



TELEPHONE: (510) 643-8678
TELEFAX: (510) 643-8919
E-MAIL: bea@ce.berkeley.edu
HTTP://www.ce.berkeley.edu/

CENTER FOR CATASTROPHIC RISK MANAGEMENT
DEPARTMENT OF CIVIL & ENVIRONMENTAL ENGINEERING
212 McLAUGHLIN HALL
BERKELEY, CALIFORNIA 94720-1710

DRAFT 1 (R. G. Bea)

An Instrument of Risk Management: The Law



Civil courts and civil law have become one of the most powerful institutions for regulating risks (Priest 1990). Civil damage judgements serve as an effective public policy instrument for internalizing costs to the parties that generate them. A predominant function of modern law is to allocate risk.

The primary premise of civil law is to internalize injury costs by making a party compensate victims injured by its activities. Risk control is a central goal of civil law.

Law concerned with risk perceives losses as occurring probabilistically, with greater or lesser likelihood. Actions become subject to potential legal liability if they increase the occurrence of loss by some amount. A producer is made responsible for avoiding more than egregiously negligent production methods; the producer must monitor all potential sources of product risk and will be held liable whenever a risk eventuates that the producer could readily have controlled. Action may generate liability because its contribution to the risk of occurrence, though it was only one of many simultaneously contributing sources of the loss.

The legal issue is one of risk and its control: did the party have sufficient control of the determinants of risk of the maloccurrence to justify its liability? If the answer is that the party did not exert sufficient control, then that party is liable for the injuries. The civil law regime aspires to impose legal controls on all activities in society that contribute to risk in any way; every action becomes subject to potential legal review because every action will increase the risk of some loss in some way.

Before the 1960s, product liability attached only to acts of clear moral dereliction. Since the 1960s, where the issue is risk control, the question becomes one of minimizing the risks of product harmful effects. The litigable question becomes whether a producer has appropriately minimized the risks of product injury. The most important of modern cases involve claims that the producers calculation of the risks of product injuries was insufficiently precise because it miscomputed relative costs and benefits.

Civil law has a primary objective of controlling risk as effectively as possible: As Low As Reasonably Practicable (ALARP). Courts have defined two fundamental principles of decision making to internalize costs to create incentives to reduce risk levels as much as practicable.

1. If injury could have been practicably prevented, liability will be placed on that part in the relatively better position to prevent it.
2. If injury could not have been practicably prevented, liability is placed on party in the relatively better position to spread the risks of the injury.

The civil law concept is to create incentives to invest in risk reduction rather than to pay damages for unprevented injuries. In risk control, the main tests applied are:

- is the risk so great or the outcome so unacceptable that it must be refused altogether or;
- is the risk so small that no further precaution is necessary or;
- if the risk falls between these two levels, then has it been reduced to a level which is ALARP

Where reducing risk ALARP is the test, a decision will be supported by knowledge of the risk, the "cost" (sacrifice) of risk reduction measures and the benefits of risk reduction. This requires knowledge of the change in harm averted, and where the measure does not achieve elimination, this is informed by assessment of the scenarios before and after the measure. The balance is biased in favor of risk reduction measures by "gross disproportion."

The first minimal principle of civil law: imposing risks on people if and only if it is reasonable to assume that they have consented to those risks. Civil law's purpose toward risk control represents a vastly expanded commitment to standards of individual responsibility. A party is responsible not only for intentionally or maliciously harmful behavior, but for all behavior that increases the risk of loss, though the loss itself may be remote.

The concept of public risk includes assessment of all significant possibilities of unbargained-for injuries to third persons that are incurred as the result of an actor's conduct. This includes small-scale risks as well as large ones. Account must be taken of the multiplicity of risks that a specific entails. Public risks must be conceived in terms of all kinds of risks of adverse consequences to other members of a community, whatever the scale of the risks and whatever their dynamics and their consequences. (Hazard 1990).

The Civil Law concept of Standard of Care (SOC) of parties in control of risk development is based on five requirements in performance of activities:

1. have requisite learning and skill
2. use necessary care and skill
3. use best judgement
4. use reasonable diligence
5. accomplish purpose

Attributes for each of these five requirements are:

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| <ol style="list-style-type: none">1. learning and skill<ul style="list-style-type: none">• formal education• knowledge• ability to use - apply knowledge (skill)2. care<ul style="list-style-type: none">• attentiveness• responsibility• competency• responsiveness• integrity3. judgement<ul style="list-style-type: none">• evidence based decisions• discernment• intuition• simulations• rational analysis | <ol style="list-style-type: none"><ul style="list-style-type: none">• detecting anomalies• detecting barriers• detecting high leverage points4. diligence<ul style="list-style-type: none">• persevering application• devotion to accomplish• persistent• energetic application• painstaking application• well balanced• sensible5. purpose<ul style="list-style-type: none">• reach goal/s and objective/s (charge)• resolution of charge• performance of charge• full execution of charge |
|---|--|

If the SOC is not met, then the party is liable for injuries.

Established civil law legal doctrines include

- Reasonable Use
- Good Faith Improver Protection - Common Enemy
- Natural Watercourse Rule
- Preventable Fault
- Exercise of the Standard of Care