# BACKCHAT

Issue 23

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# Wading RHA ashore

**Aged 18, I aspired to be the next Alan Whicker. A quintessentially English globetrotter jet-setting off to meet glamorous people. Quite why I chose to study law at Manchester Polytechnic cannot really be justified against this ambitious aspiration.**

But my admiration for all things Whicker grew when I realised that at the age I was modestly litigating at Birkenhead County Court, my hero was embedded with a frontline unit facing bitter warfare as he waded ashore onto Sicily at the heel of Mussolini's Italy. He stayed with Montgomery's desert army and was locked in a series of unique battles in World War II. After crossing the Straits of Messina, the order was to outflank Monte Casino and cut the supply lines to the German 10th and 14th armies, liberate Rome and then in the afternoon go to the cinema.

Alan Whicker understood that logistics is of critical importance to any successful endeavour whether it be war or managing the economy. Supply lines must be respected whether part of a broader Mediterranean military campaign that culminated in Venice for our Alan or endeavouring to ensure 350 daily lorry load of car parts are delivered from across Europe "just in time" to the Honda factory in Swindon. Honda currently receives 2m components per day thanks to free movement of goods. If we end up with a "no deal Brexit", to store the minimum nine days' worth of components required on site, they would need to erect the 3rd-largest building on Earth: 300,000 sq. m (source: FT 26.6.18).

That's equal to 42 football pitches and might need the logistical brilliance and grit of the brave men who, like Alan Whicker, took soggy first steps on Pachino beach and then slogged up to the Alps.

This got me thinking about difficult problems and the reality is sometimes the better you become at solving them the less you get paid. Once upon a time a locksmith realised the better he became at replacing locks, the less he got paid. In the early days he might wrestle for hours with a jammed lock but because his inexperience made his job look difficult his customers would pay without demur, often adding a tip. Eventually, he became highly expert and could fix the same problem in minutes. Now his customers resented paying his call out fee and never tipped at all.

The locksmith had not grasped the role played by justifying gobbledygook in the modern economy. For every hour of economically productive work ten must be spent in useless activity to maintain the illusion that what you are doing is more difficult and labour intensive than it really is. The thing about commercial transport is people only pay you to do things which are actually useful. You don't find operators randomly running trucks or buses where they are not needed. Some lawyers on the other hand, historically have had a bit of a reputation for generating their own gobbledygook. Moronic work being indistinguishable from productive work.

If this is how you feel about your lawyer, why not consider subscribing to RHA UP or RHA legal services where "busyness" is not to be confused with "solving the problem". Our lawyers get to the heart of the problem by imparting useful expertise straight away, because you are entitled to all the time in the world for a fixed monthly fee starting at just £10 per vehicle.

By the way, your current lawyers who probably don't offer this service will probably hate me for pointing out this phenomenon.

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# Franchising - a new landscape

James Backhouse, Director, looks at the key areas for consideration for the implementation of bus franchising since the implementation of the Bus Services Act 2017.

**The recent introduction of The Bus Services Act 2017 has opened the door for Mayoral Combined Authorities outside London to begin implementing bus franchising operations in their area.**

**The legislation also provides a procedure for Non-Combined Mayoral Authorities to implement franchised bus services, however this process is more onerous and requires the completion of more steps.** ▶


**▶ These procedures are introduced by amending The Transport Act 2000. Changes such as these follow the perceived success of a historically well-funded franchising framework in London.**

### What is a Franchised Bus Service?

Where there is a franchising scheme in place, the recognised franchising authority, the local government transport authority, will determine the details of all the services to be provided, and control when and where those services run. Effectively the scheme creates a monopoly on the local bus network and gives that monopoly to the local transport authority who become known as the franchising authority. The franchising authority will then arrange a competitive tendering process to select which operators actually operate the particular services for a defined time period. No one else is permitted to operate in competition with the franchisee.

The authority also has responsibility for ensuring and maintaining the standard of the services being provided. There are a number of potential models, but, for example, the operator may receive the remuneration from the transport authority agreed in the tender for providing the services and all the ticket revenue is retained by the franchising authority. This would often include a cashless ticket payment system as well, oyster and contactless payment in London for example.

According to Section 123A(4) of The Transport Act 2000, a 'franchising authority' can be any of the following entities or organisations:

- a mayoral combined authority;
- a county council in England for an area for which there are district councils;
- a county council in England for an area for which there is no district council;
- a non-metropolitan district council for an area for which there is no county council;
- an Integrated Transport Authority for an integrated transport area in England; or
- a combined authority which is not a mayoral combined authority.

That being said, where any authority, other than a mayoral combined authority, seeks to become a franchising authority; they may only do so if the Secretary of State permits it.

As set out above, where a franchised bus scheme has been approved and implemented, no other services can operate in the franchised area without the prior agreement of the franchising authority.

This creates significant 'buyer' control in the franchising authority, but with it comes significant financial risk.
It can also be difficult, once franchising is implemented, to return to a de-regulated model. Such concerns are one of the reasons that only mayoral combined authorities have automatic access to such schemes, and why other entities must adhere to a longer process.

### Mayoral Combined Authorities – How to Set Up a Franchising Scheme

One needs to look at the Transport Act 2000, in order to find the procedure that must be followed in order to implement a franchised bus services scheme into a local area.

This, of course, only applying to Mayoral Combined Authorities (MCA). Any alternative entity will have to follow the longer process outlined later.

The five key stages of establishing a franchised bus scheme, if you are a MCA, as outlined by The Transport Act 2000, is as follows:

1. *Prepare an Assessment of the Proposed Scheme*

The requirement to put together such an assessment lies in the provision contained in section 123B of the 2000 Act. According to subsection (2) of that provision, the assessment must predict the effects of the proposed scheme and the impact it will have on the local area, and; compare that proposed scheme with one or more alternative course of action.

The purpose of such a requirement is to ensure that the users of the services see the benefit of the alternative bus operation frameworks for their locality.

There are, naturally, a number of other things that the assessment must display before the Government will be comfortable permitting them to establish a franchising scheme. The proposed franchising authority must outline how they would operate the scheme and how they would fund and budget the infrastructure.

In putting together this report, the franchising authority may request information from incumbent or existing operators that they consider may further the analysis. Following this, they must also commission an auditor to review the final assessment, pursuant to section 123D of the 2000 Act.

The review by the auditor must state whether, in their opinion, the information relied upon in composing the assessment was of sufficient quality, the analysis of the information is of a sufficient quality and that the authority had due regard to any guidance issued.

2. *Consultation and Engagement*

Following the first step, the proposed franchising authority must publish a consultation document relating to the proposed franchising scheme. In accordance with section 123F of the 2000 Act, this consultation document must contain the following:

- a description of the area in which the proposed scheme relates;
- a description of any areas that lie within the initially identified area; ▶



- ▶ a description of the local services to be provided;
- the date on which the scheme is proposed to be made;
- the date(s) on which the franchising authority intends to enter into local service contracts;
- the period or periods it is proposed will expire between the making of local service contracts and the provision of local services under those contracts;
- a description of the proposed scheme;
- a statement explaining how the authorities will incorporate small-medium sized operators into the provision of local services; and
- the date by which the response to the consultation must be received.

As part of the consultation, the proposed authorities must consult all persons operating local services in the relevant area, as well as all other persons holding a PSV operator's licence or a community bus permit.

*3. Response to the Consultation*

Once the above-mentioned consultation has been published, the proposed franchising authority must publish a report explaining the authority's (authorities') response to the consultation, and their decision on whether to proceed with the franchising agreement.
Notice of the response to the consultation must be given to the Traffic Commissioner. Again, the authority or authorities must show consideration as to how small-medium sized providers of local services will be incorporated into the franchising scheme.

Also included in this step is the actual making and publication of the franchising scheme, as required by section 123H of the 2000 Act. The idea here is to ensure that there is actually a scheme at the ready to be implemented that improves local services and its users from the alternative de-regulated schemes. Clearly this analysis can be contentious!

*4. Transition*

Where the authority decides to proceed with the franchising agreement, the market will have to transition into this more regulated framework. In order to do so there are a number of measures outlined in the 2000 Act that will facilitate this.

Under section 123I of that legislation, incumbent local services may be postponed until full implementation can occur. However, before making such a decision they must consult persons operating local services who would be affected by the decision, as well as other persons who it would be appropriate to consult. There is also the concept of registered local service requirements enabling franchising authorities to record and keep track of who falls into the relevant area.

*5. Implementation*

Having implemented the franchising scheme, the relevant locality could see a number of potential benefits.

These include integrated multi-modal ticketing under one brand and one simple oyster-style ticketing system. There is also likely to be the ability to cap and regulate fares, to ensure that commuters and users are encouraged to use the bus service. Obviously, these capped fares have to work economically, and this will be a challenge.

Environmental policy can be furthered given that the franchising authority will be able to impose standards and regulations regarding the emissions of vehicles, with the intention of improving local air quality.

These controls however obviously have to be paid for and the scheme has to provide affordable transport.

**Alternative Entity – How to Set Up a Franchising Scheme**

With regards to franchising authorities which are not Mayoral Combined Authorities, they will eventually have to go through the above five-step process, however there is an added step for them. Such organisations must first enter into discussions with the Government, in order to show that they would be a competent and responsible franchising authority.

Consequential to such discussions, Regulations will be put in place to ensure that the approaching authority be properly monitored and regulated. Once these Regulations are imposed, then the Secretary of State must give consent for the proposed franchising authority to act as such, before they enter the first of the five-steps to franchised bus services.

Prior to giving consent, the Secretary of State may request or insist on amendments and additions to the Regulations. Only once consent has been received can an entity such as this enter into the process of establishing franchised bus services.

**The risks of franchising**

Much is written about the perceived benefits of franchising, but it is important to recognise that there are some significant potential negative outcomes. The model adopted may mitigate some of these, but they need considering.

The franchising authority is required to fund the franchise contract. Clearly the authority will factor this into their model of ticket revenue, however it would be very easy and appealing to model a fleet of new, franchising authority liveried and eco-friendly vehicles, then model the perceived growth in revenue these might attract!

Of necessity this is educated guesswork and, if wrong, the revenue could fail significantly leaving a black hole in the authority's budget. On the other hand, a lack of ambition in any proposed scheme is equally politically unattractive. For franchising to work politically the bus users and wider public will need to see the benefits, i.e. vehicles, route network and ticket price and integration.

*"As with the advantages the risks can be mitigated with the model of franchise adopted. No doubt enormous amounts of energy by economists will be put into this in the process of assessing the viability of franchising."*

Also, the provision of the vehicles, garage facilities and staff are grey areas. The operating companies only have a fixed term contract with no security for their business thereafter. If that term is five years they may be asked to bid for the contract including the provision by the operator of the specified fleet. Because there is no security after the five-year term, the operators have to write off the acquisition costs of the capital expenditure in the fleet within that time or there has to be a guaranteed sale price for the amount not written off over the term (and therefore paid for in the franchise contract) for the bespoke fleet to whoever takes over the contract at the end of the term.

Similarly, the TUPE and redundancy costs and the costs of any outstanding lease on premises that the losing operator has no use for, once they lose the contract.

The franchising authority has to make special provision for the small medium operators. It is difficult to see how this works over time. A medium privately-owned bus company providing services in a particular town which loses a tender for those services will most likely fail financially at that point and close down. They simply will not ▶

*"The potential for imposition of franchising in any locality presents significant threats to those businesses, particularly the small/medium sized operators."*

▶ be there at the next tender round in five years.

Even if the owners decide to bid the next time this will be a new start and, of necessity, be a very risk averse bid.

As with the advantages the risks can be mitigated with the model of franchise adopted. No doubt enormous amounts of energy by economists will be put into this in the process of assessing the viability of franchising.

In the end though, as has been seen with a number of rail franchises these models and the variables that feed into them are not reliable predictors of outcomes – with franchising the financial risks of failure for these rests with the local authority.

