
THE RISK CONCEPT ON MODERN TORT MAP

An Analytical Approach to English Law

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I. Introduction: The Diminishing Role of Fault:

The term *Tort* signifies the act which gives rise to a right of action, being a wrongful act of injury consisting in the infringement of a right created otherwise than by a contract.⁽¹⁾ Defined as such, tort law is traditionally -and commonly- preconceived as a set of rules that are primarily concerned with addressing Fault, i.e. wrong acts or omissions, and dealing with their legal consequences.

Existence of tort as a legal institution is historically attributed to the performance of numerous functions that are of paramount social significance. Perhaps two of the most prominent of the said functions are deterrence and compensation.

While it is evident that deterrence is a cornerstone in the fault-based tort system, in that tort rules aim to deter the tortious conduct in a manner that would ensure that 'tort does not pay',⁽²⁾ and by such inflicting a pecuniary measure of a 'punitive' nature on those who commit faults, it is thought that this particular function of tort law results in its overlap with criminal law. Compensation, on the other hand, is without doubt an indisputable demand under any liability

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(1) Jowitt, Earl & Walsh, Clifford. Jowitt's Dictionary of English Law. Sweet & Maxwell. London. 2nd edition. 1977. P. 1781.

(2) Brazier, Margaret. Street on Torts. Butterworths. London. 9th edition. 1993. P. 11.

system that aims to redress the plaintiff who suffered damages resulting of a negligent conduct.

Notwithstanding, the role of tort as a source of compensation in this respect is not as unique as it traditionally was. Mobility of the community and the ever-changing social activities introduced other alternative methods of compensation that do not require establishment of culpability on any side.⁽³⁾ In fact, questions have been risen about whether tort was not the least effective of these systems.⁽⁴⁾

Therefore, and despite the undeniable dominance of the fault principle on the tort scene, it has consistently been the focus of doubtful and critical treatment by legal doctrine, which -by the passing of time- seem to be increasingly questioning its credibility as a just and trustworthy source of liability. Cardinal arguments in this respect concentrated on that this principle requires that a defendant is only liable to an extent that is proportionate to his fault, a rule that could result in insufficient compensation to the plaintiff if damage exceeded the size of defendant's fault. In addition, the advancement of technology nowadays makes it possible that harm could occur without the element of blameworthiness. Furthermore, the insurance system resulted in a third party providing compensation in lieu of the defendant. To take this argument into a historical level, it would perhaps suffice to say that vicarious liability has existed for long without demanding that fault be evident on defendant's side.⁽⁵⁾

(3) Fridman, G. H. L. *Fridman on Torts*. Waterlow Publishers. 1990. P. 8. Other compensation systems include: the social security system, the criminal injuries compensation system, charitable gifts, and first party insurance. New Zealand, for example, has a no-fault system of accident compensation, this was coupled with preventative measures with regard to accidents. However, it is not irrelevant here to investigate a possibly inverse relation between deterrence and compensation, as it is quite likely that non-tort compensation schemes will probably be less successful as deterrents than tort law. See: Cane, Peter. *Tort Law and Economic Interests*. Clarendon Press. Oxford. 1991. P. 488

(4) A report by the Royal Law Commission on Civil Liability and Compensation for Personal Injury, which was formed in 1973 and chaired by Lord Pearson, titled: *Commission's Report on civil liability and compensation for personal injury* (three volumes, April 1978).

(5) Dias, R. W. M. *Clerk and Lindsell on Torts*. Sweet & Maxwell. London. 16th Edition. 1989. P. 9.

But perhaps one of the prominent deficiencies of tort -which has been enhanced with the technological development in modern society- is its lack of compatibility with the requirements of risk allocation.⁽⁶⁾

The above-mentioned deficiencies of the fault principle created a need to seek an alternative; a convenient system that would surpass these shortcomings while still serving the very social functions of tort, in addition to achieving economic efficiency and loss distribution, as economic considerations play an important role in the calculation of damages under any system of liability.⁽⁷⁾

It would perhaps contribute to the solution of this problem to realize that ultimately, the true purpose of the law is to allocate the risk of certain events among different parties, rather than to merely decide whether a certain injury occurred due to the existence of a faulty or a blameworthy conduct of one of the parties.⁽⁸⁾

Within this context, the concept of 'risk' will be discussed as a possible system of liability; if not alternative to the fault principle, then a system that would function in parallel at least.

