Edwards v. *Ministry of Transport*:: *Drink/drive offences and the traffic officer's power of entry on private property*

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In Edwards v. Ministry of Transport the conviction of a person who clearly committed a blood alcohol offence was overturned because the arresting traffic officer had exceeded his powers on private property. This article examines the nature and extent of traffic officers' powers on private property. It details the special difficulties involved in detecting and prosecuting blood alcohol offences. Extending traffic officers' powers on private property is discussed as a means to remedy the situation. However, that course is rejected and an alternative solution proposed.

I. INTRODUCTION

Recently the Ministry of Transport has been going all out to apprehend and prosecute drink/drive offenders. With the introduction of such ploys as random stopping, drinking motorists hardly stand a sporting chance at getting away with their crime. Or do they? In reality, traffic officers can still be frustrated in their attempts to apprehend such motorists by the limited nature of their powers.

Courts are now being forced to consider how far the law may go to protect the public from drunken drivers. The cases arising pose questions about the extent of traffic officers' powers in this area: Does the law authorise traffic officers to enter and remain on private property without occupier consent in order to seek and question drink/drive offenders? If it does not, should it? *Edwards* v. *Ministry of Transport*[1] is a case which provokes thought on these matters.

II. HISTORY OF THE CASE

A. The Facts

On the evening of 25 November 1981, Mr. Edwards was staying with a friend in Cortina Avenue, Johnsonville. He had consumed alcohol at some stage of the evening. At approximately 10:00 p.m. he left the house on his friend's motorcycle to purchase

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1 (1986) Unreported, Wellington Registry, A203/83. This was a decision of Eichelbaum J. in Edwards' tort action which resulted from his acquittal by Quilliam J. in the criminal case of *Edwards* v. *Ministry of Transport* (1982) Unreported, Wellington Registry, M356/82.

something in the Johnsonville shopping area. On returning he was pursued by Traffic Officer Roberts who checked the motorcycle's speed and found it to be in excess of the speed limit.

The traffic officer switched on his siren and flashing light. Though Edwards was aware of being required to stop, he accelerated. He quickly turned right into Cortina Avenue, into the driveway of his friend's house, and then into the garage which was attached to the house.

Moving quickly, Traffic Officer Roberts arrived at the garage as Edwards was attempting to close the roller door. The traffic officer prevented him from closing the door and after some struggle managed to force it back up. Once inside the garage Edwards immediately asked the officer to leave. At that point, Traffic Officer Roberts noticed that Edwards' breath smelt of beer. He asked whether it was Edwards' property. Edwards responded that it was not. Officer Roberts then refused to leave.

When Officer Roberts asked him to undergo a breath screening test Edwards refused and again told the officer to leave. Officer Roberts then asked Edwards to accompany him to a place where an evidential breath or blood test could be carried out. Edwards did not answer but attempted to escape the officer and enter the house. Then, after cautioning Edwards, Officer Roberts arrested him and he was taken away for tests. The breath test proved positive though the blood test was slightly below the legal limit.

Edwards was charged with three offences under the Transport Act 1962: section 66 - failure to stop after being signalled to, section 52 - driving at a speed exceeding 50 kilometres per hour, and section 58A(5) - failure to accompany a traffic officer. Though discharged under section 42 of the Criminal Justice Act 1954 for the first offence, he was convicted of the second two.

B. Edwards' Appeal

Edwards' appeal against his convictions was heard in the High Court before Quilliam J.[2] Against the speeding conviction he argued that the District Court Judge had discarded as irrelevant important evidence in favour of his acquittal. This was the evidence of his father, a civil engineer, that the motorcycle in question could not have taken the turn into Cortina Avenue at 65 km/h without reducing speed. The traffic officer's evidence was that it had.

His appeal on the conviction of failure to accompany was based on two submissions. First it was argued that the traffic officer's action of stopping Edwards from closing the garage door amounted to a forcible entry. Secondly it was submitted that where a forcible entry is effected without authority, anything occurring afterwards is inadmissible as evidence.

Quilliam J. quashed the speeding conviction. He considered that if evidence was available, that the motorcycle in question could not possibly have travelled at the alleged

2 Idem.

speed, and was not permitted to be given, or if given was not recorded, it could have materially affected the Court's view of the reliability of the traffic officer's evidence. Uncertainty resulting from the treatment of that evidence caused Quilliam J. to decide that "the only safe course"[3] to follow was to quash the conviction.

The conviction for failing to accompany was also quashed. Quilliam J. relied upon the authority of *Transport Ministry* v. *Payn*.[4] There, Richmond P., after discussing the traffic officer's right to enter and remain on private property, said "such authority is not one which carried with it a right of forcible entry".[5]

Quilliam J. went on to conclude that the traffic officer's actions at the garage door did constitute a forcible entry. Therefore, the evidence as to a failure to accompany, obtained after such illegal action, could not be acceptable as admissible evidence.

