

Tort Vulnerability and Security Risk Governance¹

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Abstract

The paper argues that the last few decades have witnessed changes in how citizens are viewed in the UK and that these changes have implications for security risk governance. The paper identifies a shift from contract to tort law, and a related shift from a contract model of citizens to a tort model of citizens, or from a view of citizens as robust, rational risk-takers to vulnerable persons at risk. My discussion of law involves socio-legal ideal-types, nevertheless, these ideals inform presumptions underpinning individual laws and policies and their interpretation.

The paper begins by discussing the contractual model of the citizen as robust rational risk-taker and its influence on the interpretation of tort law. Second the paper discusses the expansion of tort and consumer protection, and the evolving view the citizen as vulnerable victim. Third the paper discusses the implications of a tort culture of risk aversion for security strategies.

Contractual character of modern law and the rational citizen

Any account of modern citizenship would be incomplete without reference to the influence of social contract theories and theories of individuals' natural inalienable rights. From eighteenth century Enlightenment philosophers like Rousseau or political figures like Tom Paine invoked the idea of the rights of man and society founded on individuals coming together in a social contract, These ideas were applied politically by the American and French revolutionaries and the British Chartists. Political theory classes teach how the idea of an original social contract and natural rights is a myth. Nevertheless the force of social contract theories was grounded in historical developments reflecting the shift from feudal society to industrial capitalist society and its shift from social relations based on feudal status to relations based on contract, including the expansion of commercial trade and waged labour.

The rise of contractual relations in the UK was unsurprisingly accompanied by contractual disputes, and disputants applied to the courts to resolve disputes. The nineteenth century saw the rise of contract law in the UK, largely developed from civil case law. Tort law also began to develop in the

¹ Please note that this is a first draft and I have yet to add many references.

nineteenth century, but at a slower pace than contract law. Contract law was the primary field, and tort law was the subsidiary field evolving to fill anomalies in the primacy of contract law.

The relation between capitalism, contract and modern law has been analysed by the Marxist legal theorist Pashukanis and others. The contract model of law has underpinned the democratic ideal of law, which regards law as the reflection of our collective will. We follow laws, which we ourselves have willed and agreed to through political debate and assent. In other words, we are subjects of law as both authors of law and its followers.

In so far as legal sanction is invoked it is to hold us to our agreement in law. The law's contractual character is clearest in civil law. But even criminal law in the modern democratic ideal of law embodies the idea of a citizen with the capacity to reason and enter into contracts. Criminal law sanctions the citizen for violating the social contract and not following his or her will as embodied in law. The criminal sanction is measured proportionate to the violation of the social contract. The criminal contract-breaker, having served time, regains his or her freedom and returns to society to resume full citizenship rights.

Tort and the reasonable man on the Clapham omnibus

Tort law developed to redress problems that arose outside a contractual relationship or could not be addressed by breach of contract. For example, injury sustained by faulty goods or services. Or for third parties who were not party to a contract and who had suffered injury. For example, tort law sought to address injured railway passengers such as children whose tickets had been bought by somebody else, or those who had consumed defective food products but were not the original buyer. The subject of tort might be a person who is not a formal participant in a contract who is at risk and needs to be protected. Tort law originally tended to supplement contract law and was interpreted to encompass foreseeable injured parties and foreseeable injuries.

Informing the character of contract law and tort was an understanding of the citizen as a robust, rational, active self-determining individual with the capacity to handle risk. Consider the ideal of the proverbial reasonable man on the Clapham Omnibus, who was invoked to determine the standard of care in negligence claims. (See *Hall v Brooklands Auto-Racing Club* (1933) 1KB 205). The assumption was of the average solid citizen as reasonable and rational. This ideal embodied the figure of the new suburban, middle-income male office worker and householder (renting was the norm for most). Evidently this archetypal figure did not embrace women or all men when first invoked culturally before being invoked legally. Not least universal suffrage was not won by people without political struggle. Yet the ideal as it modified into 'the ordinary man in the street' came to embrace more of the population following the achievement of universal franchise, and as the possibilities for office work, becoming a householder, suburbia, and train and bus travel expanded. The ideal embraced much of the population in the postwar consensus after the Second World War.

Here I stress that I am discussing a legal ideal, yet the ideal of the rational sensible citizen, informed by social forces, influenced law's development in the nineteenth and twentieth century, especially after the Second World War. Belief in the ultimate reasonableness of people even influenced criminal law reform.

Contractual assumptions of the citizen as capable risk-taker

Under the contract model, the citizen is allowed to take risks and make wrong decisions and undertake endeavours, which might fail. Consider how the idea of the citizen as a conscious risk-taker is expressed in case law.*

Consider how the idea of the citizen as a risk-taker is expressed culturally in Kipling's historically well-known poem *If*:

If you can make one heap of all your winnings
And risk it on one turn of pitch-and-toss,
And lose, and start again at your beginnings
And never breath a word about your loss;
If you can force your heart and nerve and sinew
To serve your turn long after they are gone,
And so hold on when there is nothing in you
Except the Will which says to them: "Hold on".

This idea of the citizen as capable risk-taker was modified in twentieth century Britain through the creation of the welfare state. Nevertheless its assumptions of capacity underpin the concept of universal basic welfare, which regarded welfare rights as bound up with duties and responsibilities, that is, the capacity of citizens to act responsibly and fulfil their share of social duties. See, for example, influential models of welfare citizens' rights and duties by social theorists T.H. Marshall, Richard Titmuss, and Richard Tawney. Underlying the various models was an expectation that citizens had capabilities, would act responsibly, and, having contributed to society, were entitled to state welfare when they fell sick, became temporarily unemployed or reached retirement age.

The welfare state model with its idea of universal entitlements was propelled through the force of the collective democratic political movements of the twentieth century, which emphasised the productive capacity of the working classes and their related social entitlements. It is no coincidence too that the broad social consensus the postwar welfare state model attracted was fostered by the individual and collective sacrifices made by citizens in the Second World War. Citizens had testified to their capacity to risk their own lives for the social good and therefore society owed them a duty to support them when in need.

The default ideal of the citizen under the idea of universal welfare rights remained a capable subject with agency. Consider how Talcott Parsons' concept of the sick role assumes citizens as robust capable beings and how people would only be in the sick role temporarily because their pride in their

independence would make them want to relinquish the sick role as quickly as possible.

Only a residuum of the population were considered as lacking rational capacity. But even among this category there was overall social optimism over their reformability and therefore ultimate rational capacity. Thus in the postwar period under the sway of belief in people's rationality and society's robustness, child murderers like Mary Bell could be returned and assimilated relatively simply back into society, with a fresh start under anonymity, once they had served their sentence. Instructively the original 1960s' trial judge of Myra Hindley, perhaps the most notorious child killer in the UK of the last century, indicated that she might be released after serving a very long sentence. That her release did not happen is indicative I would argue of the shift from the risk-taking contractual model to the risk-averse tort model in subsequent decades I am discussing. One aspect of the risk-averse model is more illiberal laws and erosion of the citizens' freedoms.

