# *Random stopping: A licence to discriminate?*

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*In this article the author examines two recent Court of Appeal cases in relation to the power to randomly stop motor vehicles under the Transport Act 1962. He suggests that while both are open to attack on policy and statutory interpretation grounds the more significant question for the future is the control of the discretion now residing in traffic and Police officers. The application of the principles of administrative law to that discretion is explored. He concludes that unless such controls are placed on the exercise of the discretion to randomly stop motor vehicles a significant civil liberty will be lost.*

## I. INTRODUCTION

On 12 October 1985 Sonny Po was driving his car down a street in Wellington. He was wearing his seat belt, had a valid driver's licence, and his vehicle displayed a valid warrant of fitness. On the same day, the Ministry of Transport (the "MOT") was implementing its policy of conducting checkpoints for the sole purpose of checking the sobriety of drivers. Po came upon a checkpoint where a traffic officer at once noticed that his eyes were glazed and his breath smelt of alcohol. He admitted he had been drinking. For the next eight minutes the traffic officer checked over Po and his vehicle to ensure he was complying with the many requirements of the Transport Act 1962 (the "Act"). At that point he was asked to undertake a breath screening test which, upon compliance, proved positive. The subsequent evidential breath test showed a reading of 600 micrograms of alcohol per litre of breath.

You might think no criminal case could be more straightforward. The officer did everything right. There was no "technical" defence to be had. Yet the case of *Po* v *Ministry of Transport*[1] was to give rise to a significant judgment of the New Zealand Court of Appeal. May the MOT stop a motor vehicle and detain it when they have no particular reason to suspect its driver of committing any offence? In other words, does the MOT have the power to randomly stop a motor vehicle and detain its driver for the

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1 (1987) 2 CRNZ 495.

purposes of investigating offences against the Act? The issue involved the interpretation of section 66 of the Act:[2]

> (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 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) Every person commits an offence who fails to comply with any request, signal, or demand given under subsection (1) of this section, or who gives, in response to a demand under subsection (1) of this section, any information that the person knows to be false.
>
> (3) Any constable or traffic officer who is an officer of the Department may arrest without warrant any person who the constable or officer has good cause to suspect has committed an offence against subsection (2) of this section.

In *Po* the Court unanimously held that section 66 does authorise the random stopping and detention of motor vehicles for the purposes of enforcing the Act.

Section 66 has given rise to much judicial activity in the past ten years. With the ever increasing public concern about drink driving and the "road toll", it was only a matter of time until the Court of Appeal would be asked to consider the legal validity of the random stop and the checkpoint. This article considers the Court's decision in *Po* and suggests the issue should have given rise to more difficulty than the court seems to have recognised. Further, it argues that if the decision is to be accepted, the courts need to wake up to the significant intrusion thereby dealt to the civil liberties of the citizens of New Zealand. Only through the implementation of substantial controls of the immense discretion *Po* provides the MOT and the Police can it be ensured that those liberties will be protected.

Before going further it is necessary to point out the difference between random stopping and random breath testing. The latter has received considerable media coverage in New Zealand, not the least, through the MOT's own television advertisements. Generally random stopping involves the stopping of vehicles for investigative purposes even though there is no particular reason to suspect its driver of committing any particular offence. Random breath testing, on the other hand, involves the conducting of a breath screening test on a driver without good cause to suspect she or he has recently consumed alcohol. In itself it does not involve a random stop but rather, in New Zealand at least, involves either a vehicle involved in an accident (and therefore already stopped) or the testing of a driver of a vehicle stopped for committing a road traffic offence under

2 For a useful summary of the history of this section see: *Maxwell* v *Police* (29 June 1983, Unreported, Masterton High Court, M3/83) where O'Regan J sets out s 66's predecessors: s 32, Motor Vehicle Act 1924; and s 48, Transport Act 1949.

the Act or the regulations thereunder.[3] Thus a driver who is speeding may be stopped for that offence and a breath screening test may also be demanded. It is possible for a random breath test to follow on from a random stop. For example, a driver randomly stopped may be caught not wearing a seat belt and thus a breath screening test may be "randomly" demanded. While many of the matters discussed in this article are relevant to random breath testing, the article's main focus is random stopping.

Furthermore, the word "random" is a particularly difficult one. For the moment it is sufficient to point out that the main difference between a random stop and an arrest is that the latter requires good cause to suspect that an offence has been committed by the arrestee. The former does not require such good cause but whether it does involve some other precondition to its valid exercise is an open question. Indeed the question of what is to replace individualised suspicion in a "random" stop is the main question at which this article is directed.

## II. *ROPER* AND *PO* - RANDOM STOPPING RECEIVES THE COURT OF APPEAL'S APPROVAL

In 1984, in *Roper* v *Police*,[4] the Court of Appeal held the detention of the accused was of unreasonable length after her vehicle was stopped for driving in an "erratic" manner. The two constables checked her vehicle for "roadworthiness" and noted that it had three bald tires. She was informed she would have to remain where she was until a traffic officer arrived to "write her off the road". Being impatient and having her children in the car, Mrs Roper drove off. The Court of Appeal held she was within her rights to do so. The Act did not allow the Police or the MOT to detain a vehicle for an unreasonable time. Here the time was unreasonable and Mrs Roper was acquitted of the offence under section 66(2).

