

RISK – DANGER OR DEVELOPMENT?

BY STEVE MARK, LEGAL SERVICES COMMISSIONER

WHAT IS RISK ?

The Macquarie Dictionary defines risk as:

- 1 *exposure to the chance of injury or loss; a hazard or dangerous chance; to run risks.*
- 2 *Insurance:*
 - 2.1 *The hazard or chance of loss;*
 - 2.2 *The degree of probability of loss;*
 - 2.3 *The amount which the insurance company may lose;*
 - 2.4 *A person or thing with reference to the risk involved in insuring him or it;*
 - 2.5 *The type of loss as in life, fire, death, etc. against which the insurance policies are drawn.*
- 3 *No RISK! (an exclamation of reassurance or approval).*
- 4 *To expose to the chance of injury or loss, or hazard; to risk one's life to save another.*
- 5 *To venture upon; take or run the risk of; to risk a fall in climbing, to risk a battle.*

All pretty negative stuff. Let's see what other definitions we can find.

In his best seller '*Against the Gods - the Remarkable Story of Risk (1998)*', **Peter L. Bernstein** says this about risk in his introduction:

"The revolutionary idea that defines the boundary between modern times and the past is the mastery of risk; the notion that the future is more than a whim of the Gods and that men and women are not passive before nature. Until human beings discovered a way across that boundary, the future was a mirror of the past or the murky domain of oracles and soothsayers who held a monopoly over knowledge of anticipated events."

Burton's Legal Thesaurus associates the following words with the term RISK:

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“Bet, Chance, Danger, Endangerment, Exposure, Exposure to Harm, Gamble, Gaming, Hazard, Imperilment, Insecurity, Instability, Jeopardy, Peril, Plunge, Possibility, Possibility of Injury, Possibility of Loss, Precariousness, Speculation, Stake, Uncertainty, Venture, Vulnerability, Wager.”

Derek Viner in his book ‘*Accident Analysis and Risk Control (1991)*’ quotes **Rowe’s** definition of risk as:

“The potential for the realisation of the unwanted common negative consequences of an event.”

This definition occurring in the context of Risk Control in an occupational health and safety context.

In another of his publications, “*Identify & Control Risk*” **Viner** uses the following illustration to discuss how we humans can contextualise risk.

“Mosquitoes & Crocodiles

We suffer irritation from a number of creepy crawly’s, but I dislike mosquitoes the most. I get bitten a lot, much more than my friends do. Mosquitoes can carry diseases such as encephalitis (a brain disease) and malaria. It is possible for me to get a very serious illness from mosquito bites but it is very unlikely. At least, where I live in the colder part of the country it is.

Now, crocodiles are something else! I don’t ever recall having been bitten by one, but I feel sure that if it did ever happen my chances of surviving would be very small indeed. I could do the heroic thing and gouge its eyes out as it carried me towards the river (that is what monkeys and baboons try to do in Africa) and hope it would drop me. If it did, I would be shaken and bitten but alive. Otherwise I would be drowned for sure.

The risk of crocodile attack is zero where I live because there aren’t any that live here. If I did expose myself to crocodile territory, however, the probability of being taken would depend on what I did to protect myself. I could avoid camping near water and avoid dangling my toes out of the boat when I was on a river.

The risk associated with crocodiles can be described as:

‘A very low probability of being bitten at all, with a slightly lower probability of dying.’

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The risk associated with mosquitoes, on the other hand, can be described as:

‘A very high probability of being bitten with a very low probability of getting sick from it, and an even lower probability of dying from it.’

These statements describe the risk of injury.

‘RISK IS A TERM WHICH REFERS TO BOTH THE PROBABILITY AND THE SERIOUSNESS OF THE CONSEQUENCE OF THE EVENT BEING CONSIDERED.’

Bernstein says:

“The word ‘RISK’ derives from the early Italian risicare, which means ‘to dare’.

In this sense, risk is a CHOICE rather than a FATE. The actions we dare to take, which depend on how free we are to make choices, are what the story of risk is all about. And that story helps define what it means to be a human being.”

Now all of this might appear to be extremely pedestrian to those who are involved in the risk management industry or indeed for lawyers whose very working life is immersed in the concept of risk, however, it has been useful for me to start with the very basic concepts addressed above in order to provide a platform for my belief that society is becoming risk adverse through our failure to embrace the positive aspects of choice.

I’m afraid I will also need to have a short look at the history of risk.

THE HISTORY OF RISK

It is universally accepted that gambling, the very essence of risk taking, is the genesis of the modern concept of risk. But until **Pascall** and **Format** in answering a question (in 1658) on how to divide the stakes of an unfinished game of chance between two players when one of them is ahead, stumbled on the mathematical theory of probability, gambling was a pastime devoid of any system of odds that determined winning and losing.