C. A Judge's Discretion

The Judge did not discuss his discretion to permit or exclude the evidence. Evidence is not inadmissible simply because it is illegally obtained. That fact merely gives the judge a discretion to exclude it. Indeed, in *R* v. *Sang*[6] it was firmly stated that the judge "has no discretion to refuse to admit relevant admissible evidence on the ground that it was obtained by improper or unfair means. The court is not concerned with how it was obtained".

New Zealand authorities do seem to acknowledge the existence of a judicial discretion to exclude evidence on the basis of unfairness to the accused.[7] However, "the actual exercise of this discretion in favour of exclusion has been rare".[8] One then wonders why Quilliam J. felt that the evidence was automatically inadmissible if illegally obtained.[9] He had ample authority to decide the exact opposite.

D. An Alternative Basis of Appeal

Nevertheless, even if the evidence were judged admissible Edwards could have supported his appeal against the conviction for failure to accompany on other grounds.

3 Ibid. 4.
4 [1977] 2 N.Z.L.R. 50.
5 Ibid. 55.
6 [1980] A.C. 402, 437.
7 *Coombs* [1985] 1 N.Z.L.R. 318; *Ogden* [1985] 1 N.Z.L.R. 344.
8 S. France "Exclusion of Improperly Obtained Evidence" (1985) 11 N.Z.U.L.R. 334, 339.
9 Since this paper was written the Court of Appeal has delivered a decision indicating that where traffic officers have exceeded their powers on private property the appropriate course is to exclude any evidence thereby obtained (*Howden* v. *Ministry of Transport* (1987) Unreported, CA195/87). Therefore, although Quilliam J. may not have actually exercised his discretion the result he reached was probably the right one. See also the text accompanying note 65, infra.

He could have argued that at the time Officer Roberts asked that he accompany him for an evidential breath and blood test the officer was a trespasser. As such he could not be acting in the execution of his duty.[10] Therefore, Edwards was under no obligation to accompany him.[11]

This type of argument surfaced in the later trial when Edwards sued the Ministry of Transport for wrongful arrest and imprisonment.

E. The Action for Wrongful Arrest and Imprisonment

Edwards' action against the Ministry of Transport came before Eichelbaum J. in the High Court in 1986.[12] The defendant argued that the arrest was justified under section 58A of the Transport Act 1962. Under that section the officer has the power to arrest after a series of steps. Here, according to the defendant's argument, the first step was in the garage, when the officer acquired good cause to suspect. The following step was the officer's request that Edwards undergo a breath screening test. Then, upon his refusal, the officer was authorised to request Edwards to accompany him for an evidential breath or blood test. The last step was satisfied when Edwards again refused and thus Officer Roberts was authorised to arrest him.

The defendant, the Ministry of Transport, also tried to seek justification for the charge of wrongful arrest and imprisonment under section 68B of the Transport Act 1962. This section authorises a uniformed traffic officer to enforce the provisions of the Act. This, the defendant argued, authorised Officer Roberts to follow up Edwards' failure to stop.

The problem with both arguments is that if a trespasser at the time of carrying out any action under the sections, the officer cannot be in the execution of duty. The ultimate arrest would then still be unlawful.

10 One may note here that Quilliam J.'s exclusion of evidence approach would bring different results if Edwards was appealing a charge of failure to stop when signalled to. If all evidence after Officer Roberts' illegal entry was judged inadmissible, evidence of Edwards' identity (presuming he could not be clearly identified before entering to garage) would be inadmissible as well. Therefore a charge of failure to stop when signalled to could not succeed either. However, if the other charges failed because the officer was not in the execution of his duty (being a trespasser) that would not prevent the failure to stop charge from succeeding. At the point Officer Roberts requested Edwards to stop he was still in the execution of his duty.

11 The offence under s. 58A(5)(b) of the Transport Act 1962 states that every person commits an offence who - "fails or refuses to accompany an enforcement officer to any place, when required to do so pursuant to this section". "Pursuant to this section" implies that the requirement must be lawful and that the officer must be in the execution of his/her duty. It is not lawful and the officer is not in the execution of his/her duty when the officer is a trespasser. However the argument is not as strong as it would be if the provision specifically required the officer to be in the execution of his/her duty. Whereas some provisions will have that requirement specifically written in, s. 58A(5)(b) does not.

12 *Edwards* v. *Ministry of Transport*, supra n.1.

III. IS THIS TRESPASS?

Eichelbaum J. was faced with deciding whether Traffic Officer Roberts had been a trespasser or whether in fact some implied right had justified his presence in the garage. I will examine the points he made as well as some other considerations involved.

