

Let's Talk Fleet Risk - Episode 21

Chris Green, Keoghs

Simon: Welcome to Let's Talk Fleet Risk – a podcast for those who manage drivers and their vehicles, and want to reduce road risk in their organisation.

My guest this month is a legal expert in the field of transport and regulatory law. It's Chris Green, who is a partner at law firm Keoghs. Welcome to the podcast, Chris.

Chris: Hello, Simon. How are you?

Simon: Very well thank you. Now, I've asked Chris onto the show because we're partnering with Keogh's to present a mock trial prosecution of a van operator at this year's Health and Safety event at the NEC later this month. The mock trial presentation will be on Wednesday 26th April in DfBB's own Driver Safety Theatre – and I'll give out full details at the end of the podcast.

Now Chris, I don't want to give the game away as to what happens during this prosecution, but I do want to give a preview of the scenario and then discuss in some broad terms some of the issues that we're going to be looking at in the presentation.

So, the scenario – roughly speaking – is that a van driver struck a cyclist shortly after starting a morning shift. And it's a serious incident, with the cyclist taken to hospital and he's in a pretty bad way – the police have classed his condition as critical. The police would then obviously conduct a roadside investigation to find out what had happened and to find out whether the driver was at fault – what might have happened that had gone wrong. So what would they be looking for in that investigation?

Chris: A couple of things. In the first instance they would have Forensics and Scenes of Crimes Officers present, to see – for example – where there were broken fragments from the car, and to indicate where the collision had taken place. So that might assist in terms of the position of each vehicle in the road, or to gather witness statements from those who were present. These days we see a lot of this is covered by dashcam footage or other CCTV – so that element of the job, many years ago when I started, I'm afraid has gone out of it. So that's all done for us on a very high-tech, automated level these days. They would be interviewing the driver at the scene and checking suspected drugs or alcohol issues. They'd be asking to see the mobile phone records and potentially seizing it as well. And in addition to that they would be trying to obtain accounts from anybody present and to check the welfare of anybody injured in the collision, including the driver and anybody else as well.

So there's a number of things they would be doing, and then of course the investigation would carry on afterwards where they would begin the interview process.

Simon: What about the state of the vehicle? How much attention would they give to the roadworthiness of the vehicle at that point?

Chris: It's absolutely critical, because if there were any suggestion that there were mechanical failure that was either outside of the control of the driver, or something that had manifested itself between the time they started the journey and the time of the crash, then they've got to at least explore that possibility before they can decide how blameworthy the driver was. Occasionally I'm afraid, there are still cases that we deal with where there are examples where the vehicle just wasn't in a serviceable condition, and on that basis it's a different scenario in terms of trying to establish guilt.

Simon: So, we know that in law the driver is usually responsible for ensuring that the vehicle is safe and that they drive within the highway code. So, what potentially could lead the collision investigators to look beyond the driver and at the employer?

Chris: Well, the employer has still got a duty to protect both the employee who's driving the car and anybody else who might be affected by that. And in addition to that, any employees who may be carried in the vehicle at the same time as the driver. So, that obligation is actually quite wide. If, for example, there were any suggestion that the employer wasn't carrying out either mechanical inspections, or didn't have a policy on the use of mobile phones, drugs and alcohol, eyesight, and these sort of issues, and monitoring the hours that the driver was working... then these days, those are all aspects that the police can and will be looking for. Because there is the potential to bring in the employer as well.

Simon: You mentioned policy there, so let's delve a little deeper into that. Whenever I've seen prosecutions like this in the press, normally reported where there's a fatality, they seem to hinge around policy. And those that are found guilty have either failed to implement or failed to follow and establish policy, whereas employers that are found not guilty were generally able to prove that they did have the right policies in place, and that they were rigorously followed and monitored. So, what typical examples do you see of poor practice from a policy point of view, and more importantly what impact would this have on their case in court?

Chris: The thing is with prosecutors, sometimes I wonder whether my opponent is believing that the very fact that an accident has taken place is evidence of the breach. So in other words, you couldn't have had an accident if all was complied with, and that in itself generates the suspicion that they're negligent. I'm not sure it's quite like that but take for example a case I had recently where it was a company which was really loath to be amending their mobile phone policy. We sat down and, once we'd really spent some time to consider whether the mobile phones were actually necessary in the business, through gritted teeth some people had to concede that actually they probably didn't need it. So, really, the answer to your question is that they've got to be really clear on the test of reasonably practicable. And there is a balance to be struck between the cost and the time and the inconvenience on one side of things – in terms of implementing further measures – and on the other, the risk involved.

So, if that is balanced for example against a serious or fatal incident, then the bar is set quite high. And I think in the first instance, a court and a police prosecutor might want to prove that they've actually considered all of the right factors. They've then, as you say, got to implement anything that comes out of that process, and then critically, to follow it on the road as well. So it is quite an onerous duty, but whenever things go wrong, with reverse engineering, they would be looking to see whether that's all been done as it should have been.