The danger is also political. A loud mayoral fanfare heralds a fabulous new bus network, five years down the line a failing fleet of new technology eco-buses and the increasing costs of operating them means reducing service with older failing vehicles. This will reflect straight back to the mayoral responsibility for starting down the franchising route.

## Conclusion

Franchising outside London is a major shift in the model for bus service provision. London was recognised as being significantly better public funded per passenger journey than the non-London services and this makes a significant difference to the potential outcomes.

There are currently numerous private businesses who provide these non-London local bus services from large PLCs to small family businesses. The potential for imposition of franchising in any locality presents significant threats to those businesses, particularly the small/medium sized operators.

The franchising authority needs to recognise that it is taking, from the outset, the substantial financial risks associated with the model it adopts, particularly in capital costs and ongoing running costs. If the franchising authority does this and properly commits to funding the bus service network that it believes will service the local area over the long term, even where revenue is weak at least in the early years, then the benefits referred to above are available.

This is likely to be a long-term project with the wider economic benefits of the integrated, modern, eco, franchised local bus operation being measured and acknowledged, rather than relying on tendering to provide the ticket sales to guarantee these costs are covered from the outset.

If the authority insists that, from the start, the costs must be mitigated by the tender process and that the ticket revenue must overall exceed this cost, without looking in the long term, then the obvious risk is that tendering becomes a price only issue. Rather like many subsidised local rural and school services now, the provision becomes underfunded, sporadic, unattractive to the user and provided by operators who bid low and use poorer, cheaper vehicles.

It should be recognised that franchising is only one of the tools already available to local transport authorities to influence bus provision. Quality partnerships (formal and informal) are another model where agreed partnership with local operators can achieve many of the perceived advantages of franchising but without the financial risk to local authorities and without the risk of loss of livelihood to the small or medium operators that comes with franchising.

This model also allows local authorities to step away from the partnership if they fall on austere times again and cannot fund their side of the partnership. ■

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# Mark Davies explores the technological advances to keep your drivers awake whilst at the wheel.

**Fatigue or drowsiness at the wheel is often cited as a contributing factor for a number of HGV or PCV fatal accidents and, sadly, diagnosis of the cause is often only identified once an accident has taken place and the individual prosecuted. However products are now being developed and marketed which claim to detect drowsiness.**

Whilst many of you may identify with the feeling of extreme exhaustion, possibly due to the birth of a new baby or re-occurring insomnia due to nocturnal toddlers, 'Sleep Apnoea' is in fact a medical condition characterised by pauses in breathing or instances of very low breathing during sleep. Each pause, caused by an apnoea, can last from at least ten seconds to minutes, and may occur five to thirty times or more a hour.

Diagnosis of sleep apnoea is often identified by others who witness the effects of fatigue on the body. Symptoms may be present for years without formal diagnosis, during which time the sufferer may become conditioned to daytime sleepiness and fatigue associated with significant levels of sleep disturbance. Effects of sleep apnoea include daytime fatigue, a slower reaction time and vision problems.

## Revolutionary approach

A joint endeavour between Ford and a Sao Paulo-based creative agency, GTB, has taken a large leap forward in brainwave monitoring technology. They have developed headwear of the classic 'trucker hat' fashion fitted with an array of sensors, an accelerometer and a gyroscope to monitor attentiveness and head movements.

The 'SafeCap' comes in honour of Ford celebrating 60 years of truck production in Brazil and looks to save lives by preventing drivers of Heavy Goods Vehicles (HGVs) from falling asleep or into a state of inattentiveness. It comes at a time when falling asleep at the wheel is real concern for truck drivers.

When you or I fall asleep at our desks, we merely receive a chiding from our employer. This is not the case for truck drivers. A sleepy truck driver runs the risk of causing injury, or worse, to both himself or other road users. Thus, the SafeCap is born.

So, how exactly does the headgear wake up its users? If the technology within the hat recognises the driver is dozing or falling asleep, a combination of sound, light and vibration is used to jolt the driver awake.

Hopefully, after this wake-up call, the driver will recognise that they are too tired to be behind the wheel and pull over to a halt.

There are five stages of sleep, making up the electroencephalogram, each giving off a different variant of brainwave. Each brainwave represents a different speed of oscillating electrical voltages within the brain, almost like a signature. Stage One emits Theta brainwaves – running at four to seven cycles per second – the presence of such brainwaves informs the SafeCap that the wearer is drifting into the first stage of sleep.

There is also a kinetic aspect to the SafeCap. The developers of the technology conducted a great deal of research into head movements associated with tiredness and compared such movements with the movements of driving e.g. checking one's mirrors. By fitting an urban software of all the movements, the SafeCap can distinguish between the two forms of head movement and identify when the wearer is drifting off. Having recognised that the wearer is falling asleep, the hat will begin to vibrate, flash and make noises to bring the truck driver back around.

Ford are obviously exceptionally proud of this piece of technology. President of Ford South America, Lyle Watters, described it as 'another example of our commitment to utilizing technology both in our vehicles and also in broader driving culture to make life easier and safer for our customers.' Such comments suggest that this is not the only technological step that Ford will be taking in the transport sector.

This piece of technology is generating a substantial amount of positive feedback. However, it will not be available widely until additional, more thorough testing has been carried out.

## Cough Syncope

Whilst this revolutionary approach to monitoring drowsiness marks a major move in the heavy goods and passenger carrying industry, cough syncope also remains another significant contributor towards accidents, and again, largely remains undiagnosed. ▶

*‘another example of our commitment to utilizing technology both in our vehicles and also in broader driving culture to make life easier and safer for our customers.’*

Syncope – the medical term for fainting – is defined as a transient loss of consciousness. This can occur following a series of coughs or even after a single cough. Syncope can be brief, sometimes only lasting for a few seconds and recovery is quick.

Understandably, cough syncope has important implications regarding fitness to drive and it is worth visiting the DVLA guidelines on the subject. For group 2 entitlements (LGV/PCV) guidelines suggest that if a single episode occurs, driving must cease for twelve months. If multiple attacks take place, driving must cease for five years. Applicants can re-apply at an earlier time but must be in a position to satisfy other conditions.

There is no hiding from the fact that, in law, falling asleep at the wheel of an HGV – or bus – is considered a serious criminal offence. Further to this, the evidence in such cases often excludes any other sensible explanation except that the driver has either fallen asleep at the wheel or has become that inattentive that he, or she, has failed to see the approaching hazard. Where a driver is found to have lost consciousness due to falling asleep, that driver will find themselves facing a charge of careless driving as a starting point. That being said, the circumstances of each case may differ, and this charge could well escalate to causing death by dangerous driving, an offence that carries with it a jail sentence of fourteen years.

Mark Davies, one of the regulatory lawyers at Backhouse Jones comments that all too often, fatal accidents driving either an HGV or PCV occur when the driver is suffering from undiagnosed sleep apnoea or cough syncope. Cases have and will continue to be successfully defended on the basis of the two medical conditions but the process in doing so can be very distressing for the individuals concerned. It is therefore of paramount importance that all operators, either owner managers or Transport Managers, continue to develop a sense of awareness regarding the health and well being of their drivers.

If you are a Transport Manager and hear through the grapevine that one of your drivers is often seen having a nap in the canteen, or, hearing jokes that “Billy could sleep on the edge of a razor”, you need to address the issue, either by having an informal chat or carrying out further investigations. It may make the difference between life and death. And as for the new “Safecap” product, watch this space. Drowsiness at the wheel could soon be a thing of the past.

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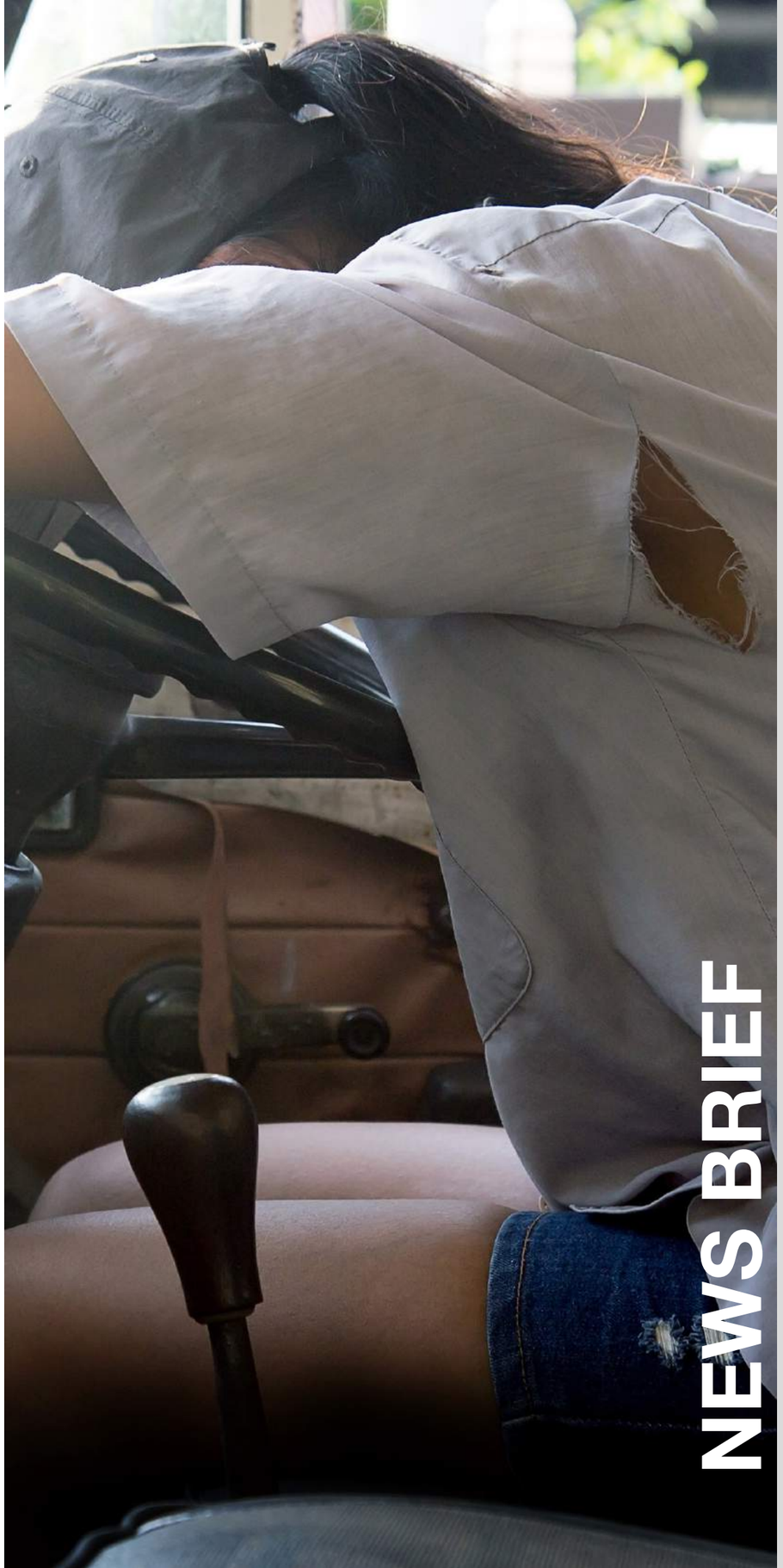




# Are you fit to drive?

**The ability for an individual to manoeuvre a vehicle depends entirely on their skills interacting with both that vehicle and the outside world. All senses come into play when driving, in particular through visual and auditory queues.**

Short and long-term memory come into play when driving through subcategorization into conscious and unconscious memory. Conscious memory refers to learnt information and autobiographical details, whereas unconscious memory relates to in particular, motor skills – notably used in driving.

The most important aspects to safe driving involve behaviour, strategic and tactical abilities, personality and the ability to adapt when faced with an illness or disability.

