

White Paper

Demystifying duty of care.

Understanding the risks and
the responsibilities.



A burning issue or one for the 'back burner'?

Duty of care is without doubt one of the hottest topics in fleet today. From sound advice to scare stories threatening immediate imprisonment for company directors, the discussion amongst fleet journalists, industry experts and leasing companies regarding the risks and ramifications continues unabated.

The upshot of this is that many companies and their directors remain unsure of the exact risks and liabilities. More importantly, most are also unclear of precisely what they should be doing to fulfil their legal obligations and ensure the safety and well-being of their employees.

The arrival of the Corporate Manslaughter Act in 2008 was greeted with a fanfare of publicity about the legal consequences if car and van operators did not implement effective risk management controls. Without a clear 'audit trail' we were warned that enormous fines and naming and shaming would deal with the worst offenders.

Since then what has happened?

Well – not very much. There have been no fleet related prosecutions and potential corporate manslaughter charges in some incidents have been ignored in favour of other road traffic act offences. The huge number of (largely uncontrolled) employees who drive privately owned vehicles for business remain one of the greatest risks - yet no prosecutions have been reported.

So what does this mean for companies?

Have the resource and financial investments on driving licence checks, risk assessment and driver training been wasted?

The answer to these questions is an unequivocal no. Those who were just implementing policies and procedures to avoid prosecution were missing the key points. The new Act has not set any new "tests" but has relied on the long standing health and safety legislation

underpinned by clear guidelines from the Health and Safety Executive (HSE). Managing occupational road risk is primarily about responsible employers having a duty of care to their employees and other road users.

Does the company and its directors hold all the responsibility or is it shared with the employee?

How should an employer inform its employees of their roles and responsibilities under health and safety and duty of care law?

In managing and mitigating liability, is it really possible to provide indemnity for the company by outsourcing to third party risk management 'experts'?

Now, a clear understanding of the topic, the legislation and the ultimate responsibilities of employers and employees is critical.

This paper aims to provide a clear and objective view of the subject, enabling a better understanding of what is required for companies to fulfil their moral and legal obligations, and minimise their risks.

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A social and a business case.

The motivating force behind the Government's focus on work related road risk is the high number of people who die or are seriously injured on the roads each year.

Some interesting statistics.

- About a quarter of all vehicle miles travelled annually on Britain's roads are for work purposes (excluding commuting).¹
- There are an estimated 3 million company cars on the roads and roughly 1 in 3 will be involved in an accident each year.²
- Company drivers who drive more than 80% of their annual mileage on work related journeys have more than 50% more injury accidents than similar drivers who do no work related mileage.²
- The annual risk of dying in a road accident while driving for business reasons is significantly greater than the risk of dying as a result of all other workplace accidents.
- Every week around 200 road deaths and serious injuries involves someone at work.
- About 300 people are killed each year as a result of drivers falling asleep at the wheel. About 4 in 10 tiredness-related crashes involve someone driving a commercial vehicle.²
- Work-related road accidents are the biggest cause of work-related accidental death. Between 800 and 1000 people are killed annually in work-related road traffic accidents compared to approximately 250 fatalities due to accidents notified annually under the Reporting of Injuries Diseases and Dangerous Occurrences Regulations (RIDDOR).
- Business drivers have collision rates that are 30 – 40% higher than those of private drivers.

¹ National Travel Survey

² DfT Road Research Report No. 51

Talking numbers can of course detract from the fact that each and every one of these incidents is a tragedy, and that the emotional and traumatic effects of an accident are unquantifiable. However, many companies fail to realise that with a small investment in risk management and driver education, much can be done to reduce the rate, the severity and the cost of accidents on our roads.

It is generally accepted that the hidden financial costs associated with vehicle accidents are usually at least 10 times that of the 'bent metal' cost. Research by the HSE into workplace accidents in general*, suggests that this could be even greater. The HSE states that for every £1 recovered through insurance, between £8 and £36 may be lost via uninsured costs.

