LEGISLATION COMMENT

ROAD TRAFFIC (AMENDMENT) ACT 1985.[1]

THE 1985 amendment to the Road Traffic Act[2] ("the principal Act") makes significant changes to the law relating to provisional licences for motor cyclists, the compounding of fines under the principal Act and the detection of blood alcohol offences.[3]

I. *Provisional Licences for Motor Cyclists*

A provisional licence is one granted for a limited period and subject to special conditions (for example, speed restrictions and the display of a warning "L" sticker) for the purpose of enabling the licence-holder to learn the mechanical aspects of driving or riding a vehicle while using the public roads. Prior to the amendment, section 36(2) enabled the Deputy Commissioner of Police to issue provisional licences for would-be drivers of any form of motor vehicle, defined in section 2 so as to include motor cycles, for a period of six months. Regulations[4] required motor cyclists to pass the Highway Code Test and to attend a half day course before a provisional licence could be granted, but the level of expertise demanded was apparently not high.

Moving the second reading of the amendment, Professor Jayakumar, Minister for Home Affairs, cited the disproportionate numbers of motor cyclists amongst those fatally injured in road accidents in Singapore and, more specifically, the accident proneness of provisional licence holders, 23 of whom had been killed and 827 injured in 1984.[5] Part of the action proposed by the government was to prohibit unqualified drivers, i.e. those with provisional licences only, from using the public roads.[6] Current provisional licence holders had been given one and a half years' notice of this decision and special arrangements were made to give them every opportunity to pass the test required in order to obtain a full motor cycle licence. No new provisional licences were issued. Special training circuits were planned so as to provide would-be motor cyclists with a safe place to learn to ride

1 No. 9 of 1985. In force 1 October 1985. See S. 273/1985.

2 Cap. 92, Singapore Statutes, 1970 Rev. Ed. (reprinted 1985).

3 Minor amendments were also made to the following sections: s. 49, permitting members of the Singapore Armed Forces to drive certain vehicles "in the possession" of the Forces; s. 79, changing the overall height for heavy vehicles from 3.2 to 4.0 metres and altering the definition of "heavy vehicles"; s. 112(2), removing the requirement that a new Highway Code, or amendments to it, could not come into force until approved by a resolution of Parliament.

4 The Road Traffic (Motor Vehicles Driving Licences) Rules, 1982. (S. 153/1982. Amended, S. 26/1984, S. 122/1984.).

5 Singapore Parliamentary Debates, (1985) Vol. 46, col. 324.

6 Driving on public roads by persons who do not hold any relevant form of licence was already forbidden. See s. 35(1).

under instruction.[7] Sections 2 and 3 of the amendment were intended to provide part of the legislative basis for this policy.

In view of the apparently straightforward nature of the Minister's objectives and some of the comments made during the Parliamentary debate, the form of the drafting is worthy of comment. Section 2(a) repeals subsections 1 and 2 of section 36, replacing them with three new subsections to the same effect but more rationally arranged, and also adds a new subsection 4. It is this new subsection which is of interest and is discussed below. Section 2(b) is merely a renumbering provision. Section 3 amends section 38, effectively extending the ban on use of Singapore public roads by holders of Malaysian provisional motor cycle licences as from the date of the commencement of the amendment.

Section 36(4) now reads as follows:

> A provisional licence to drive a motor cycle shall not be granted to any applicant after the commencement of the Road Traffic (Amendment) Act 1985 unless he has completed a prescribed course of training to enable him to obtain a provisional licence.

During the debate on the second reading, the member for Anson raised two points of clarification with respect to this subsection.[8] The first point concerned the effect of the subsection upon persons already holding provisional licences for motor cycles. Was the legislation retrospective such that these persons would, as from the date of the commencement of the amendment, be committing an offence if they rode their cycles on a public road?[9] The Minister seems to have been of the opinion that they would but did not regard this as unfair because of the prior warning given and the attempts to provide alternatives mentioned above.[10]

The second point concerned the effect of the words in subsection 4 following "1985". The member inquired whether these words indicated an intention to continue to issue provisional licences to motor cyclists rather than abolishing such licences altogether. The Minister had apparently had similar doubts. He replied,[11]

> ... I myself have had this checked with the draftsman, the Attorney-General's Chambers, and I am assured that clause 4 of section 36, as amended, although worded in that way, would have the effect that we intend, that is to say, after the commencement of the operation of the Act, we will not be issuing PDLs to any motor cycle riders.

With all due respect to the Minister and the honourable member, it is improbable that, with the exception of the effect upon holders

7 Singapore Parliamentary Debates, (1985) Vol. 46, col. 325.

8 Singapore Parliamentary Debates, (1985) Vol. 46, cols. 331-332.

9 It should be explained that a provisional licence is renewable so that there were still a significant number of people holding provisional licences at the time the amendment was passed. Whether this was because they had failed in their attempts to pass the final test, or because they had not tried, is unknown.