From this overview of some of the many components that enable us to drive safely, many illnesses or injuries could have severe consequences and therefore drivers need to be mindful of these and act when necessary.

Within the DVLA, the drivers’ medical section ensures that when there is a medical condition present, every aspect of driver licencing is investigated to identify any effect on the driver driving safely. “Assessing fitness to drive: a guide for medical professionals” is the publication which summarises the national medical guidelines on fitness to drive.

It is intended to assist doctors and other healthcare professionals in advising their patients. Any healthcare specialist can use this document to direct patients on notification of medical conditions and licencing outcomes. It can be found at www.gov.uk/government/publications/assessing-fitness-to-drive-a-guide-for-medical-professionals .

The Honorary Medical Advisory Panels encompass 6 different boards of expert knowledge on the following areas: cardiology, neurology, diabetes, vision, alcohol or substance misuse and dependence and psychiatry. The 6 panels meet twice a year to review the standards and update when necessary as well as advising the Secretary of State and the DVLA.





# The aftermath of a serious accident

Andrew Woolfall examines the potentially life-changing consequences for the parties involved in serious accidents and what to expect from a legal perspective.

**Any serious road traffic incident, whether it has fatal or non-fatal consequences, is profoundly life changing not only for the victims but also for the other drivers of the vehicles involved, whether they are in some way blameworthy or guiltless.**

The moment the incident occurs a process begins which will see the driver's actions come under close scrutiny as well as forensic examination of the vehicles involved. This may ultimately lead to a prosecution or even where there is no blame, an inquest and many months or possibly even years of sleepless nights.

Whenever a serious collision takes place, the police turn to their 'Road Death Investigation Manual' as the template for conducting their enquiries and ascertaining what really happened. The manual was first published in 2001 by the Association of Chief Police Officers (ACPO) and has been updated numerous times since. It specifies how the police should approach everything that they do. Whether there is a death or something such as life changing injuries, the manual tells them that they must treat any incident as either an actual or potential unlawful killing (at least until the contrary is proven substantially).

In the minutes and hours which immediately follow a collision, a driver, operator and other members of staff will often be kept in the dark whilst the police go about their work.

In fact, it may not just be the police who are involved in looking into matters; they may also recruit the help of other agencies such as the DVSA, the HSE or even bodies such as the Environment Agency or Trading Standards. All these agencies will still be working to the same basic principles, treating both fatal and non-fatal incidents with the same level of seriousness.

Only when it becomes abundantly clear that no blame can be attached to drivers or other bystanders will things be "scaled down". Whilst this might seem somewhat draconian, it should be remembered that the Police investigate many more fatal road traffic accidents each year than conventional homicides – it is no coincidence that the 'Road Death Investigation Manual' is very similar to the approach of the murder/manslaughter process. ▶

▶ When a serious incident occurs, the first people on the scene will usually be the ambulance service and the police. Thus begins the "initial response" phase. The first officers attending a collision will immediately conduct an assessment and send a situation report back to their control room. This report will lead to the co-ordination and deployment of supervisors and additional resources as required. Thereafter, the police will be concerned with making the scene safe to prevent further incidents and to preserve life.

Whilst preserving life is the priority, removing victims and providing first aid may disturb the scene and destroy evidence. The police may therefore start taking photographs or videoing the location straight away.

The police will look to preserve the scene as far as possible. This will include securing key evidence and identifying witnesses as well as isolating any suspects and/or vehicles. This invariably means that any driver who is thought to be responsible in some way will often be removed from their own vehicle and immediately placed into a police car or van. That driver may receive very little information about what is going on around them and may be prevented from talking to other persons, whether witnesses at the scene or indeed people back at the operating company. Every driver who is involved in a collision will be breathalysed.

Once the initial response is underway, the investigation stage will begin. The police team (leaving aside anybody that might be brought in from the DVSA or HSE) will include a collision investigator, vehicle examiner, and investigating officers to name but a few. The vehicle examiner will usually try and perform an initial review of the vehicles at the scene of the accident, before they are moved. This will often be supplemented by a more detailed examination in the following days once the vehicles have been recovered.

The investigating officers will conduct what is known as a "first account interview" with any driver who might be, in some way, considered responsible for the incident. This is often done at the scene in a police car. The idea is to get any suspect's initial account whilst it is fresh in their memory. However, it is often this interview which can subsequently cause problems for the driver if there is a later prosecution.

The driver is often giving an account whilst undergoing many mixed emotions from shock, disbelief, guilt and fear. The reality of the situation is usually sinking in and the driver may be in denial or want to be overly co-operative, to his own detriment.

Wherever possible, the driver should get access to legal advice before giving this first interview. Whilst this might appear impractical in the back of the police car, the police will normally allow the driver to speak to a solicitor.

*"Whenever there is a road traffic incident, it is often a question of fate as to the consequences that follow."*

If the driver has managed to advise the operator by this time, the employer should try and organise a solicitor for the driver. It may be that just telephone advice can be given but at least the driver can be comforted and know what is expected and advised against making his or her position worse.

It is rare that a driver is arrested at the scene and then taken to a police station. This only usually happens if there are real concerns that the driver may never be subsequently traced again, the police are mindful for the driver's or someone else's continued safety or the individual is wanted in connection with other enquiries.

After the scene of the incident has re-opened and everyone sent home or to hospital, the investigation then continues in earnest. There will invariably be follow up interviews with any drivers involved. These will take place in the days or weeks after the accident, once the police are satisfied that there has been enough time for the initial shock to settle down.

Where the police accept that a driver is not responsible but nevertheless there has been a fatality, the police will still want to interview in order to take a statement which can be used at any subsequent inquest. Here the police are not looking to prosecute the driver but simply use his/her evidence as a way of explaining, to the Coroner, what has happened in order that the Coroner

*"Where fatal incidents have occurred and there is a prosecution and conviction, fines tend to run in the tens and hundreds of thousands of pounds."*





can make a formal determination as to the cause of death. Whilst at this point the driver is not a suspect, many operators rightly take the view that the driver should still be represented given the potential serious consequences that might follow.

If the police come to the conclusion that someone is to blame for the serious accident, whether it is the driver and his individual actions or perhaps something to do with the vehicle or its load, the driver will be subject to further interviews, under caution, usually at the Police Station. This will be the part of the process of the police obtaining evidence to be used against the driver in connection with a prosecution. It goes without saying that the driver should consult legal advice before attending any of these interviews. It may be in the drivers best interest to be fully co-operative but then again, it may be best to rely upon the right of silence and say nothing!

If the police feel that there have been other external factors such as mechanical shortcomings or that the driver was tired due to the pressure of work, it is likely that the operator will also be visited. This may see a full fleet inspection take place by the DVSA/police or tachographs and driver's hours' records being seized for further forensic analysis. It is not uncommon for prosecutions to come against operators arising out of serious accidents – these are usually the most detailed and thorough of investigations.

The writer has dealt with many situations where this has happened including:

- accidents which have been caused by defective brakes leading to prosecutions being brought against operators and their engineers,

- accidents caused by driver fatigue which has seen prosecutions against company directors as a result of the pressure of work and falsification of tachographs and

- prosecutions against transport managers who have sanctioned the use of vehicles that they know are in an unsafe condition.

It is in exactly this situation that proper record keeping, by operators, becomes vital. Defect reports and PMI sheets properly and accurately completed may just be the difference between an operator and its staff being exonerated or facing jail. Accurate tachograph charts and work registers may avoid serious criminal sanctions or fines. Operators who have been tempted to "bend the law" are invariably found out in this situation.

Once the investigation has been concluded a decision will be made as to what further action should be taken. For the driver, this could include being prosecuted for careless or dangerous driving (or causing death by such driving) which could lead to a conviction and a custodial penalty as well as disqualification from driving. If there is a conviction, the driver is also likely to be called before the Traffic Commissioner for a driver conduct hearing.

If an operator has found to be at fault there may well be a prosecution against that business along with a public inquiry. The public inquiry could lead to the revocation of the operator's licence. Where fatal incidents have occurred and there is a prosecution and conviction, fines tend to run in the tens and hundreds of thousands of pounds. If a company survives a public inquiry, it may still not survive having to pay a large fine plus costs.

Furthermore, there will be civil claims for compensation and the insurance companies will look very closely into the circumstances behind the incident. If there has been fault on the part of the operator (as opposed to the driver), many insurance companies will look to "void" the insurance policy and try and reclaim any compensation that has to be paid from the operator. ▶

▶ With the potential consequences arising from a serious accident being so severe, it is not surprising that the whole process can take a very long time to complete.

It may take the police nine or 12 months to make a decision as to whether a driver should be prosecuted and if so, what charges he or she should face. If the driver decides to plead “not guilty” and contests the matter at court, it might a further year before the criminal process is concluded. Civil claims for compensation can last for many years.

Having seized any vehicle involved in the incident, the police may not release it for many weeks until the investigation has been completed. If there is to be a prosecution it may be further retained as evidence. This means that an operator can be without a vehicle for many weeks, months or even years.

Whenever there is a road traffic incident, it is often a question of fate as to the consequences that follow. It may be a ‘near miss’ where no collision takes place or it may be a serious or fatal matter where one or more lives are lost. The difference may be down to fractions of a second or millimetres of distance – however it will invariably be out of the driver’s or operator’s control.

The consequences can then last for a very long time, often with survivors having to live with the outcome for the rest of their lives. Yet again it shows the benefit of having compliance and documents to support compliance. Serious issues will not simply go away.

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# NEWS BRIEF

backhousejones.co.uk



# Deliveries that will be with you in a blink of an eye!

**In the wake of many empty high street shop fronts, the Office for National Statistics has recently announced that a staggering £1 in every £5 spent by UK customers is done so online. Most of this money is being spent on Amazon – the largest online retailer in the world.**

In 2017, Amazon paid £4.5 million in tax for UK sales of £1.9 billion and had an operating profit of £79 million. This incredibly low figure has prompted Chancellor Philip Hammond to consider an 'Amazon tax' to increase fairness between them and the high street retailers who are currently losing out.

Why are customers preferring to shop on-line? Convenience, speed and possibly price are the main reasons many consumers would cite. Take Amazon for example. It gives customers the ability to shop online and receive orders not only within 24 hours of purchase but within the same day. Amazon charges £79 for the Amazon Prime service which entitles customers to unlimited one day and same day delivery for free. "How is this even possible?" I hear you say! Well, Harry Wallop from The Daily Mail tracked the entire process of the same day delivery placed by Anne Doughty in West Yorkshire and we have tried to give you a little flavour of how it's done.

MAN1 is one in 17 of Amazon's warehouses in the UK and is located in Manchester, sixty-five miles away from Anne's home. This warehouse cost Amazon £919,370 in their business rates bill in 2017 and offered over 1,000 jobs to people in the local community, as pointed out by the General Manager.

Being near the M56 and M6, it aids the company in their rapid delivery service.

Once, Anne has clicked 'buy it now' the system works out the location of the customer, which warehouse has the item in stock and the fastest course between them.

At the warehouse, items are located randomly in specific storage units with cubby holes known as 'pods'. A robot collects the pod containing the order by using a hydraulic lift to bring it to 'picker' staff. These robots cost more than £10,000 each and outnumber staff by 800. They move like pieces on a chess board.

The order is then removed from the pod and scanned by the picker and placed in a tote to be packaged.

A picker will pick items at roughly 3 per minute whilst wearing safety gloves to avoid injury from sharp objects.

The tote containing the order reaches the packaging area via a conveyor belt where it is removed and the barcode is scanned. The screen at the packaging station communicates the correct cardboard box or envelope that is required.

The label with a second barcode is printed, attached to the parcel and scanned before being placed on a second conveyor belt. Further on, a label with the name and address of the customer is attached and scanned before heading down a chute into one of 90 different large cardboard boxes known as a 'gaylord', named after their creator the Gaylord Container Corporation. ▶

▶ Each gaylord is intended to reach a different delivery station in the UK.

