OBSTRUCTION REVISTED
by
Paul Ridley-Smith

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"OBSTRUCTION REVISITED"

A Study of Past and Present Laws Relating to Obstruction of the Highway

by Paul Ridley-Smith

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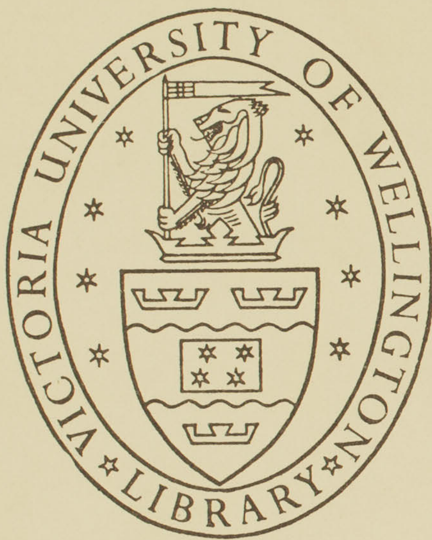
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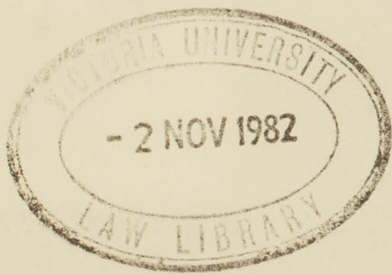

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I. INTRODUCTION

A. Why?

As a result of the civil unrest and disobedience which occurred during the South African rugby teams tour of New Zealand in 1981, interest was aroused in all sections of the community as to what exactly was the law relating to public order; were people allowed to block traffic, march down motorways and what could the Police do about such behaviour?

Coincidently and paradoxically, at the exact same time as such issues were confronting the community, Parliament was involved in reforming the very laws regulating such situations as it "... reformed and restated the law relating to summary offences by repealing the Police Offences Act and it's amendments"[1] and replacing it with the Summary Offences Act.

My particular concern in this paper is to examine the offence of obstructing a public way, and to compare the law as it was under section 3(eee) and section 4(1)(p) of the Police Offences Act with what it is now under section 22 of the Summary Offences Act 1981.

However, before looking at the substantive issues involved in that specific area it is worthwhile to consider the sequence of events leading up to the wider area of reform of the entire Police Offences Act.

B. Background to Reform

It has been commented on many times, but perhaps more recently of late that New Zealand is a country without a written constitutional code to protect the basic rights and freedoms of the citizen.[2] One of the consequences of this is that an ordinary Act of Parliament which deals predominantly with the rights and freedoms of the citizen is of particular importance because the laws once made, are unimpeachable

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except by Parliament itself. It is not possible for a New Zealand court to strike down legislation on the grounds that it offends against the constitution or derogates from the basic freedoms guaranteed by a Bill of Rights.

Because of this Parliament must be extra careful when it enacts laws which seek to restrict a citizens access to, for instance free speech or freedom of assembly. Such concerns were clearly on the minds of the Parliamentarians when they debated the Summary Offences Bill.

The Hon. J.K. McClay, Minister of Justice said when introducing the Bill:[3]

> At its core, however the Police Offences Act is that part of our criminal code that sets the limits on how we can behave and what we can say in a public place. For that reason and because of it's potential reach into the area of free speech, it is ... of central importance to our criminal and constitutional law.

The need for reform of the Police Offences Act was recognised by Parliament in 1973 when Hon. Dr. A.M. Finlay, Minister of Justice moved:[4]

> That the Statutes Revision Committee be instructed to consider the Police Offences Act 1927 and to report to the House what changes, if any, it considers should be made in the law in light of present day attitudes and social conditions.

This Committee called for and heard many submissions[5], some of which I'll consider later[6]. They examined all the provisions of the Act and commented on changes they thought desirable. In regard to section 3(eee) the Committee recommended "No change" as it was divided on it's views.

However, substantial change was to occur in section 3(eee), as with most of the Act, but such major legislative reform is a slow process and it was not until 10 June 1981 that

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the Summary Offences Bill was introduced into Parliament. Subsequently, the Bill was referred again to the Statutes Revision Committee which heard numerous submissions on the Bill,[7] from a wide variety of groups and individuals, some also of which will be considered later.[8]

Both major political parties supported the reform while disagreeing on some clauses which are outside the scope of this paper. So without too much rancour the Bill passed through the Committee stage, with a number of alterations being made, and in due course after receiving a second and third reading and Royal Assent it became law effective from 1 February 1982.

That brings us to section 22 itself, however in order to get a perspective on this current provision it is important to consider the Common Law, past New Zealand statutes and past and current United Kingdom statutes in the area.

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II. HISTORICAL PERSPECTIVES[9]

A. Common Law

Public nuisance was a Common Law misdemeanour. It consisted of:[10]

> .... an act not warranted by law or an omission to discharge a legal duty which act or omission obstructs or cause inconvenience or damage to the public in the exercise of rights common to all His Majesty's Subjects.

If someone suffered damage from a public nuisance they could maintain an action for damages in tort.

The most common and important public nuisance is obstruction of a highway.[11] As the Common Law has always recognised a citizen's right to use a public place for the purpose of "passing and repassing ... for the purposes of legitimate travel"[12] then any action which interferes in an appreciable way with this right of passage is a nuisance. Gibson J. in Lowdens v. Keaveney[13] described the Common Law right and offence as follows:[14]

> A public highway is primarily for the free passage of the public for all reasonable purposes of business or pleasure ... (but) ... where the use of the highway is unreasonable or excessive that is a nuisance irrespective of any guilty or wrongful intent.

However, while the courts have recognised the citizen's Common Law right "to pass and repass" the law has always drawn a distinction between moving and static meetings on the highway. The former is just an aggregate of people exercising their Common Law right while the latter is a civil trespass against the owner of the land, usually a local authority, and may if it unreasonably obstructs, be a public nuisance.[15] This historical distinction is relevant when considering the statutory offences today.

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B. United Kingdom Statutory Provisions

However , for many centuries the English Parliament has legislated in the public order area. Originally statutes were introduced in England in response to serfdom breaking down and as a way to keep peasants tied down to one place of work and to stop them wandering around. Stephens describes the situation in the 14th Century as:[16]

> Statute after statute [was] passed in the reign of Richard II referring to the number of persons who wandered about the country and committed all sorts of crimes leaving their masters, associating in bands and overawing authorities.

The problem was one of significance because in 1547 Parliament enacted that:[17]

> ... every loitering and idle wanderer who will not work is to be taken as a vagabond and branded with a 'V' and adjudged a slave for two years to any person that demands him.

Many more Acts were passed and repealed through the centuries up until the 19th Century dealing with public order.

The writer believes the other major influences on Parliament which became more important in the 18th and 19th Centuries which occassioned obstruction of highway provisions were the need to keep the streets clear, so traders and commercial folk could carry out their business more easily and finally, the need to regulate horse and carriage traffic to stop the towns becoming congested and dangerous to passerbys.[18]

To counter the situations that arose many specifically worded sections were enacted like section 14(8) of the Metropolitan Police Act 1839[19] which made it and offence to:

> ... roll or carry any cask, tub, hoop or wheel or any ladder plank, pole showboard or placard, upon any footway, except for the purpose of loading or unloading any cart or carriage or of crossing the footway.

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However more important were the general provisions relating to obstruction. Section 72 of the Highways Act 1835[20] made it an offence if any person ".... shall in any way wilfully obstruct the free passage of any such highway." Section 14(6) of the Metropolitan Police Act[21] made it an offence to:

> ... by means of any cart, carriage, sledge, truck or barrow or any horse or other animal, ... wilfully interrupt any public crossing or wilfully cause any obstruction in any thoroughfare.

So the Common Law offence of public nuisance and the statutory offences relating to public order and obstruction have a long history which was reflected in the early laws of New Zealand.

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III. NEW ZEALAND LAW ON OBSTRUCTION OF A HIGHWAY UP UNTIL 1982

A. 1840 - 1884

In 1858 the New Zealand Parliament removed doubts regarding what law had been inherited into New Zealand from England by passing the English Laws Act[22] which said that the laws of England, so far as they were applicable to the colony (which were) in force at 14 January 1840, were made the laws of New Zealand. That meant that the general provisions of both the Highways Act and Metropolitan Police Act probably applied in New Zealand. However, before long the New Zealand Parliament repealed the English statutes and enacted statutes of it's own. After a series of Vagrancy Acts,[23] whose provisions mimicked the English statutes,[24] and a failed attempt in 1868 to pass a Police Offences Act[25], Parliament in 1884 repealed all the Vagrancy Acts and provincial statutes and enacted the Police Offences Act 1884.

