

Chapter One

WHAT ARE SPECIAL REASONS?

Licence endorsements

Generally speaking, when a person is convicted of a driving offence in the United Kingdom, that person will either be disqualified from driving for period of time or will have his or her driving licence endorsed with penalty points.

In some cases, such as speeding, the court has a choice of penalties within certain parameters; in others, such as drink-driving and dangerous driving, Parliament insists upon mandatory disqualification except where “Special Reasons” exist. Not many solicitors still confuse the two related but distinct concepts of Exceptional Hardship and Special Reasons but it is surprising how often I still hear experienced lawyers saying they are in court for a Special Reasons Proof when in fact their proof has nothing to do with the offence and everything to do with Exceptional Hardship.

Special Reasons pertain exclusively to situations where the accused has been found or has pled guilty and now faces disqualification unless he can persuade the court that the circumstances of the offence are such that it would be unjust to impose a ban. Remember that you may establish Special Reasons and still be banned but for a shorter period than the mandatory 12 month period or more likely have points endorsed from 3 to 11 and that may take you into the land of “Totting Up”.

Always be prepared for when you lose your Special Reasons Proof to be moving the court to set an Exceptional Hardship Proof if you consider cogent arguments for same exist.

Special reasons and exceptional hardship are, therefore, both essentially means of mitigating the effect of a driving offence but that is as far as the similarities go. Perhaps the most effective way to describe “Special Reasons”, therefore, is in the context of how they differ from “Exceptional Hardship”.

Difference 1 - Special reasons can apply in any case

Exceptional hardship can only be argued in totting-up cases. Totting up is where the driver if convicted - will have accumulated 12 points on his licence within a three-year period (the relevant date being the date of incident). It is not competent, therefore, to request an exceptional hardship proof when faced with a mandatory driving ban, as in drink-driving and dangerous driving cases. Nor can it be argued in cases where the person will not face a potential ban under totting-up procedures (for example, in a speeding case where the person previously had a clean licence).

As shall be illustrated in chapters 2 and 3, it is competent to argue that special reasons can apply in any case irrespective of the status of the accused's driving licence and irrespective of the penalty for the offence. Thus a person can argue that there are special reasons for driving in excess of the speed limit, driving without insurance, or driving while using a mobile phone, all offences which carry the penalty of discretionary disqualification or penalty points. Similarly, special reasons may apply to offences which would otherwise

involve mandatory disqualification, such as driving while over the legal limit for alcohol and dangerous driving

In other words, Special Reasons consist of mitigating factors which do not amount to a defence in law.

Difference 2 – “Special Reasons” apply to the incident in question

When trying to persuade the court that there are special reasons for non-endorsement, the individual circumstances of the person are irrelevant (*Adair v Munn*, 1940 JC 69) Thus it is irrelevant, for example, that the person relies upon his driving licence for his employment. The special reason must be connected to the incident. Thus there must be a particular reason (such as a medical emergency) which provides a justification for the illegal actions of the person in question.

Exceptional hardship, on the other hand, applies solely to the personal circumstances of the person in question and other persons who would be affected by the loss of the person's licence. The particular circumstances of the incident are irrelevant to whether there is exceptional hardship.

Difference 3 - Endorsement

If the court is persuaded that exceptional hardship is applicable, the person's licence is nevertheless endorsed with penalty points. If special reasons are applicable, however, the person's licence may not be endorsed with penalty points.

Special Reasons have produced a considerable volume of case law. Much of it is straight forward although it can be difficult to categorise and keep on top of. I have put together a list (Far from exhaustive) to help you build your own database of relevant cases for future reference. I will try to have active links to cases where possible so that the ebook can be referred too by phone, tablet, or PC when researching and preparing for your Proofs.

Chapter Two

DEFINING SPECIAL REASONS

Parliamentary Legislation

Notwithstanding issues of devolution, possible independence and the abandonment of the European Convention on Human Rights, the supreme source of law in Scotland remains the United Kingdom Parliament at Westminster. Who knows exactly where it will be after the Brexit but for now we look to Parliament for our road traffic law.



The law regarding special reasons derives from an Act of the Westminster Parliament, namely the Road Traffic Offenders Act 1988, sections 34(1) and 44(1) and (2).

Section 34(1) of the 88 Act provides:

34 Disqualification for certain offences.

(1) Where a person is convicted of an offence involving obligatory disqualification, the court must order him to be disqualified for such period not less than twelve months as the court thinks fit unless the court for special reasons thinks fit to order him to be disqualified for a shorter period or not to order him to be disqualified.

Section 44(1) and (2) provide:

44 Endorsement of licences.

(1) Where a person is convicted of an offence involving obligatory endorsement, the court must order there to be endorsed on the counterpart of any licence held by him, particulars of the conviction and also—

(a) if the court orders him to be disqualified, Particulars of the disqualification,

(b)if the court does not order him to be disqualified —

(i) particulars of the offence, including the date when it was committed, and
(ii) the penalty points to be attributed to the offence.

(2) Where the court does not order the person convicted to be disqualified, it need not make an order under subsection (1) above if for special reasons it thinks fit not to do so.

The effect of section 34 is that, in cases involving mandatory disqualification, such as drink-driving, the court can choose to impose penalty points in place of disqualification if persuaded that there are special reasons for so doing. For example, in the case of *McLeod v McDougall* 1989 SLT 151, the accused was convicted of drink-driving and disqualified for twelve months. The High Court of

Justiciary found that special reasons were applicable, quashed the disqualification and ordered that the accused's licence to be endorsed with four penalty points in substitution.

Read in conjunction with section 44, however, one view is that the court does not *have* to impose penalty points in such cases and that Parliament has therefore made clear that obligatory disqualification, discretionary disqualification and penalty points for driving offences can all be avoided if special reasons can be established.

This interpretation of the legislation is now unlikely to find support in view of the decision of the Sheriff Appeal Court in *Watt v PF Aberdeen* (see below). In that case, a disqualification for dangerous driving was quashed in its entirety but, *obiter*, the court stated that “senior counsel reminded us that the court would then *be obliged* (emphasis added) to endorse the appellant’s licence with anything between 3 and 11 points”.

My own experience in Scottish Justice of the Peace courts has often been that when Special Reasons are found to be established the court then do not impose any penalty points. Sheriffs tend not to miss a trick and make sure that your client is punished by imposition of points or a shorter period of ban.

The legislation does not, define what constitutes special reasons or in what circumstances they may be established. That task is left to the courts. Therefore case law is all important. Because there is so much, it can be tempting to cherry pick parts of cases that support your argument whilst ignoring more of the general content. Well, I confess that it is for me, but should you do so then expect to suffer the embarrassment of a clued up Sheriff shooting you down in flames

as he highlights what you have not highlighted. The answer is keep searching for a case in point it will ultimately make your life easier at time of proof.

The role of the courts



The leading case regarding the definition of special reasons is *Adair v Munn* 1940 JC 69. In this case, special reasons were defined as:

1. Mitigating or extenuating circumstances relating to the commission of the offence;
2. Which do not amount to a legal defence of the charge;
3. But are nevertheless circumstances which the Court ought properly, to take into account.

Put simply, then, Special Reasons are found in cases where someone has technically broken the law but, in all the circumstances, it would be wrong or unjust to punish the person for so doing. In the most recent case on special reasons (*Watt v PF Aberdeen – supra*), the Sheriff Appeal Court construed this as a ‘but for’ test – i.e. but for the special circumstances, the offence would not have been committed or, as the court put it, “the extenuating circumstances generated by the emergency were.... unquestionably connected to the commission of the offence”.

Of course, not only the particular interests of the driver - or those people the driver may be trying to help - should be considered.

The Courts, in a series of cases in the 1940s and 1950s, stressed that - no matter how understandable the driver's actions were - the cardinal concern should be public safety.

The need to protect the public from dangerous situations will be considered alongside the reason for the driver's actions.

The court is obliged to take into account not only actual dangers but also potential dangers (*Holden v McPhail* 1986 SCCR 486) **It is the duty of the court, therefore, to balance the concern for public safety with the reasons for the driver's actions.** For a more potentially ‘defence-friendly’ interpretation of the public safety element of the test, however, it is worth reading the judgement and reasoning of the Sheriff in *Normand v Logue* 1996 SCCR 797, on which I say more below.

Examples of Special Reasons

There is no set 'list' of circumstances which may amount to 'Special Reasons'. Further, certain categories of Special Reasons will only apply to a particular type of crime and we shall explore this in Chapter 3 below. However, the following are the most common Special Reasons which can be applied broadly irrespective of which particular road traffic law has been broken:

Medical emergency

Where the accused person is driving in response to a medical emergency, special reasons may apply. A situation has arisen where the driver would not have driven if it had not been for a perceived medical emergency. Thus, in *Watson v Hamilton* 1988 SLT 316, a case relating to drink driving, a man drove a pregnant woman to hospital while over the legal limit. Because this was a sudden medical emergency, special reasons were held to exist. Similarly, in *Graham v Annan* 1974 SLT 28, a disqualified driver had to drive when his wife (who was 7 months pregnant) was taken ill at the wheel.



Other emergency

There are myriad other examples of cases where an emergency situation has led to a finding of special reasons. For example, In *Riddle v McNeil* 1983 SCCR 26, special reasons were found to exist when a drink-driver extricated a crashed car from a snowdrift to prevent further obstruction to traffic. Similarly, in *Orrtewell v Allan*

1984 SCCR 208, special reasons were found when a drink-driver moved a stalled car from the main road into a side street in the interests of safety.

In the relatively recent English case of *DPP v Heathcote* [2011] EWHC 2536 (Admin), a driver was over the legal limit when his quad bike was stolen. He decided to drive to try to retrieve the bike. After driving for 10 minutes, he saw a group of police officers, stopped and reported the theft. The Justices found that special reasons applied as the situation was an emergency and a crime was in progress. The Crown's appeal was, however, allowed. The respondent had had a considerable amount to drink, the danger to other road users was obvious, he had driven some distance and, crucially, "the threat was theft of valuable property not risk to life and limb".

A similar decision was reached in the earlier English case of *DPP v Harrison* [2007] EWHC 556 (Admin). The defendant had been subject to anti-social behaviour from a group of youths for many months. On this particular occasion they had smashed his neighbour's window and he had called the police. Subsequent to this they smashed his patio doors and ran off. He was over the limit but decided to follow them and identify them. He drove 400 yards and caught them up. The police arrived and the youths scattered. The Justices found that the car had been driven at a normal pace and there were no other vehicles present. In view of the reason for driving they found that special reasons applied. On Crown appeal, however, the decision was reversed. The distance driven was significant; he had ignored the advice of the police to remain at home; the driving was on a main arterial road signifying potential risk to other road users and there were other options open to the defendant. Although not

explicitly stated, it seems again that there is a difference between damage to valuable property and physical safety.