The parcel leaves MAN1 in the gaylord via an HGV. Anne's delivery arrives at the delivery station (DLS2) in Leeds, one of 38 in the UK, where the gaylord is removed from the lorry.

At this station the parcels are sorted into delivery districts for the drivers. Same day deliveries are put into a yellow cage to signify that they are being delivered that evening. From 2012 Amazon began their same-day and Sunday services and therefore no longer used firms such as Yodel or Hermes for sorting and delivery but took on the action themselves.

Delivery drivers from various couriers including Flex (a bit like Uber), a new company allowing anyone with their own car to sign up via smartphone and earn from £12 to £15 per hour, arrive outside the station to pick up evening deliveries.

These drivers scan a quick response code in the warehouse and are given roughly 25-30 parcels in a cage.

Amazon calculates the routes, designed to take 9 hours, for the different couriers once they have logged in on their Amazon app. Amazon gives bonuses to the companies which are passed onto the drivers, not for the amount of parcels they can deliver in their time slot, but customer service and awareness of their vehicle during delivery.

Anne receives her parcel less than 9 hours after she bought it online. Anne explains that driving to her local retailer would take her 20 minutes for a camera almost double the price of what Amazon are offering.

With the ease, speed and potential savings made on this product, it's hardly surprising that online shopping is on the increase.





# AdVANtage

**After quickly surfing the internet it is apparent that average mileage for vans, like cars, varies hugely but most statistics suggest that average annual mileage is in the region of 25-35,000 miles.**

There will however be many vans, for instance courier service vans, which do 3 or 4 times this mileage with numerous different drivers operating up to 24 hours a day. And then of course there are the one-man-bands doing local work where the mileage is more in line with the average car doing the equivalent of 10-12,000 miles a year.

Why is this relevant? Vans, like most other motor vehicles, are obliged to have an annual MOT inspection, and that is - one - a 'one size fits all' check on your vehicle to ensure that on one day of the year it meets the minimum safety standards required. In reality, for most van operators of this type, one check is not going to be enough to ensure the vehicle remains in a roadworthy condition throughout the year. In fact, even on the average mileage, it is highly likely that many vans will experience tyre problems, braking component issues and other general wear and tear throughout the year.

Most operators of vans wait until something goes wrong before repairing it, often relying on their drivers eventually telling them that there is a problem - and this may be over several weeks before deciding to send the van in to have it looked at. Is this an effective and cost-effective way of managing the fleet?

The problem with the wait-until-it-goes-wrong system of maintenance management is that it will go wrong at inconvenient times, and furthermore, by the time it has gone wrong there could be a number of consequential issues which may have been avoided, for example having to replace brake discs which have become damaged because the brake pads have worn to the rivets.

**Proactive maintenance regime**

A proactive maintenance regime of regular inspections in line with the annual mileage of the van together with a robust driver defect reporting system which puts a structure on the driver's legal obligation to drive a fit and serviceable vehicle means that faults and defects are identified and repaired before causing significant consequential damage. In addition, those repairs are carried out when expected and within the scheduled workings for the van meaning far less down time for the vehicle.

Ultimately careful and properly planned maintenance should give you the adVANtage over the opposition; knowing your fleet is in good working order when you need it and enabling you to have confidence that serious incidents or accidents are unlikely to occur due to vehicle condition.

**Avoiding the finger pointing**

The added benefits of properly managed driver maintenance will hopefully make your drivers more aware of the condition of their vehicles. It is far easier to hold people to account when failures do occur, for example tyres should not become bald and if they do the driver is at fault; braking systems should not wear out and if they do the garage is at fault. Being able to hold both employees and/or contractors to account should further help improve vehicle condition as those individual people or companies do not wish to have the finger pointed and be subject disciplinary action or some other contractual claim.

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# Q&A

## Operator's Question Time

Scott Bell, provides a practical and pragmatic solution to some of our readers important regulatory issues

***Q | I have a mechanic who occasionally drives for me when I'm short of a driver. He is going to drive for me this afternoon and I need to know what he should record on his chart.***

A | The tachograph chart has to record all activity from the end of the previous daily or weekly rest until the start of the next daily or weekly rest. Therefore, the mechanic needs to make a manual entry for their work at the point when they arrive at the depot to the point where they take over the vehicle including recording work, break or period of availability.

Once the mechanic takes over the vehicle they must insert their chart or digi-card and record any work already completed on that day, plus their walk around check as 'other work' and thereafter use the chart normally until they leave the vehicle. If they go on to conduct further work away from the vehicle the mechanic must make manual entries to record this. They must complete the daily rest within 24 hours from starting work (not from when they took over the vehicle but when they arrived at work). They will also incur the obligation to commence a weekly rest before midnight on Sunday of the week they drove.

***Q | I am a Transport Manager and the company I work for is growing in size. I have recently been told by my employer that a new company structure is being introduced and that the name on the Operator's Licence will change. Should I be concerned?***

A | The Operator's Licence is not transferrable between companies. The first thing you need to establish is whether it is a simple change of name where the company number remains the same. If this is the case, all you need to do is to notify the Traffic Commissioner of the name change. Normally however it is the company number which changes, and, in this case, you have two options;

The new company must apply for a new operator licence before the change takes place.

The second is that if the original company holding the licence is to become a 'holding company' (thereby it is the new company which will employ the drivers and operate vehicles), the holding company can be given permission by the Traffic Commissioner allowing the new company to use the holding company's licence.

Sufficient time must be allowed in the first option for an application to be processed before the change takes place. Failing to address a change properly will lead to serious potential consequences including the possibility of the impounding of vehicles and loss of repute. It may also have implications for your insurance and the vehicles are not correctly licenced.

***Q | "To audit or not to audit, that is the question?" Should you have some form of independent audit of your systems?***

A | The common-sense answer is of course, yes, you should. Complacency is as prevalent in every business as it is in life. You will assume that everything is okay and may well become out of date with the latest ideas and concepts. The benefit of an audit or 'review' as it is now commonly known, is that it provides a 'friendly' test against the latest thinking and good practice - and remember - it is always sensible to have an audit rather than wait for the DVSA to come and give you one of theirs! The DVSA will visit often after an unsatisfactory, undesirable meeting with the Traffic Commissioner, commonly known as a Public Inquiry.

However, if you have an audit and fail to address the recommendations within the report, the audit will become a positive hindrance. This is because if the DVSA are aware that you have had an independent audit (and they often find out because you inadvertently tell them, regarding your actions as a positive thing), the Traffic Commissioner will ask for a copy.

Once the Traffic Commissioner has seen sight of the report, they will compare what the DVSA has highlighted as issues /recommendations with your actions. If you have not addressed the key points in the report the Traffic Commissioner will be suspicious of any reassurances you give them at the time of the hearing. Broadly, you are on notice that once you have had an audit, you must respond to the recommendations and actions within it with immediate effect.

***Q | I do not get my signed Preventative Maintenance Inspection (PMI) sheet back with my vehicle. I usually receive it a few days later or, in the worst-case scenario it comes with an invoice at the end of the month. Does this matter?***

A | The short answer is yes! You should consider the PMI sheet as a declaration that the vehicle is fit for the road, assuming of course it is signed to that effect. Without the signed PMI sheet your vehicle is, in essence, not fit for the road as you do not have any evidence to suggest that it is.

If your vehicle goes on the road after inspection (without the signed PMI sheet) and you are unfortunate to have an incident with the vehicle and it was subsequently discovered that there was a defect on the vehicle that contributed to the accident, you will to struggle to get an engineer to sign to say it was ever fit for the road. A court would therefore assume that the vehicle was not fit for the road and that you should have known this because you did not have the relevant documentation to suggest otherwise.

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# BACK behind the mechanics

**In April, the DVSA launched a revised and updated edition of its "Guide to Maintaining Roadworthiness" (the "Guide").**

Whether you are new to the industry or an established and experienced operator, transport manager or maintenance provider, the Guide is a 'must read', as it contains practical up-to-date advice for anyone whose responsibilities include ensuring vehicle roadworthiness and it sets out the standards and expectations against which you will be assessed during any DVSA interventions.

Road safety is one of the main objectives of the operator licensing regime. Ensuring that your systems for maintaining vehicle roadworthiness are effective is therefore key. Yet, despite the existence of the Guide (and its predecessors), vehicle maintenance issues continue to be the most common reason for Public Inquiry and we are regularly instructed to assist operators and transport managers in connection with DVSA maintenance investigations and maintenance-related Public Inquiries.

**So where are operators and transport managers falling short of their obligations?**

*1. Stretched Safety Inspection Intervals*

When you apply for your Operator's Licence, you provide a statement of intent, which confirms the intervals at which your vehicles (and trailers) will be maintained (for example, six weekly). It is for you to choose the appropriate interval (taking into account factors such as the age of the vehicle or trailer, the conditions under which it will be operated and the expected annual mileage). The updated Guide replaces the graph (of mileage vs inspection frequency) that was used to calculate safety inspection intervals with a table, which contains examples of time-based inspection frequencies for various operating conditions using case studies. This is intended to encourage operators to take a proactive, evidence-based approach to the management of safety inspection intervals.

Whichever safety inspection interval is chosen, these intervals are maximum intervals and they must not be exceeded. Further, the safety inspection interval chosen should not be extended without prior notification in writing to the Office of the Traffic Commissioner at Leeds. Historically, DVSA Examiners and the Traffic Commissioners measured safety inspection intervals in days (i.e. a six-weekly safety inspection interval equated to 42 days); however, the Guide allows some flexibility (as the previous 2014 edition did) by recommending that safety inspections should be completed within the relevant International Organisation for Standardisation ("ISO") week (i.e. Monday to Sunday).

For example, if a six-weekly safety inspection frequency is used and the previous safety inspection was completed on the Monday of week 10 of the ISO calendar, the next safety inspection must be completed on or before the Sunday of week 16 of the ISO calendar; this scenario provides for a maximum permitted safety inspection interval of 48 days. This should not, however, be misinterpreted as a six weekly safety inspection interval equating to a 48-day safety inspection interval because, if the previous safety inspection was completed on the Sunday of week 10 of the ISO calendar, the next safety inspection must still be completed on or before the Sunday of week 16 of the ISO calendar; this scenario provides for a maximum permitted safety inspection interval of only 42 days or less. ▶





▶ In our experience, despite the flexibility provided by the ISO week, DVSA Examiners still regularly identify stretched safety inspection intervals when conducting maintenance investigations and stretched safety inspection intervals feature in almost all maintenance-related Public Inquiries. These stretched intervals may arise where the operator has simply failed to maintain their vehicles or trailers at the stated frequencies; however, they are more commonly a result of: (i) missing safety inspection records (see below); (ii) a failure to update the forward planner to recalculate future safety inspection dates where a safety inspection has been carried out early; and/or (iii) a failure to use appropriate 'off road' notices to record any period of time where a vehicle or trailer is out of service.

*2. Safety Inspection Records – Missing, Incomplete, Out of Date*

A safety inspection record must be completed for every safety inspection of the vehicle or trailer and records of all safety inspections and repair work must be retained for at least 15 months.

Missing safety inspection records inevitably cause issues for operators, as (in the absence of any other records) DVSA Examiners are unable to establish if and when safety inspections have been carried out and whether safety inspections have in fact been carried out at the stated intervals (see above).

Incomplete safety inspection records are also a common shortcoming frequently identified during DVSA maintenance investigations and are a consistent feature at maintenance related Public Inquiries. The Guide provides examples of suitable safety inspection records for both goods and passenger vehicles and confirms that the safety inspection record must include: (i) name of owner/operator; (ii) date of inspection; (iii) vehicle identity; (iv) odometer reading (if appropriate); (v) a list of all the inspection manual items to be inspected (your vehicles and trailers should be inspected against the latest inspection manual); (vi) an indication of the condition of each item inspected; (vii) details of any defects found; (viii) name of inspector; (ix) details of any remedial/rectification or repair work and by whom it was done; and (x) a signed statement that any defects have been repaired satisfactorily and the vehicle is now in a safe and roadworthy condition.

