Risk and the Law

Edited by
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Risk and the Law

Natural and man-made risks have long been recognised as vital conditioning factors in the formation of social institutions and the conduct of social life. In this volume internationally recognised experts examine in detail the implications in practice of the modern concept of risk in particular legal fields. The chapters explore the ways in which the law in its many branches can accommodate, manage and reduce the extent of risk in the modern 'Risk Society', matters of pressing importance for the development of all branches of law in all jurisdictions.

The fields of activity affected by the issues discussed include law, medicine, insurance, state security and public health. The collection also contributes to comparative legal studies in respect of risk and the law, presenting a perspective which has largely been neglected outside the works of general theory. Thus the topics considered range from the civil law of injuries in Germany, and the food law of the European Union, through sales of goods, including international sales, in English, German and French law, to the English law of torts.

Risk and the Law, written by specialists who are authorities in their fields, will be of interest to academics and students who are interested in new developments and ideas regarding the relationship between risk, law and social change in many different fields.

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Preface

This volume is one of the fruits of a collaboration during the past 15 years between the Faculty of Law and Economics of the University of Bayreuth, Germany, and the Birmingham Law School at the University of Birmingham, United Kingdom. A link between the two institutions was formally established in 1994 with a programme for exchange visits by students, and was extended in 2001 to regularise and increase the numbers of exchange visits by members of the academic staff. We were encouraged by the success of this academic collaboration to organise a conference of members of the two institutions. This took place in March 2003 at Schloss Thurnau near Bayreuth. This volume consists of papers given in early draft form at that meeting and subsequently developed.

The topic 'Risk and the Law' seemed apt to fulfil our objectives. These were to hold a discussion related to a current concern of legal development, but also to range over a wide variety of branches of law in both of the jurisdictions. The participants were already aware of the large volume of literature on the modern 'risk society', and most of us had already considered how our research in our own fields might be related to this. But we were aware also that many, if not all, branches of the laws of Germany and of England, of the European Union and of the international commercial community could be considered from this perspective. We believed that it would be useful to all of us to look outside our specialisms to learn how other branches of the law were dealing with the same categories of issues. The possibility of learning about corresponding developments in another national jurisdiction was a considerable bonus in this exploration. We did not aim to conduct highly detailed or specific comparative studies, but we hoped that, just as we might benefit from hearing about comparable issues arising in other branches of our national laws, we would also learn from hearing about these issues arising in other legal systems.

We thus heard papers examining legal policies towards risk on topics ranging from consent in the civil law of injuries (in Germany) and food law (of the European Union) through sales of goods, including international sales (in English, German and French law), to labour law (both German and British), to mention only a selection. At the end of two days of intensive

discussions on prepared papers we believed that our objectives had been attained to a high degree. It is hoped that readers of this volume will agree.

We are grateful to all the contributors for preparing their papers for publication, and to Dr (now Professor) Tim Kaye for writing an introductory essay. Our gratitude is also expressed to the University of Bayreuth, which met all the expenditure required for us to meet at Schloss Thurnau. Our hope is that this book will prove as interesting and stimulating to readers as the exchange of ideas has been to the contributors.

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Introduction

1 Law and risk: an introduction

Tim Kaye[1]

From status to contract

It was an Englishman writing in the nineteenth century, Sir Henry Maine, who famously observed that the transition from feudalism to industrial capitalism marked 'a movement from Status to Contract'.[2] Inherent in this claim was the notion of mobility, in two senses. First, improving communications meant that it was becoming easier to travel and thus to trade, so that wealth could be accumulated faster than ever before and without the need for bloodshed. Second, since these opportunities were becoming available to ever greater proportions of the population, people could no longer be expected necessarily to remain within the social class into which they had been born. Social status was thus no longer the fixed bedrock of society: generalised commodity exchange, facilitated by the law of contract, enabled everyone to climb the social ladder:

> Not many of us are so unobservant as not to perceive that in innumerable cases where old law fixed a man's social position irreversibly at his birth, modern law allows him to create it for himself . . .[3]

But such opportunities, perhaps celebrated most openly across the Atlantic as the 'American dream', inevitably bring with them ever more numerous sources of potential harm. Most such hazards are not, of course, matters of life and death in the way that the perennial feudal issues of war, disease and famine so clearly were. But, as Gordon Woodman points out in his contribution, perceptions change. As life expectancy increases, new hazards arise. Many illnesses – like cancer or heart disease, for example – are not particularly dangerous to someone who is very likely to die before he or she reaches the age of 30 in any event. Yet they are significant hazards today. Moreover, these 'new' hazards are considerably more numerous and often difficult to envisage in advance. 'In advanced modernity the social production of *wealth* is systematically accompanied by the social production of *risks*.'[4] To put this another way, the movement from status to contract implies at the same time a movement from certainty to risk.

Given the centrality of risk-taking within industrial capitalism, a fact which has caused many non-lawyers to talk of the 'risk society',[5] it is perhaps rather odd that, at least until recently, the role and concept of risk have received relatively little attention from lawyers. It seems instead that risk has been considered more suitable as an object of study for sociologists and economists. Perhaps this lack of systematic legal analysis can be at least partially explained by the fact that there is no one area of law by which it can be said to be more or less wholly encompassed. Unlike contract, which – irrespective of the particular national or supra-national jurisdiction – is self-evidently a legal construct with its own rules and principles, there is no clearly demarcated legal subject which can be said to deal solely and exclusively with risk. Legal studies obsessed with doctrinal analysis have therefore largely overlooked the role and significance of risk. This would not have impressed Maine. As Raymond Cocks has recently emphasised:

> He believed that in seeking to understand law the best results could be achieved by making constant references to non-legal topics. Ultimately, law had to be accounted for and criticised in non-legal terms. After all, a man who wrote about progress had at some stage to write about legal change and was then confronted by the fact that law did not create itself and was not changed by itself.[6]

Paucity of analysis of risk

Moreover, where risk has been mentioned as a factor underlying the law, the analysis attempted has often been lazy and superficial. The word 'risk' is sometimes employed in English law, for example, as explaining in a throw-away line the basis for the doctrine of vicarious liability, according to which an employer is legally liable for the acts and omissions of his employees acting in the course of their employment. A typical example can be found in one of the leading student textbooks on torts:

> A more plausible explanation of strict liability is that it operates as a loss distribution mechanism. Accidental damage arising from the materialisation of a risk inherent in a particular activity is paid for by the person or enterprise carrying on the activity. That person is in the best position to spread the loss via insurance and higher prices for the products that the activity creates, and so the true social cost of these products is borne by the consumers in small amounts. Vicarious liability is a good example of this process.[7]

But not only does the author never use the word risk again, he fails to explain why – at least until the decision of the House of Lords in *Lister v Hesley Hall Ltd*[8] – there was such confusion in the law as to when the concept of vicarious liability could be successfully invoked by a claimant eager to receive full

compensation for harm or loss sustained as a result of someone else's wrongdoing. An effective loss distribution mechanism would require that employers should not be able frequently to escape liability, as they could before *Lister*. It would also require that the law be clear as to the identity of the relevant defendant, for otherwise unnecessary costs are added into the equation. Yet, before *Lister*, it was extraordinarily difficult to predict the outcome of a case on vicarious liability. Interestingly, the judges in *Lister* itself hardly invoked the notion of risk to justify their decision to simplify the law, but instead based their views on the idea that the employer had somehow taken on a responsibility towards the victim (a line of argument more commonly associated with primary, rather than vicarious, liability).