A. Police Powers of Entry on Private Premises

One must first examine when the Police may lawfully enter private premises. There are three basic situations where this power exists: Police may enter with the express consent of the occupier, with the implied consent of the occupier, or where they are given the power under specific statutory authority.[13]

The first situation is clear. Anyone may enter premises with the express consent of the occupier. The second situation arises from the authority of *Robson* v. *Hallett.*[14] In that case Lord Parker C.J. states that "the occupier of any dwelling-house gives implied licence to any member of the public coming on his lawful business to come through the gate, up the steps, and knock on the door of the house".[15] This implied licence, as Eichelbaum J. points out, is not limited to police or traffic officers but applies to any member of the public. It does not, as Eichelbaum J. again points out, "take the visitor beyond the door of the house".[16]

The third situation, entry under statutory authority, arises in different forms. Some statutes permit entry only by warrant. With others the simple existence of the particular statutory provision provides authorisation for entry where certain preconditions are met.[17]

Section 317 of the Crimes Act 1961 is one such statutory authority. It provides that where authorised to arrest any person without warrant any constable may enter any premises, by force if necessary, to arrest that person if the constable:

(a) has found the person committing an imprisonable offence and is freshly pursuing that person; or
(b) has good cause to suspect that that person has committed any such offence on those premises.

Moreover, under section 317(2), constables may enter any premises, by force if necessary, to prevent the commission of any offence likely to cause immediate and

13 W. Hodge *Doyle: Criminal Procedure in New Zealand* (2 ed., Law Book Company Limited, Sydney, 1984) 27.
14 [1967] 2 Q.B. 939.
15 Ibid. 951.
16 Supra n.12, 10.
17 D. Bates *Powers of Entry, Search, Inspection and Seizure in New Zealand* (Brooker & Friend Ltd., Wellington, 1983) 711.

serious injury to any person or property if they have reasonable and probable grounds for believing that such an offence is about to be committed inside.

Section 317 confers a very wide-ranging power of entry. It is intended to aid constables in emergency situations where it is impractical or undesirable to obtain a warrant before entering.[18]

B. Traffic Officers' Powers of Entry on Private Premises

Traffic officers are in a different situation than Police constables. Traffic officers' training is naturally geared towards use in their workplace. That workplace is out on the roads. Though they have training in the skills of dealing with people, they have somewhat less than do constables. Those are, however, the most important skills where a power of entry on private premises is concerned.

Traffic officers have more limited powers of entry. Naturally, they enjoy the same rights as the public in respect of their power of entry on private property with the express or implied consent of the occupier. However, the powers conferred on constables under section 317 do not extend to traffic officers.

Several cases have examined the traffic officer's powers in relation to private property. *Kelly* v. *Lower Hutt City Council* [19] established that a power to request and conduct a breath test on private property may properly be exercised if a traffic officer is there with the leave and licence of the occupier. One year later, in *Police* v. *Ward* [20], Cooke J., as he then was, held that an occupier of private property was bound to allow a constable or traffic officer to enter to carry out a breath test on a person whom the officer had good cause to suspect of having committed an offence under section 58A(1) of the Transport Act 1962. Cooke J. was even prepared to acknowledge a right of forcible entry on the part of traffic officers in such circumstances.[21] The right of forcible entry would be safeguarded by the need for good cause to suspect and by the requirement that the officer be in uniform or in possession of a warrant.[22] Moreover, according to Cooke J., a forcible entry could only be effected if "clearly necessary and after notice of the business on which the officer has come, a demand to enter and a refusal to admit".[23]

As Eichelbaum J. mentions, it did appear at this time that "the judicial tide seemed to be running in favour of some statutory implication which would extend the powers of traffic officers in these circumstances" [24] but the case of *Transport Ministry* v. *Payn* [25] reversed that trend.

18 Supra n.13.
19 [1972] N.Z.L.R. 126.
20 [1973] 2 N.Z.L.R. 418.
21 Ibid. 428.
22 Idem.
23 Supra n.20, 429.
24 Supra n.12, 12.
25 Supra n.4.

In *Payn*, the Court of Appeal placed decisive limits on the traffic officer's powers of entry on private property. It was there held that the powers of a traffic officer under section 58A cannot be exercised on private property unless the officer is on the property by the licence of the occupier.[26] This eliminated any possibility that one might imply a right of entry for the purposes of upholding provisions of the Transport Act. *Payn* was therefore a serious obstacle to the Ministry of Transport's case in *Edwards*.

It could not use existing authority to support reading in an implied right to do as Officer Roberts did. *Halsbury* states: [27]

> A constable has no general right of entry into private property for the purpose of obtaining evidence, questioning persons or effecting an arrest; every invasion of property, however slight, is a trespass, and no person has the right to enter property except by consent or strictly in accordance with some lawful authorisation.

This basic constitutional principle is firmly entrenched in our law. As far back as 1765 property rights were firmly upheld in the case of *Entick* v. *Carrington*.[28] There it was held that the sole justification for any invasion of private property was to show that some positive law had empowered or excused the action.[29] It would be wrong to assume that such a principle has become obsolete.