Rise of citizen as consumer and tort claimant

The expansion of tort is linked to policy approaches treating the citizen as a consumer. The postwar social consensus and collective political movements that had underpinned the universal state welfare system began to fragment. In that fragmentation, claim-making took on more individualised, special pleading forms. From the 1980s the state welfare system shifted from a collective welfare model to a more individualised, privatised model, which imagines the citizen as consumer and has sought to put more welfare costs onto private individuals and bodies, for example, to encourage citizens to take up private pensions and more health insurance etc.

The ideal of choice, essentially a consumer model of choice, has displaced the previous ideal of a universal, shared system of national welfare and common social institutions. Tellingly local authorities are applying consumer data models to populations in their policy planning (see the importance of the company Experian's expertise, regularly consulted by UK government bodies, also Ireland too). Instead of choosing between big competing political visions, the citizen as consumer chooses between a set menu of policy priorities and competes for places in the most attractive institutions like schools. Contrast past idealism over the local comprehensive school with today's ideal of parental choice of school. Contrast the past idealism over the creation of a universal health service and the local general hospital, with today's ideal of patient choice of hospital and the promotion of the 'choose and book' patient appointment system.

The citizen as consumer does not easily square with previous idea of citizens' commensurate rights and responsibilities. Consider the retail mantra 'the customer is always right': the consumer is to be flattered and does not expect to be made to feel uncomfortable. How well do such ideas translate into the public sphere? On the one hand the citizen as consumer under official social policy will be flattered and encouraged to feel self esteem for just being, as did the BUPA advertising campaign of a few years ago. But on the other hand

the consumer analogies are obviously strained. If something is not pleasing, then the consumer may walk away and go elsewhere. Yet when consumer choice is applied to limited public services, not every citizen is able to realise their choice or go elsewhere if their choice is not met.

The model of citizens competing for access to the best public services creates an inevitable winners and losers' situation. Its operation is experienced as arbitrary and inequitable, and tends to further fragment a sense of social solidarity and alienate people whose choices cannot be fulfilled in public institutions. The experience of social inequity and uncertainty over access to desired public goods is underscored by the accompanying rise of tort.

Official policy has also sought to encourage the use of tort and its privatised model of personal redress through the identification of third party wrong as part of shifting the welfare burden onto the private sector.

Fuller welfare entitlements arise based on the finding of a tortuous act. An individual's welfare entitlements are considerably enhanced if there is an identifiable tortuous act and a tort offender with the capacity to meet the tort claim. Conversely an individual's welfare entitlements are considerably lower if no tort claim can be established and enforced. The position of the tort offender becomes paramount. Can a claim for negligence be established? Does the tort offender have the financial capacity to meet the court claim? Is the tort offender sufficiently insured?

In shifting from a collective social contract universal needs-based state welfare towards more tortuous wrongs based welfare provision, the fortunes of those requiring welfare provision appears to be more arbitrary. The unequal welfare benefits arising from tort further undermines a sense of commonality between citizens. Citizens as consumers and tort claimants are encouraged to view their own welfare and security in privatised terms. Under the concept of choice, citizens may live in the same area, but increasingly lead parallel lives, not sharing the same social space or social institutions, thereby further eroding the shared civic space.

The idea of citizen of consumer appears to follow social contract theories. Indeed in its more individualised concept of the relationship between the citizen and state it appears to follow the social contract theories more strictly than the collective welfare state model. But the contemporary privatisation of responsibility is paradoxically accompanied by official mistrust of citizens' capacity to make responsible choices. Declining political and civic engagement among citizens has encouraged a more negative view of citizens' capacity among policy-makers. Citizens are expected to take more financial responsibility for their own welfare, but are not expected to act wisely in their best interests without official guidance. External advice, regulations and programmes are expanding to *empower* weak citizens and ensure citizens make the correct choices according to official policy. Thus contemporary official policy departs from the contract presumption of citizens' capacity. Indeed the growing institutional use of personalised contracts like ABCs (A Behaviour Contracts - note their tellingly childish sounding acronym),

or school-home agreements or university-student contracts with citizens is symptomatic of a breakdown of social trust. These contracts are not entered into as free acts by citizens, but as part of disciplinary frameworks.

The diminished view of the capacity of citizens as consumers is becoming codified in contemporary consumer protection and tort law. Before I discuss the contemporary tort model of the individual, the next section discusses the expansion of tort and consumer protection law.

Expanding consumer protection law

The expansion of tort and consumer protection is also related to institutions seeking to establish their legitimacy and forge links to a more individualised, depoliticised population. Expanding consumer protections have been introduced by European legislation too. Indeed European institutions have attempted to gain political legitimacy through appealing to the citizen as consumer and developing consumer protection legislation. The European Community/European Union have been important in expanding consumer protection, and health and safety legislation.

The number and role of governmental consumer advisory bodies or professional consumer advocacy groups have expanded. Take the Consumer Association, founded in 1957, and its influential magazine *Which?* The Consumer Association, now known as *Which?*, claims to be the largest such organisation in the world with a membership of * (*Which?* web site). It was a core sponsor of the European Office of Consumer Unions set up in *, now known as BEUC which lobbies the European Union on consumer issues (*Which?* web site). In 2004 *Which?* was 'granted official super-complaint powers by the Department of Trade and Industry, giving it 'the power to make super-complaints to a number of government agencies about markets that are failing consumers' (*Which?* web site). Take the government Food Standards Agency (FSA) set up in 2000, championed by *Which?*, whose remit is protecting consumer interests in food safety and standards.

Indicatively the growing prominence of professional consumer advocacy groups, such as *Which?*, has paralleled the decline of political engagement, trade union activity and other civil society activism. Civil society increasingly has the character of professional advocacy rather than activity by ordinary citizens. Concurrently older bodies like the trade unions are revising their activities away from collective actions towards more individualised professional services such as providing legal aid or counselling.

The original legislative provisions and campaigning focus of consumer organisations was on regulating manufacturers, retailers and service providers. We can see this emphasis in the list of acts highlighted by *Which?*: the Unsolicited Goods and Services Act 1971, Unfair Contract Terms Act 1977, Consumer Safety Act 1978, the Sale of Goods Act 1979, the Competition Act 1980. Consumer protection law also broadened to encompass increasing protections against the citizen entering into detrimental contracts. Protections against consumers entering onerous contracts, such as

cooling off periods, were codified in the Unfair Contract Terms Act (UCTA) 1977. The legal limitations have expanded, but they remain fairly cautious and have not made serious inroads into consumers' freedom and risk to contract. However the courts have become more willing to interpret consumer protection loosely, and, for example, overturn onerous but legal credit contracts in a few notorious cases.

