# CHAPTER 2

# PROCEDURE

## CONTENTS



## COMMENCING PROCEEDINGS

### Generally

**2.01** Road traffic prosecutions may be begun by way of a summons issued on an information laid before a magistrate or justices' clerk or person authorised by the justices' clerk. The information may, however, be served on the magistrates' court officer by a member, officer or employee of a prosecutor on behalf of the prosecutor (Criminal Procedure Rules 2014 (SI 2014/1610), r.2.4(2), as amended). The High Court may make a vexatious proceedings order under which the person subject to an order may only pursue proceedings with the leave of the High Court (Senior Courts Act 1981 s.42).

An information may be oral or in writing (see below, however, for the requirements where a warrant is sought). There is no prescribed form. It should identify the informant and also the defendant (by description if necessary) and give particulars of the offence and statute, etc. It seems that an unincorporated body of persons cannot lay an information charging a criminal offence—see *Rubin v DPP* [1989] R.T.R. 261.

**2.02** Alternatively, s.29 of the Criminal Justice Act 2003 provides a procedure which enables identified prosecutors to institute criminal proceedings by issuing a written charge together with a requisition, that is, a requirement to appear before a specified magistrates' court to answer the charge or a "single justice procedure notice", that is, a requirement to indicate plea and whether the defendant (if pleading guilty) is content for the case to be dealt with under a new s.16A to the Magistrates' Courts Act 1980 which permits a wide range of summary, non-imprisonable offence to be dealt with in the absence of the parties. Proceedings may be started in this way by a "relevant prosecutor" within the meaning of s.29(5)(a) and (c) of the 2003 Act who has been authorised to issue requisitions. Some relevant prosecutors are authorised only to issue written charges and single justice procedure notices following the amendment to this section by ss.46 and 47 of the Criminal Justice and Courts Act 2015. Those authorised prosecutors prior to the amendment continue to be so authorised: s.29(10) as amended. The authority to issue requisitions (and single justice procedure notices) therefore continues to apply to any police force (or person authorised by a police force to





institute proceedings); the Secretary of State for Business, Innovation and Skills (or person authorised by that Secretary of State); Transport for London (TfL); a person authorised for the purposes of s.49 of the Vehicle Excise and Registration Act 1994; by the Secretary of State for Work and Pensions or for Health; a person authorised by the Driving and Vehicles Standards Agency. It is also available for proceedings instituted by a police force in magistrates' courts sitting in specified locations in London (Brent, Feltham, Havering and South Western), in Essex or in Gloucestershire. A copy of both the written charge and the requisition must be served on the court. The Criminal Procedure Rules 2014 (SI 2014/1610) apply to these documents and to the form, content and service of summonses. By the same rules, neither requisition nor summons needs to be signed by the person issuing it, but the name of that person will be stated within the document. It would appear that the effect of this change is likely to mean that it is the date of the first issuing of the requisition that will be relevant for ascertaining whether an offence has been prosecuted within the required time-limits.

### The laying of an information

**2.03** There is a distinction between laying an information, which is a ministerial act by the prosecutor, and issuing process, which is a judicial function for the magistrate or justices' clerk or person authorised by the justices' clerk under the Justices' Clerks Rules 2005 (SI 2005/545): *Hill v Anderton* [1982] 2 All E.R. 963 HL also reported under the name *R. v Manchester Stipendiary Magistrate* at [1982] R.T.R. 449. The information is laid when it is received at the relevant office. Many informations will be prepared and laid using electronic methods. The need for caution when laying informations electronically was highlighted in *Atkinson v DPP* [2004] EWHC 1457; (2004) 168 J.P. 472. The defendant was prosecuted for carrying an insecure load. The date of the alleged offence was June 16, 2002. The information date printed on the summons was December 10, 2002 (and so within the six-month time-limit). The summons itself was printed on December 20, 2002. On the computer system in use, the police entered initial data and the date of the entry was recorded. A summons would not be issued until that information is "validated" and no record was made of any changes between the original entry and the validation. In that time, it was possible to change the data originally entered including the date given as the information date. The date of validation was not recorded and therefore it was not possible to ascertain any date before the date on which the summons was issued as the date of validation and, therefore, the date of the information. Accordingly, since the summons was issued more than six months after the date of the alleged offence, the magistrates had no jurisdiction.

Factual and legal items common to a number of informations such as the date and place may be set out in a single preamble and incorporated by reference (*Shah v Swallow* [1984] 2 All E.R. 528 HL).

**2.04** It is quite clear that an information must give sufficient particulars of the offence being charged. The requirements for a fair hearing in the European Convention on Human Rights (incorporated into domestic law by the Human Rights Act 1998) require defendants to be clearly informed of what is alleged and to have a reasonable time for the preparation of their defence. An illustration of this principle can be found in the decision of the Divisional Court in *Halls Construction Services Ltd v DPP* [1989] R.T.R. 399. The company was convicted of using

heavy goods vehicles without holding the appropriate licences. On appeal against conviction, it was argued for the appellants that the informations were defective in that they lacked sufficient particulars of the offences being charged, especially the amount of tax which should have been paid. The appeal was allowed. It was held that the informations did not enable the appellants to appreciate the case they had to meet, nor did they give a clear idea of the maximum penalty. The court also said that notices sent out by the Department of Transport informing the defendants of the penalties and back-duty payable were capable of curing a defective information. However, such notices required study of the legislation—which was being constantly amended—in order to ascertain liability for back-duty and penalties; that was a difficult task even for a lawyer. In view of the requirement for magistrates and defendants to know precisely what sum was payable, it was unacceptable that the appellants had not been informed that the prosecution was seeking to recover penalties and back-duty. The appeal was allowed.

A magistrate (or justices' clerk or authorised person) may not reconsider an application which has already been rejected by a fellow magistrate (or justices' clerk or authorised person) (*R. v Worthing JJ.* [1981] Crim. L.R. 778). It is submitted that this does not preclude a further application at the discretion of the magistrate (or justices' clerk or authorised person) where there is fresh material.

**2.05** Where an information was required to be laid within two months of the procuring of a sample, unless the magistrate certified that it was "not practicable to do so", the words were to be construed strictly, and the discretion exercised judicially (*R. v Harvey Ex p. Select Livestock Producers Ltd* (1985) 149 J.P. 389).

**The issue of a summons**

**2.06** The issue of a summons is a judicial act. Certain basic requirements should be fulfilled before the issue, namely that:

(a) the allegation is of an offence known to law and the essential ingredients of the offence are prima facie present;
(b) the offence alleged is not "out of time";
(c) the court has jurisdiction; and
(d) the informant has the necessary authority to prosecute.

A proposed defendant has no right to be heard at this stage; he may be heard only at the discretion of the court (*R. v West London JJ. Ex p. Klahn* [1979] 1 W.L.R. 933). The Criminal Procedure Rules 2014 (SI 2014/1610) provide in r.7.4(1) that a court may issue (or withdraw) a summons or warrant without giving the parties any opportunity to make representations and without a hearing. Where a hearing is arranged, it can be in public or in private. In *R. v Clerk to the Bradford JJ. Ex p. Sykes* (1999) 163 J.P. 224, it was held that the person considering the issue of a summons was entitled to make inquiries beyond the information, but was not under a duty to do so.

**2.07** The question of whether or not an information discloses an offence known to law is one which should be tackled at the outset, i.e. prior to the issue of a summons; it should not be left in abeyance until the matter comes to trial. A party aggrieved by the issue (or non-issue) of process may apply for judicial review (*R. v Horseferry Road JJ. Ex p. Independent Broadcasting Authority* [1986] 2 All E.R. 666). Magistrates may refuse to issue a summons if they think fit on reasonable grounds. If a summons is unreasonably refused, there may be a judicial review to





compel its issue. It was held in *R. v Bury JJ. Ex p. Anderton* [1987] Crim. L.R. 638, that the High Court had jurisdiction to grant relief by way of judicial review to quash a summons where it could be clearly shown that the issue of a summons was an abuse of the process of the court and the allegations which the summons made were oppressive and vexatious. Before exercising the discretion to issue a summons, the person considering the issue is entitled to inquire as to the reasons for delay in laying an information even though the statutory time-limit for the laying of informations has not been breached (*R. v Clerk to the Medway JJ. Ex p. Department of Health and Social Security* [1986] Crim. L.R. 686). In *Wei Hai Restaurant Ltd v Kingston upon Hull City Council* [2001] EWHC Admin 490; (2002) 166 J.P. 185, informations were laid for breaches of food safety provisions virtually at the end of the 12-month limitation period although, the defence alleged, the Council had been in a position to proceed within two to three months of the initial investigation. The deputy district judge found that there had been delay in the proceedings and applied the test of whether that delay had led to prejudice in that the appellants would be denied a fair trial. He found that that was the case in respect of two of the 16 informations and they were stayed. His refusal to stay the other informations was upheld by the Administrative Court which emphasised that the power to stay proceedings was to be exercised "most sparingly" and only when the alleged abuse directly affected the fairness of the trial.

**The issue of a warrant**

**2.08** By s.1(4) of the Magistrates' Courts Act 1980 a warrant to arrest a defendant aged 18 or over in the first instance may not be issued for any offence unless it is indictable or an "either way" offence, or punishable with imprisonment, or his address is not sufficiently established to enable a summons to be served on him. For such a warrant the information must be in writing and substantiated on oath (s.1(3)).

Under s.13 of the Magistrates' Courts Act 1980 (as amended) a warrant may only be issued on non-appearance where the offence is punishable with imprisonment or the court, having convicted the defendant, proposes to disqualify him. Where the defendant is under 18, the requirement is that the offence be punishable with imprisonment in relation to a person aged 18 or over: s.13(3A). There are certain further restrictions on the exercise of this power to issue a warrant on non-appearance which are set out in s.13. Apart from this, a warrant may always be issued for a failure to answer bail (Bail Act 1976 s.7(1)).

**2.09** A warrant may not be issued unless the condition in s.13(2A) or s.13(2B) has been fulfilled. In s.13(2A), the condition is that it is proved to the satisfaction of the court, on oath or in such other manner as may be prescribed, that the summons was served on the accused within what appears to the court to be a reasonable time before the trial or adjourned trial. In s.13(2B), the condition is that (a) the adjournment now being made is a second or subsequent adjournment of the trial; (b) the accused was present on the last (or only) occasion when the trial was adjourned; and (c) on that occasion the court determined the time for the hearing at which the adjournment is now being made.

The distinction between the position at first instance and following non-appearance will be noted. Some "either way" offences are punishable with imprisonment only on indictment (e.g. forgery of driving licences, insurances,

etc., contrary to s.173(1) of the 1988 Act). Although such offences might be regarded as remaining imprisonable after the decision to proceed to summary trial and when being dealt with summarily because of, e.g. the power under s.3 of the Powers of Criminal Courts (Sentencing) Act 2000 to commit for sentence, *R. v Melbourne* [1980] Crim. L.R. 510, see § 16.20, implies the contrary.

**2.10** A considerable extension to the powers of the police in cross-border enforcement is provided by ss.136–140 of the Criminal Justice and Public Order Act 1994. Perhaps the most important for readers of this work is s.136, which provides that a warrant for arrest issued in one part of the United Kingdom may be executed in another part and that it may be executed either by an officer from a force within the jurisdiction in which it was issued or by an officer of the jurisdiction within which the arrest takes place, as well as by any other person authorised within the warrant to issue it. Section 140 conveys reciprocal powers of arrest, so that a constable from one jurisdiction and present in another jurisdiction in the United Kingdom, may arrest a person using the police powers applicable to the local jurisdiction.