Even where safety inspections are outsourced to an external maintenance provider, you as the operator or transport manager, remain responsible for ensuring that your vehicles and trailers are roadworthy. You must therefore continuously review and monitor the quality of your external maintenance provider's work (including the quality of the facilities and staff responsible for maintaining your vehicles/trailers) and their completion of the relevant safety inspection records to ensure that: (i) you are provided with a completed safety inspection record in relation to every safety inspection of your vehicles and trailers; (ii) all sections of the safety inspection record are completed correctly; and (iii) the safety inspection record used is the latest version – 'out of date' safety inspection records continue to be presented to DVSA Examiners and Traffic Commissioners at Public Inquiries!

*3. Inadequate Brake Testing*

Every safety inspection must assess the braking performance of the vehicle or trailer. The Guide re-emphasises that a dynamic assessment of brake performance (using a roller brake tester or decelerometer) should be carried out at each safety inspection.





*"A driver must undertake a daily walk around check of their vehicle (and trailer) before they commence driving each day."*

A printout, which records the results of the brake efficiency test, should be obtained and attached to the relevant safety inspection record. If, however, the brake test equipment cannot produce a printout, brake efficiency results should be recorded on the safety inspection record.

A common feature of maintenance-related Public Inquiries is a lack of any dynamic assessment of brake performance and/or a failure by both in-house fitters and external maintenance providers to properly document brake efficiency results. For example, the 'brake performance' section of the safety inspection record is often left blank and, in the absence of a separate printout, it is not possible for a DVSA Examiner to establish whether any assessment of brake performance has in fact been undertaken at the safety inspection. When analysing completed safety inspection records, operators and transport managers must therefore ensure that the 'brake performance' section is completed correctly and, where appropriate, a separate printout is attached to the safety inspection record.

*4. Low Initial Annual Test Pass Rate*

A common issue at maintenance-related Public Inquiries is an initial annual test pass rate that is below the national average. The Guide confirms that operators must be aware of, and monitor, their annual test pass rate (which can be done via your Operator Compliance Risk Score data), as it is expected that vehicles and trailers should meet minimum legal requirements at all times – your vehicles and trailers should therefore have thorough and effective pre-MoT inspections (which should include a roller brake test and headlamp aim test) to ensure insofar as is possible that they will pass upon initial presentation.

*5. Drivers' Daily Defect Reporting – Inadequate, Ineffective*

Drivers' daily defect reporting is a critical element of any effective vehicle roadworthiness system; however, in our experience, drivers' daily defect reporting is frequently described by DVSA Examiners during maintenance investigations (where the outcome is 'unsatisfactory' and it normally follows that the operator will be called to a Public Inquiry) to be inadequate and/or ineffective where, for example:

i) details of rectification work undertaken are not recorded - DVSA Examiners are unable to establish if and when rectification work has been carried out;

ii) there are a large number of 'nil' defects and a lack of 'minor' defects (such as bulbs, mirrors etc.) identified – this would tend to indicate that drivers are identifying and rectifying any such defects but are not reporting them in writing; and/or ▶

▶ iii) there has been an ‘S’ marked prohibition issued.

An ‘S’ marked prohibition is, quite rightly, the one that is most feared by operators and transport managers. The ‘S’ marking indicates that, in the opinion of the DVSA Examiner issuing the prohibition, there has been a significant failure in the operator’s maintenance systems. This failure might arise where your in-house fitter or external maintenance provider misses a defect during the vehicle’s or trailer’s safety inspection, but, far more commonly, arises where a driver fails to spot an obvious defect during their daily walk around check of the vehicle or trailer before they commence driving. The Guide confirms that DVSA still finds that one-third to one-half of all prohibitable defects it identifies at the roadside could have been prevented by the driver conducting an effective “walkaround” check.

Either way, the imposition of the ‘S’ marked prohibition will result in the DVSA making an unannounced visit to the operator’s premises to conduct an in-depth maintenance investigation - the outcome of that maintenance investigation will always be ‘unsatisfactory’ (by virtue of the fact that there has been an ‘S’ marked prohibition) and will, in the majority of cases, lead to Public Inquiry.

As the daily walk around check is a vital part of your vehicle maintenance system, you must continuously monitor the quality of your drivers’ daily walk around checks and defect reporting to ensure that checks are being performed, and documented, correctly.

This can be done using gate checks (i.e. by stopping drivers on a random basis before they leave the operating centre, undertaking a formal roadworthiness inspection of the vehicle and trailer yourself and comparing your findings to those of the driver); however, this can also be done using the safety inspection record (i.e. by cross referencing any defects that should have been identified during the drivers’ daily walk round checks with completed defect reports).

### Are Your Systems Effective?

The Guide recognises that there is no ‘one size fits all’ approach to vehicle (and trailer) maintenance but operators are expected to comply with the undertakings and conditions recorded on their Operator’s Licence. Regardless of the system used, the ultimate test is whether it is effective in ensuring that your vehicles (and trailers) are in a fit and roadworthy condition.

Continuous reviewing and monitoring of the quality of the systems in place is essential to ensure that they are sufficiently comprehensive to do the job. It is worth remembering that it is not just complacent, careless and unscrupulous operators that find themselves on the wrong side of the law -even diligent, responsible and well managed businesses can occasionally trip up (especially where vehicle maintenance is concerned).

It makes commercial sense to ensure that you are fully compliant, as the penalties for, and consequences of, non-compliance can range from the inconvenient to the very serious (i.e. revocation of your Operator’s Licence) and, sometimes, fatal! Operators are therefore actively encouraged to have regular independent reviews of their compliance systems and, if you have not done since the introduction of the updated Guide, now is probably as good a time as any to consider one – don’t leave it to chance!

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# FACTS & FIGURES

## The Numbers Behind Operator Licensing

### HGV & PSV Operators

**NUMBER OF LICENCES HELD**
HGV **72,547**
PSV **8,756**

**NUMBER OF VEHICLES**
HGV **378,476**
PSV **95,634**

**NUMBER OF APPLICATIONS**
HGV **11,714**
PSV **1,231**

**PUBLIC INQUIRIES (NON COMPLIANCE)**
HGV **810**
PSV **181**

**LICENCES REVOKED**
HGV **261**
PSV **86**

**LICENCES SUSPENDED**
HGV **104**
PSV **11**

**OPERATOR DISQUALIFICATIONS**
HGV **82**
PSV **28**

**TRANSPORT MANAGER DISQUALIFICATIONS**
HGV **105**
PSV **39**

### DRIVERS

| VOCATIONAL LICENCE APPLICATION REFUSED | VOCATIONAL LICENCES REVOKED | VOCATIONAL LICENCES SUSPENDED | DRIVERS CALLED TO CONDUCT HEARING | CASES CLOSED |
|---|---|---|---|---|
| 2,798 | 262 | 838 | 3,290 | 21,222 |

# Who's in the BACK?

John Heaton, Solicitor, discusses some of the issues surrounding clandestine entrants and the current guidance in respect of the same.

**The media at present is full of the immigration stories just as locations in Europe from Kos to Calais are full of would be migrants. By the time lorry drivers and our haulage industry have contact with them, the law calls the same people "would be clandestine entrants".**

But lorry drivers also have rights. They have the right to do their job for their hauliers and on behalf of the customers without interference and without physical threats.

Clandestine entrants, of course, have rights as well. Many will be victims of persecution though some will be economic migrants only. Some of them will be criminals. All are desperate to gain admittance to the UK.

The classic difficulty that lorry drivers in the UK find is that having arrived in the UK and driving on UK roads they then hear something from deep inside their trailer which suggests that they have clandestine entrants on board. ▶

# What to do?

**▶ Should the driver deliver his vehicle to the Police or UK Border Agency, voice his suspicions and let the authorities "open the box"?**

The driver's involvement in bringing the legal immigrants then comes under scrutiny.

If he delivers them up to the authorities, that might be strong evidence that he is not knowingly part of an illegal scheme.

The driver and haulier will face heavy civil penalties unless they can prove they have the statutory defence. They will have to prove the defence against Civil Penalties under s34 of the Immigration and Asylum Act 1999 in order to stand a chance of avoiding the penalty. If they cannot, they face penalties of up to £2,000.00 each per stowaway.

The stakes are high. The Civil Penalties may be the least of the driver's worries. He will be concerned that having brought clandestine entrants into the UK that the Police/UK Border Force think he is criminally complicit with them and perhaps being paid by them. It is perhaps understandable that a driver faced with the suspicion he has clandestine entrants on board is reluctant to go to the authorities. UK Border Force have a tough job and are under specially close scrutiny at present. The driver will fear that they are suspicious of him and at the very least unsympathetic to the dilemma he has found himself in.

The driver is likely to fear personal arrest and criminal charges of being complicit in bringing in clandestines. With these worries and concerns, he may feel tempted to find a quiet location at which to open the doors and let his passengers walk away on the basis this is the option least likely to cause him trouble.

The Code of Practice under the Act ("the Code") addresses a situation where the driver forms a suspicion that he has clandestines on board prior to embarkation to the UK. Unfortunately, the Code is less explicit when it comes to situations where the driver suspects he has clandestines aboard and has already arrived in the UK. For guidance in this regard, the driver will have to turn to the government website.

Whilst there is guidance on the government website, a large part of this guidance is to remain in the cab of the vehicle and alert the authorities, an option already identified as being unattractive to the driver in this situation.

The driver and the haulier have to prove 3 things if they are to avoid a civil penalty under The Immigration and Asylum Act 1999 ("the Act"). This criteria is outlined in Law at Section 34(3) of the Act, however the Code sets out good practice which assists in proving the defence.

*"The driver has to balance a moral imperative to go to the authorities against a moral and legal duty not to imprison his passengers once he knows they are aboard and wish to get out."*

1. *No knowledge, and no reasonable grounds to suspect clandestines are on board. The haulier will generally not have been present personally when the vehicle is loaded or on the journey and will have no problems proving this element. The driver will often have been present when the vehicle is loaded and will of course have been driving with the stowaways on board prior to them being found. Often the driver can do no more than deny actual knowledge and point to an absence of physical clues of a break in which might have put him on notice. He could also point to the system of checks and his operation of the systems (see below).*

2. *An effective system to prevent the carriage of clandestines. Both driver and haulier will have to demonstrate the operation of a proper system for ensuring the loading and security of the vehicle without stowaways on board. They will have to demonstrate an effective system of locks and seals and inspection procedures for the vehicle prior to sealing up and regular interim checks by the driver on route. Of course, each time he stops he potentially gives the Clandestine entrants the opportunity to sneak on board. All of this must be properly documented and ideally (according to the the Code) have the fact that he is carrying out the checks witnessed by a third party. The haulier must train the driver and demonstrate when this was done and how it was kept up to date. The driver's knowledge should be audited.*

3. *The driver must operate the system properly and be able to demonstrate he did so. The driver can expect to be interviewed if clandestines are found and will have to demonstrate in interview that he knew nothing of his passengers and that he did carry out appropriate checks and document them.*

A further problem for the driver is that he cannot imprison the people once he is aware that they are in his vehicle. In the end it is the driver's decision as to what he is going to do. The driver has a balance a moral imperative to go to the authorities against a moral and legal duty not to imprison his passengers once he know they are aboard and wish to get out. Once he knows they are there the driver may well have some duty to ensure that they are not in danger. The sensible advice to the driver would be to go to the authorities. The driver, of course, finds himself in an impossible dilemma for the reasons already stated.

