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John Kelsey

Bartlett School of Construction and Project Management, Faculty of the Built Environment
University College London, Wates House, 22 Gordon Street, LONDON WC1H 0QB
j.kelsey@ucl.ac.uk

Abstract

One of the concepts included in current draft legislation on Corporate Manslaughter is that of seeking to profit. The paper seeks to examine this concept and whether the assumptions underlying it are valid. Firstly the concept is examined in terms of managerial economics where it is argued that there is no necessarily direct trade-off between profit and safety expenditure. It is also difficult to disentangle expectation of profit and actual profit realisation in relation to a single cost factor. Recent literature on longer-term managerial decision making suggests that there is a range of company attitudes to both profit and safety which do not necessarily trade one off against the other. Other research suggests widespread ignorance among senior managers about actual safety-related expenditure. Turning to the public sector it is possible to find a safety-economic gain trade-off both in government operating practice and in decision making about the introduction of regulations. Health and safety regulations themselves are not always appropriate or practical in all situations and in some cases may bring into question project viability. The paper concludes that the assumptions underlying the concept of seeking to profit are invalid and that it should be omitted from the legislation.

Key words: Corporate Manslaughter, Profit, Health and Safety regulations, Corporate Decision Making, Cost-benefit analysis

Introduction

Clause 3(2)(b)(iii) of The Corporate Manslaughter Bill (Home Office 2005) requires juries to consider whether the senior managers (of an organization) sought to cause the organization to profit from failure (to comply with Health and Safety legislation and guidance) resulting in the death of someone to whom the organization owed a duty of care). In response to criticism (House of Commons 2005) the government has since stated that the factors listed in Clause 3 are matters which the jury may (rather than must) consider and that they may drop the 'senior management' test. However they have insisted that reference to profit motivation should still remain in the legislation (Home Office 2006).

This part of the Bill seems to assume a model of an organization where

a) there is a direct trade-off between profit, the cost of safety measures and the degree of risk to which employees and others (to whom the organization has a duty of care) are exposed
b) there is an explicit decision-making process among senior managers which can balance the expectation of profit against specific expenditure on health and safety measures

c) the profit-making activities are subject to a set of health and safety regulations appropriate to all possible situations

This paper seeks to examine these assumptions and review some associated literature. It is written from the viewpoint, not of a legal expert, but rather one trained in economics, accounting and quantity surveying who has had not only responsibility for health and safety on construction and mining sites but also financial responsibility for individual construction contracts including budgetary control.

A short-run economic model

One of the other troublesome issues in the Bill is that of causation (House of Commons Office 2005). Hart and Honoré (1985) argue that although causation is a tricky concept with many difficult philosophical issues, the word should be used (for legal purposes) as understood by ordinary people. With profit, most ordinary people have some dim grasp of the idea of accounting profit even if they have never seen a set of accounts. It would, therefore, be difficult to argue that the word merely referred to any form of gain without reference to some form of accounting profit – especially for a corporate offender. So it must be assumed that profit in the mind of the ordinary juror refers to 'Revenue less Cost' even if they are unclear about exactly how these are determined.

Clearly it is on the 'cost' side that the issue rests. The cost of safety is not only the cost of a safety department and specific safety-related measures such as inductions, training, protective equipment and additional costs of 'safer' working practices. There is also a cost of failure to take suitable safety-related actions. An economist, management accountant or risk manager might view the costs of safety as in Figure 1.

The right hand axis measures the costs of safety expenditure. The left hand axis measures the costs of safety-related incidents. This would include (for a building contractor) disruption to work, loss of employee time, compensation to injured parties, HSE fines and court costs, internal investigation costs, loss or reduction of contractual safety incentives (if any) and increase in Contractor's All-Risk insurance premiums. There may be longer-term costs in loss of reputation and/or removal from 'approved contractor' lists of important clients. In the experience of this writer in working for large contractors, these are costs which Head Office Safety Managers are very keen to impress upon site staff.