B. Section 4(1)(p)

1. General outline

Part I of this Act was headed "General Police Provisions" and it contained a myriad of provisions reminiscent of the English statutes, regulating public behaviour. Section 4(12) read:

> Section 4: Every person is liable to a fine not exceeding ($20) who in or upon any public place -
>
> (12) wilfully or negligently encumbers or obstructs a public way in any manner not before specifically described.

Preceeding subsection 12 were a great variety of specific obstruction offences concerned mainly with animal tending and bovine transportation.

Nowhere in the Act was "encumbers" or "obstructs" defined, while public place was defined in section 2 as:

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> ... includes and applies to every road, street, footpath, footway, court, alley and thoroughfare of a public nature or open to or used by the public as of right and to every place of public resort so open or used.

This obstruction provision remained unaltered until being repealed in 1981 apart from being renumbered section 4(1)(p).

2. <u>Cases on section 4(1)(p)</u>

There are a number of reported Magistrate Court decisions and a Supreme Court decision on section 4(1)(p). The first is the Supreme Court decision of <u>Adams</u> v. <u>Horan</u>,[26] where Edwards J. in upholding a lower Court decision found that a bookmaker who was in the habit of using Vulcan Lane (a narrow mid city lane in Auckland) as a place to meet clients was guilty of "wilfully obstructing a public place". Edwards J. had no difficulty in establishing that there was an actual obstruction as pedestrians had to walk on to the street to avoid Adams and his associates, however, Edwards J. said this was not sufficient when he affirmed Adams submission that:[27]

> ... any lawful act which is a reasonable user of the highway is not an obstruction within the meaning of the statute.

However Edwards J. considered that Adams acts were not a reasonable user and thus sustained the conviction. He said:[28]

> In determining whether or not there has been a reasonable user of the highway all the circumstances must be looked at, including ... the antecedent user of the highway by the person charged with obstructing it. If, as the result, the irresistable inference is that the person charged with obstructing the highway is not making a reasonable use of it as a highway and, a fortiori, if the legitimate inference is that he is not using it as a highway at all, but for some other purpose, and if the

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> result of his acts is such as to impede the free use of the highway as a highway, then he may be properly found guilty of encumbering or obstructing it, and this none the less if the particular act in respect of which the charge is laid is such as to cause no more actual obstruction than might be caused by the lawful user of the highway by a person using it as a highway.

So from <u>Adams</u> it seems that before an act which impedes passage along a highway becomes an illegal obstruction it must having regard to its character and circumstances be shown to be unreasonable.

This was certainly how the United Kingdom Courts interpreted similar statutory provisions.

Edwards J. approved of the decision in <u>Lowdens</u> v. <u>Keaveney</u>[29] where Lowdens was charged under Section 13 of the Summary Jurisdiction Act 1851[30] which made it an offence to "wilfully or by negligence or misbehaviour prevent or interrupt the free passage of any person or carriage on any public road or street." Here the defendant allegedly wilfully interrupted and prevented free passage in a city street by leading a band down the street playing a party tune. The defendant was convicted at first instance but his appeal was upheld. Lord O'Brien L.C.J. after accepting that there was a physical obstruction, and that it was wilfull in the sense that the defendant must be presumed to intend the natural consequences of his acts, quashed the convictions on the grounds that the magistrate did not find the procession unreasonable. The court defined "obstruction" in the statute in the same way as it was defined in the Common Law offence of public nuisance. Lord O'Brien L.C.J. said:[31]

> These instances show that taking part in a procession which has caused obstruction in the street ... is not enough to create liability under the statute. There must be something more. What more must there be? This, namely that the user of the street was unreasonable.

There are a number of New Zealand Magistrate Court decisions on section 4(1)(p) reported. However, it is the opinion of the writer that because the reasoning in the decisions is so briefly stated and at times quite unclear that these cases are difficult and unsatisfactory authorities to cite.

Police v. Elwood[32] is such a case. Here the defendant parked his car on the left hand side of the road, and opened his door only to cause a cyclist to crash into it.[33] He was charged with obstruction but the information was dismissed by Luxford SM because as he interpreted Adams[34] he said the law was:[35]

> ... not directed to negligent acts while lawfully using the highway but to wilfull and negligent acts while unlawfully using a highway if other persons are thereby impeded.

With respect this is not what Adams said at all. Certainly, Edwards J. was more likely to find an unlawful act causing an obstruction as being more unreasonable than a lawful act causing the same obstruction, however, he never contemplated that a lawful act could never be an obstruction. This is clear from the passage quoted on page 8 where Edwards J. says that lawful acts which are a reasonable user are not offences, the implication being that lawful acts which are unreasonable could be offences. So if Luxford SM had wanted to follow Adams he should have asked if Elwoods action was in fact an obstruction and if so, was it unreasonable in the circumstances?

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In Police v. Cane,[36] Page SM, convicted a hypnotist of obstruction because he placed a mesmerised woman in a shop window which partly as a result of his advertising drew a large crowd which obstructed the footpath. The Court found Cane's act wilfull as he must be presumed to intend the probable consequences of his voluntary act. The Court held that there was an offence committed as it was a natural and probable consequence for a crowd to gather to see the woman and thus to obstruct the footpath. It is not made clear in the decision, but presumably the Court found Cane's acts unreasonable and further that Cane was found guilty as a principal as it was his act which caused the obstruction.

On the other hand in Police v. Adams Bruce Ltd[37] the defendant Company was acquitted of a charge under section 4(1)(p). Adams Bruce Ltd retailed chocolates and when they had chocolates to sell queues formed outside their shop as chocolates were in scarce supply due to wartime shortages. Adams Bruce Ltd admitted that there was a physical obstruction, but resisted the charge claiming;

Firstly, that they couldn't be made liable as a party to the offence as an aider and abettor;

Secondly, that the obstruction was not unreasonable, and

Thirdly, that the acts of the defendant were not obstructive.

Although not an easy judgement to follow it seems that Lawry SM agreed with all three submissions. He agreed that to be an aider and abettor one needs intent and here Adams Bruce Ltd had no intent, in fact they staggered shop hours and didn't advertise

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to try and stop queues forming (although the writer would submit that they surely had sufficient intent as they had knowledge of a certainty as queues always formed when they sold chocolates).

Secondly, Lawry SM said the obstruction had to be unreasonable and here it wasn't as Adams Bruce Ltd was only exercising it's reasonable right to trade and, thirdly, and again unclearly Lawry SM noted Gavin Duffy's J view in Campbell v. Hannaford[38] and seemed to interprete it to mean that no act is an obstruction if the act does not itself directly obstruct the footpath. As Adams Bruce Ltd had not actually obstructed the footpath they had not committed the offence.

It is the writers opinion that Lawry SM reached a fair and correct decision, however, it was done in an awkward way. Rather than try and maintain that there was no actionable obstruction for which Adams Bruce Ltd was liable because it had done nothing actively obstructive, Lawry SM would have been better to find that Adams Bruce Ltd had caused an obstruction, but that in the circumstances such an obstruction was reasonable. Lawry SM could have considered that as Adams Bruce Ltd was only carrying on it's lawful business in an ordinary way and was doing it's best to minimise the obstructions caused, that in the circumstances the obstruction caused was not unreasonable.[39] By following this approach Lawry SM would have been in accord with the authority of Adams[40] and would not have to have resorted to the dubious distinction made in Campbell.

The final reported case on section 4(1)(p) is Police v. Gillies.[41] Here the defendant had parked his car legally, but the rear portion of the car overhung the footpath sufficient that:[42]

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> ... an unwary pedestrian passing along the footpath in the ordinary way may have collided with the overhanging portion of the car.

This was sufficient for Luxford SM to justify a finding that there was an obstruction. Luxford SM inferred negligence for not considering the obstruction when parking. Therefore the defendant was convicted.

This is a curious decision from the same Magistrate who decided Elwood because there Luxford SM said section 4(1)(p) was not designed to catch people who did lawful acts negligently so Elwood escaped liability. Yet it would seem that Gillies act was a lawful use of the highway as he had parked his car in complete accordance with local authority bylaws and regulations, but nonetheless Luxford SM found his act negligent and convicted him.

3. Summary of section 4(1)(p)

In summary it is difficult to draw together a clear picture of how section 4(1)(p) was interpreted. Firstly, because so few cases are reported and secondly, because most of those that are unsatisfactorily reasoned or unclear in their meaning.