II. The Risk Concept: A Framework:

Risk Defined. Risk is one of the major concepts that play central role in modern tort law, whether explicitly or impliedly. No theory of civil liability could succeed without inquiring about the best approach toward

(6) Holmes referred to this deficiency more than a hundred years ago. He indicated that tort rules "cannot enable to predict with certainty whether a given act under given circumstances will make him liable, because an act will rarely have that effect unless followed by damage, and for the most part, if not always, the consequences of an act are not known, but only guessed at as more or less probable. All the rules that the law can lay down beforehand are rules for determining the conduct which will be followed by liability if it is followed by harm ... the only guide for the future to be drawn from decision against a defendant in an action of tort is that similar acts, under circumstances which cannot be distinguished except by the result from those of the defendant, are done at the peril of the actor; that if he escapes liability, it is simply because by good fortune no harm comes of his conduct in the particular event". Holmes, Oliver Wendell. *The Common Law*. Macmillan. London. 1968. P. 98.

(7) Fridman. *Op. Cit.* P. 8.

(8) Cane, Peter. *Atiyah's Accidents Compensation and the Law*. Butterworths. London. .5th edition. 1993. P. 357.

harm as a consequent of a risky activity. However, risk, in its abstract form, is vague concept. It seems to have developed through relying on intuitive grounds, as case law does not introduce it through a well-structured set of regulatory roles, nor does it provide an acceptable terminology.⁽⁹⁾ Thus, we are always faced with a risk determination problem, both in terms of definition and measurement.

Never the less, this problem can be overcome through a casual treatment that would serve the purpose of this presentation. So a working definition of Risk would be what it is generally referred to as the probability or likelihood of suffering harm from a hazard. A "hazard", in its turn, is any action or substance that can cause harm.⁽¹⁰⁾

As for determination of risk in terms of measurement, this can be approached qualitatively or quantitatively. Risk identification, in the qualitative sense, is a matter of identifying the relevant hazard and determining whether there is any serious possibility of its occurrence. Whereas quantitative identification of risk is usually employed when comparing risks against potential benefits, through a mathematical theory of probability.⁽¹¹⁾

Approaches to Risk Allocation. Once risk is defined and determined so that such matters of principle are settled, there remains the question about the best possible approach with regard to risk allocation. In practice, this is an issue that is related to public policy, for whereas in a contractual relation the risk allocation question is left to the mutual determination of the parties, it is the law that regulates treatment of this problem under the tort system.⁽¹²⁾

(9) Vern R. Walker. The Concept of Baseline Risk in Tort Litigation. Kentucky Law Journal. Vol.80. No.3 1991-92. P. 635

(10) Risk theory, and probability theory itself, originated in part from a study of gambling or games of chance, which still provide clear examples of what is meant by risk. Risk can be measured by the expected loss associated with the possibility that a hazard event might occur (i.e. the probability of the hazard event occurring multiplied by the amount of the loss if it occurs). See: Vern R. Walker. Op. Cit. P. 637, 638.

(11) Vern R. Walker Op. Cit. P.639.

(12) Cooke, John and Oughton, David. The Common Law of Obligations. Butterworths. London. 2nd Edition. 1993. P. 350.

