

# PROLEGOMENA FOR AN INTERPERSONAL RISK REGULATION

## PROLEGÓMENOS PARA UNA REGULACIÓN INTERPERSONAL DEL RIESGO

ALEXANDER VARGAS TINOCO\*

### Abstract:

This paper explores some arguments allowing the interpersonal liability for the risk generated and, consequently, an interpersonal risk regulation through tort law. In this sense, it deals with an interpretation that would allow this, some implications of the concept of risk and the question of the regulation system of the law of torts. Finally, a justification is given for this area of the law to deal with risk regulation in an auxiliary manner.

**Keywords:** *Risk; Danger; Responsibility; Tort Law; Probability; Regulation*

### Resumen:

El presente trabajo explora algunos argumentos que permitirían una responsabilización interpersonal por el riesgo generado y, consecuentemente, una regulación interpersonal de este a través de la responsabilidad civil. En ese sentido, se aborda una interpretación de la probabilidad que así lo permitiría, algunas implicaciones conceptuales del riesgo y la cuestión de la estructura normativa de la responsabilidad civil. Finalmente, se deja planteada una justificación para que este ámbito del derecho se ocupe auxiliariamente de la regulación del riesgo.

**Palabras clave:** *riesgo; peligro; responsabilidad; responsabilidad civil; probabilidad; regulación*

The literature on risk, in both, the legal and the non-legal field, is wide and complex to outline regarding the problems it addresses. The difficulty increas-

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\* Universidad Externado de Colombia (alexander.vargas@uexternado.edu.co). Member of the Project of Philosophical Analysis of Private Law of the Chair of Legal Culture. I would like to thank Esteban Pereira Fredes, Alberto Pino-Emhart, Sebastián Figueroa Rubio, Sebastián Agüero Sanjuán, Lucila Fernández Alle, Joulina Roperó and Joaquín Reyes for their comments prior to an early version of this work, presented at the Special Workshop 96 (Philosophy of Private Law) organized as part of the World Congress on the Philosophy of Law held in July 2019 in Lucerne, Switzerland. Article received on June 9, 2020 and accepted for publication on July 1, 2020. Translated by Fluent Traducciones.

es when one realizes that the perspectives of other areas (such as psychology, sociology, epidemiology, statistics, among others) may directly impact many of our legal appreciations of risk. It is surprising how little jurists believe they can do about risk as such, beyond regulating it statutorily by public law (as a matter for other experts to deal with) or repairing the harm that would result from it.

In this paper I expect to mention some arguments that would allow a third path, which is an interpersonal regulation of risk. In that order, I will refer to four arguments from which we can discuss the interpersonal responsibility for the risk we create when interacting with others.<sup>1</sup> This implies that someone can call someone else to account, particularly for creating certain risks and, to that extent, there may be an interpersonal regulation of risk that could be parallel to the statutory regulation.<sup>2</sup> Each of those arguments may be understood as a scenario for debating, theoretically, about this possibility, since behind each of them there are important divergences whose terms is not feasible for me to fully address much less resolve. I will only explain how each of them could contribute - and to what extent - to defending a possible interpersonal regulation of risk, where I consider as condition to hold someone in particular liable.

The general objective is no other than exploring the interdisciplinary *initial* terms of this discussion, and to awaken a little more interest in the issue at stake, which has not played a leading role in the theoretical-legal field. Thus, all arguments will be presented as “possibilities” for defending the thesis and their presentation will be as follows. The first argument deals with the probability to allow interpersonal responsibility for causing the risk. The second addresses a concept connection between risk and responsibility. The third refers to the possibility that tort law is an appropriate institution for such responsibility and finally, as a fourth argument, I will set out a possible justification for adopting the proposal of the third argument.

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1 There are two ways in which something can be understood as “interpersonal”. A broad sense refers to that which involves a relationship between two or more people, or between one person and all the others. A narrower sense, which I will refer to mainly, can be understood as synonymous with bilateralism or bipolarity, i.e. two extremes linked with each other, which have correlative and special legal positions in that relationship. In this regard, DARWALL (2013a), pp. 12-15 and 20-39.