The result in *Roper* according to the Court of Appeal was dictated by the law as declared in *Blundell* v *Attorney-General*.[5] That case had emphasised the "cardinal principle... that the police [and, of course, the MOT] have no power to detain a citizen except under express statutory authority".[6] As can be seen from section 66, set out above, there is no express power to detain a vehicle in the section. Indeed there is not

3 Section 58A of the Act empowers an officer to require a person to undergo a breath screening test if the officer has good cause to suspect that before or during driving he or she has recently consumed alcoholic drink (s 58A(1)(a) and (b)). The officer may automatically and without good cause to suspect alcohol consumption demand a breath screening test when the offence involves the use of a vehicle and: (1) the officer has good cause to suspect the person has recently committed any offence under Part V (dealing with road traffic) of the Act or under the regulations (s 58A(1)(c)); or (2) there is an accident. In the latter case the officer may demand the test of a driver or suspected occupant (where the identity of the driver is unable to be determined),(s 58A(2)).

4 [1984] 1 NZLR 48.

5 [1968] NZLR 341.

6 *Roper*, above n4, 51.

an express power on the part of a traffic officer to stop the vehicle. Rather there is an express obligation on the user to stop upon a signal to do so.

In *Roper*[7] the Court held that the section gives rise to two obligations on the part of the user of a vehicle: (1) an obligation to stop at the request or signal of a constable or traffic officer; and (2) an obligation to furnish the specified information (name, address and ownership details) on demand. Both *Roper* and *Po* seemingly hold that these obligations carry with them what one High Court Judge describes as "correlative"[8] powers on the part of the officer: (1) to stop a vehicle by request or signal; and (2) to demand the driver's name, address and the ownership details of the vehicle.[9] This holding is the first power that the Court of Appeal has read into the section.

Having acquitted Roper of the offence under section 66(2), the Court in *Po* was faced with answering the obvious question: Upon the driver of a vehicle stopping at an officer's signal and upon the driver answering the questions the section allows, may the officer then detain the vehicle to conduct an investigation under other sections of the Act? In other words section 66 gives rise to two significant questions:

(1) Does section 66 allow the "random" stopping of vehicles ie. without good cause to suspect any offence?

(2) Assuming it does, are the officer's incidental powers to that stop limited to demanding the information the section refers to or is the officer then empowered to exercise other powers under the Act eg. to demand a breath screening test.[10]

The Court of Appeal's answer to the two issues is clear. First, the Court simply assumes that section 66 allows random stopping. Second, within the time limitation set out in *Roper*:[11]

> [i]t is a fair and virtually inevitable interpretation that a traffic officer... may require a driver to stop to enable the officer to check whether there is good cause to suspect the recent consumption of drink.... Similarly he may check, for

7 Above n4, 51.

8 *Davies* v *Ministry of Transport* (23 June 1986, Unreported, Auckland High Court, AP78/86) 6, per Chilwell J. This case is apparently later relied upon in *Po*, above n1, 497, although incorrectly titled and cited as "*Davis* v *Ministry of Transport*, Auckland AP No 70/86, 23 June 1986". See also: *Hohaia* v *Roper* (23 February 1983, Unreported, Wellington High Court, M534/82) reversed on appeal on other grounds in *Roper*, above n4; and see: *Maxwell*, above n2.

9 The use of the words "request" and "demand" in s 66 do not carry any power of compulsion with them although failure to comply will result in the offence under s 66(2) being committed. See generally: *Auckland City Council* v *Dixon* (1985) 1 CRNZ 514; *Puttick* v *Ministry of Transport* (1986) 2 CRNZ 91; and *Taylor* v *New Zealand Poultry Board* [1984] 1 NZLR 394.

10 On *Roper*, above n4, see generally: D Pope "Traffic Officers and False Imprisonment" (1986) 16 VUWLR 77.

11 *Po*, above n1, 497.

example, such matters as the currency of the warrant of fitness, the wearing of a seat belt, the driver's licence.

This right of detention is the second power that is read into the section. Section 66, then becomes a general power "to check whether the Act is being complied with".[12]

The decision in *Po* raises two different questions. The first concerns the legitimacy of the Court implying the twin powers to randomly stop and detain motor vehicles. The second relates to what limitations there are on the powers thereby created.

## III. STATUTORY INTERPRETATION OR JUDICIAL CREATION?

The holding in *Po* that section 66 allows the random stopping of motor vehicles is not surprising given the apparent acceptance in *Roper* that there it was not the stop that could be complained about but rather the length of the detention incidental thereto. Indeed Po's counsel argued that it was the detention rather than the stop that was unlawful.[13] But the stop in *Roper* was not random but rather was conducted on the basis of Mrs Roper's "erratic" driving. *Roper* could not therefore be taken to have upheld the power to random stop.