10 Singapore Parliamentary Debates, (1985) Vol. 46, col. 333.

11 Singapore Parliamentary Debates, *ibid.,* col. 334.

of a Malaysian provisional licence to drive a motor cycle,[12] the amendment is retroactive at all. It merely provides that provisional licences will not be granted after a certain date. It says nothing at all about the validity of existing licences. It is submitted that such licences will remain valid until the end of the relevant six months period at which time the licence holder will not be able to obtain the renewal which, apart from the amendment, was available. This seems a fair and reasonable result in the circumstances.

As to the second point, again with all due respect to the Minister and the draftsman, the amendment does not abolish provisional licences for motor cycles. On the contrary, it clearly supposes that such licences will be available upon completion of a prescribed test. It is true that, in theory at least, this effect of the subsection could be circumvented by a refusal on the part of the proper authority to prescribe an appropriate test. However, the subsection may be said to imply a duty on the part of the proper authority to prescribe a suitable test.[13] The use of the term "applicant" clearly implies that an application must be possible. If there is a right to apply, there must be a corresponding duty to hear the application. However, on the terms of the subsection, an application cannot be determined unless it can be established whether the applicant has completed a prescribed course. It is apparent therefore, that unless the Minister has a duty to prescribe such a course, this subsection is nonsense. Performance of the duty could then be enforced by mandamus in the usual way.[14]

If the duty is conceded and the test prescribed, it is difficult to interpret the subsection as one giving the relevant authority a discretion to refuse to issue a provisional licence to an otherwise qualified applicant on the ground that, in the interests of safety and notwithstanding the statutory provisions, provisional licences should not be granted to motor cyclists in any case. Such a refusal would also be unlawful.[15]

There is another interesting twist to this problem. As of 1 November 1985, the regulations governing provisional licences for motor cyclists had not been revoked or repealed. If, as suggested, subsection 4 is not inconsistent with the continued existence of provisional licences for motor cyclists, those regulations are still in force.

[12] Ironically, these are the cyclists least likely to have been aware of the proposed change in the rules.

[13] It is true that s. 140(1) gives the appropriate Minister power to make rules for prescribing anything which may be prescribed under the Act, which also suggests power not to make such rules. However, administrative law recognises instances in which what is admittedly a power must be exercised so that in effect it becomes a duty, at least in that instance. See H.W.R. Wade, *Administrative Law,* (5th ed., 1982), pp. 228-231.

[14] *R.* v. *Manchester Corp.* [1911] 1 K.B. 560; *The State (Modern Homes Ltd.)* v. *Dublin Corp.* [1953] I.R. 202. Compare, *Kilmarnock Magistrates* v. *Secretary of State for Scotland* [19611 S.C. 350 where mandamus was refused on the ground that the Minister had a concurrent discretion to decide applications himself. Here, the Minister has no authority to issue provisional licences on a case by case basis.

[15] *R.* v. *Walsall Justices* (1854) 18 J.P. 757; *R.* v. *Port of London Authority ex p. Kynock Ltd.* [1919] 1 K.B. 176; *British Oxygen Co. Ltd.* v. *Board of Trade* [1971] A.C. 610; *R.* v. *Secretary of State for the Environment ex p. Brent L.B.C.* [1982] 2 W.L.R. 693. See also Jain, *Administrative Law of Malaysia and Singapore,* (1980), pp. 308-311.

Pursuant to those regulations the Deputy Commissioner of Police devised a training course for would-be provisional licencees. Can an otherwise suitable applicant be refused an opportunity to pass the test on the ground that it is no longer government policy to grant provisional licences to motor cyclists? To answer yes is to say that the executive may by proclamation, i.e. by a statement of its will, suspend the laws of Parliament, or valid regulations passed thereunder. Since the Magna Carta such self-ordained power of suspension has never been allowed.[16]

It is submitted that, if the intention of Parliament is to abolish provisional licences for motor cyclists in the future, subsection 4 should be redrafted and existing regulations governing the grant of provisional licences to motor cyclists repealed.

II. *Compounding Offences*

Prior to amendment, section 135(1) of the principal Act permitted the Deputy Commissioner of Police or any specially authorised police officer not below the rank of sergeant, at his discretion, to compound any offence under the principal Act, or the rules made under it, being an offence which may be compounded, "… by collecting from the person reasonably suspected of having committed the same a sum of money not exceeding $50." Section 10 of the Amendment increased this sum to $200.