2 On the idea of accountability as “calling to account” you can read FIGUEROA (2019). By “interpersonal regulation” I mean that which is not necessarily the result of statutory or regulatory prescriptions issued by administrative or legislative bodies, but that which results from regulating an interaction between two extremes by means of generic rules of reasonableness of conduct.

## I. THE POSSIBILITY OF INTERPRETATION

In connection to the idea of risk is that of the possibility, and thus, the probability; since the possibility arises when determining how possible an event is. To identify how possible is to allow interpersonal responsibility, represents a first challenge.<sup>3</sup> This issue is interesting insofar someone considers that the uncertainty implied in every risk is sufficient to reject it as basis for a reasonable moral judgment against someone. What we consider a risk could be mere speculative estimations regarding future events (by definition not occurring yet) which, as such, would not be sufficient to base a value judgment regarding what someone “has done” or may actually do.<sup>4</sup>

In this line, it would not be possible to hold somebody liable for what implies a caution, doubt or ignorance regarding what will happen or has happened.<sup>5</sup> This type of objection would suppose that (i) our moral judgements must be based on beliefs justified by the reality of the world and that (ii) referring to risk is a way of expressing a lack of knowledge about causing an outcome, insofar it implies uncertainty.<sup>6</sup> Thus, the subject’s epistemic deficiency about reality, which seems to be part of the concept of risk, would reveal a sort of ignorance, on the basis of which no one should be held liable. In contrast, when talking about outcomes such as harm, one could be judged by one’s incidence in the world and the effected we caused.

In addition, certain perspectives of probability set out that risk would depend on the individual’s willingness to be convinced of something, in this case, a future outcome.<sup>7</sup> Furthermore, if we assume that expected results are *determined* by causal laws and not by people’s convictions - or degrees of conviction - risk appears as an unreliable basis for responsibility.<sup>8</sup> In fact, for those supporting a deterministic stance about events, any uncertainty, including probability, would be an expression of the subject’s epistemic difficulties and would not necessarily correspond to reality of what happens in the world. Thus, moral judgements could only be directed against the subject’s belief in his acts, but not against his

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3 OBERDIEK (2017), p. 46.

4 WRIGHT (2008), p. 1296, n. 6; RENN (1992).

5 TOULMIN (1958) cited in OLIVÉ (1981).

6 BAMMER *et al.* (2008), p. 298 y RIESCH (2012).

7 About the evolution of the concept of risk, WOOD (1964), p. 91

8 For a criticism on the probability as a degree of conviction, FERRER (2007).

action itself.<sup>9</sup> In this case, to give moral relevance to risk *per se* would be irrelevant, since it would be based on epistemic difficulties and not on certainties that adequately explain the cause of events.<sup>10</sup>

As can be seen, much of the difficulty lies in how to interpret probability itself and in the fact that it involves some form of ignorance. If probability is a subjective issue, which gives account only of a person's state of knowledge (his/her "*opinion*"), one would at least have to justify why one has to take responsibility for it, even though it is not necessarily descriptive of the world. Regarding this, historically there have been two well-known interpretations of probability, according to which it has been conceived either as (i) a way of expressing the degree of belief in certain propositions devoid of statistical background, or as (ii) a statistical concept, which refers to stochastic laws about processes involving chance and how certain results can be predicted from them.<sup>11</sup> Thus, in contrast to the subjective meaning of probability, there are interpretations seeking a reliable descriptive (and predictive) scope of what happens or will happen; either by appealing to the frequency with which certain outcomes are produced, or by appealing to the tendency with which an outcome tends to be produced.<sup>12</sup> These characterizations are based in rationally structured theoretical models, seeking to represent aspects of reality even though they are based on some data we have about all the variables in play, which if were fully known, an outcome would be predicted precisely. Based on these models, even if we do not know exactly the result when throwing a die on a table under normal conditions - because for this all relevant variables would have to be known: strength of the throw, height, direction, size, weight, proportion, hardness of the die and of the table, resistance of the table and the air, among others - we can consider some known aspects to determine how possible is a certain outcome, such as the fact that there are only 6 possible results, from 1 to 6.<sup>13</sup> In this sense, the probability of an event will no longer vary according to the attitude or disposition of the subject, but according to the theoretical model, rationally used.

