bank and a gate post injuring the driver and damaging the gate. In the Scottish decision of *Bremner v Westwater* [1994] SLT 707, it was held that to constitute an accident, it was not necessary to have any form of impact.

(b) 'Driver'

1.7 This expression is defined in s 2 of the RTO in the following terms:

> In relation to any vehicle (other than a rickshaw), vehicle of the North-west Railway, or tram, means any person who is in charge of or assisting in the control of it and in relation to a rickshaw means the person pulling a rickshaw.

The effect of the definition is that two people may be the driver at the same time, eg a driving instructor in a dual-control vehicle. In *Tyler v Whatmore* [1976] Crim LR 315, the front-seat passenger had both hands on the steering wheel, could reach the ignition and obstructed the view of the person in the driving seat. It was held there that the passenger was driving and, therefore, was a driver. It was further held that the act of the person in the driving seat of controlling the motion of the car, but not the direction, was also 'driving'. See also, on similar facts, *Langman v Valentine* [1952] 2 All ER 803. However, in *Jones v Pratt* [1983] RTR 54, a front-seat passenger who briefly took hold of the wheel and caused the vehicle to go off the road was found not to be the driver in the ordinary sense of the word. In *Cawthorn v DPP* [2000] RTR 45, the appellant was convicted of being a driver, failing to stop and failing to report an accident. He had parked his car at the side of the road to post a letter and, whilst he was not present in the car, it had rolled down the road and collided with a brick wall. He arrived at the scene of the accident within a few seconds and when he was approached by a police officer he made off. On appeal, it was held there was a distinction between 'driver' and 'driving'. Under such facts, the appellant was rightly regarded as the driver at the material time.

(c) 'Driving'

1.8 This expression is not defined by the RTO. Each case will turn on its own facts as to whether the defendant was driving: see *Pinnear v Everett* [1969] 3 All ER 257 (discussed in detail at para 1.11 below). To determine the issue, the guidelines in the leading case of *R v MacDonagh* [1974] QB 448 (CA) should be applied to the facts:

(1) The essence of driving is the use of the driver's controls to direct the movement of the vehicle.

(2) An important factor is whether the defendant has himself deliberately set the vehicle in motion.

(3) There is a difference between 'pushing' and 'driving' which turns on the extent to which the defendant is relying on the controls to manoeuver the vehicle.

(4) It does not matter that the vehicle is not moving under its own power, or moving under the force of gravity or others pushing.

Lord Widgery CJ said at p 451:

> There are an infinite number of ways in which a person may control the movement of a motor vehicle, apart from the orthodox one of sitting in the driver seat and using the engine for propulsion. He may be coasting down a hill with the gears in neutral and the engine switched off; he may be steering a vehicle which is being towed by another. As has already been pointed out, he may be sitting in the driving seat while others push, or half sitting in the driver seat but keeping one foot on the road in order to induce the car to move. Finally as in the present case, he may be standing in the road and himself pushing the car with or without using the steering wheel to direct it. Although the word 'drive' must be given a wide meaning, the courts must be alert to see that the net is not thrown so widely that it includes activities which cannot be said to be driving a motor vehicle in any ordinary use of that word in the English language.

1.9 In *Poon Jing v R* [1985] HKLR 341, there was a conflict in the evidence. The police officer said that the appellant (who was a disqualified driver), seated in the driving seat, started the engine, turned the steering wheel left and was about to get out of the car when the officer approached. The appellant said he had been a passenger in the car – he had gone to the driving seat to use the key to turn on the car radio, the door was open and he was about to get out of the car when the officer approached. The conflict was not resolved by the magistrate who held that as the appellant was 'in control' of the vehicle, he was driving. After considering *MacDonagh*, the court held that there was no finding of fact upon which it could be said the appellant was driving and the appeal succeeded.

1.10 By way of further example:

(1) In *R v Roberts (No 2)* [1965] 1 QB 85, it was held that the release of a lorry handbrake with the consequence that the lorry travelled down the hill was not 'driving'.

(2) See also *Tyler v Whatmore* (above at para 1.7) for a case involving a driver and a driving instructor, both held to be driving the same vehicle. It should be noted that this decision is in the context of a charge of 'taking and driving away' where the defendant was seen to get into the cab of the vehicle, do something and get out, whereupon the vehicle rolled down the hill.

(3) In *McQuaid v Anderton* [1980] 3 All ER 540, the defendant sat in the driving seat of a motor car while it was being towed by a rope connected to another vehicle; the defendant was held to be driving. The same decision was reached in *R v Challinor* [1985] Crim LR 53. In *Whitfield v DPP* [1998] Crim LR 349, the appellant was at the driver's seat of a tipper being towed by a lorry. The two vehicles were connected with a metal bar with a ball hitch and a shackle. Both ends of the bar were free to move. The appellant was held to be the driver since he had directional control even if he was not in

County Council [1956] Crim LR 561. The 'special characteristic' test in *Vivier* (above) was applied more recently in *Havell v DPP* [1993] Crim LR 621. There, the driver (on a 'drunk in charge' prosecution) was in his car which was parked in the carpark of a community centre. The carpark was readily accessible from the road and there was no physical obstruction preventing access to it by any member of the public. There were no signs saying that it was private or that there was restricted access. To use the centre's facilities, an individual first had to become a member which required nomination by an existing member. The court held that the defendant used the carpark as a member of the club and not as a member of the general public and, accordingly, the carpark was not a road for the purposes of the legislation. No finding was made as to whether anyone other than a member of the club ever used the carpark.

1.26 'To cause', 'to permit' and 'to use'

(a) 'To cause'

A number of offences may be committed by either causing, using, or permitting. If 'causing' is charged, the prosecution must prove mens rea, that is mental knowledge of the facts which make the use unlawful. A person causes a vehicle to be used both when he drives it himself and when he instructs another to drive it: *Baker v Chapman* (1963) 61 LGR 527. Issues arise when a person other than the defendant has carried out the act of driving. Thus, there must be some express or positive mandate from the person 'causing' to another person, or some authority arising from the circumstances of the case.

In *McLeod v Buchanan* [1940] 2 All ER 179, Lord Wright described 'permit' as a term more loose and vague than 'cause'. In *Shave v Rosner* [1954] 2 All ER 280, a garage proprietor was acquitted of causing offence after the owner of a van drove the van after staff at the garage had negligently failed to tighten the wheel nuts during repairs. Had the offence been one of 'permitting', it is submitted that a conviction may have followed. The act of 'causing' was described in *Price v Cormack* [1975] 1 WLR 988, as requiring a positive act on the part of the defendant rather than merely looking on passively. Thus, in *Mounsey v Campbell* [1983] RTR 36, it was held that to park a vehicle up against the bumper of another car which was subsequently boxed in was causing and not merely permitting. Sometimes, a provision will contain the words 'using, causing or permitting'. In such circumstances, the prosecution must elect which of the degrees of culpability it intends to allege against the defendant. A charge alleging the three (or any two) in the alternative would, it is submitted, be bad for duplicity. The nature of the required mental element for a causing charge is well illustrated by *Ross Hillman Ltd v Bond* [1974] QB 435, where the defendant

company had warned its drivers against driving the company's vehicles when overloaded. A driver did use an overloaded vehicle and the company was convicted, at trial, of causing that overloaded use. There was no evidence that the company had prior knowledge of the overloading of the vehicle on the occasion charged. There was nothing in the case which amounted to a command or direction to do the act. It was necessary to establish that to establish causing. Mere knowledge or deliberate shutting of the eyes was held not to be enough as there must be a positive act as distinct from mere passive acquiescence in the commission of an offence which is known to be taking place or is about to take place. The offence was an absolute offence and the court noted that had the owner been charged with using, he would have been convicted. As the required mental element was not present, the company was acquitted on appeal. The importance of laying the correct charge was illustrated in *Crawford v Haughton* [1972] 1 All ER 535, where Lord Widgery CJ said:

> ... the offence of using is an absolute offence whereas the offence of causing or permitting requires knowledge on the part of the accused. It is often more difficult to convict, therefore, of causing or permitting than it is of using, but it is quite clear that the prosecution must lay their information under the correct constituent of the section, and if in fact this was only causing or permitting and not using, the correct answer is that the information must be dismissed.

(b) 'To permit'

1.27 A distinction must be drawn between a defendant's knowledge of the use of the vehicle and knowledge of the unlawfulness of its use. Knowledge of the former kind is an essential ingredient of permitting; knowledge of the latter kind may or may not be an essential ingredient. The expression 'permit' is a less clear term than 'to cause' as it does not require a positive action on the part of the defendant but encompasses express or implied permission or even acquiescence as to use. The expression 'permit' was described by Lord Wright in *McLeod v Buchanan* [1940] 2 All ER 179 at 187 in the following terms:

> The other person is not told to use the vehicle in a particular way, but he is told he may do so if he desires. However, the word also includes cases in which permission is merely inferred. If the other person is given control of the vehicle, permission may be inferred if the vehicle is left at the other person's disposal in such circumstances as to carry with it a reasonable implication of a discretion or liberty to use it in the manner in which it was used.

