

[Understanding Corporate Manslaughter]

The introduction of the Corporate Manslaughter and Corporate Homicide Act 2007 ('the Act') which came into force on 6th April 2008 has put the spotlight firmly on business transport. Every company is affected and will have to ensure that its policies and procedures protect it from prosecution in the event of a fatal accident. The existing common law of negligence already places certain obligations on organisations to take reasonable steps to protect the safety of their employees and this includes staff who are driving for work purposes. The new law is designed to punish organisations whose breach of their duty of care results in the deaths of employees or members of the public.

Before the Act, a company could only be convicted of manslaughter if a single employee of the company committed all the elements of the offence and was of sufficient seniority to be seen as embodying the 'directing mind' of the corporation. The practical consequence of this was that successful prosecutions were rare, and were generally achieved only in cases of very small companies or 'one-man-bands'. There was widespread public discontent where it was perceived that culpable corporations had escaped censure and punishment. Examples include the Herald of Free Enterprise disaster in 1987, and the more recent rail crashes involving Network Rail (and predecessors) where prosecution attempts failed because of the difficulty of directly linking one person in management to specific operational failures.

The revised legislation makes it easier to prosecute small, medium and large organisations for manslaughter where serious corporate mismanagement has led to a work-related death.

Some industry pundits are predicting that company car and van fleets could be the first to become liable for prosecution because of the sheer number of at-work road deaths. Estimates vary, but it is generally accepted that one third of road fatalities and injuries involve people who are at work. On average, this equates to more than 1,000 deaths a year and more than 60,000 injuries affecting people travelling for work. By comparison, the total number of workplace deaths in all other areas averages just over 200 a year.

The Corporate Manslaughter Act

Under the new Act, an organisation will be guilty of corporate manslaughter if the way in which its activities are managed or organised:

- a) causes a person's death; and
- b) amounts to a gross breach of a relevant duty of care owed by the organisation to the deceased; and

the way in which an organisation's activities are managed or organised by its senior management is a substantial element in the breach.

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The offence applies to:

- Corporations (including LLPs);
- Various, but not all, government departments;
- Police forces; and
- Partnerships, trade unions and employers' associations that are themselves employers.

Gross breach

A breach of a duty of care by an organisation is a gross breach if the alleged conduct amounts to a breach of that duty that falls far below what can reasonably be expected of the organisation in the circumstances. The jury must consider whether the evidence shows that the organisation failed to comply with any health and safety legislation that relates to the alleged breach, and if so:

- how serious that failure was; and
- how much of a risk of death it posed.

The jury may also:

- consider the extent to which the evidence shows that there were attitudes, policies, systems or accepted practices within the organisation that were likely to have encouraged the failure, or to have produced tolerance of it; and
- have regard to any health and safety guidance that relates to the alleged breach.

Senior management

Senior management means the persons who play significant roles in:

- the making of decisions about how the whole or a substantial part of its activities are to be managed or organised; or
- the actual managing or organising of the whole or a substantial part of those activities.

Penalties

On conviction a corporation may receive a range of punishments:

- An unlimited fine, most likely based on profitability and turnover;
- A 'publicity order' which requires the organisation to publicise the conviction;
- A 'remedial order' which will require the organisation to take specified steps to remedy the breach, and ensure adequate health and safety policies and practices are put in place.

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How to respond?

All Companies need to be able to demonstrate working health and safety procedures in line with all existing Health and Safety legislation. Work-related road safety should be incorporated into existing health and safety procedures. FleetDirections is designed to provide information on how you can respond to this new law. The risk management section of the FleetDirections website sets out our recommended approach.

The legal process

In the event of a fatal accident, the police will investigate using techniques outlined in the Association of Chief Police Officers' Road Death Investigation Manual. The latest version of the manual, published in late 2007, is meant to outline a comprehensive procedure for assessing the causes of a fatal accident.

Police officers investigating fatal crashes are told to assume the death is an unlawful killing until proved otherwise. Therefore, fleet managers must expect all fatal crash investigations will be extremely thorough and will involve delving into all of the relevant health and safety and employee duty of care procedures and policies in place within a fleet. This approach has led to many motorways and roads being closed for forensic investigation following any fatal accident - a far cry from the days when the main objective of the police was to re-open the road.

