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# **Overview of current legislation by Steve Proctor, FSoRSA**

Why we don't actually have to do very much, why we worry about it a lot, and why there are a few things we should do well

*....a Safety Practitioner's perspective*



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**We actually don't have to do very much.....**

# **We don't actually have to do very much!**

## *An overview of legal requirements*

We **have** to undertake RSAs on the TERN  
from Dec 2013 (Directive 2008/96/EC)

### Article 4

#### Road safety audits for infrastructure projects

1. This Directive shall apply to roads which are part of the trans-European road network, whether they are at the design stage, under construction or in operation.
1. Member States shall ensure that road safety audits are carried out for all infrastructure projects.



# **We don't actually have to do very much!**

## *An overview of legal requirements*

- We **have** to maintain our roads (Section 41 Highways Act 1980 & Roads Scotland Act 1984)

*“the highway authority ...are under a duty to maintain the highway, and to ensure, (reasonably practical), that safe passage along a highway is not endangered by snow or ice”*



# **We don't actually have to do very much!**

## *An overview of legal requirements*

- We **have** to take steps to prevent accidents from occurring on new roads (Section 39 Road Traffic Act 1988)

- England and Wales only

“in constructing new roads, must take such measures as appear to the authority to be appropriate to reduce the possibilities of such accidents when the roads come into use”



# **We don't actually have to do very much!**

## *An overview of legal requirements*

- We **have** to avoid killing (or injuring) people through negligent actions
  - Common law offence of Gross Negligence Manslaughter



# **We don't actually have to do very much!**

## *An overview of legal requirements*

- The HA **requires** us to undertake RSAs on trunk roads
- Most local authorities **choose** to undertake RSAs
  - Advice is not the same as Statute or Common Law



# **We don't actually have to do very much!**

## *An overview of legal requirements*

- The police **have an obligation** to undertake investigations into road deaths (Human Rights Act 1998)
- The police **choose** how to undertake investigations into road deaths (RDIM 2007)
  - Advice is not the same as Statute or Common Law





TMS

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**But we do worry **a lot** about what we do!**

**Stop worrying! It's never a problem until  
something goes wrong!**

***When what goes wrong is a road death***

- **Gross Negligence Manslaughter**

- Common Law

- Duty of Care

- **Corporate Manslaughter Act 2007**



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**Stop worrying! It's never a problem until something goes wrong!**

## ***Gross Negligence Manslaughter***

- Before April 2008 - **Common Law**  
Offence of Gross Negligence  
Manslaughter
  - “Identification Principle” applied
  - required courts to identify a person responsible for the death – a “directing mind”
  - Failure of “**Duty of Care**”



**Stop worrying! It's never a problem until something goes wrong!**

## *Common Law*

- **Common Law** (Case Law, Precedent)
- Law developed by judges through decisions of courts
- As opposed to laws developed by Parliament (**Statutes**)