In *Payn*, Woodhouse J., as he then was, points out that "if there is to be any derogation from the liberties enjoyed by individuals in favour of powers given to an official it is essential that the change should be authorised in clear definite terms".[30] It is for Parliament, in their forum of discussion and debate, to make any such serious extensions of an officer's power. This view is supported by later House of Lords rulings in the case of *Morris* v. *Beardmore*.[31] There, a constable had been a trespasser at the time of request for a breath specimen. In deciding that the constable's power to require a citizen to produce a breath specimen did not imply a power to do so on private property when there against the occupier's will, it was said: [32]

> Had Parliament intended to empower a policeman to enter and remain on the private premises of a suspect against his will and there to require him to provide evidence, which in all probability would ... lead to his arrest, prosecution, and conviction, Parliament could, and in my opinion would, have included in the relevant legislation an express power or right of entry.

26 Supra n.4, 69.
27 *Halsbury's Laws of England* (4 ed., Butterworths, London, 1976) vol. 11, para. 122, p. 85.
28 (1765) 95 E.R. 807.
29 Ibid. 817.
30 Supra n.4, 62
31 [1981] A.C. 446.
32 Ibid. 463.

Morris v. *Beardmore* has been quickly accepted and applied in later House of Lords decisions.[33] Courts in other common law jurisdiction have been more prepared to imply or create powers in these circumstances.[34] However, New Zealand Courts have traditionally held that any derogation of individual rights must find its authority in law.[35] One may assume that where such a power is not explicitly authorised it was not intended.[36]

1. *The effect of section 317*

Indeed, section 317 of the Crimes Act 1961 is some indication that where Parliament intends to infringe any individual right it will define specifically the metes and bounds of the intended infringement.[37] The existence of section 317 speaks strongly against any justification of Officer Roberts' actions. Richmond P. in *Payn* discusses that section and concludes that although the section does not prevent the implication of a right of entry without force[38] it is "clearly exhaustive of the rights of forcible entry vested in a constable".[39] There is no reason to suppose that if a constable's power is so clearly limited, a traffic officer should be able to rely on an implied right of forcible entry to enforce the provisions of the Transport Act 1962.

Furthermore, even if the section 317 power extended to traffic officers it would not avail Officer Roberts in this situation. The power of entry when in fresh pursuit is dependent upon the offence in question being punishable by death or imprisonment.[40] Although drink/drive offences are punishable by imprisonment, Officer Roberts did not know before entering the garage that Edwards had been drinking. Before that point he was merely in fresh pursuit of a speeding motorist who failed to stop when signalled to.

33 See: *Clowser* v. *Chaplin*; *Finnigan* v. *Sandiford* [1981] 1 W.L.R. 837.

34 In *R.* v. *Dedman* (1985) 20 C.C.C. (3d) 97, the Supreme Court of Canada extended the common law to uphold a conviction for refusing to supply a breath sample although at the time there had been no statutory authority for the police officer's stopping of Mr. Dedman. Also, in *R.* v. *Landry* [1986] 1 S.C.R. 145, the Supreme Court of Canada implied a power to enter and arrest without warrant based on common law authority although no direct statutory authority existed to justify the action.

35 See *Blundell* v. *Attorney-General* [1968] N.Z.L.R. 341, where it was held that forcible restraint can only be justified where the person restrained is arrested or being arrested on grounds permitted by law.

36 However, since this paper was written the Court of Appeal decided the case of *Po* v. *Ministry of Transport* (1987) Unreported, CA288/86, which may be seen as an exception to the general rule. There the Court was prepared to read a power into a section. It was held that officers having stopped a motor vehicle pursuant to s. 66(1) of the Transport Act 1962 for the purpose of random checking as to drinking are further empowered to detain the driver for that purpose for a time that is reasonable in the circumstances. Hopefully this case does not indicate an increased readiness to indulge in judicial law-making. See also: D. Pope "Traffic Officers and False Imprisonment" (1986) 16 V.U.W.L.R. 77.

37 Supra n.4, 63.

38 Supra n.4, 57

39 Supra n.4, 56.

40 Crimes Act 1961, s.317(1)(a).

Neither of those offences (ie. speeding, or failure to stop) are imprisonable. Therefore, even if Officer Roberts were a constable he would not have been able to enter the garage as he did. If a constable cannot enter in that situation, a traffic officer surely could not either.

2. *Entry to third party premises*

The defendants attempted to distinguish this situation on the basis that Edwards was not going into his own home but that of his friend. This distinction is founded on the argument that offenders should not be able to escape the law simply by running into any house they are close to. While their own homes may provide sanctuary, any other private property should not.

Eichelbaum J. did not consider this point important. He argued that Officer Roberts' entry was still forcible and the risks involved with forcible entries still apply regardless of whose house one is entering.[41]

It should also be noted that regardless of whose house is being forcibly entered the officer still has no authority under the Transport Act 1962 to so enter. If the offender escapes into third party premises (with the licence of the occupier) there is nothing the officer can do but knock on the front door.