The general rule with regard to risk associated liability seems to be that injuries resulting from common daily risks are not compensatable, as such risks represent a necessary aspect of the contemporary life. Therefore, The question of liability can only be raised when the defendant creates an unreasonable level of risk. The well-famed objective criterion is normally applied with regard to negligence in this respect, being the standard conduct of a reasonable person under similar circumstances.⁽¹³⁾

Available approaches seem to differ according to the possibility to detect a fault element in the defendant's conduct. This question is addressed in different methods, so when the blameworthiness element is existent, then the traditional approach would be to shift loss from the plaintiff to the defendant as a wrongdoer.⁽¹⁴⁾ Another method is to allocate the risk to the party who created it as the one who should bear its cost.⁽¹⁵⁾ However, the commonly accepted practice is to impose liability on the party in the better position to minimize the risk, an approach that would encourage the said party to take risk-prevention measures whenever possible to decrease the risk's chances of materializing.⁽¹⁶⁾

However, courts seem to be adopting a moderate position with regard to risk allocation; based on common sense and the notion of justice in its wider scope. Therefore, it is generally felt that decisions in risk-related cases tend to merely address the facts rather than to set well-defined rules with regard to the rationale behind the judgments.⁽¹⁷⁾ Such positions are generally indicated through treatment of negligence cases.

III. Negligence: The Two Sides of the Coin:

The classic definition of negligence is "failure to take precautions

(13) Vern R. Walker. Op. Cit. P. 631.

(14) Brazier, Margaret. The Law of Torts. Butterworths. 9th Edition. 1993 . P. 10.

(15) Cane, Peter. Op. Cit. P.358.

(16) Although the wide spread of insurance seems to have created a growing preference among legal writings to allocate risk to the party who would be in a better position to distribute the anticipated loss to all persons benefiting from the activity that created this loss. See: Cane, Peter. . Op. Cit. P.358. See also: Brazier, Margaret. The Law of Torts. Op. Cit. P.11.

(17) Cane, Peter. Op. Cit. P.482.

against foreseeable harm".⁽¹⁸⁾ This definition is marked by a conduct-based objective criterion, as negligence is confined to the "omission to do something which a reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do".⁽¹⁹⁾

Defined as such, negligence is a twofold notion that comprises the following elements: a) The fault factor which is related to the injurious behavior and to the extent in which it relates to the standard of reasonable conduct. Here, in addition to proving the damage, the plaintiff has to prove that the defendant was in a particular state of mind when he committed the questionable act or omission, this forms the mental element of tort. b) The risk factor: it is an aspect that serves the social security, and is concerned with protecting people of exposure to harms resulting from a person's specifically dangerous activities. The two factors may apply simultaneously but they are not necessarily connected to each other. However the risk factors is often overridden by its fault counterpart, as the later is the dominant one in the negligence liability arena.⁽²⁰⁾

Thus, the concept of negligence entails the concept of risk. However, it is noteworthy that this does not follow that all risk creating actions are negligent conducts by necessity; negligence is an interest-sensitive notion in which liability is measured by a scale that starts with a certain level of permissible risk and ends with unreasonable risk of harm.⁽²¹⁾ Risks, as such, come in many forms. Nevertheless, In processing cases of alleged negligence special attention should be paid to both parties' conduct; analysis of the defendant's conduct should concentrate on foreseeable

(18) Peter cane. Justice and Justifications for Tort Law. Oxford Journal of Legal Studies. Vol.2. 1982. P. 42.

(19) *Blyth v Birmingham Waterworks Co.* (1856) 11 Exch 781, 784, per Alderson B.

(20) Millner, M. A. Negligence in Modern Law. Butterworths. London. 1967. P.7.

(21) Stephen Perry. The Moral Foundations of Tort Law. Iowa Law Review. Vol.77. 1992. P. 466. One suggested mathematical approach to define the concept of permissible risk is that a defendant should be negligent if the likelihood of injury multiplied by the gravity of the injury, exceeds the cost of taking adequate precautions. See: Cooke, John. Law of Tort. Pitman Publishing. 1992. P.67.

risks to others created by him, whereas analysis of the plaintiff's conduct should concentrate on the foreseeable risks he created to himself.⁽²²⁾ Finding of negligence by a court would result in shifting the burden of loss from the plaintiff to the defendant. In certain occasions, foreseeability can play a significant role in determining this.