These provisions must be regarded as unexceptionable, and the flexibility granted by Parliament should enable the police to proceed with fewer encumbrances against alleged offenders who possess much greater mobility than was the case only a few years ago. Consideration is being given to extending these powers to court staff and to approved bodies.

**2.11** Unless a statute otherwise requires, a prosecution may be commenced by any person. Exceptions are most prosecutions under Pts II and III of the Public Passenger Vehicles Act 1981 (see s.69), and prosecutions for most of the offences under the Vehicle Excise and Registration Act 1994 (see s.47), and (possibly) for obstruction and other offences under the Town Police Clauses Act 1847 s.28. There is no necessity for a third party prosecutor to prove public interest before being able to initiate proceedings: *R. (on the application of Ewing) v Davis* [2007] EWHC 1730; [2007] 1 W.L.R. 3223. Whilst most prosecutions are initiated by publicly funded bodies or by organisations, a private individual not directly affected by an offence is entitled to lay an information with a view to commencing proceedings for an offence. Where that offence is contrary to a public or general Act of Parliament, that Act would have been enacted for the public benefit and there was no obligation on a prosecutor to demonstrate that the particular prosecution had a public interest benefit. There were sufficient other safeguards arising from the power of the courts in relation to an abuse of process and from the power of the DPP to take over (and discontinue) prosecutions.

The proceedings may be continued notwithstanding the death of the informant prior to the hearing (*R. v Truelove* (1880) 5 Q.B.D. 336), or prior to the appeal if a police informant (*Hawkins v Bepey* [1980] 1 All E.R. 797).

### Form of summons or requisition

**2.12** An irregularity or illegality in the mode of bringing a defendant before the court, if not objected to at the hearing, does not invalidate the conviction (*Gray v Customs Commissioners* (1884) 48 J.P. 343).

By r.7.4(2) of the Criminal Procedure Rules 2014 (SI 2014/1610) a single summons or requisition can be issued for more than one offence and r.7.2(4) expressly provides that two or more informations may be set out in one document. The cases where more than one charge has been included in the information





should be read with these provisions in mind. See also *Shah v Swallow*, § 2.03 above. As to the particulars in the summons or requisition generally, see the Criminal Procedure Rules 2014 r.7.4(3). Examples of insufficient detail in summonses are found in *Stephenson v Johnson* [1954] 1 All E.R. 369 and *Cording v Halse* [1954] 3 All E.R. 287. The summons does not have to show the date of the laying of the information unless there is some question of its being out of time (see *R. v Godstone JJ Ex p. Secretary of State for the Environment* [1974] Crim. L.R. 110). With regard to whether an information is bad for duplicity, practitioners should note the decisions set out at §§ 2.92 et seq.

**2.13** Under r.7.3(1), every information must contain a statement of the offence (describing it in ordinary language and identifying the legislation that creates it) and enough detail about the conduct to make it clear what is being alleged against the defendant. Under r.7.4(3), a summons or requisition must give details of when and where the defendant is required to attend court together with the offence(s) alleged and the person under whose authority the summons or requisition is issued. The 2012 Rules are, however, directory and not mandatory because in so far as they conflict with the statute they have to be adapted to meet it (per Ormrod L.J. in *Thornley v Clegg* [1982] R.T.R. 405 at 410). Whilst, as a matter of general principle, the overriding objective (that criminal cases be dealt with justly (2012 Rules r.1(1)) will be the lens through which an appellate court will consider procedural irregularities, there will be occasions when strict statutory provisions will be followed even where no injustice has arisen. In *R. v Leeks* [2009] EWCA Crim 1612; [2010] R.T.R. 16 (p.182) changes were made to an indictment and the defendant subsequently pleaded guilty. However, that indictment had never been formally endorsed and the Court of Appeal allowed the defendant's appeal; the statute required the Crown Court to "make such order ... as the court thinks necessary" and, since that had not occurred, the proceedings were founded on a nullity even though all parties were clear about what was taking place. Since the statute was clear, the conviction could not be allowed to stand. In *Simmons v Fowler* (1950) 48 L.G.R. 623 DC it was held that the summons should indicate the Act and the regulation. The summons should specify the defects in the parts and accessories but does not need to specify whether the defects are in the parts or in the accessories (*Brindley v Willett* [1981] R.T.R. 19). The requirements for a fair hearing in the European Convention on Human Rights (incorporated into domestic law by the Human Rights Act 1998) require defendants to be clearly informed of what is alleged and to have a reasonable time for the preparation of their defence.

A person cannot be convicted under a repealed statute even if it has been re-enacted with identical words (*Stowers v Darnell* [1973] Crim. L.R. 528). However, the information may be amended. Again, where the statute has been omitted it is possible to amend by inserting it providing the defendant is not misled (*Thornley v Clegg* above, applying s.123 of the Magistrates' Courts Act 1980). See also *Jones v Thomas* [1987] R.T.R. 111 where it was held that an information was not defective and was incapable of misleading where it referred to an alleged offence as being contrary to s.6(1) (now s.5(1) of the 1988 Act) of the Road Traffic Act 1972 "as amended", rather than "as substituted". The Divisional Court considered, however, that the more appropriate form of wording was, " s.6 of the Road Traffic Act 1972 as substituted by s.25 of the Transport Act 1981".

**2.14** See § 2.92 as to duplicity and charging alternative offences and § 2.81 as to amending a summons.

# CHAPTER 4

# DRINK/DRIVING OFFENCES

## CONTENTS



## INTRODUCTION

### The legislative framework

**4.01** The whole of the Road Traffic Act 1972, together with Pt IV of, and Schs 7 and 8 to, the Transport Act 1981 were repealed by the Road Traffic Act 1988 and the Road Traffic Offenders Act 1988 (Road Traffic (Consequential Provisions) Act 1988 Sch.1). Those Acts served to consolidate the previous legislation and apart from some minor stylistic changes and rearrangements in the drafting, faithfully reproduced the repealed provisions. The Road Traffic Act 1988 (referred to hereafter as "the 1988 Act") consolidates provisions relating to road traffic offences whilst the Road Traffic Offenders Act 1988 (referred to hereafter as "the 1988 Offenders Act") amounts to a consolidation of provisions relating to the prosecution and punishment of those, and other, offences.

Section 4 of the 1988 Act (driving a motor vehicle when unfit through drink or drugs, etc.) was amended by Sch.1 to the Road Traffic Act 1991 which replaced the words "motor vehicle" where they appeared in that section with the words "mechanically propelled vehicle". The 1991 Act also inserted a new s.3A in the 1988 Act in order to create with effect from the same date the offence of causing death by careless driving when under the influence of drink or drugs; this offence is dealt with in Chapter 5 below.

New offences are inserted into the Road Traffic Act 1988 by virtue of s.56(1) of the Crime and Courts Act 2013. These new offences were brought into force for offences committed on or after March 2, 2015.





The Act brings, under the new s.5A, offences of driving or attempting to drive a motor vehicle, or of being in charge of a motor vehicle, on a road or other public place when there is a specified controlled drug in the body of the offender.

The offence is committed if the proportion of the drug in his blood or urine exceeds the specified limit for that drug.

In addition to the specific new offences of drug driving, other amendments are made to the 1988 Act to create an offence of Causing Death by Careless Driving when under the influence of drink or drugs. In s.3A(1), after para.(b) a new para.(ba) is inserted linking this offence to the new s.5A offence by making reference to having in his body a specified controlled drug at a level in his blood or urine exceeding the specified limit for that drug. (see § 4.27a)

Section 7(3) of the 1988 Act was amended by s.63 of the Criminal Procedure **4.02** and Investigations Act 1996, which inserted therein a new subs.(bb) enabling police to make full and proper use at police stations of the second generation of stationary breath-alcohol analysers (see § 4.110).

Section 7(4) of the 1988 Act was amended, and a new s.7(4A) inserted, by the Police Reform Act 2002 s.55. The effect of these amendments is to allow registered health care professionals as well as registered medical practitioners to decide that blood specimens should not for medical reasons be extracted from suspects, provided that the opinion of the latter is not contrary to that of the former, and to require the decision as to who is to be asked to take a specimen (if one is to be taken) to be made by the officer making the requirement (see § 4.220).

A new s.7A was inserted in the 1988 Act by the Police Reform Act 2002 s.56, **4.03** in order to provide for the taking of specimens of blood from persons incapable of consenting (see § 4.290).

Section 6 of the 1988 Act was replaced by the Railways and Transport Safety Act 2003 s.107 and Sch.7 para.1, which inserted in its place new ss.6, 6A, 6B, 6C, 6D and 6E in order to provide a statutory regime for the preliminary testing of drivers of motor vehicles for drink or drugs based upon the administration to suspects of three specific kinds of preliminary test; a preliminary breath test, a preliminary impairment test and a preliminary drug test (see §§ 4.35 et seq).

Sections 6D and 7 of the Road Traffic Act 1988 were amended by s.154 of the Serious Organised Crime and Police Act 2005 in order to provide police with a power to undertake evidential breath tests at the roadside (see § 4.37).

Further changes were made to the law relating to drink driving with effect from the April 10, 2015. The Deregulation Act in s.52(a) and Sch.11 brings about some important changes that have implications for the taking of specimens and the gathering of evidence. The "statutory option" to have a specimen of 50µg or less replaced with one of blood or urine under s.8 of the Road Traffic Act, is now removed. Total reliance will now be placed upon the evidential readings of the machines and blood or urine will only be an option where there are medical reasons or a machine failure.

The requirement to carry out a preliminary breath test before proceeding to the evidential tests is removed, as is the need to carry out the evidential test at either a police station or hospital. At present there are no approved portable evidential breath testing machines but this change would allow their introduction at some point. The ability to do a screening test at the road side is still left in the legislation and this can still be used as the basis for arrest but the evidence of the reading of the screening machine cannot replace the need for the evidential procedure.

Amendments are made in relation to drug driving by amending both s.6 of the Road Traffic Act and s.7(3)(c) is amended to allow an officer to require a specimen to be taken where an offence under s.3A or 4 is suspected and the constable has been advised by a medical practitioner that the condition of the person might be due to a drug. Paragraph 5 of Sch.11 of the Deregulation Act now adds that a healthcare professional may make that assessment.

Further amendments are made to s.7A Road Traffic Act, by allowing a healthcare professional to take samples from someone who is incapable of consenting.

The text of the relevant parts of the current legislation is reproduced in full in Vol.2.

Where a section of a statute is referred to without its statute being named, the reader may assume that it refers to the Road Traffic Act 1988 ("the 1988 Act").

### Offences

**4.04** The offences dealt with in this chapter are:

(1) Driving or attempting to drive a mechanically propelled vehicle while unfit to drive through drink or drugs (s.4(1)).

(2) Being in charge of a mechanically propelled vehicle while unfit to drive through drink or drugs (s.4(2)).

(3) Driving or attempting to drive a motor vehicle on a road or other public place after consuming so much alcohol that the proportion of it in the person's breath, blood or urine exceeds the prescribed limit (s.5(1)(a)).

(4) Being in charge of a motor vehicle on a road or public place after consuming alcohol so that the proportion of it in the person's breath, blood or urine exceeds the prescribed limit (s.5(1)(b)).

(a) Driving or attempting to drive a motor vehicle on a road or other public place when there is a specified controlled drug in the defendant's blood or urine that exceeds the prescribed limit for that drug (s.5A(1)(b)).

(b) Being in charge of a motor vehicle on a road or other public place when there is a specified controlled drug in the defendant's blood or urine that exceeds the prescribed limit for that drug (s.5A(1)(b)).

(5) Without reasonable excuse, failing to co-operate with a preliminary test (s.6(6)).

(6) Without reasonable excuse, failing to supply specimens of breath, blood or urine for analysis (s.7(6)).