The Code ignores the dilemma. It is desirable that the Code gives specific advice as to what a driver should in these circumstances. The Code by ignoring the dilemma does not even acknowledge that the situation exists. It would be possible for the Code to acknowledge the dilemma and for instance to indicate that the Civil Penalties, if they applied because a driver could not prove the defence, would be capped at a lower level in cases where a driver went to the authorities.

This of course would have to be in a situation where the authorities were satisfied that the driver was not complicit in the importation of his passengers in the first place.

In the absence of such comfort, drivers will remain in a dilemma and will make up their minds as to what to do on a case by case basis.

The absence of guidance from the Government for a driver in this dilemma deserves addressing – The Code, by ignoring the dilemma, does not acknowledge the situation exists. Of course at the time when the driver has to make a decision having formed the suspicion that he has clandestines on board will be without the benefit of legal advice.

In the meantime, the number of migrants in the Pas de Calais increases and the politicians wrestle with the situation across Europe.

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2018 Modern Families Index Summary Report

# Flexible working still not that flexible?

**In an age where many of us 'want it all', are businesses offering 'flexible working arrangements' delivering?**

The Modern Families Index is a comprehensive survey of how working families manage the balance between work and family life in the UK. This year's survey found that less than half (44%) of parents felt that flexible working was a genuine option for mothers and fathers in their workplace, despite only 16% saying that they did not want to work flexibly. The lack of flexibility can be damaging on parental relationships and wellbeing.

All employees have the right to request flexible working and employers must deal with such requests in a reasonable manner, for example by assessing the advantages and disadvantages of the application, holding a meeting to discuss the requests with the employee and offering an appeal process.

The survey found that, for some parents, working flexibly isn't, on its own, delivering enough control to help achieve a better work life balance. Of those parents who worked 'flexibly', nearly one third had restricted or no control over where they work, a quarter had restricted or no control over working hours and one fifth had restricted or no control over their start and finish times.

The survey found that availability of flexible working was most restricted in accommodation and food, manufacturing, education and human health and social work sectors. The Transport and storage sectors were found to be the worst sectors in terms of parents having control over the number of hours worked, start and finish times and the place of work.

## What needs to change?

The right to request flexible working has not gone far enough to deliver work life balance for families. Flexible working is, too often, an individual arrangement for an individual employee and many parents do not see it as an option to them.

The UK needs a flexible working revolution so that flexibility is delivered as the normal way of working. Employers should use the 'Happy to talk flexible working' strapline to encourage employees to make applications for flexible working and to recruit for more flexible and 'human-sized' jobs.

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# Update on overtime and holiday pay

## Case summary from the Employment Appeal Tribunal regarding overtime and holiday pay.

**Holiday pay and overtime – you're probably sick of hearing about it. Since the Bear Scotland decision in relation to overtime payments when calculating holiday pay, the landscape has changed significantly.**

There have been a number of cases which have, in effect, widened the scope for which overtime payments need to be taken into consideration. What started out as a rule requiring employers to take account of payment for overtime which was guaranteed or mandatory, if offered, has gradually expanded to included overtime worked regularly, non-guaranteed overtime and voluntary overtime.

The question of holiday pay has come back under the spotlight in a recent Employment Appeals Tribunal ("EAT") case relating to voluntary overtime.

**Facts**

In Flowers v East of Anglia Ambulance Trust UKEAT0235/17/JOJ, Mr Flowers (F) was a member of ambulance staff. He claimed for an underpayment in respect of holiday pay for two types of overtime:

1. *Non-guaranteed overtime which related to tasks which must be carried out (for example, a call out where it ran over the end of his shift); and*

2. *Voluntary overtime*

At the initial employment tribunal hearing, the Tribunal decided that the first of his claims should be included and not the second. In the interim, the EAT handed down its decision in Dudley Metropolitan Borough Council v Willetts which held that voluntary overtime should be included when assessing "normal remuneration" for calculating holiday pay.

In view of Dudley, F appealed to the EAT. The EAT applied the decision in Dudley and found that both non-guaranteed (mandatory) overtime and voluntary overtime should be taken into consideration under the Working Time Directive. Interestingly, there was also a question about the wording of F's contract as ▶

▶ the wording of the contract in relation to holiday pay did not distinguish between non-guaranteed and voluntary overtime.

The reality is that for the moment at least it doesn't really matter what the contract says, but it is possible that at some point in the future, wording of contracts could be significant. What can be said, at this stage, in relation to wording of contracts, that setting down a fixed daily payment for holiday pay where employees work overtime, either mandatory or voluntary, is a recipe for disaster.

**Comment**

At present, when calculating holiday pay for employees who work overtime, if you want to keep yourself out of an employment tribunal and your workforce happy, it is advisable to look at all overtime worked in the 12-week reference period prior to the holiday for which payment needs to be made. The recent case law does not affect either the 3-month gap or 2 years' backstop rules.

It should be noted that the Trust in Flowers have sought leave to appeal to the Court of Appeal so this may not be done yet. It's also worth adding that there are a number of cases in the pipeline relating to the question of overtime/commission payments and holiday pay and the satellite issues that come with it so that, taken together with Brexit, means it is likely to be some time before we have a "once and for all" definitive position.

**At last... Some Guidance on Overtime**

ACAS have recently issued guidance on what constitutes overtime. The guidance itself gives some much-needed direction on an issue that many employers have been grappling with for some time.

*"The impact of overtime on holiday pay calculations has been a hot topic for employers since recent Court decisions have been filtering through the legal system. "*

Specifically, the guidance covers the following areas:

- the different types of overtime
- working time limits on overtime
- payment for overtime
- overtime for part-time workers
- the impact of overtime on holiday calculations

**Impact of overtime on holiday calculations**

The impact of overtime on holiday pay calculations has been a hot topics for employers since recent Court decisions have been filtering through the legal system. We have reported on the developments and this guidance now seeks to build on that for clarity.

By way of re-cap, when calculating a worker's statutory holiday pay entitlement, employers are to use an average of the workers preceding 12 weeks pay, to determine what their pay for holiday leave being taken should be.

What is to be included in the calculation has been widely debated however of note, caselaw has indicated that all overtime worked should be included when calculating a worker's statutory holiday pay entitlement. The only exception to this is overtime that is worked on a genuinely occasional and infrequent basis, need not be included.

The guidance makes clear that the court decisions apply only to the four weeks of annual leave which are required under European law. All workers in the UK must receive an additional 1.6 weeks of leave by law, and some receive more as part of their terms and conditions of employment. It is only four weeks of annual leave that this applies to.

While, many employers choose to apply the judgments to extra annual leave too, this is not a legal requirement but can help to keep the processes simple and understandable for employees and payroll. The alternative is that some employers state in their contracts that the above applies to the first 20 days leave an the remainder will be paid at the basic rate.

As we have noted in previous articles, the guidance being from case law renders it an indication and case specific. There may be circumstances which give rise to challenging applying the above guidance however, legal advice is recommended in order to determine how these decisions will impact on the organisation and consideration to any prospective employment tribunal claim should be given.

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NEWS BRIEF

# Would you let your staff chose their own working hours?

With employees demanding more flexibility regarding their working arrangements, is the “9 to 5” working day model beginning to be outdated?

That’s exactly what PwC, one of the Big Four accountancy firms, has done. PWC has created the “Flexible Talent Network”, which give new recruits the ability to list their skills and the working hours they would prefer, which could be anything from only working several months of the year to reduced weekly hours. The aim is to attract workers who do not fit, or do not wish to conform, to the traditional Monday to Friday, 9-to-5.

Rather than applying for a specific role, they will apply based on their skills add what pattern works for them. The scheme then aims to match recruits to specific projects instead of job roles and therefore should entice a broader range of talent to the firm.

After carrying out a study on the aspects individuals prioritise when looking for a new job, PwC concluded that 46% of the 2000 participants that took part considered flexible working hours and a good work life balance to be of upmost importance.

The scheme was launched in the summer and has already seen some in excess of 2,000 applicants, indicating that this is highly attractive to individuals. As well as this, PwC also have a programme known as “Back to Business” whereby individuals who have taken a lifelong career break, can restart their career by applying for a 6-month paid internship.

PwC believes that it will gain a competitive advantage over other firms by supporting people moving in and out of work throughout their life. An example where the program has worked particularly well was through employing through a 100-day contract.

A member of the Flexible Talent Program who was studying to be a financial analyst was also raising two young children. In November, she carried out training for 10 days to get to grips with the Company. She then returned in January after spending time in China with her family to finish the 90 days when the Company was very busy. She will then return in October to start the 100-day contract again.

This flexibility allows PwC to employ skilled workers for the times that are convenient for both themselves and the employees.

As Laura Hinton, Chief People Officer at PwC rightly pointed out, this approach takes flexible working to a whole new level.

Flexible working has been available to all employees with at least 26 weeks service since June 2014, however, based on the recent survey the “Modern Families Index” less than half (44%) of parents felt that flexible working was a genuine option for mothers and fathers in their workplace, despite only 16% saying that they did not want to work flexibly.

Employers should embrace flexible working rather than seeing it as a hindrance to their business. In some circumstances, it shouldn’t matter when or when the work is undertaken, so long as it is completed within the required remit.

Whilst there are in some instances genuine business reasons as to why flexible working in not an option, many employers are often too quick to dismiss an approach for flexible working as unworkable without giving serious consideration as to whether it could in fact work and how it could potentially be beneficial for both parties.

# Ground breaking legal action for truck cartel case

**Backhouse Jones, in conjunction with Addleshaw Goddard, have lodged a ground-breaking legal action with the Competition Appeal Tribunal (CAT) on behalf of the Road Haulage Association (RHA).**

The application, lodged on 17 July 2018, signals the start of a claim against European truck manufacturers found to be colluding in a 14-year price fixing cartel (the "Trucks Cartel") between 1997 and 2011. The application seeks compensation in excess of £1 billion for thousands of road haulage operators who have suffered loss as a result of the illegal cartel activities.

The legal action, which is open to RHA members and non-members alike, currently has over 4,100 road haulage operators signed up with a further 720 who have registered an interest. It is anticipated that the number of claimants signing up will increase significantly over the coming months and this can be done by visiting www.truckcartelleaglaction.com

Early indications suggest that UK transport operators which opt into the claim could be entitled to damages of £6,000 for every 6-tonne and above vehicle they bought or leased between 1997 and 2011. The claim is fully funded by Therium Capital Management Limited and has the benefit of After the Event Insurance, allowing claimants to participate in the collective proceedings without cost to their own business.

Commenting on the case, Steven Meyerhoff, Director at Backhouse Jones (legal representatives for the RHA) added: "The submission of the application is the first formal step in the RHA seeking to be appointed class representative on behalf of road haulage operators who suffered loss because of the Trucks Cartel. The RHA will be asking the Tribunal for what's called a "collective proceedings order" which will authorise the RHA as class representative and define the class of businesses that can opt in to the claim. As the claim is being brought on an opt-in basis, businesses wanting to be part of the claim will need to opt in once the Tribunal has authorised the RHA to be class representative."

Mark Molyneux, partner at Addleshaw Goddard said: "This is a significant claim and we expect the overall value is likely to exceed £1 billion. This was a lengthy infringement of competition law that we know has affected around 600,000 purchasers of trucks in the UK between 1997 and 2011. We know cartel activity is extremely damaging to customers and truck purchasers should be entitled to be compensated for the loss that they have a suffered as a result of this activity. We hope that the CAT will agree that this is exactly the right type of claim that should be permitted under the new regime and allow the RHA to bring a collective claim on behalf truck purchasers." ▶

▶ David Went, barrister at Exchange Chambers comments: “This is the first case in which anyone has tried to use the new regime that allows a representative to bring a collective claim on behalf of businesses impacted by a competition law infringement. The claim being brought by the RHA on behalf of the haulage sector is precisely the type of claim envisaged under the new rules. There have been two previous attempts to use the new regime but they were both opt-out collective actions on behalf of consumers. We don’t think that the RHA’s claim will face the same difficulties that beset those claims not least because it is possible to link the overall claim value back to the amount of loss actually suffered at the level of each individual claimant.”