Simon: Now, we're going to be prosecuting a company in our mock trial presentation, so, it's a fictitious incident obviously but the investigation in this case must have obviously raised some serious concerns about the way the company managed driver safety. And you

mentioned a couple of things there that a policy needs to include – mobile phones, driver fatigue, that kind of thing – there are other things as well like driver checks, vehicle defect reporting, that kind of thing. These are all things that should be included in a policy, so how would you expect companies to manage these things and what impact does managing it poorly have in a prosecution?

Chris: Well, the onus is on them. The balance of probabilities there that they would need to demonstrate – i.e. it's more likely than not that they comply – but the key point is the onus is actually on the company to prove they're innocent rather than the other way around. So, if I'm prosecuting Health and Safety offences, all I need to show is that the individual was an employee – well that's usually straightforward, that the company employs people – and that there had been an accident. So, as soon as I've established those two factors as a prosecutor, then the onus shifts to the defendant – in this case the company – and they would need to prove they'd done everything they reasonably could, and there's law on that that suggests that that's got to be not only in disproportion, but it's arguably got to be grossly disproportionate, and it's only those things that you're entitled not to do as a company.

If roughly the time and the expense involved in putting that measure in place doesn't look totally out of kilter with the risk of a serious or fatal accident, then really the onus is on you to take that step, or at least explain – having gone through the assessment process – why you don't think it's practical. So, be it on your head, and then – as you say – it's then got to be followed through by the individuals out on the road.

Simon: So, the onus is on the employer to prove that they're innocent. That would suggest that record-keeping is pretty important, yes?

Chris: Well it would. It's really sad in my line of work where it's quite clear that a company has good processes and the custom of practice is that it's usually followed by people. But of course, many times where there has been a fatal accident, the absence just of one document ironically could be the one that would prove that the measure the company needed to demonstrate it had taken – there's just no evidence on the point. So, some HSE inspectors say to me that the absence of evidence is evidence of absence – so if it's not documented it didn't exist. So, I'm afraid it won't be the first time a lawyer's said this, but the key point behind what you've said is that you don't just need to take the step, you need a mechanism to gather and collate and keep the proof of that as well, else it does leave you fairly vulnerable as I'm sure we might see at the trial.

Simon: It's not just proving that you've done something, you've implemented a step or a policy now I guess, is it. Because, a key part of this is ensuring that you monitor compliance of that step or policy or procedure – whatever it is. And that you prove you take appropriate action if people are found to be cutting corners or routinely missing those steps out – whether it's a vehicle check, for instance, and that's not getting done. So it's as important to monitor compliance and take appropriate action in the event of non-compliance as it is to put that step in place as well, I guess isn't it?

Chris: That's right. There has to come a point where the company has done all it can reasonably could and I think relying on good common sense will go a long way in that. If you've got drivers, for example, who are just routinely signing documents to say that something's happened when it clearly hasn't, then really the onus is on them – that's a false statement. Equally, however, it is important that there is some supervisory mechanism in place and that checks are undertaken to establish the procedures are being followed as they should be. But again, sadly, practice tells that it is quite common after some of these incidents that the individual driver who may not have followed the policy may not be the only one who hasn't followed the policy, or you can't prove that the other have as well.

So you can see how that would play out, and this is where prosecutors perhaps start getting a bit of an inkling that there is a bigger problem, a more widespread failing as part of the company's obligations.

Simon: My final question I think here Chris is to ask you about what offences we would typically be looking at here. Years ago there was a great big focus on corporate manslaughter for instance, but my understanding is that's a difficult thing to prove. I'm not aware of any prosecutions – successful prosecutions – under that. But, what offences would we be looking at and what would be the legislation that those would fall under?

Chris: Sure, well if we looked outside out window on any given day, I dare say we'd probably all conclude that there are examples of driving that falls into the first category which is 'Careless Driving' – failure to meet the standards of the reasonably prudent and competent driver, in a way that would be obvious to the reasonable, prudent and competent driver. So that isn't a very high bar to overcome. Clearly if we prosecuted all of those then the criminal justice system would grind to a halt in no time at all.

Where there is a serious injury involved, then clearly the resources that the Police and the Crown Prosecution Service would devote to the case right from the outset are that much higher. So the second category would be 'Causing Serious Injury by Careless Driving', so you're very much really bound by the consequences rather than necessarily the standard of the driving. As we go up the scale of seriousness, if the serious injury has been caused by dangerous driving – so it's what I've just said there but it's falling far below those standards, rather than just below those standards – then you can go further up the scale depending on the injury and the standard of the driving.

So at the very top end of the scale, as far as those categories are concerned, would then be causing death – if for whatever reason there is a fatality involved, and the injured party doesn't make it through – then 'Causing Death by Careless or Dangerous Driving' would actually be another offence, and carry a serious penalty.

You're right as far as manslaughter and corporate manslaughter goes, it's rare. What I can tell you is that the Health and Safety Executive are looking for cases with big, well-known defendants and corporate entities, or entities with deep pockets. So really the key from this end is that you have been warned. So there are a range of offences available to any prosecutor.