The following are examples of areas of investigation:

- Driver competency. Has the employer failed to ensure that drivers are competent and capable of doing their work in a way that is safe for them and other people? For example, has the employer considered whether the driver has the necessary driving licence and if so whether further training is required?
- Fitness and health. Has the employer ignored obvious signs that an employee is unfit to drive; for example, from the effects of drink or drugs?
- Vehicle suitability. Are vehicles being used for a purpose for which they were not intended; for example, saloon cars used to transport heavy or bulky goods without appropriate means to secure the load safely?

In the event that an accident involves an employee driving on company business, the police will be looking to establish:

- why the vehicle was at the scene;
- the mechanical condition of the vehicle – regardless of ownership;
- the physical condition of the driver, including signs of fatigue; and
- the legalities of both vehicle and driver – licence, MOT, insurance, etc. It is for these reasons that a vehicle and driver audit trail is required to show that the policy for employees driving on company business is based on health and safety best practice guidelines.

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There are numerous Acts of Parliament applying to road transport that set out clear requirements for both employer and employee regarding roadworthiness and safe operation of company vehicles.

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Risk and reality

Fleet operators and their managers would be forgiven for thinking that every time there was a fatal accident the police were committed to finding some responsibility on the part of the employer of any fleet drivers involved. The reality of corporate responsibility is currently very different from the hype that surrounds the management of occupational road risk and the risk of prosecution resulting from a fatal road traffic accident. Although prosecutions do occur they are still few and far between. However, that doesn't mean your business is free from risk.

Management failure criteria

The test to be applied will focus on the way in which a particular activity is being managed. If a company has not carried out a risk assessment or has done so but is only paying lip service to it, then this could be construed as a failure to manage. It is proposed that the responsibility to manage will fall on senior directors and managers; as a consequence, it is likely that a fleet manager will be regarded as being at too low a level of management to have a directing impact on the management of an organisation's activity. However, if it can be demonstrated that the fleet manager was undertaking a senior role then this presumption may be reversed. In addition there is a second tier of responsibility for individuals who have a 'significant role'; these are individuals whose management responsibilities bear on the organisation as a whole or a substantial part of it. The phrase 'significant role' is intended to capture those managers whose role in management terms is decisive or influential. There is no doubt that some fleet managers and health and safety managers will fall within this definition.

Vehicle maintenance

The position with regard to organisational liability for road traffic accidents involving an occupational vehicle is highlighted in recent case law which demonstrates that the use of an occupational vehicle is now widely believed to fall within the requirements of the Provision and Use of Work Equipment Regulations 1998. This places primary obligations upon the organisation for the inspection and maintenance of equipment used by employees.

In *Stimpson v (1) Curran (2) Land Rover UK Ltd and (3) Exel Logistics Ltd (2004)*, Wayne Curran was an employee of Land Rover (UK) Ltd who permitted him to use one of the company's Defender vehicles for a journey. Curran was carrying a number of passengers, including Paul Stimpson who was injured when the vehicle was involved in a roll-over accident on the M6 motorway. Exel Logistics Ltd had previously assembled the front offside wheel and tyre. It was subsequently established that the two rear tyres were under-inflated and the front offside tyre had deflated. The court had to determine firstly the responsibility of Curran and whether he owed a duty to his employers and passengers to ensure that the vehicle was in a safe condition before the journey began and during the journey itself. Curran himself accepted that under the Road Vehicles (Construction and Use) Regulations 1986 he did have a duty to check the vehicles tyre pressures before setting off, but claimed that as the vehicle was immaculately maintained by his employer this excused him from his obligation.

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Vehicle maintenance (Cont.d):

As Curran had not noticed any unusual handling characteristics during the journey, notwithstanding the description of a wallow by the rear passengers, the court would not fix him with any liability for the accident. The vehicle in this case was a 12-seat Defender, owned by Land Rover and maintained by one of its employees. It was found as a fact that the rear tyres were at a reduced pressure – 29psi instead of 48. It was argued that in these circumstances Land Rover should have been aware of the dangers posed by under-inflated tyres and as a result, should bear the greatest share of responsibility. Having said this, the rear tyres were not the sole cause of the accident. Exel had assembled the offside wheel and tyre. It was found that during this process dirt and grit had found its way between the inner tube and the tyre casing. The court accepted that this had resulted in a split in the inner tube and a partial deflation of the offside tyre just before the accident. The court also accepted that, had the tyre deflation occurred in isolation, there was a chance that Curran may have been able to bring the vehicle to a halt; it was the interaction with the under-inflated rear tyres which led to the fish-tailing and then roll-over. Taking all of these arguments into consideration the court absolved Curran from any blame and found both Land Rover and Exel 50% each responsible for Stimpson`s injuries.