The Minister explained that $50 was no longer an appropriate figure for some of the more serious offences, including careless driving and failing to give way to fire engines and ambulances.[17] The deterrent factor needed to be increased. At the same time, it remained desirable that most traffic offences should be compounded by the traffic police rather than brought to the court. The amendment would ensure that this was possible. The Minister's concluding remarks are of interest.[18]

> Let me stress, Sir, that traffic offenders will, even after this amendment, still pay composition fines of $50 or less for most offences. However, with this amendment, we will be able to consider a more rational approach, such as drawing a line between offences that result in accidents and those that do not, when penalizing offenders. At present, they are pegged at the same level.

Presumably the Minister is referring to accidents which do not result in fatal injury, since fatal accidents are clearly differentiated, both in the Road Traffic Act and the Penal Code.[19] It is not clear whether the line proposed will be drawn in terms of the magnitude of fines imposed or at the stage of deciding whether an offence may be compounded or should be taken to court.

16 For a recent restatement of this principle see *Fitzgerald* v. *Muldoon* [1976] 2 N.Z.L.R. 615. Of course, the Constitution may provide otherwise but that is not the case here.

17 Singapore Parliamentary Debates, (1985) Vol. 46, col. 327. The Minister also mentioned the future possibility of increased fines for offences committed by drivers of heavy vehicles.

18 Singapore Parliamentary Debates, *ibid.,* col. 328.

19 Road Traffic Act, Cap. 92, Singapore Statutes, 1970 Rev. Ed. (reprinted 1985), s.67; Penal Code, Cap. 103, Singapore Statutes, 1970 Rev. Ed., s. 304A.

III. *The Breathalyzer*

Sections 5 to 7 of the amendment relate to the offences of driving, or being in charge of, a motor vehicle under the influence of drink or drugs. It is necessary to review the basic structure of those offences in order to understand the effect of the amendments.

1. *Sections 68 to 71: the existing scheme*

Section 68 of the principal Act creates the offence of "... driving or attempting to drive a motor vehicle on a road or other public place,... under the influence of drink or of a drug to such an extent as to be incapable of having proper control of such vehicle...". Section 69 creates a similar but lesser offence of being in charge of a motor vehicle on a road or a public place, without actually driving the vehicle but in a state" ... unfit to drive in that [the offender] is under the influence of drink or of a drug to such an extent as to be incapable of having proper control of a motor vehicle...". In either case, offenders are arrestable without warrant.

Whether a person is or is not incapable within the meaning of these two sections is a mixed question of fact and law. Before this amendment, section 71 provided that any person arrested under section 68 or 69 "... shall be presumed to be incapable of having proper control of a motor vehicle if the specimen of blood provided by him under section 70 is certified by a medical practitioner to have a blood alcohol concentration in excess of 110 milligrammes of alcohol in 100 millilitres of blood." Section 6 of the amendment changed this figure to 80 milligrammes of alcohol per 100 millilitres, a level chosen by many states throughout the world.[20]

It is important to recognise that this provision does not create a separate "prescribed-level" offence but merely indicates one way in which the "impairment" offence may be proved. The presumption appears irrebutable, but should probably be read in the light of section 4(2) of the Evidence Act[21] which provides: "Whenever it is directed by this Act that the court shall presume a fact, it shall regard such fact as proved unless and until it is disproved." It is probable that the words in section 70 would be construed in the manner subsection 2 provides. An accused person would then have the legal burden of disproving incapacity, presumably on the balance of probabilities.[22]

Section 70 provides that, subject to certain medical considerations, a person arrested under section 68 or 69 may be required by a police officer to provide a specimen of blood or urine or both at a hospital for the purpose of testing the relevant alcohol concentration.[23] The

20 See H.J. Walls & A.R. Brownlie, *Drink, Drugs & Driving* (2nd ed., 1985), Ch. 16.

21 Cap. 5, Singapore Statutes, 1970 Rev. Ed. (Reprinted 1982).

22 Even if the presumption is irrebuttable, it does not follow that the defendant can never challenge the relevance or accuracy of the medical practitioner's finding. S. 70(3) provides that the certificate shall be evidence of the matters certified therein. It does not say conclusive evidence. The presumption is as to the capacity of the defendant, not the conclusiveness of the medical certificate.

23 A reference to the new s. 71A was inserted in the first line of s. 70(1) by s. 5 of the amendment.

police officer must have reasonable cause to suspect the person of having alcohol or a drug in his body. No particular concentration or degree of intoxication is mentioned. Failure to comply with the requirement, without reasonable cause, is an offence punishable as if the arrested person had been charged under section 68 or 69, whichever is appropriate. A certificate purporting to be signed by a medical practitioner that he took a specimen of blood or urine from a person with his consent is evidence of the matters certified and of the qualifications of the practitioner for the purposes of sections 68, 69 and 70.

2. *The Amendment*

Section 7 inserts a new section 71A into the principal Act. The infamous breathalyzer is about to arrive in Singapore!