Tort law evolved secondary to contract law, but a risk consciousness is becoming culturally pervasive and expanding tort. Official policies to encourage the use of tort law led to a loosening of rules governing solicitors and the funding of civil claims in the 1990s. Advertising was allowed and civil claims funded on a conditional fee or 'no win, no fee' basis, to encourage more tort claims. These changes were accompanied by the spectacular growth of claims management firms and aggressive advertising in the media. Crucially the expansion of tort has also been accompanied by qualitative changes in the character of tort, consumer protection, and expectations of risk. The next section discusses the rise of risk consciousness.

Embracing risk consciousness

The expansion of tort was gradual, but the late 1980s marked a watershed in a new tort consciousness and sense of being at risk. This sense was manifested in a series of disasters including the Bradford fire (May 1985), Zeebrugge ferry (March 1987), King's Cross fire (November 1987), Piper Alpha (July 1988), Lockerbie air disaster (December 1988), Kegworth air disaster (January 1989), Hillsborough stadium (April 1989), Marchioness boat disaster (August 1989).

The disasters did not register as individual tragedies but came to be linked together culturally to signify a pervasive sense of pessimism and vulnerability. These disasters were also significant legally as they were followed by a series of legal cases, which expanded tort law. The extensive media coverage of the progress of the legal claims helped keep these disasters in the public consciousness and reinforced their cultural impact.

Indicative of the changing cultural expectations was the new attention given to emotional damage. The Hillsborough negligence case, for example, expanded the potential negligence claims for psychiatric injury. See *Alcock and Others v Chief Constable of South Yorkshire Police* [1991] WLR 1057

It should be emphasised it was not simply the scale of disasters that precipitated the heightened cultural sense of being at risk. Past disasters had not resulted in the same cultural or legal risk consciousness. The enormity of the Aberfan tragedy, where over a hundred teachers and pupils were killed by a mining landslide, elicited very different cultural responses. No legal claims were initiated by the Aberfan relations – the idea was rejected as bowing to vengeance (Furedi, 2000). The cultural responses affirmed the strength of the community and outside intervention was rejected (*ibid.*). Interestingly since the 1990s, the new risk consciousness has been revising the cultural histories of disasters like Aberfan or the 1953 floods. Victims of these past disasters,

interviewed about their experiences in various documentaries or oral history projects from the perspective of today's cultural norms, appear to be reshaping their memories in the light of present expectations of vulnerability and psychological trauma. Like other cultural norms, risk consciousness comes to shape views of appropriate and inappropriate responses, including official models of functional and dysfunctional behaviour.

Risk governance of consumers

Growing risk consciousness has been analysed as a defining feature of contemporary culture. There is now an extensive sociological literature on 'risk society'. Castel (1991) has identified a shift from 'dangerousness to risk', which involves the rise of social regulation through risk prevention rather than traditional morality or political ideologies. Risk governance involves identifying risks (including risky behaviour), targets, prevention policies and monitoring mechanisms. The sociological risk literature observes how risk governance blurs the ordinary and the dangerous, and invites ordinary activities to be viewed through the prism of potential risk. Risk management policies involve making individuals aware of risks, and providing guidelines and programmes to support those needing to modify their behaviour.

Significantly, government policies and advocacy groups are broadening the categories of risk and risky behaviour from which they wish to protect individuals. The expanding role of both government and non-governmental consumer protection organisations has been accompanied by changed understanding of consumer protection which does not simply entail ensuring manufacturing standards but encompass attempts to regulate consumer choices. These changes are not necessarily (yet) legally codified, but are indicated a shift from contractual freedom to tort protection in organisations' interpretation of their mission and attitudes towards consumers. In this vein, two major bodies, the FSA and Which? want to change citizens' eating habits and address 'poor food choices' (Which?, 2004). This mission is captured in the FSA's institutional slogan 'Safe Food and Healthy Eating for All' and elaborated in its eating well web pages.

Consider the alarmist opening tone of the alarmingly named 2004 report *Recipe for Disaster* by the Consumer Association:

Our food is killing us. We eat too much of the wrong type of foods and we are now suffering the health consequences with almost a quarter of people in the UK obese' (Consumer Association, 2004, p. 2).

The report contends that 'Poor food choices are a key risk factor for the major killers' (Consumer Association, 2004, p. 2*). Its Health Warning for Government* campaign is demanding government 'Launch a hard hitting, innovative campaign by government to change UK eating habits' (Consumer Association, 2004, p. 3*). Both organisations have been trying to promote simple traffic light labels on food to guide consumers to make the eating choices in line with government health policy.

The traffic light labels join proliferating advice to citizens. There has also been huge expansion of lifestyle media programmes and columns and seeking to change their behaviour, which endorse official risk governance of the citizen, from parenting to healthy eating. Retailers too are also ready with advice to consumers to help them follow official healthy living guidelines. Government bodies, NGO advocacy, and media programmes, and retailers too seem eager to make us aware and offer us advice. Sometimes the same figures appear in different guises. So Sainsbury's free magazine to parents puts forward healthy meals and pack lunches for children devised by the chef Jamie Oliver, who produced a television documentary on his attempts to reform school dinners, in turn becoming an informal government advisor and spokesperson on the nation's diet. Strikingly whereas the older consumer programmes like Watchdog, which began broadcasting in 1980, advised people about faulty products and investigated the products or services of major companies (including the civil claims company The Accident Group!), today's lifestyle programmes revel in berating individuals for their greed, slovenliness, poor relationships or simply lack of taste. In this vein Oliver was ready to voice contempt for parents who gave junk food to their children.

The ever-expanding consumer protection labelling, health awareness campaigns, basic safety or life skills advice implicitly suggest the stupidity of citizens. Relentless officially sanctioned advice to put on sun cream or put on a jumper, eat your greens, or don't drink too much effectively treats citizens as children. The shift from contractual freedom to tort protection thereby involves a demoralised view of citizens. Interestingly many advocacy campaigns like the Which? report above often cite 'one in four' people to be affected by their particular campaign concern. Consider just a few alarming 'one in four' reports of recent years: One in four [women] 'had drinks spiked', 'One in four students suffer mental illness', 'One in four children are overweight by age three', 'One in four touched by ID fraud', One in four at risk of cannabis psychosis, 'One in four teens a crime victim', 'one in four adults' with high blood pressure and at risk of cardiovascular disease. There is even a registered charity called One in Four which 'offers a voice to and support for people who have experienced sexual abuse and sexual violence'. The charity claims, 'Research has consistently shown that one in four children will experience sexual abuse before the age of 18'.

The basis of the 'one in four' figure rarely appears well substantiated, as the case here. Has the striking coincidence of this statistical risk repeated in so many different sorts of awareness campaigns been researched? I have not yet found a general study of the 'one in four' statistic, although reports have questioned the common 'one in four' statistic in specific areas. Questions have been raised on 'one in four' domestic violence or campus rape statistics (for example, Sommers, 1995; Holbrook, 2003). The 'one in four' statistic first appeared commonly in the United States, before the UK. The 'one in four' statistic is now also common among international NGOs and echoed by regional NGOs. I have heard it quoted by NGO advocates in the post-Yugoslav states. It would be interesting to know why so many risks seem to coincide at the figure of 'one in four' in contemporary advocacy. An informal

google search of the 'one in four' figure is dominated by individuals at risk, while the figure 'one in ten' seems less monopolised by individuals at risk and the reference to victims of violence less prominent. (The 'one in ten' risks include risks like 'one in ten resistant to TB drugs' or 'one in ten victim online fraud', while the 'one in ten' figure is also associated with dodgy acts by individuals like 'one in ten avoiding paying licence fee' or 'misused credit card'.)