The solid line represents the combination of both these sets of costs According to economic theory a profit-maximising company will seek to expend costs $O_M C_{M0}$ and deliver safety measures M_0 in order to minimise total safety-related costs $C_{T0.}$

Let there be a government regulator who imposes a set of safety measures M_G because, in the regulator's view, while there are additional private costs to the company of:-

$$C_{TG} - C_{T0} = (C_{MG} - C_{M0}) - (C_{R0} - C_{RG})$$

there are even greater social benefits (or avoided costs which the company does not have to pay) in not having the occurrence of the relevant additional safety-related incidents.

Safety expenditure and total safety cost
- adapted from Bohenblust and Bossert (1998)

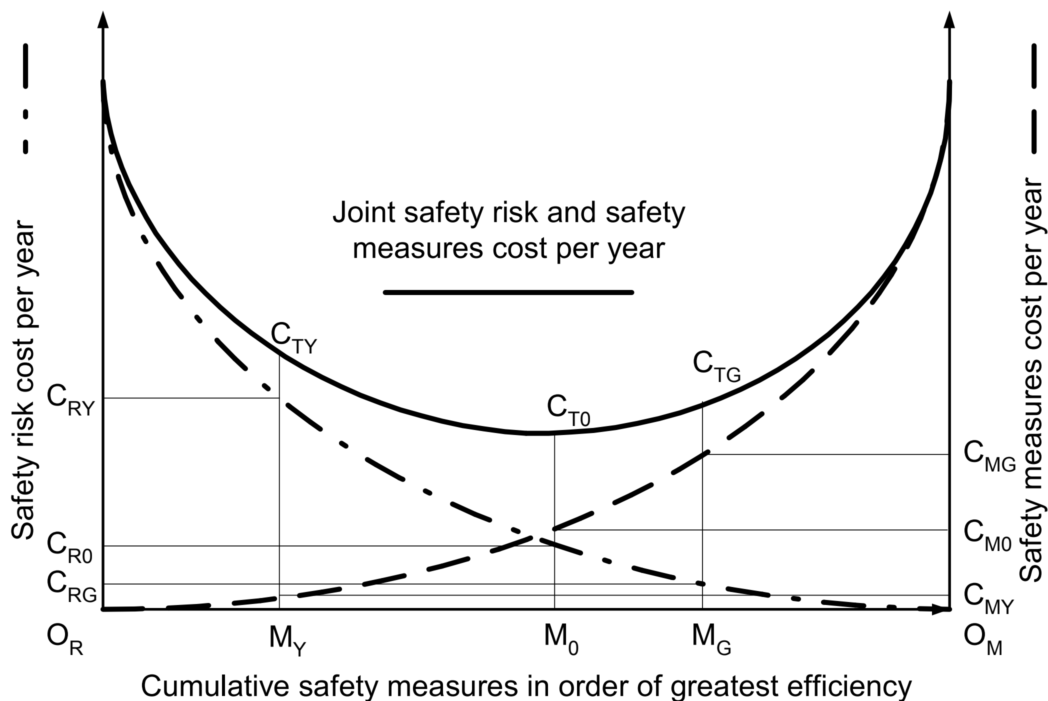

Figure 1

Suppose the profit maximising contractor ignores these regulations and continues to maximise profits. Suppose also that there is a 'cowboy' contractor who puts in place a minimal package of safety measures M_Y at a minimal cost C_{MY} but who ultimately incurs a large safety-related cost of C_{RY}. Suppose both experience a management failure which results in the death of one of their workers and they are prosecuted for corporate manslaughter.

Now looking at the situation using this model, it might be possible to argue that the profit-maximising contractor was seeking to profit from non-compliance with regulations. It is altogether rather more problematic to do so for the 'cowboy' builder. In this scenario the more extreme offender may actually end up with less profit.

