Traffic officers and false imprisonment

David Pope*

In this article, David Pope explores powers conferred on traffic officers in New Zealand. He notes the recent decision of the Court of Appeal in Roper *v.* Police *and advances two theories on the wider implications of this decision. He argues that, even on the theory more favourable to traffic officers, important restrictions on stopping or holding drivers now exist. Infringing these restrictions may leave an officer open to an action in false imprisonment. The author raises a very substantial doubt about the legality of "random stopping" to check for drinking drivers and calls for the matter to be remedied by legislation.*

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 or 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.

* This article was completed as part of the LL.B.(Honours) programme at Victoria University.

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 necessary 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 is not so much on whether the plaintiff was actually 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]

1 [1977] 2 N.Z.L.R. 50.
2 Unreported, High Court, Wellington M356/82.
3 (1983) unreported, High Court, Auckland M270/83.
4 (1984) unreported, High Court, Wellington M634/83.
5 (1983) unreported, Court of Appeal CA 67/82.
6 R. V. Heuston (ed.) *Salmond on Torts* (18 ed., Sweet and Maxwell, London, 1981) 116.
7 J. G. Fleming *The Law of Torts* (6 ed., Law Book Company Ltd., Australia, 1983) 26.

> 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 imprisonmnt 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 him (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 it 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 this latter type of brief detention which a traffic officer may exercise over a motorist, that 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 consent. If it can be shown that a person chose voluntarily to remain with another, while at all times both being free and believing to be free to leave, then there is no false imprisonment.[10] However consent must be genuine. That is to say 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, such as physical violence or arrest, or 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 two main 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,

8 *Blundell* v. *Attorney General* [1968] N.Z.L.R. 341.
9 *Blundell* v. *Attorney General* [1967] N.Z.L.R. 492, 503.
10 Supra n.7, 27.
11 Supra n.7, 10-11.

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 A 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:

> *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 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.

> 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

12 **Supra n.8.**

(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 made 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 has regarded section 66 as a general all-purpose stopping provision. It 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 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 then to 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* case and *Maxwell's* 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:

> 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 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

13 (1977) unreported, High Court, Auckland M1337/77.
14 (1983) unreported, High Court, Masterton M3/83.
15 N.Z. Parliamentary Debates Vol. 457, 1984: 706.

Maxwell's case where O'Regan J. cites the High Court decision of *Police* v. *Roper*.[16]

In 1984 the Court of Appeal overturned the High Court decision in *Roper's* case. 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

1. *The facts of the case*

The Court of Appeal's decision in *Roper* v. *Police*[17] 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.[18] 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[19] and the High Court where a conviction was entered against her,[20] 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[21] 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 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.

2. *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 section 66(1) to remain stopped is governed by the associated obligation to supply information."[22] This implies that once the information required by section 66 is given, a motorist may leave and an

16 (1983) unreported, High Court, Wellington M534/82.
17 *Roper* v. *Police* [1984] 1 N.Z.L.R. 48.
18 Set out earlier in part III A.
19 (1982) unreported, District Court, Wellington.
20 Supra n.16.
21 Supra n.8.
22 Supra n.17, 51.

officer cannot detain this motorist to exercise other powers under the Transport Act. As the judgment states later[23]

> 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[24]

> 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's 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.

3. *The effect of the strict interpretation*

The effect of the strict interpretation of *Roper's* case is to limit severely 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".[25]

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.[26] Under a strict interpretation of *Roper's* case 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 fact in *Roper's* case 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*[27] and *Kinder* v. *Ministry of Transport*,[28] 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.

23 Idem.
24 Ibid., 52.
25 Idem.
26 Set out earlier in part III A.
27 [1976] 1 N.Z.L.R. 522.
28 Unreported, High Court, Rotorua, M235/82.

The result of this is that if a strict view is taken of the decision in *Roper's* 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.

4. *The wide interpretation*

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

For these reasons a later court may seek to take a broader interpretation from *Roper's* case. It may be held that other powers could be used following a stopping under section 66, as long as the section 66 power was not abused. There is some support for this wider view when the real focus of the court's concern in *Roper's* case is examined. As noted, *Roper's* case is a case with a very unusual fact situation. It involved both the police and the Ministry of Transport 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 used section 68B(2) to write the car off the road themselves, then the court might have held this to be 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*.[29] 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[30]

> 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.

29 (1981) unreported, District Court, Auckland, CR No. 121339.
30 Ibid.

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 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.