IV. Foreseeability as an Indicia for Risk:

Relation of risky conduct to the harm achieved could be determined by the foreseeability factor, this is referred to as the 'risk rule of causation'. Under such rule, different tests are applicable; one would be to measure the foreseeability of harm by reference to the anticipations of a reasonable man placed in the particular circumstances of the defendant. This answers the question of whether a particular injury is foreseeable.⁽²³⁾

Interestingly enough, this seems to be the base of *Holmes'* early concept of tortious liability, as he established his theory on two elements, the first being that a defendant is liable if he was knowledgeable of the circumstances accompanying his act, while the second is awareness of the possibility that damage could result from such an act.⁽²⁴⁾

Indeed, in conformity with this view, it has been decided that if a particular danger could not reasonably have been anticipated, then the defendant has not acted negligently, because a reasonable man would not take any precautions against unforeseeable consequences. This is measured by reference to knowledge at the time of the event.⁽²⁵⁾

Nevertheless, it is noteworthy in this respect that English courts tend to balance the question of risk foreseeability against convenience of required adverse measures. Thus, the 'threshold' idea was introduced, indicating that there is a point of risk below which taking no more

(22) Richard W. Wright. Tort Law in the Aristotelian Tradition. In: Owen, David G (Editor). Philosophical Foundations of Tort Law. Clarendon Press. Oxford. 1995. P.257

(23) Another possible test would be to measure the statistical probability of harm of a certain kind arising from specified forms of activity (e.g. operations of industrial nature). See: Millner, M. A. Op. Cit. P.88.

(24) Holmes, Op. Cit. P.116, 117.

(25) *Roe v Minister of Health* [1954] 2 QB 66.

preventative measures is perfectly acceptable. Lord Dunedin referred to this issue of balance as follows:

"If the possibility of the danger emerging is reasonably apparent, then to take no precautions is negligence; but if the possibility of danger emerging is only a mere possibility which would never occur to the mind of a reasonable man, then there is no negligence in not having taken extraordinary precautions ... people must guard against reasonable probabilities, but they are not bound to guard against fantastic probabilities".⁽²⁶⁾

Lord Oaksey commented that a man could:

"Foresee the possibility of many risks, but life would be almost impossible if he were to attempt to take precautions against every risk which he can foresee. He takes precautions against risks which are reasonably likely to happen".

However, a major drawback of this concept is the difficulty that is normally associated with determining vague guidelines as the issue of 'reasonably likely' or 'sufficiently probable' risks. Such difficulty reflects a shadow of doubt about whether this was indeed a workable criterion.⁽²⁷⁾

V. Strict Liability: Risk Concept in Action:

Benefits of modern life are a result of taking considerable risks. In fact, It is even thought that indulging in such risky activities is possibly "the only way to determine beneficial courses of action of mistaken ones".⁽²⁸⁾

However, the traditional view held for centuries was that liability in terms of compensation should not be held unless the notion of culpability is evident on the defendant's side. This doctrine could have been

(26) *Fardon v Harcourt-Rivington* (1932) 146 LT 391, 392. The threshold idea was taken further in *Bolton v Stone* [1951] AC 850, as the House of Lords decided that there is no need to take preventative measures when the risk of causing damage is very small.

(27) Howarth, David. Textbook on Tort. Butterworths. 1995. P.42.

(28) Chapman, John W. Compensatory Justice. New York University Press. New York. 1991. P. 324.

acceptable in previous times, but it is not suitable any more to a dynamic and machine based society such as ours.⁽²⁹⁾

Thus, it is inevitable with regard to certain hazardous -but legal- activities that liability be imposed on defendant's side as a risk creator independently of intention or negligence, in order to guarantee that the innocent plaintiff be compensated for the loss he suffered. This 'strict' version of liability was first introduced to the common law through the renowned *Reynolds v. Fletcher*, concerning the escape of dangerous things accumulated for some non-natural purpose. In 1867 Blackburn J. held a mill owner liable when a reservoir in his land leaked and flooded an adjoining mine:

"The person who for his own purpose brings on land and collects and keeps there anything likely to do mischief if it escapes must keep it in at his peril, and if he does not do so is *prima facie* answerable for all the damage which is the natural consequence of its escape".⁽³⁰⁾

Such position could be explained on policy grounds; law throws the absolute risk of certain transactions on the person engaging in them, irrespective of blameworthiness.⁽³¹⁾ In such cases the security of the particular interest of the plaintiff is predominant over the defendant's interest in freedom of action.⁽³²⁾ It only appears to be just to ask -when neither side could be blamed for the loss- who is in a better position to bear the loss, and then shift that loss to him.⁽³³⁾

A study of English law decisions in this respect would reveal that the current position of the law is to establish a strict form of liability, i.e. liability without fault, in different cases, those could be classified under

(29) Denning, Sir Alfred. *The Road to Justice*. Stevenson & Sons Ltd. London. 1955. P. 110.