Adams Bruce Ltd[44] reasoning is extremely difficult to follow and understand. Cane[45] is incompletely reasoned. Finally, Luxford SM's decisions in Gillies[46] and Elwood[47] deal in a very cursory way with cases that are more concerned with traffic and transport regulation than maintenance of public order and as I mentioned earlier Luxford SM did not seem sure as to what test he should apply to ascertain the guilt or otherwise of the accused.

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The above circumstances illustrate just how difficult the Magistrate Court decisions are to cite as authority. This effectively leaves us with the Supreme Court decision of Adams v. Horan.[48] As this decision was in line with English authorities[49] the writer believes that it was probably fairly strictly applied. In summary this case stood for the following propositions.

Firstly, although not an issue before the Court, as the defendant never denied causing an actual physical obstruction, Edwards J. did briefly contemplate that someone would have to be impeded for there to be an offence when he said that it was enough to convict the defendant if:[50]

> .. the appellant was not using the highway as a highway, but for some other purpose and that his continued and repealed presence there did impede the lawful user of the highway by the general public.

Although one should note that no one was actually obstructed in Gillies.

Secondly, no physical obstruction of a public way is an offence unless it is unlawful or unreasonable in the circumstances, and

Thirdly, whether an obstruction is reasonable or not, is a question of fact which depends on the circumstances. Many different circumstances may be relevant. Edwards J. found the use to which the alleged obstructor was using the highway very relevant.

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C. Section 3(eee)

1. General outline

In 1958 Parliament passed the Police Offences Amendment Act 1958 which by section 2(1) of that Act added section 3(eee) to the principal Act. Section 3(eee) reads:

> Section 3 "Every person is liable to a fine not exceeding $50 who ...
>
> (eee) without lawful authority or reasonable excuse obstructs any footpath or footway or carriageway".

This Amendment Act also inserted section 315(2)(d) into the Crimes Act which allowed the Police to arrest without warrant, anyone who continued to offend against section 3(eee) after having being warned to desist. Section 4(1)(p) was not repealed.

The reason why section 3(eee) was added is not completely clear as there is no debate on the Amendment reported in Hansard, but it was almost certainly due to Police pressure. Mr. S. Barnett the then Controller-General called for legislative change in his 1958 Annual Report[51] because of problems with gangs of youths who congregated in public places and refused to "move on" when asked to and refused to give their names or addresses when requested to by the Police. The Commissioner was concerned that:[52]

> ... pedestrians could go to some lengths in being insolent provided they did not physically obstruct the policeman or insult him. Therefore in one important respect the policeman is powerless to deal with these gangs. They must positively offend before he can handle the situation.

so he proposed that:[53]

> ... the law be amended giving the Police the right to ask anyone who refuses to obey their request to "move on" for his name and address. If this be refused they may thereupon be arrested.

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Ferner SM commented on the amendment in Police v. Wootton[54] where he said[55]

> Before the enactment of section 3(eee) it was at least doubtful whether the mere pedestrian use of the footpath by standing or walking, per se constituted an offence. Doubtless the present section was enacted to provide authority under which pedestrians causing unreasonable obstruction would be successfully checked.

It is apparent therefore from the views expressed by Mr. S. Barnett and Ferner SM that section 3(eee) was introduced as a form of controlling "bodgies" and "widgies" and other gangs of the day. There is no doubt that section 4(1)(p) was sufficient to police these gangs if an actual unreasonable obstruction had occurred, Adams[56] clearly establishes that, however, it is the writer's belief that the Police did not think section 4(1)(p) was applicable if no one was actually obstructed or impeded and that they desired a means of controlling and if necessary arresting these youths at an earlier stage to the section 4(1)(p) offence. Also section 4(1)(p) may as a matter of course only been used to police regulatory type offences like in Adams Bruce[57] and Gillies[58] and not for public order enforcement in the criminal sense.

2. Cases on section 3(eee)

How then was section 3(eee) interpreted? Two reported Magistrate Court decisions in 1959 Police v. Hardaker[59] and Police v. Wootton[60] both relate to the same evening in The Square in Christchurch. Hardaker was asked to move along three or four times by the Police because he and his friends were obstructing the footpath. On the last occasion his name was taken and he was prosecuted. In court Hardaker offered no evidence in his defence, but moved that the information be dismissed on the general ground that the prosecution had not discharged the onus of proof.

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The prosecution claimed that all they had to do was prove the actual physical obstruction and that because of section 67(8) of the Summary Proceedings Act 1957 the burden on the defendant to show "any lawful authority or reasonable excuse" was the persuasive one.

The defendant submitted that the burden of proving any excuse which the defendant may have is evidential and not persuasive and that it is encumbent on the prosecution to prove the guilt of the accused in every case.

Ferner SM interpreted the effect of section 67(8) on section 3(eee) in this way:[61]

> The evidence must be such as to give rise to a reasonable inference that the defendants conduct was unreasonable in some respect. If the evidence is such as to give rise to such an inference then and only then in my opinion do the provisions of section 67(8) come into effect.

On the facts Ferner SM found there was a reasonable inference that the conduct was unreasonable and thus there was a persuasive burden on the defendant to show "lawful authority or reasonable excuse". The only evidence adduced was presented by the prosecution and this did not show any lawful authority or reasonable excuse. In the end Ferner SM found that a physical obstruction was proved by the prosecution so Hardaker was convicted.

In Wootton[62] the defendant gave evidence that he was meeting friends and that although he did physically obstruct the footpath because of his purpose his obstruction was not unreasonable. Ferner SM agreed that meeting friends was not unreasonable, but:[63]

> .. in my view it is clearly unreasonable to join a group on the pavement and stand with that group when pedestrian traffic is heavy with the result that other pedestrians must walk around that group or elbow their way through.

Therefore Wootton was also convicted. Ferner SM felt the evidence established a reasonable inference that the conduct was unreasonable and after considering the facts and Wootton's evidence decided in Wootton's "own evidence he raised no lawful authority or reasonable excuse."

However, having looked at Hardaker and Wootton one must be careful about taking too much from them because Richmond J. in the Supreme Court decision of Police v. Stewart[64] interpreted section 3(eee) and section 67(8) in quite a different way.

This case again involved youths in The Square, this time Stewart was sitting against a wall so his outstretched legs occupied about three feet of the twelve foot width of footpath. In deciding whether there was an obstruction Richmond J. expressly adopted the test given by Grifith J. in Haywood v. Mumford[65] who said:[66]

> obstruction ... includes any continuous physical occupation of a portion of a street which appreciably diminishes the space available for passing and repassing or which renders such passing or repassing less commodious whether any person is in fact affected by it or not.

Stewart was clearly obstructing under this definition. Richmond J. then went on to consider on whom the burden lies to prove or disprove "lawful authority or reasonable excuse." After considering section 3(eee) in light of section 67(8) Richmond J. concludes that Ferner SM was wrong in law in Hardaker[67] in his interpretation of the effect of section 67(8). He says:[68]

> ...'without lawful authority or reasonable excuse' are words of qualification of the offence of obstructing a footpath and as such fall within section 67(8) ...

and thus:[69]

> ... the onus rests on the prosecution to establish an act which is in fact an obstruction of the footpath ... and if the prosecution discharges this onus then the onus rests on the defendant to prove either lawful authority or reasonable excuse.

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By this Richmond J. meant that the prosecution must prove the actual obstruction as outlined in the Haywood list, beyond reasonable doubt, while the burden on the defendant to show a defence is the persuasive one, or as Richmond J. puts it, the onus on the defendant is to show:[70]

> Whether or not on the whole of the evidence the reasonable probability is that the appellant has reasonable excuse for what he did.

Richmond J. went on to say that on the facts the defence of "lawful authority" did not arise and that as the defendant had no reasonable excuse "such as sudden illness or the like he must be found guilty."[71]

A recent obstruction case which has come to the writer's attention, but to which he can find no court or newspaper report except a short reference in Hansard,[72] may be of note. The case concerned seven anti-Springbok Tour protesters who were acquitted of a charge of obstructing a public way because they were undertaking some form of sincere demonstration.[73] Presumably the District Court Judge must have considered sincere protest "lawful authority or reasonable excuse". However the writer would submit that this case must have been decided on very special circumstances because many anti-Springbok Tour protesters were convicted under section 3(eee). (See Appendix).

D. Summary of Combined Effect of Sections 3(eee) and 4(1)(p)

Police practise since the enactment of section 3(eee) up until the repeal of the Police Offences Act in 1981 has been to use section 3(eee) almost exclusively over section 4(1)(p).[74] The writer would suggest that this was because section 3(eee) was considered to have a wider scope; as a result of Stewart, convictions were thought easier to obtain; persistent offenders could be arrested and finally, but importantly because of administrative practise.[75] So when one summarises the effect

of section 3(eee) one is effectively summarising the law of obstruction as it has been understood for the last twenty three years in New Zealand.