Subsection 1 of section 71A authorises police officers to require any person driving or attempting to drive a motor vehicle on a road or other public place to provide a specimen of breath for a breath test. However, the police officer must have reasonable cause to suspect the person requested either of having alcohol in his body or of having committed a traffic offence while the vehicle was in motion. No requirement may be made in the latter case unless it is made as soon as reasonably practicable after the commission of the traffic offence.

Subsection 2 creates a similar power where an accident occurs and the police officer has reasonable cause to believe the person was driving or attempting to drive the vehicle at the time of the accident. Where the person is in hospital, subject to medical limitations, the specimen must be provided at the hospital. Otherwise, the requirement may be to provide a specimen either at or near the place where the requirement is made or, if the officer thinks fit, at any police station the officer may specify. In either case, failure to comply with the requirement without reasonable excuse is an offence.[24]

If it appears to the officer that the test is positive, i.e. that the proportion of alcohol in the person's blood exceeds the prescribed limit, the officer may arrest that person except where the person is a patient in a hospital. If a person fails or refuses to comply with a requirement to provide a breath sample, and an officer has reasonable cause to suspect him of having alcohol in his body, the officer may arrest that person without warrant, again except where the person is a patient in a hospital.

For the purposes of the section, "breath test" is defined as:[25]

> … a preliminary test for the purpose of obtaining by means of a device of a type prescribed by the Minister, an indication whether the proportion of alcohol in a person's blood is likely to exceed the prescribed limit.

3. *Commentary*

Section 71A is similar to the old section 8 of the United Kingdom Road Traffic Act 1972, now renumbered section 7.[26] Local courts

[24] Since no special penalty is stipulated, the punishment is prescribed by s. 131(1).

[25] S. 6. The prescribed limit is 80mg/100ml.

[26] Transport Act 1981, Sch. 8.

may find the approach of English courts to this section useful.[27] It is not practicable at this stage to review all the issues concerning breathalyzers which have arisen under the United Kingdom legislation. However, there are several points about the Singapore provisions which are worth noting.

(a) Not an offence.

The most significant characteristic of the new legislation is that a positive result on the breath test, that is, a reading which indicates a blood alcohol concentration above the prescribed limit, is not in itself an element of any offence, as it is in New Zealand for example,[28] and may not even be admissible as evidence of some other offence, as is the result of an evidential breath test in the United Kingdom.[29] The latter point is considered in more detail below. For the moment it is important to note that, whatever the legal possibilities, the breathalyzer introduced in section 71A is intended to be used purely as a screening device, ensuring that only persons who are likely to be convicted are actually brought to a hospital for blood or urine tests. The possibility of requiring a breath test where the officer has reasonable cause to suspect that the person has committed a traffic offence whilst the vehicle is in motion may also enable the detection of drivers under the influence who would otherwise pass unnoticed.

(b) Are random tests permitted?

Similar provisions to section 71A in the United Kingdom and New Zealand have given rise to debate as to whether so called "random tests" are sanctioned by the legislation. A random test would be one where a police officer ordered a driver to stop and then required a sample of breath without first having any reason at all to suspect that this driver, as distinct from any other, had consumed alcohol or had alcohol in his body or had committed any traffic offence. In other words, the driver was stopped on the off-chance that he or she might be committing an offence. The opportunities such a procedure would provide for abuse and harrassment, not to mention extreme inconvenience, are obvious. When it is remembered that there is no requirement that a person be arrested before a sample of breath can be demanded by a police officer; that failure to provide the sample may result in an arrest; that a positive result justifies an arrest for the purpose of obtaining a blood or urine sample, although there is no other ground for complaint as to the standard of the person's driving; and that where the basis for the police officer's request is the occurrence of an accident, the person requested may be taken to a police station of the officer's choice for the purpose, it will be recognised that the issue is one of significance even in Singapore.

[27] Useful commentaries include Walls & Brownlie, *op. cit. supra,* note 20 Billy Strachan, *The Drinking Driver and the Law,* (3rd ed., 1983); Local Government Library Encyclopedia of Road Traffic Law and Practice Vol. I, (Sweet & Maxwell). The latter is a loose leaf publication, annotated regularly.

[28] New Zealand Transport Act 1962, s. 58(1) (a) as amended by Transport Amendment Act (No. 3) 1978, s. 7.

[29] United Kingdom Road Traffic Act 1972, s. 10 as amended. See also definition of "breath test" in s. 71A(6). This was the view of the Minister when he moved the second reading of the amendment. Singapore Parliamentary Debates, (1985), Vol. 46, col. 326.

Even so, at first sight the reader might be forgiven for supposing that the spectre of random testing was a "man of straw". Section 71A specifically stipulates that the police officer must have had "reasonable cause to suspect" or "reasonable cause to believe" one or other listed possibility. Ordinary principles of statutory interpretation would suggest that, if the officer did not have such reasonable cause or belief, he or she would not be acting in the exercise of his or her duty in demanding a sample of breath for testing. Obtaining a sample in such circumstances might be described as unlawful.