A physical threat was evident in *Ferguson v McPherson* 2011 SCCR 60. The accused had been visiting her brother and had consumed alcohol. Her brother became drunk and aggressive and threatened her, before physically throwing her out of the house in her pyjamas. She then drove 25 metres into another street and telephoned for assistance. The sheriff accepted she was at risk while within the house but that there was no subsequent need to drive. In holding that special reasons applied, the High Court held that it could be reasonably perceived that she remained in jeopardy if she had simply sat in her car outside the house and she drove the “very short distance that we have mentioned and stopped the car and thereafter endeavoured to obtain assistance”.

In all cases of emergency, whether medical or otherwise, it should be noted that the complete defence of necessity may be available (*Moss v Howdle* 1997 JC 123). If successful, this - unlike special reasons which will prevent disqualification and/or penalty points but not conviction - will mean that the accused person is acquitted.

However this defence is only available in the most extreme situations - i.e. immediate danger of death or great bodily harm to the accused himself or another.

Moreover, any reasonable alternative **MUST** be taken (*Dawson v Dickson* 1999 JC 315). As we shall see, these tests are significantly higher than those for special reasons in response to an emergency. Accordingly it is not unusual for a defence of necessity to fail but for special reasons to be established (including in an English case

involving one of the most famous men in the country - see chapter 3 below).

One might think, “I will run the defence of necessity and if that fails the balance of probability test, I can then submit that I have at least reached that threshold for Special Reasons to be established”. This is a logical and worthy approach but human nature being what it is you may find it difficult to then persuade your Sheriff that you have gone as far as is required to establish that there is no threat to public safety and that you have indeed established Special Reasons. Again there is no set rule but I often find it can assist a case tactically to pin one’s colours to the mast and make out the strongest case possible for Special Reasons. You obviously have a duty to your client regarding preparing and presenting his defence and if you consider that “necessity”, “duress” is something that exists then you may feel duty bound to lead the defence. I would suggest that if you intend leading a defence of necessity/duress/coercion you should intimate at the outset of the case what your client’s position is and that if you fail to make out this defence you will be making submissions regarding Special Reasons based on the same facts and circumstances. It then keeps the Sheriff alive to the fact that this case isn’t over just because he/she has ruled on the defence.

Medical defences

In very special circumstances, a medical condition may amount to a special reason. Thus in *Finnegan v Heywood* 2000 SCCR 460, a person who drove in a state of (self-induced) parasomnia was found to have special reasons (had the parasomnia not been self-induced, a special defence of automatism may have been applicable). However, each case is fact-sensitive. In the English case of *Davies v CPS*

Bradford [2009] EWHC 1172 (Admin) a driver drove at 37mph in 30mph zone. He did so consciously as he had started to suffer a hypoglycaemic attack and wanted to reach a safe point to take glucose. On appeal it was held that, as he had consciously speeded as opposed to doing so inadvertently in his anxiety, special reasons did not apply. It has to be said that this is a strange decision as it seems that the appellant had driven in response to an accepted emergency and had ceased to drive as soon as he reached a safe place to pull over.

Inadvertence



Generally speaking, inadvertence will NOT amount to Special Reasons. Thus, if a driver is mistakenly thinks a higher speed limit is in place and subsequently breaks the speed limit, this will not amount to special reasons. Similarly, if a driver does not think he is over the drink-drive limit (having only had a couple of drinks), this will not amount to Special Reasons (Normand v Cameron 1992 SCCR 390; cf the dicta in Tedford v Dyer 2006 SCCR 285 below.

As we shall see below, however, inadvertence CAN amount to Special Reasons in cases of driving otherwise in accordance with a licence or driving while uninsured.

Laced Drinks

This special reason applies exclusively in the context of drink driving and is considered below.

Shortness of distance driven

Again this special reason applies mainly in the context of drink driving and is considered below.

Driving when instructed by the police

Where the accused can demonstrate that he was only driving under police instruction, special reasons should apply (*Farrell v Moir* 1974 SLT (Sh Ct) 89. However this must be an instruction, not a mere request (*Hutchison v Spiers* 2004 SCCR 405).

Public interest

In very special circumstances, the public interest in the accused person retaining his licence may constitute a special reason for not disqualifying (*Murray v MacMillan* 1942 JC 53, doctor carrying out essential tasks during wartime). The High Court, in numerous cases since, has made clear that this was a very exceptional case and unlikely to be followed. Of course, if other people rely upon the accused's being able to drive (such as a doctor's patients) then this will be of relevance in determining whether disqualification would result in exceptional hardship. Thus - in totting-up cases at least - the public interest may well be a relevant consideration for the court.

Limits of Special Reasons

Special Reasons are most commonly argued in 'emergency' situations and the courts have made clear that, for Special Reasons to exist in this type of situation, certain criteria must be fulfilled.

The test is not as strict as it is in the complete legal defence of necessity (*Hamilton v Neizer* 1993 SCCR 153) but it remains a high test. It is worth reminding your Sheriff that you are not attempting to establish the defence at this stage as you accept that to do so must meet a very high test but at this stage you merely wish to mitigate the offence by establishing Special Reasons and thereby granting the court latitude with sentence whereby penalty points or a shorter ban can be imposed should the court consider this a just outcome.

In *Skeen v Irvine* 1980 SCCR 259 it was held that special reasons must involve some act of emergency which compels the accused to drive in spite of his condition, because there was no other way of achieving some wholly necessary objective. From this, it can be taken that:

- First, there must be a genuine, sudden, unexpected emergency. i.e If not for the emergency the person would not have driven.
- Second, consideration should be given to whether reasonable alternatives were available to the accused person.

However, the cases ALSO make clear that, in considering reasonable alternatives, the court should not place too high a burden upon the accused person.

The driver is expected to think about his situation but latitude must be given for stressful circumstances. For example, in *Tedford v Dyer* 2006 SCCR 285, a case involving drink driving in response to a medical emergency, it was held at paragraph 13:

"We consider that some account must always be taken of the fact that, when faced with an anxious and unexpected situation, people may sometimes react, with the best intentions at the time, in a manner which, viewed in retrospect, and in the cold light of day, might be considered to have been unwise "

The limits or otherwise of special reasons, in emergency situations, is further discussed in the context of specific cases in chapter 3.

Chapter Three

SPECIAL REASONS IN PRACTICE

You may sometimes hear practitioners referring to Special Reasons as a defence. As we have demonstrated in the previous chapter, there are various grounds which may constitute grounds for Special Reasons. In this context, the word 'defence' should be used with caution as, strictly speaking, special reasons are not a defence but rather a form of mitigation and, in fact, a situation cannot be BOTH a defence and a special reason. It is one or the other.

Thus, for example, the only statutory defence to driving while using a mobile telephone is that the accused person was making a 999 call in response to a genuine emergency and where no other alternative than to make the call existed (Road Vehicles (Construction and Use) Regulations 1986, Regulation 110 and the Road Traffic Act, Section 41D(b)).

At common law, the defence of necessity may be available but only in very limited circumstances (*Moss v Howdle* 1997 JC 123). If Special Reasons are applicable to the case, the accused person will still be convicted, of the offence. The crucial difference is that the convicted person will avoid either disqualification or penalty points as a consequence of the conviction.

The various grounds which may mean that special reasons are applicable can apply to most road traffic offences. The most common are as follows:

- Dangerous or careless driving
- Speeding
- Driving while using a mobile telephone
- Drink-driving
- Driving without insurance
- Driving otherwise than in accordance with a licence/while disqualified

This chapter shall look at Special Reasons in practice, in the context of these particular scenarios. While reference is made to reported decisions, we also refer where appropriate to certain cases from our firm's case history.

DANGEROUS DRIVING, CARELESS DRIVING, SPEEDING



The same factors will determine whether special reasons will apply to cases where drivers either break the speed limit, drive dangerously or - as is often the case - do both. In other words, if the driver can prove that he was acting in response to a genuine medical, or other

emergency, special reasons should apply if there was no reasonable alternative other than to drive in the manner libelled.

Special reasons in respect of dangerous driving arose in the only case of this type currently decided by the Sheriff Appeal Court. In *Watt v PF Aberdeen* [2016] SAC (Crim) 16, an on-duty police officer pleaded Guilty to dangerous driving but argued that special reasons applied. She was responding to a call from other officers seeking emergency assistance and drove through a red light. The court concluded that what “properly fell to be considered by the court were the appellant’s actual conduct and the circumstances in which the conduct took place”. In holding that special reasons had been established, the key issue was that “the extenuating circumstances generated by the emergency were.... unquestionably connected to the commission of the offence”.

This case was relatively similar in its facts to *Husband v Russell* 1997 SCCR 592. A fireman had pleaded Guilty to careless driving and argued that special reasons applied. He was attending an emergency and attempted to overtake two vehicles and struck one of them when attempting to move back into lane. On appeal, the High Court heard that the emergency journey lay at the heart of what had occurred. Together with the relatively minor level of culpability, special reasons were applicable and the driver was granted an absolute discharge.

A very famous example of a Special Reasons case is an English case involving the footballer David Beckham. Mr Beckham's case was handled by the famous English road traffic specialist, Nick Freeman. Mr Beckham was being hounded by numerous paparazzi while

driving. The photographers were, Mr Beckham states, swarming around his car like bees around honey.

This incident happened when the tragic circumstances of Princess Diana's death were still fresh in the mind. Mr Beckham, in genuine fear, made three '999' calls and also drove his car in excess of the speed limit to escape the paparazzi. He was subsequently charged with speeding and faced a ban from driving.

Mr Freeman first argued that Mr Beckham had acted out of 'necessity'. However, as the Court held (rightly or wrongly) that there was not an imminent danger to life or of serious injury, the defence was unsuccessful. The Court then further dismissed the argument that Special Reasons were applicable. On appeal, however, it was successfully argued that, in the circumstances, special reasons were applicable and Mr Beckham's licence was not endorsed.

Although this is an English case, it serves to illustrate the difference between an outright defence and 'Special Reasons'. The BBC reported this case, stating that Mr Freeman 'lost' the case. An outraged Mr Nick Freeman soon set the record straight although the fact remains that, technically, Mr Beckham was found guilty of speeding and only a 'Special Reasons' argument saved his licence.

Interestingly, Mr Beckham would have had a defence in law if the charge had been using his mobile phone while driving as he was making a '999' call in response to a genuine emergency. Should the law be changed in respect of speeding in response to a genuine emergency which is not necessarily life-threatening? Should someone's life have to be at risk before speeding can be excused?

DRIVING WHILE USING A MOBILE PHONE



There are no reported cases relating to a special reasons defence in respect of mobile phone use while driving. However, in view of the limited statutory defences regarding such use, it is only a matter of time before a case is brought before the High Court of Justiciary.

By virtue of the Road Vehicles (Construction and Use) Regulations 1986, Regulation 110 and the Road Traffic Act, Section 41D(b), it is illegal to use a mobile telephone, for the purpose of interactive communication, while driving. There is a limited statutory exception for 999 calls in response to a genuine emergency. This means that there are many situations where people may understandably use a mobile phone and find themselves in receipt of a fixed penalty or criminal charge. For example, a child may have gone missing and relatives and friends have gone looking for him in separate cars, using phones to communicate.