At about the same time that **Pascall** and **Format** were dabbling with the theory of probability, the first attempts to generalise demographic data for

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mortality records kept by local churches in England and Holland were forging the beginnings of the Life Insurance Industry on a sound actuarial basis.

During the 18th Century, the concept of *utility* or *value* in relation to risk emerged. This means that both the objective facts and the subjective view of the result of any decision must be taken into account.

Since then, there have been many refinements of the mathematics of probability and decision-making theory which have been extremely useful in setting business goals, ensuring the viability of the insurance industry and assisting the millions who gamble on the Stock Market. But it has only been in this century that there has been any serious study of the psychology of risk, which, to my knowledge has been primarily based on an attempt to refine decision-making to ensure profit, particularly from investment in shares.

What this all seems to slightly miss is that, at least with the wisdom of 20th Century hindsight, risk and all its attendant theories seem to be nothing more than common sense, uncommon though that may be. If we could accurately predict all outcomes, would we all be winners? Would we do anything at all?

Bernstein says:

“If everyone valued every risk in precisely the same way, many risky opportunities would be passed up.

Venturesome people place:

- *High utility on the small probability of huge gains; and*
- *Low utility on the larger probability of loss.*

Others place:

- *Little utility on the probability of gain, because their paramount goal is to preserve their capital.*

Where one sees sunshine, the other sees a thunderstorm. Without the venturesome, the world would turn a lot more slowly. Think of what life would be like if everyone were phobic about lightning, flying in aeroplanes, or investing in start-up companies. We are indeed fortunate that human beings differ in their appetite for risk.”

Over perhaps the last 30 years, the concept of risk management has evolved in leaps and bounds. Unfortunately, however, it has in my view not

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exclusively been the tool of avoiding catastrophic mistakes, unwise investments or unsafe work practices, but has acted to suppress the positive aspects of risk taking which are the basis of Growth, Evolution, and Achievement.

CONTROL VERSUS FREEDOM

In addressing this subject for the purpose of writing this paper, I have been uncomfortable with the way risk is generally discussed and approached, and have the nagging belief that our society has become very risk adverse with potentially dire social consequences.

In the limited time I have available today, I will be unable to explore this in any but a fleeting and superficial manner, but I hope to conceptualise risk somewhat differently from some of what I have quoted above and attempt, as an undying optimist, to find some positives in what generally appears to be a negatively treated concept.

In this regard, I am more comfortable with the way **Bernstein** and **Viner** seem to allow for humanity (emotion, psychology and chaos) to have a role in conceptualising risk and its effects, than with those who view it only in terms of mathematical probability.

Much of what is written about risk management involves the concept of control. If there were no controls over the operation of the Stock Market, those with the greatest economic leverage could reap huge profits at the expense of smaller investors. If we could not control the speed of motor vehicles travelling on our suburban streets, there would very likely be an increase in motor accidents. If I have far too much to drink, and get 'out of control', the assumption is that I could put myself and others at risk of injury - physical or emotional.

On the other hand, one can look at risk in terms of freedom. Freedom to make choices. To me, risk is all about making choices, and making those choices with the most appropriate amount of information. Making choices must be the greatest freedom a human being has, but it can also lead to the greatest calamities. The freedom to choose (dare I refer to free will?) seems to me to be the basis for all development. The fact that I choose the way that I wish to live my life also, of course, attracts personal responsibility and accountability, and that accountability is to an array of individuals and agencies, but fundamentally to me.

These two perceptions of risk appear to some extent to create a dichotomy which could be perceived as negative versus positive or pessimist versus optimist.

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But why do I think society is becoming risk adverse?

- Perhaps the answer lies in the fact that society has simply become too complex for us simple humans to cope with.
- Perhaps people also need a bit of control and order in a chaotic and turbulent environment.
- Perhaps our fear of accountability has grown in direct proportion to the increased popularity that word has in management theory, particularly that which flows from the concept of economic rationalism or some of the more negative aspects of competition policy.
- Perhaps we are becoming risk adverse because of the plethora of laws that we now must comply with: *Anti-discrimination, Occupational Health & Safety, Affirmative Action, Privacy, Solicitor & Barristers Rules,* the list is almost endless. And the community continues to get mixed messages about risk.

Take gambling for example. We now have casinos sprouting like mushrooms across Australia and many Australians continue to embrace the cultural icon of us being prepared to bet on two cockroaches running up the wall.