(30) (1866) LR 1 Ex Ch 265 at 279; affd (1868) LR 3 HL 330.

(31) Holmes. Op. Cit. P. 116.

(32) Heuston, R. F. V. and Buckley, R. A. *Salmond and Heuston on the Law of Torts*. Sweet and Maxwell. 21st Edition. 1996. P.30. Therefore, it is said that it is more accurate to call strict liability a conduct-based liability than to refer to it as a duty-based liability, since the defendant has no duty to prevent the damage, as it is beyond his control. See: Peter cane. *Justice and Justifications for Tort Law*. Op. Cit. P.32.

(33) Roscoe Pound. *The End of Law as Developed in Legal Rules and Doctrines*. Harvard Law Review. Vol.27. 1913-14. P.233

three categories: a) Liability on Social grounds: examples are dangerous premises, abnormally dangerous activities⁽³⁴⁾ and fire. b) Liability on 'Semi-fault' grounds: *Reynalds v Fletcher*, animals, and vicarious liability.⁽³⁵⁾ c) Liability without fault on doctrinal grounds: contractual obligations, which are strict because the parties' intentions gave them this force.⁽³⁶⁾ It is noteworthy that while this form of liability is a strict one, it is never absolute. Defenses such as act of god or act of a third party are available under certain conditions.

However, with the ever-increasing complexity of modern life, it is becoming remarkably difficult to differentiate between reasonable and unreasonable risks. Different approaches have been suggested to solve this dilemma, one of which is to use a formula stating that the plaintiff has a right to recover for losses caused by a risk greater in degree and different in order from those created by himself.⁽³⁷⁾

There is a further complication. Whereas it may seem, *prima facie*, that a comparison between fault and strict liability would conclude that the first is based on a positive idea, while the latter is based on a negative one⁽³⁸⁾ -in that it means liability without fault- that may well not be quite accurate.

In fact, a thorough investigation of strict liability would reveal that is actually based on the assumption of fault on the defendant's side when he is carrying a risky activity, due to difficulties involved in proving fault in his side. This indicates that even though this form of liability is so called 'strict', it is actually conceived as based on the fault principle.⁽³⁹⁾

(34) Abnormally dangerous activities are normally characterized by one of two factors: a. abnormal activity, b. potential of imposed risk is high.

(35) Vicarious liability is a liability which one person takes over from another, and as such not his but that other's, just as a 'Vicar' was originally a person in holy orders who occupied a place which was not his but the rector's whose substitute he was. See: Peter Birks. *The Concept of A Civil Wrong*. In: Owen. Op. Cit. P.41

(36) Tettenborn, A. M. *An Introduction to the Law of Obligations*. Butterworths. 1984. P.38-47.

(37) George. P. Fletcher. *Fairness and Utility in Tort Theory*. Harvard Law Review. Vol.85. No.3. Jan. 1972. P.537, 542.

(38) Cooke. *Law of Tort*. Op. Cit. Passim.

(39) Peter Birks. Op. Cit. P.43

Indeed, such complexities which result from the unconventional nature of strict liability have had its impact on courts. In different occasions, judges would establish their decisions with respect to strict liability on basis of risk or insurance.⁽⁴⁰⁾ The general position reveals a sort of uncertainty; not only about the nature or the extent of the interplay between fault and risk in the modern industrial society, but also of their role in the process as a whole.⁽⁴¹⁾ As a result, the House of Lords explicitly decided that its role does not exceed "deciding particular cases between particular litigants", and that formulating a set of relevant principle is a task that is left to the Parliament.⁽⁴²⁾ It is indeed difficult to ascertain suitability of this view for a society with an ever-increasing technological advancement such as ours. Restricting court role and limiting it to facts presented in individual cases would negatively affect the ability to formulate a common rationale for judgments, which leaves the doors wide open to inconsistency in court decisions.