However, while some courts in the United Kingdom have suggested that, where the point is put in issue, the prosecution must prove the existence of reasonable cause at the relevant time,[30] others have upheld convictions where random tests in the sense previously mentioned have been used.[31] Some courts have distinguished, explicitly or by implication, between random stopping and random testing.[32] Most have accepted that reasonable cause may arise after a driver has been legally stopped for some quite different reason, whether from detection of the smell of alcohol, the driver's admission that he has been drinking, or some other cause.[33] In addition, such lenient decisions have been given as to what may amount to reasonable cause, that several commentators have been driven to observe that random tests are in effect permissible under the legislation, or that the situation is not very different from that which would exist if they were.[34]

The approach of the Singapore courts remains to be seen, but it is submitted that, while random testing may be perfectly defensible on a number of policy grounds,[36] the decision to permit such an inroad on traditional civil liberties is one that should be made by Parliament, not the courts. By incorporating a requirement of reasonable cause in section 71A, that is a decision Parliament has so far refused to make. It is hoped that in Singapore, if not in the United Kingdom, their refusal will be respected. Even so, it must be accepted that official rejection of strictly random testing is unlikely to provide much protection for Singaporean motorists since it is already possible to legally stop motorists under a range of provisions unrelated to the manner of their driving,[36] and it is probable that Singapore courts will follow the English lead in deciding that the reasonable suspicion or reasonable grounds required may arise at a

[30] *R.* v. *Gaughan* [1974] Grim. L.R. 480; *Sakhuja* v. *Allen* [1972] 2 W.L.R. 1116; *Clements* v. *Dams* [1978] R.T.R. 218.

[31] *Shersby* v. *Klippel* [1979] Crim. L.R. 186; *Such* v. *Ball* [1981] Crim. L.R. 411; *Steel* v. *Goacher, The Times,* July 8, 1982.

[32] *Adams* v. *Valentine* [1975] Crim. L.R. 238; *Winter* v. *Barlow* [1980] R.T.R. 209.

[33] *R.* v. *Needham* [1974] Crim. L.R. 640 (C.A.); *Hay* v. *Shepherd* [1974] R.T.R. 64.

[34] Billy Strachan, *op. cit. supra* note 27 pp.95, 146-151, 174-175; Walls & Brownlie, *op, cit. supra* note 20, pp. 176-177; J.L. Caldwell, "Blood-alcohol Offences —The Judicial Approach" (1983) N.Z.L.J. 286, 286.

[35] Random testing has been explicitly adopted in the Australian state of Victoria (Motor Car Act 1958, s. 80EA), and, according to Strachan, *ibid.,* pp. 151-152, France.

[36] E.g. Road Traffic Act, Cap. 92, Singapore Statutes, 1970 Rev. Ed., s. 127; National Registration Act, Cap. 45, Singapore Statutes, 1970 Rev. Ed., s. 16(2) (b).

point in time after a driver has been stopped for some completely different reason.

(c) The legal effect of an illegally obtained test result.

Even if the requirement for proof of reasonable cause is actively enforced, the legal consequences for a conviction admittedly obtained in part as the result of a random breathalyzer test are not at all clear. The issue is a subset of the broader question of the status of a conviction dependent upon evidence obtained from an unlawful breathalyzer or other testing procedure. This in turn is a subset of the status of illegally or unfairly obtained evidence generally.

In the United Kingdom, this problem arose in several contexts. Under the unamended 1972 provisions, the House of Lords held that sections 5(5), 8 and 9 of that Act laid down a mandatory procedure which had to be followed before a motorist could be convicted of the Offence of driving with a blood alcohol level in excess of the prescribed limit.[37] If the initial demand for a breath sample was without reasonable cause, or a purported arrest intended to secure custody of a driver so that further tests could be made was for some reason unlawful,[38] or if no opportunity for the requisite preliminary or second breath tests was given, or the proper procedure for the taking of any of the tests was not followed,[39] any certificate indicating the blood alcohol level of the driver would be inadmissible as evidence of excess alcohol offence. Since the certificate was the only way in which such an offence could be proved, where the procedure provided had not been strictly followed the motorist had to be acquitted.

That this conclusion was a consequence of the peculiar drafting of the statutory provisions, not an exercise of the admittedly narrow judicial discretion to exclude certain types of unlawfully or unfairly obtained evidence, was expressly recognised by Lord Edmund-Davies in *Spicer* v. *Holt.*[40] For this reason, the same rule did not apply with respect to test results used to obtain convictions under the impairment offence where no mandatory procedure or form of proof was required,[41] and has been specifically rejected with respect to the new excess alcohol offence for which prior administration of a breath test is at the discretion of the police officer and arrest is not a necessary prerequisite for the requirement that evidential breath samples be supplied. In other words, subject to the requirement that supply of the samples is voluntary,[42] strict compliance with a particular pro-

37 *Spicer* v. *Holt* [1976] R.T.R. 389.

