

WHITEPAPER

THE CORPORATE MANSLAUGHTER ACT, TEN YEARS ON



iam
RoadSmart

The Corporate Manslaughter and Corporate Homicide Act 2007 (CMCHA) received royal assent in July 2007 and came into force on April 6 the following year.

Championed by then Labour Home Secretary John Reid, it was intended to replace the existing common law offence of corporate manslaughter, which had led to only a handful of successful prosecutions of businesses and organisations, following workplace deaths.

The pressing need for new legislation was underlined in March 1987 by the Herald of Free Enterprise ferry disaster, which caused the deaths of 193 passengers and crew, off the coast of Zeebrugge. Three years later, in September 1990, seven individuals and ferry operator Townsend Thoresen's parent company, P&O, went on trial charged with manslaughter. The case collapsed because of insufficient evidence against the senior management.

This highly publicised failure led to renewed pressure⁰¹ for a rethink on how corporations could more effectively be made legally capable of committing, being convicted of, and sentenced for, a criminal offence.

Under common law, police and prosecutors needed to find a senior person, in a corporation, who was said to be the company's 'controlling mind' - making them as culpable as the organisation they worked for. The CMCHA introduced what was intended to be a more straightforward test.



Under the CMCHA 2007⁰², an offence is committed if a gross breach of duty of care - and a person's death - are the result of "the way in which (the organisation's) activities are managed or organised by its senior management".

By avoiding the need to pinpoint a 'controlling mind', it was meant to be easier to prosecute large companies - with a lower standard of proof required. It was expected to lead to more convictions of large companies.

Many in the transport and driver risk management arena welcomed the new legislation, believing it would make it easier to hold organisations more closely to account for the wellbeing and safety of those engaged in driving for work, with safety benefits for other road-users.

In the words of Tony Greenidge, IAM RoadSmart Business Development Director: "The fleet industry was buzzing with experts warning companies that if they didn't implement proper, robust workplace driving policies to safeguard the public and the workforce, they would all be going to jail. It was going to be transformational for safety... No company car driver involved in an avoidable death has been anywhere near a prosecution. It seems the legislation has proved difficult to apply."

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TONY GREENIDGE, IAM RoadSMART



What general cases have been prosecuted?

HealthAndSafetyAtWork.com published a list of prosecutions under the CMCHA, up to July 2017⁰³. The first successfully prosecuted case under the CMCHA ('corporate manslaughter' in England, 'homicide' in Scotland) was of Cotswold Geological Holdings, in February 2011, following the collapse of a geologic trial pit. It was fined £385,000.⁰⁴

Early convictions under the CMCHA 2007 (Healthandsafetyatwork.com)

Convicted company	Nature of incident	Sentence date	Fine	Plea	Trading?
Cotswold Geotechnical Holdings	Geologic trench collapsed	15 Feb 2011	£385,000	Not guilty	No
JMW Farms	Bin fell from forklift tines	8 May 2012	£187,500	Guilty	Yes
Lion Steel Equipment	Fell 13m through roof light	20 July 2012	£480,000	Guilty	Yes
J Murray and Son	Pulled into unguarded machine	15 Oct 2013	£100,000	Guilty	Yes
Princes Sporting Club	Struck by speedboat	22 Nov 2013	£135,000	Guilty	No
Mobile Sweepers (Reading)	Falling street sweeper hopper	2 Feb 2014	£8000	Guilty	No
Cavendish Masonry	Falling two tonne limestone block	18 Nov 2014	£150,000	Not guilty	No
Sterecycle (Rotherham)	Struck by debris from autoclave explosion	7 Nov 2014	£500,000	Not guilty	No
A Diamond and Son (Timber)	Struck by moving machinery	28 Jan 2015	£75,000	Guilty	Yes
Peter Mawson	Fell 7.6m through roof light	3 Feb 2015	£200,000	Guilty	No

In successive cases, fines ranged from:

- £8,000, involving a worker crushed by a road sweeper⁰⁵ to
- £1,200,000 for a construction firm after two workers fell to their deaths from a balcony while manoeuvring a sofa.⁰⁶

None involved major firms. None met the expectations of fleet and transport industry figures who anticipated prosecutions of firms following road deaths.

Is driving for work a problem?

Does the absence of driving-for-work prosecutions suggest there is not a problem in that arena? The evidence suggests otherwise.