One might argue that it is surely not rational for the cowboy contractor to behave in this way. However, the expenditure on safety measures is relatively easy to forecast. The probability and financial impact of safety-related incidents and accidents is altogether much more difficult to forecast. If the profit fails to materialise, it may be difficult to show that the company was seeking to profit *from the minimisation of safety-related expenditure* as opposed to any other cost-reduction measure.

Another objection might be that it would be difficult to argue before a jury that the risk-related costs represent true safety costs and that the jury should only take into account actual safety-related expenditure. That is a good argument except that the Bill does not use the phrase ‘sought to minimise safety-related expenditure’. It uses the phrase 'sought to cause the organisation to profit'.

One final twist to this may be illustrated by the fact that in the design, construction and operation of infrastructure (and sometimes in straightforward building contracts) there are now financial incentives for good safety performance. If a corporate manslaughter case is brought in this context the prosecution will have to demonstrate at the very least that specific safety-related expenditure was avoided and that it exceeded the company’s expected safety incentive. Their task is not an enviable one.

A medium-term managerial model

Now most companies seek to make some sort of profit and some of them may indeed seek to maximise it. Senior managers are, after all, supposed to seek profit for their shareholders. Such managers will look at a whole variety of risks (including hopefully safety risks) that have to be managed in order to deliver a profit. It is not clear how juries are supposed to disentangle 'seeking to profit' from one type of risk merely on the basis of some degree of non-compliance with Health and Safety legislation and guidance.

The obvious trap for juries to fall into is the one of simply using *actual* occurrence of compliance failures and *actual* profits to determine whether the latter has been sought from the former. Figure 1 suggests that things are rather more complex than that. There is also no mention as to whether 'profit' is being sought at the workplace or site or at the level of the organization as a whole (and, in the case of a group company whether the 'organization as a whole' is the whole group). In looking at actual profits one can, of course, have profitable contracts within loss-making companies and *vice versa*. Similarly one can have loss-making subsidiaries within an overall profitable group of companies and *vice versa*. Selection of the 'right' accounting policies can allow manipulation of profits between different group companies (Smith 1996) (as well as between different contracts within the same company).

There is yet a further problem. The economist's model itself assumes a senior management with a relatively short-term focus on profit maximisation. Increasingly enlightened corporations are looking beyond the immediate bottom line to a set of measures to determine corporate performance (Kaplan and Norton 1992). Developing these further the European Foundation for Quality Management (Vincentsen 1998) developed a model of 'Business Excellence' which includes Health and Safety.

A profit-safety performance matrix for companies

		SAFETY	
		BAD	**GOOD**
PROFIT	**LOW**	**A**	**B**
	HIGH	**C**	**D**

Figure 2

So in very simplistic terms we may end up with a range as shown in Figure 2 with companies in all four segments. So, from the point of view of organization type D, a profit-seeking, efficiently-run corporation is one that has a good health and safety record. For these corporations, quality, efficiency, profit, health and safety are allies and none is an enemy of another.

Research carried out by Smallman and John (2001) suggests a less rosy and slightly more complicated picture. It agreed that there were some companies who took health and safety to be part of a model of business excellence but pointed out that there was a spectrum the other end of which was represented by companies who regarded minimal compliance with legislation as the appropriate attitude.

Corporate view of relationship between reputation damage and non-compliance with government health and safety legislation

