AVOIDING TOTTING UP DISQUALIFICATIONS

David Barton
motorists' lawyer

Guide to
Winning Exceptional Hardship Arguments

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Introduction

The expression **"totting up**" has been around for a long time. It is used to refer to the position a driver finds himself in when facing a disqualification under the "totting" provisions of the Road Traffic Offenders Act 1988. They are set out in Section 35, and a driver who has acquired the requisite number of penalty points within the relevant period becomes a "totter" and is liable to a period of disqualification for a minimum period of 6 months.

Motorists who become "totters" for a second time in three years face a minimum ban of 12 months. Those who do so more than twice face at least two years off the road.

The courts in England and Wales deal with thousands of motorists every year who face lengthy disqualifications and serious consequences for them, their loved ones and work colleagues. For most people the ability to drive is vital for very many aspects of life, both business and domestic, and the consequences of a disqualification for 6 months or more can be very damaging and very expensive.

This guide is intended to provide an overview of the legislation and the options available to motorists facing a lengthy and expensive disqualification. It is written by an experienced motorists' lawyer and will help motorists understand their position and how the courts will go about deciding what to do. Not every motorist will avoid a totting disqualification, but proper presentation of your case gives you the best chance of doing so. This guide is no substitute for taking timely legal advice on individual circumstances, from an advocate who knows what he is doing.

I will set out later in this guide what types of evidence can be introduced and how it is done.

Lastly, I should make clear this guide applies to offences committed in England and Wales.

The legal framework

There are many motorists able to keep driving even though they have acquired far more than the 12 points that will normally lead to a disqualification.

In early 2014 the penalty points record holder was a man from Liverpool who accumulated 45 penalty points in November 2013. The points were all for failing to disclose the identity of the driver or exceeding statutory speed limit on a public road, between 01 October 2012 and 20 June 2013. This apparently beat the previous record of 42 points.

The second-highest points total, 36, went to a man from Warrington, Cheshire, who was caught driving without insurance six times in less than two weeks, between 20 February and 2 March 2012.

These and other similar statistics are unusual, and they create a false impression that it is not difficult to avoid a totting disqualification. The reality is that courts are getting tougher on motorists who get to this position and are increasingly resistant to argument.

"Totters"

The majority of motorists coming before the courts as potential "totters" do so because they have just reached 12 points or perhaps slightly more. Failing to give the identity of the owner, speeding, use of a mobile telephone, and driving uninsured are the most common reasons for points, and over a three year period it can seem surprisingly easy to commit three or four relatively modest offences to acquire those points.

It is helpful to have an understanding of how the "totting" provisions interact with the fixed penalty regime, and this can be explained very simply with an example.

If a motorist has 9 points on his or her licence (resulting from 3 fixed penalties of three points each for speeding) and commits a further speeding offence within 3 years of the commission of the first of the three, the police may well still send out an offer of a fixed penalty. If it is accepted and payment made it will result in a rejection

after the motorists' record is checked. A summons will be issued instead and it will contain details of a court date and location. The offence specified in it will be the 4th speeding offence. If a conviction (either by a finding of guilt or a guilty plea) results in further points, the driver becomes a "totter" and the "totting" provisions of Section 35 will apply.

For many motorists it will be their first time in court. The offences that made them "totters" may well have been fixed penalties and dealt with by post without a court attendance, and the prospect of not just an appearance but the loss of a licence for a lengthy period of time is daunting. The disqualification can be very damaging for the motorist and any dependents such as family, work colleagues and businesses. It is very often at this stage that the true cost begins to emerge.

The legislation that applies in these circumstances has been in force for over 25 years and Magistrates' Courts around the country deal with it every day. The relevant provisions are worth reading should they apply to you.

Section 35

(1) Where:

(a) a person is convicted of an offence to which this subsection applies, and

(b) the penalty points to be taken into account on that occasion number 12 or more, the court must order him to be disqualified for not less than the minimum period unless the court is satisfied, having regard to all the circumstances, that there are grounds for mitigating the normal consequences of the conviction and thinks fit to order him to be disqualified for a shorter period or not to order him to be disqualified.

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

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

(b) hardship, other than exceptional hardship, or

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

The expression “exceptional hardship” is widely known, and has its origins in Section 35(4). That subsection also prevents a motorist from arguing that any of the individual offences being taken into account are not serious. In many cases modest speeding offences have taken the motorist to 12 points. It also makes clear that a motorist can rely only once in three years on the facts forming the basis of a successful exceptional hardship argument.