The Occupational Road Safety Alliance (ORSA), in its 'Crash and Casualty Data study',⁰⁷ estimates that between a quarter and a third of all reported road casualties involve someone driving, riding or using the road for work.

Deaths and injuries while driving for work (ORSA Crash and Casualty Data)

	2006	2007	2008	2009	2010	2011	2012	2013	2014	2015	2016
Killed	858	890	745	592	540	559	539	515	547	541	529
Serious	6,622	6,673	6,150	5,456	5,281	5,197	5,231	5,052	5,168	4,822	5,269
Slight	59,879	58,165	53,525	50,080	48,868	47,052	44,819	42,035	44,269	40,496	38,250
All	67,359	65,728	60,423	56,128	54,689	52,808	50,589	47,602	49,984	45,859	44,048

The Health and Safety Executive report, 'Driving at Work, Managing Work Related Road Safety'⁰⁸ puts the proportion at 'more than a quarter' of 'all road incidents'.

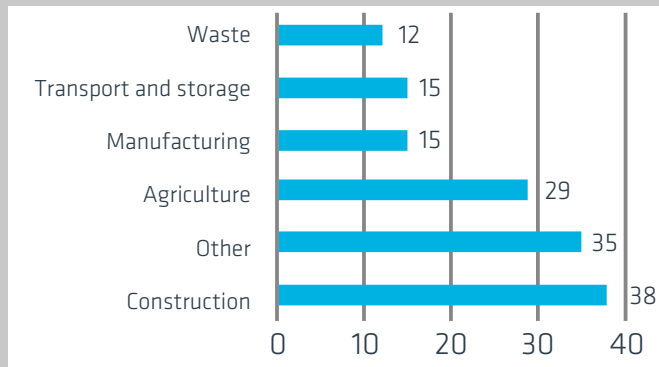
And the joint BVRLA (British Vehicle Rental and Leasing Association) and EST (Energy Saving Trust) study, 'Getting to Grips with Grey Fleet'⁰⁹ is more specific. It reported, in July 2016, that: "It is estimated that around 200 incidents involving someone at work, cause injury or death on the road every week. Road accidents are the biggest cause of work-related accidental death with the HSE estimating costs arising from 'at-work' road traffic accidents are in the region of £2.7 billion per year."

There is plenty of other evidence too.

- The Road Safety Observatory¹⁰ reports that in 2016, almost 6,000 people were killed or seriously injured in road traffic collisions involving someone driving for work.
- The HSE's 'Workplace Fatal Injuries in Great Britain 2018' report¹¹ states: "The Manufacturing and the Transportation and storage sector have a rate of fatal injury around 1.5 to 2 times the average rate across all industries."



Fatal injuries to workers by main industry



IAM RoadSmart's analysis of Department for Transport figures states that in 2016, an estimated 30% of all road deaths - 529 of 1792 fatalities - involved individuals driving on business. Meanwhile total non-driving at-work deaths in the same year (the latest figures available) were 144.



As the IAM RoadSmart analysis concludes: "Driving on business is the UK's most dangerous work-related activity." This is against a background of the UK moving from 1,905 people killed on roads in 2010 to 1,854 in 2014, to an estimated 1,783 in 2017¹² - a fall of 6.4%.

Despite the evidence that driving for work is dangerous, there is, says John Webb, Principal Consultant with Lex Autolease, an attitude among many transport sector organisations of 'What is the bare minimum I can get away with on health and safety?'

It was this attitude that many in the transport sector hoped would be corrected by the Act.

Has the CMCHA raised awareness?

Is there evidence that the CMCHA raised corporate awareness of safety issues within the driving-at-work arena? The absence of prosecutions directly related to workplace driving makes it hard to gauge precisely what impact the CMCHA has had.

Many people in the transport industry believe that - despite initially alerting the fleet sector to the dangers of being prosecuted for shortcomings - the lack of prosecutions may have led to corporate complacency.


John Webb again: "In the lead up to the Act there was a lot of noise in the press and the industry about directors being carted off to prison. It got people to sit up but when it wasn't matched by activity there were accusations of crying 'wolf' and interest tailed off. Police have had opportunities to carry out prosecutions but instead pursued lesser road traffic offences. The industry at large is aware of this."

Neil Greig, IAM RoadSmart Head of Policy and Research, largely agrees. "It is commonly felt that the Health and Safety

Executive, which should be taking a lead with CMCHA, is not fully engaged with this. We want to see the driving seat seen much more firmly as a place of work, with all that would entail under the Act."