Thus, in *Lloyd v Singleton* [1953] 1 QB 357, an employed driver or manager of a company-owned vehicle was able to permit the use of the vehicle. The leading case on 'permitting' is *James & Son Ltd v Smee* [1955] 1 QB 78. There, a vehicle, in good condition when it left the company's premises, was found later on its journey to have defective brakes. This was as a result of negligence of employees during the journey. The company

(c) in the case of a motor cycle, in a conspicuous place on the left-hand side of the vehicle in such a manner that it is clearly visible from the side of the vehicle.

In *HKSAR v Lee Koi-hop* (HCMA 643/2002), the licence owner was summonsed for failing to display at all times in a conspicuous position on a pleasure vessel the current licence disc issued in respect of the vessel. There was an argument on the definition of 'in a conspicuous position'. The licence was displayed on the window located at the top of a small cabin which was below the deck. When one stood inside the cabin, one could only see the back of the licence. The front of the licence was displayed on the window. However, the window was nearly at the same level as the deck. Thus, when standing on the deck outside that window, it was not easy to notice the licence. In order to see it, a person had to lie down, with his head on the deck level. Besides, the area outside that window protruded as a slope, where it was difficult to stand. The court held it was not a conspicuous position. It was further held that whether it was a conspicuous position was a matter of fact depending on the design, construction, use and the size of the subject matter.

2.17 The use of a vehicle which does not display a valid licence renders the driver liable to a fine of $5,000 and to imprisonment for six months. Most other offences under the regulations are subject to a fine of $2,000. Failing to display a licence is an absolute offence. In *Strowger v John* [1974] RTR 124, a vehicle excise licence had, after the defendant left the vehicle, fallen to the floor, thus not complying with the requirements of the regulations. The defendant was convicted. However, in the leading New Zealand case of *Kilbride v Lake* [1962] NZLR 590, a car exhibiting a necessary warrant of fitness on the windscreen was left by the owner for a short time. When he returned, he found that a trespasser had removed the warrant and a traffic offence notice had been fixed to the windscreen. The court held that the omission to display the warrant was not within his conduct, knowledge or control and he was acquitted. *Kilbride v Lake* was considered in *Strowger* but distinguished because in *Kilbride*, the removal of the licence was totally unexplained as it had disappeared from the car. In *Strowger*, the Divisional Court held that the offence was made out but indicated that in such situations where there was no fault of the defendant, an absolute discharge might be appropriate. It is submitted, with respect to the Divisional Court, that a proper exercise of prosecutorial discretion on such facts would result in the driver not being prosecuted. *Strowger* was followed in Hong Kong in *Hong Kong Electric Co Ltd v R* [1981] HKLR 687, where the offence was held to be an absolute offence. There, the vehicle was parked on the road with no valid licence displayed on the windscreen. It was not necessary for the Crown to prove who was in charge of the vehicle at the time of the offence since the registered owner was guilty of the offence; whoever it was. In *HKSAR v Lau Kok-lam* (MA 513/1998), the defendant was charged with driving an unlicensed vehicle and also using a vehicle without third party insurance.

Suffiad J confirmed the view of the magistrate that it was for the appellant to prove on a balance of probabilities that there was a valid licence and valid third party insurance for the vehicle.

(c) Vehicle "upon or used on a road"

2.18 The obligation is to display the licence when the vehicle is 'upon or used on any road'. In *Holliday v Henry* [1974] RTR 101, in an attempt to avoid the need for licensing, the vehicle was placed on roller skates. Under English legislation, it was held to be still 'kept on' the road even if not directly in contact with the road surface. Plainly, a vehicle in such condition would be found to be 'upon' a road. In *Hong Kong Electric Co Ltd v R* (above), proof that the vehicle was parked on the road was proof that it was 'upon or used on any road'. In *Lee Kin Pong v HKSAR* [1998] 1 HKLRD 182, the appellant parked his motorcycle under a flyover at the junction of two roads with the licence expired. He argued that the requirement of a valid licence should only apply when it was 'used' on the road. The Court of Final Appeal rejected his argument as the regulation stated 'no vehicle shall be upon or used on any road'.

2.19 Ownership of a vehicle is not an essential element of the offence of using a vehicle on a road: *Napthen v Place* [1970] RTR 248. Thus, once the prosecutor has established that the defendant used the vehicle on a road, the burden of proving the purpose of use, or that the vehicle was licensed, is upon the defendant: *Guyll v Bright* [1987] RTR 104. Equally, if a vehicle is upon a road, proof of ownership will be sufficient to cast the burden on the defendant to establish that it was registered. The 'days of grace' available under Reg 15 of the Road Traffic (Driving Licences) Regulations are not available in respect of vehicle licences. Thus, the rule in *Nattrass v Gibson* (para 2.9 above) will apply.

2.20 Strictly, the driver of an unlicensed vehicle, as well as the owner, is liable for the offence. In *Carpenter v Campbell* [1953] 1 All ER 280, summonses were issued to both an employee driver and the owner of the unlicensed vehicle upon whose business the vehicle was being driven by the employee. Lord Goddard said at p 281:

> ... the court desires to express its strong disapproval that for an offence of this sort, the lorry driver was summoned. The duty to take out proper licences in respect of vehicles is the duty of the employers ... To multiply summonses in this way and serve them on the driver, who is no more responsible for the fact that the licence has not been taken out than I am, is an abuse and it is oppressive, and although we cannot say that, within the technical words, he did not 'use' the vehicle, it is most undesirable that he should have been summoned.

It should be noted, however, that these comments were made in the context of a case involving vehicle excise licences and not the licence to operate the vehicle on a road. In this latter case, it is submitted that prosecution of the driver as well as the owner is proper. In *Richardson v Baker*

[1970] RTR 486, as applied in *R v Evans (Terence)* [1974] RTR 232, where a police officer had reasonable grounds, from his observation of a motorist's driving, to suspect him of having alcohol in his body and communicated that suspicion by radio to another officer, the other officer could properly say that he had reasonable cause to suspect the motorist for the purpose of requiring a breath test specimen.

4.29 If the informant is not a police officer, it is a matter of fact whether the cause to suspect is reasonable and will depend upon the circumstances, including the identity of the informer and the information given. Information as to mere drinking habits, and not drink on the day in question, was insufficient in *Monaghan v Corbett* (1983) 147 JP 545 where the court classified the information from a neighbour as being based on gossip.

4.30 In Hong Kong, a police officer in uniform has a specific power to require a vehicle to stop: s 60 of the RTO. No reason need be given for stopping the vehicle. The random stopping of vehicles, which subsequently gives rise to reasonable suspicion of alcohol, has been upheld in England. The reasonable cause to suspect must, however, first arise before a screening breath test may be required. If, on stopping a vehicle, the police officer forms the view that alcohol has been taken, whether by observation or in response to questions, he is entitled to require a screening breath test, even if the police had no specific right to stop the vehicle: *Winter v Barlow* [1980] RTR 209. With the introduction of random breath testing by the Road Traffic Legislation (Amendment) Ordinance 2008, a police officer will no longer need to show reasonable cause to suspect when stopping a vehicle and requiring a specimen of breath for a screening breath test from the driver.

4.31 In *Chief Constable of Gwent v Dash* [1986] RTR 41, the driver was stopped in a random check when a police officer smelt alcohol on his breath. The court held that in the absence of malpractice or oppression or caprice or opprobrious behaviour, there was no restriction on stopping a motor vehicle and requiring a breath test if the police officer, there and then, genuinely suspected the driver had consumed alcohol. Macpherson J, delivering the judgment of the court, drew a clear distinction between the random stopping of vehicles for the purpose of making genuine enquiries as to whether a person was drinking and driving and the random stopping of vehicles for the purpose of requesting a screening breath test, which was not permitted.

4.32 This reasoning was applied in *DPP v Wilson* [1991] RTR 284, where the court held that a police officer is entitled to act on anonymously provided information that a person was drinking and driving to stop the vehicle and, on smelling alcohol on his breath, to require a screening breath test. In delivering judgment, the court explained the earlier decision of *Monaghan v Corbett* on the basis that although the police officer smelt alcohol on the breath of the driver this was never argued as being the basis of reasonable suspicion.

4.33 A police officer with good reason to believe one of several persons was driving the motor vehicle and that they had all consumed alcohol may lawfully require each of those persons to provide a specimen of breath: *Pearson v Commissioner of Police of the Metropolis* [1988] RTR 276. The court, in upholding convictions for failure to provide a specimen, rejected the argument that a request can only be made after the driver has been identified.