Perhaps the strongest argument against a distinction on such grounds is, however, that traffic officers in pursuit of drivers will rarely know whether the drivers are running into their own houses or someone else's. At the time Officer Roberts forced his way into the garage he did not know the house was not Edwards'. He only found that out once inside the garage. It is impossible to give officers a power to chase offenders into third party homes unless traffic officers suddenly develop some means of knowing where every single motorist happens to reside.

Existing authorities and arguments lead one to conclude that the result of the *Edwards* case is correct in law. Though, as Eichelbaum J. says, "the outcome may be seen as a windfall for a person who was fortunate to avoid being penalised for breaches of the traffic laws"[42], he could hardly have decided otherwise. To do so would have meant breaching long standing constitutional principles as well as going against current case law.

IV. SHOULD THIS BE TRESPASS?

The *Edwards* case clearly illustrates some problems. A young man on a motorcycle, noticing he is being followed by a traffic officer and worried that he may face drink/drive charges, runs a road race to escape prosecution. He succeeds in attaining sanctuary, his

41 Supra n.1, 12.
42 Supra n.1, 13.

friend's house, before the officer is able to catch up. The officer's only means of getting to this man and identifying his culprit is to do something illegal. In the end someone has successfully evaded conviction under the provisions of the Transport Act 1962 by racing into private premises and has received $7000 damages against the traffic officer in the bargain.

Is this simply one of those "occasional unmerited escape[s] from the net of driving regulations"[43] as Eichelbaum J. says, or is it indicative of a flaw in the workings of the Transport Act 1962? If it is such a flaw, what can be done to correct it?

A. The Limits of Traffic Officers' Present Powers

The problem may be highlighted by examining the limits of traffic officers' present powers in relation to drink/drive offences. These offences present special difficulties in the area of enforcement. The offence of driving under the influence of alcohol is outlined in section 58 of the Transport Act 1962. Under that section anyone commits an offence who drives while the proportion of alcohol in their breath exceeds 500 micrograms of alcohol per litre of breath[44], or while the proportion of alcohol in their blood exceeds 80 milligrams of alcohol per 100 millilitres of blood[45], or while under the influence of alcohol or drugs to such an extent as to be incapable of having proper control of the vehicle.[46]

The evidence necessary to secure a conviction for driving under the influence is therefore very specific. One must establish that the alcohol content in the breath or blood exceeded specific levels or that the person was influenced to such an extent as to be incapable of having proper control of the vehicle. It is, of course, an onerous burden to prove anyone absolutely *incapable* of having proper control of a vehicle. Moreover, information on specific alcohol levels cannot be obtained without the suspect's submission to the tests.

Without positive tests results, a successful prosecution could not be brought under the drink/drive provisions. Though the smell of alcohol on the breath, and erratic driving may be suggestive of guilt, such evidence alone is insufficient. After drinking half a glass of beer a driver may have smelly breath yet if stopped and breath tested, be well below the legal limit. Similarly erratic driving alone does not necessarily imply guilt. It may arise merely from toying with the radio dials.

Where a suspect refuses to cooperate the traffic officer may arrest yet only after a series of steps designed to protect the suspect. Under section 58A, where an officer has good cause to suspect any person of driving after having consumed drink that person may be required to undergo forthwith a breath screening test. If the person fails or refuses to do so, the officer may then require the person to accompany him or her to a

43 Idem.
44 Transport Act 1962, s.58(1)(a).
45 Transport Act 1962, s.58(1)(b).
46 Transport Act 1962, s.58(1)(c).

place to undergo either a breath or blood test or both. At that point, if the person fails or refuses to accompany the officer an offence is committed and only then may the officer arrest the person without warrant.

These provisions serve quite well where suspects are stopped on the road and are sufficiently cooperative either to submit to the tests or to listen to a traffic officer going through the series of questions until their refusals to comply mean the officer may arrest them. However, the *Edwards* case illustrates the problems that can arise when the suspect seeks to evade the officer altogether.

A person close to home (or to a friend's house) may be wise to opt for the *Edwards* alternative: drive quickly enough to get home and run inside so that the officer will never have a chance to detect alcohol on the breath. If officers come to the door, of course, the best policy is not to answer it as they cannot come inside to get anyone.

One problem this presents is that of identification. Traffic officers will rarely be able to positively identify the driver of a car that they have been pursuing. The driver may be doing 130 kilometres per hour to escape. The officers cannot just casually pull up alongside and look in the window.

It may even be difficult to identify *Edwards*- type offenders as they leave their cars to run inside the house. If the officers are far behind they may arrive at the house only to see a person's back before they disappear inside. The identification problem is compounded at night when anyone is difficult to identify at a distance. That is, however, when most drink/drive offences occur.

Another problem is that the officer has no concrete evidence that a drink/drive offence even took place. With a bank robbery, an empty vault and some frazzled tellers provide evidence that a crime has occurred. With a drink/drive offence, however, if the officer cannot have access to the driver within a certain period of time all evidence is lost.