Giles Ward, Senior Partner and litigation expert at Milner's Solicitors says, "CMCHA does not exist in a bubble. Risk and compliance has become a full time job for large companies. The Health and Safety (Offences) Act 2008 gave new teeth to health and safety at work. The statistics show increased numbers of convictions year on year and an increased average value of fines since the change. Companies have never been more aware of risk and the threat of criminal convictions is significant in that heightened awareness. But isolating the CMCHA as a catalyst in that change is difficult based on the evidence."

Whatever the state of awareness and engagement among employers, there is good information available. The HSE (Health and Safety Executive) provides detailed advice on managing work-related road safety in its paper 'Driving at Work'.¹³



An absence of prosecutions

Why have there been no driving-for-work prosecutions? Experts including Professor Steven Tombs of The Open University agree that a primary obstacle is the immense complexity of investigating and preparing a case under the CMCHA.

The fleet sector has thousands of vehicles. For one company there may be dozens of different work sites and hundreds of different workers with different levels of responsibility. It's complex.

The question is, can the criminal legal system, which is built around crimes on the part of the individual, really be used to bring a large organisation to account?

The complexity of bringing a prosecution is made worse by a number of other factors.

A high bar of proof

According to John Webb, the key reason is that the bar for proving gross negligence on the part of management of health and safety is 'very high'. In addition the task of gathering sufficient evidence for a prosecution is onerous. Instead police use easier-to-prosecute offences.

The truth is that it would take many months, hundreds of thousands of pounds and vast manpower to amass enough evidence to prove gross corporate negligence in the case of, for instance, a company car driver suspected of causing a death while driving, while using a mobile phone.

Managerial responsibility

Despite months of investigation, the chances of making a direct link between a suspected offence and a senior director might be slim, so the chance of securing a conviction in court is low. The larger a company is, the less likely its senior management will have managerial responsibility for the incident. Therefore the more difficult it will be to find a gross breach at the senior management level.

By contrast, preparing a Causing Death by Careless or Dangerous Driving prosecution against the driver might take a few weeks - with more likelihood of conviction.

A lack of data

Weak reporting of work-related road incidents is another problematic area. Company car incidents are not reliably recorded separately by police, so the issue lacks visibility. Police have more recently been gathering statistics on the purpose of journey but even so, there is massive under-reporting of incidents involving people driving for work.

Grey fleets (the use of non-company cars by employees driving on business) have obscured the scale of the driving-at-work problem. There may be as many as 14 million grey fleet vehicles in use in Britain, compared to just one million company cars, which are more highly regulated. This suggests that the proportion of incidents taking place on journeys for work purposes may in fact be much higher than indicated by the official data.

Public sector grey fleet mileage

	Local Authorities	NHS Trusts	Civil Service	Further & Higher Education	Police & Fire Services	Total
Total Staff	1,367,200	1,894,959	399,760	482,604	288,576	4,433,100
Mileage	491,000,000	624,000,000	265,000,000	79,000,000	53,000,000	1,512,000,000

The BVRLA report ‘Getting to Grips with Grey Fleet’¹⁴ records that 1.5 billion miles a year are driven by grey vehicles in the public sector alone.

1.5 billion miles. And yet, if businesses are not incentivised to monitor performance of grey fleet drivers there is a significant and growing unquantified risk that this will lead to an increase in business driving incidents not being classified as such.

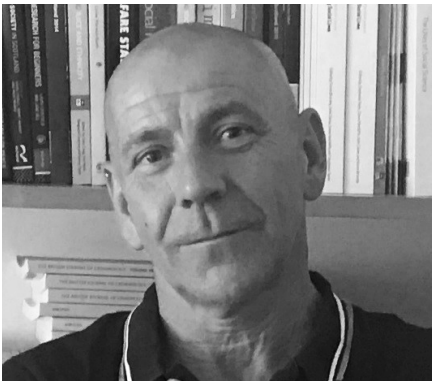
A low priority

Professor Steve Tombs (author ‘The UK’s Corporate Killing Law; Unfit For Purpose’)¹⁵ says that within the HSE, corporate manslaughter is “too far down the pecking order” and that it has no dedicated team.

“It has not done what it was designed to do; bring to account large companies. Where the law falls down is in its ability to identify fault in one central headquarters location or with the senior executive; it is difficult with a big company spread over many geographic locations. You can always pin it down to the individual man or woman driving. Showing that he or she did not do something is easy to prove. But showing ‘he or she was failing to operate in a way that was required by the company’ is much harder.”