It could be concluded that despite the dominance of the fault principle as a prominent source of liability under tort law, it is undeniable that more area is being progressively covered by the strict liability rules. However, it should be submitted that the development of the latter is slow and -in a way- confusing, in that whereas serious steps have been taken towards establishing liability without requiring proof of fault - based on the convenience of the maxim *res ipsa loquitur*⁽⁴³⁾- there is still a significant lack of both consistency and coherence in this respect.

VI. Changing Roles: Risk as A Defence:

While the above presentation was concerned with introducing risk

(40) *Willis & Son v British Car Auctions* [1978] All ER 392, 395-396.

(41) Samuel, Geoffrey & Rinkes, Jac. *The English Law of Obligations in Comparative Context*. Ars aequi libri. 1991. P. 137.

(42) Lord Macmillan in *Read v J Lyons & Co* [1947] AC 156, 175. In this decision, there is a denial for a general theory of strict liability for ultra-hazardous activities, and indication to that what is actually there is only a liability for non-negligent conduct in a serious of defined situations only. See also: Lord Wilberforce in *Air Canada v Secretary of State for Trade* [1983] 2 AC 394, 438.

(43) Meaning: "The thing speaks for it self". See: Farouqi, Harith Sulaiman. *Farouqi's Law Dictionary*. Lebanon Library. Beirut. 1986.

as an alternative system of liability, this should not lead to the conclusion that this is the only role that is currently attributed to the risk concept in the negligence sphere. Risk seems to play a double role indeed. Paradoxically, instead of being a source of liability, risk, in certain occasions, can actually serve the defendant as a defence to negligence.

Tort law knows a doctrine of risk acceptance, where a person who consents to risk being taken against him, is considered to have absolved the defendant from all responsibility for it, and therefore cannot have a right of action against him in case the risk materializes and results in harm. This is only applicable when the plaintiff had preserve knowledge about the existence of a particular risk with full appreciation and decides -despite this-to take it upon himself. This rule is introduced by the maxim *volenti non fit injuria*, and is known as 'assumption of risk'. However, it is not sufficient for this maxim to be applicable that the plaintiff knew about the risk; he should have also freely granted his consent to incur it, whether expressly or impliedly.

In addition, certain conditions have to be met in order for assumption of risk to be accepted as a defense, one of which is that knowledge of risk should be evident on the plaintiff's side, as he must have known of the nature and extent of the risk⁽⁴⁴⁾. Thus, it presupposes a distinct state of knowledge on the plaintiff's part, one that involves identifying risk as such.⁽⁴⁵⁾

However, such knowledge must have had taken place prior to the risky conduct.⁽⁴⁶⁾ Furthermore, there must be evidence that the plaintiff has waived his right of action -whether expressly or impliedly- as mere appreciation of the risk and willingness to take it is not sufficient.⁽⁴⁷⁾

In this sense, the doctrine of *volenti non fit injuria* has a twofold significance, in one part it functions as a proof that the defendant was not

(44) *Osborne v. L. & N. W. Ry.* (HC 1888).

(45) Vern R. Walker. Op. Cit. P. 677

(46) *Wooldridge v. Sumner* (Ca, 1963). Per Diplock L. J.

(47) *Letang v Ottawa Electric Rly Co.* [1926] AC 725 at 731, PC, citing *Osborne v London and North Western Rly Co.* (1888) 21 QBD 220.

negligent in the sense that he did not breach a duty of care that he owed to the plaintiff. On the other side, there could be evidence with regard to the breach of a duty, but a plea on grounds of assumption of risk could succeed in rebutting negligence.⁽⁴⁸⁾

VII. Insurance: A Safety Net for Risk?

It could be concluded that risk allocation is a legal technique that could be best implemented by asking the direct question 'who should bear the risk of loss resulting from a particular activity' rather to trying to find the responsible party under a blameworthiness logic.⁽⁴⁹⁾ Addressing such a question would necessarily lead to the quest for a method that is economically feasible with regard to loss coverage. Insurance is considered one of the best solutions in this respect, where the abstract concept of risk allocation is transformed, in a posterior stage, into the calculated measure of risk distribution.