4.34 Accident

A further power to require a screening breath test arises under s 39B(2), where if an accident occurs owing to the presence of a vehicle on a road, a police officer in uniform may require a screening breath test from any person whom he has reasonable cause to suspect was driving or attempting to drive, or was in charge of the vehicle at the time of the accident. For the power to arise, there must have been an accident, not merely a suspicion of an accident, no matter how reasonable that suspicion may be on the part of the police officer (for a discussion of the expression accident, see Chapter 1: Introduction and Definitions). When exercising his power under this provision, the officer need not suspect that the driver may have taken alcohol. The right to require the test arises from the fact of the accident.

4.35 The place for the screening breath test

Where the request for a screening breath test is made under s 39B(1), the driver may be required to provide a specimen of breath at or near the place where the requirement was made (s 39B(3)). Whether the specimen of breath is made at or near the place where the request was made is a matter of degree and fact: *Arnold v Kingston-upon-Hull Chief Constable* [1969] 1 WLR 1499, where the court held that a police station situated one and a half miles away was not there or nearby, the expression then used in the English legislation.

4.36 Where the right to require the screening breath test arises due to the occurrence of an accident under s 39B(2), the specimen may be required to be given at or near the place of the requirement or at a breath test centre, a police station or hospital specified by the police officer (s 39B(4)). A breath test centre means a place or vehicle designated by the Commissioner of Police as a breath test centre under s 39C(20) (see para 4.75 below).

Poon Kin Pong [2006] 3 HKC 421, the court held that nervousness was not a reasonable excuse.

(6) Mental condition or physical injuries must be of a very extreme character to constitute a reasonable excuse: *Rowland v Thorpe* [1970] 3 All ER 195. In *Sykes v White* [1983] RTR 419, the driver's claim that he was so afraid of blood that it made him light-headed and had to sit down, and fear of fainting thereby being unable to provide a urine sample, was rejected as a reasonable excuse. Similarly, in *HKSAR v Lai Leung-yuk* (HCMA 1165/2005), the court held that a driver's assertion that the drawing of blood was bad for health was rejected as a reasonable excuse.

(7) 'Feeling discomfort' per se cannot be a valid reasonable excuse unless such physical discomfort renders it impossible to give a proper breath sample, or that the taking of samples would adversely affect the well-being of the driver: *R v Lai Chi-keung* [1996] 4 HKC 168. The court emphasised that one must not ignore the purpose of the legislation, which was to prevent people from driving while under the influence of alcohol and that very often breath samples need to be taken from drivers who are in some stage of physical discomfort, perhaps after a traffic accident or in cases where they were suspected of being drunk. For these precise reasons breath samples needed to be taken.

(8) Following legal advice to refuse to provide a specimen is not a reasonable excuse as bad advice would defeat the whole object of the legislation: *Dickinson v DPP* [1989] Crim LR 741.

(9) There have been many cases concerning the right to consult a solicitor before providing a specimen of breath. The courts have repeatedly held the refusal to enable a person to consult a solicitor does not furnish a defendant with a reasonable excuse for not providing a specimen: *DPP v Billington* [1988] RTR 231, as applied in *DPP v Ward* [1999] RTR 11 and *DPP v Noe* [2000] RTR 351. The courts have further held that this refusal does not breach human rights; see, for example, *Campbell v DPP* [2004] RTR 5, as applied in *Kennedy v DPP* [2002] EWHC 2297; *Kirkup v DPP* [2003] EWHC 2354 and *Causey v DPP* [2004] EWHC 3164.

(10) A failure by the arresting police officer to enquire when a driver had taken his last drink or smoked his last cigarette did not invalidate a roadside breath test or subsequent arrest or provide a reasonable excuse for failure to provide a specimen at the police station: *DPP v Kay* [1999] RTR 119.

(11) In *R v Harling* [1970] 3 All ER 902, the doctor had made three unsuccessful attempts to obtain a blood specimen and having lost confidence in the doctor the appellant refused any further attempts. The court held that whilst it may be harsh to describe this as unreasonable, it was not a reasonable excuse for failure to provide a urine sample.

(12) In *DPP v Beech* [1992] RTR 239, it was unsuccessfully argued that a driver's self-induced intoxication rendered him unable to understand the procedure. The court said that to allow that excuse would defeat the purpose of the legislation. Similarly, in *HKSAR v Choi Chi-hung* (HCMA 62/2000), the court held that failure to give a specimen because of drunkenness was not a reasonable excuse.

Held to be a reasonable excuse

(1) Where no woman police officer was present to take a urine sample from a woman driver, this may be a reasonable excuse for failing to provide a urine sample, however, this may not be a reasonable excuse for not providing a blood sample: *Rowland v Thorpe* [1970] 3 All ER 195.

(2) Physical or mental disabilities have been held to afford reasonable excuses but, generally, only in circumstances where the allegation of the disability is supported by independent evidence before the court, which evidence will usually come from an expert. The driver must communicate to the officer conducting the test his medical condition, and not just to the police officer who stopped the defendant: *DPP v Lonsdale* [2001] RTR 29. However, it is to be noted, that whilst in the great majority of cases a failure to mention any relevant medical conditions may well result in the court concluding, as a matter of evidence, that a medical excuse belatedly proffered was not acceptable and indicated a wilful failure to provide a specimen, there is no legal obligation to inform the testing officer of any medical condition that could prevent the provision of a sample: *Piggott v DPP* [2008] RTR 16. For examples of physical or mental disabilities amounting to a reasonable excuse, see: *R v Harding* [1974] RTR 325, a fear of hypodermic needles, and *De Freitas v DPP* [1993] RTR 98, a genuine obsessive phobia of contracting AIDS. This excuse, however, failed in *DPP v Kinnersley* [1993] RTR 105 and *DPP v Fountain* (see paragraph (3) above). Only in very rare cases will a phobia such as this be a reasonable excuse.

4.54 The right of arrest

By virtue of s 39B(9), a police officer in uniform may arrest a person without warrant if:

(a) as a result of a screening breath test he has reasonable cause to suspect that the proportion of alcohol in that person's breath exceeds the prescribed limit; or

(b) the person has failed to provide a specimen of breath for a screening breath test when required to do so under this section.

that the specimens of breath be replaced by a specimen of blood or urine. Where the prosecution are relying upon a breath test between 22 and 37 as the basis of the prosecution, the prosecution must prove that the option under s 39D(2) has been explained to the defendant, otherwise the prosecution is not entitled to rely on the breath specimen as conclusive evidence of guilt: *Anderton v Lythgoe* [1985] 1 WLR 222. Whilst the police officer will decide whether the specimen shall be blood or urine, he must tell the driver of both options: *DPP v Magill* [1988] RTR 337.

4.102 Where the driver was unable to understand the choice available to him because of the alcohol consumed by him, evidence of the breath specimen remains admissible against the driver: *DPP v Berry* (1996) 160 JP 707.

4.103 Medical reasons

In *DPP v Warren* [1992] 4 All ER 865, the court held that a police officer must fully inform the driver of the nature of the option open to him and what would be involved if he exercises the option, namely that he is entitled to claim to have the specimen replaced by a specimen of blood or urine if he wishes, but that, if he does so, it will be for the police officer to decide whether the replacement specimen is blood or urine and that if the police officer requires a specimen of blood it will be taken by a doctor (a medical practitioner, registered nurse or enrolled nurse in Hong Kong), unless a doctor is of the opinion that for medical reasons a specimen of blood cannot or should not be taken in which case the specimen will be urine.

4.104 The guidance given by the House of Lords in *DPP v Warren* as to the procedure to follow when a police officer requires a specimen of blood or urine (s 39C(2)), or explains to a driver the right to replace a specimen of breath with a specimen of blood or urine (s 39D(2)), with three exceptions, is not to be treated as mandatory, but indicating that a driver should be made aware so that he may know the role of the medical practitioner in determining any medical objections which the driver may raise to the giving of a specimen of blood. If the driver is not told at the outset of the role of the medical practitioner, it will be for the justices to decide whether the omission prejudiced the driver and deprived him of the opportunity to make an informed decision: *DPP v Jackson; DPP v Stanley* [1999] 1 Cr App R 204. The three exceptions are the warning of risk of prosecution (s 39C(18)); the reason why a breath specimen cannot be taken or used (s 39C(2)); and that the specimen of breath does not exceed 37 micrograms of alcohol in 100 millilitres of breath (s 39D(2)).

4.105 Where the driver informs the police officer of a medical condition, a failure by the police officer to inform the doctor will invalidate the result: *Butler v DPP* [2001] RTR 28. Similarly, where a person declines to provide a specimen of blood on the basis of his fear of needles, the police officer should ask for the reasons for his fear to establish whether the fear was well founded: *Johnson v West Yorkshire Metropolitan Police* [1986] RTR 167 as followed in *Wade v DPP* [1996] RTR 177 and *R v Epping JJ, ex p Quy* [1998] RTR 158. Where the driver says there is no medical reason for him not to give a blood sample, the fact the driver has tablets or mouth spray in his possession does not place upon a police officer the obligation to consult a doctor before deciding that the specimen would be one of blood: *Kinsella v DPP* [2002] EWHC 545.