9 For an examination on theories of truth, HAACK (1982), pp. 112-115. According to HURD (1994), pp. 200-201 and (1996), pp. 262-263, this characteristic makes that what is incorrect or unjust are our beliefs regarding the correctness or incorrectness of our actions, and in that sense, our guilt, does not make the actions themselves incorrect, because in a world that is causally determined, the risky action did not create a possibility of harm.

10 See MOORE (2011), p. 240 and PERRY (1995), pp. 323-324 as well.

11 About this duality, see HACKING (1975), p. 86 ff. also HAACK (2014), pp. 56 ff.

12 For different interpretations of probability HÁJEK (2019).

13 OLIVÉ (1981), p. 39.

Thus, if we understand risk as a concept involving the possibility to create a result in the world, then, when determining risk there should be a *desideratum* of objectivity and correspondence with risk, so that its measure varies only according to the progressively acquired knowledge about risk.<sup>14</sup> Intersubjectivity, offered by a rationally built model, would counteract the propositions about the probability of an event that could be made arbitrarily, since rational individuals will be forced to accept as true the conclusions obtained under the valid method that bases the model. In this way, to appeal to risk will not be synonymous with mere speculation or full ignorance about what we should expect from reality when using a rational model based on partial knowledge of a phenomenon.<sup>15</sup> As long as this model is based on evidence about how the world functions, drawing rational conclusions about the possibility of an outcome, it will be accessible to those who are responsible and those who are accountable, even when its access requires some effort on the part of the parties to an interaction.<sup>16</sup> Thus, the risk where is worthwhile to hold someone else liable is the risk that constitutes knowledge of the world - even if it is only partial - which can serve as a basis to justify holding someone liable for its creation.

## II. THE CONCEPTUAL POSSIBILITY

In addition, not only the notion of probability that is related to that of risk can be interpreted in a way that allows for an interpellation between persons and potential liability. The same concept - at least on a very general level - seems to imply an evaluative nature that allows it to be linked to the idea of responsibility.

To evidence how, it should first be mentioned that risk is not a concept that floats in the air, but rather implies the possibility of an outcome affecting something or someone, in a determined or determinable temporal, locational and/or a material scope. Otherwise, our uncertainty would be complete and no

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14 This kind of answer would not be fully satisfactory for those who are sceptical of the possibility of splitting up the subjective elements of quantifications that claim some objectivity under theoretical models that use numerical measurements. In this sense, it has been said that there may be implicit valuations even in the risk determination itself. In this respect, HANSSON (2007). Along these lines, there are those who maintain that it would be a mistake to fall in a 'reification' of risk, i.e. to approach it as a concept unrelated to subjective factors that have to do with psychology or risk assessment. In this regard, TAYLOR (2012), p. 447.

15 In this sense, risk would provide knowledge in the form of quantification. In fact, there are those who claim that the quantification of probability is the distinctive character of risk with respect to mere uncertainty. In this respect, KNIGHT (1921) or SUNSTEIN (2005), p. 87.