(7) Without reasonable excuse, failing to allow specimen of blood to be subjected to a laboratory test (s.7A).

A summary of these offences is set out in §§ 4.21–7.

### Irrelevance of arrest to admissibility of evidence of analysis

**4.05** In contrast to earlier statutory provisions, the present law entitles a constable to require specimens of breath, blood or urine "in the course of an investigation whether a person has committed an offence under section … 4 or 5 " (s.7(1)). For this reason it was held in three separate cases in the Divisional Court (*Fox v Gwent Chief Constable* [1984] R.T.R. 402, *Anderton v Royle* [1985] R.T.R. 91





and *Bunyard v Hayes* [1985] R.T.R. 348 *Note*) that the fact that the arrest was unlawful (as in *Fox*) or that the officers had failed to prove a valid arrest (as in *Anderton v Royle*) is irrelevant provided that the specimen for analysis was obtained without inducement, threat (other than the statutory warning), trick or other impropriety. In *Bunyard* the defendant refused to supply evidential breath specimens at the police station after having been arrested on suspicion of being the driver involved in an accident (which he was not). It was again held following *Fox* that as there was no misconduct on the part of the police the defendant should be convicted under what is now s.7(6) of refusing specimens for analysis.

The case of *Fox v Gwent Chief Constable* was considered by the House of Lords on appeal ([1985] R.T.R. 337). Their Lordships unanimously upheld the Divisional Court holding that evidence of a specimen of breath obtained at a police station in accordance with the procedure laid down in the Act and without any trick or impropriety was admissible notwithstanding that the accused had been unlawfully arrested. On a proper construction of s.7(1) an arrest or lawful arrest is not an essential prerequisite for the evidence of the breath test result at the police station to be rendered admissible.

**4.06** The principle that evidence of a specimen of breath obtained at the police station is admissible notwithstanding that the accused had been unlawfully arrested also applies to a sample taken at hospital after an unlawful arrest (*DPP v Wilson* [2009] EWHC 1988; [2009] R.T.R. 29 (p.375): see also § 4.293 below).

### Exclusion of evidence of analysis

**4.07** It is clear from the unanimous decision of the House of Lords in *Fox* (see § 4.05 above) that evidence or proof of compliance with the requirements of the roadside breath test procedure is no longer an essential prerequirement of proof of an offence under what is now s.5. It was accordingly held in *Gull v Scarborough* [1987] R.T.R. 261. *Note* that, following *Fox*, a magistrate was wrong to dismiss a case under what is now s.5(1) because an arrest for failing to provide a roadside breath specimen was unlawful, the magistrate having found as fact that the police had no reasonable cause to suspect that the accused was driving with an excess of alcohol in his breath. It was further held that there is no distinction in principle between the provision of a breath specimen at a police station, as in *Fox*, and, as was the case in *Gull* where the machine was out of order, the provision of blood.

Although it is not clear from the report what cases were cited to the court in argument, it would appear that the Divisional Court in *DPP v Kay* [1999] R.T.R. 109 drew upon the authority of *Fox* above when advising justices to be slow to exclude evidence of the taking of the substantive specimen of breath because of a technical shortcoming in the roadside procedure. In the case in point the roadside police officer's innocent failure to follow the manufacturer's instructions about allowing a 20-minute gap to elapse from consumption of the last drink to the breath test did not render unlawful the result of the subsequent Intoximeter test at the police station. When weighing the failure to follow the correct procedure at the roadside and its effect on the fairness of proceedings, justices should have in mind that the 1988 Act was enacted to prevent motorists who were over the permitted limit escaping responsibility on technicalities.

**4.08** *DPP v Kay* above was considered and applied by the Divisional Court in *DPP v Kennedy* [2003] EWHC 2583; (2004) 168 J.P. 185. A failure to change the

mouthpiece on an Alcolmeter SL–400A before a second roadside test on the same suspect could not possibly have distorted the result of that second test. Even if the justices had been correct to hold that the mouthpiece should have been replaced, there would have been no justification, on the authority of *Fox* above, for excluding the evidence of the breath analysis at the police station under s.78 of the Police and Criminal Evidence Act 1984.

A similarly robust course was followed by the court in *Harper (Alistair Stewart) v DPP* [2001] EWHC Admin 1071. Following a forced entry to property in pursuit of a suspected drink/driver, the suspect was arrested by police with the words "I am arresting you on suspicion of driving a motor vehicle on a road whilst over the prescribed limit through drink or drugs". These words were an adequate summary of s.5 of the Road Traffic Act 1988, which did not provide a power of arrest, but were not appropriate to s.4 ibid., which did provide such a power; his arrest, therefore, had been unlawful. The unlawfulness of the arrest had been a matter of form rather than substance, however, and there was no unfairness in allowing the evidence of his refusal to supply a specimen of breath at the police station to be admitted (applying *Fox* above); furthermore, the position was no different under the European Convention on Human Rights, which was concerned with substance rather than form.

**4.09** It has been further held that, provided there is no malpractice, caprice or opprobrious behaviour on the part of the police, there is no restriction on the stopping of motorists for the purpose of ascertaining whether the drivers have alcohol in their bodies and on the subsequent requirement of a breath test; (what are now) ss.6 and 6A govern the administration of the preliminary breath test and not the stopping of a car; random stopping of cars within these limits is not prohibited, but the police are prohibited from requiring breath tests at random (*Chief Constable of Gwent v Dash* [1986] R.T.R. 41, following *Steel v Goacher* [1983] R.T.R. 98 but disapproving dicta to the contrary in *Such v Ball* [1982] R.T.R. 140) (see further § 4.53)).

It should, however, be made clear that while evidence of a breath, blood or urine specimen is normally admissible notwithstanding that there was no arrest or that the arrest was unlawful, the evidential specimen may be inadmissible if it was not obtained in accordance with the procedure for obtaining such a specimen in the police station set out in ss.7, 8 (see further § 4.107).

**4.10** The principles of *R. v Sang* [1979] 2 All E.R. 1222 (a House of Lords case), to the effect that although a judge has a discretion to exclude evidence of admissions, confessions and evidence obtained from the accused after the commission of the offence, he has no discretion to refuse to admit relevant admissible evidence merely because it has been obtained by improper or unfair means, were to some extent overtaken by statute with the bringing into force on January 1, 1986 of s.78 of the Police and Criminal Evidence Act 1984 (see § 3.96). The section provides that in any proceedings the court may refuse to allow evidence on which the prosecution proposes to rely to be given if it appears to the court that having regard to all the circumstances, including the circumstances in which the evidence was obtained, the admission of the evidence would have such an adverse effect on the fairness of the proceedings that the court ought not to admit it.

This statutory provision clearly can apply to statements produced by evidential breath testing machines. Section 78 states that the court has a discretion to exclude the unfairly obtained evidence in any proceedings ("proceedings" are defined as





criminal proceedings including service proceedings (1984 Act s.82)). The section would thus seem to be of general application. It will be noted that unlike the doctrine of law in the United States ("the fruit of the poisoned tree") the evidence will not be automatically excluded if obtained illegally or if obtained after an unlawful arrest; instead the court under s.78 has to consider whether the admission of the evidence would have such an adverse effect on the fairness of the proceedings that it ought not to be admitted having regard to all the circumstances, including the circumstances in which it was obtained.

**4.11** It was always anticipated that s.78 of the Police and Criminal Evidence Act 1984 would become the subject of case law; that anticipation was fulfilled, albeit to a limited extent and in very unusual circumstances, in the case of *Matto v Wolverhampton Crown Court* [1987] R.T.R. 337 (also reported as *Jit Singh Matto v DPP* [1987] Crim. L.R. 641). Having followed the suspect up a driveway for some 200 or 300yds and been informed by him that they were on private property and could not therefore breathalyse him, the two police officers concerned nevertheless persisted in their request for a breath test and a positive result was obtained. The defendant was arrested and at the police station subsequently provided specimens for an evidential breath test which revealed an alcohol level of 73µg/100ml of breath. He appealed to the Crown Court against his conviction for driving with excess alcohol.

The appeal was conducted by both sides on the basis that the validity or otherwise of the screening breath test was crucial to the determination of the issue. Although the court found that the police *knew* they were acting illegally, it decided not to exercise its discretion to exclude the evidence of the evidential breath test. An appeal to the Divisional Court followed, and in the case stated the Crown Court referred to the screening breath test as having been obtained *voluntarily*.

**4.12** The Divisional Court (Woolf L.J. and McCullough J.) interpreted the known facts somewhat differently. Given that the court below had found that at some time after their initial request for a screening breath test the police officers had become aware that their implied licence to be on the property had been terminated, but had nevertheless persisted with their request, the finding that the specimen had been taken voluntarily was, per Woolf L.J., "wholly inconsistent". McCullough J., concurring, stated that he did not think it could properly be said that the appellant in giving the specimen at his house "… was acting voluntarily. It would be almost—not quite, but almost—as logical in the crime of rape to say that the woman who submitted because she believed she had no alternative acted voluntarily".

Having thus established that the police officers were acting *mala fide*, the case could be said to fall within the exceptional category of case envisaged by the House of Lords in *Fox* when they referred to the different view they might have taken had the defendant in that case been lured to the police station by trickery or oppression rather than, as he had been, as the result of a genuine mistake.

**4.13** Turning then to s.78 of the 1984 Act, Woolf L.J. observed that he was satisfied that the statute does not reduce the discretion of the court to exclude unfair evidence which existed at common law. Accordingly, given the finding of *mala fides* by the Crown Court, that court "could or might" have exercised its discretion to exclude evidence of the breath-alcohol analysis. The appeal was allowed.

The facts of this case made it an exceptional one, and Woolf L.J. was at pains

to point out that in the ordinary way courts will not be concerned with what happened with regard to the screening breath test, but will only be concerned, in accordance with *Fox*, with the procedure at the police station under what are now ss.7, 8.

**4.14** *R. v Sang* and *Matto v Wolverhampton Crown Court* above were distinguished by the Divisional Court in *R. v Thomas* [1990] Crim. L.R. 269 (also reported as *Thomas v DPP* [1991] R.T.R. 292). Where a police officer unlawfully arrested a motorist for failing to provide a screening breath test (such a specimen not in fact having been requested), but in so doing acted under a misunderstanding rather than in bad faith, there was no reason why evidence of the motorist's subsequent refusal to provide a specimen at the police station should not be admitted. It was clear from the authority of *Fox* that an unlawful arrest was irrelevant to breath test procedures at a police station. A discretion to exclude those procedures rested upon a finding of *mala fides* but in the case in point the justices had specifically found that the police sergeant concerned had acted solely as a result of a misunderstanding. The defendant's appeal against a conviction of an offence under what is now s.7(6) of failure to provide a specimen of breath for analysis was accordingly dismissed.

*Thomas v DPP* was itself distinguished by the Divisional Court in *DPP v McGladrigan* [1991] R.T.R. 297 and *DPP v Godwin* [1991] R.T.R. 303 in which it was held, applying *R. v Samuel* [1988] QB 615, that the discretion to exclude evidence under s.78 was phrased in general terms and was not dependent upon a finding of *mala fides* on the part of the police.