38 In *Spicer* the driver was required to take a roadside breathalyzer test. The driver only partially inflated the bag. The law requires the sample to be of a sufficient quantity for testing. The police officer administering the test thought the sample insufficient and, without checking to see whether the crystals had changed colour, arrested the driver for failing to provide a breath sample. Since this arrest was held to be unlawful, notwithstanding that all subsequent procedures were correctly followed and that there was no question of the officer's good faith, the driver was acquitted.

39 In *Scott* v. *Baker* [*1969*] 1 Q.B. 659, the prosecution had failed to prove that the device used for the breath tests had been approved by the Secretary of State as required.

40 *Supra* note 37, at p. 404.

41 *R.* v. *Trump* [1980] R.T.R. 274; *R.* v. *Sadler* [1970] R.T.R. 127; *Spicer, supra* note 37, *per* Lord Edmund-Davies at p. 407.

42 S. 10(4) as amended.

cedure is no longer a prerequisite to the admission of otherwise reliable test results as evidence in a prosecution for either offence.[43] In fact, section 10(2) of the U.K. Act provides, subject to certain exceptions, that evidence of the proportion of alcohol in any sample of breath, blood or urine provided by the accused *shall* be taken into account with respect to both the impairment and the excess alcohol offences.

Of course, it does not follow that a defence based upon the unlawfulness of police action in the course of a drunk driving investigation will never succeed. In *Fox* v. *Chief Constable of Gwent*[44] the driver was acquitted of a charge of failing to provide a specimen of breath when required on the ground that the officer requesting the specimen was a trespasser and hence the requirement could not have been lawfully made. Nevertheless, as indicated above, evidence of excess alcohol subsequently obtained by virtue of the arrest and further tests which followed this trespass, was admissible, not by virtue of section 10(2) of the U.K. Act, but as a consequence of their decision that the discretion to exclude unlawfully or unfairly obtained evidence should not be exercised.

The position in Singapore is uncertain. As in the later United Kingdom legislation, the breath test is not a necessary prerequisite to the taking of a blood or urine test, a person need not be arrested in order for a breath test to be required, and there are no special rules as to how the offences under sections 68 or 69 must be proven. On the other hand, arrest is a prerequisite for a requirement that a person supply a blood or urine sample and there is no equivalent of section 10(2) in the Singapore legislation. Thus, the legal circumstances are significantly different from those in the United Kingdom both before and after the amendment. It is submitted that the position in Singapore may be considered afresh.

Putting to one side the possible implications of defects in the procedure used in obtaining, testing or interpreting the various samples, any one of which might render the evidence suspect and useless, and assuming the sample was obtained with the subject's consent,[45] it is submitted that, in principle, the mere fact that the preliminary breath

[43] *Bunyard* v. *Hayes The Times,* Nov. 3, 1984; *Fox* v. *Chief Constable of Gwent* [1984] R.T.R. 402; *R.* v. *Birtwhistle* [1980] R.T.R. 342; *Winter* v. *Barlow* [1980] R.T.R. 209. In these cases, the principles with respect to unlawfully or unfairly obtained evidence outlined in *R.* v. *Sang* [1980] A.C. 402 were applied.

[44] [1984] R.T.R. 402.

[45] The Act makes an unreasonable failure or refusal to provide a required sample a criminal offence but there is no provision at all for the taking of samples by force or otherwise without consent. That such consent was given must be included in the medical practitioner's report under s. 70(3). It is submitted that evidence derived from a sample obtained without consent should be inadmissable in like manner as involuntary confessions. There may not be the same risk of unreliable evidence, but the possibilities of prosecution fabrication would be increased and the public interest in discouraging physical abuse of power is the same. If this argument is accepted, the English decision of *R.* v. *Trump* [1980] R.T.R. 274 was wrongly decided. It has in any case been overruled in the United Kingdom by the new s. 10(4) which expressly provides that specimens of blood taken without consent shall be disregarded. See discussion in Local Government Library Encyclopedia of Road Traffic Law and Practice, *supra* note 27, para. 1-1193, pp. 1358/3-1358/4.

test was unlawful due to absence of reasonable cause, should not vitiate an otherwise reliable conviction under sections 68 or 69, especially where the prosecution relies upon section 71 and the arrest under section 70 was lawful. The validity of the proceedings should depend upon the validity of the actual prosecuting procedure. This principle is derived from an analogy with habeas corpus cases in which the lawfulness of the detention is determined by the lawfulness of the present basis of that detention and not by the lawfulness of some earlier basis the legal effect of which is already spent.[46] Admittedly this result reflects a policy choice which is not inevitable. It is essentially pragmatic, but it does not necessarily leave the wronged person without recourse. A person who has been stopped without reasonable cause should have a defence to a charge of failing or refusing to provide a sample of breath, and also a civil remedy against the offending officer. Where there is evidence of bad faith, the admissibility of evidence obtained pursuant to the unlawful test should be open to question in accordance with established principles.[47]