We had such a case where a head teacher in a Special Needs school was driving around a local area searching for one of their pupils who had climbed over the fence and made off from school. One of the other school assistants was searching in another vehicle and they were in contact by phone. Fortunately the court saw sense, accepted

Special Reasons existed and decided not to impose 3 penalty points and impose the totting up ban that the head teacher would have faced.

One would hope that common sense would prevail in such a situation and no action would be taken against the persons involved. However it remains the case that there is no legal defence to such use other than a special reasons submission on the basis of a genuine emergency.

Our firm was recently involved in one such case, where a worried father was trying to track down his eighteen year old daughter. Her car had broken down at lam on a Saturday morning in a less than salubrious area. She telephoned her father in a distressed state and asked him to come and collect her. As he neared the scene, he was having difficulty finding her. There was no other traffic on the road and he called her to ascertain her location. As he was anxious to find her, he continued to drive while making the call. He was spotted by an unmarked police car and received a fixed penalty. Incredibly, it later emerged that the police car had actually driven past the two teenage girls standing beside a broken down car with the bonnet up. Presumably the officers involved were too busy to stop and help but not too busy to issue a ticket to a worried father. Thankfully, on this occasion, the Crown saw sense and - at the trial - agreed to desert the case. It was not necessary to request a proof on whether special reasons applied.

This case nonetheless shows the real value of Special Reasons. Had the Crown decided to proceed, our client would have had no defence in law. A Special Reasons Proof would have allowed the Courts to apply common sense and fairness to a situation where the strict letter of the law is letting our citizens down.

DRINK-DRIVING



Perhaps the most emotive of all driving related offences IS drink-driving. While many people are genuinely shocked to discover that they will have a criminal record if convicted of speeding or using their mobile phone while driving, there is no such surprise in respect of drink-related driving

offences. Notwithstanding this, Special Reasons may apply in drink-driving cases although the courts may still impose penalty points on the driver's licence in accordance with Schedule 2 of the Road Traffic Offenders Act 1988.

Drink-driving is a very serious offence and can have devastating, occasionally fatal, consequences. Not surprisingly, there is a heavy burden upon the accused seeking to rely upon Special Reasons to justify driving while over the legal limit. The courts will stringently apply the tests referred to above, and a number a rules can be discerned:

- Does the situation constitute a genuine emergency?

- Was there any other reasonable alternative course of action open to the accused other than driving?
- The driving must be in response to this genuine emergency. Once the emergency has passed, the driving must immediately cease
- Consideration should always be given to matters of public safety

These criteria are best illustrated by reference to the following cases:

Copeland v Sweeney 1977 SLT (Sh ct) 28

A case where special reasons did not apply by virtue of an 'alternative course of action' is *Copeland v Sweeney* 1977 SLT (Sh Ct) 28. Thus, where a man's daughter was stung by a wasp and had an allergic reaction, he did NOT have special reasons for driving. His daughter was thirty miles away and he drove to pick up her medication and take it to her. The court held that this WAS a medical emergency but that the accused could simply have called an ambulance.

Hamilton v Neizer 1993 SCCR 153

This provides an example of a case to illustrate that the driving must cease once the emergency has passed. The accused was near his car which was parked in a lane. Knowing he was over the limit, he intended to sleep in his car before going fishing the next day. On the way to his car, he was attacked by a gang of youths and had to go to hospital. Upon returning to his car later, he became panicky about being attacked again and drove off from this area. He travelled about

half a mile before crashing on a roundabout. He subsequently drove a further 250 yards before being stopped.

The High Court held that Special Reasons WOULD have applied had the accused simply driven to get away from the locus of his initial attack. Had the accused ceased to drive after he had crashed at the roundabout then special reasons would have applied. However, when he crashed at the roundabout, the emergency had passed and so had the course of driving to which special reasons were applicable. By continuing to drive AFTER crashing at the roundabout, special reasons had ceased to apply. This case sits uneasily with the earlier decision of the High Court in *MacLeod v McDougall* 1988 SCCR 519 (see below).

McClelland v Whitelaw 1993 SCCR 1113

This is a case which illustrates the importance of requirements of public safety. The accused was driving to hospital to visit his three week old daughter, who was in a life-threatening condition. Clearly, the accused was NOT driving in response to a genuine emergency because his daughter was already in hospital.

Notwithstanding this, the Court indicated that such driving COULD, from a humanitarian point of view, amount to Special Reasons but nevertheless held that the driver should nevertheless be disqualified. This was because the driver had acted irresponsibly and was a danger to the public as (a) he had never held a licence; (b) he had a number of road traffic convictions and (c) he was more than three times the drink-drive limit.

Despite these criteria, however, there are reported cases where Special Reasons have been found to exist in response to an emergency. Moreover, the courts have made clear that the 'alternative scenario' option should not be applied too rigidly. Although these cases all concern driving while in excess of the legal limit, it is submitted that the principles would apply equally to other types of activity, such as speeding or driving while disqualified. The most important of these cases include:

Watson v Hamilton 1988 SLT 316

This case has already been referred to above. It involved a situation where the accused drove a pregnant woman to hospital while over the legal limit. The woman in question was in danger of miscarrying. The driver had tried to use two public telephones to call an ambulance but both were out of order. He also tried to obtain the assistance of a taxi driver but the taxi driver refused to help. Because this was a sudden medical emergency, and the accused had tried to find an alternative to driving, Special Reasons were held to exist.

MacLeod v McDougall 1988 SCCR 519

In this case, a drink-driver was driving to escape from a threatened attack. In the course of driving, he passed a police car without stopping to seek assistance. Notwithstanding this, special reasons were applicable even though the driving went on longer than necessary. The Appeal Court held that regard should be had not only to the immediate circumstances but also to the totality of circumstances, including the circumstances which gave rise to the driving in the first place.

This case sits uneasily with the decision in *Hamilton v Neizer* (supra). As we have seen, in that case, special reasons did not apply because the driver embarked on a second course of driving after the emergency had passed. The cases are different to the extent that the driver in *MacLeod* had, at no time, ceased to drive notwithstanding that he continued to drive after the immediate emergency had passed. Therefore, unlike in *Hamilton v Neizer*, the accused did not embark on a second course of driving.

On this basis it would seem that Special Reasons continue to apply even after the immediate emergency has passed so long as the driving is not interrupted and a second course of driving is thereafter embarked upon. So, for example, Special Reasons apply if a driver is fleeing an attack. If he stops his car, after escaping the danger, makes a phone call and then continues driving, Special Reasons are negated. If he simply continues driving without stopping to make the call, then special reasons continue to apply even after he is out of danger. This is hardly a satisfactory state of affairs and appears to be a classic case of 'hair-splitting'. It perhaps serves as a warning that each case will ultimately be determined by its own particular facts and circumstances.

The more recent case of *Ruxton v Lang* 1998 SCCR 1 reiterates the point, acknowledged in *Neizer*, that the test for Special Reasons is not necessity to drive. Accordingly where a female fleeing an attack from her boyfriend was driving while over the legal limit, Special Reasons were applicable even when she continued driving after the danger had passed.

More recent case law elsewhere in the UK can, however, be seen as supportive of the reasoning in *Neizer*. In the Northern Irish case

of *CCPS v Cassells* [2007] NICA 12, the defendant was over the limit. His friend was subsequently badly assaulted and the defendant drove him from the scene of the attack. While doing so, the assailants also attacked the car. Some time later he was stopped by the police. It was held that a single journey of any length would not necessarily continue to amount to special reasons when the danger had dissipated. Once the danger had been successfully avoided, prudence demanded that the need to continue driving should be reviewed. The case is unlikely to ever be followed in Scotland standing the decision in *McLeod*.

***Dolan v McLeod* 1998 SCCR 653 and *Ferguson v McPherson* (2011 SCCR 60)**

These two cases provide further evidence of ‘contradictory’ case law. In *Dolan*, the appellant was in the vicinity of her car when she became involved in an argument with her former boyfriend. One of the boyfriend’s friends then kicked the door of her car and she moved the car a short distance and crashed into another car. The sheriff accepted that, but for the attack, she would not have driven. However she did so not to escape but to observe the group from a distance. His decision to refuse special reasons was upheld on appeal, notwithstanding that only a short distance had been driven.

In *Ferguson*, the accused had been visiting her brother and had consumed alcohol. Her brother became drunk and aggressive and threatened her, before physically throwing her out of the house in her pyjamas. She then drove 25 metres into another street and telephoned for assistance. The sheriff accepted she was at risk while within the house but that there was no subsequent need to

drive. In holding that special reasons applied, the High Court held that it could be reasonably perceived that she remained in jeopardy if she had simply sat in her car outside the house and she drove the “very short distance that we have mentioned and stopped the car and thereafter endeavoured to obtain assistance”.

The cases sit uneasily with each other although a major problem in the former was that the evidence was “somewhat confused”. They again illustrate just how ‘fact-sensitive’ these cases can be.

Tedford v Dyer 2006 SCCR at 285

We have already referred to this case above as an example of the rule that the 'alternative scenario' criterion should not be applied too rigidly.

In this case, the accused had found his friend lying in pain with a suspected broken leg. He elected to drive even though he suspected - but could not be certain - that he was over the drink-drive limit (as it transpired, he was only slightly over the limit). At first instance, the sheriff held that the accused had not given sufficient thought to alternative options, such as finding a nearby telephone. The Appeal Court reversed this decision, holding that the Sheriff had applied too stringent a test in terms of the 'alternative scenario' criterion.

The case is also interesting because reference was made to the fact that the accused was only slightly over the drink-drive limit. It has long been accepted by the Scottish courts that the 'triviality of the offence' (e.g. only slightly over the drink-drive limit/ only slightly over the speed limit) does NOT amount to a Special Reason

(*Tudhope v Birbeck* 1979 SLT (Notes) 47; *Heywood v O'Connor* 1993 SCCR 471; *Lees v Paterson* 1997 GWD 28-1450; *Herron v Sharif* 1974 SLT (Notes) 63; cf *Smith v Henderson* 1950 JC 48).

The decision in *Dyer* indicates, however, that the 'triviality' of the offence - while not in itself amounting to a Special Reason - can be taken into account when assessing whether special reasons are applicable in a particular set of circumstances. Although the court did not state it explicitly, this is consistent with the requirement that courts should take into account public safety. After all, a driver only slightly over the drink-drive limit poses less of a risk to public safety than a driver grossly in excess of the limit.

It is submitted that the same approach should be taken by the courts in speeding cases or in 'borderline' dangerous driving cases. If, for example, a driver is only marginally breaking the speed limit in response to a genuine emergency (e.g. he still remains within the 'fixed penalty' range), the court should take into account the 'triviality' of the offence in determining whether special reasons are applicable.

Similarly, in the context of dangerous driving, the courts have rejected the submission that Special Reasons could be found to exist because the dangerous driving in question was at the 'lower end of the scale' (*Lees v Paterson* 1997 GWD 28-1450). Standing the decision in *Dyer*, however, it is submitted that the Court should take such a factor into account in a situation where the driving is in response to a genuine emergency. Dangerous driving carries a mandatory minimum of one year's disqualification from driving. In this situation, the Court could choose not to impose any kind of

penalty or, in the exercise of its discretion, either impose a shorter period of disqualification or impose penalty points.