On the other hand *Po* reflects the Court of Appeal's apparent belief that they were settling upon the only logically possible interpretation of section 66. What is disappointing is that the decision does not reflect any concern on the Court's part with the civil liberties intrusion the decision sanctions. The Court does not canvas the extensive jurisprudence on the issue of random stopping from the United States[14] or Canada[15] or even the position in England[16] which is based on an almost identical section.

In *Dedman* v *R*[17] the Supreme Court of Canada refused to read into section 14 of the Ontario Highway Traffic Act[18] the power to randomly stop motor vehicles. The

12 *Po*, above n1, 497.

13 See: *Po*, above n1, 498.

14 See especially: *Delaware* v *Prouse* 440 US 648 (1978); and *Little* v *State* 479 A2d 903 (1984).

15 See: *Dedman* v *R* [1985] 2 SCR 2 and; more recently: *Hufsky* v The *Queen* [1988] 1 SCR 621.

16 Section 159, Road Traffic Act 1972(UK) is in very similar terms to s 66 of the New Zealand Act. The courts in England have been more cautious in the interpretation of s 159 although their current interpretation is very close to that in *Po*, above n1. See generally: *Waterfield* [1964]1 QB 164; *Hoffman* v *Thomas* [1974] RTR 182; *Beard* v *Wood* [1980] RTR 454; *Adams* v *Valentine* [1975] Crim LR 238; and *Lodwick* v *Sanders* [1985] 1 All ER 577.

17 Above n15.

18 RSO 1970, c.202. Section 14 read:

> 14. (1) Every operator of a motor vehicle shall carry his licence with him at all times while he is in charge of a motor vehicle and shall surrender the licence for reasonable inspection upon the demand of a constable or officer appointed for carrying out the provisions of this Act.

majority, though, went on and by applying the principles of *R* v *Waterfield*[19] created a new common law power to do so:[20]

> The right to circulate on the highway free from unreasonable interference is an important one, but it is, as I have said, a licenced activity subject to regulation and control in the interest of safety. The objectionable nature of a random stop is chiefly that it is made on a purely arbitrary basis, without any grounds for suspicion or belief that the particular driver has committed or is committing an offence. It is this aspect of the random stop that makes it capable of producing unpleasant psychological effects for the innocent driver. These effects, however, would tend to be minimized by the well-publicized nature of the program, which is a necessary feature of its deterrent purpose. Moreover, the stop would be of relatively short duration and of slight inconvenience. Weighing these factors, I am of the opinion that, having regard to the importance of the public purpose served, the random stop, as a police action necessary to the carrying out of that purpose, was not an unreasonable interference with the right to circulate on the public highway. It was not, therefore an unjustifiable use of a power associated with the police duty, within the *Waterfield* test. I would accordingly hold that there was common law authority for the random vehicle stop....

Similarly, in *Po*, the Court of Appeal, under the rubric of statutory interpretation, upheld random stopping in this way:[21]

> Random checking on a road is quite different. There is nothing contrary to the values embodied in our legal system in recognising that a person exercising the right to use a public highway by driving a motor vehicle does so on condition. He or she may fairly be required to submit to occasional checks to ensure that unlawful danger to other road users is not being created. Section 66 imposes certain duties on users of vehicles....

> (2) Every person who is unable or refuses to surrender his licence in accordance with subsection 1 shall, when requested by a constable, give reasonable identification of himself and, for the purposes of this subsection, the correct name and address of such person shall be deemed to be reasonable identification.

This section, of course, would require considerably greater judicial creativity to imply a power to randomly stop than is the case under s 66 of the New Zealand Act. The Supreme Court has now upheld random stopping under the Canadian Charter of Rights and Freedoms. See: *Hufsky* v *The Queen*, above n15, but see: the text accompanying n34 and n80, both below.

19 Above n16.

20 Above n15, 36.

21 Above n1, 496.

and later:[22]

> [I]n the interests of both road safety and *fairness to individual motorists* a reasonable number of questions must be permissible to ascertain whether or not the driver has apparently had alcoholic drink recently.

It should be apparent that while the legal foundations of the two judgments are fundamentally different the impetus for upholding random stopping in both is very similar. Both Courts are faced with what they see as a terrible social problem - that of drink driving - which requires extraordinary law enforcement powers to combat. On the other hand, it is submitted that the fact that the New Zealand Court justifies its holding on the basis of statutory interpretation results in its failure to adequately explore the legitimacy, extent and limits on the power the Court creates.

Gallen J has said that, "... the Courts have always been astute to ensure that such an interference with the rights of an individual must be conducted within strict limits and within defined parameters...."[23] More strongly, Dickson CJC, dissenting in *Dedman*, argues:[24]

> The public interest in law enforcement cannot be allowed to override the fundamental principle that all public officials, including the police, are subject to the rule of law. To find that arbitrary police action is justified simply because it is directed at the fulfilment of police duties would be to sanction a dangerous exception to the supremacy of law. It is the function of the legislature, not the courts, to authorize arbitrary police action that would otherwise be unlawful as a violation of rights traditionally protected at common law.