In 1988 Parliament enacted the legislation to deal with serial offenders by giving them some leeway, and in addition gave those who get to 12 points one final opportunity to argue a case, and this guide is all about the way the courts interpret “exceptional hardship” and how such arguments should be presented to give them the best chance of succeeding.

To avoid any misunderstanding, the “totting up” provisions set out above do not apply in cases where disqualification is mandatory. So for example a motorist convicted of dangerous driving, drink driving or failure to provide a breath sample cannot introduce evidence of “exceptional hardship” to either avoid or reduce a disqualification.

Finally motorists affected by these provisions should be aware that the law places the burden on them to prove “exceptional hardship”. However, to make the burden a little easier, the law requires the motorist to prove his case on a “balance of probabilities”. In other words the motorists needs to introduce evidence that satisfies the court that it is more likely than not that “exceptional hardship” will be a direct consequence of a disqualification for someone in at least one clearly identifiable respect.

How points are calculated

The legislation imposes an obligation on the courts disqualify drivers who accumulate 12 penalty points within a three year period. That period is measured from the date upon which the first offence was committed to the date upon which the last offence was committed.

So remember, its **commission** to **commission.**

People sometimes think that the date of endorsement is the relevant one, but this is not so. It follows that a driver could be convicted of an offence well beyond the expiration of three years if it takes the police several months to issue a summons. Remember that the police are permitted 6 months to issue a summons. If the offence was **committed** before the three years were up the driver will still be liable to totting disqualification. The important thing to understand therefore is that there is a difference between the date of **commission** and the date of **conviction**.

To further complicate the position, the courts often have a choice between imposing penalty points and a disqualification when sentencing many road traffic offences. There is also a range of penalty points available. For example someone caught speeding at 104 on a motorway may receive between 3 and 6 penalty points or a 7 to 56 day disqualification.

The simplest way to explain this is to set out a couple of examples.

Example 1

On the 23 March 2012 I was caught travelling at 60 miles an hour in a 40 mph limit and in due course received a summons to go to court on the 29 May 2012. I was given three points on my licence.

Six months later, in November 2012, I received a fixed penalty for using a mobile telephone and a further three points which took me to 6. At that stage I needed to be careful, but in September 2014 I picked up another three points for travelling at 60 miles an hour in a 50 because I didn't see the sign.

Then to my dismay a police officer stopped me on the 15 March 2015 because he decided I had gone through a red light, which attracts 3 points. A Summons turned up in July 2015 notifying me of court date in September 2015. Even though the hearing date is well after the third anniversary of my first offence, the red light offence was committed just before the three years was up and I face a six month disqualification as a result of this.

If my red light offence had been committed on the 25 March I would have been alright because even though it was committed within 3 years of my first conviction on the 29 May 2012, it was more than 3 years after the commission date.

Example 2

This is a surprisingly common situation. Keeping to the same facts as example 1, by September 2014 I have six points on my licence.

In January 2015 I am caught on camera on the M25 near the Clacket Lane services travelling at 98 miles an hour. If I receive a fixed penalty and 3 points I will be ok. However if I am summoned to court I know that I am going to have to explain myself. There are a number of possible outcomes.

1. If the court decides to give me penalty points, it must decide whether to give me three, four, five or six. It gives me no more than five, I leave court with 11 points and still able to drive, just.
2. If it gives me 6 points I am liable to a minimum disqualification of six months as a totter.
3. The court may decide to disqualify me for the speeding offence because it has a discretion to do so. If I am disqualified for the offence I do not get penalty and will avoid a totting disqualification.

How do the Courts interpret exceptional hardship?

I have set out above the wording of section 35 of the Road Traffic Offenders Act 1988 with which the court is concerned when dealing with these cases. It will be noted that it tells the court what is not be taken into account rather than what is to be taken into account.

Firstly, the court is not allowed to take account anything that suggests that any of the offences were not serious. A motorist may have 4 relatively minor offences on his licence and yet face 6 months off the road. Many people understandably think is unfair that they face a lengthy disqualification because they have committed a minor offence, but when facing totting disqualification the legislation gives the court no power to take account of that.

In these circumstances it may be possible to use the minor nature of an offence as a good reason to put forward a “special reasons” argument for not endorsing penalty points in the first place. An experienced advocate will know how to try to do this. If this is successful the problem will go away.

Secondly, the court is not allowed to take hardship into account unless it is “exceptional” hardship. It is true to say that almost every order of disqualification will cause hardship in one way or another. The hardship may result straightaway or may happen gradually over time. Not being able to drive for six months is not easy for most people.