4.106 The police officer must not substitute his own opinion for that of a medical practitioner, unless the reasons advanced were so obviously frivolous that they could not possibly amount to a medical reason for refusing to provide a specimen of blood: *DPP v Wythe* [1996] RTR 137. A refusal to be examined does not amount to a medical reason: *DPP v Gibbons* (2001) 165 JP 812.

4.107 If a medical practitioner is of the opinion that for medical reasons a blood specimen cannot be taken, then the specimen must be of urine: s 39D(3). If the person then provides a specimen within a reasonable time after the breath analysis, the statement of analysis of the earlier breath specimens shall not be used (s 39D(4)). Where the driver fails to provide the replacement specimen, the prosecution are entitled to rely on the breath specimen previously provided: *DPP v Winstanley* [1993] RTR 222 as approved in *Hayes v DPP* [1994] RTR 163. Whether a specimen is provided within a reasonable time where a driver who initially refuses to provide a specimen later changes his mind is for the court to determine and not the police officer: *Smith v DPP* [1989] RTR 159. In that case, a change of mind 63 minutes after refusal was held by the court not to have been provided within a reasonable time. A police officer may, however, change his mind as to the type of specimen to be required, up and until the driver has supplied a replacement specimen: *DPP v Garrett* [1995] RTR 302.

4.108 Where the driver opts to replace the breath specimen, the prosecution does not have to prove that the evidential breath test device was working properly, because where the machine was not working properly, the police officer has the right to require a specimen of blood or urine under s 39C(2)(b): *DPP v Branagan* [2000] RTR 235.

4.109 Failure to follow the procedure should again be rare, for a pro-forma Pol 973A is available for police officers to complete at the time of requesting a specimen of breath, blood or urine. The form, again available in both Chinese and English, is in triplicate with a copy supplied to the driver. The form covers all the procedure set out in ss 39C and 39D.

4.110 Protection for hospital patients

In order to protect those in a hospital as a patient (as distinct from a person taken to a hospital for the sole purpose of the taking of a blood sample),

4.120 Consumption of alcohol after the driving

Circumstances may arise where, after driving, but before any testing has taken place, a driver has consumed alcohol. Section 39C(12) provides that evidence of the proportion of alcohol in breath, blood or urine provided in the specimen shall be evidence that the proportion of alcohol in the driver's breath, blood or urine at the time of the offence was not less than that in the specimen. This provision is somewhat different from the equivalent English provision in s 15(2)(3) of the Road Traffic Offenders Act 1988, which assumes that the proportion of alcohol in the accused's breath, blood or urine at the time of the alleged offence was not less than in the specimen unless the accused proves that he consumed alcohol before he provided the specimen and after the time of the alleged offence and that had he not done so the proportion of alcohol in his breath, blood or urine would not have exceeded the prescribed limit.

4.121 In the previous edition of this work, it was thought that such a burden had not been placed on the driver in Hong Kong because of the presumption of innocence in the Bill of Rights Ordinance. In the United Kingdom, the courts have held this assumption does not infringe the presumption of innocence, the assumption being reasonable and well within limits being a proportionate response to what is generally perceived to be, and is reprehensible conduct on the part of any person who takes a car on to the road having consumed alcohol: see *Parker v DPP* [2001] RTR 16, as applied in *Griffiths v DPP* [2002] EWHC 792; *R v Drummond* [2002] RTR 21 and *DPP v Tooze* [2007] EWHC 2186.

4.122 Exactly how the courts in Hong Kong will address the issue of post-offence alcohol consumption is yet to be seen. Thus, it is still submitted that it is open to a driver in Hong Kong to simply raise a doubt as to whether his breath, blood or urine alcohol content would have exceeded the limit by adducing evidence of post-offence alcohol consumption. The approach in England has been to require medical or scientific evidence to be called, unless it is so obvious to a layman that the excessive breath or blood or urine alcohol content can be satisfactorily explained by the consumption of alcohol after driving: *Pugsley v Hunter* [1973] 2 All ER 10, as applied in *Dawson v Lunn* [1986] RTR 234 (also see para 4.187 below with regard to laced drinks).

4.123 Whilst in the United Kingdom the burden is on the driver to prove had he not consumed alcohol after the alleged offence the proportion of alcohol would not have exceeded the prescribed limit, the courts in Hong Kong are most unlikely to accept the mere word of the driver and will look for medical or scientific evidence sufficient to satisfy the evidential burden placed on the defendant to raise the issue before the court.

4.124 Whether the doubt may be raised will depend on the facts. For example, a man with a high alcohol count who says he had a double brandy after driving may not raise a doubt, because, even though that drink may have raised the count, the evidence may not raise a doubt that the level at

the time of arrest was not above the legal limit. In such a case, the post-offence consumption may be relevant to mitigation as penalties are usually based in part on the alcohol level. The argument is one that may be more effective in marginal alcohol content cases where it can be contended that the post-consumption drink was the factor that took the level of alcohol over the limit.

4.125 Back-calculation

The situation may arise where there is a substantial delay from the time of the screening breath test and the giving of a sample of breath, blood or urine, in particular blood. In such cases, the prosecution may adduce evidence that the alcohol level was higher at the time of the offence than at the time of the test. This is known as back-calculation and has received the support of the courts in the United Kingdom: *Smith v Geraghty* [1986] RTR 222. Notwithstanding approval in other jurisdictions, there have been very few cases taken to court in Hong Kong on the basis of back-calculation, perhaps due to the fact that the calculation requires expert medical evidence as to rates of elimination of alcohol which is dependent on many factors, making the calculation somewhat imprecise. Thus, as stated by the court in *Smith v Geraghty*, consideration of blood-alcohol level by scientific calculation was practicable only when the evidence was reasonably clear, straightforward and relatively simple.

4.126 The statutory defence

A person is deemed not to have been in charge of a motor vehicle if he proves that at the material time the circumstances were such that there was no likelihood of his driving the motor vehicle while the proportion of alcohol in his breath, blood or urine remained likely to exceed the prescribed limit: s 39A(4).

4.127 The statutory defence only applies where the offence alleged is one of being 'in-charge'. A person is in charge of a motor vehicle if he acted in a manner which showed that he had assumed control or intended to assume control of the vehicle. The burden is then on the defence to prove there was no likelihood of the vehicle being driven while the proportion of alcohol in his breath, blood or urine remained likely to exceed the prescribed limit: *DPP v Watkins* [1989] QB 821, as applied in *HKSAR v Wong Chung-man* (HCMA 1105/2006).

4.128 Whether the reverse burden unjustifiably infringes the presumption of innocence has yet to be examined in the light of the Bill of Rights Ordinance. The courts in England have considered whether the burden imposed on the defendant is that of an evidential burden or of a persuasive

less than three months, unless the court for special reasons orders that the person be disqualified for a shorter period or that the person not be disqualified. Disqualification for a period of two years on a second conviction remains unchanged.

4.144 The fact that the subsequent offence is over five years later does not automatically mean that the defendant should be treated as a first offender. This is a matter for the discretion of the sentencing court: *HKSAR v Li Kwan-lok, Roy* (HCMA142/2005) and *HKSAR v Tsang Yuk-lung* (HCMA 378/2008). The appeal court in *Li Kwan-lok, Roy*, however, reduced the period of disqualification from three years to the mandatory minimum of two years, and in *Tsang Yuk-lung* the sentencing magistrate imposed 18 months disqualification, which was not disturbed on appeal.

4.145 By virtue of s 44(3) of the RTO, the period of disqualification for driving whilst disqualified shall be in addition to any other period of disqualification ordered under any other provision of the Road Traffic Ordinance. Therefore, where the driver is convicted of driving whilst disqualified and drink driving, any disqualification ordered for the drink driving offence is to be made consecutive to the disqualification for driving whilst disqualified: *HKSAR v Tsui Wai-nin* [2001] 1 HKC 276.

4.146 A court also has power to order a person convicted of any drink driving offence to attend and complete a driving improvement course: s 72A of the RTO. Although it is rare, such an order may be made where the driver is disqualified. Where a court makes such an order, the penalty that may otherwise be imposed for the offence may be lighter than it might have been if the order had not been made: s 72A(2).

4.147 When the drink driving legislation was first introduced, the courts placed reliance on sentencing practice in the United Kingdom, in particular the suggested guidelines set out by the Magistrates' Association in the United Kingdom: *HKSAR v Szeto Kau-sun* [1999] 3 HKC 613. Although disqualification was not mandatory in Hong Kong, the adoption of United Kingdom sentencing practice (where 12 months' disqualification is mandatory) inevitably led to a period of disqualification.

4.148 The courts in Hong Kong have slowly built up a body of case law on sentencing. The periods of disqualification have not, however, been consistent. This may be due to the fact that some courts take into account whether the level of alcohol is double or triple the limit while other courts have taken into account the actual amount of alcohol over the limit, in particular after the change in the prescribed limit. Courts have also taken into account whether the consumption of alcohol played a part in any resulting accident, in particular where the levels of alcohol are relatively low. McMahon J,. in *HKSAR v Wong Man* [2007] 2 HKC 499, acknowledged the variations in the sentences imposed for offences involving relatively high levels of alcohol and without laying down any tariffs, sought to provide guidance with a view to promoting some consistency in sentence (see para 4.170 below). The judgment was delivered in January 2007, since which time there have been very few cases that have reached the appeal courts, indicating perhaps a greater consistency in sentence.