At the same time, we have put in place legislation which requires casinos to exclude 'problem gamblers'. It will be interesting to see where society (or more appropriately Government), places the boundaries on the definition of 'problem'.

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RISK AND CAPITALISM

And how is capitalism fairing? The economic loadstone for risk-taking. We see news items almost daily in the media about huge profits the Banks and other institutions are making. At the same time we receive mixed reports about the so called 'Asian crisis' or 'meltdown' where it is proffered as a reason for every failing of Governmental economic initiative while at the same time we are told how well we are surviving in the face of such a calamity.

Bob Mills in a recent article in the Financial Review Magazine (November 1998) puts the view that our:

"Capitalist Society' has not gotten any better in recent years in calculating or limiting risks, but 'has simply transferred many of them to society in general and employees in particular. The process has resulted in a sharp reallocation of potential risks and rewards in favour of capital.'

Mills makes the point that over the last 15 years a fashion has developed to challenge the concept that the entrepreneur takes investment risks and that the willingness to take those risks is the justification, social as well as economic, for profit. He quotes **Mifflin** from '*Risk, Uncertainty and Profit (1921)*':

'Profit arises out of the inherent, absolute unpredictability of things, out of the sheer brute fact that the results of human activity cannot be anticipated.'

Yet, **Mills** notes that Banks will not give financial support to businesses who do not yield 20% or more profit, that CEO's believe they must produce that level of profit very soon after appointment or face the sack - that BHP has a minimum acceptable rate of return on its investment of 15% for every year. This all suggests that Banks and big Institutions are shifting the '*risk*' to those seeking investment or loans. Lawyers have for the past few years experienced the requirement that mortgagees place on mortgagors whereby the mortgagor must get a lawyer to sign disclosure documents to attest to the fact that the mortgagor knows what they are doing and what the ramifications are for obtaining funds from the mortgagee. This is just another form of shifting the risk.

Mills points out that the casualisation of our workforce has resulted in flexibility for employers in that they can easily add or shed workers to meet the fluctuating demands of the marketplace. This may give flexibility to the employer, but in a sense shifts the risk to the employee who has no opportunity to participate in the profits the employer makes. Hence it appears

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that the very nature of capitalism is becoming risk adverse which may result in a rethinking of our understanding of capitalism itself. As **Mills** says:

“The danger for capitalism in pushing more risks onto employees and the broader society is that the process may destroy the unspoken mandate through which society permits business to seek profits through risk taking with relatively little regulation or hindrance. People may decide that for them, the pain is out of all proportion to the pay.”

“The Latin legal maxim, ‘ubi periculum, ibi et lucrum collocatur’ or ‘he who risks a thing, should receive the profits arising from it’, seems to have an application here.

Ross Gittins in a recent article in the Sydney Morning Herald (Friday, 18 November 1998) in exploring the role the Media plays in manipulating the public mind makes the obvious point that the economy is affected not only by the concrete, but by the psychological. While **John Maynor Keynes** refers to human beings as having ‘*animal spirit*’, **Gittins** states modern economists use the less colourful term ‘*confidence*’.

Gittins says that:

“if consumers are confident about the future they will spend and enter into long term commitments to buy major items, but if they lack confidence they tend not to spend.”

He goes on to say that it is the same with people running businesses.

“Where they are confident in the future, they expand their activities, investing in new equipment and taking on more staff. But if things are turning bad, they hold steady or pull back.”

Gittins raises the perhaps obvious connection between psychology and human risk behaviour. This brings us back to my earlier statement that the perceptions of risk as being based on control versus freedom, or pessimists against optimists, is a major predictor in determining risk behaviour.

Also, as mentioned earlier, in economic terms our ‘Capitalist’ society appears to be becoming risk adverse, at least in that our major institutions seem to either be diverting their risks to others or seeking the ‘security’ of perhaps unrealistic profit projections.

What then can we say about the operation of law in what I have deemed to be a risk adverse society?

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RISK AND LAW

In comments made to a recent Australian Plaintiff Lawyers Association Conference, **Justice Michael Kirby** of the High Court stated that:

“Insurance and ‘its relevance’ to the developing law of torts is increasingly ‘brought out into the open’ in Court.”

Although **Justice Kirby** stated that historically conventional legal theory considered insurance *‘irrelevant and therefore not to be mentioned’* he believed that the High Court was increasingly *‘facing up to the reality of the insurance setting in which the Law of Torts is now developed.’*

Justice Kirby then went on to make the following comments:

“No person in public life or Parliament or the Executive Government would dream of making a decision with large economic ramifications without (first) having the best economic data.”

“We all know that in the cases that are test cases, or (those) which unwillingly become test cases the economic and the social implications are very substantial.” (Source: ‘The Risk Report, Issue No. 51, 5 November 1998).