Simon: And so, our audience for the mock trial... it's at the Health and Safety Event, so our audience largely is Health and Safety professionals who would be very familiar with the Health and Safety at Work Act, and the Management of Health and Safety Regulations. Would offences get prosecuted under that?

Chris: They can do. What we often see is that there might be a prosecution of the driver, alongside that of the company. Sometimes I wonder whether it's put on a little bit of a plea bargain to try and exact a guilty plea out of the company, in exchange for a better deal for the driver, but that's a maybe. Wherever there is evidence that something that the company has done is either widespread and a failing, and/or usually has actually played in the part in the injury and in the poor driving, then prosecutors will not be afraid at all to bring the company in as well.

So, straight away you see that anything mechanical would be an issue for the company rather than the driver. But it does go wider than that, as we said. So mobile phone policies, eyesight, hours, fatigue, drugs and alcohol, and one or two more. These days we've seen a

bit of a change in how the prosecutors are viewing these, right from day one. And unashamedly they're looking for corporate liability as well as the driver.

Simon: What's the likely punishment for a company if it was prosecuted under the Health and Safety at Work Act?

Chris: Well this is the difficulty we often find – that even Health and Safety professionals who perhaps are more used to the idea of a workplace accident would not necessarily link in the possibility that a road traffic accident would be dealt with in the same way, because of course they're usually dealt with by the police; there's an agreement in place between them and the HSE. But wherever the incident looks as if it might be work-related, or there is something in the background, the problem for them is that it's actually dealt with under the same guidelines as it would be for any other Health and Safety offence. That's where you're getting into the realms of turnover-based fines, and that's where I'm afraid we have seen some of the fines going into the millions for big, well-known companies with large turnovers.

Simon: And just a final point on that, then. Obviously, those were corporate responsibilities, but the Health and Safety at Work Act has provision for prosecuting individuals, where they haven't either put the right policies in place, or they failed to follow what was an established safety policy and that's resulted in someone getting injured, or potentially killed. So there's scope within the Health and Safety at Work Act for prosecuting individuals and the punishments for those can be quite severe as well, can't they?

Chris: They can. Under Section 37, senior-ish managers who are part of the company's strategic brain, if you will, that have a say over what the company does and how it does it... if they've personally involved in this, or turned blind eyes, don't have a policy, know it's not being followed, or worse still, contributed to the commission of the offence, then they too can be held personally liable. Again, it often comes as a surprise to a few people that those are imprisonable. They can be 2 years in prison in very, very serious cases – and they are rare – but that power is out there already.

Simon: Fantastic. Ok, Chris, thank you so much for sharing your insight with that. Hopefully that's given our audience a taster, or encouraged them to see how that mock trial prosecution plays out when we enact that later on this month. Where can people get hold of you Chris if they'd like some advice from you professionally?

Chris: The email address is cbgreen@keoghs.co.uk. But if they're on LinkedIn, or some of the other social media, the firm is Keogh's. Very happy to help, and any one of the team will be familiar with this, whatever part of the country you're in.

Simon: Brilliant, well I'll put all of those links in the show notes and also to the Health and Safety Event. It runs from Tuesday 25th to Thursday 27th of April, and the mock trial presentation will be starting at 11am on the second day – Wednesday 26th April. It's in the Driver Safety Theatre, which is part of the Health and Safety Event in Hall 3 at the NEC. We'll be looking at good practice, and the consequences of poor practice, and there will also be some packs for our audience to take away as well. Chris, if you could give us one thing that you think would be really important for people to come and see and take away from that, what would you say?

Chris: When you see how these cases pan out in court – we'll try and make this as realistic as we possibly can in the time that we have – the bit that people often say to us is "I didn't realise it was like that". And the other comment is usually really when something is tested at that level of scrutiny, as you would employ a lawyer to do, often your answers do not survive

the evidence. And seeing it in this very graphic way I think is very helpful because it will send a message out to those who might need a bit of a refresher back at base.

Simon: Brilliant. Well in addition to the mock trial, there's a packed agenda in that theatre as well – we've got three days of content, panel discussions, examples of good practice. We've published a full agenda on the Driving for Better Business website, at drivingforbetterbusiness.com/events, and hopefully we'll see some of you there. So Chris, thank you again, and I'll see you in a couple of weeks at the NEC.

Simon: If you manage drivers and their vehicles, and you face similar issues to those discussed in this podcast, there are links in the show notes to some useful resources on the Driving for Better Business website. And these are all free to access. If you enjoyed the conversation, please don't forget to hit subscribe - so you know when the next episode is released. And please also give us a 5-star review, as this helps us to get up the podcast rankings, and makes it more visible to others who might also find it useful. You can follow us – that's Driving for Better Business on Twitter, Facebook and LinkedIn. And most importantly, please help us to spread the word. All our resources are free for those who manage fleets and their employees who drive for work. Thank you for listening to Let's Talk Fleet Risk, and I look forward to welcoming you to the next episode.