with the decision to admit evidence usually dominating, except where the tort committed is especially serious.

The exclusion of evidence which is gained by an officer's tortious conduct is to be distinguished from the exclusion of breath and blood test results for reason that the statutory procedures were not complied with. The two are separate issues, with the latter involving no unlawful conduct on the officer's behalf, and being subject to the provisions about "reasonable compliance" contained in section 58E. Evidence is also excluded on the ground that it was gained by undue pressure[160]. This is not relevant here except to the extent that the undue pressure could be tortious.

V. CONCLUSION

This paper has submitted that there are a number of areas where a traffic officer could unlawfully detain a motorist. Some of these situations arise because an officer departs from the procedure which the law lays down. This is unfortunate, but is a problem that cannot be remedied as long as human nature remains fallible. Of more concern is false imprisonment that arises because of uncertainty in the law, and uncertainty as to the powers a traffic officer possesses. The case of Roper v. Police[161] has introduced substantial doubts about the current law and practice of traffic officers. Whether an officer can stop vehicles at random and whether, or in what circumstances, an officer can use other powers following a stopping under section 66 are two major areas of doubt. It is important that Parliament confronts these issues and legislates the answers clearly. At present, section 66 is the only power to stop moving vehicles which a traffic officer possesses. As such it is stretched to cover a multitude of varied situations, determined by departmental policy. It is submitted that this is a dangerous practice. Parliament is the law maker in our constitution and it is the appropriate body to determine when a traffic

officer has the power to infringe the liberty of a motorist.

The question is most contentious in the area of random stopping of vehicles. If the Government wishes to give the Ministry of Transport's officers a power to stop vehicles at random, then it should initiate a law in Parliament[162]. Stopping vehicles at random breaches a fundamental right of every citizen that unless acting illegally, his or her liberty should not be interfered with. By its very nature, stopping at random will involve the infringement of the liberty of a great number of innocent people in circumstances where there was never even any cause to suspect they had committed offences. A power with such a significant constitutional impact, in addition to the obvious practical inconvenience it causes the motorist, ought not to be introduced by a departmental directive. The proper place for the decision to be made is Parliament, where the peoples' elected representatives can debate the constitutional consequences of the scheme.

The present introduction of random stopping is particularly concerning because of the very real doubt as to its legality under the current law. It is submitted that the Minister of Transport's comments (cited earlier)[163] are not acceptable. The comments imply that there is

doubt as to whether a power exists to stop at random under the current law, but that the practice will go ahead in order to introduce the scheme without the delay which amending legislation would involve. If the Government wishes to give traffic officers these powers, then it should do so openly in the form of a law and accept the political consequences. To conduct the practice in an area of admitted legal doubt is an unfortunate approach to take. If random stopping is to be carried out, then there are questions that must be answered. Should a standard procedure be laid down? What is the uniform requirement? When should 'checkpoints' be set up? Where should they be situated?[164] These are questions that Parliament must answer or at least give guidance on.

A more substantive question is whether the practice of stopping vehicles at random is desirable at all. The Australian Law Reform Commission in its report entitled "Alcohol, Drugs and Driving"[165], decided against the need for a similar scheme in Australia. There are also arguments that stopping vehicles at random is inconsistent with parts of the International Covenant on Civil and Political Rights which New Zealand has ratified, and which guarantees that "no-one shall be subjected to arbitrary detention"[166] and that "no-one shall be subjected to arbitrary or unlawful interference

with his privacy"[167]. To a varying degree, stopping and detaining vehicles at random infringes both these rights. The Covenant[168] is not part of our internal law, but there is a general constitutional principle that our internal law should not be inconsistent with our international obligations. Further, if a Bill of Rights was to be introduced in New Zealand, similar to that proposed in the current white paper[169], then it is submitted that stopping vehicles at random would be inconsistent with it. The proposed Bill contains a provision which guarantees freedom from "unreasonable search or seizure" of "person or property"[170]. On a virtually identical provision in the Constitution of the United States of America[171], that country's Supreme Court held in Delaware v. Prouse[172] that random stopping was unconstitutional.

The main concern of this author remains however, the uncertainty of the law in the traffic area. To quote Sir Robin Cooke in Dixon v. Auckland City Council[173]

> The breath and blood alcohol legislation has grown up piecemeal and is undesirably complex and difficult. We think that a thorough revision and simpler code are desirable. We venture to suggest that this is a task calling for special attention, since the field is one involving both the safety of the public, and the liberty of the subject.

