

The Impact of the Corporate Manslaughter and Corporate Homicide Act 2007 on the Construction Industry in the UK

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The Corporate Manslaughter and Corporate Homicide Act 2007 came into force on 6th April 2008. The legislation clarifies the criminal liabilities of companies and makes it easier to prosecute them where serious health and safety management failures lead to workplace fatalities. This paper aims to explore the provisions of the new Act and examine its impact and significance for construction stakeholders and potential impact on current industry practices in construction. It will also address the socio-economic impact of the Act and fatalities in general.

Key words: Construction Fatalities, Workplace Fatalities, Corporate Manslaughter, Corporate Killing, Corporate Homicide Act 2007, Workplace Health and Safety

Introduction

In the twelve months leading up to the implementation of the Corporate Manslaughter and Corporate Homicide Act 2007, 77 people died on construction sites in the UK. (Glackin 2008)

Some argue that this shocking statistic is seen to be ‘accepted’ within the construction industry. The Act creates a new statutory offence that aims to bring about justice for those killed on construction sites and help decrease the number of fatalities by making it easier to convict companies that produce fatal accidents. The new legislation means that site deaths will be investigated by the Police with the input of experts such as the Health and Safety Executive (HSE) also harnessed. The Act applies to all companies and corporate bodies operating in the UK, with proceedings being taken by the Crown Prosecution Service in England and Wales, the Public Prosecution Service in Northern Ireland and the Procurator Fiscal in Scotland. (Ministry of Justice 2007)

The aim of this paper is to define CMCHA 2007, highlight why it has been formed, investigate the level of awareness and perception of the new Act among construction managers and operatives, and to identify the potential socio-economic impact of fatalities in general and the new law on the industry. The need for this research stems from the fact that the CMCHA 2007 has the ability to affect and penalise any construction company in the industry and its possible effects have not been specifically researched. Only once its possible effects and its current awareness in the industry are researched and communicated can we better understand its importance.

A Brief History of Corporate Manslaughter

The first prosecution for Corporate Manslaughter was Cory Bros Ltd in 1927. This failed however due to showing that an indictment could not come against a corporation for a case involving personal violence as a company could not have the requisite ‘guilty mind’ or ‘mens rea’. The Cory Bros case was decided before the principle of ‘identification’ was developed. Since then, there have been some major disasters that have focussed the public concern as to the lack of corporate liability and accountability of Company Directors and organisations as a whole. This concern started in 1985 when 49 people died in the Bradford City football stadium fire. However, the principal of Corporate Manslaughter was first properly conceived during R v P&O European Ferris (Dover) Ltd (1991) when the Herald of Free Enterprise sank killing 187 people. Other major disasters that have gone unpunished include the Piper Alpha oil platform explosion in 1988, Hillsborough in 1989 and more recently the Hatfield rail disaster in 2000. Even though the Lyme Bay Canoe tragedy provided the first successful conviction of Corporate

Manslaughter in 1994 and therefore the basis for six other successful convictions, they are all of small companies where 'identification' of failure is simple. The unsuccessful cases of the 1980's and 1990's show how after most of the disasters in recent times on which an inquiry was held and evidence of management failure present, there was no / inadequate investigation of criminal offences, nobody found accountable and nobody punished. This is mainly due to the size and complexity of the organisations involved. This has created dismay to all bereaved families and those affected by the disasters. This dismay highlights the need for CMCHA 2007 in order to enable successful convictions of similar future cases and therefore provide justice.

Before CMCHA 2007 was put in place, a company could be prosecuted for a wide range of criminal offences including manslaughter. However, to be prosecuted for manslaughter a company had to be in "gross breach of a duty of care owed to the victim." A "directing mind" of the company (a senior individual) had to be guilty of the offence; this is known as the identification principle. (Ministry of Justice 2007) Prosecutions under this offence were therefore difficult, as a sole person would need to be singled out for a gross breach of their duty and it is difficult to pinpoint responsibilities up the chain of command.