As with section 4(1)(p), one Supreme Court decision represents the major statement on the law, here it is Police v. Stewart.[76]

The first major point to be noted is how "obstruct" has been interpreted in section 3(eee). Stewart established that the test for obstruction was a question of fact; is there appreciably less space for the public to pass and repass?

Richmond J. made it quite clear that evidence that no one was in fact obstructed is not relevant to determining whether there was an obstruction, but only relevant when one considers the reasonableness or otherwise of the defendants acts. Support for this view comes from Lord Parker CJ in Nagy v. Weston[77] who says whether there is an actual or potential obstruction is relevant only in determining the reasonableness of the obstructive act. On the other hand Edwards J. in Adams[78] contemplated that there had to be an actual obstruction but as this comment was obiter and relating to a different section it was probably not of great authority. So overall the weight of authority would suggest that in interpreting section 3(eee) evidence that no one was obstructed went to assessing the reasonableness of the defendants actions and not to denying the existence of the alleged obstruction.

The second major point to be discussed is whether the phrase "without lawful authority or reasonable excuse" was to be read as a substantive part of the offence or as a defence. Richmond J. said it was a defence to the offence of obstruction. By interpreting section 3(eee) in this manner he departed from the Common Law definition of obstruction in the misdemeanour of obstructing a public way, and from the interpretation given to similar statutory provisions both in New Zealand and the United Kingdom,[79] all of which required that the obstruction be proven unreasonable as well as obstructive before an offence is committed.

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Furthermore, Richmond J's interpretation is out of line with recent English authority. In Nagy v. Weston[80] Lord Parker CJ had to apply a very similar statutory provision to section 3(eee) section 121(1) of the Highways Act, 1959[81] which reads:

> If any person without lawful authority or excuse in any way wilfully obstructs the free passage along the highway he shall be guilty of an offence.

In interpreting this section Lord Parker CJ said after establishing that there was a wilfull obstruction that:[82]

> ... before anyone can be convicted of this offence two further elements must be proved, first that the defendant had no lawful authority or excuse and secondly that the user to which he was putting the highway was an unreasonable user.

Richmond J. did not favour such an interpretation for section 3(eee) as he saw "without lawful authority or reasonable excuse" not as substantive parts of the offence which must be proven by the prosecution, but as "exception(s), exemption(s), proviso(es) or excuse(s)" in terms of section 67(8) of the Summary Proceedings Act. However, the writer would submit that there is no reason why section 3(eee) could not have been interpreted in the same way as section 121(1). When the Court decides whether a particular phrase is an "exception exemption proviso or excuse" it must have regard to the:[83]

> ... true construction of the enactment as gleaned from both it's form and substance and not upon the result of any test.

The writer would suggest that although the form of section 3(eee) lent itself to Richmond J's interpretation if one had regard to the substance of the offence then "without lawful authority or reasonable excuse" should have been substantive parts of the offence. The major reasons why, were that the prosecution or plaintiff had always had to prove that the defendants actions were unreasonable in civil and criminal proceedings for alleged obstructions of highways, secondly because English Courts were currently interpreting very similar statutory provisions in this way, thirdly because as a matter of principle if two reasonable interpretations of a statute are available then the one most favourable to the defendant should usually be chosen and finally again,

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as a matter of principle, the prosecution should be required to show why the defendant should suffer a legal sanction rather than the defendant (be required to show) why he or she should not suffer that sanction.

This brings us to the third major point in our summary of section 3(eee), that is where the burden of proof lay. As a result of Stewart[84] regarding "lawful authority or reasonable excuse" as defences to the charge the burden of proving them fell on the defendant and, as a result of section 67(8) of the Summary Proceedings Act, that burden was the persuasive one. The prosecution had to prove beyond reasonable doubt that there was an actual obstruction although this would not have been very difficult under the test from Stewart.

Fourthly we must note how "lawful authority" was interpreted. No New Zealand case in this area considered what would constitute "lawful authority". The only reference to it was in Stewart where Richmond J. said it didn't arise on the facts. In Nagy v. Weston Lord Parker CJ was inclined to the view that:[85]

> Lawful authority or excuse .... and reasonableness are really the same ground .

and he found it difficult to think of any argument that could be used to show that the defendants had lawful authority to obstruct the highway if what happened was an unreasonable obstruction.

However, R.A. Moodie in his submissions to the 1974 Parliamentary Select Committee[86] suggested that "lawful authority" probably includes the Common Law right to "pass and repass" for the purposes of legitimate travel. He further suggested that as the property of the streets are vested in the local authority,[87] they may as the owners, allow obstructions to occur on their streets. If one has the written permission of the Town Clerk to hold a gathering on a public street then arguably one has lawful authority to cause obstructions consequential to that gathering.[88]

Fifthly, one must consider what is "reasonable excuse". This has been discussed in many cases and whether the prosecution has to show lack of it or the defendant presence of it, the factors to consider remain the same. Gibson J. gave a concise statement of what might be relevant when assessing the reasonableness of the procession in Lowdens:[89]

> The question whether a user is reasonable or not is a question of fact to be determined by common sense with regard to ordinary experience. Occasion duration of the user, place and hour must be considered; and we must ask, was the obstruction trivial, casual, temporary and without wrongful intent.

So an obstruction may be caused by five youths standing in the middle of a busy mid city pavement, but it may not be an obstruction if they only stayed there a short while or they stood on the same pavement at 8 p.m. when no one else was around.

Any number of factors may go to assessing the "reasonableness" of the defendants act including the factors I considered earlier regarding lawful authority.

So to conclude our look at the pre-Summary Offences Act law, where did the law finally lie?[90] The writer believes that section 3(eee) altered the law on obstruction to give the Police very much the power they wanted. It gave the Police power to deal with individuals and groups on the streets at an earlier stage than they could have before. The Controller-General of Police wanted a provision that would allow the constable to act before the citizen could "positively offend". The writer understands this to mean that the Police wanted a power to deal with a person because "they were there" and causing a potential obstruction and not have to wait until that person started acting or behaving in an illegal way. This certainly was the effect of section 3(eee) as the Police could act if, by the defendants presence, there was appreciably less space to pass and repass and, as a result of Stewart,[91] occupying one quarter of the footpath leaves appreciably less space.

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The onus then passed to the defendant to show why he or she had limited the space for passing and repassing as they had done. This made section 3(eee) a very useful and powerful law and order provision.

A major effect of section 3(eee) which was also desired by Mr. S. Barnett was to enable the Police to ask people to "move on". Thus the aim of stopping groups loitering on the streets could be achieved by threatening to use section 3(eee) but only actually using it against these people who didn't move on.

The other major use of section 3(eee) was to deal with protesters and demonstraters. It was commonly used to deal with people protesting against the South African Rugby teams tour of New Zealand in 1981 (see appendix). Protesters who blocked off streets or motorways inevitably were charged under section 3(eee).

So having looked at the application and use of section 3(eee) one has to decide if such a provision is warranted in total, in part or at all. It is with these thoughts that we now consider the reform of the law.

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IV. TIME FOR A CHANGE?

A. The 1974 Parliamentary Select Committee

The 1974 Parliamentary Select Committee whose task it was to examine the Police Offences Act and suggest changes, if any, that were needed suggesting drafting an entirely new Act which should deal with matters of general application and concern, notably law and order.[92]

In recommending change the Committee set out a guide of principles which they thought should be taken into account when formulating the new Act, they were:[93]

1. Conduct ought not be criminal unless it is the cause of significant harm to society or the individual citizens in his or her lawful activities.
2. Order and security of person and property are fundamental needs of all societies and the criminal law has responsibilities in this direction.
3. Account must be taken of diverse lifestyles and the criminal law should notcriminalise behaviour merely because most think it eccentric, distasteful or immoral.
4. Special regard had to be paid to Maori and Polynesian lifestyles.
5. There must be a careful balance between the powers and discretion of the Police and the rights of the citizen.
6. Vaguely loosely defined and sweeping offences should be avoided. Certainty is to be a principle characteristic of the criminal law.
7. The criminal law should attain it's purpose directly rather than by using provisions in different Acts designed for different situations.

As I mentioned earlier this Committee was unable to agree on changes to the law of obstruction so it recommended. "No change".