In *Po* the denial of civil liberties did not result from an express statute the Court could not avoid but rather from the twin judicial implications outlined above. To make matters worse, in 1983 legislation[25] was introduced to expressly allow checkpoints to be set up to randomly stop motor vehicles to carry out breath screening tests. That legislation was soundly defeated in the House of Representatives even though strongly supported by the then Minister of Transport.[26] While some of the votes against the measure arose from the belief of the then opposition Labour members that section 66 already authorised random stopping, the Prime Minister and other members of the Government voted against the legislation during a "conscience" vote on the matter.[27]

While it cannot be said that a majority of the members at the time disagreed with the policy of random stopping the fact remains an amendment clearly allowing it was

22 Above n1, 497-8, emphasis added. What the emphasised words mean is entirely unclear. The "individual motorists" referred to must be other users of the road rather than the targetted driver. If that is so, the words add nothing to the sentence.
23 *Tapara* v *Police* (5 October 1988, Unreported, Hamilton High Court, AP120/88) 5.
24 Above n15, 204-205.
25 Transport Amendment Bill (No 4) 1983, clause 14.
26 See: NZ Parliamentary Debates Vol 457, 1984: 3448, 3511-3517, and 3580-3585.
27 For further discussion of this Bill see: Pope, above n10, 90.

defeated in the House. All in all it seems difficult to conclude other than that Parliament was happy to let the Court of Appeal decide the question.

In such a context one would have expected the Court of Appeal to be hesitant to take the lead on this question. After all the requirement of good cause to suspect before arrest has long been fundamental at common law. Further, "[s]hort of arrest, the police have never possessed legal authority at common law to detain anyone against his or her will for questioning, or to pursue an investigation...."[28] Rather than the Court of Appeal being the protector of common law rights the Court has become the creator of a controversial new law enforcement power. It seems odd that it was not until 1987 that the Court of Appeal held, in *Po*, that section 66 authorises random stopping given that that section was first passed in 1924 in much the same form.[29]

Of course, *Blundell's*[30] "cardinal principle", discussed above, would stop the Court of Appeal from creating a common law power to random stop as was done in *Dedman*.[31] However, it is respectfully submitted that the decision in *Po*, which takes a statutory interpretation line, is no more legitimate.[32]

The Court of Appeal in *Po* does not seem to appreciate the magnitude of the intrusion on civil liberties. They are not alone. Tipping J, in a recent case, seems almost at a loss to see what civil liberties' issue is at stake in a checkpoint case:[33]

> There may be certain civil liberties aspects of the matter. Parliament has however expressed itself in very clear and simple terms....
>
> Having said what I have about the so called civil liberties aspect of the matter, it seems to me that if it can be said that the power of a traffic officer under the section does impinge on civil liberties it does so in an extremely minor and low key way.

The prospect of a nine minute chat with a traffic officer may not to Tipping J raise a civil liberties issue but it is submitted that when one realises the force of the state is being used to interrogate non-suspected individuals the civil liberties intrusion is crystal clear. New Zealand is, after all, a signatory to the International Covenant on Civil and Political Rights, article 9, of which, prohibits "arbitrary detention". A stop not based on individual suspicion is arbitrary (at least without clear controls to ensure the power is

28 *Dedman*, above n15, 203-204, per Dickson CJ, dissenting.
29 See: *Maxwell*, above n2.
30 Above n5.
31 See text accompanying n5, above. On the other hand, the Court of Appeal did, obiter, affirm that the Police have some common law powers and duties in relation to an apprehended breach of the peace in: *Minto* v *Police* [1987] 1 NZLR 374. The Court did not refer to *Blundell*, above n5.
32 For a criticism of the judgment in *Dedman*, see: G. Luther "Police Power and the Charter of Rights and Freedoms: Creation or Control?" (1986-87) 51 Sask Law Rev 217.
33 *Baker* v *Ministry of Transport* (4 February 1988, Unreported, Christchurch High Court) AP220/87, 12.

not abused). Indeed in the recent decision in *Hufsky*[34] the Supreme Court of Canada held the random stopping of motor vehicles to constitute an arbitrary detention and thus to be contrary to section 9 of the Canadian Charter of Rights and Freedoms. The Court, though, went on to uphold the practice under section 1 of the Charter as a reasonably justified limit prescribed by law. The Covenant does not have an equivalent article to section 1 of the Charter and therefore, if the Supreme Court was right on the first point, random stopping breaches the Covenant.

The main rationale for overcoming the civil liberties objection is the view that driving a motor vehicle is only a "privilege" in the sense that "a person exercising the right to use a public highway by driving a vehicle does so on condition".[35] This view, it is suggested, is wrong. As the United States Supreme Court said in *Prouse*:[36]

> An individual operating or traveling in an automobile does not lose all reasonable expectation of privacy simply because the automobile and its use are subject to government regulation. Automobile travel is a basic, pervasive, and often necessary mode of transportation to and from one's home, workplace, and leisure activities. Many people spend more hours each day traveling in cars than walking on the streets. Undoubtedly, many find a greater sense of security and privacy in traveling in an automobile than they do in exposing themselves by pedestrian or other modes of travel.