5. *The effect of the wide interpretation*

Under a wide interpretation of *Roper's* case 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, 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 was well summed up by Hardie Boys J. in *Gifford* v. *Ministry of Transport,* when he said[31]

> 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 receive. 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 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, 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 "a 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, 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

31 (1980) unreported, High Court, Auckland, M242/80.

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, 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, 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 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

1. *Section 66: a section for acquiring information*

An analysis of *Roper's* case implies that an even more fundamental limit can possibly be placed on a traffic officer, which may lead to a false imprisonment. It raises the question of whether an officer can 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*[32] and *Maxwell*[33] 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 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 be a valid exercise of the power.

32 **Supra** n.13.
33 **Supra** n.14.

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.

It is submitted that this is not 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 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 and *Maxwell's* case 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 stated, it was not designed, namely detaining motorists. Any motorists 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,*[34] *Beard* v. *Wood* [35] and *Hoffman* v. *Thomas.*[36] 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 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 contemplated by that section or at Common Law. Similarly in *Waterfield's* case 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 case. 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 and *Hoffman's* case, because it was not contemplated in the purpose of the section.

34 [1964] 1 Q.B. 164.
35 [1974] 1 W.L.R. 374; [1974] R.T.R. 182.
36 [1980] R.T.R. 454.

It may be argued that these limits on section 66 prevent its use to stop vehicles in order to check for intoxicated motorists. Also, because the power must be used in good faith,[37] 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.

2. *Limits on the discretion given in section 66*

The stopping of motor vehicles is an exercise of a 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 should take in the task of reviewing the exercise of discretion by a law enforcement officer. The case is *Mohammed-Holgate* v. *Duke*.[38] 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"[39] which had been predominantly used only in administrative law cases to examine discretionary areas of governmental and local body activity. Even if a New Zealand court did 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".[40]

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 further argument is that an officer includes in the exercise of the discretion to stop vehicles at random 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[41] decided, that is all

37 See *Beard v. Wood* [1980] R.T.R. 454, 458.

38 [1984] A.C. 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.

39 First laid down in *Associated Provincial Picture Houses Ltd.* v. *Wednesbury Corporation* [1948] 1 K.B. 223.

40 Supra n.38, 443.

41 Supra n.17.

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.

A possible reply to the above is 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 that taken in *Mohammed-Holgate's* case may well conclude that the exercise of the discretionary power to stop vehicles in such circumstances involves an unlawful detention.

3. *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)[42] which would have allowed specifically for random stopping and breath testing. The clause was eventually excluded as the National Government at the time disliked the policy of random stopping. Furthermore, there was, according to the Honourable Mr Gair (the then Minister of Transport), "much emphasis by opponents of the need to change the law on the decision of Mr Justice Quilliam in *Police* v. *Roper*".[43] But the Court of Appeal has since overturned *Roper's* case. The Honourable Mr Gair also stated in a written question to the Honourable Mr. Prebble in the House of Representatives that he had had[44]

> 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.

The Honourable Mr Prebble's reply did not show total confidence in the current practice saying[45]

> 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 . . .

42 Clause 13A, Transport Amendment Bill (No. 4), 1983.
43 N.Z. Parliamentary Debates Vol. 457, 1984: 706.
44 Idem.
45 Ibid., 706-707.

The Honourable Mr Prebble's statement cannot be taken literally. Courts can never rule that "legislation . . . is defective," because Parliament is sovereign. Nevertheless Mr Prebble's statements 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, 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 on the off-chance if an offence has been committed, particularly that of excess breath or blood alcohol.

Following the cases of *Roper*[46] and *Winter*,[47] 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 only 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. *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 therefore becomes relevant to enquire whether a traffic officer has forced a motorist to stop and remain — by threat of legal sanction — or whether a motorist has merely consented to do so.

There is always some consent when an officer stops and detains a motorist. An officer will rarely physically force a car from the road, so on a signal from a traffic officer, most motorists will "consent" to pull over. This consent will not

46 **Supra n.17.**
47 **Supra n.29.**

necessarily defeat a false imprisonment action. In such a situation the motorist does not believe there is any choice except to stop the vehicle and remain to avoid being forced to do so.

The need for an element of choice before consent is regarded as genuine was recognised in *Ambler* v. *Ministry of Transport*[48] where it was held that

> [i]f 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, then the element of voluntariness would disappear.

Thus the operative factor in a motorist's 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.