The contemporary advocacy campaigns collectively convey the message that we are a nation at risk. The qualitative changes in law and policy amount to codifying a model of citizens as susceptible people at risk from themselves or others (typically one in four is the figure cited!). The contemporary tort view of the citizen as a vulnerable, gullible, weak, feeble, even contemptuous consumer prey to risk is a subject lacking capacity or sufficient capacity, who requires protection and empowerment by legal regulation and authorised advocates.

Institutional risk management has to take into account the risks of tort litigation and requires expanded insurance cover, while the conditions of insurances policies and their interpretation also expand under the precautionary principle. Rising insurance claims have led to rising insurance premiums and requirements on insurance holders to regulate their activities. Fear of litigation and insurance requirements contribute to institutional risk avoidance. Instead of risk to be embraced, risk is to be avoided. Citizens continue to witness activities being curtailed in their ordinary lives like school fireworks parties or presents of homemade birthday cakes to nurseries, without having to read any popular media 'health and safety gone mad' type stories. Many activities like school firework parties went ahead safely in the past based on social trust and ordinary sensible precautions without the need for risk insurance or formal risk management. The rise of formal risk management is also symptomatic of an erosion of communal solidarity and social trust.

There is a link between a more pessimistic view of citizens and the expansion of more illiberal strategies to deal with social problems to protect the best interests of citizens. A shift has taken place from a presumption of freedom to presumption of a need to regulate in the name of citizens' welfare. Thus health campaigners have successfully achieved the banning of smoking in enclosed public space. Some health campaigners are now demanding a shift in the freedom to drink alcohol in public spaces unless otherwise prohibited to a permission to drink alcohol in designated spaces only. So from the freedom to take risks we have the right to be smoke-free, alcohol-free or risk-free, involving a shift to a tort concept of freedom as protection. Freedom, in its changed meaning, becomes a regulated space.

Sensible risk principles?

Officials often deplore the development of a risk-averse climate, even as they continue to endorse policies that promote this climate. The Health and Safety

Executive (HSE) now run their own 'myth of the month' page to try to counter the idea that they support excessive regulation. The HSE states, 'We believe that risk management should be about practical steps to protect people from real harm and suffering - not bureaucratic back covering.'

It has drawn up a summary of sensible risk principles:-

1. Sensible risk management **is** about:

- Ensuring that workers and the public are properly protected
- Providing overall benefit to society by balancing benefits and risks, with a focus on reducing real risks – both those which arise more often and those with serious consequences
- Enabling innovation and learning not stifling them
- Ensuring that those who create risks manage them responsibly and understand that failure to manage real risks responsibly is likely to lead to robust action
- Enabling individuals to understand that as well as the right to protection, they also have to exercise responsibility

2. Sensible risk management **is not** about:

- Creating a totally risk free society
- Generating useless paperwork mountains
- Scaring people by exaggerating or publicising trivial risks
- Stopping important recreational and learning activities for individuals where the risks are managed
- Reducing protection of people from risks that cause real harm and suffering

Here the HSE makes a distinction between trivial and real risks. But consider how culturally what constitutes a real risk as opposed to a trivial risk is being redefined. How would the HSE regard Which?'s characterisation of the nation's eating habits? Would it consider eating junk food a real risk or a trivial risk? The HSE's sensible risk principles do not address the revised concept of responsibility, which is increasingly reluctant to allow citizens to accept risks (and their consequences) from junk food to smoking. Instead responsibility is being interpreted by government agencies and NGOs as personal responsibility to embrace a more risk aware/averse consciousness.

Further a major problem is that what constitutes a trivial or real risk is not something individuals or organisations simply determine in advance, but is becoming something that is determined after the event by insurers, the HSE, the police or the courts, as John Adams has analysed. Adams observes that an accident makes the risk appear real enough retrospectively for formal investigations for negligence to be carried out. Individuals and organisations have become risk averse, because even if those investigations conclude that there is no criminal or civil case, they are likely to be expensive financially and organisationally, and risk loss of reputation.

The next section considers the transformation of foreseeable harm into risk in recent tort cases.

Risk-based tort

Since risk is pathologised culturally, cultural norms are emerging which associates any risks that materialise however unlikely as creating culpability; these cultural norms are in turn influencing determination of tort cases. My analysis here closely follows the pithy analysis of the changing character of tort by the barrister Jon Holbrook (Holbrooke, 2007). The House of Lords' *Donoghue v Stevenson*, involving a snail in a ginger beer bottle, set out the standard of care in negligence: 'You must take reasonable care to avoid acts of omissions which you can reasonably foresee would be likely to injure your neighbour' (ibid.). Reasonable care was not intended to be a counsel of perfection: the standard of care 'should not be 'pitched too high'. And fault was not to be 'treated so as to give a right to every person injured by them to demand relief'. Legal liability arose from 'a general public sentiment of moral wrongdoing for which the offender must pay' (ibid.).

The HSE's idea of sensible risk prevention seems analogous to the tort standard of reasonable care. However some recent tort cases have been ignoring the earlier restrictions and applying a counsel of perfection towards improbable negligible risks rather than the *Donoghue* standard of reasonable care towards likely dangers. Holbrooke highlights how in *Spowart v Nottinghamshire* a local authority was held culpable for negligence when a child broke her arm falling off a slide, although the playground equipment was sound and there were sufficient playground supervisors. A supervisor had told children not to jostle each other on the slide but had turned away momentarily to respond to another child when the accident happened. But legally the court ruled that the incident was not an accident and that the supervisor had committed a tortious wrong. But would members of the public view her actions as morally wrong even under today's cultural norms? Was she neglectful in responding to another child in the playground? Should she only have been concerned with the children on the slide? It is only in retrospect that we know that she could have averted an accident on the slide and that the short attention she paid to another child was not required to avert an alternative accident. One could easily imagine the scenario reversed under the competing demands of a lively playground. As Holbrooke pointedly observes, we have moved from a fault-based system to a risk-based system, rendering the term 'tort' as wrongdoing meaningless. Instead tort is coming to mean risk and vulnerability.

If a tortious claim can be found for improbable risks rather than evident wrongdoing, it is unsurprising that organisations are risk averse and curtail certain activities. The cases are not just precedents for future court cases; they are also instructive for those cases that are settled before court, and instructive for any risk management strategy seeking to avoid potential tort claims. HSE myth-busting or sensible risk management does not necessarily stand up in court. Other government initiatives to counter fear of litigation and

a risk averse climate also tend to misunderstand the problem as one of information management.