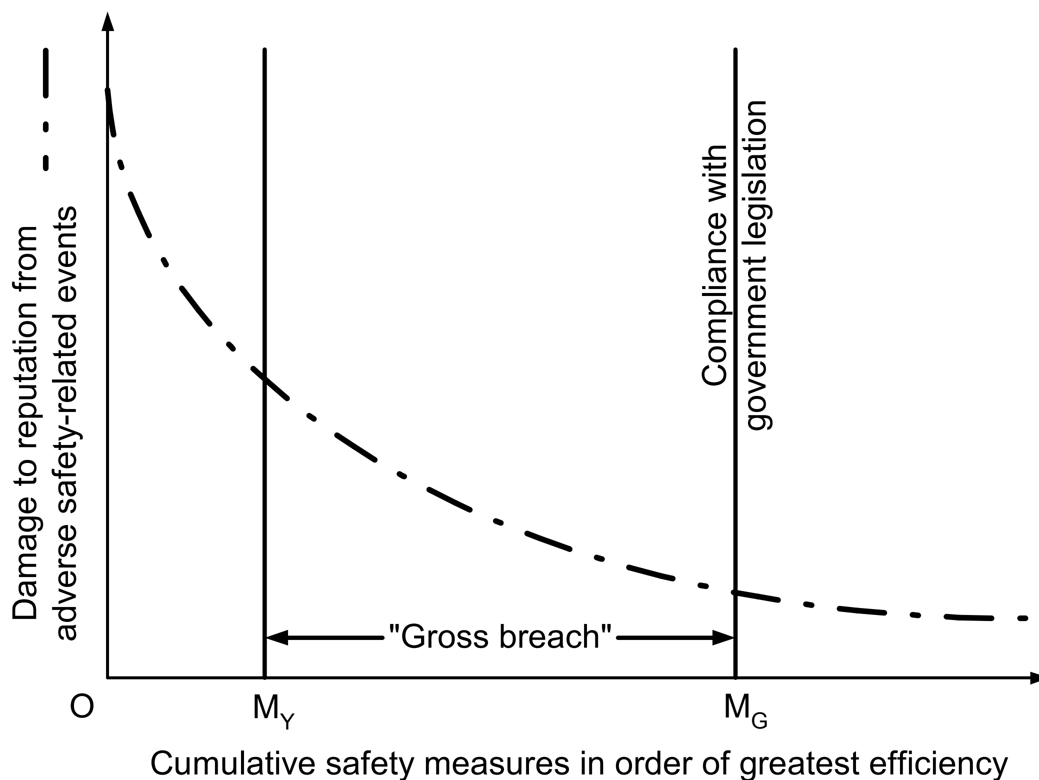

Figure 3

Most companies agreed, however, that actual damage to a company's reputation through adverse safety-related events was much greater when health and safety rules were breached. There was, therefore, little to be gained (in terms of damage to corporate reputation) from going beyond minimal compliance even if some companies wished to do so for other reasons. This is illustrated in Figure 3 (adapted from Figure 1). Thus the area covered by corporate manslaughter - the 'gross breach' is seen as the area of greatest potential damage (and therefore potential future financial loss). This is hardly a model from which to argue the case for 'seeking to profit'.

This is confirmed in a survey of attitudes to impending corporate manslaughter legislation. Virtually the whole of the respondents from the construction industry stated that their biggest fear of being charged with corporate manslaughter would be the effect on their corporate reputation (Norton Rose 2004).

One of the interesting findings of both Smallman and John (2001) and Hutter (2001) is a remarkable degree of ignorance among managers at senior levels as to how much they actually spend on Health and Safety. In this regard one might accuse them of negligence but not of 'seeking to profit' (in terms of Figure 1). Not least as Smallman and John (2001) point out private companies do not have an adequate system for openly quantifying investments in health and safety since they are unlikely, in particular, to want to reveal to themselves (let alone the workforce) the expected number of lives *not* saved by safety-related expenditure *not* undertaken.

The public sector

How wide does the term 'safety measures' extend? One device to assist safety is noteworthy in that it is unlikely to improve safety in the machine to which it is fitted. This is the so-called 'Black Box' (Cockpit Voice Recorder and/or Flight Data Recorder of which there are a variety) fitted to aircraft and which are mandatory for international airlines. This is often the only 'witness' to survive a crash and can be extremely helpful to accident investigators.