Support for these points is found in the leading English case of *Chatters v Burke* [1986] RTR 396. It was held that, in emergency situations, the court should consider:

1. How far the vehicle is driven
2. The manner in which it was driven
3. The state of the vehicle
4. Whether the driver intended to drive further
5. The road traffic conditions prevailing at the time
6. Whether there was a possibility of danger by coming into contact with other road users or pedestrians

Other types of Special Reasons applicable to drink driving

Somewhat ironically, given that it is one of the most serious of all driving offences, there are certain special reasons that uniquely apply to drink-driving. These are:

• Shortness of distance driven

As we have seen, in England, the case of *Chatters v Burke* (*supra*) provides that the court should take into account the distance driven in any particular case, together with whether there was any intention to drive further and any possibility of danger to the public.

Burke was followed in the Scottish case of *Lowe v Milligan* 1991 SCCR 551. In this case, the accused moved his car only a short distance. He was aware that the place where his car was parked could constitute a potential hazard and so moved it 25 yards into a car park. As the distance driven was short, with no intention to drive further and with little danger to the public, the sheriff found that special reasons applied.

Generally speaking, however, shortness of distance may not - in itself - constitute a special reason in Scotland. Some cases indicate that there must be a further reason for the driving and this reason must constitute a genuine emergency with no reasonable alternative to driving. If there is not a genuine emergency, or at least an understandable motive, then some cases indicate that shortness of distance is irrelevant. Further, if there is an alternative to driving, Special Reasons will be negated regardless of the existence of an emergency (*Skeen v Irvine* 1980 SCCR Supp 259). Notwithstanding this, however, recent authority makes clear that shortness of distance can be a relevant consideration in looking at the totality of circumstances in any given situation (*Hutcheson v Spiers* 2004 SCCR 405).



Ultimately, in view of the conflicting authorities, the position remains unclear in Scotland as to whether 'shortness of distance' constitutes a Special Reason. What is clear is that, in addition to shortness of distance, there must be no intention to drive further and there must be no danger to the public. Thus, it is no defence if a

drink-driver has only travelled a few yards before being caught by the police.

Similarly, there is no question that the distance driven must be very short indeed. We are often asked 'how short is short'? The answer is that we are talking metres, not miles.

There is no doubt, however, that driving only a short distance will strengthen a case for special reasons where another feature (such as an emergency) is prevalent. Thus, for example, in *Normand v Logue* 1996 SCCR 797, a sheriff found that special reasons applied where a disabled driver reversed her car some 10 metres away from broken glass from a broken shop window. She did so in full view of police officers who had attended the break-in. She struck another car while reversing, was arrested and charged with driving while unfit through drink. The sheriff accepted that the accused did not intend to do any more than reverse 10 feet away from the broken glass. There was no 'emergency' but the sheriff accepted that, in her agitated state, she may have *perceived* an emergency. The defence was, however, primarily founded upon shortness of distance driven. The sheriff accepted that this was a relevant factor but had to be considered in conjunction with public safety. The sheriff, in finding special reasons, found there was little to no immediate threat to public safety and, standing her good character, had the necessary reassurance of her "probable future conduct sufficient to overcome the presumption of future risk to public safety on the roads raised by her conviction". The reasoning in this case received implicit support in *Ferguson v McPherson* (*supra*).

Finally in the recent case of *Hutcheson v Spiers* (2004 SCCR 405), it was held that “although shortness of distance and absence of danger were relevant factors they were unlikely (emphasis added) to be sufficient by themselves”. Ultimately the appeal was refused because the car was moved (following a request from the police) in the absence of an emergency. It seems that – had the car been parked dangerously – then the cases of *Riddle* (supra) and *Ortwell* (supra) may have been followed.

The position in England seems broadly similar. For example, in *DPP v Cove* [2008] EWHC 441 Admin, the respondent had only driven about 250 metres. She had left her car in a supermarket carpark while she had a drink. Before returning home, she went to check on her car and saw a notice on it informing her she would be charged £25 per hour to park her car there. The respondent drove 250 metres on a quiet road. On appeal it was held that the Justices had failed to consider the possibility of any danger with other vehicles and the situation, albeit unforeseen, could not be said to be an emergency.

Laced drinks



In certain circumstances, where the accused can prove that his drink has been 'spiked', and the result is that the accused person has suffered a 'total alienation of reason, resulting in a complete lack of self-control' there may be a complete defence to the charge rather than simply a special reason for not disqualifying. This is known as the defence of automatism (*Ross v HM Advocate* 1991 SLT 546). Anyone who has ever tried to run this defence will know how difficult it is for the

defence to establish, even on the balance of probabilities!

Just like the legal test for necessity, however, the legal test for automatism is very high. However, just as an emergency situation may be insufficient to establish necessity but sufficient to establish special reasons, a 'spiked drinks' scenario may be insufficient to establish automatism but sufficient to establish special reasons. An obvious example is where a driver's drink is spiked with another drink. While the 'spiking' is mild, and the driver remains in control

of his actions (thus negating automatism), it is sufficient to put him (unknowingly) over the drink-drive limit.

That is not to say that it is easy to establish Special Reasons in such a case. Certain criteria must be fulfilled (*Skinner v Ayton* 1977 SLT (Sh Ct) 48). The accused must prove, on the balance of probabilities, that:

- his drink has been laced
- that he did not know, nor had reasonable cause to suspect that this had happened
- that, but for his drink being laced, the alcohol level in his blood would not have exceeded the legal limit

If the accused person realises he has inadvertently taken an alcoholic drink, but nevertheless drives, Special Reasons will not be applicable (*Watson v Adam* 1996 JC 104).

The extent to which expert evidence should be led in this type of case is open to question. There is no requirement that the position of the accused is corroborated (i.e. supported) by further evidence; however there is no doubt that the case is stronger if supported by expert medical or scientific evidence (*Watson v Adam*, supra).

In view of the dearth of recent authority, the English case of *Knifton v DDP* [2011] All Er (D) 126 (Nov) may be relevant. The test in England, as established in *Pugsley v Hunter* [1973] 2 All ER 10 is almost identical to the Scottish test, namely that the accused must establish:

- that her drink had been ‘laced’
- that she had not known her drink had been laced
- and, but for this, her blood alcohol limit would not have exceeded the prescribed level

The Justices held that special reasons had not been made out as the appellant had known, or at least suspected, that something was amiss. In dismissing the defence appeal, the Administrative Court held that the Justices were entitled to reach the conclusion that the defendant had to have realised that “something of that kind had gone wrong”. English authority is therefore clearly in line with Scottish authority that the accused must not only be unaware of the laced drinks but also have no reasonable cause to suspect something was amiss. It would seem that the greater the excess of alcohol, the harder it will be to establish the defence.

Similarly, a person who drinks without enquiring whether the drink is alcoholic cannot avail themselves of special reasons if the English case of *Robinson v DDP* [2003] EWHC 2718 (Admin) is followed. The defendant, a tee-total Rastafarian had drunk what he believed to be non-alcoholic punch at a wedding. He felt tired but attributed that to the events of the day.

DRIVING WITHOUT INSURANCE

Perhaps the most common of all Special Reasons cases relates to cases where the driver is accused of driving while uninsured or



permi tting another to drive while uninsured.

Section 143 of the Road Traffic Act 1988 means that it is an offence to drive (or permit another person to drive) without a valid insurance policy. This means that someone who allows another person to drive their car, in a situation where that person is not insured to drive it, will face a criminal conviction. The penalty for a breach of section 143 is either 6-8 penalty points or a discretionary disqualification.

It is, of course, absolutely correct, that those who knowingly or recklessly drive while uninsured should be punished by the force of law. However there are numerous cases where the accused person either drives, or allows another person to drive, without a valid insurance policy bringing place. In our internet age of online insurance reliant upon email and automatic Direct Debits we see frequent slips along the way by ordinary decent folk who genuinely believed that they or their relative was insured.

The general principle is explained in the leading English text:

"The following are capable of amounting to Special Reasons.... The fact that the defendant unintentionally committed the offence or was misled, without negligence, into committing it" (*Wilkinson's Road Traffic Offences*, 23rd Edition, pl 139)

Special Reasons will, therefore, apply where:

- The accused person was genuinely unaware that he or the other person was uninsured or was misled into believing that the other person was insured
- Where the accused person is the driver, to be able to demonstrate that he has a genuine and understandable reason for believing insurance cover was in place
- Where the accused person allows an uninsured person to drive, to demonstrate that he has a good reason for believing that the uninsured person had insurance cover.

Marshall v McLeod 1998 SLT 1199 is the leading case involving an accused person driving without insurance. The accused had been given an assurance by the owner of the car that the owner's insurance covered him to drive. At first instance the Sheriff nevertheless imposed 6 penalty points on the ground that the accused had not sought further proof that he was covered by the owner's insurance. The sheriff held that:

"I believe that a driver should do more than rely on the statement of another that insurance cover is available for the use of the vehicle "

On appeal, however, the penalty points were quashed. The High Court held:

"In circumstances such as the present one with which we are concerned, it would be appropriate for the potential driver to inquire of the owner whether insurance is available. If the owner gives an affirmative answer, and the potential driver has no reason to disbelieve that answer; we see no reason why it should be said that the driver has failed to take the necessary steps"

The leading case where the accused person is the owner of the vehicle and has permitted another person to drive (known as causing and permitting') is *Gordon v Russell* 1999 SLT 897. The accused had permitted his co-accused to use his car while there was no policy of insurance in force. The accused genuinely believed that his co-accused's insurance policy would cover his co-accused to drive. Applying *Marshall v McLeod* the High Court held:

"Although the facts in the present case were slightly different [from McLeod] in that the accused was the owner of the car, the essential fact [in McLeod] was that his genuine belief derived from information obtained from a person who in turn was the owner of a car and had insurance in respect of the car.... We have come to be of the view that this case was not distinguishable on its material facts from Marshall v McLeod.....namely that the appellant had a genuine belief that the co-accused would be insured.... and that belief was based upon an assurance given by a person known to him' [emphasis added].

Our firm has succeeded on numerous occasions in applying Special Reasons to such circumstances. One of the most recent involved a case where a young woman's boyfriend was given permission by the girl's mother to drive the mother's car. The mother had looked at the young man's insurance policy and seeing that he had 'fully comprehensive' insurance, mistakenly thought he could drive her

car. The insurance did not cover him but, in all the circumstances, the court held that Special Reasons applied.

Although this case was a success, it also
A common misconception that 'fully comprehensive' insurance means that an insured person can drive any car when, very often, it means nothing of the sort. Drivers should always check their insurance cover very carefully before driving another person's car. You may ask 'how careful' must I be?' While we do not suggest contrary to the image opposite - that it is literally necessary to get your magnifying glass out, the court will nevertheless expect you to take reasonable care in understanding the limits of your policy.