Consider the Better Regulation Commission's *Better Routes to Redress* report (2004). The report states 'Excessive risk aversion is not helpful to the UK's prosperity nor well-being' (Better Regulation Commission, 2004, p. 18). It acknowledges how, 'Local communities and local authorities unnecessarily cancel event and ban activities which until recently would have been considered routine. Businesses may be in danger of becoming less innovative' (Better Regulation Commission, 2004, p. 3). The report sees the problem of risk aversion as caused by mistaken perception more than reality, 'The compensation culture is a myth; but the cost of this belief is very real (Better Regulation Commission, 2004, p. *). Its report wants the term 'compensation culture' to be avoided. The report highlights how tort costs are relatively low in the UK compared to the United States and other countries in Europe (Better Regulation Commission, p. 6*). It acknowledges the additional costs of out of court settlements but suggests a lower impact than a previous study *Courting Mistrust* (2000*).

The report sets out a need to 'publicise the law to make it clear that compensation will only be awarded where an injury is caused through someone else's fault' (Better Regulation Commission*, p. 4). The report restates the elements of negligence, namely proximity, reasonable foreseeability and fault, and argues that proving all these elements is difficult (Better Regulation Commission, p. 14). But note how even here it blurs the distinct between fault and negligent fault – not all faults have been considered either legal or moral wrongdoing. People can make mistakes that cause accidents that are not *negligent* mistakes, at least previously under law. Even its subtle re-interpretation of fault expands the traditional meaning of tort culpability.

The report cites cases like *Tomlinson v Congleton* limiting liability for tort or *Simonds v Isle of Wight* where a council was held not liable for a child falling off a swing in a council playground. The report hoped that these 2004 cases and others would alleviate the problem of risk aversion, but the above 2006 case, notwithstanding that it is a lower court ruling, illustrates that the problem remains a legal reality, not one of mere public perception. The report proposes policies 'to education those litigated against that the best way to avoid litigation is to be aware of the risks and to have taken cost effective measures to manage them' (Better Regulation Commission, 2004, p. 17). The follow-up government report *Tackling the "Compensation Culture"* endorses the *Better Routes to Redress* report, but again emphasises the problems of perception rather than reality, setting out a need to 'publicise the law to make it clear that compensation will only be awarded where an injury is caused through someone else's fault' (*Tackling the "Compensation Culture"*, 2004, p. 4). But its approach is not very helpful when government and non-government approaches are expanding the risks institutions and individuals have to take into account, and court decisions may equate tort with risk rather than moral wrongdoing.

The recent Compensation Act 2006 asks courts to consider the 'Deterrent effect of potential liability' and the standard of care applied would inhibit desirable activities:

A court considering a claim in negligence ...may in determining whether the defendant should have taken particular steps to meet a standard of care (whether by taking precautions against a risk or otherwise), have regard to whether a requirement to take those steps might –

- (a) prevent a desirable activity from being undertaken at all, to a particular extent or in a particular way, or
- (b) discourage persons from undertaking functions in connection with a desirable activity

Observe how the notes refer to taking precautions against a risk rather than harm or risk 'reasonably foreseeable'. The restatement of the law de-emphasises 'reasonably foreseeable', implicitly lowering an element of tort, as does blurring the distinction between fault and legal fault elsewhere. Indicatively this clause, Holbrooke observes, was more directed at public perception than actually reversing the current position (Holbrooke, 2007), as is evident from the act's explanatory notes:

- 7. to address what was suggested by the Better Regulation Task Force (BRTF) report of May 2004 (*Better Routes to Redress*) to be a common misperception, that can lead to a disproportionate fear of litigation and consequent risk-averse behaviour.'
- 10. This provision is intended to contribute to improving awareness of this aspect of the law; providing reassurance to the people and organisations who are concerned about possible litigation; and to ensuring that normal activities are not prevented because of the fear of litigation and excessively risk-averse behaviour (from Compensation Act 2006, Explanatory Notes, Part 1).

The HSE, the former Prime Minister Tony Blair, children's organisations all deplore the perverse outcomes of 'health and safety gone mad', court decisions, but governmental and non-governmental policies continue to foster a risk-averse consciousness, while blaming risk aversion on persisting myths.

Consumer protection policies and citizens' eating habits may appear distant from security problems. However risk governance in these areas is changing citizens' responses to risk with implications for combating terrorism. Cautious interpretation of health and safety legislation, the insurance burden, and the embedding of the precautionary principle in formal and informal regulation have impacted on civil society activities and individual citizens' actions. The overall impact of legal, institutional and cultural norms of precaution is discouraging citizens' self-determination, initiative and risk-taking. Citizens are effectively encouraged to wait for official authorisation before acting or for action by authorised professionals. I will discuss this further below. Before that I want to indicate how the changing view of the citizen from a contract to a tort model is subtly changing the concept of rights championed by rights

defenders and how they too are promoting risk consciousness and the idea of the need for greater regulation of risk.

Rise of victims' justice

The expansion of tort and its changed view of the citizen in civil law have been paralleled by the rise of the victim's justice model in criminal law. This rise has been accompanied by a rise of victims' organisations paralleling the rise of consumer protection organisations. Consider the history of Victim Support as the main national victims' organisation whose stated mission is 'Helping people cope with crime' and whose remit includes working 'to promote and advance the rights of victims and witnesses' and to raise awareness of the effects of crime'. The first Victim Support scheme was set up by NACRO in 1974 in Bristol and expanded nationally, registering in 1979 as the National Association of Victim Support Schemes as a charity supported inter alia by the Home Office Voluntary Services Unit.

From the late 1970s there was an incremental expansion of victim protection policies paralleling the expansion of consumer protection policies. Just to highlight some milestones: in the 1984, the government published A New Deal for Victims and from 1987 Victims' Support began to receive its core funding from the Home office. From the 1990s initiatives multiplied. In 1996 the government published a Victims' Charter, which was reviewed in 2001 and followed up by the creation of a Victims' Advisory Panel and more recently with current legislation for a Commissioner for victims and witnesses. It may be noted that the definition of a victim in the Domestic Violence, Crime and Victims Bill states 'It is immaterial ...no complaint has been made about the offence', that is you can effectively be a victim even if you do not necessarily regard yourself as one.

We may also note the growing number of organisations or campaigns organised around victimhood, often set up by a grieving parent and sometimes named after the victim. Victim organisations began to appear from the mid-1980s, for example the Susie Lamplugh Trust (1986), or the Snowdrop Campaign (1996). Their campaigns are usually focused on raising awareness, risk management, victim support and lobbying for changes in official policy. The Suzy Lamplugh Trust whose motto is 'Live Life Safe' seeks 'to raise awareness of the importance of personal safety' and 'to highlight the risk people face and to offer advice, action and support to minimise those risks'. The phenomenon illustrates the importance of victimhood as an organisational principle in contemporary culture. Individuals may quickly come to prominence and gain a public advisory role as victims, for example, Stephen Lawrence's mother on ethnic minority concerns, Leah Betts' father on drug abuse, and Sara Payne's mother on child protection laws or Madeleine McCain's father on missing children.