Perhaps the test to be applied is similar to that used by the courts in the interrogation cases. The question in these cases was whether a person was in custody (though not arrested) or was consenting to remain. The answer was relevant to determine if the police had to comply with the judges' rules[49] on interrogation. A common theme runs through the interrogation cases, and according to Savage J. in *R.* v. *Kurupo*[50]

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

Applying a similar test to the traffic officer and motorist situation, when signalled over, a motorist is likely to believe that it is not possible to resist (even if desiring to do so) and the grounds for this belief are reasonable. This belief is often strengthened because a traffic officer will park a patrol car behind the motorist's vehicle and will then stand beside the motorist's car in such a way as to make the physical act of departing nearly impossible. This is even more significant at a checkpoint where it is common for a motorist's car to be virtually surrounded by traffic officers.

The case for false imprisonment is easier to prove, of course, if it can be shown that the plaintiff asked to leave and had the request refused. But this is not essential as long as it can be shown that a motorist believed on reasonable grounds that had such a request been made, it would have been refused. This is shown in *R.* v. *Bass*[51] where 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.

It is therefore submitted that traffic officers do use their powers to stop and detain motorists and that motorists do not believe there is any choice but to stop

48 (1980) unreported, High Court, Dunedin, M104/80.

49 The judges rules are a set of guidelines laid down in 1912, and revised in 1918 and 1930 by judges of the Queens Bench division, for the purpose of controlling police conduct during interrogation of persons in custody.

50 (1983) unreported, High Court, Wellington, T40/83.

51 [1953] 1 Q.B. 680.

and remain. It is not reasonable to expect a motorist to defy an officer and drive off, and therefore if an officer abuses the power, a false imprisonment will occur.

IV. CONSEQUENCES OF A FALSE IMPRISONMENT

A. The Duration of the False Imprisonment

Assuming that a motorist is unlawfully detained, will the false imprisonment end only when the motorist regains freedom, or is there a point when unlawful custody becomes lawful. The case of *Hussein* v. *Chong Fook Kam*[52] indicates it is the latter, and that there is no reason why unlawful custody cannot at some stage become lawful.

In the traffic officer and motorist situation it is submitted that a traffic officer acts in excess of powers and unlawfully detains a motorist if a motorist is stopped at random, without the desire to seek the details which section 66 permits. However, such unlawful detention will end if the traffic officer then suspects a drink-driving offence and arrests under section 62 or requires a breath test under section 58A.

The very point that is relevant here is the one expounded in *Blundells case*.[53] If one person deprives another of liberty, the former must be able to point to a specific legal authority allowing it. Here, while the original stopping is illegal, the subsequent lawful use of section 62 or section 58A provides the legal authority for the detention, and so the false imprisonment ends. This statement, of course, is subject to the proviso that under a strict interpretation of *Roper's* case,[54] no other powers can be used pursuant to a stopping under section 66, and so damages can be sought for the whole period.

Therefore the duration of false imprisonment will be from the time the motorist is first detained until the time when he or she is released, or until an officer lawfully uses another power to detain.

B. Damages

The aim of a tort action is to compensate a victim for loss. Proving liability in tort is pointless unless worthwhile damages can be gained. In many cases it will be worthless to bring a tort action against a traffic officer. If a plaintiff sues for the commission of a minor tort committed while the plaintiff was being apprehended for a serious crime, courts will not take a sympathetic view. Similarly, should random stopping be held to amount to a false imprisonment, then again a court may choose to award only nominal damages, because of the "flood" of claims that would otherwise follow. False imprisonment arising not out of deliberately illegal conduct by a traffic officer, but out of a technical mistake in an uncertain area of the law is unlikely to bring forth a substantial award of damages.

52 [1970] A.C. 942.
53 Supra. n.8.
54 Supra. n.17.

Nevertheless, false imprisonment actions may still be worth bringing in such circumstances because

(a) if random stopping or other Ministry of Transport practices are illegal, then it is important they are recognised as such; and
(b) 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.