4.149 Imprisonment

In most cases only a fine and disqualification are imposed on a first offender. Rarely has a prison sentence been passed though on occasions a defendant has been ordered to perform community service. The first known case where an immediate prison sentence was the subject of appeal was *R v Chow Tin-jack* (HCMA 61/1997). The appellant was involved in a head-on collision in the Cross Harbour Tunnel. The appellant's alcohol level was 51 micrograms of alcohol per 100 millilitres of breath, which was less than double the then prescribed limit. In allowing the appeal and substituting a suspended sentence, the court found that the facts did not show the appellant deliberately driving recklessly under the influence of alcohol and the injury to the other driver was a very minor one. The court went on to say, had the accident caused death or serious injury to other road users or the appellant had previous similar convictions, the result may have been different and emphasised that in serious cases there is nothing wrong in passing an immediate custodial sentence as a deterrent in order to safeguard the lives and property of other road users.

4.150 In *HKSAR v Ho Ho-chuen* [1998] 2 HKC 544, the magistrate, following the guidance given in *Chow Tin-jack*, imposed a suspended sentence on a serving police officer, whose alcohol level was 91 micrograms of alcohol per 100 millilitres of breath, well over double the old legal limit. The appellant was seen driving the wrong way on a one-way road when a collision occurred resulting in damage to both vehicles but no injury. On appeal, statistics were placed before the court showing that in the preceding two years, out of 121 convictions, only five resulted in prison sentences being imposed, all of which were suspended. In allowing the appeal and substituting a fine for the suspended sentence, the court found that a study of the statistics showed that in the great majority of cases, where there has been no more than accident damage and no injuries caused, first offenders pleading guilty were punished by way of a fine only coupled with a period of disqualification.

4.151 A similar result can be seen in the case of *HKSAR v Tsing Kwok-biu* (HCMA 1260/1998). The magistrate imposed concurrent sentences of 3 months imprisonment for offences of driving over the prescribed limit and reckless driving. The appellant, aged 22, was seen by the police to jump a red light at 0345 hours. When the police following the appellant switched on the blue beacon and through the loudspeaker instructed the appellant to stop, the appellant increased his speed and while being chased jumped three further red lights before his car rammed into a stationary private car. Serious damage was done to both vehicles with further damage

occurring to a tram stop sign post and the outer wall of a house. The alcohol level of the appellant was 54 micrograms of alcohol per 100 millilitres of breath. The appellant was remanded in custody for 14 days prior to sentence. On appeal, the court said that where there was no personal injury involved, the sentence imposed by the magistrate on the appellant as a first offender was excessive and that the 14 days spent on remand was a sufficient lesson for what this young man had done. The court substituted a fine for the drink driving offence and the 14 days remand prior to sentence for reckless driving.

4.152 The court again substituted a suspended sentence with a fine in *HKSAR v Lo Chui-yuk, Michelle* [2001] 2 HKLRD 408, a case where the appellant was one microgram below three times the prescribed limit. When starting her car in the access road of the Peninsula Hotel, the appellant lost control and, at a high speed, grazed some of the cars in the access road and finally came to a stop when ramming into a taxi. The court found that the fact the accident happened in an access road was not as serious as in *Ho Ho-chuen* and *Tsing Kwok-biu*. This was followed in *HKSAR v Chu Sung-kei* (HCMA 122/2007), the court quashing a suspended sentence where the defendant was over five times the prescribed limit.

4.153 In *HKSAR v Fong Leung, Lawrence* (HCMA 317/2001), the appellant drove his jeep down a narrow one-way street when he collided with a parked vehicle causing some damage. The appellant then reversed his jeep before being pursued by two witnesses on foot. They caught up with the appellant when he was waiting to turn right, and opened the driver's door to remonstrate with the appellant. The appellant drove off and as he did so injured one of the witnesses on the head with the car door. The witnesses and others then caught up with the appellant when he had to stop because of traffic in Nathan Road and restrained him until the police arrived. The appellant was over four times the prescribed limit. At trial, he was acquitted of failing to stop because the evidence was insufficient to prove that he had been aware the witness had sustained injury. On appeal, the court set aside a sentence of two months' imprisonment and substituted a fine. The court, in allowing the appeal, considered the earlier cases and said that whilst every case depends upon its own facts, those cases made it clear that within certain factual parameters there is a settled band or range of sentences which ought in justice and in the interests of consistency be followed, and that given the facts in that case a sentence of imprisonment was not appropriate let alone inevitable. Whilst there was no personal injury as a result of the accident and the appellant was acquitted of failing to stop, the reading was high but more significantly, the appellant, having been involved in an accident, attempted to leave the scene full well knowing he had been drinking and driving. The decision, therefore, to substitute a sentence of imprisonment with a fine may seem somewhat surprising. This may be explained by the fact that the court, in allowing the appeal, found that it was quite apparent that there was at least a perception of 'a rush to judgment' without a full consideration, to which the appellant was entitled,

of the sentencing options and without indicating to counsel for the appellant what the court had in mind. If a case involving a driver leaving or attempting to leave the scene of an accident, after drinking and driving, again comes before the court, the decision that a prison sentence is not appropriate may well be different.

4.154 Immediate imprisonment

In *HKSAR v Lo Shun-Kwong, Alexander* [1999] 1 HKC 134, the appellant was convicted of driving above the prescribed limit and reckless driving and sentenced to concurrent sentences of one month's imprisonment. The appellant strayed across to the opposite carriageway when he was involved in a head-on collision with a taxi. Another taxi trying to avoid the collision by veering to his right crashed into the central concrete barrier. Serious injury resulted to the passengers in the appellant's car resulting in them being admitted to hospital for one week. The taxi driver and two of his passengers were not seriously injured and were discharged from hospital the same morning after treatment. The remaining passenger, a 76-year-old lady, broke four of her ribs and on admission to hospital she had a cardiac arrest resulting in her lapsing into a coma. The lady remained in a coma until she died. At the time of sentencing by the magistrate, the lady was still in a coma. The appellant's alcohol level was 156 millilitres of alcohol per 100 millilitres of blood, almost double the old legal limit. In dismissing the appeal, the court said the sentence of one month's imprisonment was manifestly inadequate and that in cases where death or serious injury occurs after excessive drinking, sentences in the range of three to six months' immediate imprisonment were appropriate.

4.155 A previous similar conviction may result in immediate imprisonment. In *HKSAR v Szeto Kau-sun* [1999] 3 HKC 613, the appellant was convicted of driving above the prescribed limit and careless driving. The appellant appealed a sentence of two months' imprisonment for driving above the prescribed limit. The appellant was almost four times the old legal limit, (131 micrograms of alcohol per 100 millilitres of breath), and committed the offence whilst on bail for a similar offence. On appeal, the appellant, a civil servant, relied on the earlier decision in *Ho Ho-chuen*, where a suspended sentence imposed on a police officer for a similar charge was reduced to a fine on appeal. The court, in dismissing the appeal, held that the magistrate correctly distinguished the case of *Ho Ho-chuen* upon the basis that the appellant's alcohol level was considerably higher than in *Ho Ho-chuen*, and this was his second conviction whereas in the case of *Ho Ho-chuen*, that was the first conviction. Where the previous conviction was over ten years old a suspended sentence was upheld in *HKSAR v Tsang Yuk-lung* (HCMA 378/2008).

[1946] KB 114. In *Jarvis v Fuller* [1974] RTR 160, the court held that because the defendant who drove in light rain, at night, with dipped headlights did not see a cyclist in dark clothes with no rear light until he was about six to eight feet away and too late to avoid a collision with the cyclist did not necessarily mean that he was driving at a speed which did not enable him to pull up within the limits of his vision. This was followed in *Webster v Wall* [1980] RTR 284, where a motorcyclist riding at night collided with a stationary car parked on the nearside of the road. The parked car was not displaying any lights; the cyclist was on dipped headlights and travelling within the speed limit; the nearest streetlight was 35 feet away; the road was wet and visibility was poor. On appeal, the court held that the justices had correctly rejected the contention that since the accident occurred between the defendant's motorcycle and a stationary vehicle this raised a presumption the defendant was not maintaining a proper lookout.

5.49 Automatism

The term automatism connotes no wider or looser concept than an involuntary movement of the body or limbs of a person. The prosecution must prove beyond reasonable doubt that the defendant did not act in a state of automatism. However, it is for the defence to lay a proper foundation by adducing positive evidence upon which a court can rely: *A-G's Reference (No 2 of 1992)* [1994] QB 91.