Victim demands for changes to the law often appear to parallel official policy concerns and their lobbying has helped legitimise official policy proposals. Changes to the criminal justice system over the last decade have been taking greater account of the victim's position. UK legal reforms on these lines have

been echoed by European Union legislative developments too. Consider Victim Support's list of achievements which includes lobbying on overturning the law on double jeopardy and the unrepresented defendant's right to cross-examine a rape victim, and the creation of the Victim's Charter, a Victims' Advisory Panel and a Commissioner for victims and witnesses, and introduction of the victim's personal statement to be taken into account in criminal proceedings. The victims' justice model is informed by and reinforcing the idea of the individual citizens as an emotional fragile, vulnerable victim at risk and in need of protection. The next section considers its implications for rights advocacy.

From civil rights freedoms to human rights protection

If freedoms are being eroded everyday life in the name of citizens' welfare, then it is hardly surprising that terrorist suspects' rights are being eroded. The erosion of rights to tackle anti-social behaviour or terrorism, extension of detention, ID cards, have been vigorously criticised by organisations like the long-standing Liberty, formally known as the National Council for Civil Liberties, set up in 1934. Liberty has been a prominent critic.

Human rights critiques of official security strategies classically analyse these illiberal security measures as forging an authoritarian state. But the expansion of illiberal laws eroding defendants' rights was already taking place prior to the war on terror, not evoking state interests, but the interests of vulnerable victims. Consider how the civil rights of defendants have been eroded along with the idea of defendants' rights as the rights of the citizens against the state has been eroded under the concept of victims' justice. The eradication of the unrepresented defendant's right to cross-examine a rape victim both undermines their rights to cross-examine and also logically the presumption of innocence – formally under the law there is only an alleged rape victim. Demands of victims' justice are seeking to loosen rules of evidence, including on hearsay evidence, and shifting the burden of proof from beyond reasonable doubt to balance of probabilities, also blurring civil and criminal law, and seeking to shift.

Moreover the changing character of international human rights activism embracing a victims' justice approach has had direct consequences. Whereas human rights activism was previously focused on supporting political activists, political prisoners of conscience and defendants' rights along with political rights, international human rights shifted from defendants' rights to victims' rights and demands for prosecution. Human rights lawyers have directly been involved in eroding defendants' rights like rules of evidence in the evolving international criminal justice system again in the name of human rights victims, but helping legitimise the illiberal security measures in the war on terror they now deplore.

The concept of rights championed by rights advocates has been influenced by more pessimistic view of the rational capacity of citizens. Consider Liberty's mission slogan is 'Protecting Civil Liberties Promoting Human Rights'. The terms of civil liberties and human rights have historically often been used

interchangeably. But as Liberty's slogan indicates the meaning of civil rights and human rights are not synonymous. Moreover they are not necessarily compatible. The contemporary interpretation of human rights is essentially opposed to civil rights in theory and practice.

I have already indicated how this opposition arises in the criminal justice system through the concept of victims' justice. The concept of civil rights parallels the contract model of the citizen as a rational citizen with the capacity to determine his or her rights. Conversely the concept of human rights parallels the tort model of individuals as vulnerable creatures lacking capacity and requiring external protection. Historically rights have been recognised on the basis of capacity to enforce those rights through the force of political movements: the working class, women and blacks achieved rights recognition incrementally following the working class movements, the suffragettes and the civil rights movement. The traditional understanding of civil rights has been criticised as not recognising the rights of those who lack capacity, the very groups who need greater legal protection. The contemporary model of human rights has sought to fill the lacuna in civil rights and recognise rights protection for the vulnerable.

A core demand of human rights advocates in the UK over the last two decades has been for a written constitution or a charter of fundamental rights to protect citizens' human rights. All parliamentary legislation would have to comply with a written constitution. Human rights advocates have also sought European or international human rights documents to be incorporated into UK law to protect citizens. Yet examining the arguments put forward by human rights advocates, they express anxiety about democratic politics and the freedom and capacity of the electorate. Consequently human rights champions today end up seeking the external legal regulation of democracy and citizens' political choices. Just as consumer protection is becoming more about protecting consumers from their consumption choices, so the demand for human rights becomes the judicial protection of citizens from their potential political choices.

Importantly the concept of human rights is no longer interpreted to restrict state intervention but is increasingly interpreted by human rights advocates to require state intervention on behalf of groups at risk, or from a concept of human rights which wished to protect people from the state to a concept of human rights which seeks protection by the state. As such the concept of human rights increasingly clashes with the concept of civil rights seeking to limit state power over people.

Thus contemporary human rights advocacy and security strategies may be opposed on specific issues, but their underlying political outlooks are closer than either would recognise. Human rights advocates have been slower to address the newer areas like smoking bans, or newer concepts like hate speech regulation or victims' justice which erode citizens' freedoms in the name of personal well-being, peace of mind, and being risk-free, rather than the traditional authoritarianism. Liberty has recognised the right of free speech over protection from being offended and how a right not to be offended would

curtail free speech, but many other human rights advocates are going down the route of regulation and protection.

So while human rights critiques of security see fear of terrorism bolstering state authority over people, the consequence of contemporary human rights model involving a greater formal regulation of society would extend official governance of people's lives.

Tortuous claims and the end of the military covenant

I now want to discuss the implications of the shift towards a privatised model of welfare for security strategies. Consider first the military covenant where military concerns have directly linked the erosion of the military covenant with the rise of tort. The military discussion articulates the broader public sense that the rise of tort undermines the previous social compact of the postwar welfare state.

The flipside of empowering citizens to look after their own welfare is the perception of the authorities deterring responsibility. If the state is no longer universally responsible for providing welfare, if the ideal of the common good is undermined, if welfare responsibility is privatised, then the collective social contract is eroded and citizens are discouraged from feeling universally responsible for the common good.

The privatised tort model has implications for the military covenant, its topicality touches on broader social anxieties. Its ideal implies comprehensive welfare for those who go beyond ordinary notions of duty and risk lives. Historically there has been a close link between war and welfare policy. The naval divisional system introduced two hundred years ago on British naval ships, which provided food, and better organised lived conditions to sailors, was linked to improving military discipline and command, and provided lessons in the nexus between welfare and social order. Public contention has been raised over the armed forces' entitlement to welfare provision and the need to prove military negligence to gain enhanced benefits. Here we see a clash between contemporary risk averse norms and the inherent risks of military service. The unequal welfare provision arising from growing reliance on tort is perceived as leading to perverse results.

Consider the story reported on the BBC of the civilian secretary with a damaged finger whose tort claim for negligence could reach a six figure sum over the severely paralysed military personnel whose claim amounted to £100,000 (Radio 4 Today Programme, Thursday 16 August – check figures). The currency of the story taps into social perceptions of injustice and low morale among the military services. 'Why should we make sacrifices when our sacrifices are not valued?', the argument goes. There is a sense of tort creating unjust unequal entitlements and some free-riding.