What is undoubted is that the monetary cost of vehicle damage is dwarfed by personal injury costs, time off work, lost business, replacement vehicles and management time spent dealing with the incident. The list goes on.

Quite apart from a desire to safeguard employees from injury, trauma or worse, it is evident that it makes good financial sense to proactively manage work related road risks as well as considering the legal ones.

* Health and Safety Executive, The Costs of Accidents at Work HSG96, www.hse.gov.uk

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The legislation in focus.

What is clear is that driving on business is one of the highest risk activities the majority of employees will face. There is a plethora of regulations and legislation that come into play for individuals required to drive on business.

As such, a high level appreciation for these areas of law helps to understand the action that is required. The key areas where the law has a direct reference to driving at work are as follows:

Health and Safety at Work Act 1974.

All employers have a duty to ensure, so far as is reasonably practicable, the health and safety of all employees while at work. They also have a responsibility to ensure that others (non-employees) are not put at risk by your work related driving activities.

Management of Health and Safety at Work Regulations 1999.

Employers have a responsibility to manage health and safety effectively. The employer is required to carry out an assessment of the risks to the health and safety of their employees while they are at work and to other people who may be affected by their work activities. The Regulations require employers to periodically review the risk assessment so that it remains appropriate. A record must be kept of the risk assessment and any measures implemented.

Health and Safety Offences Act 2008

This law came into force in January 2009. The effect of this change is that it increases penalties and provides courts with greater sentencing powers for those who flout health and safety legislation. While car and van fleets are not specifically mentioned in the legislation it is clear that any health and safety breaches in the operation of car and van fleets will be covered.

Corporate Manslaughter Act 2008.

The Corporate Manslaughter Act became law in April 2008, effectively making it easier for large companies to be prosecuted. Prior to the Act there was a

need to hold a specific individual to account when a company was being prosecuted for manslaughter. This Act marks a change in this practice and enables the company as an entity to be liable for manslaughter where gross failures in the management of health and safety cause death. This complements the law under which individuals can be prosecuted for gross negligence, manslaughter and health and safety breaches where there is direct evidence of individual culpability.

The offence.

An organisation to which this section applies is guilty of an offence if the way in which any of its activities are managed or organised by its senior managers;

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

In addition there are many other laws and requirements for all road users. Some of these are heavily focused towards the driver, who will typically bear the greatest burden of responsibility.

The Road Traffic Act and Construction and Use Regulations are primarily focused on the driver, although under 'cause or permit' principles the company cannot either cause or knowingly permit an employee to breach these regulations.

The major risk to companies now is the increased potential for successful civil actions against a company that is proved negligent in its health and safety obligations, with the prospect of very significant fines.

Moreover, if an injured party identifies that a company vehicle was involved in an accident, the opportunity for large

payouts becomes apparent, as there will no longer be the need to identify individuals responsible.

Key to the success of the Corporate Manslaughter Act is the change in focus by the police when investigating a serious accident. We know that this has already become evident, with the scenes of serious road accidents being treated as potential crime scenes and investigations launched.

'Fact finding' at the scene of an accident includes questions relating to whether the driver was using the vehicle for private or business purposes and what their work and rest patterns have been over the period prior to the incident.

Questions relating to the condition of the vehicle and the condition or concentration levels of the driver can also have a business implication. For instance, has the driver been working long hours, using a mobile phone whilst driving, or driving a vehicle that has a defect affecting its safety?

Put quite simply, the option of not having a robust and rigorously applied health and safety policy is long gone if legal compliance is to be ensured.

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Managing and mitigating risk.

The key to businesses meeting their legal obligations centres on the risk assessment required under the Management of Health and Safety at Work Regulations.

This assessment should never be viewed as a one off exercise. It is required periodically and must be seen as a 'living' policy which is revisited and reassessed to ensure it is always relevant to the company and its operations.