5.50 In *Broome v Perkins* (1987) 85 Cr App R 321, the defendant had driven for over five miles along a road at times swerving about, many times being completely on the wrong side of the road, and colliding with a vehicle travelling in the opposite direction. The justices dismissed the information accepting the defendant was suffering from an attack of hypoglycaemia, which could not reasonably have been foreseen. On appeal, the court held that a vehicle could not be driven for five miles along a road without the mind directing the limbs for at least part of the journey and that even if for periods of the journey the defendant's mind was not in control during other periods he was in control being able at times to drive at the appropriate speed, veering away from other vehicles, braking behind a stationary traffic queue and at one stage being able to restart his car, drive home and park the car. Therefore, the court concluded that for part of the journey the defendant was controlling his limbs, albeit imperfectly, and clearly without due care and attention.

5.51 Where the defendant was aware that drowsiness was overtaking him, this does not amount to automatism: *Kay v Butterworth* (1945) 173 LT 191, where the defendant drove his motor vehicle into the rear of a party of 36 American soldiers who were marching, injuring 16. The justices upheld the submission that the defendant having worked all night had been overcome by sleep or drowsiness and was, therefore, temporarily

unconscious and not responsible for his actions. On appeal by the prosecution, the court, allowing the appeal, held that if a driver allows himself to drive while he is asleep, he is at least guilty of the offence of driving without due care and attention, because it is his business to keep awake. If drowsiness overtakes a driver while he is at the wheel, he should stop and wait until he shakes it off and is wide awake again.

5.52 The court went on to say that a person, however, who through no fault of his own, becomes unconscious while driving, for example, by being struck by a stone, or by being taken ill, ought not to be liable at criminal law. Also see *Hill v Baxter* [1958] 2 WLR 76, where the court considered the dictum in *Kay v Butterworth* as to the circumstances where an accused could not really be said to be driving at all, giving examples such as a stroke or epileptic fit. In *R v Whoolley* [1998] CLY 914, the court held that sneezing could produce a state of automatism and that justices could take judicial notice without hearing medical evidence as to the effect of sneezing.

5.53 Mechanical defect

A mechanical defect in a motor vehicle may be a defence if it causes a sudden total loss of control which is in no way due to any fault on the part of the driver, but such defence has no application where the defect is known to the driver or should have been discovered by him had he exercised reasonable prudence: *R v Spurge* [1962] 2 All ER 688. The court went on to say that it was for the defendant to put forward the defence and that once it had been put forward it must be considered with the rest of the evidence. The accused is entitled to be acquitted if the explanation that the accident was caused by mechanical defect leaves a real doubt in the mind of the jury.

5.54 In *Haynes v Swain* [1975] RTR 40, the defendant drove his car, which he regularly maintained and serviced, for 20,000 miles without experiencing any difficulty when using the brakes. Two other persons who also drove the car noticed a tendency for the car to pull to the right when the brakes were applied at high speeds. When the defendant was informed of this, he took the car to the supplier's garage to test the brakes but no defect could be found. Whilst travelling at 70 mph, the defendant braked fairly hard, the car immediately swerved to the right and an accident resulted. The justices found that the braking system defect was of long standing and that the defendant continued to drive when he must have known or at least ought to have known of the defect during the 20,000 miles that he had driven the car if he had exercised reasonable prudence. On appeal against conviction on the ground that the defendant was entitled to rely on regular servicing as showing the car to be in good mechanical order at all times after servicing, the court, dismissing the appeal, held that after a car had been serviced, all that a car driver could assume was that the service had been carried out.

line', a driver may cross the line from the side of the broken line if the following conditions in Reg 11(2)(a) are met:

(i) if no danger is thereby caused to his vehicle, any other vehicle or any other person;
(ii) he can return to the left side of the continuous white line with a broken white line before the commencement of double white lines; and
(iii) he does not remain on, over or across the continuous white line with a broken line for a greater distance or a longer time than is reasonably necessary.

A further exception is provided in Reg 11(3)(c) permitting a right turn into or out of a road premises or place adjacent to the carriageway unless the double lines control vehicles proceeding in the same direction.

6.6 In *R v Chow Ki-wai* [1985] HKCL A101, it was held that this regulation did not permit a driver to make a U-turn by turning across the lines into a driveway and then reversing out. A U-turn does not require a single sweep of the steering wheel. However, see *A-G v Cheung Moon-wah* (HCMA 920/88). Here the driver reversed into an entrance and turned out of it to the right, thereby crossing double white lines. The facts proved did not make it clear that effecting a U-turn was his only purpose and Hooper J found that there no offence had been committed. This case was distinguished in *R v Kwong Wing-lei* (HCMA 189/89) where Bewley J held that Reg 11(3)(c) did not cover a driver who reversed into a gap in the pavement in order to effect a U-turn, which manoeuvre was, therefore, an offence. If a driver undertakes a passing manoeuvre where there are no continuous white lines and finds, as a result of the ordinary exigencies of driving, that he is unable to return to his correct side of the road before a continuous white line begins, then, unless he can bring himself within the provisions of Reg 11(2), he has committed an offence: *R v Blything (Suffolk) JJ, ex p Knight* [1979] RTR 218. It should be remembered that by s 110 of the Road Traffic Ordinance of the Laws of Hong Kong (Cap 374) ('RTO') (discussed in para 14.17), a variation in the road marking from that prescribed in the Schedule to the regulations, which does not alter the visible and general appearance of a sign or marking, and the meaning of the sign is not by the variation materially impaired, will not afford an answer to a charge. Thus, English authorities such as *Davies v Heatly* [1971] RTR 145 and *O'Halloran v DPP* [1990] RTR 62, upholding, as a defence, non-conformity of a sign to the regulations even if the sign is clearly recognisable for what it is intended to be, have no application in Hong Kong.

6.7 Driving rules

Certain driving rules contained in Part VII of the Road Traffic (Traffic Control) Regulations may be noted. Regulation 42(a) prohibits a driver, when driving a motor vehicle on a road, from permitting any person, not being a driving instructor, to grasp or interfere with the steering, gearing, or braking mechanism of the vehicle. Another rule, commonly ignored in Hong Kong, is that contained in Reg 43 which prohibits the use of any audible warning device on a vehicle on a road, except to warn any person on or near a road of danger. As it is highly unlikely that traffic stopped in a traffic jam presents any danger to anyone, the inference that a horn, used in such circumstances, is being used to demand passage would be overwhelming and an offence committed. By Reg 44(2), no person shall open, or cause or permit to be opened, any door of a motor vehicle or trailer on a road so as to cause injury to any person. This specific proviso avoids the need to resort to a charge of 'wilful obstruction' as had to be resorted to by the prosecution in *Eaton v Cobb* [1950] 1 All ER 1016. In that case, the defendant was acquitted as, on the facts, he was found to have taken precautions to see if traffic was coming. There is now an identical provision in England in Reg 105 of the Road Vehicles (Construction and Use) Regulations 1986. Penalty for any of these offences is a fine of $2,000.

6.8 Expressways

An 'expressway' is defined by s 122 of the RTO as:

> ... any expressway designated as such by the Commissioner under section 123(1) and delineated as such on a deposited plan, and includes part of an expressway.

The entrance to expressways are designated by signs which indicate the commencement of the expressway. Under the Road Traffic (Expressway) Regulations (Cap 374) (Sub Leg Q), certain driving rules and offences in relation to expressways are prescribed. The only vehicles permitted on an expressway are those with an engine cylinder capacity of more than 125 cc3: Reg 4. Under Reg 9(1), it is an offence to stop a motor vehicle or to cause it to remain at rest on the carriageway of an expressway except by reason of breakdown, lack of fuel, accident or illness, or to permit a person to help another in respect of the foregoing difficulties: Reg 4(2).

6.9 The most significant driving rule is that which restricts the use of the off-side lane of an expressway. By Reg 11(1), a medium goods vehicle, a heavy goods vehicle, a private bus, a public bus, a motor cycle or motor tricycle driven by holder of a probationary driving licence, a motor vehicle towing a trailer or another vehicle, or a Government vehicle, or a vehicle used by the Hong Kong Garrison may not be driven in the offside lane of an expressway where three or more lanes are open in the same direction unless there is a traffic sign indicating that the offside lane joins a diverging lane or it is necessary for the vehicle to be driven in the offside lane in order to proceed to the diverging lane. Further, by Reg 12, the driver of any vehicle using an expressway must drive in the nearside lane except when overtaking another vehicle or where one or more traffic lanes merge with,

sufficient for two vehicles, but the vehicles had to slow down when passing the parked vehicle. It was argued it was not likely to cause obstruction and the obstruction was not unnecessary. Citing *Ball*, it was held that because 'other road users could not use that specific bit of road' the parking of the vehicle was likely to cause obstruction. The court also held that in determining whether an obstruction was unnecessary, an objective test should be adopted. The subjective condition of the driver, for instance, parking while waiting for a passenger could not be regarded as necessary.