# Stop worrying! It's never a problem until something goes wrong!

## *Duty of Care*

### ● Lord Aitken

you must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour

### ● You have a **Duty of Care** to others when you do something

- eg design a roundabout

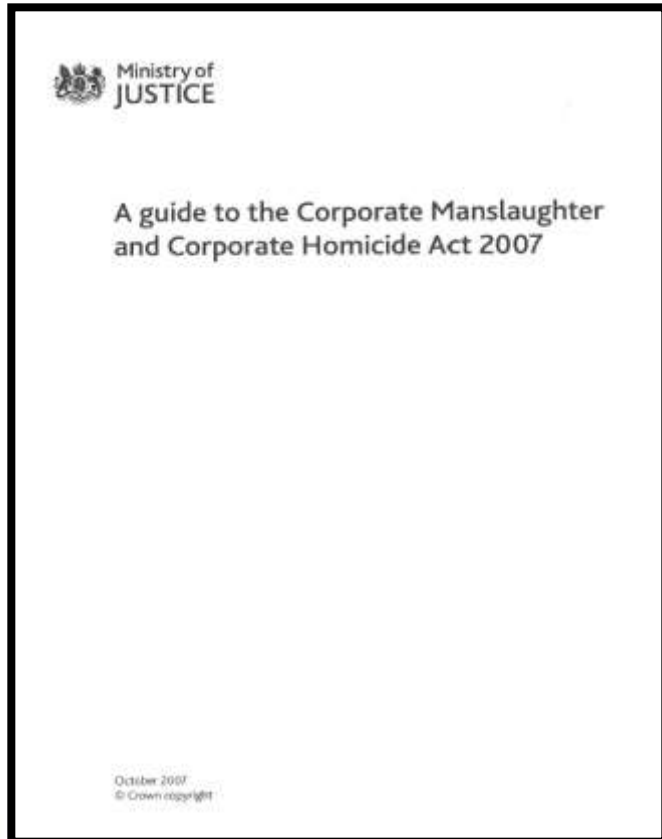
### ● Or when you don't

- eg not signing a known hazard



# Stop worrying! It's never a problem until something goes wrong!

## *Corporate Manslaughter Act 2007*



- Removes requirement for a “directing mind”
- Requires a substantial part of the breach to be the way in which activities were managed by senior management
- Prosecutions against the organisation rather than individuals



# Stop worrying! It's never a problem until something goes wrong!

## *Corporate Manslaughter Act 2007*

### Key information

Corporate manslaughter/homicide will continue to be an extremely serious offence, reserved for the very worst cases of corporate mismanagement leading to death.

The offence is concerned with **the way in which an organisation's activities were managed or organised**. Under this test, courts will look at management systems and practices across the organisation, and whether an adequate standard of care was applied to the fatal activity.

A substantial part of the failing must have occurred at a **senior management level**.

Juries will be required to consider the extent to which an organisation was in breach of health and safety requirements, and how serious those failings were. They will also be able to consider *wider cultural issues* within the organisation, such as attitudes or practices that tolerated health and safety breaches.

The threshold for the offence is **gross negligence**. The way in which activities were managed or organised must have fallen far below what could reasonably have been expected.

The failure to manage or organise activities properly must have **caused the victim's death**.





## Owing a relevant duty of care

A **duty of care** is an obligation that an organisation has to take reasonable steps to protect a person's safety. These duties exist, for example, in respect of the systems of work and equipment used by employees, the condition of worksites and other premises occupied by an organisation and in relation to products or services supplied to customers. The Act does not create new duties – they are already owed in the civil law of negligence and the new offence is based on these.

The duty must be a **relevant** one for the offence. Relevant duties are set out in section 2 of the Act and include:

- Employer and occupier duties.
- Duties connected to:
  - Supplying goods and services
  - Commercial activities
  - Construction and maintenance work
  - Using or keeping plant, vehicles or other things.
- Duties relating to holding a person in custody.



**Stop worrying! It's never a problem until something goes wrong!**

***When what goes wrong is a serious injury or death...***

- Civil Litigation based on breach of Statutory Duty or Negligence
  - Burden of Proof and Standard of Proof
  - Precedent from Case Law



**Stop worrying! It's never a problem until something goes wrong!**  
***Civil Litigation – Case Law sets legal precedent***

- Most actions against local authorities are **Civil Actions** in which an incident occurs, leading to injury or damage
- The victim alleges an **actionable fault** by the highway authority
- An investigation identifies a **causal link** between the fault and the injury
- Litigation commences



**Stop worrying! It's never a problem until something goes wrong!**

## ***Burden and Standard of Proof***

- **Burden of Proof** initially on person bringing the case
- Burden of proof then shifts to the defence –
  - Eg Statutory defence to Section 41 fail to maintain claim - Section 58 Highways Act 1980

“it is a defence...to prove that the authority had taken such care as in all the circumstances was reasonably required...”



**Stop worrying! It's never a problem until something goes wrong!**

***Burden and Standard of Proof***

- **Standard of Proof** is different in Civil Law to Criminal Law
  - Criminal Law – beyond a reasonable doubt
  - Civil Law – on a balance of probabilities