In the event of a work related road fatality or serious injury the company must be able to demonstrate adherence to the minimum standards required under their duty of care for employees. Therefore the employer must have all of the following:

- A current and robust corporate risk assessment in place covering all employees driving on business (including cash allowance takers).
- A risk mitigation plan in place to address any general and specific issues identified by the risk assessment.
- An audit trail to demonstrate that risk assessments are carried out periodically and that management action is taken to address any areas where unacceptable levels of risk have been identified.
- Clear policy documentation and procedures in place to ensure employees are aware of both their own and the company's responsibilities in minimising work related road risk.

If a company does not address these areas then they could be deemed deficient under health and safety law and face prosecution by the Police, HSE or the Vehicle and Operator Services Agency (VOSA). This could result in a prosecution against an individual director, manager or, under Corporate Manslaughter Act, the organisation as a whole.

It is also worth noting that some companies have already faced hefty fines from the HSE not as a result of fatalities where there were vehicle or employee failures (such as the vehicle being unfit for purpose or the driver having an invalid driving licence) but purely for having no policies or procedures in place to assess whether the person or the vehicle was safe and fit for purpose in the first place.

When carrying out a risk assessment, an understanding of what constitutes a risk is essential. Whilst expert advice is always recommended, the following table highlights some of the main considerations.

Good risk management practice revolves around conducting regular risk assessments, identifying areas of unacceptable risk, and then instigating policies and procedures to address these issues.

Companies must ensure that a management structure exists on an ongoing basis to maintain and manage the risk assessments and implement control procedures, thus minimising risk as far as reasonably practicable.

Risk assessment should never be viewed as a one off exercise. It is required periodically and must be seen as a 'living' policy which is revisited and reassessed to ensure it is always relevant to the company and its operations.

High risk.

High business mileage (over 20,000 business miles per annum).

Long working hours/shift working.

Employee using private vehicle (reduced operational control).

Performance or sports cars.

Driver under 21 years of age.

Full driving licence held for less than two years.

Foreign nationals with little experience of driving in the UK.

Employees with poor accident/claims histories.

Nine penalty points or more on licence.

Low risk.

Low business mileage (below 5,000 business miles per annum).

Standard 9am – 5pm working day.

Company provided vehicle (fit for purpose).

Standard saloon/hatchback.

Driver over 25 years old.

Full driving licence held for over five years.

Five years or more experience driving in the UK.

Employees with low claims histories.

Clean driving licence.

Whose risk is it anyway?

What is often not fully appreciated is that, in the first instance, the majority of responsibility lies with the vehicle driver.

Under the Road Traffic Act and Construction and Use Regulations the person who is driving the vehicle should, before commencing a journey, ensure that the vehicle is compliant with these Regulations and is being used within the vehicle's operational capabilities.

The company's responsibilities become an issue when they may have 'caused' or 'permitted' an offence to occur, or have breached their health and safety obligations.

With a high burden of responsibility on the driver there may well be shared responsibility identified between an employee driving and the employer.

An example of such a case is where an employee fell asleep at the wheel with his manager present in the vehicle, it was decided that the company had breached its health and safety obligations by requiring him to work and drive long hours. However, the employee was also deemed culpable for not stopping the vehicle when he knew he was extremely fatigued.

The compensation paid to the employee by his employer was reduced by 33% as it was deemed that this was the element of responsibility that fell upon him to pull over and rest. This demonstrates that fault can be divided between various parties, proportionate to the level of responsibility considered to apply to those held culpable.

From the company's perspective, all 'reasonable' steps must be taken to ensure employees' safety and the safety of other road users. It is, though, appreciated that the company cannot

necessarily follow or check on every driver, every hour of every day.

Risk assessments must therefore consider what is reasonable and be seen to identify unacceptable risks. From here, targeted action plans must be implemented and processes and procedures put in place to reduce these high risks. Importantly, these policies and procedures must be seen as active management tools. They cannot just be written policies to which only lip service is paid.

One of the areas causing most concern from a company risk perspective is the 'grey' fleet, where employees use their own vehicles for business use. In the eyes of the law, the ownership status of the vehicle being used is an irrelevance. It is the fact that an employee is driving for business purposes that incurs corporate responsibility.

