

According to the Department for Transport there are now some 35 million vehicles licensed for use on roads in Great Britain<sup>28</sup> with another million or so licensed in Northern Ireland<sup>29</sup>. Within Great Britain (excluding Northern Ireland) there are 37.8 million drivers holding a driving licence of some type.<sup>30</sup> Clearly these are significant figures in terms of the number of vehicles using the road. Inevitably of course there are accidents. Statistics collected by the Department for Transport in 2013 show that there were 138,000 reported accidents on Great Britain's roads, the bulk of which (some 82%) were classified as "slight".<sup>31</sup> Fortunately only about 1% resulted in fatalities. In 2013 there were 2.9 million insurance claims involving privately owned (including grey fleet) motor vehicles totalling over £6 billion. The average cost of a private claim was £2,767 rising to £11,272 where there was personal injury. This equates to £17.1 million per day in claims settled.<sup>32</sup>

The reason for highlighting these figures is that according to the Health and Safety Executive, more than a quarter of these reported accidents will involve someone who is driving in the course of their employment at the time.<sup>33</sup> This should make the health and safety of these 'work related' drivers a matter of prime concern for all employers. The numbers alone should ensure that driver safety and the duty of care to these drivers is high on the agenda of the board of directors and their management teams.

A key element in any procedure to mitigate risk to business drivers should be validation of the right to drive the vehicle in question and (based on the driver's previous record) any steps needed to mitigate the risk presented by that driver to themselves and other road users. In short their driving licence and entitlement needs to be checked on a regular basis. Where the employer allows employees to use their own vehicles (whether privately owned or acquired by the employee on a "cash4car" basis – i.e. where the employee gets a cash allowance instead of a company vehicle) there are certain additional obligations which need to be met. These are considered later under the grey fleet best practice heading.

## The Duty of Care

This refers to the circumstances and relationships that exist between individuals that the law recognises as giving rise to a legal obligation to exercise certain standards and behave in such a way as not to cause avoidable harm to other persons. Failure to exercise the appropriate duty of care (it will vary according to the circumstances and the relationship) can lead to a claim for damages (monetary compensation) for any losses suffered by the injured party. The most famous summary of this duty is that provided by Lord Atkin in *Donoghue V. Stevenson (1932)*

*"The rule that you are to love your neighbour becomes in law you must not injure your neighbour; and the lawyer's question "Who is my 'neighbour?'" receives a restricted reply. You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour. Who then in law is my neighbour? The answer seems to be persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question."*

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<sup>28</sup> Statistical release published by the Department for Transport published 10/04/2014 "Vehicle Licensing Statistics: 2013"

<sup>29</sup> Northern Ireland Transport Statistics 2012-13 (published by the Central Statistics and Research Branch)

<sup>30</sup> Information published on [www.gov.uk](http://www.gov.uk) March 2014.

<sup>31</sup> Department for Transport National Road Traffic Survey (2013)

<sup>32</sup> Information from the Association of British Insurers "UK Insurance Key Facts 2014" Report

<sup>33</sup> Driving at Work Managing work-related road Safety Pub. Dept. for Transport April 2014

In the case of employers however, the obligation extends beyond the simple duty not to harm their employees. The relationship between employer and employee has been extended beyond this by both case law and statute such that the employer must abide by the relevant health and safety legislation, industry specific regulations and employment law, as well as the common law duty of care. Employers have a duty to take all steps that are reasonably possible to ensure the health, safety and wellbeing of their employees<sup>34</sup>. Acas lists a number of examples of where the employer owes his employees a duty of care, including:-

- Clearly defining jobs and undertaking risk assessments
- Ensuring a safe working environment
- Providing adequate training and assessing performance, including remedial training
- Controlling hours worked by staff so that they are not excessive
- Providing areas for rest and relaxation
- Protecting staff from bullying and harassment
- Preventing discrimination
- Providing channels for employees to raise concerns about their work/workplace
- A duty to consult with employees on issues that concern them

However, the obligation to take care does not rest solely on the shoulders of the employer. Employees are also under a legal obligation to look after their own health and safety whilst at work (and this would include driving in connection with their work). They are entitled for example to refuse to undertake work that they consider isn't safe. Even if the employer is found to be negligent in failing to ensure that the employee is safe at work in court, the careless employee who has failed to exercise proper care for their own wellbeing and take precautions can find their compensation affected by the legal principle of "contributory negligence". In other words they will be considered to be partly responsible for their own injuries and will have their damages reduced accordingly.