An unlawful arrest under section 70 raises the same issues, but in sharper relief. The policy argument that evidence so obtained should be excluded as a disincentive to the police is much stronger, the connection with the unlawful act being more direct. But unlawfully obtained evidence is generally admissible in Singapore,[48] subject only to a judicial discretion to exclude exercisable on the grounds indicated in *Kuruma* v. *R.*[49] and *R.* v. *Sang.*[50] The conflicting interests involved were clearly stated in *R.* v. *Trump* wherein Eveleigh L.J. observed:[51]

> There are two particular aspects of the problem before the court. One is whether the court should attempt to discipline the police by ensuring that irregular behaviour will, so far as the court can achieve it, be fruitless. This may also be regarded as a means of seeing that an accused is fairly treated. The other aspect is to ensure that the trial itself is fair. It is possible to regard a trial as being fair in itself even though the evidence used at the trial was unfairly or improperly obtained. A trial is not a game.

Without wishing to imply any agreement with the actual decision in *Trump,* and noting the comment of Eveleigh L.J. that there may be cases where the exclusion of evidence for the purposes of disciplining the police would be justified, this statement is as apt for Singapore as it is for the United Kingdom. It is submitted that even where the arrest preceding the requirement that a sample of blood or urine be given is technically unlawful, the ordinary rules with respect to the admissibility of illegally obtained evidence should apply. The possibility of a defence to a charge of refusing to supply an adequate sample and normal civil remedies for false arrest would remain.

46 R. Sharpe, *The Law of Habeas Corpus,* (1976), pp. 174-177.
47 *Cheng Swee Tiang* v. *P.P.* [1964] M.L.J. 291.
48 *Ibid.*
49 [1955] A.C. 197.
50 [1980] A.C. 402.
51 *Supra* note 41 at pp. 277-278.

(d) Are the results of the breathalyzer evidence for the purpose of a prosecution under section 68?

It was not intended that the breathalyzer results would be admissible evidence in an impairment prosecution.[52] Consequently there is no provision equivalent to section 70(3) in the new section 71A.[53] The results obtained from the comparatively imprecise hand held breathalyzer of the type apparently contemplated would not normally be the best evidence of impairment due to intoxication in any case. However it is not impossible to imagine circumstances in which the prosecution might wish to have the results of a breath test admitted, for example, where the test showed a very high blood alcohol level and subsequent blood tests were either lost or unable to be obtained for medical reasons. Since there is no special provision either permitting or excluding the results, existing rules of evidence will apply. There are three possible approaches.

First, the officer who administered the test could give direct evidence of the procedure followed and the readings obtained. If the officer made a note of the results of the test, either contemporaneously or "... so soon afterwards that the court considers it likely that the transaction was at that time fresh in his memory...", a practice which it seems desirable for all officers to follow in the circumstances, the officer might be permitted to refresh his or her memory from the note,[54] and might be cross-examined upon it, either as a prior inconsistent statement,[55] or for some other reason. A document used to refresh memory which is then the subject of cross-examination may be made evidence in the proceedings so that any statement in the document by the person using it to refresh his or her memory is then admissible as evidence of any fact therein of which he or she could have given admissible oral evidence.[56]

Second, the officer's written note might be independently admissible as evidence of the truth of the facts contained therein under section 377 of the Criminal Procedure Code, but only if the officer was either not available or refused to give oral testimony, and only if the written note was not made after an investigation had begun.[57]

A third, more remote, possibility is admission under section 379 of the Criminal Procedure Code. There are two situations to consider. If the contemporaneous note is prepared by the officer, could it be

[52] Of course, the breathalyzer is not itself admissible as real evidence since the results obtained from the use of any current design of hand-held devices cannot be preserved for independent evaluation at the trial.

[53] S.70(3) provides: "For the purposes of any proceedings for an offence under section 68 or 69 or subsection (2), a certificate purporting to be signed by a medical practitioner that he took a specimen of blood or urine from a person with his consent shall be evidence of the matters so certified and of the qualifications of the medical practitioner."

[54] Evidence Act, Cap. 5, Singapore Statutes, 1970 Rev. Ed. (Reprinted 1982), ss. 161-162; Cross on Evidence, (6th ed. 1985), pp. 248-256.

[55] Evidence Act, s. 163; Cross on Evidence, *ibid.,* pp. 254-256.