For fleets, this is a clear warning of the need to take occupational road safety seriously and do everything possible to limit crashes and keep drivers safe. Crashes will continue to happen, but if a company can show the incident was limited to the actions of the individuals involved and they had the skills required to carry out their role, then it should be enough to avoid prosecution. For daily rental it is unlikely that the courts will now place any responsibility for checking safety critical systems upon occasional drivers. It may be different on longer hires, but you may have a responsibility for training the driver as to what to check, when and how. For leasing companies who permit their clients to service and maintain their lease fleet of vehicles, the leasing company must ensure that such client follows the manufacturer`s requirements and has adequately trained technicians. The leasing company is still the vehicle`s owner and has a consequential health and safety responsibility; it must ensure that there is a recorded audit trail.

For companies that maintain vehicles on behalf of their clients who lease fleets, again an audit trail is vital to show that manufacturers` requirements have been followed, appropriate technicians with the right skills have done the work, and that decisions to do or not to do work are recorded in case they are analysed at some point in the future.

How can the employers of occupational drivers minimise this risk?

- If you believe that the employee has a responsibility to look after a vehicle, think again. You as the employer must require the employee to check safety systems, document such requirement and most of all train the employee how to do the checks and monitor that they do.
- If the employee is using their own vehicle, implement a reasonable system to ensure the vehicle is properly maintained. Do not forget that if the employee is acting in the course of their employment, the fleet may still ultimately be held responsible for the employee`s negligence by virtue of vicarious liability, whoever owns the vehicle.
- Put in place a reasonable system for monitoring your internal systems if you maintain vehicles yourself and your external contractors, if vehicles are maintained externally. An audit trail is good fleet management and the best line of defence to any prosecution.

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What effect is this going to have on companies servicing or maintaining occupational vehicles?

The courts are going to be quite prepared to entertain split liability between the employer and the motor trade, particularly where a defect can be traced back to past servicing or maintenance – the ‘who touched it last’ principle. Record everything, even when a vehicle misses an appointment. If something is done, record it! Always assume that someone may ask you to subsequently justify your action. In a similar vein if you do not do something, for example after a value judgement of whether the work is actually required, or you are instructed by the owner or fleet manager not to do the work, record it! Not only should the decision be recorded, but when it was taken and by whom.

Always use the correct level of technician for the job in hand. We all have to learn so if someone is used who does not have the necessary qualifications or experience, make sure that the work is supervised by someone that has the skills, and record it!

Cases – criminal and civil

Below are some cases which illustrate the problems and pitfalls employers can face when road traffic accidents involve occupational drivers.

- In *Michael Eyres v. Atkinsons Kitchens and Bedrooms* (2007) a worker was paralysed after being flung from his van after falling asleep at the wheel. He had been working for 19 hours and the court found that the company’s philosophy and culture had encouraged excessive hours and placed him at risk of such an accident. His employer was found liable for his injuries and ordered to pay damages. This case is a strong reminder to employers of the need to manage occupational road risk. Companies need to be sure that their employees are in a fit condition to drive and have had adequate quality sleep before getting behind the wheel.
- In *R v The Produce Connection* (2006) a company was fined £30,000 for breaching health and safety legislation as a result of one of its workers dying in a car crash after working 76 hours in four days. The case is thought to be the first of its kind in the UK because the company involved admitted breaching health and safety legislation even though the employee died outside working hours. Mark Fiebig had worked four 19-hour days – starting early in the morning and finishing late at night. He died when his car drifted into the path of an oncoming lorry as he drove home from work in October 2002. The court held that the company had failed to properly monitor the hours its employees were working. The company admitted failing to ensure the health of workers and the public. Along with the £30,000 it was also ordered to pay £24,000 costs.
- In the cases of *Melvyn Spree* and *Keymark Services*, a transport manager was found guilty and jailed as a result of breaches of Health and Safety Regulations, forgery and tachograph offences. Lorry driver Steven Law died when he crashed his vehicle through the central reservation of the M1. The court heard that his employer had encouraged drivers to drive excessive hours on a regular basis and that various ploys were used to falsify tachograph records. It concluded that such practices had been the cause of the accident, in that the driver probably fell asleep at the wheel. The transport manager was jailed for 18 months. The case highlights the need for an accurate audit trail in respect of vehicle operations. If investigated by the authorities these procedures will be scrutinised for weaknesses, evidence of non-compliance with legislation and/or the company’s own policies and evidence of abuse.