In 1996 the Law Commission's report "Legislating the Criminal Code: Involuntary Manslaughter" (Law Commission 1996, Law Commission 1996) included proposals for a new offence of corporate killing. This would act as a stand alone statutory offence, enabling the prosecution of companies rather than just individuals (prosecutable by old law). The Labour Party showed commitment to the reforming of the law in their manifesto in 1997 and the Law Commission's report provided the platform for the Government's consultation paper in 2000 entitled "Reforming the Law on Involuntary Manslaughter: the Government's Proposals." (Welham 2000)

A draft Corporate Manslaughter Bill (Cm 6497) was published in March 2005, which set out the new Government proposals, most notably the application of the new offence to Crown bodies. This draft was then analysed by the Home Affairs and Work and Pensions Committees in the House of Commons in the same year. Their report (HC 540 I-III) was published in December 2005 and the Government responded in March 2006 (Cm 6755). (Matthews 2008)

The New Law

The CMCHA 2007 creates a new statutory offence that is based on corporate liability; therefore an individual does not need to be identified.

A relevant duty of care is "*an obligation that an organisation has to take reasonable steps to protect a person's safety.*" (Ministry of Justice 2007) The new offence only applies when an organisation owed a duty of care to a deceased victim under the law of negligence at common law. The Act does not create new duties where they are not already owed. It simply creates circumstances in which an existing breach of a duty of care will constitute a criminal offence.

In the past, the problem of deciding who and how the duty of care was owed to the victim resulted in conflicting Court of Appeal judgments and more often than not justice has not been accomplished for the victim and their family. The main feature of the CMCHA 2007 is section 2 (5), whereby whether a duty of care is owed to an individual by an organisation is a question of law and "*The judge must make any findings of fact necessary to decide that question.*" (Matthews 2008) states that the Act sweeps away the fiction that 'duty of care' is a simple question of fact that a jury can determine simply through application of directions of law. The Act provides no more than a bare statement of principle and details no mechanism or procedure, therefore leaving the establishment of a 'duty of care' to the judge, where some determinations of fact are usually for the jury. To determine a gross breach, the jury must consider failure to comply with legislation, the seriousness of that failure and how much of a risk of death that failure posed. The use of section 2 of the Act should therefore clarify whether a 'duty of care' is owed. Mr Gerry Sutcliffe MP states; "*In the vast majority of cases, it should be straightforward.*" (Mr Gerry Sutcliffe MP 2006)

Investigation is undertaken by the police who receive input from industry experts such as the HSE. Proceedings are taken by the Crown Prosecution Service in England and Wales, the Public Prosecution Service in Northern Ireland and the Procurator Fiscal in Scotland. (Ministry of Justice 2007) It is punishable by way of unlimited fine, remedial order and publicity order.

The Study

The aim of the study carried out was to investigate construction industry management and operative awareness and perception levels for the new Act and how it would alter their Safety culture. It was therefore primarily conducted by issuing an internet-based questionnaire to the management of four principal contractors who are part of the UKCG and visiting their sites to issue paper copies to operatives. Eighty-five respondents to the management questionnaire and fifty-nine respondents to the operative questionnaire mean that a very credible analysis of the awareness and perception of the industry as a whole will be able to be made. Semi-structured interviews allowed further insight into construction, health and safety, and corporate manslaughter professionals' ideas and views on the impact that the new Act will on the construction industry. Interviewees included the following:

- Respondent A - Project Director for a principal contractor belonging to the UKCG
- Respondent B - Senior Construction Manager for a principal contractor belonging to the UKCG
- Respondent C - Health and Safety Director for a major sub-contractor and ten years experience investigating fatalities for the HSE
- Respondent D - Field Operations Manager for a world-leading health and safety consultancy and corporate manslaughter specialist
- Respondent E - Criminology Professor and corporate crime author, researcher and specialist

These viewpoints along with generic research by reading around the subject area enabled the discussion of the various social, technical, economic and legal impacts the Act produces.

Questionnaire Results

- 81.18% of managers are aware of CMCHA 2007 and 49.15% of operatives are aware. Combined, 65.17% of construction industry practitioners are aware of CMCHA 2007.
- 43.04% of managers were informed about the enactment of CMCHA 2007 by their company compared to 20.34% of operatives who were informed by their company. The other major sources of knowledge of the CMCHA 2007 were reading in trade press and courses attended.
- 100% of operatives feel competent toward their individual health and safety responsibilities compared to 97.65% of managers who do. One manager of 0-5 years experience stated that he felt he was not experienced enough to class himself as competent. A senior operational manager stated, "*Recent changes have not been fully explained and many like me feel a little exposed.*"
- 94% of managers are CSCS qualified and 86.44% of operatives are CSCS qualified. This means that of all 144 respondents to the questionnaires in total 9 in 10 people have a CSCS card.
- 82.35% of the management respondents think that prison sentences are a penalty under CMCHA 2007. That shows a very common mis-conception throughout the industry.
- The majority of companies have done well in communicating the implementation of the Act but not what it means.
- 83.54% of managers think all workplace fatalities are preventable compared to 89.66% of operatives who believe this. The demographic of those who think workplace fatalities are not preventable tends to be the most senior and experienced managers and operatives.
- Management and operatives alike feel that individuals, particularly those carrying out the task, should take more responsibility.