**Stop worrying! It's never a problem until something goes wrong!**

***Precedent from Case Law  
– Gorringe v Calderdale***

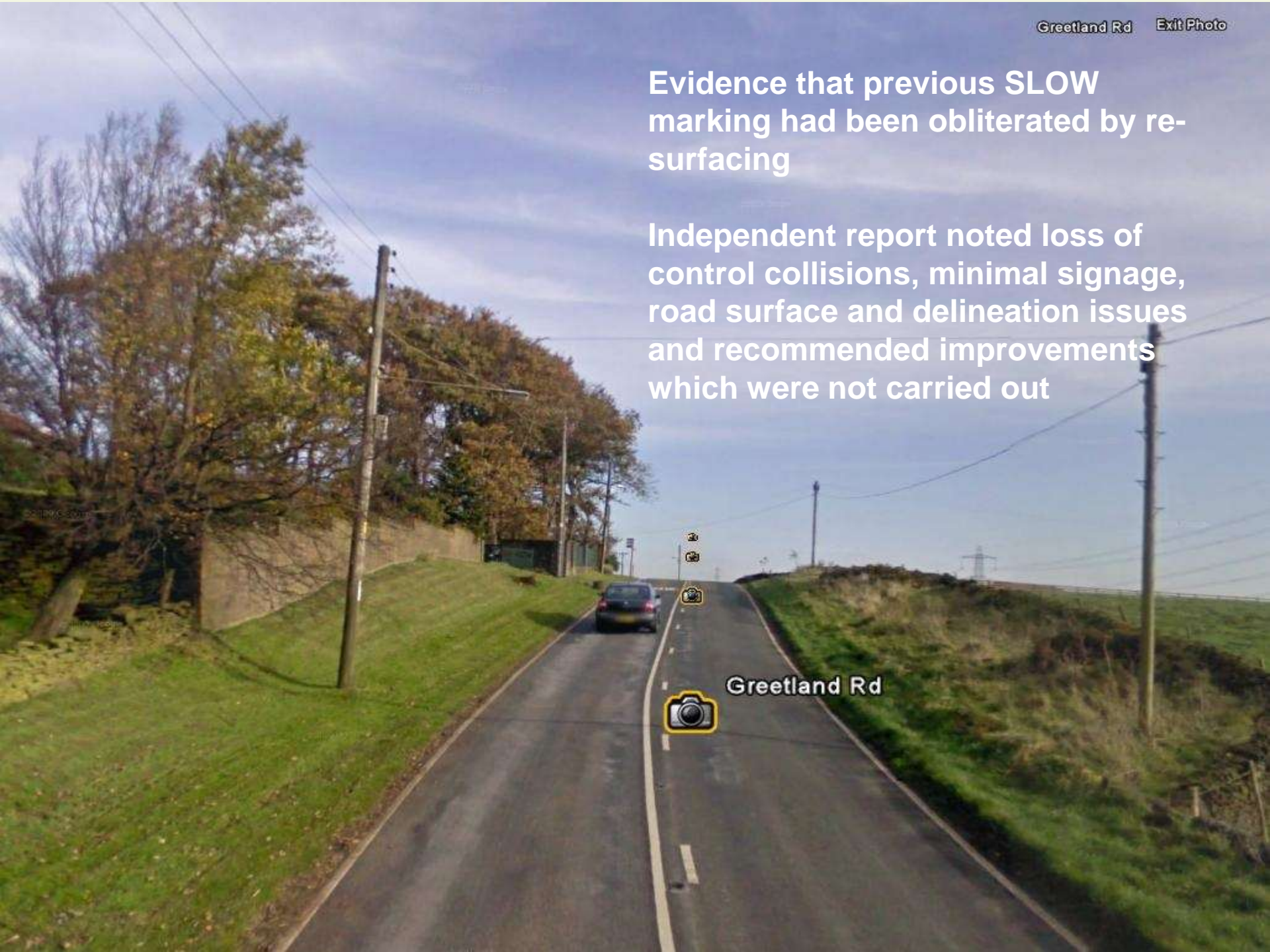
- July 1996 Denise Gorringe's car strikes a bus on a derestricted rural B class road
- She suffers serious head injuries leading to brain damage and paralysis
- She was familiar with the road and thought the bus – beyond a crest – was on her side of the road





**Evidence that previous SLOW marking had been obliterated by re-surfacing**

**Independent report noted loss of control collisions, minimal signage, road surface and delineation issues and recommended improvements which were not carried out**



# **Stop worrying! It's never a problem until something goes wrong!**

## ***Gorringe v Calderdale***

### **THE ALLEGATION:**

- The failure to replace warning signs constituted a breach of the Highway Authority's Duty to Maintain the Highway under Section 41 of the Highways Act 1980
- The failure to provide warning of the hazard also constituted a breach of their Duty of Care created by Section 39 of the Road Traffic Act 1988



# **Stop worrying! It's never a problem until something goes wrong!**

## ***Gorringe v Calderdale***

### **THE HIGH COURT JUDGEMENT:**

- High Court accepts allegations and finds in favour of Mrs Gorringe

Road markings are such an integral part of the road surface that it is fanciful to suggest otherwise. A 'SLOW' warning marking is as much covered by section 41 of the Highways Act 1980 as a tarmac surface.