So if the High Court is now willing to explore the relationship between insurance (one of the fundamental landscapes for risk analysis and management) and the Law of Torts (civil wrongs such as negligence), what of the development of risk theory for law and order policies?

LAW AND ORDER

John Ralston Saul in his book *‘Voltaire’s Bastards’* (published in 1992) made the observation:

“... the American right has been in power for 20 of the last 24 years. One of its central themes is Law and Order. The argument is that the American left - the liberals, whatever that word means - is incapable of maintaining Law and Order. And yet for 20 years the level of armed robbery, violent crime and murder have continued annually to grow to record highs - records both for the United States and in comparison to other Western Countries. Still, the American Right persists in thinking of itself, and is thought of by its opponents on the left, as the voice of Law & Order.”

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Judging by the Law & Order lotteries endemic to Australian State Election campaigns, it is apparent that those comments could equally well apply here.

At a recent conference (26 October 1998) on 'Crime Prevention through Social Support' hosted by the NSW Legislative Council Standing Committee on Law and Justice, and the International Commission of Jurists (Australian Section) I was asked to provide the opening comments on behalf of the International Commission of Jurists.

I attempted to make the point that, while it is entirely understandable that the community is concerned about crime, it is illogical and counter-productive for successive Governments to 'get tough' on crime by increasing penalties and enacting legislation which either unduly or unnecessarily suppress Civil Liberties or Human Rights, or which are otherwise contrary to the Rule of Law.

Legislation:

- commonly known as the '3 strikes and you are in' laws;
- promoting grid sentencing;
- empowering the Police to take children off the streets and deliver them to safe places - against their will;
- allowing Police to both stop and search young people - on the assumption that they might be carrying a knife;

are only some of the pieces of recent legislation that have been enacted or proposed in NSW. The problem, however, is not in the fact that we are enacting or proposing such legislation as a reaction to the community's fear of crime, it is that the Government is leading the public to believe that such legislation will have the effect of reducing crime. There is no evidence in support of that contention.

The point here is that Law which **Saul** states has been intended to protect the individual from the unreasonable action of others, especially those in power (the State), is now being used for the opposite effect.

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The prime reason for holding a conference on Crime Prevention and focusing on positive outcomes which have been achieved through social support rather than through reliance on oppressive or suppressive legislation was to attempt to re-focus the community's attention on positive solutions to crime prevention which are actually occurring in the community, rather than to succumb to the media presentation of a perennial crime wave which can only be addressed through harsher penalties and oppressive legislation.

The psychological 'sea change' that is needed for the community to be able to take some 'risks' around, for example, introducing drug testing and treatment programs designed to get heroin users into treatment or kick the habit rather than simply increasing penalties or the rate of their incarceration is, in my opinion, imperative. In other words, society needs to take responsibility for the problem - rather than allowing Government to get away with the charade of *GET TOUGH* law and order campaigns.

ENTROPY AND CHAOS

Making choices can be a risky business. Yet we are required to make choices with increasing frequency in an ever-increasingly complex world. How are we to make the 'right' choices?

An exploration of the philosophy and psychology of decision-making is outside the scope of this paper, however, as the issue of optimism versus pessimism is central to the theme of the paper, it is important to mention a few concepts.

300 years ago **Isaac Newton** gave us the concept of the clock-work universe where everything has its place, predictability, at least in physics and mathematics, flowed from the immutable laws he developed.

Margaret Wheatley in '*Leadership and the New Science - Learning about Organisations from an Orderly Universe (1994)*' says

"3 centuries ago, when the world was seen as an exquisite machine set in motion by God - a closed system with a watch-maker father who then left the shop - the concept of entropy entered our collective consciousnesses. Machines wear down; they eventually stop."

In **Yeats's** phrase: '*things fall apart; the centre cannot hold, mere anarchy is loosed upon the world*'.

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We humans seem to have a need for certainty. Perhaps to reduce or eliminate risk. But where is this certainty? And if we were to find it, would Life not become meaningless and grey? I am intrigued by the number of organisations that I have worked with both while I was the President of the Anti-Discrimination Board and now as the Legal Services Commissioner which have told me that their main objective as corporate organisms is to achieve certainty, eliminate conflict, achieve 'smooth sailing - find equilibrium'.

Of course, one view of the meanings of equilibrium is consistent with the definition of entropy as found in **Newton's** Second Law of Thermo-Dynamics. This is basically the inexorable tendency of all systems to seek equilibrium in terms of energy. In other words, any system holding energy will attempt to dissipate that energy (as in leaving a cup of hot tea for too long without drinking it). As **Wheatley** says: "*Life goes on, but it's all downhill.*".