Finally the duty of care owed by the employer to other road users should not be forgotten. The legal principle of vicarious liability means that the employer can be liable for the actions or omissions of their employees whilst they are acting in the course of their employment. The employer may still be liable for losses or damage caused by employees driving for work purposes, even where the employee is clearly in the wrong. The question in each case is whether the employer had taken all reasonable steps to ensure that the employee should not cause harm to other road users. This would include checking entitlement to drive as well as any necessary remedial training or action – including an express prohibition against driving for work purposes – if the risk warrants this.

## Road Traffic Legislation

These laws apply to drivers irrespective as to whether they are driving for business or pleasure purposes. The legislation relating to the roadworthiness of a vehicle and the insurance requirements will clearly apply to the employer where they provide the employee with a fleet vehicle. Other legislative provisions for vocational drivers will similarly apply directly to the employer (and in many cases jointly to the employee). Setting aside the detailed additional requirements for vocational drivers at this stage, the legislation currently requires that certain basic requirements are met. These include:-

- The vehicle is registered with the DVLA (GB Vehicles)
- The vehicle is taxed for use on the roads with the DVLA or an off road declaration has been filed
- The vehicle is appropriately insured
- The vehicle holds an MOT or roadworthiness certificate if required
- The driver holds the appropriate driving licence for the vehicle being driven
- The driver meets the eyesight requirements (vocational and ordinary drivers)
- The driver is of the minimum age
- The registered keeper of a vehicle must be notified to the DVLA and any changes to the vehicle specifications notified
- The driver must inform the DVLA of any change of address or a notifiable medical condition

There are various criminal and civil sanctions including fines and imprisonment for failure to comply with the various legislative requirements. The Road Traffic Acts also provide for a number of motoring offences. A number of these are directed towards the driver's conduct on the road, but others could involve the employer (for example failures to pay road tax or MOT test a fleet vehicle).

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<sup>34</sup> Acas "Defining an employer's duty of care – Workplace Snippets 2012

## Contract of Employment & Offer Letters

The requirement to hold a valid driving licence could form part of a contract with the relevant employee. The term could be clearly stated in an offer letter or contract, or it could be implied because of the nature of the work or through common custom and practice within a particular job or calling or sometimes in order to make sense of the agreement that has been reached. The need to hold a valid driving licence might also be included within a job advert as a qualifying requirement – provided that this was actually necessary for the job and not a veiled attempt to discriminate unlawfully.

The employer will generally be obliged to provide their employees with a contract of employment or a statement of the basic terms of their employment. Included within this contract may be certain express and implied terms that relate to the carrying out of the employee's function. Where the employee is provided with a fleet vehicle for example, there may be terms within their contract that directly prohibit certain types of activity in relation to that vehicle, or which require compliance with company policies in relation to the use of company property. For certain job roles there may be a term that requires the employee to maintain a valid driving licence as part of their role or job description. Losing their licence would be a breach of this agreement that could lead to suspension, demotion or dismissal. Failure to enforce the requirement could be evidence of negligence should the unlicensed employee injure another employee or member of the public whilst driving at work.

Even if there is no express term that requires them to keep their driving licence, it may be implicit in the nature of their work that this is so (an implied term). A person employed as a delivery driver for example would be unable to continue in this role if they ceased to be able to drive. Similarly if it would be impractical or impossible for the employee to do their job without the ability to drive, the courts may imply a term to this effect if it is necessary to give sense to the employment agreement (for example a dairy employing a milk delivery driver or courier firm engaging a parcel delivery driver).

There will also be implicit within the employee's contract of employment a requirement that employees will receive appropriate training for their job and will not be provided with unsafe equipment. Whether or not such a term is within the contract of employment or can be implied in the circumstances will be a question of fact in each case, to be determined by the wording and custom and practice within the particular profession or calling. It is important to remember however that the contract can impose obligations on both the employer and the employee. The contract can also refer to documents (such as company policies) which although non-contractual, can still form the basis of a claim by the employee or justify disciplinary action on the part of the employer.

The law of contract is also relevant where, for example, an agency provides a driver to another company. The contract between the agency and the hiring company may well contain an express term (or implied term) that the driver is suitably qualified.

## Trade and Professional Associations & Voluntary Schemes

These typically involve a contractual relationship between members of trade or professional associations and/or between employers and external agencies.