- There is a general consensus that policies and procedures could be made much simpler, resulting in a better understanding of them and ultimately less accidents and fatalities taking place.
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- Finally, there is also a general consensus that worker engagement and cultural change is the main tool needed to combat health and safety problems looking to the future.

Social Impact

The social impacts of somebody going to work and not coming home are indescribable. It will cause untold grief and despair to loved ones. It is also very likely the bereaved family will have also lost their main 'breadwinner' and so will struggle from a financial viewpoint in the future. Various organisations such as Disaster Action and Families Against Corporate Killing (FACK) have been set-up to represent and advise the families and loved ones of those killed in a disaster or killed at work.

Fatalities also affect the projects on which they occur. There is an obvious drop in productivity and morale following a fatality but a stigma can also be attached to particular sites. Reversely, a fatality can also incite change on a personal, team, site or company level, but it should not take a death to create such change. When talking about a site where a fatality had taken place Respondent B stated; *"People were moved about in order to improve the performance of the project, but the culture had already been created, so the bad practices were there and there wasn't a regime so you're forced to play catch up then."* He goes on to say; *"It's dramatic, you get a stigma with it, people change their behaviour. The natural instinct for people to be creative goes because fear gets in."* However, *"There was no blame culture, it created solidarity in the fact that we were not going to tolerate this and were going to out things right."*

Upon investigating one particular fatality at a small company, Respondent C explains; *"One accident I have been involved in had the tangible affect of bringing all sorts of groups of people together to revise risk assessments, put together manuals, and generally roll-out x, y and z which had a galvanizing affect."* The two varying reactions of a drop in productivity and morale plus a galvanised reaction due to wanting to put things right are natural human responses to disaster but must be properly handled by management to ensure the best is made of a terrible situation. Respondent B summarises this fact by saying; *"For me there was an embedded issue that you don't want that to happen again and you would do everything in your power to make sure it doesn't."*

Respondent B goes on to state that *"The other thing is the stress that causes, now in our business to build a project there is a lot of stress, but this added stress is not easy to deal with and manage."* Stress is important because it is proven that negatively orientated personalities have a higher impact than adverse job conditions. In addition, long-term or unresolved stress can cause psychiatric damage. To highlight the frequency rates of stress within construction and particularly the field of health and safety, this report found that in the last couple of years half (about 6 people) of the HSE's construction specialist's have had periods of time off work with work-related stress. The impact is also felt by family and friends, Respondent A states *"Stress impacts on too many other people."*

Experience dictates how a person deals with stress and so if you have no experience of something i.e. a fatality occurring this can often send individuals 'off the rails.' Respondent B states; *"I look at a manager involved in a fatality – he's never got over it, every year he's drunk because that's his way of dealing with it, it's a horrible thing. My view is, nobody will ever know how to deal with it, but you should use it as a positive and use it as a stand and say I'm never ever going to let that happen again."*

To conclude, this report has found that many managers do feel the strain of their company's health and safety procedures, but on a social front, health and safety is the responsibility of every individual. However, Respondent B says, *"You could pay someone Wayne Rooney's wage a week, it doesn't make him care about his job, you need to have the right values."* These 'right values' must be achieved through a change in the social mindset of the industry as a whole.

Technical Impact

Looking at the impact of fatalities technically, they can change work methods, processes and equipment / machinery. Respondent B stated that one fatality “*highlighted that there was an issue with quick hitches within the industry.*” This technical issue is therefore communicated industry wide and put right to make sure the same mechanical failure does not happen again. Respondent A goes on to say; “*If safety alerts come through with a rectification process within them they would change the processes within the business.*”

The only problem with these technical changes is that the particular problem is not foreseen and so they are reactive. In some cases, solving the problem may be too late for some people. Respondent C stated, “*After a fatality I investigated, a company totally reviewed their procedures towards everything they did and it’s a shame it took that to make them see sense.*”

It is also important to note that over time, accidents and fatalities have ultimately created technical changes in work processes either through legislation or social un-acceptance of what had become the norm. These changes are not reactive as above but are an evolution. As well as changing physical processes, procedures have also evolved. For example, new CDM Regulations place more emphasis on designers to plan and design-out possible safety risks early on and also gives clients more responsibility. The use of cultural change programmes such as IIF now have a big influence over technical procedures. If somebody thinks what they are about to do is unsafe, it is likely they will express their concerns and the situation will be righted. The workforce as a collective also has more of a voice than ever before to express general worries and problems.