When damages are awarded in a false imprisonment action, they are assessed primarily for non-pecuniary loss under two heads, namely "loss of time considered primarily from a non-pecuniary point of view" and "the indignity".[55] Damages are not, however, broken down, and an award is made simply of an amount which the jury sees as fair. It is also possible to claim aggravated damages because "the manner in which the false imprisonment is effected may lead to aggravation . . . of the damage, and hence the damages."[56] In one false imprisonment case involving the traffic department this was described as circumstances because of which " . . . this deprivation of liberty was made worse for him than it might otherwise have been."[57] This encompasses the idea that false imprisonment may also lead to a loss of reputation. Aggravated damages are to be distinguished from exemplary damages which are awarded in very few cases since the House of Lords decision in *Rookes* v. *Barnard*.[58] New Zealand, however, has been reluctant to follow this decision and as cases such as *Donselaar* v. *Donselaar*,[59] *Taylor* v. *Beere*[60] and *Jamieson Tow & Salvage Company* v. *Murray*[61] illustrate, exemplary damages will still be awarded if conduct is malicious or oppressive or shows "an arrogant disregard for any rights the plaintiff may have had."[62]

Brockie v. *Lower Hutt City*[63] illustrates that substantial damages can be gained in false imprisonment action of the type this paper discusses. In this case a carrier was stopped for no more than fifteen or twenty minutes while a dispute was sorted out as to whether the carrier was disqualified from driving. Despite this short length of time, and a finding that the officers acted in good faith, an award of $10,000 general damages and $1,000 aggravated damages was given. In a later motion for a new trial[64] Quilliam J. stated that while this was a high award of damages it was not so excessive as to warrant setting it aside.

It is therefore submitted that tort actions against the Ministry of Transport may be worth bringing, both to keep a check on the exercise of the Ministry's conduct and because there is at least some precedent that substantial damages can be gained.

55 H. McGregor *McGregor on Damages* (14 ed., Sweet and Maxwell, London, 1980) para. 1357.
56 Ibid., para. 1361.
57 *Brockie* v. *Lower Hutt City* (1981) unreported, High Court, Wellington, 5.
58 [1964] A.C. 1129.
59 [1982] 1 N.Z.L.R. 97.
60 [1982] 1 N.Z.L.R. 81.
61 (1983) unreported, High Court, Wellington, M.611/82.
62 *Taylor* v. *Beere* [1982] 1 N.Z.L.R. 81, 92.
63 Supra. n.57.

C. Exclusion of Evidence in Criminal Cases

Generally speaking, evidence as to a crime will not be excluded because it is gained during the commission of a tort. The general rule stated in the well known case of *Kuruma* v. *R.*[65] and recently reaffirmed in the New Zealand Court of Appeal in *R.* v. *Coombs*[66] is that

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

By analogy therefore, evidence gained by illegal random stopping or breath testing may not necessarily be excluded in a criminal trial.

It should be noted, however, that in *R.* v. *Hannah*[67] Casey J. excluded physical evidence gained by the illegal detention of suspects, as a means to discipline the police. Perhaps based on similar grounds, where breath test evidence is gained by the illegal detention of a motorist, it may also be excluded as a way of checking the activities of the Ministry of Transport.

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*[68] has introduced substantial doubts about the powers 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 provides clear answers.

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.[69] Stopping vehicles at random breaches a fundamental right of every citizen that, unless acting illegally,

64 *Brockie* v. *Lower Hutt City* (1981) unreported, High Court, Wellington, A.57/79.
65 [1955] A.C. 197.
66 (1984) unreported, Court of Appeal, C.A.116/84, 6.
67 (1984) unreported, High Court, Auckland, T.58/83.
68 Supra. n.17.
69 A similar form could be used to clause 13A of the Transport Amendment Bill (No. 4). See n.42.

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 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 people's elected representative can debate the constitutional consequence 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)[70] 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 undesirable approach to take. If random stopping is to be carried out, 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?[71] These are questions that Parliament might consider and 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 it report entitled *Alcohol, Drugs and Driving*[72] 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".[74] To a varying degree, stopping and detaining vehicles at random infringes both these rights. The Covenant 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,[75] 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".[76] On a virtually identical

70 See part III D3.
71 Several owners of hotels in Wellington have complained to the Ministry of Transport of victimisation because check points are frequently established in the vicinity of the hotel and thus causing custom to declinc.
72 Australian Law Reform Commission *Alcohol, Drugs and Driving* report No. 4.
73 International Covenant on Civil and Political Rights, Article 9. 21 U.N. GAOR Supp. (No. 16) 49.
74 Ibid., article 17.
75 *A Bill of Rights for New Zealand — A White Paper* (Government Printer, Wellington, 1985).
76 Article 19 of the proposed Bill of Rights.

provision in the Constitution of the United States of America,[77] that country's Supreme Court held in *Delaware* v. *Prouse*[78] 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*[79]

> 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 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.

77 The fourth amendment of the Constitution of the United States of America.
78 440 U.S. 648 (1979).
79 (1985) unreported, Court of Appeal, CA 234/84.