DRIVING OTHERWISE THAN IN ACCORDANCE WITH A LICENCE/DRIVING WHILE DISQUALIFIED

Section 87 of the Road Traffic Act 1988 provides that it is an offence to drive otherwise than in accordance with a licence. Similarly, section 103 provides that it is an offence to drive while disqualified from driving.



Although we are considering them together, it should be pointed out that driving while disqualified is a far more serious offence than driving otherwise than in accordance with a licence.

Special Reasons will usually apply if two criteria, essentially similar to those relevant to driving without insurance, are fulfilled:

- The accused person was genuinely unaware that he was disqualified or that his licence had been revoked.

The accused person is able to demonstrate that he has a genuine and understandable reason for this lack of awareness.

The defence is well-illustrated by the case of *Robertson v McNaughton* 1993 SLT 1143. In this case the accused had been disqualified in a previous case and was appealing that decision. As is usual, he was allowed to drive pending the outcome of the appeal. Unknown to the accused, his appeal was abandoned because his solicitor had failed to lodge essential paperwork in time. The accused subsequently drove, not knowing that he was now disqualified.

In these circumstances, the High Court held that the accused was genuinely unaware that he was disqualified and had good reason for this. As the High Court held @1147:

"The appeal was deemed to have been abandoned due to a failure by the appellant's solicitor; not to anything which the appellant himself did or failed to do. It would have been a different matter if the appellant had given instructions for his appeal to have been abandoned....In the Present case the appellant's ignorance of the fact he was disqualified was capable of amounting to a special reason"

Chapter 4

PROCEDURE IN SPECIAL REASONS PROOFS

Persons seeking to persuade the court that Special Reasons are applicable to their cases must raise the issue and will usually have to lead evidence to that effect. The court is not entitled to conclude Special Reasons exist without those reasons being raised and argued by the defence.

If raising the issue of Special Reasons after trial and conviction then it may be sufficiently clear from the evidence that Special Reasons exist however it is for you to raise that issue in addressing the court in relation to sentence.

If your client pleads guilty you should indicate when tendering the plea that the accused intends to make submissions that Special Reasons exists for not imposing disqualification.

You should intimate this to the Procurator Fiscal's office prior to the plea and provide the Crown with copies of witness statements, any supporting documentation and copies of any authority that you may rely upon. Otherwise they will be entitled to adjourn to consider their position and you may be open to criticism from the bench regarding the court time wasted.

Having raised the issue the Sheriff will normally then ask the Procurator Fiscal if they can accept the reasons or if they can neither

accept or deny them and therefore require a proof. He/she may then ask if a date requires to be set or if parties can proceed that day.

Unless the plea is tendered at the trial diet, one would expect a future date to be set for the hearing of evidence.

The accused should be there for the hearing but where he/she is abroad and cannot attend his case can be dealt with in his absence even if disqualification is obligatory. See *Imrie -v- McGlennan 1990 SCCR at 218*

Evidence requires to be led but I have conducted Special Reasons Proofs where *ex parte* statements have been provided by me and accepted by the Crown. Minutes of Agreement and Joint Minutes are really the order of the day to avoid going over issues that are convenient to agree such as certain police evidence etc

There is no evidential burden upon the Crown to prove that Special Reasons do not exist. The onus of proof is entirely upon the driver. The standard of proof in Special Reasons cases is on the balance of probabilities. (See *McLeod -v- Scoular 1974 SLT (Notes) 44* for authority on the procedure.)

There can be several different sources of evidence in a Special Reasons case. Such as:

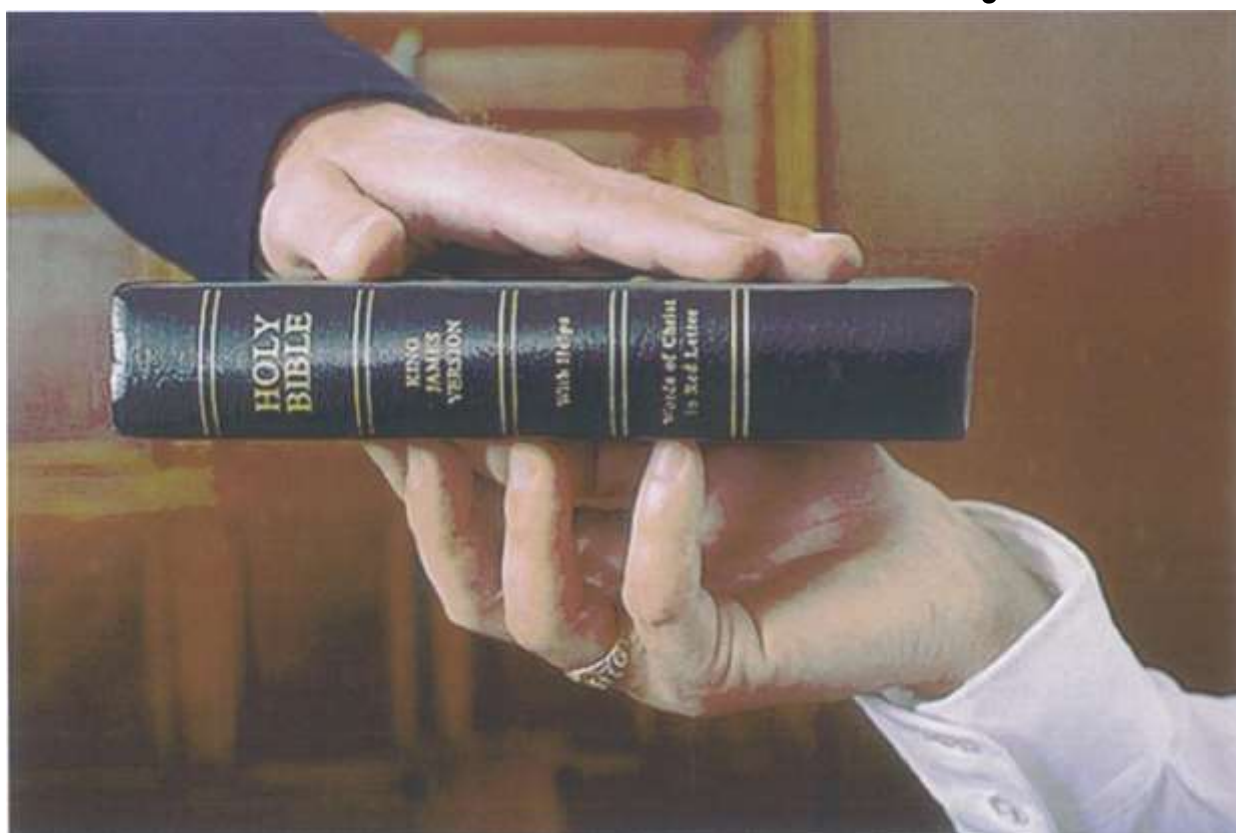
- Sworn witness testimony

- Sworn affidavits

- Signed letters

- Agreed Evidence
- Legal submissions

Sworn Witness Testimony



As stated in chapter one, Special Reasons are applicable when the particular circumstances of the incident mean that there are Special Reasons not to endorse the accused's licence. In all cases, therefore, at the very least the accused will be expected to give evidence. Any persons who can corroborate or support the position should also - ideally - appear as witnesses.

Many people feel intimidated at the thought of appearing in court. A good solicitor will help their client understand court procedure and prepare you for what to expect. Be careful not to rehearse your client

or witnesses or this will have an adverse effect on the case as the Sheriff or JP discounts their evidence as unreliable as it is obviously rehearsed. If you explain to your client the key elements of a successful Special Reason argument you may find their evidence adapting to fit that particular bill and that will smell distinctly fishy to the presiding Sheriff who may then decide he simply doesn't believe the evidence. A fine balance has to be struck because you want to direct and control the evidence but it must also flow on those essential aspects otherwise it may fall at the hurdle of credibility.

Signed Affidavits

An affidavit is a written, sworn statement of fact or facts, made voluntarily by a person under oath to an authorised person such as a notary public.



For the purposes of a Special Reasons proof, affidavits will be used when a person who would ideally be a witness cannot attend court for practical or medical reasons. Because an affidavit is a sworn statement, it carries more

weight in court than a signed letter stating the same facts. This also means that there is a better chance of the Crown accepting that the matters referred to in the affidavit are agreed facts. In turn, such agreement increases the driver's chances of success at proof. A

Sheriff may consider the affidavit of little worth but if it the veracity has been agreed in a joint minute there is not much he/she can do but accept it. Hence the real benefit of providing such documents to the Crown well in advance of proof dates so you can press for agreement of the contents.

The affidavit itself takes a legally-prescribed form and is usually presented in the form of a series of facts in numerical order. A well prepared affidavit can be extremely useful in persuading the court of the veracity of the driver's case. A good solicitor will prepare the affidavit and arrange for it to be sworn. They are also useful where witnesses are remote or infirm. In these circumstances consider requesting a local Notary Public to attend upon the witness and take the affidavit.

Signed Letters

Signed letters from interested parties act as an another alternative to the person appearing in

court as a witness. Generally, letters are less persuasive than affidavits because they

are not sworn documents. It is also less

likely that the Crown will not dispute the evidence of a letter as opposed to a signed affidavit. For such reasons, affidavits are generally preferable to letters.





Letters are more useful, and more likely to be agreed, when they are from persons not directly affected by the loss of the driver's licence.

Thus a letter from doctor, in cases of medical emergency, confirming that the relevant person has a

medical condition will be helpful. The Crown will more readily accept the written word of an independent expert than a lay person directly affected by the case.

Agreed Evidence

We have alluded above to certain situations where the Crown and Defence can agree in advance that certain facts are proved. These facts are written down, in the form of a series of numbered



paragraphs, in a document known as a 'Joint Minute of Agreement'.

A Joint Minute has the advantage of allowing certain facts to be proved without evidence having to be led. This can mean that certain witnesses will not have to attend court. This is particularly useful when the witness concerned is, for example, a busy doctor.

Joint Minutes also have the advantage of ensuring that the court must accept the evidence therein. If the Crown and Defence agree certain evidence, it is not for the Court to challenge the veracity of this evidence.

Legal Submissions

At the end of your case, you will make a legal submission. This is basically a 'summing-up' of all of the evidence that has been led in the case and the key indicators that support your argument that Special Reasons apply. You should refer to your case law that is in point and demonstrate to the court why the circumstances of your present case can be considered as “on all fours with” or is “supported by the dicta in “ your supporting cases law. Copies for the Sheriff and the Procurator Fiscal should be available for them.

Some Sheriff's (the really awkward ones) can insist that the authority be provided in its proper form i.e. Covered book or Report. The Scotcourt website might get you out of some trouble but much of the case law is old and pre Scotcourts website.

As previously stated try not to cherry pick the occasional line from cases but instead dig a bit deeper with your research and try to find cases that are completely in point or at least mirror most of the important principles in your own case.