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PROFESSOR STEVE TOMBS, OPEN UNIVERSITY



In addition, police could go further but their resources do not allow it. Ideally, if a driver who has an accident is on a business journey the police should contact the employer for more details.

The lack of prosecutions of large companies under the Act is in stark contrast to the Health and Safety at Work Act which in 2017 alone was used to bring several big firms to court over various health and safety incidents including some fatalities.

So has the lack of driving-for-work prosecutions created a feeling that there is minimal risk associated with non-compliance? The answer is probably yes.

Is this surprising? While the sample size for corporate manslaughter convictions is small, the fact is that no large companies have been prosecuted under the Act. And while there have been significant fines, none have been against a major company.

It seems clear that the authorities should have been taking a more robust approach under the CMCHA, if only to provide a serious deterrent to corporate bodies that choose to ignore it. The disappointing truth is that the lack of prosecutions means that many companies want to know what the bare minimum is they can do for health and safety.

Do we need a high profile prosecution?

Would a big prosecution, following a driving-for-work road death, restore the reputation of the Corporate Manslaughter and Corporate Homicide Act within the transport arena?

It would certainly send an important message. According to John Webb, "If you are a multinational organisation and you have directors getting prosecuted it's not what investors or the public want to hear. We've not had one prosecution in the driving for work field yet, despite opportunities. It's now down to a judgement call by the police and the Home Office to show how seriously they want to take it. The right decision would shake things up."

Neil Greig, Head of Policy & Research of IAM RoadSmart adds "If a company director forced someone to drive too many hours in the day, or employed someone who had been banned (from driving) and there was a crash resulting in a fatality, a prosecution would help send a message to businesses that more care needs to be taken in this area."

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NEIL GREIG,
IAM ROADSMART



The effect on training

How influential is the Act on company implementation of appropriate driver risk management programmes?

According to Neil Greig: “Everyone thought the Act would mean ‘I must get my drivers trained, I must check driving licences, put robust new driver risk management policies in place and so on.’ But generally, it hasn’t happened. There is a sense that there may not be any prosecutions in the transport field. It has led to a feeling by some that they will not get caught. It has not been good for safety. People beat the drum too loudly at first. Now, some firms are no longer listening.”

However Chris McCellan, CEO of fleet telematics firm RAM Tracking,¹⁶ believes the CMCHA has had an effect. He says: “We have countless businesses on board

who specifically monitor driver behaviour and speeding in order to reduce risks, potentially breaching the CMCHA. By monitoring this in real-time and through historical reporting, it allows these businesses to quickly identify and reduce any potential dangerous driving in their mobile workforces in the future.”

So has the Act had an effect on training? The answer of course is that some organisations have responded to it and others have not. The sad thing is that so many have not.

John Webb adds, “Driver training is not a punishment, it’s to make sure something doesn’t happen. It is a positive measure. Often, when I ask companies what training and policies they have in place, they will say ‘but nobody else has been prosecuted’. My reply is: “Do you want to be the first?”