The need to obtain evidence quickly is a distinguishing factor in drink/drive offences. Breath and blood tests are inconclusive after hours of delay. Moreover, suspects capable of getting to their homes and holding off the officers for long enough may drink more alcohol. They have every right to do so in their own homes yet such action will completely frustrate any attempt to attain accurate breath tests or gauge blood-alcohol levels at the time the person was driving.

A driver behaving as did Edwards may leave the traffic officer incapable of securing a conviction under section 58. The officer may be left with no way of identifying the suspected offender and with no concrete evidence of an offence under the drink/drive provisions.

B. The Need for an Extension of Powers

These problems may indicate the need for an extension of traffic officers' powers. There are several arguments to support giving traffic officers the right to enter private premises in these types of situations.

The type of situation involved in *Edwards* may be seen as a threat to the general purpose of the blood alcohol legislation. That legislation was designed to serve the important goal of reducing the road toll caused by drinking drivers. As Richmond P. states in *Payn*, "[t]his object is so important that the court should not allow it to be defeated except on weighty grounds".[47] Do we want to allow people this means of escaping prosecution under the Act when such a situation may encourage them to offend again, the next time possibly costing innocent people their lives?

Indeed, as Cooke J. points out, the number of known cases of this genre to reach the High Court indicates that this sort of driver conduct "could constitute a by no means insignificant threat to the efficacy of the blood alcohol legislation, especially if the possibility of successful exploitation of property rights were to become more widely known".[48]

It is not difficult to imagine the potential danger if the general public were to believe that to avoid a drink/drive charge one need only drive quickly enough to outspeed the traffic officer, reach home, and run inside. It is in the public's best interest that such drivers be encouraged to slow down and stop for traffic officers. This type of situation may not only fail to help ease the road toll but may cause it to increase as intoxicated drivers run the road race to escape prosecution with driving skills impaired by drink.

Drinking drivers may abuse their property rights to escape prosecution. The argument facing the English Court of Appeal in 1970 with the case of *R.* v. *Jones* [49] has resurfaced here in another form. In that case it was considered whether lack of leave or licence from the occupier would disentitle officers from exercising their powers on private property. The question arose whether drivers could escape being required to give a breath test when that action would otherwise be appropriate merely by turning a few feet off a highway. The Court held that drivers could not so escape any police action. It was said that to hold otherwise would result in absurdities and pave the way to the situation where: [50]

> ... any driver who sees himself followed by police has only to drive fast enough to get off the road and on to the nearest piece of private property (forecourt, drive or other ground) to escape the consequences which the Act intended.

While that avenue of escape is not available to motorists they may, under *Edwards*, achieve the same ends if capable of driving even faster. Motorists must now drive fast

47 Supra n.4, 55.
48 Supra n.4, 68.
49 [1970] 1 W.L.R. 211.
50 Ibid. 217.

enough to get home and get *inside*. This, of course, makes a much more challenging road race. There would be some sporting motorists, however, that would enjoy that opportunity to frustrate traffic officers.

C. Suggested Extensions of Powers

The difficulty, of course, in arranging for any extension of traffic officers' powers is to know what powers to give and how to confine them.

1. *The suggestion of Richmond P.*

In *Payn* [51] Richmond P. considered that traffic officers should have authority to enter and remain on private property for the purposes of exercising their powers under section 58A, such authority to operate from the time that the officer acquired good cause to suspect. He qualified the power by adding that such authority would not carry a right of forcible entry nor would it extend to entry into a private residence without actual or implied leave and licence.

Such a power would certainly enable traffic officers to deal with the motorist who stands on their front lawn and says, "I don't have to talk to you. Get off my property!" However, as Woodhouse J remarks, there would be few such cases that could not still be dealt with very effectively from the roadside.[52] Moreover, the problem of the offender who runs indoors is left without a solution. Such an extension of power therefore seems little worth the derogation in rights that it entails.

2. *The suggestion of Barker J.*

In his Supreme Court decision in *Payn* Barker J. suggested that traffic officers have an implied right of forcible entry, yet he restricted it to cases of fresh pursuit.[53] This type of power could help bring the *Edwards*-type offender to justice yet it is not without problems.

In *Edwards* the traffic officer was unaware that Edwards had been drinking until entering the garage. Traffic officers will often be unaware that they are dealing with a blood alcohol offence until face to face with the driver. Before that point, for all their knowledge, they are merely pursuing another speeding motorist.

A power of entry in cases of fresh pursuit of drunken drivers is useless if officers do not know when they are following a drunken driver. The way to get around that would be to allow the power of entry in fresh pursuit of *any* driver who fails to stop when signalled to.

51 Supra n.4, 55-6.
52 Supra n.4, 65.
53 Supra n.4, 69.

The right to the privacy of one's home, however, is very precious. Perhaps people would be prepared to concede the right of entry in pursuit of drink/drive offenders because of the public importance of controlling the road toll caused by such people. However, it is asking considerably more for people to permit the sanctity of their homes to be violated in the pursuit of *any* motorist who fails to stop at an officer's signal.