Reference has been made elsewhere in this Guide to the FORS and Driving Licence Checking requirement and the Freight Transport Associations Van Excellence Scheme. Both are examples of where a contract between the scheme operator and the employer/vehicle operator require the vehicle operator to perform driving licence checking up to the required standard as an express requirement for initial and continuing membership. Another example of where this would be relevant is the DVLA Earned Recognition scheme for commercial vehicle deliveries/operations. It is a requirement that in order to satisfy the criterion for "Earned Recognition" driving licence checks must be performed on drivers.

## Health and Safety Legislation

This has direct relevance to employers for both fleet and grey fleet drivers. **The Health and Safety at Work Act 1974** places duties on employers for the health and safety of their employees for on-the-road activities. In summary, the legislation requires employers to do all that is reasonably practical to ensure the health and safety of employees while at work. They also need to take steps to ensure that employees driving on their behalf are not put at unreasonable risk by the activities of those employees.

The general obligation is to take such measures as are reasonably practical. This requires a pragmatic balancing of the levels of risk against the measures needed to control the risk in terms of effort, money and time. If the risk is slight, but the measures needed to mitigate such risk are entirely disproportionate to the actual threat, then the employer would not be obliged to address the threat. In weighing up the action needed to discharge this statutory obligation, the employer needs to carry out suitable risk assessments, that focus not simply on the possibility of the event occurring, but also factor in the likely harm should it occur. The risk of catastrophic damage would require more effort and justify more money to address the risk – even where the chances of it occurring are slight. The fact that an employer cannot afford the precautions will be no defence at law.

One of the obligations under the Health and Safety at Work Act and Regulations is **to provide employees with information, instruction, training and supervision**. These measures may be particularly appropriate for drivers who have been identified as ‘at risk’ either because of health issues or in relation to their driving history. Given the fact that the health and safety obligation applies to driving on behalf of the employer, **it is absolutely critical that the employer takes certain basic steps in order to properly assess each driver in their employment**. The most obvious and basic starting point for such an assessment is to check their driving licence and entitlement with the DVLA or licensing authority.

Breaches of the **Health and Safety at Work Act** and Regulations can result in prosecution leading to fines and imprisonment (maximum unlimited fine and 2 years imprisonment) as well as the issuing of improvement and/or prohibition notices. There is also the inconvenience of being subject to investigation and the bad publicity that this attracts.

It is a requirement of the legislation that employees are actively consulted as part of the assessment and risk management process.

## New Sentencing Guidelines

New Sentencing Guidelines related to the penalties for breaches of sections 2 and 3 of the **Health and Safety at Work Act 1974** and Health and Safety Regulations came into effect from 1st February 2016 in England and Wales. The Sentencing Guidelines represent mandatory rules which must be followed by the court dealing with the offence unless this would cause injustice. The Guidelines apply to all corporate bodies and any individual over the age of 18. So they apply equally to the public and private sectors, charities and individuals. They are formulated by the Sentencing Council; an independent non-departmental body of the Ministry of Justice. The policy in terms of setting the levels of fines to be applied to offences under the Act was to try to bring these more in line with what were considered to be equivalent offences and as part of a deliberate move, to increase levels overall so that a clear message was sent to shareholders and directors that health and safety was not a matter to be taken lightly. The same policy dictated the approach to **Corporate Manslaughter** (see page 109).

The new Guidelines set out a number of steps (9 in total) that courts should follow when they consider sentencing the offender. They also make it clear that it is the risk of harm that is the important consideration to set the starting point for any fine, rather than actual harm. The fact that employees or members of the public have actually suffered harm will serve to increase the level of fine rather than set the initial level. The culpability of the organisation and attitude to the offence and health and safety will be factored into the equation, as will the turnover of the organisation. Aggravating factors such as previous convictions, deliberate cost cutting at the expense of safety and ignoring warnings by employees will add to the fine. Mitigating factors such as a good health and safety record (to this point), acceptance of responsibility, and steps taken since to remedy the situation will reduce the fine. Other things to be factored into the final equation will include discounts for a plea of guilty, the risks to the business from the level of fine to be imposed and the level of assistance offered to the prosecution. In other words other general sentencing principles will also be called into play.

## Sentencing in Scotland

Defining sentencing practice and policy in Scotland is the function of the Scottish Sentencing Council. This was established on the 10th October 2015. Whilst commentators are of the opinion that the SSC will produce its own guidelines on sentencing for health and safety breaches, the area has yet to be specifically addressed. Instead it is likely that Scottish courts will follow the guidelines for England and Wales. There is evidence to support this approach from recent cases in Scotland such as the following.

