

# **Law and Uncertainty Risks and Legal Processes**

Edited by

Robert Baldwin

with the assistance of  
Peter Cane



# Contents

<i>Acknowledgements</i>	xi
<i>List of contributors</i>	xii

1	Introduction – Risk: The Legal Contribution	1
	<i>Robert Baldwin</i>	
1.1	Risk studies: five core concerns	1
1.1.1	Defining risk	1
1.1.2	Types of risk	2
1.1.3	The perception and assessment of risks	3
1.1.4	Risks, information and democratic processes	10
1.1.5	Managing risks	11
1.2	The legal contribution	14
1.2.1	Assessing risks	15
1.2.2	Tort law and risks	15
1.2.3	Statutory design and risks	15
1.2.4	Regulatory responses to risk	16
1.2.5	Using the law in risk management	17
1.2.6	Courts, judges and uncertainty	17
1.3	Conclusions	18

## Part I Assessing Risks

2	Prediction Scores for Risk Assessment	21
	<i>David Wright and John Copas</i>	
2.1	Statistical methodology for risk scores	22
2.1.1	Point scoring	23
2.1.2	Logistic regression	25
2.2	Two examples of reconviction scores	26
2.2.1	A risk score for probation	26
2.2.2	A risk score for parole	27
2.3	Risk scores: some practical issues	31
2.3.1	Choice of risk factors	32
2.3.2	Interpretation of risk scores	33
2.3.3	The use of risk scores	34
2.4	Comparison of risk scores	35
2.5	Conclusion	38

3	Some Ergonomic Challenges for Fault-Based Compensation Systems	39
	<i>Julian Killingley</i>	
3.1	The cognitive mechanisms of automaticity and vigilance	41
3.1.1	Automaticity	43
3.1.2	Vigilance	44
3.2	Automaticity, vigilance and deterrence	47
3.3	Risk compensation and risk homeostasis theory	49
3.4	Conclusions	52

## Part II Tort Law and Risks

4	The Control of Corporate Conduct and Reduction of Uncertainty by Tort Law	57
	<i>Gert Brüggemeier</i>	
4.1	Instrumental concept of tort law	58
4.2	Wrongs and risks – negligence and strict liability	59
4.3	The new challenge of the ‘risk society’: reduction of uncertainty	63
4.4	The four answers of tort law	65
4.4.1	Enterprise liability	65
4.4.2	Collective liability of enterprises	70
4.4.3	Directors’ and officers’ liability	72
4.4.4	Shareholders’ proportionate liability	73
4.5	Conclusion	74

## Part III Statutory Design and Risks

5	Parenthood at Risk	77
	<i>Catherine Kratz</i>	
5.1	Artificial procreation in the light of social function and objectives of the law	78
5.2	Risk in artificial procreation	80
5.2.1	Technology as a tool to reduce uncertainty	81
5.3	Law and the danger of technological control	82
5.3.1	How should we understand this notion of a social environment?	84
5.3.2	Risk as a normalization of uncertainty	85
5.4	Neutralization of the legal danger of artificial procreation: the construction of a legal risk	86
5.5	Law and the danger of surrogacy arrangements	88
5.6	Suggestions for a better communication of risk	91

6	Limiting the Rise of Limited Liability <i>Andrew Hicks</i>	95
6.1	Introduction	95
6.2	Historical background	96
6.3	How important is limited liability?	102
6.4	The transfer of risk to creditors	104
6.5	The uses and abuse of limited companies	107
6.6	Incentives and disincentives	111
6.7	Insurance	113
6.8	A new 'business corporation'?	115
6.9	Conclusions	119
7	The Entrepreneur, Business Failures and Corporate Law Ideology <i>Joseph Savirimuthu</i>	121
7.1	The politics of corporate risk culture: a historical perspective	122
7.2	Redefining corporate ideology	126
7.2.1	Effective management	127
7.2.2	Corporate financial distress	129
7.3	Risk management or crisis management?	131
7.4	Conclusion	134

#### Part IV Regulatory Responses to Risks

8	Risk Management and 'Rational' Social Regulation <i>Anthony Ogus</i>	139
8.1	Institutional framework for risk management	140
8.1.1	Judicial interpretation of general standards	140
8.1.2	Bureaucratic formulation of regulatory specific standards	141
8.2	Risk management and the economic concept of optimal care	143
8.3	Limitations of the economic model of optimal care	144
8.4	Differences between lay and expert perception of risk	145
8.5	'Rational' risk management and lay perceptions of risk	147
8.5.1	'Rationality' and social preferences	147
8.5.2	Extending the traditional parameters of cost-benefit analysis	149
8.5.3	Adjustments to the institutional arrangements	150
8.6	Conclusions	152
9	Derivative financial instruments, risk, regulation and investor protection <i>Joanna Gray and Elspeth Fennell</i>	155
9.1	Derivative financial instruments	156
9.1.1	Futures contracts	156