Your skill and expertise, during legal submissions but also during the preparation and presentation of your entire case, is crucial to your chances of success at a Special Reasons Proof or an Exceptional

Hardship Proof. Frame your arguments and try to focus on your key bullet points in closing.

Chapter One

WHAT IS EXCEPTIONAL HARDSHIP?

Most drivers will be aware of the penalty points system operating in the United Kingdom. Additionally, most are aware of the law stating that a driver who accumulates 12 penalty points within a three year period will be subject to a potential six-month ban from driving under totting-up procedures.

The year period runs from offence date to offence date so there is no point adjourning or delaying cases to get past a three year deadline. If your client has managed to accumulate points after the present offence date they are counted in the three year window.

For many people, the thought of appearing in court is a daunting experience. However, it is not all bad news. In the first instance, the court case is an opportunity for the driver to “fight his case”.

Test the Crown case and see if there is sufficient to support conviction.

Secondly, even if the driver pleads guilty or faces a “Totting Up Ban”, he has the opportunity to convince the court that a driving ban would cause 'Exceptional Hardship'.

Exceptional hardship is the name given to a type of court case where an accused person can lead evidence to prove that a driving ban would cause such hardship to the driver AND to other parties that it is in the interests of justice, that he retains the right to drive notwithstanding the fact that he has 12 or more live points on his driving licence.

Exceptional hardship can only be argued in totting-up cases. Therefore, it is not competent to request an Exceptional Hardship Proof when faced with a mandatory driving ban, as in drink driving and dangerous driving cases.

This booklet aims to provide you with information and guidance on the definition of exceptional hardship, the types of situation which may give rise to it, and how to prove in court that a driving ban would cause exceptional hardship.

Chapter Two

DEFINING EXCEPTIONAL HARDSHIP

Parliamentary Legislation

Notwithstanding issues of devolution and the predicted demise of the European Convention on Human Rights, the supreme source of road traffic law in Scotland remains the United Kingdom Parliament at Westminster.



The law regarding exceptional hardship derives from an Act of the Westminster Parliament, namely the Road Traffic Offenders Act 1988, in particular Section 35 (1), (3) and (4).

It provides:

(1) Where—

(a) a person is convicted of an offence to which this subsection applies, and (b) the penalty points to be taken into account on that occasion number twelve or more, the court must order him to be disqualified for not less than the minimum period unless the court is satisfied, having regard to all the circumstances, that there are grounds for mitigating the normal consequences of the conviction and thinks fit to order him to be disqualified for a shorter period or not to order him to be disqualified.

(2) The minimum period referred to in subsection (1) above is—

(a) six months if no Previous disqualification imposed on the offender is to be taken into account, and

(b) one year if one, and two years if more than one, such disqualification is to be taken into account and a previous disqualification imposed on an offender is to be taken into account if it was for a fixed period of 56 days or more and was imposed] within the three years immediately Preceding the commission of the latest offence in respect of which penalty points are taken into account under section 29 of this Act.

(4) No account is to be taken under subsection (1) above of any of the following circumstances—

(a) any circumstances that are alleged to make the offence or any of the offences not a serious one,

(b) hardship, other than exceptional hardship, or

(c) any circumstances which, within the three years immediately Preceding the conviction, have been taken into account under that subsection in ordering the offender to be disqualified for a shorter period or not ordering him to be disqualified.

This important piece of parliamentary legislation therefore means that anyone accumulating 12 penalty points within a 3 year period shall be subject to a potential minimum 6 month ban from driving.

If a person has been disqualified under the Totting Up provisions previously, the length of ban will be increased.

The wording of the legislation makes clear that the 3 year period refers to the date of incident, not the date of conviction. This can cause much confusion amongst motorists. The simplest way to explain this important distinction is by way of examples:

Example one

A driver receives a fixed penalty of 3 penalty points for using his mobile phone in Jan 2009. He then receives 6 points for a speeding offence in Aug. 2011. In Feb. 2012, he is stopped by the police for using his mobile telephone and is subject to a fixed penalty of 3 penalty points.



The driver is NOT subject to a 6 month ban under totting-up procedures. By the time of the final incident, more than 3 years have passed since the first incident. Therefore, by the time of the final incident, the driver only has 6 live points on his licence.

Example two

Another driver receives a fixed penalty of 3 penalty points in

Aug. 2009. She then receives 6 points for speeding in May 2010. Finally, she is stopped by the police in July 2012 for using her mobile phone. She receives a court citation in Oct. 2012. She appears in court in Jan. 2013 pleads Guilty as libelled and



receives 3 penalty points. A common misconception is that the driver will not be subject to a totting-up ban as more than 3 years have passed between receiving her first set of penalty points and her final set. This is incorrect as the relevant dates are the dates of incident, not the dates of endorsement. The driver has been involved in a number of incidents within a 3 year period and received 12 penalty points as a result.

The date that the licence is actually endorsed is irrelevant.

Driver two, therefore will be subject to a potential totting-up ban. However this ban is not compulsory. Section 35(4) means that a ban does not have to be imposed if the result of such a ban would cause 'Exceptional Hardship'.

The wording of section 35(4) makes clear, however, Parliament's intention that 'ordinary' hardship shall be insufficient to save the driver from a 6 month ban. Such hardship must be 'EXCEPTIONAL'. Most drivers do not have what will amount to Exceptional Hardship... that is what makes it Exceptional.

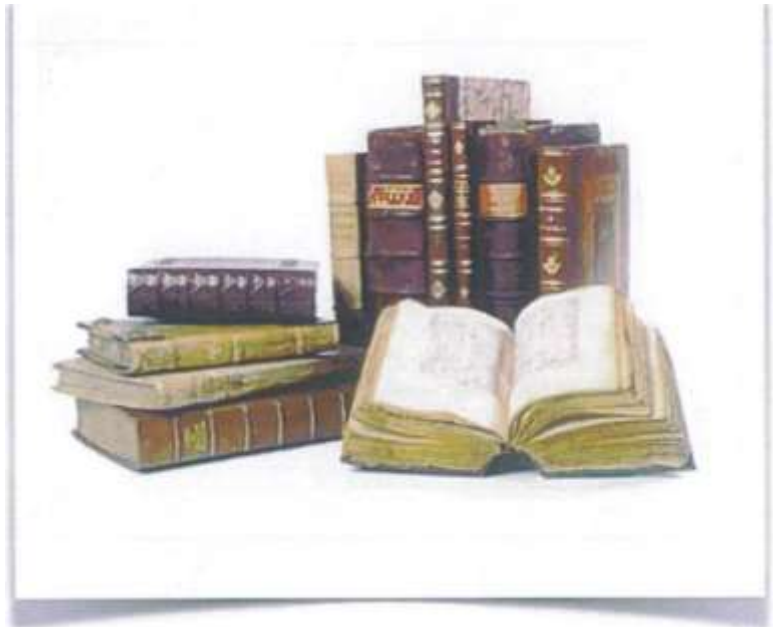
The Act does not define the distinction between 'ordinary' hardship and 'exceptional' hardship. That task is dealt with on a case by case basis by the Courts.

The Role of the Courts



Section 35 of the Road Traffic Offenders Act 1988 has afforded the courts a certain amount of discretion in determining whether exceptional hardship has been made out. The Courts, in turn, have made clear that each exceptional hardship case will ultimately be decided on its own facts and circumstances (*Carmichael v Shevlin 1992 SLT 1 13*).

This does not mean, however, that a Court has complete freedom to make its own judgement. Cases regarding exceptional hardship will usually be heard in the Justice of the Peace Courts or (less commonly) in the Sheriff Courts. These courts must take into account the reported decisions of the High Court of Justiciary, and the Sheriff Appeals court. This is known as the rule of Precedent.



The High Court and Sheriff Appeals court only decides exceptional hardship cases on those occasions where an accused has decided to appeal the decision of the lower court and is subsequently granted leave to do so. Their decisions, however, provide the best guidance to what may be considered exceptional hardship.

Some of the most important cases are:

- *Railton v Houston 1986 SCCR 428* prospect of loss of employment resulting in likely loss of family home, resulting in hardship to immediate family. Exceptional hardship established.
- *Robinson v Aichison 1986 SCCR 51 1* - loss of business owner's licence would result in collapse of business and loss of 6 employees jobs. Exceptional hardship established.
- *Allan v Barclay 1986 SCCR 111* - while loss of employment is not in itself exceptional hardship, subsequent risk to family

home and inability to meet other debts meant hardship was established.

- *McFadyen v Tudhope 1986 SCCR 712* - held that hardship to employees existed where it was proved that the business relied upon the owner's ability to drive and it was not possible for him to employ a driver without paying someone else off.
- *Clumpas v Ingram 1991 SCCR 223* - a driver was the author of his own misfortune and the consequences to him and others had to be accepted. Exceptional hardship not established.
- *McLaughlin v Docherty 1991 SCCR 227* - the effect of a business owner's disqualification upon independent contractors should be taken into account. Exceptional hardship established.
- *Marshall v McDougall 1991 SCCR 231*- the importance of documentary evidence crucial in proving that loss of business owner's licence would result in business failing and subsequent job losses. Exceptional hardship established.
- *Carmichael v Shevlin 1992 SLT 113* - while statements made in previous cases can provide guidance, each case is ultimately decided on its own unique merits. Exceptional hardship not established.
- *Ewan v Orr 1993 SCCR 1015* - hardship had to extend beyond an effect on the driver and his immediate family. Exceptional hardship not established.
- *Edmonds v Buchanan 1993 SCCR 1048* - fact that accused had to take her child to hospital on a regular basis meant exceptional hardship was established.
- *Howdle v Davidson 1994 SCCR 751* loss of licence would endanger the family home. Taken together with risk to job losses amongst employees, exceptional hardship established.

- *Findlay v Walkingshaw 1998 SCCR 181* - where the loss of licence of skilled employee would cause serious hardship to the employer, exceptional hardship was established.
- *McPake v Lees 1998 SCCR 184* - while hardship to the accused alone can competently be considered exceptional hardship, same will only be established in truly severe circumstances.
- *Colgan v McDonald 1999 SCCR 901* - a single mother needed to drive to take care of her two disabled children. Exceptional hardship established.
- *Kirk v Procurator Fiscal Ayr NJ 2831/99* - where father had to be able to drive to take son for kidney dialysis, exceptional hardship established.
- *Findlay v Procurator Fiscal Aberdeen, unreported, 2004* - exceptional hardship can be established on the basis of undisputed documentary evidence alone.
- *Forson v Procurator Fiscal Alloa, unreported, 2008* - hardship to accused in itself will usually be insufficient to establish exceptional hardship.
- *Mugarenza v Procurator Fiscal Glasgow, unreported, 2008* - the court should take the current economic climate into account when determining the effect of loss of employment, particularly upon employees.
- *Gardiner v Procurator Fiscal Perth, unreported, 2009* - accused would be unable to continue charity work. Effect on charity considered exceptional hardship.
- *Bruce v Procurator Fiscal Dundee, unreported, 2011* - where loss of licence and employment meant child could not continue in further education, exceptional hardship was established.