In the upgrade of RAF Chinook helicopters 1988-93, the fitting of black boxes was omitted, *partly as a cost-saving measure*. (Unlike civilians, service personnel do not get to choose their air carrier.) In June 1994 one of them crashed killing not only the crew but a large number of experts in Northern Ireland Intelligence (including civilians as well as military personnel). Ironically the subsequent 3-man inquiry recommended that Black Boxes be fitted to the Chinooks. They were inconclusive as to the cause of the accident but were subsequently over-ruled by two Air Vice-Marshals who attributed the accident to pilot error. This final verdict has since been open to considerable criticism (House of Lords 2002) not least because the impartiality of the two men was open to question.

The Black Boxes may well have helped explain the accident. There had been a number of mechanical issues with the Mark 2 Chinook and the Ministry of Defence (MoD) was in the process of suing one of its suppliers at the time of the accident. In addition, the Chinooks had been pressed into service prior to the full range of acceptance tests undertaken at the MoD test centre at Boscombe Down (possibly because of operational necessity) thus contravening the RAF's own internal procedures. (House of Lords 2002)

If there had been a subsequent crash, would the MoD have been guilty of corporate manslaughter for failure to fit a Black Box into the machine which crashed in 1994? Would they have been guilty in any case of the 1994 crash (had the cause proved to be mechanical) for failure to carry out full test procedures before allowing the Chinook into operational service (albeit with operational restrictions)?

It is not clear as to the extent to which the public sector will be included in the corporate manslaughter legislation. A UCL Professor of Law has stated that she does

not fully understand this point in the draft legislation so it will not be pursued here (House of Commons 2005). However, it is unlikely to include the MoD or that 'seeking to profit' will figure largely in the arguments. Seeking to save money might be a more relevant criterion although, as stated earlier, this is open to question.

Many public sector expenditure decisions are based on 'cost-benefit analysis' (Layard and Glaister 1994). The very name suggests (correctly) that it involves the judgement of the value of benefits (e.g. lives saved) against costs (e.g. safety measures) (Mishan 1971, Jones-Lee 1990, Viscusi 1993). In other words the motivating principle which may be used in arriving at a verdict of or sentence for Corporate Manslaughter is basically the same one which is used by government (as public sector spender) to justify or refuse safety-related expenditure or (as regulator) the introduction (or removal) of health and safety regulations.

So the fact that government uses this decision-making process may account for why they have draft legislation which assumes that private sector industry acts in the same way. The Chinook example suggests that the government may face a conflict of interest in its role as service provider and regulator in making regulations that apply equally to both public and private sectors.

Incomplete regulation, the problem of the 'second best' and management focus

It is unlikely that any contractor is going to openly admit in a survey that they 'intend' to breach health and safety regulations or guidance. There are situations, however, which force site managers to make unpalatable choices. Take, for example, the Channel Tunnel on which this writer worked for five years (although not in a safety role). One aspect of safety was explained as follows by a member of one of the Safety Teams:-

> "Look, the progress of the job rests on the progress of the TBM's. (*Tunnel Boring Machines*) You've got an £8m machine which is hundreds of feet long. Parts of it go wrong on most shifts. Normal health and safety rules would require us to stop the machine every time we do a repair. If we did that the Tunnel would never get built. So you've got many people working on live machinery and inevitably you will get more accidents. It's not like you can return the machine to the supplier and ask for a replacement. You can't even remove the TBM once it's started tunnelling without effectively destroying it. It's there and we have to make it work come what may." Anon (1990).

It is likely that at least one (if not more) of the deaths on the Tunnel could be partially attributed to this practice. So was this a 'gross' breach from which companies sought to profit or was it a case where the only practical means of continuing to work was to find a 'second-best' way of working which minimised risks but within an overall higher risk environment which itself breached 'safe working' rules?