Risk⁽⁵⁰⁾ distribution, as a measure reinforced by insurance, endeavors to mitigate the peril of a potential loss by spreading its cost on a group.⁽⁵¹⁾ Thus, loss could be more easily borne if it was spread from the individual victim to all persons benefiting from the activity that created this loss. Insurance, in this sense, is described as "nothing more than an effort by agents to convert tort from a roulette system like game two to one like game one".⁽⁵²⁾

However, insurance system has its own drawbacks. On one hand insurance is still occasionally associated with the concept of fault, as it does not seem to have dispensed with the element of blameworthiness

(48) Brazier, Margaret Op. Cit. P.277.

(49) Rogers, W.V.H. Winfield and Jolowicz on Tort. Sweet & Maxwell. 15th Edition. 1998. P.37.

(50) Risk, in insurance terminology, is defined as "the danger, peril, or event insured against; the possibility of the loss happening under such circumstances as to make the underwriter liable; when this possibility has arisen". See: Jowitt's Dictionary of English Law. Op. Cit. Vol.2., P.1585.

(51) Clarke, Malcolm A. The Law of Insurance Contracts. Lloyd's of London Press. 2nd Edition. 1994. P.6.

(52) Christopher H. Schroeder. Corrective Justice and Liability for Increasing Risks. UCLA Law Review. Vol. 37. No. 3. Feb. 1990. P.474.

entirely.⁽⁵³⁾ On the other hand, it has been seriously questioned in terms of a possible negative effect of the deterrent function of tort law, as "by spreading the financial impact of liability amongst a number of potential defendants it reduces very significantly the amount which any individual will have to pay".⁽⁵⁴⁾

Nevertheless, insurance plays a most prominent role as a compensation system. This could be well appreciated with regard to injuries resulting from legal but hazardous activities and in difficult situations where no one is liable for a given injury so the victim must bear his loss himself.

Notwithstanding the merits of insurance, its practicability as an alternative compensation system seems to have a limited influence on judges, as only few are known to have relate their decisions in finding negligence or deciding high compensatory damages with the availability of an insurance scheme.⁽⁵⁵⁾ The majority of judges are reluctant to follow the same approach out of what seems to be fear of expanding the traditional boundaries of liability. Courts often indicated that the existence of insurance should not affect the decision with regard to the issue of negligence. In this respect, Viscount Simonds said:

"As a general proposition, it has not, I think, been questioned for nearly two hundred years that in determining the rights *inter se* of A and B, the fact that one or other of them is insured is to be disregarded".⁽⁵⁶⁾

Indeed, such position of the courts is quite understandable, as it is submitted that English law still establishes the principle of liability upon the traditional fault theory rather than risk distribution, the question of insurance is then, *helas*, irrelevant.⁽⁵⁷⁾

(53) Dias, R. W. M Op. Cit. P.10.

(54) Cane, Peter. Tort Law and Economic Interests. Clarendon Press. Oxford. 1991. P.431.

(55) E.g. Lord Denning MR in *SCM (UK) Ltd. v Whitall & son Ltd* [1971] I QB 337 at 344; *Spartan Steel and Alloys Ltd. V Martin & Co (Contractors) Ltd.* [1973] QB 27 at 38. Lord Denning expressly says "there should be absolute liability in all such cases whenever the defendants can be protected by insurance". See: Denning,. Op. Cit. P.113.

(56) *Lister v Romford Ice and Cold Storage Co Ltd.* [1957] AC 555 at 576.

(57) One exception of this general rule could be applied -after taking social purposes into consideration- and that is when the defendant is vicariously liable for the tort of another person. See: Williams, Glanville. Foundations of Tort. Butterworths. London. 1976. P. 164, 165.