Roper's case[174] has raised many doubts as to where the limits of the law in this area now lie. It is Parliament's task to take these questions in hand, and decide what powers a traffic officer should possess. In an area where individual liberty is to be infringed, the paramount duty is to make these limits clear. All New Zealanders have a right to expect this.

Footnotes

1. [1977] 2 NZLR 50

2. Not reported. High Court, Wellington M356/82

3. Not reported. High Court, Auckland M270/83

4. Not reported. High Court, Wellington M634/83

5. Not reported. Court of Appeal CA 67/82

6. R V Heuston (ed) Salmond on Torts (18th ed, Sweet and Maxwell, London) p 116

7. J G Fleming The Law of Torts (6th ed, Law Book Company Ltd, Australia) p 26

8. Blundell v. Attorney General [1968] NZLR 341

9. Blundell v. Attorney General [1967] NZLR 492,503

10. supra n.7 at p 27

11. supra n.7 at p 10-11

12. supra n.8

13. Not reported. High Court, Auckland 18/11/77

14. Not reported. High Court, Masterton M3/83

15. New Zealand Parliamentary Debates VOL.457 1984, p 706

16. supra n.13

17. supra n.14

18. supra n.13

19. supra n.14

20. supra n.14

21. Unreported. High Court, Wellington M534/82

22. Idem

23. Roper v. Police [1984] 1NZLR 48

24. Set out earlier p.13-14

25. Not reported. District Court. Wellington. 11/6/82

26. Police v. Roper Unreported. High Court, Wellington M534/82

27. supra n.8

28. supra n.23

29. Roper v. Police [1984] 1NZLR 48

30. Ibid p. 51

31. Ibid p 51

32. Ibid p 52

33. supra n.23

34. supra n.23 at p 52

35. Set out earlier p.12

36. supra n.23

37. supra n.23

38. [1976] 1NZLR 552

39. Not reported. High Court, Rotorua M235/82

40. supra n.23

41. supra n.23

42. supra n.23

43. supra n.23

44. supra n.23

45. Not reported. District Court, Auckland. 2 July 1981. CR No. 121339

46. Idem

47. supra n.23

48. supra n.23

49. supra n.23

50. supra n.23

51. Not reported. High Court, Auckland M242/80

52. supra n.23

53. supra n.23

54. supra n.23

55. supra n.23

56. supra n.23

57. supra n.23

58. Felton v. Auckland City Council. Not reported. High Court, Auckland 18/11/77

59. Maxwell v. Police. Not reported. High Court, Masterton M3/83

60. supra n.23

61. supra n.23

62. supra n.58

63. supra n.59

64. supra n.23

65. [1964] 1QB 164

66. [1974] 1WLR 374; 1974 RTR 182

67. [1980] RTR 454

68. supra n.66

69. supra n.65

70. supra n.65

71. supra n.66

72. see Beard v. Wood [1980] RTR 454,458

73. [1984] AC 437. There is some confusion as to the name of this case. It is cited in most law reports a Mohammed-Holgate v. Duke, although it appears that the appellant's name was actually Holgate-Mohammed.

74. First laid down in Associated Provincial Picture Houses Ltd v. Wednesbury Corporation [1948] 1KB 223

75. Mohammed-Holgate v. Duke [1984] AC 437, 443

76. supra n.23

77. supra n.73

78. Clause 13A Transport Amendment Bill (No.4) 30/9/83.

79. New Zealand Parliamentary Debates VOL 457, 1984, p 706

80. Ibid p 706

81. Ibid p 706-707

82. supra n.23

83. supra n.45

84. Set out earlier p.12

85. A breath screening test is the initial road side breath test conducted by a traffic officer. It

involves the motorist breathing through a tube of crystals to inflate a small plastic bag. Any alcohol on a motorist's breath will chemically react with the crystals causing them to change colour. In such a way excess breath alcohol can be ascertained.

An evidential breath test is the test carried out by an officer on special alcosensor equipment. It gives an accurate reading as to breath alcohol level in micrograms of alcohol per litre of breath.