The technical impact of CMCHA 2007 means collective failures are punishable which does away with the ‘identification principle’.

Economic Impact

The main economic impact of the Act will be via fines and publicity. Firstly, looking at publicity, companies would have to advertise the fact of their conviction, specified particulars of the offence, the amount of any fine imposed and the terms of any remedial orders put in place. This could potentially damage the reputation of the business and could have a negative impact on staff recruitment, retention and the perceptions of customer, clients and supply-chain thus damaging the equity of the company and providing competitors with a major advantage. Many critics have questioned the value of publicity orders, but the late Joseph Pulitzer combats stated; “*Publicity may not be the only thing that is needed, but it is the one thing without which all other agencies will fail.*”

As previously stated fines are unlimited but are likely to be set at 10% of a company’s annual turnover to create an equal economic impact on organisations of different sizes. In general, Corporate Manslaughter will create fines that are larger than ever seen before. The guidelines state that the amount should be sufficient:

- To reflect serious concern at the consequences of the breach;
- To ensure that those responsible for governance of the organisation are properly aware of the need to ensure a safe environment; and
- If possible, to eliminate any financial benefit from the offence. (It should not be cheaper to offend than to prevent the commission of an offence.)

For the four companies used as part of the questionnaire sample, 10% annual turnover represents 6 times the profits of these companies for a year on average. Being fined a lump sum of 6 times the profit for a single year would undoubtedly cause chaos for all companies, even the largest multi-nationals. Whether this is fair or representative of killing someone in the workplace is a matter of opinion. Interviewees gave wildly different opinions on the rate of fine when asked. Hopefully, the seriousness and size of the fine that can be imposed under CMCHA 2007 will help fundamentally change a company’s values for the better.

Another interesting economical fact is that criminal fines cannot be insured against for reasons of public policy. Most liability insurers provide defence costs following prosecution arising from an alleged breach of health and safety legislation and since prosecutions of Corporate Manslaughter are likely to arise from such breaches,

prosecution defence costs will be covered. However, this should not be taken for granted, as most policies will not automatically include manslaughter defence costs so organisations must update their policies.

Legal Impact

Put simply, the initial legal impact on companies who were already complying with health and safety legislation and guidance is zero. However, CMCHA2007 will have an impact if companies are found to be in breach of health and safety legislation and guidance. This could result in unlimited fines, publicity and remedial orders if the technicalities discussed in the technical impact section are proved. The Regulatory Impact Assessment estimates 10-13 cases a year to be prosecuted under CMCHA 2007.

Mitigation

Over recent years, mitigation against accidents and fatalities has become a moral obligation for large construction organisations to fulfil. It is the argument of this report, that the traditional triangle showing the three main performance indicators be replaced by the diagram below (Fig.1) which represents the present cultural change happening in the construction industry through initiatives such as Incident and Injury Free (IIF).

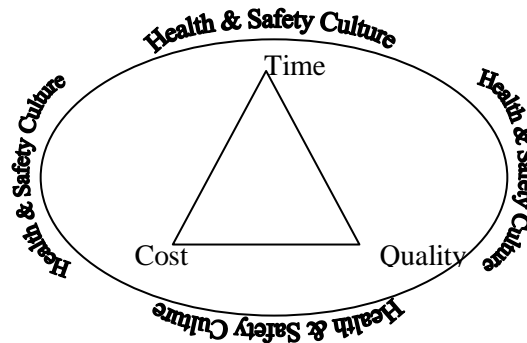


Figure 1. Changing Safety Culture as a result of the Act.