The consequent risk levels here are substantial. Typically a company will have far less control and fewer policies in place for employees' own vehicles compared to a company supplied vehicle.

When it is considered that privately owned cars are often older and not as well or regularly maintained as company cars, the high risk levels become all too obvious. Identification and management of this risk is therefore imperative for companies under the current legal framework.

The Continual Risk Assessment.



The myth of risk outsourcing.

There is a great deal of misinformation within the fleet industry regarding the mitigation of work related road risk.

Some driver training providers have stated that all employees driving on company business must undertake formal driver training or the company will fail in its legal duty of care and be open to prosecution.

Others have stated that without annual driving licence checks, validated through the Driver and Vehicle Licensing Agency (DVLA), a company is failing to fulfil its legal obligations.

These are both untrue. What is true is that driver training and licence checking are commonly used tools for managing work related road risk. They are by no means a legal necessity though.

From the other perspective, in a vain search for the ultimate in risk mitigation, some companies remain convinced that third party suppliers such as risk management companies and leasing providers should offer products or services that take on their duty of care responsibilities and indemnify them against prosecution. Sadly, this is also untrue.

The idea of outsourcing health and safety or duty of care obligations is undoubtedly very appealing. In reality, the law is unequivocal. These risks fall firmly at the feet of the company that is commissioning the business use of the vehicle.

The company has control over policies and procedures and has the contracts and the direct management line with the employees. This is something no external provider would have the absolute ability to control.

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So what elements can be outsourced?

Having stated clearly that legal obligations relating to health and safety and duty of care cannot be outsourced, it should be added that external service providers can assist greatly in identifying and quantifying the levels of risk through structured risk assessments.

They can also recommend action plans and products to mitigate and reduce those risks. However, it remains that they cannot guarantee immunity from prosecution.

There are also computer and Internet based risk analysis tools available that can help identify risk levels and provide driver assessments. These assist in highlighting employees who may have high risk profiles by examining driving patterns and general motoring knowledge.

Some of the more sophisticated offerings can assist further by assessing and quantifying risks, identifying unacceptably high risks, suggesting potential risk mitigation policies and providing a structured framework with which to maintain detailed records.

The essential point to remember is that the company commissioning the business mileage must be seen to take all reasonable action to minimise exposure to risk. If a third party can assist in the process by providing real added value and expertise, then the company can potentially save time and money.

External verification and validation can also provide strong evidence that the company is committed to managing their health and safety responsibilities. There can be no guarantees or transfers of responsibilities though, as the company will always have a direct responsibility under law.

Companies cannot pass all the responsibility to the employees. It is not reasonable to take the view that under the Road Traffic Act and Construction and Use Regulations they bear the majority of the responsibility. Nor is it defensible to operate under the basis that in a large fleet you cannot be expected to know what all the drivers are doing all the time.

Under health and safety, duty of care, and cause or permit, the company is legally obliged to ensure business travel is safe and that both employees and other road users are not exposed to unnecessary levels of risk.

In summary, as a company commissioning business mileage it is never possible to either pass your responsibility to a third party or expect your employees to carry the full burden of responsibility.

The Final Word.

With prosecutions predicted to rise, legal precedence will grow and so, in turn, will companies' understanding of the definitions of 'reasonable' actions. This process will prove an expensive learning curve for many UK businesses and their directors.

It is therefore strongly advisable to ensure that your organisation is not one of the early cases that provide the barometer by which others will judge their actions.

About our consultancy service.

The Lex Autolease Strategic Fleet Consultancy team works with board directors and senior managers to identify how the provision of fleet can better support key business objectives.

Our consultancy covers cost reduction, policy, tax, the environment, duty of care and fleet delivery strategy. In addition to core fleet issues, we consult on related areas such as fuel and cash schemes.

Our consultants have depth and breadth of knowledge in a range of technical areas and have prior experience in major advisory firms or industry. We combine leading edge thinking with the operational experiences that come from being part of Lex Autolease, the UK's leading fleet provider.

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