86. Parker v. Ministry of Transport. Not reported. Court of Appeal CA 252/81

87. Transport Act 1962 s.58A(3) set out earlier p.12

88. [1981] 1NZLR 86

89. Ambler v. Ministry of Transport. Not reported. High Court, Dunedin, M104/80

90. supra n.3

91. Transport Act 1962 s.58A(3)

92. Glynn v. Ministry of Transport. Not reported. Supreme Court, Auckland. M1700/79

93. [1982] 2NZLR 641

94. Glynn v. Ministry of Transport. Not reported. Supreme Court, Auckland M1700/79

95. Transport Act 1962. s.58E(1) states that 'reasonable compliance' with the breath and blood alcohol procedures in the Act will be sufficient.

96. Transport Act 1962, s.58(1)(c)

97. Crimes Act 1961, sections 30-38

98. Crimes Act 1961, s.192

99. Crimes Act 1961, s.171

100. s.35(a) Crimes Act 1961

101. s.35(b) Crimes Act 1961

102. [1982] 2WLR 10

103. [1966] 1QB 312

104. (1975) 23 C.C.C. (2d) 513

105. supra n.89

106. The Judges Rules are a set of guidelines laid down in 1912, and revised in 1918 and 1930 by Judges of the Queen's Bench division, for the purposes of controlling police conduct during interrogation of persons in custody.

107. R v. Kurupo. Not reported. High Court, Wellington. T40/83

108. [1962] VR 545

109. (1957) 97 CLR 100, 129

110. [1968] NZLR 426, 442

111. supra n.107

112. supra n.110

113. [1953] 1QB 680

114. Until the passing of the first Crown Proceedings Act in New Zealand in 1908, the general rule was that the Government was immune from tort actions.

115. J G Fleming The Law of Torts (6th ed. Law Book Company Ltd, Sydney) p 154

116. [1970] AC 942

117. Ibid p 949

118. supra n.8

119. supra n.23

120. [1980] QB 105, 113

121. Harvey McGregor McGregor on Damages (14th ed. Sweet and Maxwell, London)

122. Ibid para 1357

123. Idem

124. Idem

125. Idem

126. supra n.121

127. Childs v. Lewis (1924) 40 TLR 870

128. Pritchet v. Boevey (1833) 1 CR and M775, 149 ER (EX) 220

129. Not reported. High Court, Wellington 15/7/81

130. Idem

130A. Brockie v. Lower Hutt City. Not reported. High Court, Wellington. A57/79

131. supra n.129

132. supra n.129

133. supra n.121 at para 1361

134. supra n.129 at p 5

135. 1944 WN 214

136. Ibid p 214

137. [1972] AC 1027, 1070

138. [1964] AC 1129

139. [1982] 1NZLR 81

140. [1982] 1NZLR 97

141. Taylor v. Beere [1982] 1NZLR 81, 92

142. Idem

143. Not reported. High Court, Wellington. M611/82

144. supra n.138

145. supra n.138 at p 1226

146. Kuruma v. The Queen [1955] AC 197

147. R v. Sang [1980] AC 402

148. As it was in Kuruma v. The Queen, supra n.146

149. Not reported. High Court, Auckland. T58/83

150. Not reported. Court of Appeal. CA 116/84

151. supra n.146

152. supra n.150 at p 6

153. supra n.150

154. supra n.149

155. supra n.149

156. R v. Lee [1978] 1NZLR 481 is one example of a case which did this.

157. supra n.23

158. supra n.4

159. supra n.5

160. Not reported. High Court, Auckland M39/84

161. supra n.23

162. A similar form could be used to clause 13A of the Transport Amendment Bill (No.4) See n.78

163. See page 39

164. Several owners of hotels have complained to the Ministry of Transport of victimisation, because checkpoints are frequently established in the vicinity of the hotel, thus causing custom to decline.

165. Australian Law Reform Commission, "Report No.4 Alcohol, Drugs and Driving"

166. International Covenant on Civil and Political Rights, Article 9. infra n.167

167. Article 17 International Covenant on Civil and Political Rights. 21 UN GAOR Supp.(No.16) 49

168. The International Covenant on Civil and Political Rights 21 UN GAOR Supp. (No. 16) p.49

169. A Bill of Rights for New Zealand - A White Paper.

170. Article 19 of the proposed Bill of Rights. Supra n.169

171. The fourth amendment of the Constitution of the United States of America

172. 440 US 648

173. Dixon v. Auckland City Council. Not reported. Court of Appeal, CA 24/85

174. supra n.23