In summary it is suggested that *Po* represents a significant policy decision on the part of the Court of Appeal to authorise the random stopping of motor vehicles. It is disappointing that the Court never showed the hesitancy so clear in the decision in *Roper*. The legitimacy of the decision is questionable on statutory interpretation grounds and is a low water mark in its adherence to the principle strongly enunciated in *Blundell*[37] and to the International Covenant.

## V. LIMITATIONS ON THE POWER TO RANDOM STOP

More significant for the future are the possible limitations on the power created in *Po*. First, there is an express limit in the section. The officer must, if a constable, be in uniform and, if a traffic officer, be in uniform or wearing a cap, hat or helmet which identifies him or her as a traffic officer.[38]

The second limit is that recognized in *Roper*,[39] and affirmed in *Po*, that any stop conducted under section 66 must not result in a detention of unreasonable length. In *Roper*, while not quantified in minutes, the detention involved was the waiting by the Police for the arrival of a traffic officer to "write her off the road", a power given to both the Police and the MOT by section 68B(l)(d) of the Act. The failure of the Police to exercise the power under section 68B themselves seemingly resulted in an unreasonable

34 Above n15. See also: the text accompanying n80, below.
35 *Po*, above n1, 496.
36 Above n14, 662-3, citations omitted.
37 Above n5.
38 On this limit see: *Maxwell*, above n2.
39 Above n4.

delay. On the other hand, the eight minutes involved in *Po* was accepted by the Court as reasonable even though the Court itself said it "seems longer than one would have normally expected".[40] The question of reasonable time then seems to turn on the reasonableness of the conduct of the officer rather than on any "bright-line" approach in terms of minutes.

Whether there are further limits on the power under section 66 is more controversial. It is submitted that there are other limits on the power even though such do not appear in the section. The most obvious is that now accepted by Gallen J in *Tapara* v *Police*.[41] There the police attempted to stop the accused pursuant to section 66 as they were interested to speak to his passenger in relation to an investigation unrelated to the accused. The exact nature of that investigation is not clear from the case although it did not arise under the Act.

In allowing the appeal from conviction for failing to stop under section 66(2) Gallen J said, "... I think it is inconceivable that Parliament could have intended to provide a completely unrestricted right under the provisions of s66 of the Transport Act, a right which ... would allow even capricious stopping".[42] Indeed in *Po*, itself, the Court said, "The duties imposed on drivers by s66 must have been intended by Parliament to facilitate the enforcement or administration of the Act. But, apart from that obvious limitation they are unqualified duties."[43] Therefore, the purpose behind the stop is relevant to the validity of the stop. The third limit, then, is that the purpose must be to enforce the Transport Act 1962 and no other.

The conclusion in *Tapara* is also consistent with the courts' traditional treatment of arrest powers. There the subjective purpose of the constable is always a relevant question. Cases such as *Dumbell* v *Roberts*[44] and *Elder* v *Evans*[45] have long ago held that even if objectively the constable had the power to arrest, the arrest will be unlawful if the purpose of the constable was to exercise a non-existent or inapplicable power.

This issue arose under the Act in *Heyligers* v *Ministry of Transport* where the traffic officer relied on the wrong circumstances and thereby the wrong section of the Act to arrest the accused for drink driving. Wylie J held:[46]

> I have no doubt that the evidence would have supported a finding that the traffic officer *would have been* justified in requesting a breath test on the basis of the "ex post facto" driving, but in my view, it is not what he was entitled to do, but what he did, that is crucial.

40 Above n1, 498.
41 Above n23.
42 Above n23, 5.
43 Above n1,497.
44 (1944) 170 LT 227.
45 [1951] NZLR 801.
46 (11 November 1986, Unreported, Auckland High Court, AP135/86) 16, emphasis in original. See also: *DPP* v *Richards* [1988] Crim LR 606.

This limit, then, that the stop be for the purpose of the Act, represents a considerable step in controlling the use of section 66. It is submitted that while the stop will be initially presumed to be valid, if some evidence is present (ie. a reasonable doubt is raised) that the purpose was not as required, it will be for the prosecution to prove validity of purpose.[47]

*Tapara*[48] also raises the question as to whether, given that the purpose of the stop is relevant, that purpose, albeit valid on the *Tapara* criterion, is open for review on other grounds. It should be noted that the decision in *Po* validates two quite distinct powers. First, it authorises the setting up of checkpoints (or roadblocks) by the MOT and second, authorises the stopping of motor vehicles by roving MOT or Police patrol cars. Both practices seem to be founded: (1) upon the difficulty in detection of (especially drink drive) offences under the Act; and (2) perhaps more importantly, upon the deterrent effect on the average driver if she or he knows the MOT has the power to set up checkpoints or to random stop. On the other hand, it is clear that the two practices are quite distinct and that the random stopping of motor vehicles by roving patrols is subject to much greater potential abuse that the checkpoint. That is, while the random nature of the checkpoint can easily be ensured, the potential for uncontrollable discriminatory practices in the operation of roving patrols is enormous. Indeed, the difference is great enough that it led the United States Supreme Court to hold that while roving patrols cannot constitutionally randomly stop vehicles, checkpoints are constitutionally permissible in that country.[49]

*A. Random stopping by roving patrols*

Random stops by roving patrols are objectionable because they allow such an immense probability that those selected for stopping will be chosen for some irrelevant and perhaps discriminatory reason. The issue raises perhaps the most difficult issue in this whole area. What is authorised by section 66? Ought the stops be totally uniform (ie. the first car come across) or should the MOT and Police be encouraged to target certain stereotypical offender categories? For example, the apparent age of a driver may give rise to certain probabilities of committing road traffic offences viz. cost of automobile insurance being set according to age. Further, the type of car, the manner of dress, and the style of hair, are all conceivable reasons an officer might use to select a vehicle for stopping. Similarly the colour of skin may be the basis of the decision. Surely the latter (if not each of the above) is a totally objectionable criterion for these purposes.