16 In this regard, KUMAR (2015), pp. 46-7, and OBERDIEK (2017), p. 56.

action to counteract a likely outcome would be justified. In fact, the idea of a “reference class”, part of the theses on frequency of probability is possible thanks to the fact that the scope of risk can be delimited somehow, so to determine risk relates to determining risk of people or objects subjected it in a certain way.<sup>17</sup> This sphere of affectation is not devoid of a relationship with a subject. On the contrary, the reference to risk implies that someone estimates the outcome as *undesirable*. Considering this, there could be a conceptual relationship, albeit tenuous, between risk and responsibility. The relationship does not seem evident, but if we analyze that a risk entails the undesirability of a result - which is considered negative - then we can see an assessment element in the concept of risk, and there are reasons for not causing that outcome.<sup>18</sup> In other words, an undesired outcome implies that there are reasons for acting that are discernible by a subject assessing risk. The subject assessing risk can transmit these reasons against those who can also discern them, who, since are linked to risk, will act in a certain way in the face of those reasons. Thus, the probability of an undesirable outcome supposes the *possibility* of directing reasons regarding that outcome and, to that extent, responsibility is conceptually allowed, even of oneself, to do something about the assessed risk.<sup>19</sup>

This would mean some sort of control – even if it is limited - of someone to whom the reasons are addressed to, regarding to cause an undesirable result. Otherwise, to claim responsibility would seem unfounded. These possibilities of action by the subject in the face of risk may also be regarded in a retrospective manner, after the outcome was been produced, or in a prospective manner, before the outcome is produced.<sup>20</sup> Whatever the direction in which responsibility is projected, interpersonal claims – giving reasons to act in a certain manner regarding that probability – are possible. The possibility of addressing claims implying responsibility allows us to locate risk in the scope of an interpersonal construction of morality, which provide basis for valid claims against others. Thus, the fact that someone has an underlying claim against imposing or creating a risk shows that risk is relevant in a context where morally mandatory behaviors are built on what we can demand of each other about our behavior.<sup>21</sup> Thus, risk appears as an hybrid concept involving (incomplete) knowledge of certain cause-effect

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17 A discussion on what this implies for contractualism is to be found in KUMAR (2015), p. 45.

18 In this regard, see HANSSON (2018).

19 VAN DE POEN & NIHLÉN (2018), p. 885.

20 VAN DE POEN & NIHLÉN (2018), p. 886.

21 VAN DE POEN & NIHLÉN (2018), p. 886.

relationships, and sending a prescriptive message for “someone” to do something regarding certain effects that are considered undesirable.<sup>22</sup>

The aforementioned does not mean to overcome the critics of ignorance of causality that could arise from determinism respect to the idea of probability (discussed in the previous section), but it does put in question the need for full causal knowledge as a necessary condition for holding someone responsible. The *desideratum* of full knowledge about causality would be necessary only if we consider our moral practices are directly related to the outcome we create in the world, not considering relevant other issues such as our reactive attitudes. Certainly, our reactions towards others are important allowing us to reproach other even if there is no outcome, so those reactions should not be minimized because of having partial causal knowledge.

Nevertheless, although to make someone responsible in the most basic sense would only require recognizing the other as recipient of an implicit claim in a reactive attitude,<sup>23</sup> we as rational beings consider necessary a coherent justification to transmit reasons to someone else. Therefore, although no full knowledge of causality is required to hold someone liable, the claim for the risk may be justified because of the probabilities we estimate that occurred objectively or in an intersubjectively controllable manner, according to a theoretical model based on facts or evidence from the world, from which rationally valid conclusions can be drawn.<sup>24</sup> For this purpose, people with the necessary inductive capabilities are required, even if these can be complemented or corrected later with more accurate knowledge coming from a more complete theoretical model.<sup>25</sup>

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22 RENN (1992), p. 58. Also, BECK (1992), pp. 33-34, notes that risk implies something real and unreal at the same time, referring to these descriptive aspects and to the threat it entails.

23 In this regard, see STRAWSON (1995), pp. 41-53.

24 The conclusions about probability obtained in this manner are called “epistemic probability” by PERRY (1995), p. 325.

25 That there is a model to represent what may happen in the future does not imply a full description of reality or a cause-effect link between that which increases the possibility of the outcome and the outcome itself. This could generate a moral objection to being held responsible for what did not necessarily happen or will happen, but even this objection is not sufficient to deny that creating a risk may be morally significant in itself considered to justify a reaction against it. In fact, if we were to demand full causal knowledge for our tort liability suits, we could hardly carry out such legal practice. Judges and litigants do not always have access to all the relevant data about what caused an accident, so they focus on proving certain hypotheses attempting to explain the causality of what happened.