- *LW v Procurator Fiscal Glasgow*, unreported, 2012 – a crucially important and relatively recent decision. While the facts themselves or the basis of the hardship were not in themselves unusual, the case is very important in determining the relevant test for exceptional hardship. It was held that the relevant test is one of *risk*, not one of certainty – i.e a risk to the family home, a risk to your employees jobs is the level required. It is not required to prove that such things will definitely occur although the risk must be substantial.
- *Waine v Procurator Fiscal Glasgow* – in the short history of the Sheriff Appeal Court, this is the only reported case to date. The lower courts were reminded that they could not look behind evidence that remained unchallenged by the Crown and the Justice’s treatment of the evidence was severely criticised. It was held that a potential loss of employment for the appellant’s 10 employees amounted to exceptional hardship.

Chapter Three

EXAMPLES OF EXCEPTIONAL HARDSHIP

It should always be borne in mind that the types of situations that may constitute exceptional hardship are non-exhaustive. The case law of the High Court of Justiciary detailed in the previous chapter demonstrates, however, that several main grounds re-occur with the most regularity.

The main grounds are:

Hardship to immediate family

- Hardship to sick or elderly relatives
- Hardship to employer or employees

Hardship to creditors

Living in a remote location

This chapter shall examine these main grounds in a little more detail. Although they are considered separately here, these grounds are not mutually exclusive. Indeed, in the most persuasive cases, the driver will be relying upon two or more of these grounds.

Hardship to Immediate Family



The loss of employment or hardship to the accused himself in itself is usually insufficient to constitute exceptional hardship (see, for example, *Forson v Procurator Fiscal Alloa NJ 1520/08*). As mentioned previously, we must have regard to the intention of Parliament when it framed the legislation. While the statute does not expressly limit the concept of hardship to hardship suffered by others, it is clear that only in truly exceptional and severe circumstances will hardship to the accused himself suffice (*McPake v Lees 1998 SCCR 184*). For example, if re-employment would be unlikely with regard to the appellant's age, general health and profession, then the initial job loss may be considered to be exceptional hardship (*Piacenti v PF Kilmarnock, unreported, 2005*; see also *Kirk v Procurator Fiscal Ayr NJ 2831 / 99*; *McPake v Lees, supra*)

More common, however, are situations where the loss of your driving licence will cause hardship to your immediate family. In such circumstances, exceptional hardship may exist (*Howdle v Davidson* 1994 SCCR 571; *Railton v Houston* 1986 SCCR 428; *c.f.* *Millar v Ingram* 1986 SCCR 437; *see also Ewen v Orr* 1993 SCCR 1015 where the High Court held that hardship had to extend beyond the accused and his immediate family). In view of this conflicting authority, welcome clarification was provided in *Brennan v McKay* 1997 SLT 603. The High Court applied the decision in *Howdle*, accepting that hardship did not have to extend beyond the driver and his immediate family, the question being one of fact and degree.

Usually such hardship will occur when the driver is the main or only financial support for his family and will lose his or her job as a result of losing the right to drive. A typical example is where the loss of employment results in an inability to pay the mortgage or other debts, with the result that the family home is at risk. Thus, in *Allan v Barclay* 1986 SCCR 11 the High Court held that the fact that the accused was likely to lose his job was not in itself exceptional hardship.

However the fact that the family home would be placed in jeopardy (together with an inability to repay a bank loan taken out to furnish the home) meant that there was exceptional hardship. Similarly, in *Howdle v Davidson, supra*, the accused's garage business would have been at risk, leaving his family without any income. The High Court held that, together with the risk to the jobs of the accused's employees, exceptional hardship was established.

Another example is where the loss of your employment could result in your children's education being affected (*Bruce v Procurator*

Fiscal Dundee NJ 162/1 1; LW v Procurator Fiscal 2012, unreported). Thus, for example, if the outcome is that your children could no longer attend the private school in which they are settled or will be unable to take up or continue their university course because you are unable to assist with their fees, then exceptional hardship may be made out (*Bruce, supra*).

It should be pointed out that the Court is entitled to consider that the actions of the accused are the reason that the family home is at risk and the accused must accept the consequences of his actions as the author of his own misfortune (*Clumpas v Ingram, 1991 SCCR 223*). However, in view of more recent authority, it is submitted that the decisions in cases such as *Clumpas* should be read narrowly. In particular, it should also be pointed out that, in all instances, the court should take the current economic climate into account when making its decision (*Mugazerenza v Procurator Fiscal, unreported*). In considering the decision in *Mugazerenza*, the High Court has now made clear that the decision should be viewed broadly. Thus, where the current economic climate means that there would be difficulties in finding alternative employment, the loss of employment and the subsequent risk to the family home should be viewed as exceptional hardship (*Maclvor v Procurator Fiscal, 01427/10*).

Hardship to Sick or Elderly Relatives



If a sick or elderly person depends upon the accused's ability to drive, this could be a significant factor in establishing exceptional hardship (*Edmonds v Buchanan 1993 SCCR 1048; Colgan v McDonald 1999 SCCR 901; Kirk v Procurator Fiscal Ayr 2831/99*). Again, each case will be judged on its own facts and circumstances. Medical reports from doctors and details of the medical condition will be required in all circumstances. While the family member may not be able to attend court for medical reasons, it will be beneficial if he or she can provide a supporting affidavit or letter.

There are myriad examples of such hardship. In *Colgan v McDonald 1999 SCCR 901*, where the accused had to take her child to hospital on a regular basis for psychiatric treatment and another child suffered from cerebral palsy, exceptional hardship was established. In *Kirk v*

Procurator Fiscal Ayr NJ 2831 / 99, the fact that a father had to take his son to hospital on a regular basis for kidney problems contributed to a finding of exceptional hardship. Finally, exceptional hardship was established where a driver had to drive a sick child regularly to hospital, a previous child having died (*Edmonds v Buchanan 1993 SCCR 1048*).

Although all of these cases involve children, it is submitted that they will apply equally to the care of an adult or elderly relative. In all cases, the burden will be on the accused to demonstrate that there is no adequate alternative method of transportation.

Hardship to Employer or Employees



As previously stated, in the current economic climate, the court will take into account the accused's loss of employment. However the court will be more concerned in the effect that a ban would have on other, innocent, parties. The leading case on such hardship is *Mugarenza v Procurator Fiscal Glasgow NJ 1186/08*. This was a successful appeal against the Justice's decision to ban the accused notwithstanding that his business would come to an end and, subsequently, his three employees would lose their jobs. The High Court held that, taking into account the current economic climate, such an effect was more than inconvenience and thus constituted exceptional hardship.

In the earlier case of *Robinson v Aitchison 1986 SCCR 511*, the accused was a businessman who required to travel throughout Scotland. The accused ran a printing company and the business was dependant upon the sales that he was able to generate. The business was specialised and, accordingly, the accused could not simply employ someone to fulfil his role. Additionally, the hours involved were such that it was not possible to obtain the services of a hired driver. As such, the business would collapse if the accused lost the right to drive, leading to his six full-time employees losing their jobs. In these circumstances, the High Court held that the loss of the accused's licence would have 'catastrophic' effects and a finding of exceptional hardship was made.

Robinson is instructive because it demonstrates certain key criteria that are essential if a finding of exceptional hardship is to be made in such circumstances, namely:

- There must be evidence that a driving licence is a prerequisite of fulfilling the accused's business obligations. This could be because the job involves extensive travel or because the nature of the work requires transport (for example, an electrician or builder needs his van to transport his work materials, visit builders merchants etc).
- There must not be a viable alternative, such as being able to employ someone else to fulfil this role. This may be because the work is specialised or because the business could not cope with the extra costs involved.
- It must be demonstrated that there is good reason why the accused cannot employ a driver to allow him to continue

performing his role. Again, there may be economic or practical reasons for this.

Similarly, the accused should demonstrate that it is not possible for one of his employees to perform the driving duties. This was established in *McFadyen v Tudhope 1986 SCCR 712*. In this case, the business owner was the only person in the company who could drive. The High Court accepted that, if he was to employ another person who could drive, he would have to pay off one of his current employees. The case also makes clear that potential hardship to employees' families, and the particular circumstances of those families, should also be taken into account.

In addition to hardship caused to the employee, it is also competent to argue exceptional hardship on the grounds of hardship to the employer. A typical example would be where the employee has a specific skill-set and would thus be very difficult to replace. This was the basis of a successful defence appeal in *Findlay v Walkingshaw 1998 SCCR 181*, where a livestock driver had very specific skills and would have been very difficult to replace. Exceptional hardship was found on the basis of hardship to the employer. Further cases providing useful guidance on this matter include *Marshall v McDougall 1991 SCCR 231*, *McIvor, supra*, and *Howdle, supra*.

The effect on those who are not directly employed by the accused, such as independent contractors, was considered in *McLaughlin v Docherty 1991 SCCR 227*. In this case, the accused was a self-employed consulting engineer. His business involved extensive travel throughout Scotland and it was accepted in evidence that he could not afford to employ a driver. Three self-employed

subcontractors relied upon the accused's ability to secure contracts to provide them with work and one of these contractors was married with children. In these circumstances, the High Court accepted that the contractors' livelihoods were at risk and exceptional hardship was established.

In a similar vein to hardship being caused to an employer or employee, where the disqualification of a doctor would cause hardship to his patients, exceptional hardship may be made out. Similarly, where the accused worked for a charity, and the charity would be adversely affected by her disqualification, exceptional hardship was established (*Gardiner v Procurator Fiscal Perth 0834/09*). Finally, where the accused was a “carer” and his disqualification would cause hardship to his male clients (who preferred a male carer, the accused being the only male carer employed by the Trust), a finding of exceptional hardship was made (*McIvor, supra*).

Other grounds of Exceptional Hardship

Hardship to creditors:

Banks and other financial institutions may not illicit much public sympathy today but the court will take into account the inability of the accused to meet his debts when determining whether exceptional hardship has been established (*Allan v Barclay, supra*). If a driving ban means that the accused will default on significant debts, such as business or personal loans - and the accused can prove the existence of these loans with appropriate documentation - then this factor will be taken into account.

Living in a remote location:

In itself, this is very much a subsidiary cause of exceptional hardship. However, the remote location may mean that the driver cannot continue to remain in employment as he



cannot get to work. Accordingly, there may be potential difficulties

regarding his mortgage which could give rise to exceptional hardship.

If the driver has children, there may be insurmountable difficulties, for example, in taking and collecting the children from school. Again this gives one possible ground for exceptional hardship.

The issue was most recently aired in *Waine v PF Glasgow (supra)*.