**Scottish Sea Farms and Logan Inglis V. HM Advocates Ltd (Jan 2012)**  
**HMA V. Belfinger Salamis UK Ltd (Feb 2016)**

## Sentencing in Northern Ireland

Although the Sentencing Guidelines apply to England and Wales, in the absence of any specific guidelines for Northern Ireland, the Northern Irish courts have tended to follow the Sentencing Council's lead. This is certainly the case with the earlier guidelines for serious health and safety breaches and the consensus seems to be that the courts will continue to follow this path.

Activity/Offence	Minimum Fine	Maximum Fine
Large: turnover £50 million plus	£3,000	£10 million
Medium: turnover £10 - 50 million	£1,000	£4 million
Small: turnover £2 – 10 million	£100	£1.6 million
Micro: under £2 million	£50	£450,000

## Obligation to Contractors

It is worth noting that the health and safety obligation may also arise in relation to contractors. So, for example, an agency driver employed by a firm to drive an LGV on their behalf will still be subject to the legislation and the firm should have in place policies and steps to mitigate the risk of loss or damage to other employees and the public. This would involve checking their vocational licence or making sure that such a check had taken place within a reasonable time to confirm their entitlement and that the licence is current.

## Corporate Manslaughter

The **Corporate Manslaughter and Corporate Homicide Act 2007** came into effect on April 6th 2008. The legislation was intended to replace the criminal offence of corporate manslaughter by making it easier to prosecute organisations where a corporate failing had caused a fatality. The new offence sits alongside existing Health and Safety at Work Act offences and will typically be investigated by the Health and Safety Executive and the police where they suspect that there may be a case of corporate manslaughter or homicide. The decision as to whether or not to prosecute will sit with the Crown Prosecution Service in England and Wales (Procurator Fiscal in Scotland and the Director of Public Prosecutions in Northern Ireland). The Act makes it an offence if the management of the organisation have been grossly negligent and the senior management are largely to blame for the situation. In order to be culpable, senior management's conduct must have fallen substantially below that which can reasonably be expected of the organisation in the circumstances. The offence will only apply to senior management of an organisation. Whether or not a Fleet Manager could be liable will depend upon the seniority of that person and their ability to influence company policy and strategy at board level. Individuals will continue to be liable under the common law offence of gross negligence manslaughter and other health and safety offences. The Act is not retrospective in operation and will only apply to deaths occurring from the date of implementation.

The effect of the Act and its applicability should not be overstated. Thus far there have only been 19 cases brought before the courts under the legislation and not all of them have been successful. What appears to be clear however is that avoiding liability or the threat of action under the legislation is easily avoided by raising responsibility for health and safety at board level, reporting on this and taking action based upon these reports. Making a director responsible for health and safety is recommended.

NEW

Under new Sentencing Guidelines that became effective from February 1st, 2016, the criteria to be applied by the courts and the table of fines has been increased partly due to the fact that fines for health and safety offences had fallen behind the levels for other offences considered to be equivalent and partly because the Sentencing Council who are responsible for setting the guidelines wanted to ensure that any fine set by the courts was material enough to send a clear message to directors and shareholders.

The new Sentencing Guidelines will apply to any sentence imposed after the introductory date, irrespective of when the offence was actually committed. Complex trials or enquiries that started prior to this date but have yet to reach a conclusion will therefore be subject to the new rules.

Under the new Guidelines, the range of fines for each type of company or organisation are listed in the table below. Maximum fines are imposed where there is a high or very high level of culpability on the part of the directors/senior managers that has led to actual harm being suffered by employees and/or members of the public. Minimum fines will be levied where the offence has not caused actual harm and the organisation had procedures in place to address the risk, but they happened to fail in the case in point due to unfortunate circumstances. Fines may be further increased or reduced according to a range of other factors that need to be weighed up by the court. This would include matters such as the level of co-operation in any investigation, whether a guilty plea was submitted and whether the range fine (if imposed) would cause unwanted or unacceptable consequences. Culpable directors or managers may also be subject to a term of imprisonment.

#### Corporate Manslaughter Table

Organisation Description	Minimum Fine	Maximum Fine
Large: turnover £50 million plus	£3 million	£20 million
Medium: turnover £10 - 50 million	£1.2 million	£7.5 million
Small: turnover £2 – 10 million	£350,000	£2.8 million
Micro: under £2 million	£180,000	£800,000

#### Sentencing in Scotland and Northern Ireland

See earlier comment on breaches of the Health and Safety at Work Act 1974.