The failure to replace the obliterated 'SLOW' marking within a reasonable time amounted to a failure to maintain the highway





# Stop worrying! It's never a problem until something goes wrong!

## *Gorringe v Calderdale*

### THE COURT OF APPEAL:

- Appeal Court allows the Council's Appeal

The Duty to Maintain the Highway under section 41 of the Highways Act 1980 does not include a duty to provide warning signs or road markings

The Council had complied with its duties under section 39 of the Road Traffic Act 1988 by keeping accident records and having a general programme of road safety improvements, which included the road in question.

The Court would not usurp the Council's function of prioritising its own resources



# Stop worrying! It's never a problem until something goes wrong!

## *Gorringe v Calderdale*

### THE HOUSE OF LORDS:

- House of Lords dismisses Mrs Gorringe's Appeal

Section 41 of the Highways Act 1980 does not include the provision of road signs or markings

The existence of a statutory duty (e.g. under section 39 of the Road Traffic Act 1988) will not in itself create a Common Law Duty of Care

statutory duty is a general duty to the public at large

a duty of care (as in negligence) is a duty to individuals



# Stop worrying! It's never a problem until something goes wrong!

## *Summary of current Case Law*

- Judgements have consistently made it clear that **drivers are responsible for their own safety** and that road users should 'take the road as they find it'
- However, a Highway Authority may be liable in **negligence** where, by its actions, it has created a **new** danger



**It's never a problem until something goes wrong!**  
***A recent case to worry about.....***

- A21 (T), Kent, 24 October 2011
- 20 year old female student driving home from Tunbridge Wells in her green VW Polo with her sister, (22)
- Dark evening with heavy rain
- Car skidded out of control on bend and collided with roadside trees







# It's never a problem until something goes wrong! *A recent case to worry about.....*

- Driver killed and passenger seriously injured
- Inquest in April 2013 heard of 'systemic failings of the Highways Agency to maintain the road despite evidence of a worsening safety record'



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# It's never a problem until something goes wrong!

## *A recent case to worry about.....*

- Carriageway around bend resurfaced by HA in 2007 – previous HFS not replaced
- SCRIM tests between 2008 and 2010 showed skid resistance below investigation levels
- A number of complaints about slippery surface received between 2009 and 2010
- HA proposed to lay HFS in January 2011, but failed to do so (the route did not score highly enough to receive funding)
- HFS laid after the fatal accident at a cost of £12,000



**It's never a problem until something goes wrong!**  
***A recent case to worry about.....***

- So far, a Coroner's Inquest....what next?
- Corporate Manslaughter case?
  - Existing duty of care for road users?
  - Gross breach of that duty by the Highways Agency senior management?
- Negligence through civil Litigation?
  - Duty of care?
  - Is a negligent failure to improve safety sufficient?
- Breach of statutory duty to maintain the highway (s.41 Highways Act)?







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**And what we do have to do, we should do well..**

# What we do have to do, we should do well!

## *How to avoid embarrassing questions*

- Newham Judicial Review
- High Court findings in Gorringe v Calderdale

## *How to get it right from the start*

- IAN 152/11 Syllabus



# What we do have to do, we should do well!

## *Newham Judicial Review*



- LB Newham Design Guide published 2009
- Tactile paving guidance differed from national guidance - Grey, and only at controlled crossings
- Pilot schemes constructed, appraised, guidance retained in 2010 following consultation
- Local resident (visually impaired person) objected, no injury claim – Judicial Review of “someone of standing who is adversely affected”