6.11 Parking offences

'Parking' is defined by Reg 2(1) of the Road Traffic (Parking) Regulations (Cap 374) (Sub Leg C) as:

> ... the standing of a vehicle, whether occupied or not, except when standing temporarily for the purpose of and while actually engaged in loading or unloading or picking up or setting down passengers.

In *HKSAR v Tsang Wai-keung* (HCMA 220/1998), the defendant's vehicle was found double-parked, and unattended on Des Voeux Road. The traffic warden observed the vehicle for four to five minutes before issuing a ticket. The defendant gave evidence that he stopped the vehicle outside a shop in order to get some foodstuffs from the shop owner. He had just left the car for a short while. It was argued that the vehicle only stood temporarily for the purpose of loading. It was held that standing temporarily has to mean standing for a limited period of time. What is 'temporary' differs according to the circumstances. In respect of road traffic, it must be judged according to the condition of the road and the flow of traffic at the time. The appeal failed and the conviction was upheld.

6.12 By Reg 4(1), parking is prohibited:

> ... on any road on which there is a system of street lighting furnished by means of lamps not more than 200 meters apart other than in a parking place.

The placing of the street lamps correctly is presumed once the court is satisfied that there is a system of street lighting on the road: proviso to Reg 4(1). The penalty provided is a fine of $2,000. By analogy from *A-G v Davies* [1972] HKLR 450, a case in relation to speeding which previously also required proof of a street lighting system to establish speed limits, signs indicating that parking is not permitted are not required.

6.13 The right to erect parking meters on Crown land or at any parking place is in the Commissioner of Transport: Reg 11. The offences in relation to the use of parking meters are created by the Fixed Penalty (Traffic Contraventions) Ordinance (Cap 237). (For the operation of this Ordinance see Chapter 7: The Fixed Penalty System). A coin must be inserted in the meter, or the approved card, or the appropriate 'pay and display' receipt displayed 'as soon as practicable after the motor vehicle is driven in'. It is

submitted that this expression would avoid the sad result which faced the driver in *Strong v Dawttry* [1961] 1 All ER 926. There, the motorist parked and found that he did not have appropriate change to insert in the meter. He approached a police constable some 15 yards away for change but was not able to get any. He then obtained change from a taxi driver and returned to the meter to pay. In the five minutes that he had been away from the vehicle, a warden had attached to the car an excess charge notice as the meter showed that the time had expired. He explained the situation and paid the initial charge and refused to pay the excess charge. He was held to be rightly convicted of refusing to pay the excess charge. Lord Parker CJ said:

> ... the payment is to be made as soon as the vehicle is placed in the parking place. Whether the driver leaves the vehicle in the sense that he gets out of the vehicle or whether he stays there cannot affect the matter at all.

6.14 As noted above, the right to erect parking meters on Crown land or at any parking place is in the Commissioner of Transport: Reg 11. Section 10(2)(a) of the Fixed Penalty (Traffic Contraventions) Ordinance (Cap 237) is in the following terms:

> ... insertion of the appropriate coin required by subsection (1)(a)(i) shall be payment for the use of the parking space referred to in that subsection, in respect of the motor vehicle then in it, for the period indicated on the parking meter as the period in respect of which payment is made, commencing from the time the coin or coins are inserted.

It is submitted that the effect of this section, when read with s 8 of the Fixed Penalty (Traffic Contraventions) Ordinance, which makes it an offence to park a vehicle in a parking space contrary to a traffic sign erected under Schedule 1 to the Road Traffic (Parking) Regulations (which sign may limit the time which may be spent at a meter), is to give a motorist who parks the benefit of any unexpired time on the meter and to prevent 'meter feeding'. In England, the issue of meter feeding is the subject of specific provision. In *Beames v DPP* [1989] Crim LR 659, the defendant was accused of 'feeding' a parking meter, ie inserting an additional coin into a parking meter postponing the time after which an excess charge was incurred. She had parked her car in a bay in which the meter showed unexpired time. After expiry of that time, she returned to insert coins which would have allowed additional parking time of three hours. The Parking Places and Controlled Parking Zone (Manchester) Order 1971 provided:

> No person shall insert in the parking meter any coins additional to the coin or coins inserted by way of payment of the initial charge in respect of that vehicle.

She argued that because the additional coins she put in were in respect of her vehicle, and not in respect of the vehicle for which the initial charge had been made, there was no offence. However, Article 25 of the Order made it clear that an initial charge paid by one motorist who has left an unexpired portion on the meter is to be regarded as having been paid by the

(15) Parked in a parking space in respect of which there is a card operated parking meter without as soon as practicable after parking using a parking card or, where applicable, an approved card for the payment of the parking fee: s 10(1)(a)(ii)
(16) Parked in a pay and display parking space without as soon as practicable after parking displaying a display ticket on the inside of the windscreen so that the ticket shows the payment of the parking fee, the relevant parking space, the date on and the time until which payment is made: s 10(1)(b)(i)
(17) Parked in a pay and display parking space beyond the time indicated on the display ticket as the time until which payment is made or when the display ticket does not indicate payment for the use of that parking space or for that date: s 10(1)(b)(ii)
(18) Parked in more than one parking space in respect of which there is a coin operated parking meter without inserting an appropriate coin in each meter: s 10(4)
(19) Parked in more than one parking space in respect of which there is a card operated parking meter without inserting a parking card or, where applicable, an approved card in each meter: s 10(4)
(20) Parked in more than one pay and display parking space without displaying the appropriate number of display tickets: s 10(4)
(21) Parked in a parking space in respect of which there is a parking meter when the meter does not indicate that payment has been made: s 11(1)

7.3 The FP(CP)O deals with 57 offences all of which are driver offences. They are:

(1) Driving in excess of the speed limit by 15 km an hour or less
(2) Driving in excess of the speed limit by more than 15 km an hour (except where item 2A or 2B applies)
(2A) Driving in excess of the speed limit by more than 30 km an hour (except where item 2B applies)
(2B) Driving in excess of the speed limit by more than 45 km an hour
(3) Driving with an expired driving licence
(4) Failing to carry driving licence when driving
(5) Failing to produce driving licence
(6) Driving unlicensed vehicle
(7) Driving a private car which is carrying goods weighing more than 200 kg
(8) Contravening condition of a vehicle licence
(9) Unlawfully entering box junction
(9A) Unlawfully entering yellow stripped light signal crossing
(10) Crossing continuous double white line or white line with a broken white line
(11) Driving in a prohibited zone
(12) Picking up/setting down passengers in a prohibited zone

(13) Loading/unloading goods in a restricted zone
(14) Failing to comply with traffic signals
(15) Driving on a closed road without a permit
(16) Failing to give precedence to pedestrians on a pedestrian crossing
(17) Failing to stop for school-crossing patrol
(18) 'U-turn' causing obstruction
(18A) Using mobile telephone while vehicle in motion
(19) Sounding audible warning device unnecessarily
(20) Unauthorised stopping at bus stop/public light bus stand/taxi stand/public light bus stopping place
(21) Driving without necessary lights illuminated
(22) Light other than permitted lights showing to rear
(22A) Driving motorcycle without keeping obligatory lamps lighted
(23) Excess passengers
(24) Overloading
(25) Insecure load
(26) Failing to comply with traffic signs
(27) Failing to comply with road markings
(28) Defective direction indicator
(29) Excess smoke or visible vapour
(30) Defective or inadequate dipping mechanism
(31) Registration mark not displayed/lit/adequately fitted
(32) Failing to report change of vehicle particulars
(33) Failing to display valid licence
(33A) Driving a vehicle without a 'P' plate
(33B) Failing to comply with restriction on carrying passengers
(34) Contravening condition of driving licence
(35) Failing to display 'L' plates
(36) Contravening condition of learner's licence
(37) Driving motorcycle without protective helmet
(38) Driving private car without securely fastened seat belt
(39) Driving private car when front seat passenger not securely fastened with seat belt
(40) Driver of first or second public light bus at public light bus stand leaving vehicle
(41) Driver of first or second public light bus at public light bus stand not ready/willing to drive from public light bus stand
(42) Public light bus driver not moving forward at public light bus stand
(43) Public light bus obstructing other public light bus at public light bus stand
(44) Public light bus driver at stand not obeying directions given by police officer/traffic warden
(45) Taxi driver not moving forward at taxi stand
(45A) Taxi driver of first or second taxi at a taxi stand not sitting in or standing beside his taxi
(46) Taxi driver at stand accepting fare out of turn