The two major submissions received on section 3(eee) in 1974 were from R.A. Moodie, then lecturer in law at Victoria University[94] and the New Zealand University Student's Association (NZUSA).[95] Both were concerned with how section 3(eee) related to demonstrations, public meetings and organised dissent. The main point of contention was that moving

demonstrations were prima facie not obstructions while static demonstrations were, as the Common Law had never recognised the citizens right to assemble in a public place for a meeting. Both Moodie and NZUSA wanted this distinction removed. NZUSA wanted a new provision which stated that moving and static demonstrations are not obstructive themselves and that demonstraters should only be punished if they offered violence to persons or property.

Moodie took a more moderate view and said that there was no logical basis for the distinction between moving and static demonstrations and thus all demonstrations should be regarded as lawful unless they caused unreasonable interference with the public right of way. Moodie suggested that if a demonstration could remain in one place without fear that they demonstraters were breaking the law then less interference would be caused to the public right of way.

The writer is of the opinion that Moodies submissions were sensible and logical while NZUSA in their attempt to protect the right to protest seemed to believe that it was acceptable for demonstraters to subject the public to severe inconvenience as long as there was no damage to persons or property.

B. The Summary Offences Bill

However, when the Summary Offences Bill appeared in 1981 it was obvious that both submissions had been rejected.

Clause 21, which was eventually to become section 22, had two significant changes from section 3(eee). Firstly the offender had to be warned by a constable to stop the obstruction and then subsequently continue with it before an offence was committed. In section 3(eee) the original obstruction was an offence and the warning was only given to give the constable a power of arrest.

Secondly "lawful authority" had been deleted in the Bill.

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I will examine both of these changes in the next section.

Clause 21 read:

> 21. Obstructing footpath - (1) Every person is liable to a fine not exceeding $500 who, without reasonable excuse, obstructs any footpath and, having been warned by a constable to desist,-
>
> (a) Continues with that obstruction; or
>
> (b) Does desist from the obstruction but subsequently obstructs that footpath again, or some other footpath in the same vicinity, in circumstances in which it is reasonable to deem the warning to have applied to the new obstruction as well as the original one.
>
> (2) In this section "footpath" includes every road, street, path, mall, arcade, or other thoroughfare.

The 1981 Parliamentary Select Committee called for submissions[96] and, as in 1974, received a good many.

The Justice Department in the introduction to their specific submission suggested four things that the Committee should have in mind.[97]

Firstly, the Police Offences Act and soon the Summary Offences Act are the statutes through which the greatest number of citizens are likely to meet legal sanction apart from minor traffic matters.

Secondly, the Acts are of utmost constitutional significance as they control nearly all our manifestations of expression and conduct by word or deed.

Thirdly, as we have no Bill of Rights by which a judge can strike down legislation as derogatory of our basic freedoms, Parliament must be careful not to pass oppressive legislation, and

Fourthly, one must carefully weigh constitutional freedoms against public interest in maintaining law and order and still try and achieve certainty in the law. Specifically in relation to clause 21, the Justice Department recommended that <u>Police</u> v. <u>Stewart</u>[98] be legislated around and that clause 21 be altered to; "Allow Police intervention only where there

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is some public inconvenience". To this end they recommended that the definition in the American Law Institutes Model Penal Code which defines "obstructs" as "renders impassable without unreasonable inconvenience or hazard," be added to the section.

Similar submissions were received from the Victoria University of Wellington (VUW) Law Faculty[99] who suggested that the offence of obstruction should involve proof that member(s) of the public were affected by the defendants obstructive behaviour, even better in their opinion would be a requirement, that serious or appreciable inconvenience be caused.

These two submissions seemed to have an effect because when the Bill appeared for it's second reading a definition of "obstructs" had been added, it was "obstructs in relation to a public way means unreasonably impedes normal passage along that way". I will look at the effect of this change in the next section and consider whether it goes as far as the submissions asked it to.

Another submission received from the VUW Law Faculty suggested that there was a minor problem over the interpretation of footpath in clause 21. They felt it would be preferable to replace "footpath" with "public thoroughfare" to emphasise that the offence was restricted to public rights of way. As a result "footpath" in subsection 1 was replaced with "public way" and the definition in subsection 2 was consequently changed, however, the word "footpath" remained in paragraph (b) of subsection 1.

The New Legislation Committee of the Auckland District Law Society[100] took up the issue of static demonstrations and recommended that as the clause sought to ensure a public right of way any partial obstruction should be allowed if it is not unreasonable in the circumstances. They specifically restricted their view to "bona fide demonstrations participating in a demonstration relating to a matter of public or private concern." This matter was not taken up by the Committee.

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One submission suggested[101] that while the requirement of a warning was a good thing in fact three warnings should be given because in the context of a demonstration warnings may not be heard or may be thought not to apply to an individual and so to ensure that all people have received due and fair warning more than one warning should be given. This submission was also not taken up by the Committee.

So after hearing the submissions the Committee made the changes outlined in clause 21 and in other clauses of the Bill and submitted the Bill to Parliament for it's second reading. The Bill passed it's second and third readings without change, so by due process of law it became the Summary Offences Act, effective from 1 February 1982.

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V. SUMMARY OFFENCES ACT 1981

A. Section 22

Obstructing public way - (1) Every person is liable to a fine not exceeding $500 who, without reasonable excuse, obstructs any public way and, having been warned by a constable to desist, -

(a) Continues with that obstruction; or

(b) Does desist from the obstruction but subsequently obstructs that footpath again, or some other footpath in the same vicinity, in circumstances in which it is reasonable to deem the warning to have applied to the new obstruction as well as the original one.

(2) In this section -
"Obstructs", in relation to a public way, means unreasonably impedes normal passage along that way:
"Public way" means every road, street, path, mall, arcade, or other way over which the public has the right to pass and repass.

B. Suggested Interpretation of Section 22

At the time of writing, August 1982, no cases concerning section 22 have been reported or come to the writer's attention. People have almost certainly been convicted under section 22 but exactly how the provision has been interpreted is not known.

The question is how will section 22 be interpreted and applied?

One of the most important parts of the new Act is the definition of "obstructs" which is in subsection (2). The question is whether some member of the public must actually be obstructed for there to be an offence? The definition of "obstructs" requires there to be an impedance. The writer would suggest that as a matter of common sense and logic one can't impede nothing or no one. If no one is impeded then the actor has only "attempted" to impede normal passage along the way but not "actually" impeded normal passage. If this line of argument is accepted then there would have to be an actual impedance for there to be an obstruction.

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A recent Australian case R v. Darling[102] may support this view as it said that there was no obstruction unless some person is, in fact, actually obstructed or prevented from passing. The problem with this case though is that the statutory provision interpreted, section 10 of the Summary Offences Act 1970 (NSW), makes it an offence to "wilfully prevent in any manner the free passage of a person, vehicle or vessel in a public place ...". This section specifically requires that the "free passage of a person be prevented" which makes section 10 much clearer in it's intent than section 22.

So one can't be sure that the courts will require an actual obstruction to be shown in fact is is more likely that they won't.

Firstly, because a similar argument could have been made as to the meaning of "obstruct" in section 3(eee) but the court had no difficulty in saying that whether someone was in fact obstructed was only relevant to the reasonableness of the defendant's acts. Secondly, Parliament could so easily have added a clause like "and therefore inconveniences any member of the public"[103] to have made it clear that someone had to be obstructed. They didn't do so, so the implication may be that there is no requirement that an actual obstruction be proved.

Finally, there are a number of cases mentioned earlier which look at this issue.[104] The weight of those authorities must favour the view that evidence that no one was obstructed only goes to the reasonableness of the defendant's actions. Lord Parker CJ in Nagy v. Weston said:[105]

> Whether or not the user amounting to an obstruction is or is not an unreasonable use of the highway is a question of fact. It depends on all the circumstances, including ... whether it does in fact cause an actual obstruction as opposed to a potential obstruction.

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So overall it is likely that a similar interpretation to that preferred in Stewart will be taken, that is; is there appreciably less space for passing and repassing?

The next point to be noted with regard to the definition of "obstruct" in section 22 is whether the obstruction has to be proven unreasonable before an offence is committed. The definition added to subsection 2 after the submissions made by the Justice Department and the VUW Law Faculty shows a definite intention to grapple with Stewart[106] and to make it necessary for the prosecution to show unreasonableness on behalf of the defendant. However, careless drafting has clouded this intention because while the definition section says that the obstruction must be proven by the prosecution to be unreasonable, "without reasonable excuse" has been left in subsection 1 in exactly the same manner as in section 3(eee). This latter clause was interpreted in Stewart to be a defence to the charge with the onus of showing reasonable excuse lying on the defendant. Read literally section 22 requires the defendant to show "reasonable excuse for causing an unreasonable impedance" to escape liability. The writer can't envisage any situation where the defendant could show "reasonable excuse" for causing an obstruction which has already been found on the facts to be "unreasonable". The net effect is for "without reasonable excuse" to become quite redundant with the definition in subsection 2 requiring the prosecution to prove that the obstruction was unreasonable.