**4.15** The case of *Matto v Wolverhampton Crown Court* above was applied by the Divisional Court in *Sharpe v DPP* [1993] R.T.R. 392. A defendant whose erratic driving had caused constables to pursue him into his own driveway made it clear to those constables that their presence on his property was unwelcome and that they were trespassers; he was nevertheless led or dragged by them back onto the road where he refused to provide a specimen of breath for a breath test. He was taken under arrest to the police station where he provided specimens for an evidential breath test which revealed an alcohol level of 111µg/100ml of breath. At the close of the prosecution case the defendant applied for witness summonses for two of his neighbours so that they could give evidence of the constables' oppressive behaviour and also of the normality of the defendant's driving in the vicinity of his home so that the justices would be able to consider exercising their discretion to exclude the breath analysis evidence under s.78 of the Police and Criminal Evidence Act 1984. The justices declined to issue the summonses on the basis that evidence of the defendant's later driving would add nothing material to the case since the constables had given sufficient evidence of earlier erratic driving, and that since the constables had accepted that they were trespassers in the defendant's driveway, any evidence about their exact behaviour would take the matter no further.

Allowing the defendant's appeal against his conviction, the court stated that the conduct of the officers in stopping and arresting the defendant in his driveway was relevant to the justices' exercise of their discretion under s.78 of the 1984 Act. In stating that they would not have excluded the breath analysis evidence whatever the witnesses might have said and however bad the police officers' behaviour might have been, the justices had not exercised their discretion. They therefore erred in excluding the evidence of the neighbours by not issuing the





witness summonses and, consequently, in forming the opinion that, whatever the evidence, they would automatically have exercised their discretion in favour of admitting the breath analysis evidence.

**4.16** In the course of argument it was submitted on behalf of the defendant that where *mala fides* was established, the discretion under s.78 could only be exercised one way, namely by the exclusion of the evidence of the breath analysis. That "rather extreme" submission (per Buckley J.) was not accepted by the court; the authority of *DPP v McGladrigan* [1991] R.T.R. 297 and in particular *R. v Samuel* [1988] Q.B. 615 cited in that case would appear to contradict, not support, such a submission.

In *R. (on the application of Crown Prosecution Service) v Wolverhampton Magistrates' Court* [2009] EWHC 3467; [2009] All E.R. 293 (Nov), police officers chased a vehicle on foot and came across the car after it collided with an embankment. The driver (M) was arrested by an officer who observed that his eyes were glazed and that he smelled of intoxicants. No preliminary roadside breath test was conducted as the arresting officer did not have the necessary equipment to conduct such a test and had not been trained to conduct an impairment test. M was taken to a police station where he failed a blood-alcohol test and was charged with driving while over the limit. At the end of the prosecution case M submitted that he had no case to answer as his arrest was unlawful. The magistrates' court held that, whilst the police officer had acted in good faith, the arrest was nevertheless unlawful as the police officer had no power of arrest pursuant to s.6 of the Road Traffic Act 1988, because neither a preliminary roadside breath nor an impairment test had been conducted by the police officer. The judge said that the fact that few officers had been trained to conduct impairment tests was unacceptable. The evidence of the blood tests was excluded under the Police and Criminal Evidence Act 1984 s.78 and as a result there was no case to answer. That decision was quashed by the Divisional Court and the case was remitted to the magistrates' court. The magistrates' court had not properly considered whether pursuant to s.78 the evidence of the blood test would have an adverse affect on the fairness of the proceedings. In the circumstances the evidence of the blood test could not have had any impact on the fairness of the proceedings. Further a police officer had the power to arrest a motorist if he had reasonable cause to believe that an offence contrary to s.4 of the 1988 Act had been committed.

**4.17** It is important to note that it is not permissible to raise before the Divisional Court the issue of the justices' discretion to exclude evidence under s.78 if that issue was not raised earlier before the justices (*Braham v DPP* [1996] R.T.R. 30). The justices concerned could hardly be criticised for deciding as they did by reference to a power they had not been asked to exercise; accordingly the case did not come in the same category as *Matto v Wolverhampton Crown Court* and *Sharpe v DPP* (both described above).

The statutory procedure under ss.7 and 8 of the 1988 Act for obtaining specimens for analysis does not constitute an interview for the purposes of Code C of the codes of practice issued under the authority of the Police and Criminal Evidence Act 1984; accordingly the decisions of justices to exclude prosecution evidence under s.78 of the latter Act on the grounds that such evidence was obtained contrary to Code C for the detention, treatment and questioning of persons by police officers were overturned by the Divisional Court in *DPP v D (A Minor)*; *DPP v Rous* [1992] R.T.R. 246.

| *Offence* | *Allocation (mode of trial)* | *Section ** | *Imprisonment* | *Level of fine* | *Disqualification* | *Penalty points* | *Endorsement code* | *Sentencing guideline †* |
|---|---|---|---|---|---|---|---|---|
| Failure of keeper of vehicle and others to give information as to driver, etc. | Summary | s.172 | — | 3 | Discretionary if committed otherwise than by virtue of s.172(5) or (11) | 6 | — | Fine band C |
| Failure of keeper of vehicle and others to give information as to driver, etc. | Summary | s.112 RTRA 1984 | — | 3 | — | — | — | — |
| Failure of keeper of vehicle and others to give information as to driver, etc. | Summary | s.46 Vehicle Excise and Registration Act 1994 | — | 3 | — | — | — | — |

* Road Traffic Act 1988 unless otherwise specified

† **Note**: See Appendix 3.

** For offences committed on or after March 12, 2015 by a person aged 18 or over, s.85 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 removes the limit of £5,000 where that had previously been the maximum fine payable on conviction in a Magistrates' Court.



# CHAPTER 8

# VEHICLE OFFENCES

## CONTENTS



## CONSTRUCTION AND USE

### Generally

**8.01** The two main sources are the Road Vehicles (Construction and Use) Regulations 1986 (SI 1986/1078) and the Pedal Cycles (Construction and Use) Regulations 1983 (SI 1983/1176). The lighting regulations, some of which are made under s.41 of the 1988 Act and deal with the fitting, maintenance and use of lamps, etc., are dealt with separately, see §§ 8.112 et seq.

The 1986 Regulations have been much amended. They are divided into two main parts; the part governing the construction and equipment of motor vehicles and trailers, and the part governing their use. It may be that causing danger is in a category of its own in applying both to maintenance and use (regs 100 et seq.).

The "construction" part of the regulations is being gradually superseded by the system of type approval (see § 8.09). It is essential therefore when any "construction" regulation is in issue to check whether the type approval system applies instead of the construction regulation. For this purpose reference should be made to reg.6 (Compliance with Community Directives and ECE Regulations) and Sch.2 to the 1986 Regulations. The position normally depends on the date of manufacture and date of first use. The definition of "Community Directives" includes directives issued by the European Parliament and the Council of the EU as well as those adopted by the Council of the Commission of the European Communities.

**8.02** Certain of the "use" regulations depend on the "construction" regulation. If the "construction" regulation does not apply then the "use" regulation will not apply either. A use or maintenance offence will sometimes be a contravention of the basic construction regulation and sometimes of the type approval or approval mark requirement (see, e.g. regs 35 and 36 (speedometers) and 18 (brakes)). It is necessary for the prosecution to choose the correct provision and for the defence to ensure that they have done so. A practical test as to whether the vehicle is subject to type approval may be whether there is a type approval certificate.

The Construction and Use Regulations and the type approval schemes are considered below. Matters relating to particular regulations are then dealt with together with the penalties for all offences.

**The Construction and Use Regulations**

**8.03** Regulation 3 contains the definitions, and definitions in the 1988 Act also apply where the regulations do not have a specific one. The case of *Wakeman v Catlow* [1977] R.T.R. 174 is of importance where a court has to decide whether a vehicle comes within a specified class of vehicle. The defendant drove a jeep with two defective tyres. It was licensed under what is now the Vehicle Excise and Registration Act 1994 as a "land tractor" (as defined in the 1978 Regulations). A "land tractor" is exempted from the requirements of the former reg.99 relating to defective tyres. The justices without considering the definition of "land tractor" and in particular whether the jeep was used "primarily for work on land" dismissed the case. Sending the case back to the justices, the Divisional Court held that the nature of the excise licence alone is insufficient to establish the category of the vehicle and the onus of proof to show that a vehicle comes within an exempt category is on the defendant. Where the category of a vehicle depends not only on its physical characteristics but also on the use to which the vehicle is put, the defence must produce evidence to show that the vehicle was used for that purpose. It will be noted that many of the definitions contained in reg.3 require a vehicle to be used for a certain purpose, e.g. "industrial tractor", "works trailer" and "works truck". There is no definition of the phrase "land tractor" in the 1986 Regulations. The phrase used is "agricultural motor vehicle" and, with effect from March 9, 2015, a "category T tractor". The principle in the *Wakeman* case would appear to be applicable to the new definition, however.

A living van is defined in reg.3(2) as a vehicle which is used primarily as living accommodation and which is not also used for the carriage of goods or burden which are not needed for the purpose of residence in the vehicle. For the interpretation of this the decision in *Plume v Suckling* [1977] R.T.R. 271 may assist. A coach had been converted to carry six passengers, kitchen equipment and a stock car. The stock car was held not to be goods needed for the purpose of residence, but it is submitted that not every luxurious item of goods or burden would take the vehicle out of the definition.

**8.04** The regulations and definitions are detailed and should always be carefully consulted. Offences under the regulations are generally for "using" or "causing" or "permitting" use: see Chapter 1 as to these expressions. Of the cases there cited, many were on these regulations.

Some of the regulations refer to vehicles "first used on or after a specified date" e.g. reg.15. What is meant by "first used" is set out in reg.3(3). An exemption is provided for a vehicle first used on or after the specified date where that vehicle was manufactured at least six months before that date: reg.4(2). This acknowledges the inevitable gap for most vehicles between construction and use. Similarly, where an exemption applies to a vehicle first used before a specified date, e.g. reg.15, it will also apply to a vehicle first used on or after that date if it was manufactured at least six months before that date: reg.4(3). Other provisions apply to vehicles manufactured before or after a certain date (e.g. reg.15). In that case, no further extension is given.

**8.05** The regulations normally apply to both wheeled and track-laying vehicles: reg.4(1). However, reg.4(4) contains exemptions from specified regulations for certain vehicles, including certain track-laying vehicles, such as vehicles in the service of a visiting force or of a headquarters, vehicles going to a port for export





and vehicles on test. Motor vehicles and trailers brought temporarily into Great Britain are also exempted from some of the regulations. "Temporarily" means "casually" and does not include a trailer brought intermittently but regularly into this country (see *BRS v Wurzal* [1971] 3 All E.R. 480). Some regulations specifically exempt certain vehicles. For instance, "works trucks" are exempted from reg.63 (wings). A works truck is defined in reg.3. One part of the definition is use in "the immediate neighbourhood" of the premises. It was held that "in the immediate neighbourhood" had to be construed with reference to the amount of use on the roads involved. Land adjacent or nearly adjacent to the main premises may not be in the "immediate neighbourhood" if it nevertheless involves having to travel a considerable distance on a public road (*Hayes v Kingsworthy Foundry Co Ltd* [1971] Crim. L.R. 239). This case was followed in *Lovett v Payne* [1980] R.T.R. 103, a case of the nearest weighbridge. "Nearest" was held not to be as the crow flies but the nearest suitable road route (i.e. suitable for the vehicle in question). Regulation 4(4) and (5) qualifies the case of *Wilkinson v Barrett* (1958) 122 J.P. 349 (see § 1.57, meaning of "trailer").

**8.06** Regulation 4 confers other exemptions from some of the regulations for certain motor vehicles in addition to those mentioned. It may therefore be worthwhile to refer to reg.4 (as amended) in an appropriate case.

The regulations apply to wheeled vehicles, not being tram or trolley vehicles operated under statutory powers (see powers contained in the Road Traffic Act 1988 s.193A), and additional obligations are imposed by the Public Service Vehicles (Conditions of Fitness, Equipment, Use and Certification) Regulations 1981 (SI 1981/257) (see further § 13.171). Generally, the 1986 Regulations would seem to apply only to roads and only to motor vehicles and trailers while used on a road as defined in Chapter 1; strange results would follow if they applied to them off the road. See s.42 of the Road Traffic Act 1988.