# What we do have to do, we should do well!

## *Newham Judicial Review*



- Judge held that Newham's guide was unlawful
- No good reasons allowing Newham to depart from the

guidance:

national guidance produced at a high level, involved those with considerable experience and expertise

guidance issued against the background of the Equality Duty

need to achieve an acceptable level of uniformity and consistency throughout all localities

no special circumstances in Newham that made national guidance inappropriate



# What we do have to do, we should do well!

## *High Court findings Gorringe vs Calderdale*

- “shameless incompetence”
- “50 years out of date”
- “unblushing amateurism”
- “bureaucratic abyss”
- “exceptional failings in records
- “haphazard staff training”
- “evidence of hazards ignored by Officers”
- “Officers unaware of good practice or deliberately ignored good practice”
- **“WHOLLY UNREASONABLE CONDUCT”**



# What we do have to do, we should do well!

## *IAN 152/11 Syllabus*

The Highways Agency wants Safety Auditors to know about these things...

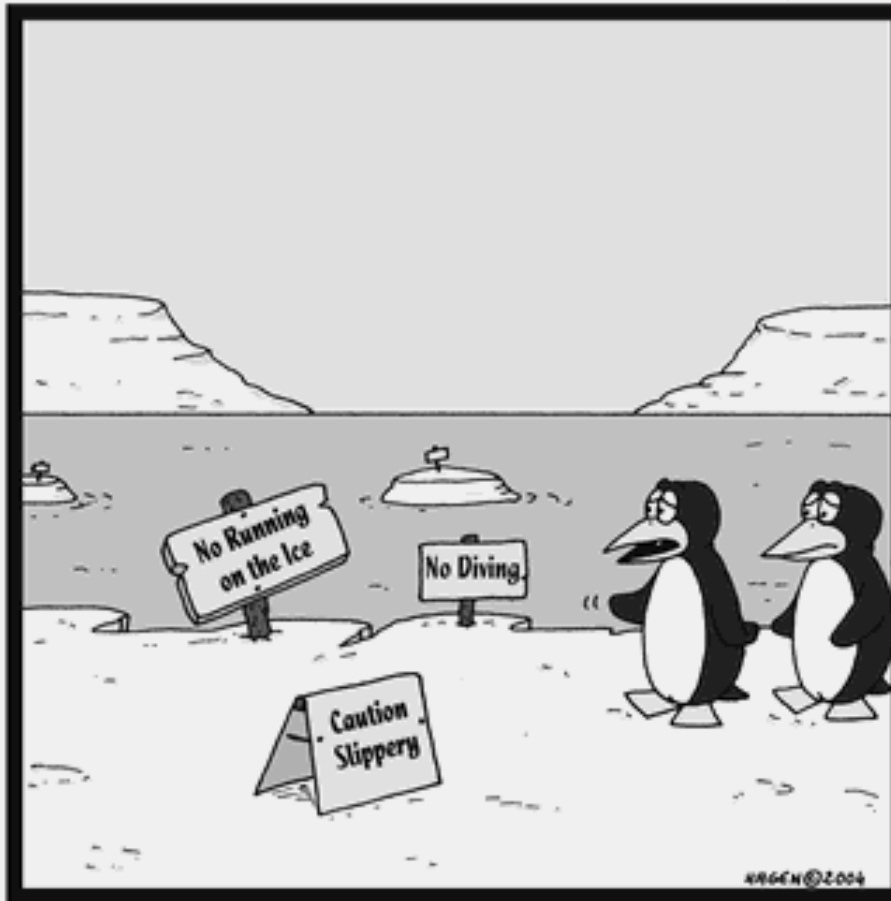
Interim Advice Note 152/11  
Road Safety Audit  
Compliance with EC Directive 2008/96/EC

Figure 1 – Outline Training Curriculum

Core Module	Example Module Content
1 Road Safety Legal Issues, Legislation and Policy	Review of the reasons why Road Safety Audit is undertaken, in terms of the 1980 Highways Act and 1988 Road Traffic Act. Introduction to the 2007 Road Death Investigation Manual. The Corporate Manslaughter and Corporate Homicide Act 2007. The Manslaughter by Gross Negligence Common Law. The EC Directive 2008/96/EC. Road Safety Policies, targets and strategies.

# It's a Jungle out there!

by HAGEN



If you ask me, the constant fear of litigation  
is taking all the fun out of life...

Hagen Cartoons: <http://www.hagencartoons.com>

Let's remember  
why we do  
this...



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