So overall under section 22 the prosecution must prove beyond reasonable doubt an unreasonable obstruction. However, as there are many factors which may affect the reasonableness or otherwise of the defendant's acts, some of which are known only to the defendant, the prosecution need not negative the existence of all of these factors.

For instance it may be reasonable for someone to cause an obstruction because they are feeling unwell and need to rest, however, the court need not consider this possibility if it is not raised. To have this matter considered by the court

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the defendant has to raise it, and satisfy the evidential burden. Once raised to this standard the prosecution will either have to negative the claim or show that notwithstanding the illness of the defendant the act was still unreasonable.

The next issue to be considered is over what is "reasonable" or "unreasonable". Mention has already been made of what previous tests courts have taken into account to assess the reasonableness or unreasonableness of a defendant's action,[107] essentially it comes down to a question of fact to be decided in the circumstances. Factors which may be considered include:

- time of day of obstruction.
- place obstructed.
- whether anyone was effected.
- how many people were effected.
- length of time of obstruction.
- consequences of the obstruction.
- purpose or reason for obstruction.
- intent or state of mind of the obstructer.
- degree of obstruction, i.e. trivial partial or complete.
- circumstances prior to the obstruction.
- whether the obstructer is moving or not.
- whether the local authority has given its permission for the activity.
- whether the use of the public place is as a public place or for some other purpose, e.g. trade or commerce.
- whether the obstruction was caused as a result of the lawful activity of the obstructer exercising his or her lawful rights.

This list is by no means an exhaustive one and other factors may arise in the peculiar circumstances of each case.

A major change in the legislation has been the deletion of "lawful authority" as a statutory defence. I cited earlier Lord Parker CJ who believed that "lawful authority" and "reasonable excuse" are near enough to the same thing so as

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not to matter and Brownlie is of the same belief when he says[108]

> Whether there is a lawful excuse seems to depend simply on whether the obstruction is reasonable.

However the writer would suggest that the points made by R.A. Moodie may be valid. If "lawful authority" was still recognised as a defence in itself then if someone could establish that they were only exercising their Common Law right to "pass and repass" then any obstruction caused incidental to this would be proven to be done with lawful authority and thus be a complete defence to the charge. However, if lawful authority was only to be considered along with other factors to determine the reasonableness of the act then it might be outweighed by other considerations. This may be good or bad depending on the circumstances. It may be good in a situation where someone by "passing and repassing" is hampering emergency services tending an accident. Such behaviour, which one might want to sanction, is almost certainly unreasonable, but if done with "lawful authority", not illegal. However the consequences may also be bad because someone may be prosecuted for doing something they are lawfully entitled to do. This may now happen in demonstrations because, with "lawful authority" no longer a specific defence, distinction between moving and static demonstration is gone. In the past as moving demonstrations were just a collection of people exercising their lawful right to "pass and repass" any charge for the incidental obstruction caused could be resisted. Now a court may decide that in the prevailing circumstances the incidental obstruction caused by the demonstration is unreasonable and thus an offence, notwithstanding that the demonstraters were only exercising their lawful right. A judge might consider mild disruption to peak hour traffic or the admitted desire of the demonstrater to disrupt the Prime Minister's passage to Parliament sufficiently unreasonable to outweigh the reasonable desire to "pass and repass".

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The second situation where Moodie thought the defence of "lawful authority" had a place was if a local authority had given someone permission to do something on the local authority's land, for instance, to set up a stall on the footpath or to hold a procession, both of which may cause incidental obstruction. In the past the fact that both were done with the lawful authority of the owner of the land would have been sufficient defence to a charge of obstruction as long as they had done no more than what they had been permitted to do. Now the local authority's permission is only another factor to consider when assessing the reasonableness of the accused's behaviour.

This situation raises difficult policy problems. On the one hand one can't sanction people who are doing only what they are legally entitled to do, but on the other hand when one exercises one's rights there is the accompanying responsibility to not infringe on the rights of others. On balance it may be best to weigh up the arguments for allowing the obstruction and the arguments against allowing the obstruction and then decide which claim is more reasonable.

While this approach seems fair and almost certainly what the courts will do, the writer believes that it is unfortunate that as a consequence of this approach demonstraters may lose some of the protection which section 3(eee) gave. Courts may regard non violent expression of dissent as a very reasonable act, but then again they may not. If they don't then the important constitutional right of freedom of expression may be endangered.

A feature of section 22 is the requirement that a warning is to be given to the obstructor and the obstructor only commits an offence if he or she continues with the obstruction or reobstructs in certain circumstances after initially desisting. The Police claim that this is nothing more than codification of current practise and that they always gave warnings anyway, however, a significant reason for this practise was that the Police could only arrest an obstructor after that person had been warned to desist. In theory the Police could have summarily prosecuted an obstructor without ever having to warn them.

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Notwithstanding current practise this is a welcome reform because the person who has unthinkingly or unwittingly caused an obstruction will be able to remedy the matter and so avoid prosecution. The requirement of a continuing offence or reoffence imports a notion of wilfulness into the offence. To commit an offence now, the obstructor will because of the warning in almost all circumstances, know that they are breaking the law if they continue to act as they are. This would not be true if the offender mistakenly thought that the original warning no longer applied, however, this mistaken belief may help show the reasonableness of the obstructor's actions. This situation may occur if the warnings were a while apart or if the obstructor moved to a different area.

It is unlikely that a general warning given to a group of demonstraters will be of effect at a subsequent obstruction because of the evidential problem of proving that the accused was part of the original obstruction and has thus been previously warned. In practise warnings will probably have to be personal so that a constable if required to, can testify that he or she did warn the accused at the time of the original obstruction and that the accused did subsequently reoffend.

This reform may work to a small degree to reduce harrassment by the Police because they can no longer just approach an obstructer and set in motion a summary proceeding. It is important to realise that just because a constable asks you to move along or warns you that you are obstructing isn't actual proof that your action is unreasonable.[109] The unreasonableness must be proven on the facts adduced at the trial. The constable's view that the obstruction was unreasonable is not sufficient although his or her views may carry more authority in Court than the view of others.

Problems with section 22 may be in the interpretation and application of section 22(1)(b). This deals with offenders who after being warned to desist from obstructing do so, but reobstruct later.

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The first matter to be considered is what constitutes the "same vicinity". Submissions to the Bill questioned the scope of "vicinity" but none suggested any interpretation nor severely criticised the use of the word.[110] The writer has more difficulty in deciding what the scope of "vicinity" is. "Vicinity" is defined in the Shorter Oxford Dictionary as:[111]

> Neighbourhood .. a wider lattitude than proximity or contiguity and may embrace a more extended space than that lying contiguous to the place in question.

By this definition and ordinary usage one would consider opposite sides of The Square as in the same vicinity and suburbs in the city as probably not, but would one consider places half a mile apart in the same vicinity? There has been little judicial interpretation of "vicinity". So, as with so much of section 22, this is a question which the court will end up deciding, however the writer would suggest that if one is guided by the dictionary definition the word is capable of broad and extended application.

The importation of another "reasonableness" test, into section 22(1)(b) gives the Court a wide discretion as to when to deem the original warning to be of effect. All the 'reasonableness' factors considered earlier could be relevant,[112] with the most important ones being the time between obstructions, how specific and personal the original warning was and whether the obstructor has moved since the original warning and if so how far they have moved.

A further problem with section 22 arises as a result of a drafting error which seems to have arisen as a result of submissions made by the VUW Law Faculty,[113] who suggested that "footpath" in the Bill be replaced with "public thoroughfare". "Footpath" was in the end replaced with "public way" wherever it appeared except in section 22(1)(b). This is most clearly an error as it is now an offence to:

Section 22(1) ... Obstruct any public way and having been warned by a constable to desist, -

(b) Does desist from that obstruction but subsequently obstructs that footpath, or some other footpath in the same vicinity ...

On one potential reading this means that an offence is committed if the accused obstructs a public way, desists after being warned, but subsequently reobstructs on any public way which is a footpath. But Parliament clearly intended a reobstruction of any "public way" to be an offence (subject to the latter half of paragraph (b)) not just a reobstruction on a "footpath".

Whether the courts can apply the section in the manner intended by Parliament will depend on whether the section as it presently is can be sensibly read and applied, if it can the courts are bound to do so, however if the section is ambiguous and contradictory then by ordinary canons of statutory interpretation the courts will take the fair and sensible interpretation[114] which, in this case, will allow it to read "that footpath, or some other footpath" as "that public way or some other public way."