VIII. The American Perspective:

Legal doctrine in the United States, has made increasing use of economic analysis techniques of tort related problems, through an approach of prior risk determination. These techniques are based on welfare economics, a theory, which envisage the legal system as an enhancing factor to allocation of society's resources.⁽⁵⁸⁾ Its objective is to encourage cost effective preventative measures through inducement of accident-reducing steps when these cost less than the outcome of the accident. In this sense, economic analysis was regarded as a useful tool to attain understanding of the operation of certain torts, in particular negligence and product liability which formed the focus of many theories in this domain, as they are thought to offer a measure by which the compensation system can be judged.⁽⁵⁹⁾

Epstein and *Fletcher* were amongst the prominent theorists of this legal school, they developed a concept of strict liability based on the creation of risk as a criterion.⁽⁶⁰⁾ Thus, by assessing liability in an amount equal to expected harm, such a system eliminates the lottery characteristics of liability.⁽⁶¹⁾

In application of this theory, it could be said that the question of reasonableness in risk prevention remains a question of balance, the criteria is proportional to size of foreseeable risk in contrast to the cost of preventative measure (e.g. additional precautions, insurance, ...etc).⁽⁶²⁾ This means that if a significant amount of risk could be reduced by a small expenditure then it is reasonable for the defendant to have had taken the necessary preventative measures in this respect. This theory is

(58) Markesinis, B. S. & Deakin, S. F. *Tort Law*. Clarendon Press. Oxford. 4th Edition. 1999. P. 23, 24. With regard to risk concept, American doctrine embarked from Aristotle's notions of 'corrective justice' and 'distributive justice'. For more on this, see: James Gordley. *Tort Law in the Aristotelian Tradition*. In: Owen. Op. Cit. P. 131-158.

(59) Brazier. *The Law of Torts*. Op. Cit. P.12.

(60) Williams, Glanville. *Foundations of Tort*. Butterworths. London. 1976. P.201.

(61) Christopher h. Schroeder. Op. Cit. P.465.

(62) For a detailed overview of American courts' position, see: The American Law Institute. *Restatement of the Law (Second)*. 1977. Vol. 3: Torts . P. 36-43.

reflected by the mathematical formula introduced by Judge Learned Hand, who said:

"If the probability be called P; the injury, L; and the burden, B; liability depends upon whether B is less than L multiplied by P: i.e. whether $B > PL$ ".⁽⁶³⁾

Nevertheless, this school of thinking has been extensively criticized for applying economic principles in the legal arena, as this could result in multiple complications and possible inconsistency on given occasions.

However, positive gains are attributable to this theory in terms of both risk assessment and analysis and should not be overlooked. Also, its use of statistical and probabilistic information could prove to be of great use in judicial proceedings.⁽⁶⁴⁾

Notwithstanding the welcoming grounds this theory found in the United States, it was confronted with a quite conservative reception in England; very little of this view has found its way through to the English courts. This could be attributed to the fact that economic efficiency functions on very complicated grounds, in addition to being simply one of the several and sometimes contradictory objectives of tort.

IX. Conclusion:

Historical foundations of the fault principle as a liability system resulted in its being a long-established legal institution under tort law. However, industrial revolution introduced a wealth of risky -though legal-activities. The situation demonstrated an urging need to produce more relaxed roles in terms of both proof of negligence and provision of compensation. This legal void appears to be gradually filled by the 'risk' concept. It manifests its flexible presence in many patterns through endeavoring to serve in different fronts, examples are strict liability, assumption of risk and insurance, to name a few.

Notwithstanding the above analysis, it has to be submitted that it is

(63) *US v Carroll Towing Co.* (1947) 159 F2d 169, 173.

(64) Christopher h. Schroeder. Op. Cit. Passim.

probably still early to refer to risk as a full scale 'theory', since it has not developed through following a systematic approach, but rather from a mere practical need to solve specific problematic situations. Thus, it seems that for 'risk' to be suggested as an alternative to 'fault' as a ground for liability, much progress has to be achieved. However, determining from its both expansion rate and scale, this writer conceives that the said emerging concept is most likely to conquer more tort grounds in the near future.