2. *The suggestion of Cooke J.*

As previously mentioned, Cooke J. in *Police* v. *Ward* advocated the implication of a power of entry (not limited to cases of fresh pursuit) under the Transport Act 1962 encompassing a power of forcible entry. This power was to be limited to where an officer had good cause to suspect one of the relevant drink/drive offences. Also, such entry could only occur when "clearly necessary and after notice of the business on which the officer has come, a demand to enter and a refusal to admit".[54]

The requirement of good cause to suspect would still prevent officers pursuing someone like Edwards into private premises. However, such a power would mean that many guilty of drinking and driving could not seek refuge from the law inside their homes.

In *Payn* [55], Cooke J. recanted his views about force, deciding that a right of forcible entry was not necessary for the working of the statute. However, a right of entry that stopped short of authorising the use of force would have certain limits. In a case where a driver such as Edwards ran into the garage and started pushing down the roller door, the traffic officer would have to stand by and watch.

Moreover, as Woodhouse J. points out, it is difficult to see how the purpose for requiring that officers have a right of entry could be sufficiently achieved without an associated right to use force.[56] Woodhouse J. further argues that the submission that a right of entry is required "has no validity unless it can depend upon the claim that there is a real need for immediate and urgent action".[57] If such a need is present why not allow forcible entry as well? Perhaps the submission that a right of entry is required does have no validity.

D. Arguments Against an Extension of Powers

It is not clear that allowing traffic officers any power to enter private premises is the right answer to the problem. It may provide the only means of identifying a driver who flees traffic officers. Yet, as mentioned, a traffic officer who has not been close enough to identify a driver often will not have the good cause to suspect drinking necessary to enter private premises in the first place. Moreover, in giving traffic officers this power

54 Supra n.20, 429.
55 Supra n.4, 69.
56 Supra n.4, 61.
57 Supra n.4, 62.

to invade the sanctity of people's homes, one would be met with serious opposition. There are various arguments against such an extension of powers.

Where such a power is conferred there is great potential for abuse. Knowing they have no power of entry, traffic officers are forced to knock on doors and await replies. If given the power of entry, traffic officers may barge into homes unnecessarily. Though there may be the safeguard of requiring good cause to suspect before entry, some officers may misjudge the situation. Moreover, the people whose privacy had been unjustly invaded may be left without a remedy. Courts are reluctant to second-guess officers who are called upon to act in the "heat of the moment".

Furthermore, the right to the privacy of one's home is fundamental. In the famous case of *Semayne* [58] in 1604 it was said that "the house of every one is to him as his castle and fortress, as well for his defence against injury and violence as for his repose".[59] This principle is no less true today.

While it is widely recognised that individual rights must occasionally give way to the public good, this has been viewed as a potentially dangerous doctrine: "in a free society, individual liberty is itself an important aspect of the public good".[60] Therefore, such an invasion should not be undertaken if there is any other means of controlling the situation.

E. Alternative Solutions

It is then essential to examine any possible alternatives before choosing to violate such a fundamental right. As previously emphasised, the information from breath and blood tests required to successfully prosecute a drunken driver can only be acquired with the cooperation of the driver. Effective legislation should then seek to encourage driver cooperation.

Drivers should be discouraged from attempting to evade traffic officers, as Edwards did, by speeding off when they are signalled to stop. One way to achieve this is to increase the penalties under section 66(2) of the Transport Act 1962 covering failure to stop at the request or signal of a traffic officer. That penalty is now a fine not exceeding $500 and a possible temporary disqualification from driving.[61]

Drivers may be willing to risk that penalty if the alternative is being caught for driving under the influence. That offence carries the more substantial penalty of imprisonment for a term not exceeding three months, or a fine of up to $1500, or both, and mandatory disqualification from driving for at least 6 months.[62] If the penalty for failure to stop when signalled to were made more comparable, drivers may think twice before speeding away from a traffic officer.

58 (1604) 5 Co. Rep. 91a, 77 E.R. 194.
59 Ibid. 195.
60 *Wills* v. *Bowley* [1983] 1 A.C. 57, 87.
61 Transport Act 1962, s.30(4).
62 Transport Act 1962, s.30(3).

The penalties for leaving the scene of an accident are already substantial (imprisonment for up to 3 months, a fine of up to $1500, or both, coupled with mandatory disqualification from driving for at least 6 months where no person is killed or injured.[63] If someone is killed or injured the penalties are imprisonment for up to 5 years, a fine of up to $4000, or both, coupled with mandatory disqualification from driving for at least one year.).[64] This is a good sign. Such penalties would discourage drunk drivers from leaving to seek refuge in their homes before the arrival of traffic officers. If drivers may be thus prevented from abusing property rights to evade the law there is no reason to take those rights away.