Moreover, as Cane has pointed out:

> just saying that the law is concerned with allocating risks does not answer the question of to whom particular risks ought to be allocated or why certain risks are allocated in a particular way. This question alerts us to the fact that although the language of risk-allocation is often associated with strict liability in tort law, the difference between fault-based and strict liability is not that the latter allocates risks of injury but the former does not, but that they allocate risks of harm in different ways.[9]

Accordingly, five chapters in this collection deal head-on with precisely the question of who does and/or should bear the risk in various situations. Dietmar Boerner explores the issue of who in Germany shoulders the risk of an employee being rendered unfit to work through illness or injury, whilst Ulrich Spellenberg and Koji Takahashi examine the position in various commercial transactions. Of course, whilst consent has always been one of the main threads running through the doctrine of the law of contract in both Germany and the UK, its role in the law of tort has always been considerably more problematic. Yet, as Ansgar Ohly argues, the way in which the law deals with apparent consent to the running of a risk remains a fundamental issue even outside contract law. This has major implications as to who bears the risk of being liable for the costs of litigation, an issue discussed by Keith Uff.

'Fault-based' and 'risk-based' liability

A thoughtful analysis of the interaction between risk and law has been provided by the aptly named German, Erwin Deutsch. Echoing Maine's analysis, Deutsch's argument is that German law – at least, German civil law – has moved (and continues to move) from fault-based liability towards risk-based liability.[10] In case this terminology should cause some confusion, it should be noted that Deutsch's use of the term 'fault' is rather different from the way in which that term is commonly understood by English lawyers. To

him 'fault-based liability' is liability which is imposed when a legal person suffers injury as a result of another person's inherently dangerous behaviour. In other words, it represents a legal view that risky activity is itself unwelcome (unless, of course, luck prevails and it causes no harm), so that when someone undertakes such behaviour they are automatically at fault. To many an English lawyer, this looks, ironically, like 'no fault' or strict liability. Yet to Deutsch, the 'fault' resides in the fact that the defendant chose to behave in a manner which put others at risk. A good example of this in English law is the rule in *Rylands v Fletcher*, where the construction of a reservoir and the storage of water within it was considered to be such a novel and dangerous activity – a 'non-natural use of the land' – that the occupier was held liable for any damage caused by the escape of water, even where the escape was not itself due to the conduct of the occupier.[11]

Liability which Deutsch would characterise as 'risk-based', meanwhile, is not founded on the view that risky activity is automatically reprehensible. According to this approach risk is simply a fact of life in a risk society, whether the activity involves the carrying out of well-established, routine tasks or something entirely new. The fact that harm has been done to a third party is not sufficient in itself to warrant the imposition of liability. When liability is risk-based, what matters is the *degree* or *level* of risk taken. Only if harm has resulted because an unacceptable level of risk has been taken will there be any imposition of legal liability. Translating this approach once again into English law helps to explain the modern interpretation of the rule in *Rylands v Fletcher* adopted by the House of Lords in *Cambridge Water*,[12] where it was held that 'the requirement of non-natural use [of land] embodies an evaluation of risk . . . where, *inter alia*, the gravity of the harm threatened is weighed against the utility of the defendant's conduct'.[13] This evolution of the rule in *Rylands v Fletcher* suggests that Deutsch's analysis may be as applicable to English civil law as it is to German civil law. It also perhaps implies that it may represent a wider truth common to all legal systems operating within industrial capitalism, and that the movement from the fault-based to the risk-based model in civil law may have consequences in the fields of criminal and public law as well. Certainly the analyses of Peter Huber and Gerhard Dannecker suggest that it does, although this then opens up a new question as to which risks are best dealt with by each branch of the law. By way of contrast, the role of customary law is considered by Gordon Woodman.

Deutsch does not claim that fault-based liability has been completely usurped by risk-based liability. He contends instead that the best approach is 'to present risk-based liability as a complement to fault-based liability'.[14] Indeed, just as status may still sometimes have more significance than any contractual agreement,[15] there remain instances where fault-based liability is predominant, such as where the magnitude of the potential harm is very high (so that it is still felt that the activity is inherently dangerous)[16] or the cost of prevention of harm is very low.[17] One characteristic of duties based on