### Background to the “Trucks Cartel”

The RHA’s claim for compensation is based on the European Commission’s decision in July 2016 to fine European truck manufacturers MAN, Daimler/Mercedes, Iveco, Volvo/Renault and DAF, €2.93 billion after they admitted operating the Trucks Cartel. The Commission found that the Trucks Cartel operated between 17 January 1997 and 18 January 2011 (the “Cartel Period”) and related to trucks of six tonnes and over. The illegal activities included:

- fixing gross list prices;
- agreeing the costs that truck purchasers would be charged for emissions technologies (Euro III, IV, V and VI); and
- delaying the introduction of those emissions technologies.

While Scania was not party to the original decision, having denied its involvement in the Trucks Cartel, the Commission subsequently found it guilty and imposed a fine of €880 million. Scania has appealed this decision, which will be heard by the European Courts in due course.

### Opt-In Collective Proceedings

The RHA is using the collective proceedings regime before the CAT. The regime was introduced relatively recently in October 2015 by the Consumer Rights Act 2015 to cater for group actions in the area of competition law. This regime allows an industry body, such as the RHA, to make an application to become class representative on behalf of businesses or consumers affected by competition law violations. The core notion of collective proceedings is that they group together similar claims that raise common issues (i.e., the same, similar, or related issues of fact or law).

As a not-for-profit organisation and the only trade association dedicated to road haulage in the UK, the RHA believes it is well placed to be appointed class representative and expects the CAT to hear its application early next year. If the CAT were to grant the RHA’s application, this will be the first time an application to use the new collective claim regime will have been successful.

The claim has been issued against DAF, Iveco, and MAN, although the claim covers all makes of trucks, including trucks manufactured by companies that were not part of the Trucks Cartel.

As part of the application, the RHA has proposed a class of persons entitled to opt in to the legal action. The class comprises any person who between 17 January 1997 and the date of a notice to be published later during the proposed collective proceedings purchased or leased for road haulage operations (both hire and reward and own-account) new or pre-owned trucks either (a) registered in the UK or (b) registered in EEA Member States other than the UK provided the person belongs to a group of companies which also purchased or leased such trucks registered in the United Kingdom.

As the RHA has proposed to bring collective proceedings on an opt-in basis, road haulage operators wishing to join the legal action are required to sign up to the claim. This can be done by visiting the RHA’s website at www.truckcartelleaglaction.com. Any road haulage operator that does not opt-in to the RHA claim will not be entitled to claim any compensation in the event that the RHA’s collective claim is successful.

The RHA has secured third-party litigation funding on competitive terms so that there is no cost to operators who sign up. If the claim is successful, the funders will take a fee from the compensation awarded to compensate them for the risk of providing the capital investment. The RHA has also taken out litigation insurance to protect both itself and operators signing up to the claim in case the claim or aspects of it are unsuccessful.

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# NEWS BRIEFS

## AdBlue checks become national

**Last year, the DVSA found that a regional clamp-down on the usage of AdBlue emulators demonstrated high non-compliance with the rules on AdBlue. This has therefore triggered the beginning of cheat device checks, nationwide as part of Defra’s wider policy to cut emissions.**

After over 10,000 truck checks occurred between February and August 2018, DVSA found 388 vehicles that were non-compliant and had cheating devices fitted. Before this, they discovered that 1 in 12 vehicles on the road had cheat devices fitted.

Checks have now become a national process in order to protect people from unsafe vehicles, explains Gareth Llewellyn, chief executive of the DVSA. He also indicated that the DVSA will take the strongest possible action against anyone who uses cheat devices to try to get around emissions rules.

Drivers could be faced with a £300 fine and even have their vehicle removed from the road if they are caught with an emissions cheat device or faulty emissions control system and do not correct this within 10 days. The operator will also have follow-up inquiries by the DVSA who have the power to inform and the Traffic Commissioners. Traffic Commissioners have historically taken a dim view of the use of AdBlue emulators.

## DfT Inclusive Transport Strategy

**The DfT has recently published its Inclusive Transport Strategy including:**

- **£300 million of funding for increased accessibility at railway stations;**
- **£2 million for installation of Changing Places toilets at motorway services;**
- **£2 million for audio and visual equipment on buses.**

The awareness and enforcement of passengers’ rights, staff training and improvements to accessible information is also included in the Strategy. DVSA has reminded coach operators of their responsibilities concerning passengers with disabilities. They should ensure that wheelchair users can use any available wheelchair spaces and not require passengers who use wheelchairs to book any further in advance than passengers who do not. The DVSA will not hesitate to take action against companies breaking the law.

## Brief Encounter

# Stephen Crossley

Ian Jones gets to know our newest recruit, Stephen Crossley and provides readers with an insight into what makes him tick.

**01 What is the first news/historical event you can recall?**

Sitting in front of the tele waving plastic Union Jack flags for Charles and Diana's wedding.

**02 What is the book you most wish you'd written?**

Alice's Adventures in Wonderland. A fantastically surreal novel that sold over 100 million copies. What's not to like!

**03 One bit of advice you'd give your younger self?**

Get on with it.

**04 What is your favourite saying or quotation?**

"Nothing ventured, nothing gained"

**05 Where do you want to be buried/have your ashes scattered?**

The Crossley family crypt. Seriously, we have one…

**06 If you were given £1m to spend on other people, what would you spend it on and why?**

I'd donate it to Cancer Research.

**07 The talent you wish you had?**

Being able to play a musical instrument. I used to play the recorder at school, badly.

**08 The best and worst present you've ever received?**

Best: An inflatable Tardis (albeit it didn't take long to puncture!)

Worst: Altair Design books (just Google it)

**09 What have you changed your mind about?**

What I want for Christmas.

**10 What is the biggest problem of all?**

Earth's ever diminishing resources and antibiotic resistance.

**11 Are things getting better or worse?**

Better. Just look at the stats (poverty diminishing, average wages rising, less people killed by war, famine or terrorism each year)

**12 How do you keep the flame of hope for a better world burning brightly in dark times?**

Just get on with it!!

# Fitness for purpose and exclusion clauses

Do you read every contract you sign?
**The answer is probably not.**

Running a transport business is time consuming and stressful and delivering the service your customers expect, whether you're carrying a consignment or getting children to school on time, can be challenging. So why spend your scarce and precious time reading through boring terms and conditions drafted by lawyers like me which all say the same thing at the end of the day, don't they?

Well no, they don't and a failure to pay close attention to terms and conditions inevitably leads to problems when things go wrong and you find yourself sitting in front of someone like me explaining that whilst the vehicle you purchased for tens of thousands of pounds doesn't work as it should and you've let down your customers and suffered financial loss as a result you can't recover those losses from the supplier because of the terms and conditions of contract you entered into with them. ▶

▶ It's one of those conversations I dislike having with my clients, as most of us expect that when we buy goods, whether that be a new television or an 18-tonne truck, it should "do what it says on the tin".

But what happens if it doesn't?

All transport companies will, from time to time, invest in new or used vehicles. They're an essential asset and the backbone of your business. Without trucks, trailers, buses, coaches or removal vans you can't run a transport business (putting to one side subcontracting, which would require an article of its own!) and buying a new vehicle requires significant investment, whether you purchase it outright or opt for leasing or a hire-purchase agreement.

Most haulage companies are aware of the RHA's Conditions of Carriage and how these restrict their liability when, for example, goods are lost in transit, and why their customers need to obtain their own insurance to cover their share of the potential liability.

But many of my clients are unaware that most businesses (if not all) that supply vehicles use similar terms and conditions to restrict or exclude their liability if something goes wrong.

This lack of awareness stems, I think, from a misconception that businesses are afforded the same rights as consumers when purchasing goods. The truth is they aren't and the range of liabilities that can be limited or excluded are surprisingly wide and include if a vehicle is unfit for purpose or not of satisfactory quality.

So why is this? Well, the courts and parliament have historically taken the view that businesses should be free to contract on whatever terms they see fit (within certain limits; for example you cannot, by law, exclude liability for personal injury or death caused as a result of negligence) as experienced business people of equal bargaining power are best placed to decide on what terms they wish to contract with one another.

Whilst 'light touch' regulation of business to business contracts is welcomed by most it can often lead to a nasty surprise when you realise you've signed up to something which you didn't know about because you didn't read the contract or presumed would never need to be relied upon by the other party.

The most common of such 'limitation or exclusion of liability clauses' as they're known are those that exclude or limit (hence the catchy title!) the remedy you'd normally be entitled to if the goods you purchased, and for the purposes of this article I'll be focussing on vehicles that don't work as expected or are unable to perform the tasks for which they were bought. The Sale of Goods Act 1979 applies to all contracts for the supply of goods and 'implies' certain terms into all contracts, including that the goods supplied must be of satisfactory quality and reasonably fit for purpose.

Most businesses when contracting with other businesses will seek to limit those implied terms by including in their terms and conditions a statement such as,

"the Supplier's total liability to the Customer shall not exceed £[AMOUNT]. The Supplier's total liability includes liability in contract, tort (including negligence), breach of statutory duty, or otherwise, arising under or in connection with the agreement"

Others will seek to exclude any liability using a clause such as,

*"all statements conditions or warranties as to the quality of the goods or their fitness for any particular purpose whether express or implied by law or otherwise are hereby expressly excluded."*

However, section 6(1A) of the Unfair Contract Terms Act 1977 ('UCTA') provides that a seller's implied undertakings as to conformity with goods with description or as to their quality or fitness for purpose can only be limited or excluded to the extent that such a term satisfies the requirement of "reasonableness".

So, what is meant by reasonableness?

**Section 11(2) of UCTA states,**

"In determining for the purposes of section 6 or 7 above whether a contract term satisfies the requirement of reasonableness, regard shall be had in particular to the matters specified in Schedule 2 to this Act; but this subsection does not prevent the court or arbitrator from holding, in accordance with any rule of law, that a term which purports to exclude or restrict any relevant liability is not a term of the contract."

Schedule 2 of UCTA goes on to specify the matters that should be considered when determining whether a limitation or exclusion of liability clause is "reasonable" and these include;

- the strength of the bargaining positions of the parties relative to each other, taking into account (among other things) alternative means by which the customer's requirements could have been met;
- whether the customer received an inducement to agree to the term, or in accepting it had an opportunity of entering into a similar contract with other persons, but without having a similar term;
- whether the customer knew or ought reasonably to have known of the existence and the extent of the term (having regard, among other things, to any custom of the trade and any previous course of dealing between the parties);
- where the term excludes or restricts any relevant liability if some condition was not complied with, whether it was reasonable at the time of the contract to expect that compliance with that condition would be practicable; and
- whether the goods were manufactured, processed or adapted to the special order of the customer.
- So, what does this mean in practice? Which terms are likely to be viewed as reasonable and which are not?

Unfortunately, there is no straightforward answer as each case is judged on its merits and the particular circumstances that applied when the contract was agreed will be considered by the court when determining this and as UCTA allows scope for judicial discretion when applying the "reasonableness test" this can often lead to seemingly conflicting decisions as to what does and what does not constitute a reasonable limitation or exclusion of liability clause.

*"If a clause falls foul of the "reasonableness test" it will have no effect and will be "severed" from the contract..."*

However, as a rule of thumb any clause that purports to leave the customer with no remedy when there has been a serious breach of contract (such as a new truck's engine failing a short time after purchase) is more likely to be found to unreasonable than a clause that seeks to limit the amount of money recoverable.

Other factors the courts can take into account include the use of small print or unnecessarily convoluted drafting and a failure to bring a particularly onerous clause to the attention of the customer.

If a clause fails foul of the "reasonableness test" it will have no effect and will be "severed" from the contract, meaning that it cannot be relied upon and the customer is entitled to recover its losses as if that clause had never existed.