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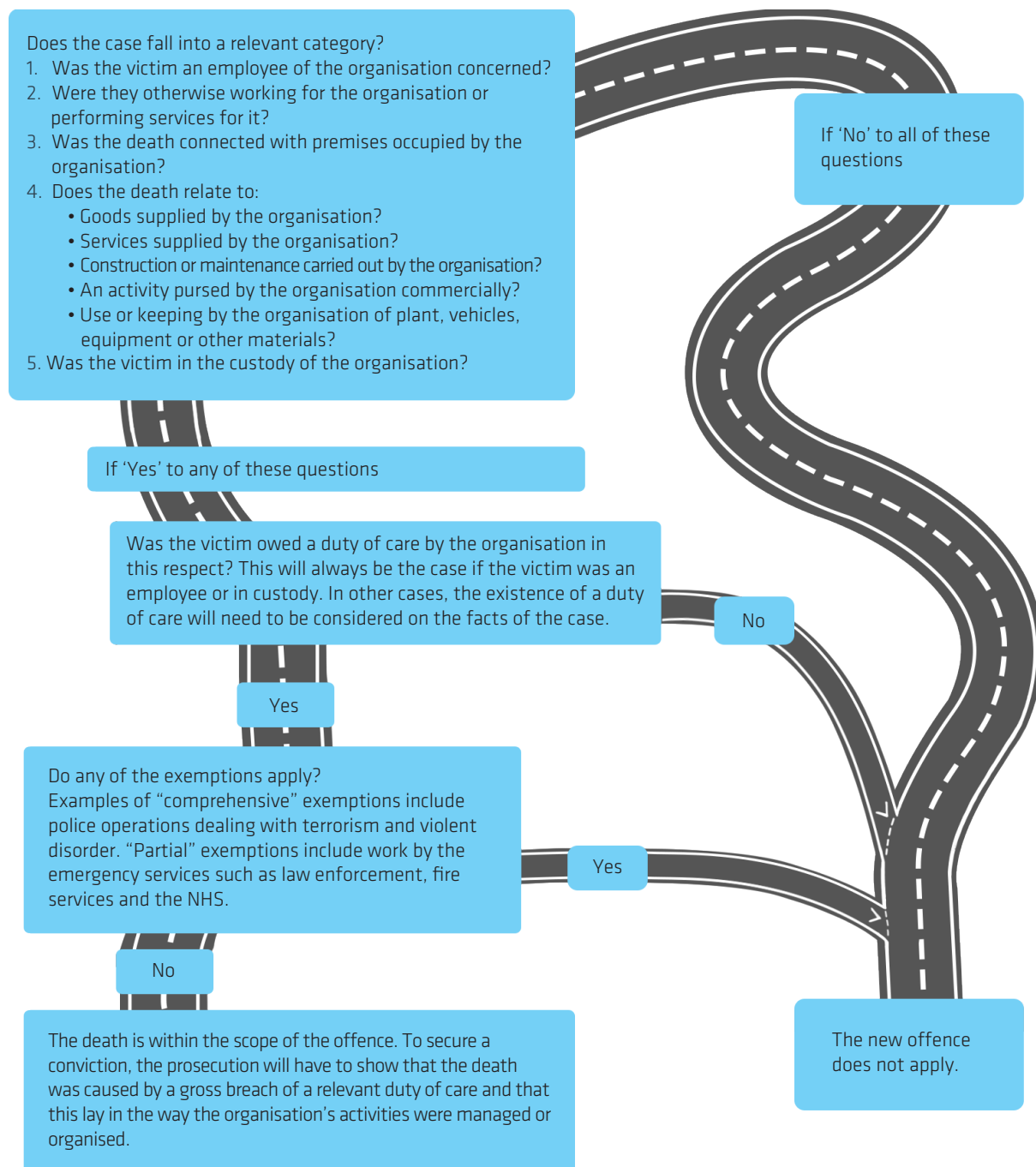
JOHN WEBB, LEX
AUTOLEASE

When does the CMCHA apply?

Was CMCHA legislation intended to see the driving seat treated as an extension of the workplace? Not primarily. The reality is that the CMCHA was not designed just for fleets. It was designed for the whole full range of workplace activities. Driving at work is just one such activity.

Working out whether a particular case is covered by the act is outlined by the Ministry of Justice in its paper “A Guide to the Corporate Manslaughter and Corporate Homicide Act 2007”¹⁷. A decision tree is shown below.

Decision tree: Does a case fall under the CMCHA?



Going forward

The increasing use of high-tech in the transport workplace, the introduction of which was speeded by the CMCHA, should make it easier for firms to manage compliance with regulations. Telematics is a good example of this.

However this should be balanced against rising levels of driving for work traffic. The IAM RoadSmart June 2018 release 'White Van Man Is Not So Crazy After All'¹⁸ notes that vans and light goods vehicles now travel 49 billion miles a year, 10 billion more than a decade ago. It is an increase of 22%, largely driven by the rise of internet shopping and the popularity of 'next day delivery' options.

According to the Department for Transport report 'Road Traffic Estimates: Great Britain 2017'¹⁹ van traffic grew 2.7% between 2016 – 2017, to reach a record high of 50.5 billion vehicles miles, the fastest growth in percentage terms of any motor vehicle type. This driving for work traffic is likely to increase further. Indeed it has been widely reported^{20 21} that over the next 20 years the online shopping boom could see traffic on Britain's motorways rise by 30% as a result of the boom in online shopping.

The right focus

Many experts believe that instead of focusing on the advantages or disadvantages of the CMCHA, industry should look more closely at:

- Training in the workplace
- Training of drivers
- Better resourcing of risk management in the workplace, and
- More rigorous inspection system on the part of HSE.