The regulations apply to Crown vehicles and drivers and (with the exceptions detailed in reg.4) to vehicles and drivers of visiting forces.

**8.07** Provisions are included in the regulations about the construction of minibuses, which are defined in reg.3(2) as motor vehicles constructed or adapted to carry more than eight but not more than 16 seated passengers in addition to the driver. Regulations 41–44 (as amended) and Sch.6 to the 1986 Regulations are relevant here. It is noteworthy that none of the requirements relates to "a vehicle manufactured by Land Rover UK Limited and known as the Land Rover". Nor do the provisions in the Schedule relating to the construction of minibuses relate to vehicles constructed or adapted for the secure transport of prisoners.

Failure to comply with the regulations is an offence: Road Traffic Act 1988 ss.41A, 41B and 42. The summons should indicate that it is contrary to the appropriate section of the 1988 Act and the particular regulation (*Simmons v Fowler* (1950) 48 L.G.R. 623). The prohibition on "use" (as opposed to causing or permitting use) in s.42(b) is absolute in the sense that no mens rea, apart from user, need be shown unless a regulation is so worded as to show that the exercise of proper care and absence of knowledge are defences, as in the regulations on speedometers and excessive noise (*James v Smee*; *Green v Burnett* [1954] 3 All E.R. 273). Where, however, the charge is causing or permitting, this normally requires prior knowledge of the unlawful user on the part of the person causing or permitting (see *Ross Hillman Ltd v Bond* [1974] R.T.R. 279 and other cases cited in §§ 1.161 et seq.). But where a regulation casts a duty only upon the vehicle-

owner, it may be that use by another is not an offence (126 J.P. Jo. 93), save so far as it is aiding and abetting.

**8.08** As to the various provisions relating to weighbridges, ascertainment and transmission of weight, plated weights and defences to weight prosecutions, see §§ 1.68–83. As to unnecessary obstruction (reg.103) see §§ 6.201 et seq.; as to opening car doors (reg.105) see § 6.259; as to the use of lights in conditions of seriously reduced visibility, see § 8.137 and as to lights generally, see §§ 8.112 et seq.

## TYPE APPROVAL SYSTEM

### Vehicles subject to type approval

**8.09** The construction of motor vehicles in Great Britain hitherto has been controlled by manufacturers being required to ensure that their vehicles are constructed in accordance with the Construction and Use Regulations. One result of the accession by the United Kingdom to the European Community and the consequent acceptance and implementation of the EC's common transport policy is that, in time, the construction of motor vehicles and their parts will be controlled by type approval schemes based on uniform conditions applying throughout the Community in accordance with EC directives or regulations.

Whether a vehicle is subject to "type approval" usually depends on the date of manufacture and the date of first use (which often means the first registration under the Vehicle Excise and Registration Act). There is a time between EC decisions being incorporated in the type approval regulations and in turn in the exemptions in the Construction and Use Regulations. The law so far as it affects Great Britain is contained in ss.54–65A of the 1988 Act and the regulations made thereunder. Using, or causing or permitting to be used on a road, a vehicle subject to the type approval requirements without a certificate of conformity is an offence against s.63(1) of the 1988 Act.

### The optional EC type approval scheme

**8.10** The relevant regulations are the Road Vehicles (Approval) Regulations 2009 (SI 2009/717), as amended. For agricultural and forestry vehicles, see the Tractor etc. (EC Type-Approval) Regulations 2005 (SI 2005/350), as amended, which apply to agricultural and forestry tractors, their trailers and interchangeable towed machinery together with their systems, components or separate technical units. In addition, there are the Motor Cycles etc. (EC Type Approval) Regulations 1999 (SI 1999/2920), as amended.

Application may be made to the approval authority (the Secretary of State) for EC type approval for light passenger vehicles and components (2009 Regulations reg.12). In relation to an EC type approval certificate or an EC certificate of conformity, it is an offence for a person, with intent to deceive, to forge, alter or use such a document, or to lend or allow such a document to be used by another person or to make or have a document so closely resembling such a document as to be calculated to deceive. The maximum punishment is, on summary conviction, a fine not exceeding the statutory maximum and, on indictment, two years' imprisonment and/or an unlimited fine. It is a summary offence to make false statements in connection with the supply of information or documents under the regulations: 2009 Regulations reg.33.





**8.11** The European Court of Justice has given consideration to the extent of a classification given to a vehicle under the EC type approval scheme. In *Voigt v Regierungsprasidium Karlsruhe-Bretten* [2006] E.C.R. I–6799; [2006] R.T.R. 36 (p.448), a driver had been driving a vehicle on a motorway in Germany on which different speed limits applied depending on whether the vehicle was a passenger vehicle or a goods vehicle. The vehicle in question was designated a passenger vehicle under the type approval scheme but a goods vehicle by German law relating to speed limits. Accordingly, it was subject to a lower speed limit. The court confirmed that the purpose of the directive on which the scheme is based was to remove obstacles to the free movement of goods; that was achieved by the harmonisation of requirements and technical characteristics but does not go beyond that. Accordingly, it does not introduce consequences that relate to the application of national road traffic rules governing the speed limits that apply to different categories of vehicle.

Where either a type approval certificate has been issued by the Secretary of State or a certificate of conformity by the manufacturer (see, e.g. the Motor Vehicles (Type Approval) (EEC Manufacturers) Regulations 1981 (SI 1981/493)) reg.6 of and Sch.2 to the Road Vehicles (Construction and Use) Regulations 1986 exempt from the regulations specified in the table the motor vehicle or trailer or its component part.

**8.12** The following points may be emphasised. The application of the 2009 Regulations and reg.6 of the Road Vehicles (Construction and Use) Regulations 1986 is not obligatory. The exemption therefore only exists where the conditions in reg.6 apply. The burden of proof of establishing the exemption is therefore on the defendant on the balance of probabilities (Magistrates' Courts Act 1980 s.101, and *R. v Carr-Briant* [1943] 2 All E.R. 156). Under the 1980 Regulations, the type approval certificate is issued by the British Secretary of State. Regulation 6 of the 1986 Regulations also exempts motor vehicles, trailers and component parts manufactured abroad with either a type approval certificate from a member country or a certificate of conformity with such a foreign type approval certificate. By reg.6 the scheme applies to trailers.

### The compulsory British type approval scheme

**8.13** The relevant regulations are the Motor Vehicles (Type Approval) (Great Britain) Regulations 1984 (SI 1984/981), as amended, and the Motor Vehicles (Type Approval for Goods Vehicles) (Great Britain) Regulations 1982 (SI 1982/1271), as amended. The Motor Cycles Etc. (Single Vehicle Approval) Regulations 2003 (SI 2003/1959) introduced a scheme for approving the design, construction, equipment and marking of mopeds (diesel or electric as well as other mopeds), motor cycles, motor tricycles and quadricycles (all as defined and limited in the regulations) and providing for those vehicles to be examined for the purposes of obtaining an approval certificate. Exceptions are provided in reg.13. Regulation 2 defines those vehicles that fall within the described types to which the regulations apply.

**8.14** The 1984 Regulations make provision on a national basis for certain classes of motor vehicles and their components manufactured on or after October 1, 1977 to be compulsorily subject to conformity with type approval schemes. The main category to which the 1984 Regulations apply is (subject to reg.3(2)) every motor vehicle (and parts of such vehicles) which was manufactured on or after October

1, 1977 and not first used before August 1, 1978 which is *either* constructed solely for the carriage of passengers and their effects *or* a dual-purpose vehicle, and which is:

(a) adapted to carry not more than eight passengers (exclusive of the driver) and either has four or more wheels or has only three wheels and is of more than 1,000kg gross weight, or

(b) has three wheels (not being a motor cycle with or without side-car), falls below the specified maximum gross weight and falls within a specified design speed or engine capacity.

For the meaning of "adapted", "dual-purpose vehicle", etc., see Chapter 1.

**8.15** The 1982 Goods Vehicles Regulations similarly provide that certain classes of motor vehicles and their components manufactured on or after October 1, 1982 and not first used before April 1, 1983, or six months after manufacture as the case may be, shall be compulsorily subject to conformity with type approval schemes. The main category to which the regulations apply is motor vehicles which have three or more wheels and are either goods vehicles, tractor units of articulated vehicles or bi-purpose vehicles (reg.3(1)). A "bi-purpose vehicle" means a vehicle constructed or adapted for the carriage of both goods and not more than eight passengers, not being a vehicle to which the 1984 Regulations apply nor a motor ambulance or a motor caravan which are also excluded separately (reg.2(1)). Regulation 3(2) contains a large number of exemptions. They include vehicles brought temporarily into Great Britain which comply with certain requirements and which display a registration mark mentioned in reg.5 of the Motor Vehicles (International Circulation) Regulations 1985 (SI 1985/600). The exemptions also include certain vehicles for export, visiting forces' vehicles, vehicles formerly in the public service of the Crown, prototype vehicles not intended for general use on roads, motor tractors, light locomotives and heavy locomotives (see the definitions in Chapter 1); engineering plant, pedestrian controlled vehicles, straddle carriers, works trucks and track-laying vehicles, all as defined in reg.3(2) of the Road Vehicles (Construction and Use) Regulations 1986.

**8.16** The Motor Vehicles (Approval) Regulations 2001 (SI 2001/25), as amended, revise the system for approving the construction of single vehicles before they enter service. They apply to vehicles to which the 1984 Regulations apply and to certain vehicles to which the 1982 Regulations apply (reg.4 of the 2001 Regulations).

Pt III of the 2001 Regulations provides for an approval certificate to be issued by the Secretary of State. There are two sets of requirements, basic and enhanced (reg.5). Special classes of vehicle are defined in Sch.2 to the regulations and those need only comply with the basic requirements. Equivalent approvals granted in other EEA states will be recognised (reg.5(8)(c)).

**8.17** Regulation 3 of the Motor Vehicles (Type Approval) (Great Britain) Regulations 1984, as amended, now applies to motor ambulances, motor caravans, personally imported passenger vehicles and amateur-built passenger vehicles which had previously been excluded. This means that in future such a vehicle may either be type approved in accordance with the 1984 Regulations or may be granted single vehicle approval in accordance with the 2001 Regulations.

Section 63 of the 1988 Act makes it an offence to use, cause or permit to be used on a road (for the meaning of these words, see Chapter 1) a vehicle subject





in whole or in part to type approval unless it appears from one or more certificates in force that the vehicle or its parts comply with the type approval. Type approval contraventions will be contrary to s.63.

**8.18** The following points may be emphasised. As stated, the scheme is compulsory. Presumably, therefore, proof of the type approval scheme and the certificate will be a matter for the prosecution to establish. At present the regulations do not apply to trailers as such but only to motor vehicles and component parts. The scheme is limited to certificates issued by the Secretary of State backed up where appropriate by certificates of conformity.

Both the 1982 and the 1984 Regulations prohibit the first issue of a vehicle excise licence in respect of a vehicle subject to type approval unless the application is accompanied by evidence showing that the vehicle conforms with the type approval requirements.

### Approval marks

**8.19** Vehicles showing designated approval marks are exempted from certain braking regulations. The Motor Vehicles (Designation of Approval Marks) Regulations 1979 (SI 1979/1088), as amended, are based on ECE Regulations, i.e. regulations prepared by the United Nations Economic Commission for Europe annexed to the Agreement of 20 March 1958 as amended (Cmnd. 2535 and 3562) relating to conditions for approval for motor vehicles equipment and parts (see s.80 of the 1988 Act).