Some may argue that toying with penalties for offences such as failure to stop when signalled to and leaving the scene of an accident is perhaps an unrealistic solution to the problem. In such situations people work on instinct rather than upon a detailed consideration of the penalties forthcoming upon any particular course of action. This may be so. Yet, it would be ridiculous to leave the law in such a state where it is more advantageous for drinking drivers to risk a small penalty to avoid the greater one. In today's society news travels fast. People hearing the result of the *Edwards* case may seek, in a similar situation, to do the same thing. It should be made clear that the law will stiffly penalise such actions.

V. CONCLUSION

Edwards v. *Ministry of Transport* has shown that property rights may be successfully used to thwart the actions of traffic officers in upholding the laws against drinking and driving. Most would consider controlling the drinking driver crucial to the welfare of society. Therefore, the problem presented by the *Edwards*-type offender is significant enough to merit a considered attempt at solving it.

However, if solving the problem means the loss of important personal rights, we may be prepared to live with an occasional offender escaping prosecution. All attempts should be made to deal with the situation without sacrificing valued rights to the sancity of the home. It is suggested that legislation be adapted to discourage offenders from following *Edwards*' example. If, by such steps, we may help prevent the situation from arising, it is preferable to trampling personal rights in an attempt to deal with it later on.

ADDENDUM

Since this article was written the Court of Appeal has had another opportunity to consider the extent of traffic officers' powers on private property. That opportunity arose with the case of *Howden* v. *Ministry of Transport*.[65] In *Howden*, the traffic officer in question had been on patrol and carrying out random vehicle checks for

63 Idem.
64 Transport Act 1962, s.30(1).
65 Supra n.9.

drink/drive offences. He began to follow a car driven by the appellant, Howden, though there was no suggestion that Howden's driving was likely to incite suspicion. Before the officer had made any attempt to stop him, Howden pulled into the driveway of his home, parked, and got out of the car. The officer parked in the mouth of the driveway then walked up to Howden telling him that he had been stopped in a normal random manner. This was plainly incorrect as Howden had actually stopped himself. Nevertheless, Howden accepted the officer's assertion and cooperated.

In the course of obtaining Howden's name and particulars the officer noticed signs that Howden had been drinking. Howden was required to take a breath screening test. That proving positive, he was taken to the police station. There a positive evidential breath test was obtained ultimately resulting in Howden's conviction.

The Court of Appeal, however, overturned the conviction. Following *Transport Ministry* v. *Payn* [66] the Court determined that the power to require someone to undergo a breath screening test under section 58A of the Transport Act 1962 may only be exercised on private property if the officer is there with the express or implied licence of the occupier.

Express licence was clearly absent so the question of implied licence was examined. Cooke P. and Bisson J. both discussed the concept of implied licence as developed in *Robson* v. *Hallett* [67] and sought to place limitations upon the circumstances in which such an implied licence might exist.

Bisson J. found that no implied licence existed in this case for two reasons:

(1) The *Robson* v. *Hallett* implied licence only exists at reasonable times of day. In this case it was one thirty in the morning and not a reasonable hour for knocking on someone's door in the absence of an emergency; and

(2) As Howden was present on the driveway there was no need to rely on an implied licence. The officer was, in the circumstances, obliged to request express permission to enter.

While the limitation as to time may be readily accepted the second limitation raises some questions. Take for example, a common Saturday afternoon scenario: a person gardening out on their front lawn. A passerby, seeing that person outside and wishing to speak to him or her, would commonly stroll onto the property and up to the person to do so. Average householders do not generally view their yards as such sacred territory that people must call out and ask permission before stepping on them. Yet, if there is no implied licence to enter in those circumstances a person entering without seeking such permission is clearly trepassing. This makes private property very private indeed.

66 Supra n.4.
67 Supra n.14.

If Bisson J.'s second limitation is accepted as providing some light on the rationale behind an implied licence it may have very important connotations for an *Edwards*-type situation. By requiring that if the occupier is present outside the officer must request express permission to enter, Bisson J. says, by implication, that one may only rely on an implied licence in cases where it is impossible to know whether express permission would be given. In an *Edwards*-type situation it certainly is not impossible to know. Where the occupier is running away the officers need not even ask to realize that they are not welcome on the property. Where express permission would so clearly not be granted it seems unrealistic to enter property in reliance on the implied licence of the occupier.

Cooke P. also acknowledges the existence of limitations on the *Robson* v. *Hallett* implied licence. However, the limitation he places upon implied licence depends on the purpose for which it is required. Cooke P. decided that officers have no implied licence to enter private property for the purpose of effecting random checks as to drinking. This analysis raises fundamental questions about the extent of any implied licence to enter private property. If random checking is one purpose for which an implied licence does not exist, what are the others? Does Cooke P.'s judgment mean that to establish an implied licence the purpose of entry must always be justified or is implied licence a residual right of entry which applies generally - this case being the narrow exception?

Both judgments raise questions crucial to understanding the extent of traffic officers' powers on private property. The limitations they place upon the notion of implied licence go a long way towards upholding personal property rights. Perhaps one must now focus not upon when traffic officers should have a right to pursue offenders into homes but upon when they might have a right to set foot on the driveway.