7.10 Review proceedings

Under both Ordinances, after the court has made the order to demand payment plus the additional penalty and costs, the person liable may apply for review proceedings to have such order rescinded on the ground that the notice demanding payment and ascertaining the intention whether to dispute liability, has not come to the personal notice of the person liable without any neglect by that person. If accepted by the court, the order for additional penalty and costs will be rescinded and the person may choose either to pay the original fixed penalty or to dispute the liability. In the review proceedings, the defendant has to give evidence to establish that he has not received the notice for reasons without neglect on his part. In *HKSAR v Chong Chor-hoi* (HCMA 500/2000) (Chinese judgment), it was held that it was for the defendant to prove, on a balance of probabilities, that the unawareness of the notice was without his neglect. In *HKSAR v Chan Kar-wing* (HCMA 151/2003), the defendant admitted receiving the fixed penalty but failed to pay within the time limit. He maintained that he did not receive the notice demanding payment at a later time. The magistrate found that the defendant was with neglect on the grounds that he should pay the fixed penalty within the required time and also that he had failed to take steps to check with the management office or relevant authority about delivery of the subsequent notice. On appeal, it was held that the matter for consideration of 'neglect' should refer to that causing the unawareness of the subsequent notice. It was wrong to consider the failure to pay the fixed penalty. In *HKSAR v Shum Shui-chan* (HCMA 222/2007) (Chinese judgment), the defendant in the review proceedings alleged that he did not receive the subsequent notice for the reason that, in the place where he lived, there was only an unlocked letter box at the entrance of the village. The villagers had to take the letters from the letter box and missing letters were quite frequent. He, however, confirmed that during the previous ten years, he encountered only one or two occasions of missing letters. He had made enquiries with some officials as to the delivery of the notice. As he was a bankrupt, he could not afford to rent a post box in the post office. The court, in allowing the appeal, held that under the circumstances of the defendant, it could not be said that the unawareness of the subsequent notice was due to his neglect. In *HKSAR v Poon King-hung* (HCMA 544/2007), the prosecution produced the application to the Transport Department by the defendant in respect of renewal of licence. The defendant, in that application, wrongly stated his address as 'Nam' instead of 'Nan'. Since the notice would be sent out according to the address kept by the Transport Department, it could not be delivered in accordance with defendant's correct address. On appeal, it was held that the magistrate was right to conclude that the unawareness of the notice was due to the neglect of the defendant.

7.11 Disputing liability

If the person liable notifies the Commissioner of Police that he wishes to dispute liability, the matter goes before a magistrate who shall determine liability. If the person does not appear at the hearing, he may be ordered, in his absence, to pay the fixed penalty together with a further penalty equal to the fixed penalty. In *HKSAR v Kong Wai-keung* (HCMA 482/1998), the defendant was ticketed for speeding. He was subsequently served with a demand notice under s 3(3) of the FP(CP)O. The defendant, however, submitted a notice to dispute liability which was six days outside the 21-day period prescribed by the Ordinance. An ex parte order demanding additional penalty was sought. The defendant asked for a review of that order but was refused by the magistrate. Suffiad J held that the powers of a magistrate are wholly governed by the words of statutes and he has only such power as is given to him by statute. The Ordinance did not give the magistrate any discretion as to the 21-day period for giving notice to dispute liability, and, therefore, the magistrate had no discretion in the matter.

7.12 To bring the matter in dispute before a magistrate, a summons is issued and served by post; proof of service is by way of certificate. If the person does not appear, the magistrate may proceed to hear and adjudicate as if the person had personally appeared. The prosecution will prove the case by submission of certificate. The court may proceed to convict. The certificate states:

(a) that the person specified in it was the registered owner or driver;
(b) that the address specified in it was at any particular time the registered address of such person or in the case of a driver, the address where he normally worked; and
(c) that payment was not made before the specified date and that the Commissioner of Police was not notified that liability was disputed.

7.13 Under the FP(TC)O, if the complaint is dismissed, the magistrate may order the complainant to pay the defendant's costs of between $80 and $1,500. Under both Ordinances, if the defendant is ordered to pay the fixed penalty fee, he may also be ordered to pay costs of between $80 and $1,500. Further, if the defence offered is frivolous or vexatious or the defendant does not appear, he may be ordered to pay, in addition to costs, a sum equal to the fixed penalty. An order is also made by the magistrate that while the penalty and costs are unpaid, the Commissioner for Transport shall refuse to issue or renew the person's driving licence or to transfer or register the motor vehicle. In *HKSAR v Leung Chi-chiu* (HCMA 1054/1999), the appellant was convicted of failing to comply with a traffic light signal in Harcourt Road. The appellant argued that he could not be found guilty as the Chinese character for 'Harcourt Road' stated in the location of offence in the fixed penalty ticket was incorrect. It was held that such grounds of appeal were frivolous and vexatious. In *HKSAR v Yu Kwok-wah* (HCMA 568/2005), the appellant was convicted of crossing double white lines at Fanling Highway near lamp-

9.21 In *Ma Kin-man*, the court said that the degree to which an offender is a danger to other persons using the roads could to some extent be assessed by an examination of his previous traffic record. The more numerous or more serious the previous offences, the greater the danger to other road users. Similarly, in *R v Ko Hei-wing, Ben* (HCMA 353/1985), the court, in upholding disqualification for 15 months, pointed out that the defendant, having only been driving since August 1982, had already run up a record (including a previous disqualification of six months) which indicated quite clearly that his driving was a danger to the public.

9.22 The court must, however, look to all the circumstances. In *Chan Kwai-lai,* Blair-Kerr J said:

> It also appears that a court is fully entitled to consider all the circumstances of the case, including the fact, (if it be a fact), that the person convicted has caused the death of a person quite irrespective of whether the charge before the court is manslaughter, dangerous driving, careless driving or drunken driving.

9.23 Special reasons

In many circumstances, the court has power not to disqualify a driver in cases which might otherwise involve obligatory disqualification, for example, drink driving offences, dangerous driving, speeding, road racing and driving without insurance. This part will discuss the general principles relating to special reasons. The reader is also referred to the chapters dealing with specific offences.

9.24 The fact that special reasons are present does not automatically entitle a driver to avoid disqualification or a reduction in the period of disqualification. However, where special reasons exist, it would be unusual for the court to impose disqualification longer than the mandatory minimum: *R v St Albans Crown Court* [2000] 1 Cr App R (S) 344.

9.25 Whether the driver merits the exercise of the court's discretion in his favour must be decided having regard to all the circumstances in the case, and having regard in particular to the driver's own conduct: *R v Newton* [1974] RTR 451.

9.26 The burden of proving special reasons lies on the defendant to be established on a balance of probabilities. Where a defendant seeks to rely on special reasons he ought to give evidence, and the court ought to hear evidence on the point and not merely accept statements by the defendant's advocate: *Jones v English* [1951] 2 All ER 853, as applied in *R v Chang Kwan-woon* [1957] HKLR 25.

9.27 If a court finds special reasons, the court should state upon the record what the special reasons are: *Lau Ping v R* [1970] HKLR 303 (a case relating to the detention of vehicles).

9.28 Definition

Section 2 of the RTO defines 'special reasons' as meaning special reasons relating to the offence, and in exceptional circumstances special reasons relating to: (a) the offender; and (b) to such other circumstance that the court may consider to be relevant.

9.29 In the United Kingdom, the expression 'special reasons' is not statutorily defined. The courts there have held that a circumstance peculiar to the offender, as distinguished from the offence, is not a 'special reason.' In *R v Crossan* [1939] NI 106, as followed and approved in *Whittall v Kirby* [1947] 1 KB 194 and *R v Wickens* (1958) 42 Cr App R 236, the court held that four conditions have to be satisfied for there to be special reasons. First, the matter must be a mitigating or extenuating circumstance; second, the matter must not amount in law to a defence to the charge; third, the matter must be directly connected with the commission of the offence; and fourth, the matter must be one that the court ought properly to take into consideration when imposing punishment.

9.30 This test has been adopted in Hong Kong, for example, see *R v Chang Kwan-woon* [1957] HKLR 25, where the court held that hardship to an offender and a lack of previous convictions do not constitute special reasons. This decision must, however, now be viewed in light of the statutory definition (introduced in 1986) which, as noted, permits in exceptional circumstances special reasons relating to the offender and to such other circumstance that the court may consider to be relevant.

9.31 The report in *Chang Kwan-woon* notes that the effect of the case is to overrule the decision in *R v Fung Wan-lan* [1956] HKLR 289. In *R v Fung Wan-lan*, the court held that the interests of justice amounted to special circumstances not to impose disqualification. The defendant, a learner driver, was driving under the tutelage of her husband. The insurance policy in force did not cover the use of the vehicle for driving lessons. Prior to the hearing before the magistrate, the defendant passed her driving test. Gregg J, setting aside the disqualification order, was of the view that special circumstances existed where the imposition of disqualification would be of no assistance to public policy and would impose a hardship unjustifiable under the circumstances.

9.32 In *Nicholson v Brown* [1974] RTR 177, a case of careless driving (endorsement of the driving licence is mandatory in the United Kingdom unless there are special reasons), the court held that merely because it was not a bad case or merely because the degree of blameworthiness was slight was not a special reason, for the line was to be drawn firmly at guilt or innocence. By way of contrast in *Lau Ping v R* [1970] HKLR 343, the court held that where there had been only a slight degree of carelessness, that may amount to a special reason not to order the detention of a public light bus after conviction for a charge of careless driving. It is submitted that the same rule would not apply to licence disqualification.