## 2.1. The risk-danger distinction and the need of regulation

Now, also from a sociological perspective, an interesting connection between risk and responsibility has been made, but not based on the undesirable nature of the outcome but on an outcome that occurs and our decision-making capacity. In this line, as long as the capacity to make decisions is conceived as one of the assumptions of responsibility, the latter could be predicated of those who decide on a possible harmful outcome. Luhmann, for example, states that the difference between risk and danger lies in the fact that, in the former, “possible future harm is attributable to the decision itself”, as when one is at risk of crashing into an aircraft only if one has previously decided to board it.<sup>26</sup> In the case of danger, on the other hand, “the harm has an external cause. This is the case if, to follow the example given, one is killed by the wreckage of a falling plane.”<sup>27</sup> In this sense, Giddens states that “[w]hat brings into play the notion of responsibility is that someone makes a decision that has discernible consequences.”<sup>28</sup>

However, this distinction seems to have its own difficulties. On the one hand, it would be necessary to specify the conditions under which a choice about a possible harm belongs to the subject’s sphere of decision and is not external. For example, if a decision were understood as a mere choice between two alternatives, one could consider that in dangers there are also someone’s decisions involved. So, if a person drives his car and suddenly an avalanche buries his vehicle: although one could think that the harm came from a source external to the subject’s decision, it could not be denied that the driver’s choice to drive by was causally necessary to be buried. In a non-trivial sense, all our choices about available alternatives are linked to risk if considered as necessary conditions for causing the harm.

On the other hand, it seems that to determine which is the relevant decision at stake in order to identify whether there is a risk or a danger, a second order observation should be necessary, since there may be decisions external that are internal to others.<sup>29</sup> For instance, the owner of the property where the avalanche took place decided not to warn the “danger” to passers-by in the area. There would be a decision at stake, but not only the subject affected by the outcome,

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26 LUHMANN (1991), p. 81, quoted in BECK (1999), p. 132.

27 LUHMANN (1991), p. 81. In a similar approach, LUHMANN (1993), p. 21. BECK (1992), p. 121 supports this idea by stating that in the risk society it cannot be attributed to something external, but that risks depend on people’s decisions and can therefore be the subject of reflection.

28 GIDDENS (1999), p. 8.

29 LUHMANN (1993), p. 26.

so there would be two risks for both, which says nothing about who should act to reduce it or assume the harm that eventually takes place. In other words, the “external” terms in which the danger can be described may also be redirected to internal terms in which the risk is described.

Moreover, linking the concept of risk to one’s decision seems to hide the burden of a moral responsibility for one’s decisions. If one were to extract a principle from this connection, it would seem that if a decision-maker discern about the consequences, this would make him responsible for causing likely results, as long as he controls his decisions and his conduct regarding what may occur.<sup>30</sup> Even if what is “discernible” - or foreseeable - should be what is likely to happen when choosing certain course of action, not always we respond for what we are able to discern or what we have discerned. The legal practices we use for allocating responsibility are nourished by a legal context that allows that not always what we discern or decide is sufficient for making someone responsible. Thus, for example, it is not always the outcome that is most easily discerned the one defining someone’s responsibility. There are outcomes that, although unlikely, can be awarded to someone to answer for. In other words, not always the most relevant outcomes – from a legal perspective - for which someone is responsible are the most easily expected or predictable. An airline could be held solely liable for the death of a passenger from an air accident, even if the probability of an accident is less than that of a successful trip, and even if this probability was comprehended by the passenger. Also, to discern possible harmful consequences or outcomes does not imply that if they actually occur the persons are liable to the same extent only because they discerned them beforehand. If I pass by a certain street at night, knowing that I am likely to be robbed, I am not liable for the robbery.