It is this concern that led the United States Supreme Court to disallow such stops on the basis of their conflict with the Bill of Rights. The Court said, "The 'grave danger' of abuse of discretion does not disappear simply because the automobile is subject to state regulation resulting in numerous instances of the police citizen contact".[50]

47 See: *R* v *Mangos* [1981] 1 NZLR 86, 89.
48 Above n23.
49 *Prouse*, above n14.
50 *Prouse*, above n14, 662, citations omitted.

The discretion given to officers by section 66 is particularly unclear in its ambit. The stopping power, as discussed above, arises from the reading into the section the correlative power to stop vehicles. The section, itself, only speaks of the requirement that, "The user of a vehicle shall stop at the request or signal" of an officer. The section would read something like this if reworded to expressly provide such an apparently unfettered discretion:

> (1) A constable or traffic officer [with the required accoutrements] may, by request or signal, stop any vehicle....

Subsection (2) would provide an offence for failing to obey the request or signal of an officer under subsection (1).

Is such a discretion unfettered? Basic administrative law principles would suggest not. Such principles have recently been applied by the House of Lords in relation to a power of arrest in *Holgate-Mohammed* v *Duke*.[51] Having found that the officer in that case had the required "good cause to suspect" the accused of an arrestable offence, Lord Diplock held that the later words, "may arrest without warrant", left the officer with an "executive discretion" to arrest her or not:[52]

> Since this is an executive discretion expressly conferred by statute upon a public officer, the constable making the arrest, the lawfulness of the way in which he has exercised it in a particular case cannot be questioned in any court of law except upon those principles laid down by Lord Greene MR in *Associated Provincial Picture Houses Ltd* v *Wednesbury Corporation*, that have become too familiar to call for repetitious citation. The *Wednesbury* principles, as they are usually referred to, are applicable to determining the lawfulness of the exercise of the statutory discretion of a constable under section 2(4) of the Criminal Law Act 1967, not only in proceedings for judicial review but also for the purpose of founding a cause of action at common law for damages for that species of trespass to the person known as false imprisonment, for which the action in the instant case is brought.

This holding was adopted by the Court of Appeal in the case of *Keenan* v *Attorney-General*[53] where Cooke P said, obiter, that a power of arrest had to be "exercised in good faith and not under the influence of irrelevant considerations".[54] At least some of the

51 [1984] AC 437.

52 Above n51, 443. *Wednesbury*, the case cited in the quotation, is found at [1948] 1 KB 223.

53 [1986] 1 NZLR 241. See also: the recent judgment of Cadenhead DJ in *Police* v *Bradford* [1988] DCR 193, 200-201, where the learned Judge held the decision to arrest under s 39(1), Summary Offences Act 1981, to be judicially reviewable, relying on: *R* v *Mangoes*, above n47; *Poanango* v *State Services Commission* [1985] 2 NZLR 385; *Lindley* v *Rutter* [1980] 3 WLR 660; and *Auckland City Council* v *Dixon*, above n9.

54 Above n53, 246. See also: page 248, per McMullin J.

High Court decisions under the Act here in question have suggested a similar limit. For example, in *Baker*, Tipping J said:[55]

> If in any particular case it could be shown that the power had been used for some quite different or collateral or improper purpose then it may be that the Court would be of the view that the power had been wrongly exercised.

Indeed the holding in *Tapara*[56] that the stop must be for the purposes of enforcing the Act can be seen as an application of administrative law principles to the exercise of the discretion to stop.

The problem here is whether the criteria for selection of a particular driver are legitimately within the scope of the judicial review of the decision. In other words, if the purpose of the stop is to enforce the Act, but the driver is selected on some spurious or discriminatory basis is there scope for judicial review?

In *Parker* v *Ministry of Transport*[57] the Court of Appeal considered section 58A of the Act, which says that an officer who has good cause to suspect the consumption of alcohol "may require" the driver to undergo a breath screening test. The Court held that the words "may require" did not import a requirement that the officer make some independent discretionary decision. This is so even though, according to McMullin J, the officer may stop short of arrest, "where considerations of a practical, urgent, or humane kind are present".[58]

*Parker* was decided almost two full years before *Holgate-Mohammad*[59] so must now be seen as of questionable authority even on section 58A. On the other hand, random stopping is clearly distinguishable from the discretion exercised under that section. Section 58A requires "good cause to suspect" as an initial precondition to the demand for a breath screening test. Indeed, it is the lack of just that requirement under section 66 that provides such considerable scope for the abuse of the discretion to stop.