Discussion

The main impact of CMCHA is to reinforce the importance of compliance with existing health and safety laws and guidance. CMCHA was introduced because current manslaughter cases are difficult to prove against large organisations. The government was therefore failing in their duty to provide justice, punishment or deterrence – the objectives of criminal law. There was therefore a sense of public injustice. The new Act does not add to or take away from any current health and safety regulations. It has been put in place to raise the likelihood of successful prosecution of manslaughter in corporate cases. There must be a ‘management failure’ rather than failure of a ‘controlling mind’ as under current manslaughter prosecutions. It is therefore easier to prosecute corporate bodies and large organisations that have many hierarchical levels. However, the Act does not produce any new health and safety law. Companies abiding by current law and regulations have therefore no further obligations with which to comply. Due to the seriousness of the title of CMCHA 2007 and the attention it received in the press, there is a common misconception amongst industry management that the Act creates new requirements of them but it does not. Some panic at its time of inception may mean it has not been properly communicated to the workforce.

By raising the likelihood of successful prosecution of manslaughter in corporate cases however, the law does present new cautions for larger corporations that operate in the UK, especially foreign companies whose home countries may not have similar legislation. The law changes the expected values of the risk of fatalities and corporations will need to re-evaluate their risk assessments with regard to their operations in the UK.

The opinion given from the four companies that participated in the questionnaires and interviews is that they are wholly confident in the systems they have in place. This means that CMCHA 2007 will not make a difference to them at all. However, there will be some organisations, who do not comply to legislation and guidance so should the worst case happen and they kill somebody, CMCHA 2007 will create justice. However, those organisations that do not have the correct policies in place are unlikely to be large companies that are well managed and have the best staff to ensure policies are in good order.

The Act is likely to only be able to make prosecutions 'stick' on smaller companies where it is clear that the correct policies and procedures were not in place, the safety culture was poor and it is easier to establish a general 'management failure' as there are far fewer managers. Indeed, the first prosecution under CMCHA 2007 announced on 23rd April 2009 is against Cotswold Geotechnical Holdings Ltd. The purpose of the Act to target and make it easier to prosecute larger organisations is therefore lost. By no means is the Act over regulation, it is needed, but it is the opinion of this report that it will not successfully achieve what it set out to do and what was promised in 1997.

It does highlight the problem of corporate killing and go some way to solving it but the fact that large organisations and individuals are likely to remain unaffected in the case of a fatality means it will not create justice. This is why it has been described as a disappointment by many.

Respondent C says; *"I don't think Corporate Manslaughter makes any difference whatsoever. If your expectations were in line of what Labour originally set out to do, I think you will be very disappointed by CMCHA 2007. I believe it will not affect large companies in any big way, as the chain of command is too great. It may act as a stricter enforcement for the white van man, although this deterrent was probably already there. The Health and Safety (Offences) Act 2008 is more significant."*

Added to this argument is the fact that there was a 13-year gestation period to bring in the Act, highlighting the issues and problems of technicalities and wording. The line between a health and safety and a corporate manslaughter offence will not be an easy one to draw. How it will ultimately pan out depends on a whole series of issues most notably investigative (Police and HSE) resources, regulatory resources, the attitude of the Crown Prosecution Service and Director of Public Prosecution and the attitude of political masters. By requiring DPP consent to prosecute, the Act threatens to entangle prosecution in the political process to an unacceptable degree. Future cases may create a 'backlash' from companies and their representatives. Some organisations are very large and hold so much power over the economy and even politics that corruption of some sort is a possibility.

Finally, on the subject of creating legislation in general Respondent C said, *"If legislation isn't careful it will drive people away, why would you want to be a senior manager if you could go to prison."* Opinions such as these are quite common, which is worrying for the future lifeblood of the industry as they may feel accountability on managers is too onerous, and therefore a threat to their existence or certainly professional happiness.

Conclusion

To conclude, research has found that the majority of managers within the industry are aware of the new Act but only half of operatives are aware. 82.35% of managers think prison sentences are a penalty under the new law, which shows it has not been properly communicated. The discussion, formulation and passage of the law has had symbolic effects by raising the awareness of health and safety responsibilities in smaller companies, putting corporate manslaughter on the political agenda and linking workplace deaths with criminal law which are all very positive and worthwhile. Nevertheless, this paper believes that the primary objective for the formation of a corporate killing law was to provide justice and this has not been achieved. The reasons for this are that large companies are *still* virtually immune from prosecution through too complex a legal process and the law does not hold the responsible individuals accountable. Convictions for Corporate Manslaughter will prove almost as elusive as they did under common law.

Acknowledgments

The authors wish to express their gratitude to all those individuals who helped in the research that formed the basis of this paper. Most notably, thanks go to the Chartered Institute of Building - CIOB for making this work possible with a supporting grant awarded through the Queen Elizabeth II Jubilee Scholarship.

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