Hutter (2001) looks at occupational safety in the UK railway industry. She also finds reports of non-compliance with safety rules because of 'impracticality'. Discomfort and difficulty in working with full PPE (personal protective equipment) was a particular recurring theme. More serious among more senior managers were the competing pressures of having to meet production and/or operational deadlines. There

was a general perception among many staff that 'second-best working' was a necessary state of affairs to keep the system working at all. (Hutter's research mostly relates to British Rail prior to privatisation.)

This suggests that there is a partial trade-off between profit and health and safety but it is a much more complex one than that assumed by the Corporate Manslaughter Bill. Managers face a host of competing pressures and tasks. Both financial pressures and health and safety concerns are included but so are a whole host of other matters not least those of particular assigned tasks, meetings, periodic reports and other work. Managers juggle with these pressures including delegating many of them to more junior staff. They hope that in so doing, none of the 'balls' being juggled get dropped. Perhaps the culpable failure here is in management 'focus' being improperly apportioned between directly profitable activities and health and safety matters. However that may be difficult to prove to a jury.

A final point to note is that regulations can themselves change people's behaviour in unexpected ways - for instance - by inducing them to act in more (and unacceptably) risky ways in other areas (Adams 2000) while possibly still being technically compliant with the law. Regulation itself does not always reduce risk, sometimes it merely transfers it.

Conclusions

We have:-

1. A short-run economic model which shows a potentially complex relationship between safety expenditure and profit

2. A longer-term managerial model which demonstrates a spectrum of attitudes towards the relationship between health, safety and the long-run objectives of a company together with ignorance of actual safety-related expenditure

3. A model of government corporate decision-making both as a service provider and as a regulator which includes the balancing of benefits (seeking to profit) against the acceptability of costs (including expected loss of life)

It may be argued that these models are, to some extent, inconsistent with one another. This is not unreasonable given that they are looking at different units of analysis (the whole firm, senior private sector management, government ministers and senior civil servants). What is clear is that neither of the first two (applied to private sector industry) gives much comfort to a jury attempting to determine the motivation of 'seeking to profit' from reducing or failure to commit specific safety expenditure in the face of expected profits.

We also have practical examples of where regulations (from which one end of the 'gross breach' may be measured) may themselves be unworkable so that:-

1. The breach occurs because of the lack of health and safety regulations appropriate to the situation

2. The 'profit' may occur (although in the case of the Channel Tunnel and the old BR this might be questioned) but the alternative may realistically be no activity and no company at all. This may be putting it in a rather extreme form but what might be said instead is that there may be a significantly discrete and discontinuous relationship between safety expenditure and profit rather than the continuous relationship shown in Figure 1.

The introduction and amendment of health and safety regulations are dynamic processes with complex relationships to the realities of the operations they seek to control. (We associate the term 'working to rule' with industrial action and inefficient production.) Where regulations are outdated or inappropriate in certain situations, it would appear more sensible (in considering corporate manslaughter) to ask whether the company has taken reasonable steps to render hazardous risks 'as low as reasonably practicable' (ALARP) (Nutt *et al.* 1998) rather than whether they have strictly adhered to specific rules (although the latter may be taken as a starting point for consideration). A negligent company should not escape because it has technically obeyed the rules; neither should a non-negligent company be convicted because it is in technical breach of the rules. Each case needs to be treated on its merits.

It has not been the purpose of this paper to argue that there are no corporations who act recklessly with people's lives in pursuit of profit. Rather it has been to argue that the processes by which this might happen are more complex than the model of corporate decision-making behaviour which the Bill seems to assume (and which does to some extent exist within government) and that it may be, therefore, difficult to identify and/or attribute such motivation or to demonstrate the extent of the profit pursued to the satisfaction of a jury. The argument also raises the question as to why, in consideration of corporate acts of gross negligence, financially efficient companies might be treated differently from inefficient ones. The recommendation which arises from this is that ‘seeking to profit’ is a concept which hinders rather than assists the prosecution of gross negligence manslaughter and should therefore be removed from the draft legislation altogether.

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