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Cases – criminal and civil (Cont.d):

- In M J Graves International, a motorist was killed when a lorry on the A12 in Essex hit his broken-down car. In court it was said that when the accident occurred the lorry driver had been working for about 20 hours and had little time for “quality sleep”. He was jailed for four years for causing death by dangerous driving and Martin Graves, the haulage company manager at Felixstowe-based MJ Graves International, was also jailed for four years after being convicted of manslaughter – for failing to prevent his drivers from working excessive hours. The case demonstrates that after a road traffic incident both the driver and employer can face criminal prosecution.

Two cases involving accidents caused by drivers using mobile phones illustrate how the courts approach questions of employee and employer liability. In the first, an employee spent six and a half minutes on his mobile phone (whilst driving his own vehicle) during a 15-minute journey. During a second call to his wife, the driver ignored a total of 15 road signs as he used his handheld phone. He then made an illegal turn on to the M6 motorway and immediately collided with a motorcyclist driving in the opposite direction, who subsequently died from his injuries. In passing sentence, the judge stated that a motorcyclist had lost his life because the driver of the car had been avoidably distracted by the use of a mobile phone. The car driver was jailed for five years, followed by a five-year driving ban. His employers escaped prosecution on the basis that the employee was talking to his wife, which was therefore not a business call.

In the second case, an employee using a non-hands-free phone lost control of his vehicle and collided with another vehicle resulting in the death of the other driver. The employee was sentenced to three years in prison plus a four-year driving ban. His employers were cleared of all blame when it was shown that all their procedures and policies were in line with the legislation and that specific written instructions had been issued to all employees regarding the use of mobile phones whilst driving. Having a mobile phone policy and being able to demonstrate that the company and its drivers abided by that policy will provide a first line of defence against prosecution.

Documentation

Both the Police and Criminal Evidence Act 1984 and the Health and Safety at Work Act 1974 confer wide-ranging powers on investigators to search premises and seize documents which may assist them in fatal accident investigations. In addition to the types of documents which would be relevant in any road accident (e.g. MOT certificates, insurance certificates, etc) organizations will need to ensure that they can produce up-to-date documentary evidence relevant to the issues of occupational driving. For example:-

- Driver training. Is the driver regularly involved in accidents of a similar nature? Do they have experience with that type of vehicle, e.g. a powerful sports car?
- Vehicle maintenance. Has the vehicle been regularly serviced? When was it last serviced? How many miles has it covered since? This may be relevant to the vehicles capabilities at the time of the accident.
- Working Time Regulations 1998. What is the employer’s policy on working hours; the number of meetings or visits made during the day; mileage covered between sites? Who sets the employee’s schedule and is it realistic in terms of mileage and time?
- Tachographs and data loggers. Are they used? Where is the information stored?

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Documentation (Cont.d):

Additionally, any of the following documents may also be relevant:-

- Accidents book entry;
- First-aider / surgery report;
- Foreman / safety representative report;
- RIDDOR report to HSE;
- Safety committee minutes;
- Report to DSS;
- Documents from previous relevant accident(s);
- Any of the six classes of documents required by The Management of Health and Safety at Work Regulations 1999, particularly pre- and post- accident risk assessments, training and employee information.

The Health and Safety (Offences) Act 2008

The Health and Safety (Offences) Act 2008 has been introduced in addition to the Corporate Manslaughter Act and will come into force on 19th January 2009. This Act increases the maximum penalties available to the courts in respect of certain health and safety offences in that it allows higher levels of fines and introduces imprisonment as an option. This Act not only focuses on punishing organisations who do not have proper health and safety systems in place but also those individuals who are responsible for running them.

The future

It is important that fleet managers do not see the arrival of this new legislation as the start of a new focus on work-related road safety. It is simply the latest chapter in an ongoing story that stretches back decades. Employers must ensure risk assessments are carried out and recorded, followed by auditable measures to minimise and manage the risks to employees.

What the changes will achieve is to remind employers of the potentially massive financial impact of their failure to manage their occupational road risk. Unlimited fines, potential imprisonment and the incredible disruption of a police investigation into your business don't bear thinking about. Making sure employees are safe and that your business can prove it should be of paramount importance.