In *Parker*, Woodhouse P, with whom Richardson J concurred, did suggest that while the words "may require" did not import,"any judicial review of the exercise of a true discretion",[60] the court would interfere where there was some "ulterior and improper use of the power for purposes outside the object of the legislation; or for the avoidance of an abuse of process of the Courts".[61] Such a distinction is difficult to accept. The use of "good faith" and "irrelevant considerations" as the criteria in *Keenan* and "ulterior and improper use for purposes outside the legislation" in *Parker* does not, it is submitted, admit of any clear divergence in standards. This is so, even though Woodhouse P

55 Above n33, 9. See also: *Tapara*, above n23, 5-6. Furthermore, the English decision, *Beard* v *Wood*, above n16, suggests a similar limitation in relation to s 159, Road Traffic Act 1972 (UK).
56 Above n23.
57 [1982] 1 NZLR 209.
58 Above n57, 214.
59 Above n51.
60 Above n57, 210.
61 Above n57, 210.

suggests the latter formulation goes "much deeper of course than any judicial review of the exercise of a true discretion".[62]

The House of Lords in *Holgate-Mohammed*[63] seemingly saw itself as applying the *Wednesbury*[64] principles of "good faith" and "irrelevant considerations". The decision in that case gives no hint that the House was not applying those principles in a full judicial review of the discretion to arrest. Some might try to argue that the result there suggests their Lordships were taking a comparatively "hands-off" approach. After all, they upheld the arrest even though the power was only exercised because the detective thought the plaintiff was more likely to confess if arrested and questioned at the police station. Surely in New Zealand, at least, that would be an irrelevant consideration. In response, one only needs to point out that Cooke P, in adopting the principles of *Holgate-Mohammed*[65] in *Keenan*,[66] felt it necessary to specifically reserve any decision on that particular conclusion.

Furthermore, it is surely arguable that there is even a greater need for judicial review of police decisions than those of the local authority in *Wednesbury*.[67] As argued in a recent article:[68]

> Moreover, in *Wednesbury* the court was dealing with the discretionary powers of a democratically elected body and would have been careful not to undermine the decisions of such a body unless it was very clearly wrong or unreasonable in a particular instance. In the case of police powers, however, the discretion in question is exercised by an individual and the court should recognise that it has a wider scope to control the decisions of policemen than those of elected representatives.

To argue that the criteria adopted by the traffic officer to select a vehicle at "random" are not reviewable is to abdicate the courts' responsibility to ensure state power is used fairly. As discussed by Lord Greene MR in *Wednesbury*, the headings of bad faith, dishonesty, unreasonableness, extraneous circumstances, and disregard of public policy, "overlap to a considerable extent".[69] A person entrusted with the exercise of a statutory discretion must, amongst other things, exclude all things that are not relevant to the decision or he or she will be acting unreasonably (and thus the decision will be ultra vires). The following example, used in *Wednesbury*, seems particularly apposite in this context:[70]

> ... the example of the red-haired teacher, dismissed because she had red hair. That is unreasonable in one sense. In another sense it is taking into consideration

62 Above n57, 210.
63 Above n51.
64 Above n52.
65 Above n51.
66 Above n53.
67 Above n52.
68 C Ryan and K Williams "Police Discretion" [1986] Public Law 285, 308.
69 Above n52, 229.
70 Above n52, 229.

> extraneous matters. It is so unreasonable that it might also be described as being done in bad faith; and, in fact, all these things run into one another.

To take the extreme example used above: to select a vehicle for "random" stoppping because it is being driven by a Maori seems particularly unreasonable.

The problem with deciding what are appropriate matters to consider under section 66 in regard to the decision to stop is made difficult because of the interpretive process criticised earlier in this article. Why is the power to random stop given? Earlier I suggested this power has been argued to be necessary due to the difficulty in detecting offences under the Act and in the hope that it will deter would-be offenders. On the other hand, it is clearly an extraordinary power unprecedented at common law. It is submitted that the power to "random" stop, at least by roving patrols, should be seen as requiring complete regularity. That is, when a patrol car becomes free from other duties it must stop the first car, the second car or whatever numerical criteria are chosen. Alternatively, if certain types of vehicles or drivers are to be singled out, the criteria chosen must be supportable as acceptable on public policy grounds and, I submit, on statistical grounds. That is, grounds that show a correlation between the particular characteristic used as a criterion and the offences sought to be detected. Of course, that criterion must also be valid on public policy grounds. Clearly the stopping of Maori because they are Maori would be against public policy.

This latter approach does clearly, it is submitted, make the stop selective, at least when the class of potential vehicles to be stopped is seen as all vehicles on the road. The criteria selected directly replace the common law requirement of good cause to suspect. Such can be argued to be even more arbitrary than the use of a completely regular selection process.