Rather than concern themselves with the Act, and how it can bring companies to account following a death, organisations should be concentrating on preventing deaths in the first place. According to Professor Tombs: "It is a question of how you devise safe systems at work. That means training of people at the workplace."

Experts agree there is a case for optimism, if not for how the CMCHA impinges on workplace driving, then for the future of compliance and safer roads.



Getting the message across

The corporate manslaughter laws may apply but as evidence of neglect is hard to prove, they are rarely used and so are ineffective. This is why there is a need for a business-to-business outreach programme to promote the business benefits of managing this aspect of operations. These benefits include reduced fuel consumption, reduced CO2 emissions, reduced vehicle wear and tear and enhanced driver wellbeing and brand protection to name a few. These are all tangible benefits that make the investment in driver training a positive action as opposed to a strategy that is simply designed to reduce the risk of prosecution.

One element of this can be seen in Highways England's website DrivingForBetterBusiness.com (DfBB), which is designed to demonstrate business benefits from managing drivers and vehicles more effectively.²² With no effective sanction in place, at least DfBB's model shows by good example what works well and how business efficiency can be improved through better driving.

The role of policy and training

Risk and compliance have, in recent years, become a full time job. The first step in managing driving risk, once serious management buy-in has been obtained, should be to define behavioural guidelines and expectations in a policy document.

Many firms initiate such policies but then reduce their efforts, citing 'time and money' reasons. They should be aware that the fact that they started shows that they knew there was a risk present. If there is a problem later on because policies have not been followed through, investigators will see that they knew there was a risk. It's almost an admission of guilt.

And writing the policy is not sufficient. It must be communicated, explained, monitored and enforced if it is to be effective.

In addition, with driving in particular, training will always be fundamental. The physical driving of a vehicle is a role with a high degree of employee autonomy. Training employees well and retaining evidence of this training will form part of any corporate manslaughter defence should an accident happen to an employee driving a vehicle.

Together these two things are likely to produce a solid and justifiable defence against any accusations of corporate manslaughter.

BIBLIOGRAPHY:

- 01 <https://www.healthandsafetyatwork.com/herald-disaster>
- 02 <https://www.legislation.gov.uk/ukpga/2007/19/contents>
- 03 <https://www.healthandsafetyatwork.com/companies-convicted-corporate-manslaughter-act>
- 04 <https://www.healthandsafetyatwork.com/cotswold-geotech-guilty>
- 05 <https://www.healthandsafetyatwork.com/corporate-manslaughter-mobile-sweepers>
- 06 <https://www.healthandsafetyatwork.com/directors-duties/martinisation-martin-gutaj-tomasz-procko-karol-symanski-cadogan-square>
- 07 <http://www.orsa.org.uk/facts-and-figures/crash-and-casualty-data/>
- 08 <http://www.hse.gov.uk/pubns/indg382.pdf>
- 09 https://www.bvrla.co.uk/sites/default/files/documents/research/bvrla_grey_fleet_final_0.pdf
- 10 <http://www.roadsafetyobservatory.com/KeyFacts/drivers/driving-for-work>
- 11 <http://www.hse.gov.uk/statistics/pdf/fatalinjuries.pdf>
- 12 <https://www.highwaysmagazine.co.uk/UK-lags-behind-as-EU-is-set-to-fail-on-road-fatality-targets/4204>
- 13 <http://www.hse.gov.uk/pubns/indg382.pdf>
- 14 https://www.bvrla.co.uk/sites/default/files/documents/research/bvrla_grey_fleet_final_0.pdf
- 15 <http://oro.open.ac.uk/50458/3/50458.pdf>
- 16 <https://www.ramtracking.com/>
- 17 <http://www.gkstill.com/Support/Links/Documents/2007-justice.pdf>
- 18 <https://www.iamroadsmart.com/media-and-policy/newsroom/news-details/2018/06/20/white-van-man-not-so-crazy-after-all-says-iam-roadsmart>
- 19 https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/722302/road-traffic-estimates-in-great-britain-2017.pdf
- 20 <https://www.msn.com/en-ie/cars/news/traffic-is-set-to-soar-by-almost-30-per-cent-in-the-next-20-years-as-online-shopping-boom-sparks-increase-in-the-number-of-vans-on-britains-roads/ar-AAzEjoD>
- 21 <https://www.thesun.co.uk/news/6706562/britains-traffic-set-to-soar-by-30-thanks-to-enormous-rise-in-vans-on-the-road-delivering-on-line-shopping/>
- 22 <https://www.drivingforbetterbusiness.com/>