Indicatively the privatised welfare model is accompanied by the increasing contracting out of defence and the rise of private contract security forces. But security cannot completely be contracted out. The private security companies

rely on former military soldiers, their military training and ultimately still therefore recruitment to the military. And there are limits to the contracts entered into by private security companies and the limits of the actions undertaken by its personnel, which are influenced by the broader cultural expectations. Moreover security cannot simply be contracted out where security problems involve domestic threats. The paper now considers further implications of citizens at risk model for domestic security strategies.

Disengaged citizens

The privatised view of welfare/security turns citizens into individualised consumers of security, and encourages a risk aversion culture, which makes safety paramount. The transformation of citizens into consumers of security and security into a safe risk-averse condition has serious implications for security strategies.

First contrast the citizens at risk model with the Clausewitzian model of war and citizens, which dominated twentieth century thinking, whether right or left (consider the Spanish civil war and its international volunteer brigades.) In the Clausewitzian model, citizens are viewed as actively engaged in war, as the citizen-soldier or the citizen-defender. The Clausewitzian model was modified in the UK with the idea of professional armed services. Nevertheless the idea of the citizen-defender is evident in civil society. Consider for example, the Scouts movement with its motto 'Be Prepared' encouraging youth preparation and engagement in defence of king, country and empire. Indicatively those not recognised as having the potential capacity to be full citizen-defenders were also those not recognised as having full citizen rights – Blacks in the empire were not recognised as full citizen-defenders and entitled to undertake all military roles, for example, to be pilots. The Clausewitzian assumption of citizens' engagement clashes with today's model of the citizen as vulnerable consumer who does not expect to be discomforted. The consumer outlook is hardly a strong foundation for calling upon citizens to risk their lives and make material sacrifices in name of collective security. Further under the precautionary principle, citizens are effectively being encouraged to wait for official authorisation before acting or for action by authorised professionals.

Second consider the paramountcy of safety. We now have a climate of risk aversion, which amplifies everyday risk. The official bodies and advocacy organisations constantly invite people to imagine new potential risks in the banal. The good citizen is expected to constantly risk assess their behaviour and relations with others. The good citizen is therefore becoming someone who is in a state of heightened sensitivity towards risk. As such the ubiquitous awareness campaigns represent lessons in anxiety-conditioning. The constant barrage of awareness-raising and inane advice against everyday risk makes the domestic management of terrorism harder. A culture amplifying a sense of vulnerability will tend to amplify the impact of terrorist threats.

Third consider further how the government is concerned about engaging the passions of citizens in war – many efforts are put into not mobilising the population's emotions and containing them in the war on terror. At first glance

its motivation may appear progressive, but it displays a tacit mistrust of the population. This is apparent when we consider rising official regulation of civil society. The Scout movement, for example, has been associated with mobilising patriotic sentiment among youth, but today scout leader volunteers are not trusted, as are any professionals or volunteers who might come into contact with children. The motives of all are under suspicion until cleared by new criminal record checks.

The institutional mistrust of citizens, and citizens' wariness of spontaneous interactions with each other and spontaneous interventions in their ordinary lives, has implications for security strategies and combating terrorism. I now want to consider risk evasion in every day problems.

Risk evasion in tackling anti-social behaviour

Consider the country's interaction with children. Mistrust of citizens' spontaneous interaction with children has been institutionalised. Citizens are increasingly permitted to interact with children only following official approval and vetting. This appears to be inhibiting volunteering with children, already eroded with the decline of civil society activism. Consider the Scouts movement's dearth of volunteers against the demand for places.

Such is the message of 'stranger danger', informal encounters between adults and children are being curtailed. Consider further how mistrust has been internalised by citizens with terrible consequences. Consider the tragic death of a toddler who wandered away from its nursery and drowned in a pond – a passing motorist was too afraid to approach the toddler wandering down the road, because he feared people would think he wanted to abduct the child. Consider the child with broken leg who was not immediately approached and helped – several motorists passed by without stopping.

If citizens are culturally inhibited from helping the harmless child, then it is unsurprising that they are culturally not prepared to confront misbehaving teenagers. Furthermore official advice discourages them from doing so. Consider the scenario of secondary school pupils misbehaving on a primary school site, advice to parents is not to tackle them and leave the problem to teachers. This advice came from a head teacher not overly risk averse, at a primary school that still takes children camping, and dares to dispense with CRB checks as impractical on parent volunteers helping on stalls at PTA events and dares to have candles at those same events.

The philosopher Julian Baggini has observed:

'People nowadays have become more fearful of the consequences if they step in and don't feel they can rely on others to back them up. The instinct still remains in older generations, to them it is just what a decent person would do. That is why they are often so shocked when people don't help in such situations' (quoted in Winterman, 2006).

Compare the situation in post-conflict Bosnia, where cultural norms of collective adult responsibility for children survived the war despite its social disruptions and fears, as I witnessed in Livno just a couple of years after the war. Children from an early age were still allowed to play outside all day, even minority Muslim children in this Croatian majority town. This norm was accepted by my Muslim landlady's then four-year and six year-old children, despite the fact that her elder child had been beaten up during the war by a young Croatian soldier. But while children may play outside without parental supervision, they remain under the informal supervision of the neighbourhood. Accordingly a neighbour was ready to scold my landlady's children about bothering a cat, and inform her so, trustful that her actions would be approved.

Crucially in Bosnia and elsewhere in Eastern Europe dangers to children are still understood culturally as the exception and therefore have not yet translated into the risk averse cultural norms of contemporary Britain. Compare how individuals in the UK feel uncertain whether other citizens or the authorities will back them up. A stranger remonstrating other people's children has become newsworthy in Britain. In this vein, *The Times* columnist Janice Turner informs us how on holiday, 'In Slovenia, a young lifeguard, watching my sons foolishly push each other, took them aside and issued a long, shame-making dressing-down, unimaginable from a stranger here' (Turner, 2007, p. 21). She associates this possibility with being in a low-crime country. But such attitudes persist even among those who have experienced violence. As it happens, a thirteen year-old young Slovenian relation of my husband was mugged for his trainers and mobile phone last year. But while the family was shaken by the incident, it did not fundamentally shake their sense of security in the neighbourhood or change their everyday behaviour.

If citizens are inhibited from intervening when children are in trouble or misbehaving, they are also reluctant to intervene in the face of adult violence. Consider the broadcaster Jeremy Vine's shame at failing to stop a man beat up another passenger on the tube in front of him (Vine, 2007). Vine's sense of shame in not intervening led him to vow he would act if it happened again, going against much official advice.