### Sale of vehicles and parts without required certificate

**8.20** If a goods vehicle or parts are sold without the certificate of conformity or Secretary of State's approval certificate required by the compulsory type approval scheme being in force an offence is committed under s.65 of the 1988 Act. The person who supplies or offers to sell or supply or exposes for sale such goods vehicles or parts similarly will also commit an offence.

Section 65(3) exempts vehicles for export. It also exempts a person who had reasonable cause to believe that the vehicle (or part when fitted) would not be used on a road in Great Britain or at least until it had been certified or that it would be used within the terms of prescribed exemptions.

## SPECIFIC CONSTRUCTION AND USE REGULATIONS

### Agricultural trailed appliance

**8.21** The term "land implement" was deleted from reg.3 of the Construction and Use Regulations and replaced by "agricultural trailed appliance" which is defined there. The definition includes a number of elements. One element requires it to be a trailer which is an instrument constructed or adapted (see § 1.27) for use off roads for the purpose of agriculture, horticulture or forestry and which is only used for one or more of these purposes. The wording of the last part of the definition (b(ii)) is complicated but appears to mean that an agricultural implement is not an agricultural trailed appliance even though it is rigidly mounted on a vehicle and supported by its own wheels, unless the mounting is permanent or unless part of its weight is supported by its own wheel or wheels and the greater part of

purposes of compliance with the regulations and their powers include the right to ask questions and the inspection and copying of entries in records for the purposes of any examination or investigation. Where an inspector concludes that a person is contravening one or more of the regulations or has contravened one or more of the regulations in circumstances that make it likely that the contravention will be repeated, an "improvement notice" may be served upon that person requiring that person to remedy the contravention, or as the case may be, the matter occasioning it within such period as may be specified in the notice. In addition, inspectors may serve a prohibition notice in cases where an inspector concludes that the activities carried out, on, by or under the control of a person being investigated involve or, as the case may be, will involve a risk of serious personal injury. There is a right of appeal against an improvement or a prohibition notice to an employment tribunal.

**Offences**

**14.203** By reg.17, any person who fails to comply with any of the relevant requirements commits an offence. A person found guilty of an offence under reg.17(1) will be liable on summary conviction to a fine not exceeding the statutory maximum, or on conviction on indictment to a fine. Schedule 2 provides for enforcement and reg.17(3) sets out the basis of criminal liability for any person who commits offences in contravention of improvement notices or prohibition notices, or who intentionally obstructs an inspector in the execution or performance of powers, uses or discloses any information in contravention of Sch.2, or makes a false statement in purported compliance with a requirement to furnish information.

Regulation 18 deals with offences which are due to the fault of another person. It provides that where the commission by any person of an offence is due to the act or default of some other person, that other person will be guilty of the offence, and a person may be charged with the commission of the offence by virtue of reg.18 whether or not proceedings are taken against the first-mentioned person.

**14.204** Regulation 19 applies to offences by bodies corporate so that where an offence committed by a body corporate is proved to have been committed with the consent or connivance of, or to have been attributable to any neglect on the part of any director, manager, secretary or other similar officer of the body corporate or a person who was purporting to act in any such capacity, he as well asthe body corporate will be guilty of that offence and shall be liable to be proceeded against and punished accordingly.

Regulation 22 permits a court to order the cause of any offence to be remedied within a specified time either in addition to or instead of imposing any punishment.



CHAPTER 15

# THEFT, TAKING CONVEYANCES, AGGRAVATED VEHICLE-TAKING, CRIMINAL DAMAGE AND CAUSING DANGER TO ROAD USERS

CONTENTS



**Generally**

**15.01** This chapter deals with the offences of theft and taking conveyances in ss.1 and 12 of the Theft Act 1968 and with aggravated vehicle-taking in s.12A ibid. Thereafter the related offences of interfering with vehicles (Criminal Attempts Act 1981 s.9), tampering with and getting on vehicles (Road Traffic Act 1988 ss.25 and 26), criminal damage (Criminal Damage Act 1971 s.1) and causing danger to road users (Road Traffic Act 1988 s.22A) are considered.

## THEFT AND TAKING CONVEYANCES

**The offences**

**15.02** A person who dishonestly appropriates property belonging to another with the intention of permanently depriving the other of it is guilty of theft (Theft Act 1968 s.1). A person who takes a conveyance for his own use or that of another without the consent of the owner or other lawful authority is guilty of an offence. A person who, knowing that a conveyance has been taken without such authority, drives it or allows himself to be carried in or on it also commits an offence (Theft Act 1968 s.12(1)). Section 12(1) does not apply to pedal cycles but a separate offence of taking these without consent is created by s.12(5) of the Act (see further § 15.12). Section 12 does not apply in Scotland where there is an offence of taking and driving away which applies only to motor vehicles (Road Traffic Act 1988 s.178). The provisions of s.12 and s.178 are designed to deal with people who take conveyances for temporary use and, because they have no intention of permanently depriving the owner of them, could not be convicted of theft. In the Crown Court a jury may convict a person charged with theft of conveyance of an offence under s.12; § 15.10 discusses the difference between theft and taking without consent and the circumstances in which a court can convict under s.12 as an alternative to theft.

**15.03** A person who enters a building, or part of a building, as a trespasser with

intent to steal is guilty of burglary (Theft Act 1968 s.9). However, a person who so enters a building with intent to commit an offence under s.12 of the Act (or s.178 of the 1988 Act in Scotland) is not guilty of burglary as those offences are not comprised in the definition of burglary.

**15.04** A person is guilty of an offence if, when not at his place of abode, he has with him any article for use in the course of or in connection with theft (Theft Act 1968 s.25). By virtue of s.12(5) of the Act, an offence under s.12(1) is deemed to be an offence of theft, so a person who goes equipped to take vehicles without the owners' consent is guilty of an offence. As taking a pedal cycle without consent is proscribed by s.12(5) rather than s.12(1), a person who goes equipped to take a pedal cycle is not guilty of an offence under s.25.

**15.05** A person does not commit an offence under s.12 if he believes that he has lawful authority to do what is prohibited or that he would have the owner's consent if the owner knew what he was doing (s.12(6) of the 1968 Act). Such belief need not have been a reasonable one and the onus lies on the prosecutor to show the accused did not have such belief. This defence is discussed further at § 15.16.

*Conveyance*

**15.06** Section 12(7) of the 1968 Act defines "conveyance" as one "constructed or adapted for the carriage of a person or persons whether by land, water or air, except that it does not include a conveyance constructed or adapted for use only under the control of a person not carried in or on it". Therefore, s.12(1) applies to ships, rubber dinghies, aircraft and other vehicles whether they are mechanically propelled or not (e.g. carts, trams, trolley vehicles, railway rolling-stock). It does not apply to remotely controlled aircraft, drones or other vehicles, whether or not they are constructed or adapted for the carriage of people if the conveyance is not controlled by a person carried on it. Neither does it apply to a conveyance that is constructed or adapted solely for the carriage of goods such as a goods trailer, porter's trolley or hand-barrow. Presumably the presence of a seat for the driver shows that a conveyance is constructed for the carriage of a person; otherwise it would not be an offence to take a lorry. It is submitted that an excavator, bulldozer or forklift truck which has a seat for the driver is constructed or adapted for the carriage of a person and therefore a conveyance under s.12. A horse is not a conveyance (*Neal v Gribble* [1978] R.T.R. 409). Moreover, even if a horse could be said to be a conveyance, which it is not, it cannot be said to be "adapted" for the conveyance of the rider by putting a bridle on it: a bridle, halter or saddle does not adapt a horse but simply makes it easier to ride (ibid.).

A conveyance must be used, or the taker must intend to use it later, as a means of transport. Where a gamekeeper's vehicle was obstructing some poachers' escape and one of them coasted it down the hill, without using the engine, that vehicle had been used as a conveyance. Had the vehicle been pushed down the hill, however, it would not have been so used (*R. v Bow* [1977] R.T.R. 6). Where the appellant had pushed a car around the corner as a practical joke, intending the owner to think it had been stolen, it had not been used as a conveyance and his conviction was quashed (*R. v Stokes* [1983] R.T.R. 59). However, the Court of Appeal upheld a conviction under s.12 where a defendant took an inflatable dinghy from a lifeboat depot, put it on a trailer and drove it away in *R. v Pearce* [1973] Crim. L.R. 321. The court rejected the contention that s.12 required the removal of the conveyance in some way propelling or removing it in its own ele-





ment, in this instance by water. Where the appellants were seen by police officers to move a car with the intention of returning later to drive it away they could be convicted of the offence under s.12 (*R. v Marchant* (1985) 80 Cr. App. R. 361). In that case the jury convicted the appellants of attempted vehicle taking, the Court of Appeal upheld the conviction, and in doing so Goff LJ cited *Pearce* with approval stating that provided the conveyance was taken so it could be used as a conveyance the offence was made out.

*Take*

**15.07** The word "take" is not equivalent to "use", nor could it consist of a mere assumption of possession adverse to the rights of the true owner. To take a conveyance for the purpose of s.12 of the 1968 Act, a person must take possession or control of it adverse to the rights of the owner or person otherwise entitled to its possession or control coupled with some movement, no matter how small, of the conveyance (*R. v Bogacki* [1973] R.T.R. 384). The Court of Appeal allowed an appeal against a conviction for allowing himself to be carried where the appellant boarded a launch, knowing it to have been taken without authority and anticipating a journey, but the launch did not move whilst he was on it: *R. v Miller* [1976] Crim. L.R. 147. The court was entitled to find a case to answer and then convict the accused where he declined to explain in interview why a mobile phone with traces of his DNA together with a key fitting his front door were found in a car which had been taken without the owner's consent (*K v DPP* [2012] EWHC 1583). Nevertheless, magistrates were entitled to take the view that the defendant's left thumb print on the internal rear-view mirror was as likely to have been left by a passenger as the driver and acquit him of taking the vehicle (*Chief Constable of Avon and Somerset v Jest* [1986] R.T.A. 372).

A person who takes a conveyance that has previously been taken and then abandoned may be guilty of an offence. The Crown Court allowed an appeal against conviction of a man who had been stopped by the police driving a car that had been taken by another. When stopped the respondent had run away from the police. He claimed to have been moving the car prior to notifying the police of the whereabouts of the vehicle. The Crown Court concluded he had been moving the vehicle for his own use but that he was not guilty as he was not the original taker. The Divisional Court upheld the prosecutor's appeal stating that there was a fresh taking of the vehicle by the respondent. Offences under s.12 are not limited to circumstances where there was a single act of taking. The test to be applied is whether the defendant took control of the vehicle and caused it to be moved and he did so for his own or another's use (*DPP v Spriggs* [1994] R.T.R. 1). Accidentally putting a foot on the accelerator of an automatic drive vehicle which had the engine running with the result the vehicle drove all over the road, was not "taking" for the purpose of s.12 (*Blayney v Knight* [1975] Crim. L.R. 237).

**15.08** A person who is carried in or on a vehicle that has been taken without consent only commits an offence if there is movement of the vehicle after he becomes aware of that fact. In *R. v Diggin* [1981] R.T.R. 83 the appellant travelled in a vehicle that was taken by his brother and Mr Zubal. Because of drink and because the vehicle was of the same year and manufacture as one he knew Mr Zubal to own, he thought he was in Mr Zubal's car. The police approached the vehicle when it had stopped at a service station. The appellant asserted that he only then became aware that the vehicle had been taken. The Court of Appeal held that, for

the offence of allowing himself to be carried knowing it to have been taken without authority, there must have been some movement of the vehicle after the appellant had knowledge of its unlawful taking.