This sense of inevitable decay does not have to be true of living systems. This is because living systems tend to be partners with their surrounding environment and can import energy from that environment and export entropy so as to stay alive, at least for the duration of their lifespan. So, entropy may 'win' in the end for all living systems, but should we hasten or focus that end through an attempt to find and embrace equilibrium thereby reducing risk to the point where we actually attract entropy?

Chaos Theory is probably best known by the concept of: "*The Butterflies' wings which beat in Hawaii causing a hurricane in the Carribean*" has been developing over the last 30 years, confronting the adherants of traditional mathematics and probability theorists.

Chaos Theory, simplistically speaking, suggests that in systems where there are simply too many variables to measure for predicting an outcome (such as in long term predictions of the weather), one must look for underlying patterns in assessing or predicting behaviour.

Planning Expert, **T.J. Cartwright**, says: "*Chaos is order without predictability*". This could also be a definition of a human being.

The point is that living systems (including humans) grow, change and develop through taking risks. People are open learning systems who receive information from their environment, act on that information to 'hopefully' improve behaviour and continue on seeking more information - the classic feedback loop.

Again, from **Margaret Wheatley**:

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“..... here is another critical paradox: the 2 forces that we have always placed in opposition to one another - FREEDOM and ORDER - turn out to be partners in generating viable, well-ordered, autonomous systems

.....

..... self organisation succeeds when the system supports the independent activity of its members by giving them, quite literally, a strong frame of reference. When it does this, the global system achieves even greater levels of autonomy and integrity

..... under certain conditions, when the system is far from equilibrium, creative individuals can have enormous impact. It is not the law of numbers, or favourable averages, that creates change, but the presence of a lone fluctuation that gets amplified by the system. Through the process of auto-catalysis, where a small disturbance is fed back on itself, changing and growing, exponential effects can result.”

In essence then, chaos, dis-equilibrium and, yes, risk, are the basis of life and evolution. Even **Darwin** found this in the development of his theories of evolution where he explored the role that mutation plays in advancing the system. It appears to be true that what is good for the individual - growth, development and learning, must also be good for society and the organisations and structures that support it.

So, what is the role of risk management? This, in part, must be answered along with the question: “Are we becoming risk adverse?”

If the answer to the second question is ‘yes’, then it stands to reason that risk managers must see their role in terms of control and perhaps even see their employment longevity solely based on ensuring that their organisation suffers no adverse consequences from risk. This goes well beyond what might be considered to be the role of a prudent risk manager in terms for example, of Occupational Health & Safety, and accident risk control.

Viner writes (1991): “Risk management has been defined (Head 1978) as:

The process of planning, organising, directing and controlling the resources and activities of organisations in order to minimise the adverse effect of accidental losses on that organisation at the least possible cost.

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Such a definition could usefully be modified to reflect the moral and legal dimensions and become:

The process of managing the activities of an organisation in such a way as to ensure all risks are controlled to the standards required by the law.

It makes perfect sense that an organisation should try to protect itself and its employees from accidental injury through thoughtful design and risk reduction strategies in the work place. It may well also be the case that society determines certain types of occupations are simply too risky to pursue (eg., some types of human drug testing). Obviously, a balance needs to be struck between the probability of an event occurring and the seriousness of the consequences of that event and the purpose or context within which the event may occur (eg., a factory producing cars, an architect's office or a scientific laboratory).

Wheatley:

"We've been so engaged in rounding things off, smoothing things over, keeping the lid on, that our organisations have been dying, literally, for information that was different, disconfirming, and filled with enough instability to knock the system into new life."

In my view, successful organisations like successful individual humans, seek self-knowledge by which they can better identify potential risks whilst still remaining open to development, learning and change.

Organisations can create a greater sense of safety and certainty for staff about their working environment by providing clear vision and strategic direction, linked to performance management systems. Individuals and teams can then make more proactive, adult choices, rather than needing to be 'controlled', managed or directed. Paradoxically, through understanding and identifying with the vision, values and 'what's important' for the organisation, staff can then have more freedom within these boundaries to test or stretch them, take risks and to be creative, innovative and thoughtful about the long term future and changing role of the enterprise.

Positive and optimistic people do not avoid risks of their own accord, they try to seek benefit in development and change.

Negative people or pessimists, may choose to avoid risks because they consider the inevitable outcome to be negative. These people perhaps rationalise their position by saying they are seeking equilibrium. But equilibrium leads to entropy and entropy leads to death.

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It is my view that individuals and organisations in today's complex societies need to be more positive.