Deferring to official intervention risks any intervention being too late. Furthermore official interventions tend to take more coercive forms. Thus if you report complain to a secondary school about pupils' behaviour in the neighbourhood, you may find the complaint has been passed onto the police rather than being dealt with by the school. The decline of informal intervention in communities has legitimised the codification of formal anti-social behaviour offences. The new anti-social behaviour orders have received extensive critical analysis. Critiques highlight their illiberal character, erosion of rules of evidence, rebuttal of the presumption of innocence, use of hearsay, anonymous witnesses etc (See, for example, Liberty on ASBOS). Critical analysis of their illiberal character is persuasive.

Yet more coercive legal interventions like ASBOs paradoxically represent an exercise in risk evasion by official bodies. Critical analysis misses out how

the new anti-social behaviour proceedings are in practice risk averse and deter informal interventions by individual citizens and even officials. Previously more informal remonstrations were made by neighbours, and more informal remonstrations were also made by officials even if they lacked formal powers. The police officers, without necessarily invoking formal powers, would make an informal judgement and take the initiative to intervene, for example, banging on doors of occupants playing loud music and ordering them to turn down music there and then. Today the police do not do this, even when asked by members of the public, although they have greater formal powers and greater protective and offensive equipment.

Instead of informal interventions by individual officials taking the initiative, we now have long drawn out anti-social behaviour procedures. Consider again the case of noisy neighbours. The individual complainant is visited by the local authority anti-social behaviour officers, given a form and asked to note down any occurrences over a number of weeks. If the behaviour complained of persists, the anti-social behaviour unit will write a letter asking them to desist in their behaviour. If the individual complainant wants official action to be taken, officials will set up sound equipment in their home and take sound readings from their home of the neighbours, before bringing formal proceedings. At no point before the formal proceeding has an official simply gone round and remonstrated with the alleged offenders to turn their music down. It seems officials find it is easier to spend time sympathising with the vulnerable complainants. Nor are complainants encouraged to be robust and remonstrate with the offenders themselves. The remit of anti-social behaviour officials is not to nip potential civil wrongs in the bud, but to prepare for legal proceedings, which end up turning civil wrongs into criminal offences. As such however illiberal anti-social behaviour proceedings are, they are at once both illiberal and timid and represent an exercise in risk avoidance. Thus in so many everyday situations, citizens and even officials are encouraged to wait for a third party intervention to deal with a situation.

Strikingly too the many illiberal measures being adopted do not seem to translate into greater institutional authority as suggested in classic political theories. This paradox is embodied in the Home Office. For a government ministry whose remit is supposed to be domestic order, the Home Office appears incoherent and in perpetual crisis. Successive Home Secretaries appear unable to overcome its disarray and the government seeks to break up its current organisation and hive off various remits. Effectively we have authoritarian measures without authority, or a culture of pervasive fear without awe of institutions. The security strategies seem to be born more out of disorientation than an authoritarian project.

Vulnerable citizen at risk and responding to terrorism

The accumulative socio-legal changes have shifted from a model of the citizen as active risk-taker to the vulnerable consumer at risk and a model of risk from venture to safety. These socio-legal developments have serious implications for anti-terrorism strategies. Even a theoretical risk in a risk-averse culture may disrupt society. If citizens are culturally inhibited from

intervening in ordinary situations and encouraged to wait for official action, then they are also culturally discouraged from taking the initiative when confronted with extraordinary situations. Strikingly nobody acted upon any suspicious behaviour and confronted the London bombers before they detonated their explosives in July 2005.

Nevertheless the recent terrorist attacks and other disaster situations, show how people's responses belie the pessimistic professional models of their behaviour. Overall people acted calmly and capably, spontaneously helping each other in the London attack. The initial media coverage also acknowledged how people were acting responsibly. Yet subsequent coverage was apparently uninterested in stories of citizens' courage or support of fellow passengers. Instead coverage was attracted to stories of traumatised victims and the message of victimhood dominated over stories of heroism. Media attributions of 'hero' and 'London bombings' are far and few between.

The model of the citizen as the passive vulnerable consumer is not set in stone and is only a cultural tendency. Vine did act upon his experience of shame in a subsequent milder incident. The journalist chastised a bus passenger being obstructive to the driver, giving other passengers the courage to remonstrate against the passenger and pressuring him to exit. (Vine, 2007). Thus people may overcome their inhibitions, take the initiative to intervene, show solidarity and successfully challenge those being a nuisance or harming others. Is Vine's example of social responsibility and solidarity influencing other journalists? Interestingly Janice Turner endorses the stance as key to tackling street violence:

The only solution I see to heal this at source is a modest increase in our personal bravery, to intervene, to look up from the pavement and speak out – and to back up others who do (Turner, 2007, p. 21).

She adds, 'Previous generations have done far more dangerous deeds than telling sulking youths not to kick over bins' (ibid.). Individuals may ignore contemporary norms and become exemplars of alternative responses. Consider the tube passenger Angus Campbell who confronted one of the bomb plotters of 21 July 2005. His courage was recognised (for example, Edward, 2007), although coverage of his actions was fairly muted.

The cultural responses to the attempted Glasgow airport attack in July 2007 did depart from vulnerability models, helped no doubt by the fact that deaths were averted, but not solely. There was more readiness to acknowledge a hero who was found in John Smeaton, a baggage handler at Glasgow airport, who attacked one of the attempted bombers. Smeaton has become widely celebrated as the 'Glasgow airport terrorist hero' across the media and internet. The cultural responses displayed in Smeaton's comments, or attributed comments and jokes, show robustness and humour affirming the strength of ordinary people and solidarity. Observe how popular comments and jokes assert a city identity along with its citizens' capacity for tough

autonomous action independent of the authorities. Here is a flavour of the responses:

'This is Glasgow, we'll just set on you'

'All other members of the public would do the same as me.'

'Only in Glasgow do suicide bombers need rescuing from the locals by the police.'

'Only in Glasgow do terrorists need protection from the general public.'

'Glasgow has no respect for international terrorism.'

'Glasgow really isn't a good place to do terrorism.'

Other jokes have been doing the rounds, ridiculing the terrorists' threat: 'They were doctors, for God sake, why didn't they just go around shaking hands with people. They would have killed more' or simply 'Our Harold Shipman could kill more.' Culturally-knowing jokes contribute to a sense of belonging to a robust community. Smeaton was reported to have taken time off work 'for stress', but his action was understood as a pragmatic reaction rather than any sign of weakness - jokes about his extraordinary powers persisted.

Tortuous conclusions

The tort model of the citizen appears to offer more protections to citizens, but its inflation ultimately leads citizens to be more vulnerable, even as it undermines social solidarity and freedoms. The rise of tort over contract is not a progressive legal development and is leading to more illiberal laws, even as the contemporary socio-legal norms will struggle to contain the terrorist threat. The popular Glasgow responses show how ordinary people have more capacity than official policies normally give them credit. Assertion of independence and solidarity is a prerequisite for a more democratic, just and secure society. Contemporary risk governance, whether by officials or rights advocates, whether in the name of protecting victims or national security, contributes to more insecurity, more injustice and a more undemocratic society.

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