Merely releasing the brake of a lorry, so that it ran downhill driverless, was not "taking and driving away" under the old legislation (*R. v Roberts (No.2)* [1964] 2 All E.R. 541) and, it is submitted, would not constitute an offence under s.12 of the 1968 Act as, to commit the offence, the accused must have some measure of control over it. Furthermore, the taking must be for the "use of" the accused or another; it is unlikely that letting a vehicle run away would meet this condition. It seems that unauthorised possession or control of the conveyance for the purpose of transport is an essential element of the offence (see *R. v Bow*, § 15.06)

*Drive*

**15.09** Section 12(7) of the 1968 Act states:

> "For purposes of this section—
>
> (a) 'conveyance' means any conveyance constructed or adapted for the carriage of a person or persons whether by land, water or air, except that it does not include a conveyance constructed or adapted for use only under the control of a person not carried in or on it, and 'drive' shall be construed accordingly. . .".

The Court of Appeal held that driving away is not an essential element of the offence under s.12. That section does not require the conveyance to be moved in the element in which it is designed to travel (*R. v Pearce* (ibid. § 15.06)).

***The difference between theft (s.1) and taking a conveyance (s.12)***

**15.10** Sometimes a person who takes a car or motor vessel is accused of stealing the petrol also but it is submitted that he should not be punished for both offences (see [1968] Crim. L.R. 282; *R. v Burnham JJ. Ex p. Ansorge* [1959] 3 All E.R. 505; and "Two offences from one incident" at § 5.80). A person charged under s.12 may still, it is submitted, be convicted even if the facts show that he is guilty of theft if he took the vehicle for his own use or that of another. It was held to be no defence to the previous offence of driving or allowing oneself to be carried, when not a party to the original taking, that the defendant knew that the vehicle had been *stolen* and not just taken (*Tolley v Giddings* [1964] 1 All E.R. 201).

While a jury may convict a defendant charged with theft of taking under s.12 (s.12(4)), a magistrates' court cannot do so unless he has been additionally charged in the alternative.

**15.11** Whereas the accused must have acted dishonestly if he is to be convicted of theft, there is no requirement to establish dishonesty in an offence under s.12. However, the prosecution must show a person charged with allowing himself to be carried knew the conveyance had been taken without authority (see *R. v Diggin* § 15.08). The prosecution must also establish that the accused who took a vehicle did not believe he was or would have been allowed to do so. Section 12 requires the accused to physically move the conveyance (*R. v Bogadcki* § 15.07) whereas the offence of theft merely requires the accused to appropriate it, which may not involve its movement. It is necessary to show intended or actual use as a conveyance for an offence under s.12 but not for an offence of theft. Perhaps most importantly, unlike an offence of theft, there is no requirement to establish an





intention to permanently deprive the owner of the conveyance to convict for an offence under s.12.

**Pedal cycles**

Section 12(1) does not apply to pedal cycles even though they are conveyances. **15.12** The Oxford English Dictionary defines "cycle" as including "any pedal-powered vehicle with wheels and a saddle; a monocycle, bicycle, tricycle, etc." Section 12(5) creates the separate offence of taking a pedal cycle without consent. The wording is similar to s.12(1) save that the reference is to riding instead of driving or allowing oneself to be carried, etc. The maximum penalties are less severe. As to riding, see § 1.116. The expression is wide enough to include a passenger, whether carried legally or illegally. The defence in s.12(6) of belief in lawful authority or owner's consent applies to s.12(5) offences as does, it is submitted, the law generally relating to the taking of conveyances and movement of pedal cycles only for the purpose of conveyance. The s.25 offence of going equipped applies by s.25(5) to s.12(1) offences, but not to pedal cycles.

Section 12(5) states that s.12(1) shall not apply to pedal cycles. It will be for the prosecution to establish to the criminal standard of proof that the conveyance in question is a pedal cycle.

Whether a vehicle is a pedal cycle is a question of fact. Most auto-assisted mo- **15.13** tor vehicles (including electrically assisted pedal cycles) are not really designed to be driven extensively with pedals although they are capable of being propelled by them. Nevertheless it is submitted that they are also pedal cycles (as, e.g. is indicated by the expression electrically assisted pedal cycles) and that prosecutions should be under s.12(5) and not s.12(1). Penal provisions should be construed strictly.

**Consent of owner**

If the owner's consent was obtained by intimidation seemingly this would not **15.14** be "consent" under s.12 (*R. v Hodgon* [1962] Crim. L.R. 563). In *R. v Peart* [1970] 2 All E.R. 823 it was held that consent of the owner as to the use of the car by another was not vitiated by the fact that the defendant obtained the owner's consent by falsely pretending that he needed the car to go to Alnwick when in fact he went to Burnley instead. The court held that when s.12 was enacted there was no intention by Parliament to create a new offence of taking conveyances by false pretences. If therefore the owner's consent is obtained by means of a false pretence either as to the destination or purpose of the journey, no offence under s.12 appears to be committed. The court, however, reserved for a future occasion the legal position where the consent of the owner was obtained by a fundamental misrepresentation, as, e.g. where *B* pretended to the owner that he was *C*.

This was partly answered by the case of *Whittaker v Campbell* [1983] 3 All E.R. 582, which held, following *R. v Peart*, that fraud did not vitiate consent. The defendants had used another's driving licence to hire a car, representing that one of them was that person. It is immaterial that B thought C was someone else such as a famous film star as in *Lewis v Averay* [1971] 3 All E.R. 907 referred to in the *Whittaker* case. The position should be compared with *R. v Phipps*; *R. v McGill* [1970] R.T.R. 209, a case under the Road Traffic Act 1960 where *M* obtained permission to borrow the car to go to the railway station. He did not return and

used it next day to go to Hastings. It was held that, since he had failed to return the car, his use was unlawful unless he reasonably believed that the owner in the circumstances would have given his consent if asked. It seems that if the defendant in *Peart* had in fact gone to Alnwick and then on to Burnley he would be guilty in accordance with *Phipps*. For further criticism of *Peart* see [1970] Crim. L.R. 480. It should also be noted that *Phipps* was followed and applied in *McKnight v Davies* (see § 15.21). The distinction between a person obtaining permission to use a vehicle for a limited purpose and going beyond that purpose and therefore being held guilty of an offence under s.217 of the 1960 Act or s.12 of the 1968 Act (*Phipps*) and a person obtaining permission for a different purpose from the one he actually used it for (*Peart*) is a fine one. *Peart* was cited in argument to the court in *McKnight v Davies* but there is no mention of it in the judgment. (*Phipps*, contrary to the statement in the judgment of *McKnight v Davies* [1974] R.T.R. 4 at 7G, was a case under s.217 of the 1960 Act, not s.12 of the Theft Act.)

**15.15** *Whittaker v Campbell* and *R. v Peart* were both distinguished as to their facts by the Court of Appeal in *Singh v Rathour* [1988] R.T.R. 324, a civil case involving the liability (or otherwise) of an insurance company to indemnify a defendant in respect of damages for negligence in respect of a motor accident. Neither of the earlier cases dealt with a consent limited as to time, place or purpose. In the instant case, however, where a person had borrowed a vehicle subject to an implied (but known) limitation as to the purpose for which it was to be driven, he did not have the consent of the owner when driving it outside the terms of that limitation and was accordingly uninsured when so driving it.

**Defences: belief of lawful authority or owner's consent (s.12(6))**

**15.16** Section 12(6) of the 1968 Act provides that a person does not commit an offence under that section "by anything done in the belief that he has lawful authority to do it or that he would have the owner's consent if the owner knew of his doing it and the circumstances of it". Unlike the offence of taking and driving (which was replaced in England and Wales by s.12 but continues to apply in Scotland by virtue of s.178 of the 1988 Act) the accused does not have to prove this "defence".

It was held in *R. v McPherson* [1973] R.T.R. 157 that if an issue arises as to whether a defendant under s.12(6) had a belief of lawful authority, etc., the onus is on the prosecution to prove that the defendant had no such authority or consent. Accordingly, there is an evidential burden on the defence to raise the issue sufficiently but, once that is discharged, the legal (or probative) burden is with the prosecution. On the other hand the prosecution do not have to prove a specific intent on the part of the defendant to take the vehicle (ibid.). Thus where the defendant was drunk a judge was entitled to direct the jury that self-induced drunkenness was no defence, and that, unless an issue under s.12(6) was raised, the only matters that the jury had to be satisfied about were (a) that the vehicle was taken by the defendant and (b) that it was without the owner's consent.

**15.17** The practical effect of the burden of proof can be seen in *R. v Gannon* [1988] R.T.R. 49. After consuming a considerable amount of alcohol at a dance, the defendant had got into a car similar to his own (which, incidentally, he had not taken with him that evening) and was involved in an accident which put him in hospital for four days and effectively erased his memory of events between leaving the dance and subsequently regaining consciousness. The evidence about the similarity of the cars and the fact that his keys fitted it was equivocal and it could not be argued that, because he was drunk, he must or might have believed the car to be his. On the facts of the case, however, the appellant had not raised the issue of believed authority under s.12(6) since he had been unable to produce evidence that he held such a belief. In these circumstances there was nothing for the prosecution to disprove, and the jury would have had to be directed that the only verdict open to them was one of guilty.





The statute does not apparently require the defendant's belief under s.12(6) that he had lawful authority or consent to be reasonable although the absurdity of some factors for the belief may show that the belief was not really held. It is a question of fact even though the defendant has no driving licence and insurance (*R. v Clotworthy* [1981] Crim. L.R. 501).

**Passengers**

**15.18** Where a driver or passenger was not a party to the original taking and the charge is contrary to the second part of s.12(1) (knowingly, etc.), the prosecution must prove that the driver or passenger knew that the vehicle had been taken without consent or other lawful authority. The passenger must also be carried in the conveyance while it is in motion (*R. v Miller* and *R. v Diggin* at § 15.07 and at § 15.08).

The prosecution may adduce evidence of the conviction of the driver for an offence under s.12 of the Theft Act 1968 to show the vehicle had been unlawfully taken and this raises a strong prima facie case that the vehicle in which the defendant was a passenger had been taken without the consent of the owner: *DPP v Parker* [2006] EWHC 1270; [2006] R.T.R. 26 (p.325).

**Employees and hirers**

**15.19** The authorities relating to cases in which an employee who is driving in the course of his work and goes on to use it outside his employer's permission are not straightforward. It has been held that a van driver, in lawful possession of his employer's van, who drove it on a frolic of his own, committed no offence (*Mowe v Perraton* [1952] 1 All E.R. 423). It would be otherwise if he had put the vehicle back into his employer's possession, e.g. by leaving it in the employer's garage, and then took it out of such possession without leave. The reason for the decision was that an employee, being in lawful possession of his employer's vehicle whilst on duty, cannot "take" what he already has, but this reasoning is inconsistent with *R. v Phipps*; *R. v McGill* [1970] R.T.R. 209, and the latter case was followed in preference to *Mowe v Perraton* in *McKnight v Davies* below.

In *R. v Wibberley* [1965] 3 All E.R. 718, the defendant, a truck driver, was supposed to return the truck to his employer's premises at the end of the day's work but, instead, he took it home and parked it outside his house for two hours. He then drove it away for a purpose of his own. The employers would not have objected to him parking outside his house for the night and taking the truck to work next morning. His conviction for taking it for his own purposes, after he had parked it, was upheld, as he had no authority to use it, after parking it outside his home, until the next day's work began. There was a distinction between deviation from employment during working hours, when he still intended to carry out

his instructions to drive the vehicle to his employer's premises, and taking it after working hours with no such intention and after an interruption in time.