[56] Evidence Act, s. 147(4). This provision adopts a suggestion of the Criminal Law Revision Committee Report on Evidence 1972 (Cmnd. 4991) not yet accepted in the United Kingdom. See also s. 147(3) as to previous inconsistent statements generally.

[57] S.378(1), Criminal Procedure Code, Cap. 113, Singapore Statutes, 1970 Rev. Ed. (Reprinted 1980).

regarded as a document which is part of a record compiled from information supplied by a person, i.e. the accused, who had or may reasonably be supposed to have had, personal knowledge of the matters dealt with in that information? The difficulty is that whilst a lay person may be expected to have personal knowledge of the quantity of alcohol consumed, can the same be said of the quantity of alcohol in the breath? In any case, can the giving of a sample of breath which must then be analysed in order to ascertain its relevant properties be regarded as supplying information? There is a third objection in that the information may be said to have been supplied by the breathalyzer itself and not by a person at all.

Alternatively, if the breathalyzer is one which gives its own printout, that printout may be described as a device in which one or more visual images are embodied so as to be capable of being reproduced therefrom.[58] It would then be regarded as a document for the purposes of section 379. However, this suggestion is still not without difficulty. The language is artificial. The device in paragraph (d) may need to be of a kind similar to a film, negative or tape, and the problems previously mentioned with respect to personal knowledge and what is actually supplied remain. In addition, the officer would still have to be called as a witness, unless one of the exceptions applies, but the evidence might be more convincing.[59] Of course, the qualification that the note must not have been made after investigations have begun applies in either case.[60]

Even if the officer's evidence as to the result of the test is admissible under any of these heads, expert evidence would be required in order to interpret the readings proved. A report from a government chemist could be used for this purpose.[61] The reliability of the device would also have to be established, both generally, as a prescribed brand, and, if there is any cause for doubt, individually, as a particular instrument the performance of which can be relied upon in the instant case.

It should be stressed however, that even the most reliable results of a hand held breathalyzer test would not, without more, be sufficient evidence to justify a conviction under sections 68 or 69. Breathalyzers of this type are not precise and even in England only used to indicate whether the alcohol content is *likely* to exceed the prescribed limit.[62]

(e) Miscellaneous points.

Only a few minor points remain. First, following the original United Kingdom provisions, section 71A does not apply where a person is not driving or attempting to drive, but is in charge of a motor vehicle. Second, the wording of the section invites the difficulty, again earlier encountered in the United Kingdom, of trying to stretch the concept of "driving" or "attempting to drive" to cover situations where the person requested to provide a sample of breath has switched off the car, perhaps delivered the keys to a third prson or left the

58 S. 377(3) (d), Criminal Procedure Code.
59 S.377(2), Criminal Procedure Code,
60 S. 379(3), Criminal Procedure Code
61 S.368(2) (a), Criminal Procedure Code.
62 Cross and Jones, *Introduction to Criminal Law,* (7th ed. 1984), p. 385.

vehicle and been speaking to the officer or some other person for several minutes.[63] Both these points were dealt with in the United Kingdom by section 25(3) and Schedule 8 of the Transport Act 1981. Breath samples can now be required where a constable in uniform has reasonable cause to suspect not only persons who are driving or attempting to drive, but also persons who are in charge of a motor vehicle, or who have been driving or attempting to drive or in charge of a motor vehicle in the condition or circumstances prescribed. It may prove necessary to adopt these provisions in Singapore also.

Another omission from section 71A which deserves comment is the absence of a definition of "traffic offence". Traffic offences, even while a vehicle is in motion, vary from the extremely serious to the trivial. Is every person who has the misfortune to violate some technicality of the road code to be subject not only to being stopped and ticketed for the violation, which is of course already possible, but also, without any further basis for the officer's action, to be required to give a sample of breath for the purpose of a breath test? Apparently so since there is nothing in the legislation to indicate otherwise. If not carefully monitored such a provision could effectively allow random testing through a side door.

Finally, it was recently reported in the *Straits Times* that the traffic police are in the process of acquiring some three hundred portable breathalyzers for the purpose of carrying on the fight against drunken driving.[64] These machines may soon be expected to appear on Singapore roads and highways, making a reality of an amendment more likely than most to directly affect thousands of ordinary Singaporeans.

JANICE BRABYN*

[63] Walls & Brownlie, *op. cit., supra,* note 20, p. 177; Strachan, *op. cit., supra,* note 27, pp. 165-168.

[64] Straits Times, 30 October 1985, p. 13.

* Lecturer, Faculty of Law, University of Hong Kong; formerly Lecturer, Faculty of Law, National University of Singapore. I would like to thank my former colleagues in the National University of Singapore, Chin Tet Yung and Andrew Harding, the former for his assistance in unravelling relevant sections of Singapore's evidence laws, the latter for his comments concerning administrative law.