The point is that although the concept of risk *allows* for responsibility because it implies that there are controllable reasons, this is not enough, in itself, to determine liability of any *specific* individual. Thus, a legal context from which to specify the terms in which someone can be held liable for potential outcomes on which he or she decides is necessary. In other words, to define responsibility for a risk imposed to or undertaken by someone cannot be based only on causal terms considering every contribution equivalent in the causation of an outcome. By the way, this would eliminate the internal-external distinction on which the

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30 To this extent, and by virtue of that autonomy, people should have sufficient information and capabilities to make decisions consistent with their first- and second-order desires. Thus, it could be said that a primary form of wrongfulness in the area of risks would be to not provide enough information about them, especially when it is not easy for the common decision-maker to discern possible outcomes.

sociological distinction of risk-danger is based. In order for there to be liability for risk, there must be a basic regulatory framework that allows someone's conduct to be qualified, not only in causal terms of what may cause a harmful outcome, but in terms of what is relevant from a legal perspective in relation to the others in play. This would explain why risk is used as an imputation criterion in legal practice and not for examination of causality (although they are closely related). Without an evaluative context seems impossible to determine a risky conduct in an interaction, and without rules it is also impossible to determine whether the risk is irrational, unacceptable or whether a certain person should be held liable for creating it or if it eventually occurs.<sup>31</sup> The mere decision would not be sufficient to hold someone legally liable, a rule on how to consider decisions relevant, from a risk perspective, is also necessary.<sup>32</sup>

### III. THE STRUCTURAL-NORMATIVE POSSIBILITY

In view of the above, should the normative structure dealing with a claim for imposing a risk be interpersonal, as implemented according to tort law, or on the contrary, according other areas of law that are more suitable for this purpose?

The "preventive issue" is perhaps one of the most interesting debates arising in this area of law. While some claim that not harming in certain ways can be interpreted as a *priority*<sup>33</sup> or a normative ideal in this field of law,<sup>34</sup> others argue

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31 WOLF (2006) p. 410.

32 See GALINDO (2015), p. 155. In this sense, Luhmann himself states that the risk-danger distinction is successful only as long as there is a second order observer who attributes liability to someone for having decided on possible future harm. One would say, without intending to establish a comprehensive normative framework for liability, that not only the possibility for the parties to discern possible consequences has an impact on the determination of liability, but also other factors. Some of them, without limitation, would be (i) the conditions of freedom and awareness in which they make decisions about the risks they create or assume, (ii) the value of the activities or final results for which the risk is a means to achieve them, (iii) the distribution of information at the time of the risky interactions, (iv) the capacity to control the production of possible results and (v) the burdens and benefits that the mere permission or prohibition of the risky behaviors that each party can carry out imposes.

33 KEATING (2018).

34 Interpretations of the law of torts with a protective focus have been offered by SHEINMAN (2003) and PAPAYANNIS (2014), p. 130.

that only taking care of the harm caused is the primary object of this practice, thus denying that there is such a thing as a duty not to impose risk on others.<sup>35</sup>

Only the first of these perspectives seems to deal directly with the risk as such, but going deeper into the rationale, is possible to see that these would be arguments associated with the temporal proximity of the harm. This does not mean that, in principle, the practical effect of the preventive approach is not identical to the effect that an interpersonal regulation of risk would have, but that the grounds for each of them are different.<sup>36</sup> In the case of harm prevention, the fact that the harm occurs would be considered incorrect, so the harm to take place should be avoided when it is close to happening. A preventive approach would be justified only when the harm is likely to happen in a period that makes it necessary to take measures to avoid it. Thus, it would not be contradictory to say that, although tort law generally has a roll to play in the regulation of risks *ex post* of the harm, it can exceptionally intervene *ex ante* when such harm is very likely to happen.<sup>37</sup> Therefore, although the law of torts is called upon to deal with the compensation of harms, there are reasons for avoiding them to be caused. These reasons may be of economic nature or may appeal to an ideal of justice or morality. Among the economic arguments would be the very fact that the system of tort law is an incentive for rational subjects to refrain from assuming a negative externality, insofar as it is efficient.<sup>38</sup> In this line, the externality should be avoided, on the first place, by determining the situations in which harm can be efficiently avoided, and thus achieve greater benefits.<sup>39</sup> Also, to affirm that the law of torts is coherent could also be possible with arguments of a different nature; this, if we consider that this branch of law is concerned with allocating rights and duties not to harm (in certain ways) among people. In that order, if the normative ideal of liability is not to harm in certain ways, the most coherent way to achieve it is to prevent the harm from occurring, not to wait for it to happen and then compensate. Thus, behind every right not to be harmed - either by negligence or by a risky action - there would be reasons to avoid the harm, because when it is prevented a right against the harm is reinforced, not against the risk. In fact, it is well known that part of what it means to have a right is the