The writer believes that the section as it is presently worded is ambiguous and contradictory. This conclusion is reached the following way; When paragraph (b) refers to "that footpath" this implies that a footpath has been previously mentioned or contemplated.[115] No footpath has been previously mentioned in subsection 1, but "footpath" is contemplated as being included in "any public way", this is obvious from the definition of public way in subsection 2. Thus the reference to "that footpath" concerns the footpath generaly contemplated as being included in "public way". So far then it would seem that section 22 has a sensible meaning except that it is much more limited than intended.

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However, paragraph (b) does not just refer to "that footpath" but it refers to "that footpath or some other footpath". The effect of adding"some other footpath" is to make "that footpath" a reference to a specifically obstructed footpath. However there is no prior mention or contemplation of this specifically obstructed footpath only a general reference to "any public way". The end result is that "that footpath" refers to a prior mentioned or contemplated specified footpath which is in fact not previously mentioned or contemplated. Only "footpaths" in general are previously contemplated.

A reference to a previously referred to thing which is in fact not previously referred to is nonsensical and ambiguous. Thus to make sense of section 22(1)(b) "that footpath or some other footpath" must be read as "that public way or some other public way". If this is done then section 22(1)(b) will achieve what it was intended to achieve and be capable of sensible interpretation.

Of course the most desirable thing would be for Parliament to make the suitable amendment to section 22(1)(b) to completely avoid these difficulties.

C. <u>Summary of the Effects of Section 22</u>

Overall the writer would summarise the most salient features of section 22 and the most likely interpretations as follows.

Firstly, the test of obstruction from <u>Stewart</u> will be fairly closely followed, that is whether there is an obstruction is a question of fact; is there appreciably less space for passing and repassing?

Secondly, no actual obstruction need be proven by the prosecution.

Thirdly, there is an onus on the prosecution to prove that the obstruction was "unreasonable". The defendant may have an evidential burden to raise particular factors for consideration.

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Fourthly, no offence is committed until the defendant has been warned to desist and failed to do so, or done so, but reobstructed again in the vicinity in circumstances in which it is reasonable for the original warning to apply to the new obstruction as well as the original one.

Fifthly, "vicinity" will be interpreted fairly broadly so warnings will be of effect in more than just the immediate area.

Sixthly, section 22(1)(b) will be interpreted to make it an offence to reobstruct on any "public way" after having been warned to desist and not just reobstructions on "footpaths".

Seventhly, both static and moving demonstrations are neither definitely legal nor illegal. Both are legal as long as they don't "unreasonably impede normal passage along the way".

Eighthly, lawful authority or excuse is no longer a sufficient defence. It is only relevant as to assessing the reasonableness or otherwise of the defendants acts and, finally.

Ninthly, one must note that the scope of section 22 will depend to a very large extent on the Court. Apart from the court having the option as to how it will interprete "obstruct", "vicinity" and other terms in the section,it has the task of considering when it is "reasonable" to carry over the effect of a warning to a reobstruction and the task of considering what makes the impedance "reasonable or unreasonable."

The writer has suggested many factors which the Court may consider relevant in determining these considerations, but as there is no statutory guide which says what factors are to be considered when ascertaining the reasonableness or otherwise of the defendants acts it is not possible to know what weight will be attached to what factors. The writer would suggest the three main factors would be, what the alleged obstructor is using the public place for, how much actual obstruction is being caused and the state of mind or intent

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of the alleged obstructor. However it is important to remember that as determining reasonableness is solely a question of fact the test will vary in the particular circumstances of each case.

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VI. CONCLUSION

The criminal law is in the business of deciding what conduct should be legal and what conduct should be illegal. Sometimes it is easy to know whether conduct should be illegal or not but sometimes it is very difficult. For instance very few people would want to sanction someone for standing talking to a friend on the footpath but most people would want to sanction someone for lying down on the street disrupting traffic. So the problem is to decide where in the spectrum of behaviour, which causes actual or potential obstruction, should we draw the line between legal and illegal conduct?

Where each of us would draw the line must depend on our views of what the role of the criminal law is. However, just because individuals views of this role, and thus views on the need for, or aptness of, a particular law may reasonably differ, it is no reason for not questioning the reasons for and scope of the present law.

Why then do we need a law criminalising obstructions of the highway?

Mr. S. Barnett the Controller-General in 1958 may have said it is needed to stop the threat of more serious offences occuring. The writer however, would prefer the justifications of the 1974 Statutes Revision Committee who said, only conduct which may cause significant harm to society or the individual citizen in his or her lawful acts or conduct contrary to the maintenance of law and order, should be criminalised.[116]

If these are the reasons for having a law criminalising obstructions of the highway, then surely in practise the law should only criminalise those acts that do cause significant harm to society or the individual, lawlessness or disorder.

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However, it is the writer's belief that section 22 goes further than this as, did section 3(eee) and possibly section 4(1)(p). On the writer's interpretation of section 22 acts which are lawful and which cause no actual obstruction are potentially crimes, if thought by the court to be unreasonable in the circumstances, the writer would suggest that someone standing with a placard on a pavement or sitting on the pavement occupying one quarter of the available space or a group of one thousand people assembled in an inner city park don't cause significant harm to society, disorder or lawlessness, yet each one are potentially crimes. The consequence is that the citizen's right to assemble, demonstrate or air their grievances in a public but non violent way or to use the highway for any purpose even for passing or repassing are potentially restricted.

The fact that the Police usually don't attempt to stop such behaviour or that the Courts probably wouldn't find them unreasonable anyway is insufficient justification for the present state of the law. The citizen is entitled to know with much more certainty whether he or she is acting illegally or not and further the citizen should be entitled to act in whatever "eccentric immoral or distasteful"[117] way they close without fear of sanction as long as it doesn't cause significant harm to society, lawlessness or disorder.

Unfortunately section 22 does not provide that protection.

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APPENDIX

Statistical information on how many people were sanctioned under obstruction of the highway provisions before 1978 is sparse. Police statistics recorded obstruction offences separately until 1918, but from 1918 - 1977 obstruction offences were noted for statistical purposes under either "vagrancy", "idle and disorderly" or "breach of the peace". Since 1978 statistics have been available under the heading "Obstruct Public Place".

	Total Offences Reported*	Prosecuted	No Offence	Caution or Warning
1978	77	69	6	6
1979	160	143	7	6
1980	61	48	7	7
1981	571	544	10	17

* The discrepancies in totals is due to some offences being carried over from previous years.

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FOOTNOTES

1. From the long title to the Summary Offences Act 1981.

2. E.g. see G. Palmer Unbridled Power? Oxford University Press, Wellington, 1979, especially chapter 10.

3. New Zealand Parliamentary debates Vol. 437, 1981: 418.

4. New Zealand Parliamentary debates Vol. 382, 1973: 536.

5. New Zealand Parliament Statutes Revision Committee Submissions on the Police Offences Act 1927.

6. See part IV A for a discussion of the submissions.

7. New Zealand Parliament Statutes Revision Committee Submissions on the Summary Offences Bill 1981.

8. See part IV B for a discussion of the submissions.

9. See Brownlie Law of Public Order and National Security (2 ed. Butterworths, London, 1981) especially chapter 3 for a general discussion of the Common Law, United Kingdom statutes and case law in the area.

10. Stephen Digest (9th ed.) article 235.

11. Smith and Hogan Criminal Law (4th ed) p 764.

12. Harrison v. Duke of Rutland 1893 1 Q.B. 142, 152.

13. Infra n. 29.

14. Ibid. 89

15. This is still the prevailing view in England. Lord Scarman when discussing demonstrations on the public highway in his report on The Red Lion Square Disorders of June 15, 1974 (1975, Cmnd.5919) paras 122, 123 said that:

"English law recognises as paramount the right of passage : a demonstration which obstructs passage along the highway is unlawful. The paramount right of passage is, however, subject to the reasonable use of the highway by others. A procession, therefore, which allows room for others to go on their way is lawful; but, it is open to question whether a public meeting held on a highway could ever be lawful for it is not in any way incidental to the exercise of the right of passage .... I think the priority that the law gives to the right of passage is sound."

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16. Stephens, <u>A History of the Criminal Laws of England</u> MacMillan, London, 1883 Vol.III p.269.

17. Ibid. 271.

18. Support for these views comes from examining the context of the statutes in which the various obstruction provisions appear; see especially the Highways Act, 1835.

19. 2 + 3 Vic. c.47.

20. 5 + 6 Will c.50 see also S.28 Police Clauses Act 1847 10 + 11 Vic c.89 for a similar statutory provision.