So what is *exceptional* hardship? The legislation does not define it, and it is for the courts to interpret it, and for the individual magistrates hearing a case to decide whether they consider the hardship the driver will experience crosses the line from hardship to exceptional hardship. It must be more than is normally suffered. For example, loss of employment is a very common consequence of an inability to drive. The courts will often say therefore that this is not exceptional. However, magistrates must assess loss of job by reference to the circumstances of the individual. The loss of job for some people can have catastrophic long-term consequences for them or serious consequences for dependent members of the family. The point is that there

is no closed category of what constitutes exceptional hardship. Everyone's individual circumstances are closely looked at, but what is crucial for the motorist is that comprehensive evidence is presented to the court in a way that makes it difficult for it to be rejected.

Thirdly, hardship is not confined to the hardship disqualification will cause the motorist. Very frequently there will be hardship suffered by others who are connected to the motorist and who are completely innocent. In practice, the courts tend to attach far greater weight to the impact on other innocent persons than they will on the motorist. Disqualification can impact on children, parents, partners and businesses. If a motorist has a pivotal role in a business and requires a driving licence to perform it, it is usual for evidence to be presented to show that for example fellow employees may lose their jobs.

Common examples are as follows:

- Hardship to immediate family;
- Hardship to an employer;
- Hardship to fellow employees;
- Hardship to creditors;
- Hardship to elderly relatives;
- Hardship to children not seeing a separated parent;

These quite often run together and need to be proved.

So in summary, the legislation requires the motorist to prove that degree of hardship, but on balance of probabilities. The effect of the legislation is that the court must disqualify the motorist for a minimum period of six months unless the court is satisfied that exceptional hardship exists.

What is exceptional hardship is a question of fact to be judged by the court hearing the evidence presented. Magistrates Courts deal with these cases every day and become very familiar with the principles. It is a fact of life that some courts are more difficult to persuade than others, and so these cases need careful and thorough preparation. An experienced advocate will know how to do this.

What is evidence and how is it presented to the court?

It should by now be clear that the evidential burden is on the motorist to prove exceptional hardship, and the most frequent question asked is: **how is that done?**

What happens in the courtroom

The procedure is quite simple. Once the prosecutor has described the recent road traffic offence, the magistrates want to get on and decide sentence. The motorist has an opportunity at this point in the proceedings to introduce evidence of hardship. Practice varies slightly from the court. Some prefer the motorist to give evidence in full, and others prefer the advocate to tell the court what the hardship is and then ask the motorist to quickly confirm on oath that what has been said is true.

Some prosecutors like to cross examine motorists, challenging their evidence and suggesting alternative ways of getting round the inability to drive.

Magistrates also frequently question the motorist and so between the two it can be a challenging hearing. Questions have to be anticipated in advance before the hearing so they can be dealt with without exposing a weakness. Arguments can be seriously damaged if the court asks obvious questions that have not been planned for through lack of proper preparation.

"Evidence" in its simplest form is telling the court things having taken an oath to tell the truth. However, in these cases, the courts will require more than just that.

What is put forward depends on the individual facts of the case, but an experienced advocate will know what to present.

If the exceptional hardship put forward is hardship to immediate members of the family caused by job loss, the court will expect evidence of:

- **Loss of employment** by statement from the employer;
  - Evidence of the family's financial circumstances;
  - Evidence from partner or spouse;

- Evidence of the impact of loss of one source of income, such as inability to pay mortgage leading to housing difficulties, or school fees impacting on children.

If the exceptional hardship put forward is hardship to a business or to employees, the court will expect evidence of:

- **The exact role you have in the business** and why no one else can do what you do. You may have specific skills or experience that are difficult to replace and this needs proving;
  - The financial impact your inability to drive will have. This often comes from accountants;
  - The consequences for identified employees, such as job loss for them or inability for them to get to work if you act as driver for them.

If the exceptional hardship put forward is hardship to elderly relatives or those who are unwell, the court will expect evidence of:

- **What you do and why you cannot do** it if you are unable to drive;
  - The impact that will have on your relative, and you may need medical evidence.

The skill is knowing who to call as witnesses or who to take statements from and what documents to prepare. Courts will sometimes take account of the economic climate both locally and nationally in considering the impact of loss of employment.

Lastly and importantly, the advocate for you has an opportunity to make closing submissions to persuade the court that the evidence that has been produced is good enough to substantiate exceptional hardship. It's an invitation to the court to decide in your favour. It's an opportunity to deal with questions the court might have had to deal with any misunderstandings. They may have questions about the evidence or about the concept of exceptional hardship.

My function in representing motorists is to make sure the evidence to be presented is the best that it can be, and that the presentation in court itself is also the best that it can be. It is for these reasons that choosing your solicitor carefully is very important