**15.20** In *McKnight v Davies* [1974] R.T.R. 4 a lorry driver returning to his employer's depot struck a low bridge with the roof of his lorry. He was not permitted to use the lorry for his own purposes, but, being scared on seeing the damage to the lorry's roof, he drove to a public house and had a drink, then drove three men to their homes and returned to the centre of the city, had a drink at another public house and drove home leaving his lorry nearby, in all driving 30 miles in excess of his proper delivery route. The High Court preferred to follow *R. v Wibberley* above and *R. v Phipps* [1970] R.T.R. 209 in preference to *Mowe v Perraton*, which the court found to be inconsistent in particular with *Phipps*. (In *Phipps* it was held that where a defendant had been given permission to take and use a vehicle for a limited purpose, and thereafter used it for another purpose, he was guilty of the offence; see also § 15.14.) The court went on in *McKnight v Davies* to consider to what extent the unauthorised use by an employee of his employer's vehicle could in law amount to a "taking" for the purposes of s.12. Not every brief unauthorised diversion from his proper route would necessarily involve a "taking" for use (*McKnight v Davies* [1974] R.T.R. 4 at 8); if, however, he returned the vehicle and parked it for the night and drove off on an unauthorised errand (as in *R. v Wibberley*) that would be a sufficient "taking" (ibid.). It was suggested that to constitute a "taking" of the vehicle during his working day or while he had authority to use the vehicle, he must have appropriated it in a manner which repudiated his employer's true rights. In other words he had altered the character of his control over the vehicle so that he no longer held it as employee but assumed possession of it in the legal sense. In the opinion of the court, the defendant "took" the vehicle not when he first went to a public house, but when he left it to drive the three men home.

*R. v Phipps* and *McKnight v Davies* above were both applied by the Divisional Court in *McMinn v McMinn* [2006] EWHC 827; [2006] 3 All E.R. 87. Where an employee, who was permitted to drive a vehicle owned by his employer, allowed a third party to drive the vehicle (with himself as a passenger), the employee would be guilty of taking the vehicle without authority if it could be said that he had appropriated the vehicle for use in a manner which repudiated the owner's rights and showed that he had assumed control of the vehicle for his own purposes; to which end, the question would be whether he knew or believed that his employer would not have permitted the third party to drive the vehicle.

A person who takes away a conveyance on hire purchase with the hirer's consent but without the consent of the dealer or finance company which owns it does not offend against s.12 because, by s.12(7)(b), "owner", in relation to a vehicle which is the subject of a hiring agreement or hire-purchase agreement, means the person in possession of the vehicle under that agreement (*R. v Tolhurst* [1962] Crim. L.R. 489).

### Attempts

**15.21** See "Attempt" at § 1.208 and the cases at § 1.108 as to attempting to drive.

As to the offences with which a defendant may be charged where the offences under s.1 or s.12 are incomplete, see "Interfering with vehicles", §§ 15.42–6 and "Tampering with vehicles", §§ 15.47–8.





## THEFT AND TAKING CONVEYANCES: PROCEEDINGS AND PENALTIES

### Generally

**15.22** Offences of theft under s.1 and any attempt to commit them are "either way" offences triable at the Crown Court and may be tried by a magistrates' court pursuant to ss.18–23 of the Magistrates' Courts Act 1980. If the defendant indicates a guilty plea, he loses his right to be tried at the Crown Court, although he may still be committed to that court for sentence. If he indicates a not guilty plea, or fails to indicate his plea, the established allocation procedure applies; the defendant must consent to any summary trial and accordingly may insist on trial by jury. Offences of unlawful taking under s.12(1) are triable only summarily (s.12(2)). Where an offence of vehicle taking is charged under s.12A because it is aggravated by dangerous driving, an accident or by damage to a value exceeding the relevant sum prescribed by s.22 of the Magistrates' Courts Act 1980 (currently £5,000) the offence is triable either way (see § 15.34). Taking a pedal cycle, etc., is a summary offence only (s.12(5)). There is no offence under s.1 of the Criminal Attempts Act 1981 of attempting to commit a purely summary offence.

Despite the offence contrary to s.12(1) being a summary only offence, the time-limit for commencing prosecution, subject to an overall limit of three years from the date of the offence, is six months from the date on which sufficient evidence to justify the proceedings came to the knowledge of the prosecutor (ss.12(4A)–(4C)).

**15.23** The Vagrancy Act 1824 s.4 makes it an offence for a person to be found on certain enclosed premises for an unlawful purpose. A person present on such premises will be there for an unlawful purpose if he commits, attempts to commit or, arguably, merely intends to commit an offence under s.1 or 12 of the 1968 Act.

### Penalties generally

**15.24** The Court of Appeal in *R. v Evans (Brandon)* [1996] R.T.R. 46 has provided some guidance on the subject of the appropriate level of sentencing for those involved in the "ringing" of motor cars by their theft, handling, disguising and subsequent disposal. A ringleader who pleaded not guilty to such sophisticated criminal activity might expect to receive a prison sentence of four to five years on conviction. For a "lieutenant", as the appellant in the instant case might appropriately have been described, a sentence of three years on a plea of not guilty might be appropriate. Allowing the appropriate discount for a guilty plea, the sentence of three years which the appellant had received was quashed and a sentence of 27 months was substituted.

In the Magistrates' Court Sentencing Guidelines (see Appendix 3, § 3A.07 below), the guideline for taking a vehicle without consent sets out three levels of seriousness, all of which have a community order as the starting point. Although there is no specific provision for the theft of motor vehicles, the general principles of assessing seriousness are nevertheless relevant in such cases. Where the offender is aged 17 or under, a court must also follow the Council guideline "Overarching Principles—Sentencing Youths" (available at *http://www.sentencingcouncil.org.uk* [Accessed May 25, 2015]) which sets out general

principles and, in particular, the approach to be taken by a court when determining the length of a custodial sentence.

**15.25** Compensation may be ordered, on conviction of any offence in respect of personal injury, loss or damage resulting from that offence, of up to an unlimited amount except in the case of offenders under the age of 18 in respect of whom the maximum amount the magistrates' court can order is £5,000 (Powers of Criminal Courts (Sentencing) Act 2000 s.131 as amended). The court is required to have regard to an offender's means, so far as they are known, in fixing the amount of compensation (s.130(11)). No application by or on behalf of the loser is necessary. When making an order the court is to give preference to compensation over a fine although it may impose a fine as well. Compensation is to be of such an amount as the court considers appropriate, having regard to any evidence and to any representations that are made by or on behalf of the accused or the prosecution. The court must also give reasons when not making a compensation order in a case where it is empowered to do so (s.130(3)).

Courts are empowered by virtue of s.130(6) of the 2000 Sentencing Act to make compensation orders in respect of injury, loss or damage due to an accident arising out of the presence of a motor vehicle on a road, where either:

(a) the damage is treated as having resulted from an offence under the Theft Act 1968; or

(b) the injury, loss or damage involves the uninsured use of a motor vehicle by the offender, and compensation is not payable under any arrangements to which the Secretary of State is a party (i.e. the Motor Insurers' Bureau);

and the amount of compensation to be ordered may include an amount in respect of the loss of a "no claims" bonus. It should be noted that "payable" in this context means "liable to be paid at some time", not "immediately owing": *DPP v Scott* [1995] R.T.R. 40. Accordingly the justices were right in concluding that their powers were limited to making an order of £175 (the sum in respect of which compensation would at that time never be paid by the Motor Insurers' Bureau—from November 7, 2008 this excess was abolished) (see further § 10.87). *DPP v Scott* above was applied by the Court of Appeal in *R. v Austin* [1996] R.T.R. 414 when reducing to £175 an order for compensation totalling £3,642 made in the Crown Court in respect of damage inflicted upon a police car by an uninsured offender charged inter alia with aggravated vehicle-taking. Although the damage had arisen at the time an offence under the Theft Act had been committed, the damage to the police car was not to be "treated as having resulted" from that offence.

**15.26** If the offence is under the Theft Act and the property is recovered any damage occurring to the property while out of the owner's possession shall be treated as resulting from the Theft Act offence no matter who caused the damage or how it occurred (s.130(5)). Thus if a person is convicted of stealing or taking a vehicle, driving it knowing it to have been taken, or allowing himself to be carried on or in it under the Theft Act and it is damaged, whether in a road accident or any other way, that person can be ordered to pay compensation for that damage. Since a person who steals a vehicle or takes one without consent is almost by definition uninsured, s.130(6)(b) would appear to allow courts to make compensation orders in respect of other damaged vehicles as well as the one unlawfully taken. Compensation may be awarded not only in respect of an offence for which the defendant is convicted but also an offence taken into consideration.





**15.27** In *R. v Donovan* [1982] R.T.R. 126 the defendant hired a car for two days but kept it for some two and a half months. He was ordered to pay £1,388 compensation based on loss of use. The compensation order was quashed by the Court of Appeal. Eveleigh L.J. said that:

> "The amount of such damages is notoriously open to argument, and this case is therefore not one of the kind for which a compensation order is designed. A compensation order is designed for the simple, straightforward case where the amount of the compensation can be readily and easily ascertained."

More recently it is possible to detect a greater willingness to order compensation even when the exact amount may not be easy to quantify. The Magistrates' Court Sentencing Guidelines say that "in cases where it is difficult to ascertain the full amount of the loss suffered by the victim, consideration should be given to making a compensation order for an amount representing the agreed or likely loss" (Magistrates' Court Sentencing Guidelines, p.165 at *http://sentencingcouncil.org.uk* [Accessed May 25, 2015]).

**Endorsement and disqualification**

**15.28** Offences under s.1 or s.12 are subject to discretionary disqualification but are not endorsable and so, if the offender is not disqualified, no penalty points will be awarded (Sch.2 Pt II to the 1988 Offenders Act). The DVLA will use the code NE99 to record the offence on the drivers' database so that the status of the individual's driving entitlement can be confirmed. These provisions apply to anyone convicted under s.1 or s.12 as well as to drivers, provided the offence was in respect of a motor vehicle. It is appropriate to disqualify the passenger as well as the driver in a joint venture (*R. v Reed* [1975] R.T.R. 313; *R. v Saunders* [1975] R.T.R. 315). It was said by the Court of Appeal in *R. v Earle* [1976] R.T.R. 33 at 36E, that the object of giving a court the discretionary power of disqualification for taking vehicles without consent was to ensure that vehicles may not be used for criminal offences. One other reason might be to punish joyriders. In *R. v Callister* (1992) 156 J.P. 893 it was held that the punishment of disqualification should generally be restricted to cases involving bad driving, persistent motoring offences or the use of vehicles for the purposes of crime. However, this approach may change in the light of the implementation of the more general power to disqualify offenders contained in s.146 of the Powers of Criminal Courts (Sentencing) Act 2000 and the judgment of the Court of Appeal in *R. v Cliff* [2004] EWCA Crim 3139; [2005] 2 Cr. App. R. (S.) 118, followed in *R. v Sofekun* [2008] EWCA Crim 2035; [2009] 1 Cr. App. R. (S.) 78 confirming that the power could be used whenever the court thought it appropriate; it was not necessary to add any restricting gloss to the wide statutory provisions.

**15.29** It seems that a person convicted of burglary or robbery involving theft of a motor vehicle is liable to discretionary disqualification. Column 1 of Sch.2 Pt II to the 1988 Offenders Act does not specify a section of the Theft Act and refers simply to "stealing or attempting to steal". Contrast ibid., the references in column 1 to offences contrary to ss.12 and 25 of the Theft Act. In any event, courts have the discretion to disqualify for any offence by virtue of the Powers of Criminal Courts (Sentencing) Act 2000 s.146: see § 20.60.

For a table of penalties for offences contrary to ss.1 and 12, see § 15.41.