Alternatively, the use of such criteria still allows the stop to be regular amongst the vehicles that fall within the targetted class. Here, then, the regularity of the selection needs still to be censured. Furthermore, of course, if the aim of the stops is detection of offences, the use of such statistically defensible criteria is more likely to achieve that aim. In essence, such a practice, if approved, results in the court sanctioning the routine Police and MOT use of stereotypes. All of this only emphasises the fact that the sanctioning of random stopping by roving patrols is a large way from the traditional common law analysis of arrest powers.

*B. Checkpoints*

As suggested above the use of checkpoints under section 66 is less objectionable than stopping by roving patrols. They are less subject to the abuse of discretion because they allow an inherently more non-arbitrary selection process to be practised. They do raise similar issues in regard to criteria selection, albeit in a somewhat less objectionable form. They also raise road safety issues given that their nature is to slow or stop the regular flow of traffic on the roads. I will deal with the latter point first.

1. *Safety Issues*

The 1983 Bill[71] introduced by the then Minister of Transport, which was later defeated (and did not become law) envisaged checkpoints that would be subject to a number of specified safety requirements. The checkpoints would have to be "...within or near an area that is identified by signs, lights, or other devices as a place where vehicles are intended to be or are being stopped...".[72] Further it would have required at least three officers to be present,[73] in uniform,[74] with a special warrant issued by the Secretary of Transport "authorising him to direct drivers to stop vehicles under this section".[75] While these requirements would have been subject to a specific "reasonable compliance"[76] provision the controls envisaged would still have been significant. The controls presumably had a dual purpose. First, they would ensure road safety and, second, would clearly communicate the compulsory nature of the checkpoint to drivers caught in its net.

The likelihood of any such detailed court imposed controls seems slim but the Court in *Po* did suggest the possibility of some limits on their exercise:[77]

> It is doubtful whether s66 would authorise a road block operated in such a way to hold up a queue of vehicles. An obstruction of that kind would arguably be more than simply stopping the user of a vehicle.

Such a limit would, of course, be consistent with *Roper's*[78] "reasonable time" limitation. It is also consistent with limits adopted by the courts of the United States

71 Transport Amendment Bill (No 4) 1983, cl 14. See the text accompanying n23, above.
72 Above n71, proposed new section 58G(2)(a).
73 Above n71, proposed new section 58G(2)(b).
74 Above n71, proposed new section 58G(2)(c).
75 Above n71, proposed new section 58G(2)(d). Section 58G(2)(e) would also have required marked MOT vehicles to be present.
76 Above n71, proposed new section 58G(3).
77 Above n1, 498.
78 Above n4.

in upholding the use of checkpoints. In *Little* v *State*, for example, the Court of Appeals of Maryland summarised the position thus:[79]

> As a general rule the constitutionality of traffic checkpoints has been upheld where: (1) the discretion of the officers in the field is carefully circumscribed by clear objective regulations established by high level administrative officials; (2) approaching drivers are given adequate warning that there is a roadblock ahead; (3) the likelihood of apprehension, fear or surprise is reduced by display of legitimate police authority at the roadblock; and (4) vehicles are stopped on a systematic, non-random basis that shows drivers they are not being singled out for arbitrary reasons.

In that case all vehicles that went througth the checkpoint were stopped. This then raises the next issue.

2. *Criteria for selection*

In the recent case of *Hufsky*[80] the Supreme Court of Canada, under the Canadian Constitution, upheld random stopping at checkpoints. As discussed above,[81] the Court held that such stopping constituted a reasonably justified limit prescribed by law on the right not to be arbitrarily detained. More important here, the Court, almost inexplicably, held that limits such as those suggested in *Little*,[82] were not constitutionally necessary. This was so even though the Court had earlier said:[83]

> Although authorized by statute and carried out for lawful purposes, the random stop for the purposes of the spot check procedure nevertheless resulted in an arbitrary detention because there were no criteria for the selection of drivers to be stopped and subjected to the spot check procedure. The selection was in the absolute discretion of the police officer. A discretion is arbitrary if there are no criteria, express or implied, which govern its exercise.

In this way the use of spotchecks is open to the same abuses of discretion as is stopping by random patrols. They are, though, much easier to control by a regularised numerical selection procedure and one hopes that the courts will be quick to adopt such a requirement.

Of course, the location of checkpoints is a significant question, as well. Here again there is the policy question to be answered: whether the checkpoints should be situated in a regular coherent manner i.e moved from place to place to achieve uniform coverage of a city or whether it is, on the other hand, appropriate to place checkpoints in certain strategic locations where one expects more drink driving to occur. Again the issue is identical to that faced earlier in relation to random patrols. The abandonment of

79 Above n14, 911.
80 Above n15.
81 See: above n18; and the text accompanying n34, above.
82 Above n14.
83 Above n15, 663.

individualized suspicion, as required at common law, requires a rethink of what is to fill the void.

## V. CONCLUSION

The decision in *Po* v *Ministry of Transport* represents an abandonment of the traditional common law requirement of good cause to suspect in regard to the investigation of offences under the Transport Act 1962. While the decision is open to criticism, the more significant question for the future is whether the courts will intervene to control the discretion given to individual traffic officers under section 66 of the Act. One hopes that the courts will be alive to the issue. If not a crucial civil liberty will be lost.