If, however, such a clause is found to be reasonable the supplier is entitled to rely on it, the customer is bound by it and the customer will only be entitled to the remedy, if any, set down in the contract, which can often mean recovering nothing or an amount that is less than the actual loss suffered.

Having dealt with many "fitness for purpose" cases over the years and having seen the effect limitation or exclusion of liability clauses have had on my clients my general advice when purchasing goods on a business to business basis is you should always read the contract, including any standard terms and conditions that may apply and if the contract includes a limitation or exclusion of liability clause challenge it and seek to negotiate a better deal. Ask the seller if they will agree to exclude such clauses and if they refuse, go elsewhere or seek to purchase on your own terms and conditions by providing these prior to making payment or by writing to the supplier confirming that the purchase is being made on their terms excluding those you do not agree with and expressly identifying these.

Unfortunately, there is no 'one size fits all' approach so if you're looking to purchase goods and don't agree with the supplier's terms and conditions or you've purchased goods and the supplier is refusing to compensate you due to the incorporation of limitation or exclusion of liability clauses in the contract you should always seek legal advice before deciding how to proceed.

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# A picture tells a thousand words, and could cost you thousands if you don't have permission to use it!

In a world where we are now so reliant on technology and the internet, and in an industry where competition is great its very important to have an up to date website and good, constant advertising. This inevitably involves the use of photographs from the internet with the mistaken belief that because they are freely available we can use then as we wish.

Photographs are protected by copyright as artistic works, this means that in order to use a photograph commercially (not taken by yourself or an employee of the business), you will need the permission of the copyright owner in order to do so. The copyright owner being the creator of the image.

In the UK, copyright lasts for the life of the creator plus 70 years, therefore if the photograph is less than 70 years old it is still in copyright.

Copyright law is also complex for photographs published before 1st August 1989 where the creator has died. Prior to the Copyright Design and Patent Act 1988 ('the Act') unpublished works were given perpetual copyright up until the point they were first published. In order to remove this perpetual copyright, the Act reduced the term of protection for such works to 50 years from the implementation of the Act. This means that photographs not published prior to the Act are due to remain in copyright until 2039.

A common example of where copyright infringement may have occurred is where you have used a photograph on your website which you found by simply googling images relevant to what you wanted. This is almost certainly an infringement of copyright.

## How do I obtain permission to use a photograph?

i. If you can locate the original website the image is from then make contact and request permission to use the image, please note there may a fee for this. If the website host simply has a licence to use the image they may refer you to the copyright owner to seek permission.

ii. In a lot of cases, images that appear on the internet are controlled by picture libraries who either own the copyright to the image or have the copyright owner's permission to licence the right to use the image. This is a simple process where you purchase the licence to use the image.

iii. If you cannot locate the owner of the image this does not mean copyright doesn't exist and you must take all reasonable steps to find the owner. If you cannot find the owner the photograph is known as 'orphan works' and to use it you would have to obtain an orphan works licence from Intellectual Property Office, the cost to apply for this is £20.00 for one licence and the licence fee is determined when the licence is granted. Unless you specifically want to use the image in question, it may be quicker and cheaper to find an alternative image as per i and ii.

## Copyright infringement

When an individual or business infringes copyright, there are various actions that can be taken by the individual or organisation that owns or administers the copyright.

In practice, they may write to the infringer and ask that they purchase a licence to use the image and generally a practical resolution is agreed. However, legal action is available to the owner of the copyright and the Court has the power to make an order for the infringer to pay not only for a licence but also compensation for the infringement and legal fees, all of which can amount to a lot more than the original licence fee!

## Practical steps to take

1. Always obtain permission or a licence to use any image commercially.

2. Review all images in current use to check you have permission or a licence to use the images.

3. If you receive a letter claiming you have infringed on the owner's copyright, seek legal advice immediately.

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# Employees: are yours motivated?

**Keeping staff incentivised is an issue with many employers across the globe and throughout a variety of industries. With the well-known current shortage of HGV drivers, the concern may be particularly prevalent in the transport industry as employers seek to ensure they attract and hold onto good quality employees.**

A popular method of incentivisation used by small and medium companies ('SMEs') is a share option scheme, whereby an employee is given the legal right to buy a company's shares in the future, but at a price that is fixed today. The fixing of the share price means that, if the value of the company increases over time, the employee could make a significant profit when they eventually sell their shares.

One type of share option scheme which has become popular is an 'Enterprise Management Incentives option' ('EMI option'). An EMI option is a type of employee share option which can enable both the company and the individual to benefit from favourable tax treatment. As per the EMI Code, this type of share option scheme must involve a written agreement between the employer and employee.

In order to grant EMI options, there are certain requirements to be fulfilled by the company:

- It must be an independent trading company
- It must have a maximum of £30million in gross assets
- It must have fewer than 250 full-time employees





*"Over 8 in 10 of the companies surveyed reported that the EMI scheme had assisted their business with retention and there was an improvement in staff morale."*

- It must not operate an 'excluded activity', which, under the relevant law, includes industries such as those dealing in:
  - Goods, other than in the course of ordinary trade of wholesale/ retail distribution
  - Leasing (including assets on hire)
  - Property development
  - Farming

In addition, the employee has to work at the company for at least 25 hours per week (or, if less, at least 75% of their working time). They cannot be granted EMI options if they, or their associates, have a material interest in the company, or if they are non-executive directors or consultants of the company.

In order to avoid the EMI options lapsing, they must be bought by the employee within 10 years of their grant. Other lapsing provisions will often be written into the option agreement, to the employer's advantage, such as if the employee becomes bankrupt, tries to assign the options to someone else, or tries to use them as security.

A recent government publication found several pieces of evidence which supports the EMI scheme. The research which was carried out showed that the scheme is often used as a tool to assist with the recruitment and retention of employees.

Over 8 in 10 of the companies surveyed reported that the EMI scheme had assisted their business with retention and there was an improvement in staff morale.

Around half of the businesses said that the scheme had benefited in recruiting staff generally, and also in recruiting higher quality workers – which can, of course, help the company's growth going forward.

EMI share option schemes are really worth considering for SMEs who want to incentivise, motivate and involve their staff (or, indeed, potential staff). There are questions which can arise when thinking about granting EMI options, so it's important to involve your solicitor and accountant to ensure that the scheme is executed correctly.

At Backhouse Jones, we have a corporate commercial team which can work alongside your accountant to advise on EMI share schemes and draft the documents required.

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## Top 10 tips for Management Buy-Outs (MBO's)

1. **Enlist the help of a team of professionals from the outset**
2. **What finance do you require?**
3. **'The conflict'. Ensure the MBO does not become a distraction from your usual line of work**
4. **Create shareholders' agreements**
5. **Set a time-frame to complete various stages of the MBO**
6. **Preparation is key to ensure smooth transition**
7. **Ensure the structure of the MBO and the business going forwards is well thought out**
8. **Consider warranties and indemnities required by different parties**
9. **Prepare your accounts accurately**
10. **Get a confidentiality agreement (also known as a non-disclosure agreement or an NDA) in place from the get go.**

# I would normally use my own standard terms and conditions, but one of my customers wants me to sign his own bespoke contract, what are some of the issues I need to be aware of?

# Q&A

## Commercial Contracts

**Wherever possible, your own terms and conditions should be used as these are favourable to you and cover the main points which you should be concerned with.**

However, where your customer wants you to sign a bespoke contract, which may or may not incorporate your own terms and conditions, you need to be aware that where there is any inconsistency between the terms in the bespoke contract and your terms and conditions, the bespoke contract will usually supersede your terms of business. This can lead to issues such as:

### Subcontracting

Most bespoke contracts will say that you are not entitled to outsource or sub-contract any of the services, which is obviously very restrictive and in most cases impractical for an operator. Where there is a clause that prevents subcontracting you should look to delete this, or at the very least make it clear that subcontracting can take place provided you notify the customer of the identity of the subcontracting party. If this is resisted, then you can amend to say you can subcontract provided the customer provides their consent, which cannot be unreasonably withheld.

This may be necessary if, for example, you are providing specialist transport services or specialist vehicles, and your customer wants some comfort that your subcontractor has the relevant experience.

### Liability

Most bespoke contracts will impose a higher limit of liability than your own terms and conditions . In addition to this, they will try to recover indirect or consequential loss suffered as a result of delays – which could include fines imposed on your customer. In all likelihood you will not have any idea about what these possible fines could be, which could then expose you to unquantifiable risk.

You should seek to limit your liability to the fullest extent possible, either by referring to the limits set out in your terms (which should be favourable for you), or by introducing other caps on your liability. Caps can be formulated in many ways. Some common examples are:

- A single figure which applies for the duration of the contract;
- An annual cap. This ensures that the customer making a claim in one year still has a meaningful remedy in subsequent years (and so is not incentivised to exit the contract early);
- An amount linked to the sums paid under the contract. This will increase as the contract continues, reflecting the profits the operator has made;
- A high fixed sum and a percentage of the sums paid under the contract. This gives the customer a meaningful remedy if something goes wrong early on, when the total fees paid are still low.

These approaches may be combined. For example, an annual cap could be a percentage (which could exceed 100%) of the sums paid in a year. A cap may apply to each claim (or series of connected claims). Or it may be an overall cap. Or you can have a combination, as in a cap of £X per claim or series of connected claims, subject to an overall cap.

### Time of the essence.

There may be a clause saying, “time shall be of the essence in performing the services”. This may sound quite innocuous, but without knowing the full extent of the implications of this, you will not realise how dangerous this wording is. For example, if you have certain windows by which you must fulfil the services (and let’s face it most of you do), and you are late on just one occasion, even by a matter of minutes, then your customer is entitled to terminate the entire contract. This does not just mean that particular contract.

If you have a fixed term contract of say 3 or 5 years, the entire fixed term contract can be terminated if you are late by just 5 minutes on any one job. If you have a particularly valuable contract, you cannot afford to fail to exclude such a clause. It may be your customer wants to cancel the contract for another reason (such as they’ve found a cheaper alternative), so don’t give them that option by the inclusion of this clause.

### KPIs

Your customer may look to impose a set of KPIs on you which sets out the levels of service you are required to meet. If this is the case, make sure it is clear and unambiguous what your liabilities are if you do not meet these KPIs, and this should be linked to your limitation of liability as discussed above. Rather than be left open to a claim for damages from your customer, you may want it made clear that you will instead offer your customer “service credits”, these are a set reduction on future charges (and this could only be a relatively small amount) for a failure to hit a previous KPI. You should also have a reasonable procedure in place to allow you and your customer to work together to address any failure to hit KPIs, and you should be afforded a reasonable time to rectify any service failure before the customer seeks other remedies under the contract, such as damages or early termination.

### GDPR

Under the new General Data Protection Regulation (GDPR), it is a requirement for businesses who process personal data to have an agreement in place which governs the data flow. It is therefore highly recommended that you include a data protection clause in your terms and conditions, or any bespoke contracts.

The clause would highlight obligations of both yourselves and your customer, which are minimum legal requirements under the GDPR.

There should be an indemnity clause as well, which should aim to protect you (not your customer) in the event that the customer defaults under the GDPR and causes you loss.

### Force majeure

Many bespoke contracts or terms and conditions will have a force majeure clause, which is designed to ensure one or both parties are not compelled to perform their obligations under the contract if there has been an event outside of their control. There is often a list of examples, such as Acts of God, riots and terrorism. However, it is very sensible in the transport sector to include ‘adverse road and weather conditions and road closures’ as they can play a huge part in the inability to perform services, especially in the winter months. By specifically referencing this type of event, you should be able to protect yourselves in the event that these conditions occur and the customer expects you to still perform under the contract.

Backhouse Jones has a corporate commercial team which specialises in drafting and negotiating bespoke commercial contracts, and standard terms and conditions, in the transport sector.

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