21. Supra n. 19.

22. 21 + 22 Vic. No.2.

23. Vagrant Act, 1866 30 Vic. No.10 plus amendments.

24. The Metropolitan Police Act seems to have been a major influence on the early New Zealand statutes.

25. The Bill passed it's first and second readings, see New Zealand Parliamentary debates Vol.2 1868:63 but was discharged while being considered at Committee, see New Zealand Parliamentary debates Vol.4, 1868; 346.

26. (1906) 26 NZLR 169.

27. Ibid. 173.

28. Ibid. 174.

29. [1903] 2 I.R. 82.

30. 14 + 15 Vic. c. 92.

31. Supra n. 29, 87.

32. (1938) 1 M.C.D. 52.

33. A case decided in England on very similar facts was <u>Eaton</u> v. <u>Cobb</u> [1950] 1 AllE.R. 1016. The relevant statutory provision was S.72 Highway Act, 1835. The Court reached the same result as in <u>Elwood</u> by emphasising that the defendants had to "wilfully obstruct" the free passage of the highway and that this was not shown on the facts.

34. Supra n. 26.

35. Supra n. 32, 53.

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36. (1925) 19 M.C.R. 106.

37. (1945) 4 M.C.D. 362.

38. [1934] V.L.R. 246. In this case the defendants employee spoke into a microphone inside a shop which was connected to a loudspeaker outside the shop. This act caused a crowd to gather which obstructed the footpath. However the shopowner escaped liability when prosecuted under S.5(14) of the Police Offences Act 1928 (Vic.) because the Court said the act complained of must itself be obstructive. Speaking into a microphone was not an obstructive act.

39. A very similar case arose in England shortly after. Adams Bruce Ltd, it was Dwyer v. Mansfield [1946] 2 All E.R. 247. The Court dismissed an action for nuisance against a shopkeeper which had been brought because of the obstruction caused on the pavement by people queuing to buy potatoes. Atkinson J. said on p.251:

> I think the plaintiffs have failed to establish a nuisance. They have certainly failed to establish that the defendant has done anything improper, anything illegal, anything unreasonable, anything which he could have avoided. He carried on a normal business in the only way in which he could;

On the other hand the shopkeeper in Fabbri v. Morris [1947] 1 All E.R. 315 was found guilty of causing an obstruction contrary to S.72 of the Highways Act because she caused the obstruction by selling ice creams through a window. The Court found that if she had opened her shop door no obstruction would have been caused but she refused to do this.

40. Supra n. 26.

41. (1940) 1 M.C.D. 396.

42. Ibid. 397.

43. Supra n. 32.

44. Supra n. 37.

45. Supra n. 36.

46. Supra n. 32

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47. Supra n. 41.

48. Supra n. 26.

49. See Dunn v. Holt (1904) L.J.K.B. 341. This case concerned a vacuum cleaning machine which was parked on the road for seven hours. The Court in applying S.54(6) of the Metropolitan Police Act 1839 said after finding that the machine only occupied 2 feet 8 inches of the 30 foot width of road and that no one had actually been obstructed that "whether a conviction for wilful obstruction of a highway is justified must be a matter of degree and locality." Thus the defendant was acquitted. See also the early Common Law decision of Jones (1812) 3 Camp 230.

50. Supra n. 26 ,172.

51. Report on the Police Force of New Zealand for the Year Ended 31 March 1958. New Zealand Parliament House of Representatives. Appendix to the journals, Vol.3, 1958, H.16, 22.

52. Ibid. 23.

53. Idem.

54. (1959) 9 M.C.D. 439.

55. Idem.

56. Supra. n. 26.

57. Supra. n. 37

58. Supra n. 41.

59. (1958) 9 M.C.D. 496.

60. Supra n. 54.

61. Supra n. 59, 408.

62. Supra n. 54.

63. Ibid. 410.

64. [1961] N.Z.L.R. 689.

65. (1909) 7 C.L.R. 133. This case involved the interpretation of S.6 Police Offences Act 1890 (Vic.) The

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defendant was one of two musicians who played in the street to a crowd of about eighty people one summer evening. The Magistrate found that the use of the street was not unreasonable and no one was actually interfered with but that because the defendant's act was likely to cause an obstruction he must be convicted. The decision was upheld on appeal.

66. Ibid,168.

67. Supra n. 59.

68. Supra n. 64, 682.

69. Idem.

70. Idem.

71. Ibid.683.

72. New Zealand Parliamentary debates, Vol.441, 1981 : 4001.

73. Idem.

74. This was the belief expressed by Mr. R. Pittans, Police Statistician and confirmed by R. Loo, a senior Police Officer.

75. It is probable that Police Cadets are trained to use S.3(eee).

76. Supra n. 64.

77. [1965] 1 All E.R.

78. Supra n. 26.

79. See earlier discussion in part II.

80. Supra n. 77.

81. The earlier provision of the Highways Act 1835, S.72 is still in part in force.

82. Supra n. 77, 80.

83. McFarlane Laboratories Ltd v. Department of Health [1978] 1 N.Z.L.R. 861, 881.

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84. Supra n. 64.

85. Supra n. 77, 80.

86. Supra n. 5, 32.

87. S. 316 Local Government Act 1974 vests property of the Public Streets in the local authority and s.684 gives the local authority power to make bylaws concerning the use of and conduct on the public streets.

88. Section 12, Wellington City Bylaw 1980/2 (Roads and Public Places) outlines when the Town Clerks permission is needed to hold a procession, assembly, meeting or demonstration etc., in Wellington City. Essentially the Town Clerk's permission is needed to hold any sort of gathering at all. In deciding whether to grant permission for the gathering to occur the Town Clerk is to have regard to the effect on pedestrian and vehicular traffic and whether undue disorder or danger to life or property may be caused. The Wellington Town Clerk however informed the writer that permission was sought for only about half the gatherings that occurred. Permission was almost always given and no legal action had been taken in recent times against those who gathered without permission.

89. Supra n. 29, 90.

90. Mention should be made of the scope of the usual local authority bylaws. S.5(31) Wellington City Bylaw 1980/2 makes it an offence to:

> Wilfully or negligently obstruct any road or causes or permits any danger or inconvenience to be caused to any person using the road; in any manner not hereinbefore described.

However, the Wellington Town Clerk informed the writer that these provisions are very rarely used, primarily because the Wellington City Council does not have the manpower and because the Police do a sufficient job under the general criminal law provisions anyway.

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91. Supra n. 64.

92. Report on the Police Offences Act 1927. New Zealand. Parliament House of Representatives. Appendix to the journals Vol.4 1974, I5A.

93. Supra n. 4, 34 these principles have been paraphrased by the writer from those outlined on p.1.

94. Supra n.5, 32.

95. Supra n.5, 138.

96. Supra n.7

97. Supra n. 7, 34, these principles have been paraphrased by the writer from those outlined in the submission.

98. Supra n. 64.

99. Supra n.7, 17, a combined submission was received from T. Arnold, N. Cameron and D. Sleek of the Law Faculty, Victoria University and W. Young, Direction of the Institute of Criminology, Victoria University.

100. Supra. n.7, 15.

101. Supra. n.7, 11. Submission was prepared by C. Tennent R. Lack and S. Noble.

102. 1974 2 N.S.W.L.R. 542 (N.S.W. Court of Criminal Appeal).

103. This clause was suggested as a reform by the V.U.W. Law Faculty.

104. Supra part III D

105. Supra n.77, 80.

106. Supra n.64.

107. Supra part.

108. Supra n.9, 78.

109. Supra n.29, 88 Lord O'Brien L.C.J. says:

> ... as to the warning of the police, no doubt prudent and well disposed citizens will promptly accede to the suggestions of the police, and will be slow indeed to incur the reproach which would naturally arise from disregarding the advice of those who are charged with the preservation of public order, but, having

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regard to the charge in this case, the warning of the Police could not merely of itself render the user of the highway unreasonable.

110. See especially submissions from the New Zealand Federation of Labour supra n.7, 23

111. 6th edition Oxford University Press, Oxford, 1976, 1296.

112. Supra part V B

113. Supra n.7, 17.

114. See Halsbury's Laws of England (3 ed) Vol.36, para.584.

115. Supra n.111, 1198. "That" is defined as:

> The person or thing pointed to or drawn attention to or observed by the speaker at the time or already named or understood or in question or familiar.

116. From the first and second principles set out as a guide to reform by the 1974 Statutes Revision Committee, supra n.92.

117. From the third principle set out as a guide to reform by the 1974 Statutes Revision Committee, supra n.92.

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