9.1.2	Options	157
9.1.3	Swaps	158
9.2	Risk and derivatives	163
9.2.1	Market risk	163
9.2.2	Credit/counterparty risk	164
9.2.3	Legal risk	164
9.2.4	Operational risk	165
9.2.5	Systemic risk	166
9.3	Regulation and derivatives	167
9.3.1	Background to investor protection regulation and derivatives	167
9.3.2	Techniques of derivatives regulation	168
9.3.3	Some examples of substantive content	170
9.4	Regulatory reform	176
9.4.1	The regulatory reform debate	176
9.4.2	Theories of regulation and derivatives	179
9.4.3	Improving the current regime	181
9.5	Conclusion	183
10	Audit Cultures and Risk Aversion in Local Authorities: An Agenda for Public Lawyers <i>John McEldowney</i>	185
10.1	Introduction	185
10.2	Public audit and management: central government	186
10.2.1	Managing public expenditure	186
10.2.2	Audit systems	188
10.3	Public audit and management: local government	197
10.4	Environmental auditing	199
10.5	Managing the public sector: the juridical culture	202
10.6	Conclusions	205
 <b>Part V Using the Law and Risk Management</b>		
11	The Radiation Worker Compensation Scheme: Managing the Risk of Civil Liability through Voluntary Arrangements <i>Bill Leigh</i>	211
11.1	Legal actions	211
11.1.1	The civil liability regime	211
11.2	An alternative to litigation: the Compensation Scheme	216
11.2.1	Main features of the Compensation Scheme	217
11.3	Conclusions	220

12	Whose Risk is it Anyway? Allocation of Entrepreneurial Risk in Employment Contracts <i>Paul Skidmore</i>	221
12.1	Prologue	222
12.2	Risk	223
12.2.1	Planned risk	224
12.2.2	Unplanned risk	225
12.3	Risk in the case law of employment	227
12.3.1	Private allocation of risk – will it be enforced?	227
12.3.2	Default rules in employment – how does the common law allocate risk?	229
12.4	Law and economics theory – some questionable assumptions	232
12.4.1	Bargaining the risk allocation – distributional considerations	233
12.4.2	Timing of risk allocation	234
12.5	Where next? Relational contracting?	235
12.6	Epilogue	238
13	Long-tail Liabilities and Claims Management in the NHS <i>Paul Fenn and Ron Hodges</i>	241
13.1	A brief history of claims management in the UK	242
13.1.1	Claims management prior to NHS indemnity	242
13.1.2	Claims management after NHS indemnity	243
13.1.3	Claims management under the CNST	245
13.2	Evidence relating to claims management decisions in the NHS	247
13.3	Evidence relating to accounting provisions in the NHS	251
13.4	Conclusion	253
14	A Risk Management Approach to Legal Decision-Making about 'Dangerous' People <i>David Carson</i>	255
14.1	Predicting dangerousness	257
14.2	Risk-taking decisions	262
14.3	Risk management	265
14.4	Conclusions	269
 <b>Part VI Courts, Judges and Uncertainty</b>		
15	Radiological Risk and Civil Liability: A Review of Recent Developments in the United Kingdom <i>Christopher E. Miller</i>	273
15.1	<i>Merlin v. British Nuclear Fuels plc</i>	277

15.2	<i>Reay v. British Nuclear Fuels plc; Hope v. British Nuclear Fuels plc</i>	278
15.2.1	Statutory background	278
15.2.2	Scientific versus legal standards of proof	280
15.2.3	The Gardner and Kinlen hypotheses	281
15.2.4	The Bradford–Hill criteria	283
15.3	Conclusions	288
16	<b>The Risks of Quantifying Justice: The Use of the Substantial Evidence Test in Judicial Review of OSHA Rule-Making</b>	293
	<i>Elizabeth C. Fisher</i>	
16.1	Regulating risk: defining the problem	294
16.2	OSHA and judicial review	297
16.2.1	The substantial evidence test	297
16.2.2	Judicial review	299
16.2.3	The <i>Benzene</i> decision and its aftermath	300
16.2.4	The <i>Air Contaminants</i> case	303
16.3	Reorienting: two paths to reform	306
16.3.1	The pragmatic approach	306
16.3.2	The idealistic approach	308
16.4	Conclusion	311
17	<b>Vulnerable Providers of Security, Independent Legal Advice and Moral Hazard: Risk Management Considerations in Non-Commercial Third Party Secured Transactions after <i>Barclays Bank v. O'Brien</i>, <i>Massey v. Midland Bank plc</i> and <i>Clark Boyce v. Mouat</i></b>	313
	<i>Robin Mackenzie</i>	
17.1	As above, so below: macro-and microeconomic banking regulation and moral hazard	314
17.2	The legal background to non-commercial third party secured transactions	319
17.3	Containing moral hazard and maintaining commercial liability	328
17.4	Conclusion	332
	<i>Selected Bibliography</i>	333
	<i>Index</i>	341