Chapter Four

EVIDENCE OF EXCEPTIONAL HARDSHIP

Persons seeking to persuade the court that a driving ban would cause exceptional hardship must lead evidence to that effect. This is known as the burden of proof

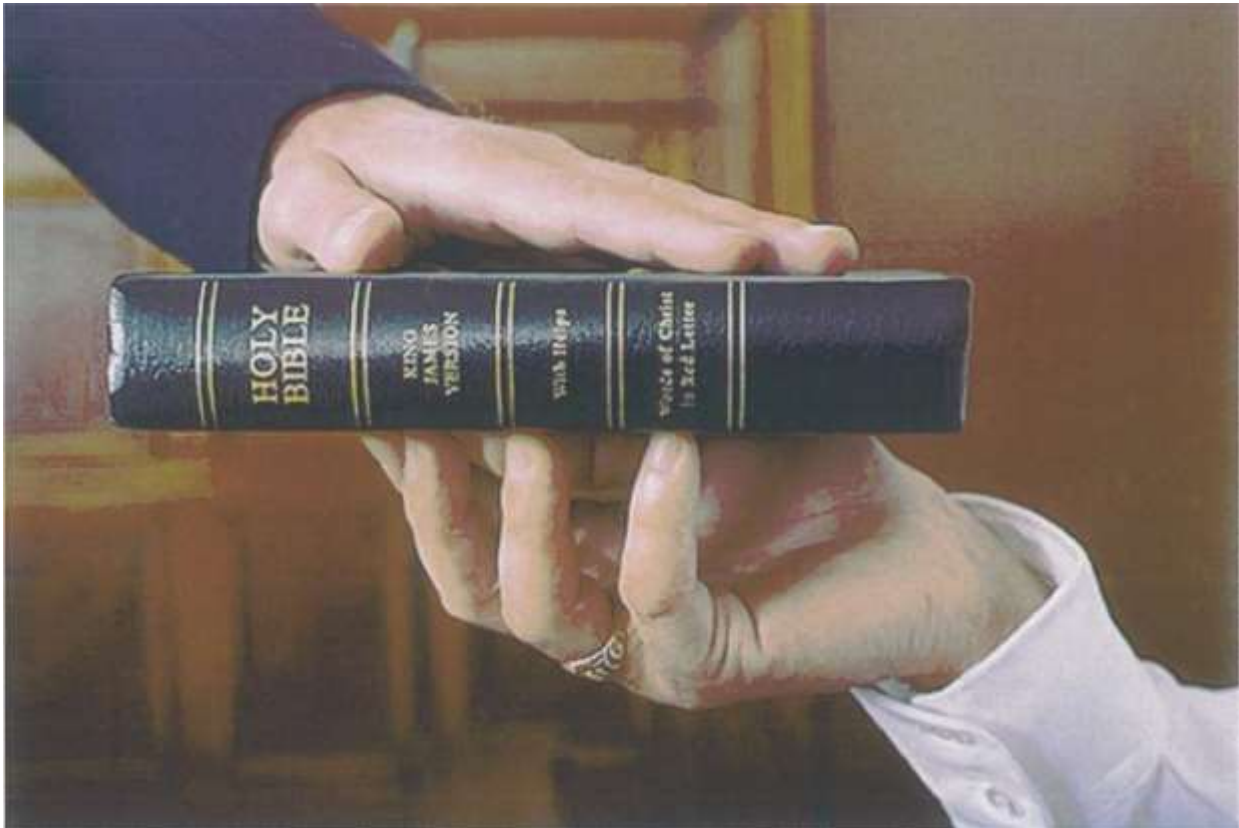
There is no evidential burden upon the Crown to prove that exceptional hardship does not exist. The onus of proof is entirely upon the driver. Unlike in criminal cases, however, where the Crown must prove the guilt of the accused beyond a reasonable doubt, the standard of proof in exceptional hardship cases is on the balance of probabilities.

There can be several different sources of evidence in an exceptional hardship case. This chapter shall outline the main sources. These are:

Sworn witness testimony

- Sworn affidavits
- Signed letters
- Other documentary evidence
- Legal submissions

Sworn Witness Testimony



Although it is possible to succeed at an exceptional hardship proof on the basis of agreed evidence alone (*Findlay v Procurator Fiscal Aberdeen, supra*), it is now the norm for witnesses to give evidence. In almost all cases, at the very least the accused will be expected to give evidence. It is also generally very beneficial of those persons most reliant upon the accused's right to drive can appear as witnesses.

Many people feel intimidated at the thought of appearing in court but the court, understandably, takes the view that anyone who would be so affected should be prepared to give evidence to that effect. Thus, for example, the court may well be sceptical if any employer or employee is claiming that the loss of the accused's licence would also be potentially devastating for them but is not prepared to attend and appear as a witness. Similarly, if a person is claiming that the family

home would be at risk, thus affecting his or her family, the court may be more easily persuaded if that person's spouse or partner appears in court to give evidence.

There are, of course, valid reasons why potential witnesses may not be able to appear, such as ill-health. In such circumstances, there are other ways in which the evidence can be put before the court. Whenever possible, however, affected parties should appear as witnesses. A good solicitor will help you understand court procedure and prepare you for what to expect.

Signed Affidavits

An affidavit is a written, sworn statement of fact or facts, made voluntarily by a person under oath to an authorised person such as a notary public.



For the purposes of an exceptional hardship proof, affidavits will be used when a person who would ideally be a witness cannot attend court for practical or medical reasons.

Because an affidavit is a sworn statement, it carries more weight in court than a signed letter stating the same facts. This also means that there is a better chance of the Crown agreeing that the

matters referred to in the affidavit are agreed facts. In turn, such agreement increases the driver's chances of success at proof.

The affidavit itself takes a legally-prescribed form and is usually presented in the form of a series of facts in numerical order. A well prepared affidavit can be extremely useful in persuading the court of the veracity of the driver's case. A good solicitor will prepare the affidavit and arrange for it to be sworn.

Signed Letters

Signed letters from interested parties act as another alternative to the person appearing in court as a witness.

Generally, letters are less persuasive than affidavits

because they are not sworn documents.

It is also less likely that the

Crown will not dispute the evidence of a letter as opposed to a signed affidavit.

For such reasons,

affidavits are generally preferable to letters, particularly where they are from a person who is claiming to be affected by the loss of the driver's licence.



Letters are more useful, and more likely to be agreed, when they are from persons not directly affected by the loss of the driver's licence. Thus a letter from a doctor confirming that a person has a medical condition, meaning that the person is dependent upon the assistance of people with driving licences, is useful.

Another example would be a letter from an employer stating that the accused would lose his job if he lost his licence. However if the employer is claiming that this would also cause the business significant hardship, then it is preferable if the employer either appears as a witness or signs an affidavit.

That said, there may be sound medical, practical or economic reasons why an affected party cannot appear as a witness or sign an affidavit. In such circumstances, the letter should state the reasons for this.

Ideally, the letters should be served on the Procurator Fiscal prior to the hearing so that the Crown has fair notice of their content. If the Crown does not dispute the evidence, it has the effective status of agreed evidence and should be accepted as a true statement of fact (*Findlay v Procurator Fiscal Aberdeen* XJ948/04). Acceptance of such undisputed evidence can mean that exceptional hardship is established even without any other evidence (*Findlay, supra*).

Other Documentary Evidence

In a court of law, only those facts that are within judicial knowledge are accepted as proved without evidence being led to prove them.

These are facts which are so notorious that they are known to everyone. Thus, for example, it does not need to be proved that lawnmowers are used to cut grass or that Glasgow city centre is busy during rush hour.

However, the status of your mortgage, the existence of other debts, the position of your employees and the financial strength of your business are not within judicial knowledge. These, and other, aspects relevant to exceptional hardship must be proved by evidence. The accused person can provide oral evidence of such factors on the witness stand. This should be corroborated by documentation.

Examples of the type of documentation that should be utilised in an exceptional hardship proof include bank statements, mortgage agreements, credit card bills, loan statements and business profit and loss accounts.

		52 weeks ended 1 May 2014				52 weeks ended 2 May 2013 (restated)			
		Continuing operations		Discontinued operations		Continuing operations		Discontinued operations	
	£m	Underlying results £m	Goodwill amortisation and exceptional items £m	Discontinued operations £m	Total £m	Underlying results £m	Goodwill amortisation and exceptional items £m	Discontinued operations £m	Total £m
Turnover	23	6,458.0	-	33.7	6,491.7	5,719.8	-	38.6	5,758.4
Group operating profit	4	317.8	168.21	2.2	271.8	276.1	(17.6)	15.0	273.5
Share of profit of associate		-	-	-	-	2.0	-	-	2.0
Total operating profit	23	317.8	168.21	2.2	271.8	278.1	(17.6)	15.0	275.5
Profit/loss on sale of investment	4	-	79.6	-	79.6	-	(5.1)	-	(5.1)
Profit on disposal of business assets	4	-	3.2	-	3.2	-	-	-	-
Profit on ordinary activities before interest		317.8	34.8	2.2	354.8	278.1	(22.7)	15.0	270.4
Net interest	5	11.5	-	0.1	11.6	4.8	-	0.5	5.3
Profit on ordinary activities before taxation		329.3	34.8	2.3	366.2	282.9	(22.7)	15.5	275.7
Taxation on profit on ordinary activities	6	(85.7)	5.4	(2.4)	(82.7)	(65.8)	2.6	(3.9)	(67.1)
Profit on ordinary activities after taxation		243.6	40.0	(0.3)	283.3	217.1	(20.1)	11.6	208.6
Equity minority interests		(2.9)	-	-	(2.9)	(1.6)	-	(1.2)	(2.8)
Profit for the period	23	240.7	40.0	(0.3)	280.4	215.5	(20.1)	10.4	205.8
Equity dividends	23	(142.6)	-	-	(142.6)	(129.2)	-	-	(129.2)
Retained profit for the period	23	98.1	40.0	(0.3)	137.8	86.3	(20.1)	10.4	76.6

earnings per share

Adjusted diluted 'before discontinued operations, amortisation and

	12.3p	11.1p	10.4p
Basic		14.4p	10.4p
Diluted		14.3p	10.4p

The crucial importance of documentary evidence is well illustrated by the decision in *Marshall v McDougall 1991 SCCR 231*. In this case, the accused was the managing director of a company involved in the installation and servicing of central heating systems. He had several employees who would lose their jobs if the business failed.

His role involved extensive travel throughout Scotland.

It was accepted that the anti-social hours made it impractical to employ a driver. In holding that exceptional hardship was established, the High Court stressed the importance of the documents and accounts presented to them, in particular a very full report from a firm of chartered accountants. These documents allowed the court to accept the claim that the accused was the 'technical brains' of the company and the only person qualified to undertake contracts and obtain new business.

Legal Submissions

At the end of your case, you will be required to make a legal submission. This is basically a 'summing-up' of all of the evidence that has been led in the case. You will require to refer to a number of cases in the submission and provide reasons why these decisions are relevant to your case and invite the court to decide the case in your favour.

Your skill and expertise, during legal submissions but also during the preparation and presentation of your entire case, is crucial to your chances of success at an exceptional hardship proof. Read your case law, prepare your bullet points and be ready to focus your arguments on the strongest aspects of the actual evidence led.

Provide the Procurator Fiscal with all of your documentary productions well in advance of the proof date and make sure that copies of all authorities are provided to the Justice of the Peace or the Sheriff on the day of the proof.

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AUTHORITIES AND CASE NOTES THEREON

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