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35 NOLAN (2013). For remedy perspective on tort law, see, among others, COLEMAN (1992), KOZIOL (2017) and PRIEL (2018).

36 In this regard, PRIEL (2018), § 14 and § 18, notes that the question of permissible risks is different from the question of who bears the losses that occur.

37 PAPAYANNIS (2016), pp. 85-86.

38 ACCIARRI (2013), p. 430; TICHÝ (2013), p. 22.

39 A presentation on the economic logic of prevention and negligence is seen in POSNER (1972), pp. 31-33.

possibility that it be institutionally reinforced, avoiding it to be infringed, and if this happens, to seek for a remedy or a sanction.<sup>40</sup>

The substance of the matter here could be a moral argument, according to which, if a subject has this type of right to indemnity, then he has a sort of individual authority before others which allows to demand respect.<sup>41</sup> On the basis of this authority, the individual is owed the right not to have his or her primary rights infringed, given that the value of his or her authority cannot be reduced to that of the money given to him or her as indemnification for an unjustly harm suffered. This argument would consider that part of autonomy is to be able to claim something from others, and that this autonomy is unquantifiable since it cannot be restored with monetary remedies. In other words, this is a concept which requires to fulfil a duty towards the object of respect in the first place, and not afterwards, because afterwards what enabled to keep the respect *ab initio* will have been lost from a regulatory perspective. Thus, respect seeks to preserve the indemnity of the person, original object of the duty.<sup>42</sup>

But if it is argued that risk regulation is also important for liability or that not only an outcome of damage is significant for this area of law, then the arguments are not necessarily the same. There are risks that we are not interested in reducing even though they may lead to compensable harm, and to that extent the reasons for one action and another would be different. Moreover, when it is said that risk is worthy of a regulation *per se*, it seems to refer only to a conduct that is legally relevant insofar as it is far from a certain standard, even when it cannot be stated outright that the damage is close to happening. According to risk regulation, if a risk is imposed this does not mean that only the lack of proximity of the damage restricts to provide a response, the magnitude of the damage - even if it is not immediate - could also play in favor of a regulation.<sup>43</sup>

Unlike the case of creating a damage - where there is a certain outcome that one should take responsibility for because it has affected or is close to affect the world in a certain way - in the case of (mere) risk as legal basis, the relevant here seems to be the conduct itself, no matter the factual consequences or

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40 RAZ (1996), p. 256.

41 DARWALL (2013b), p. 13.

42 See a similar argument in VARGAS-TINOCO (2018).

43 It is well known that in the quantification of risk, not only the probability of harm, but also the magnitude of the harm is relevant. For example, Article 5:101, paragraph 3, of the European Principles of the Law of Torts states that “the risk of harm may be significant having regard to its seriousness or probability.”

if they are immediate temporarily. Under this argument, if there is no outcome harming someone in particular, someone would say that it is not possible to give interpersonal legal responses against conducts in which anyone may incur and anyone could be a “victim”, without a particular connection.<sup>44</sup> Thus, if there is no outcome, there would be no room to speak of causality either, and the basic requirements for compensation would not be met.<sup>45</sup>

However, if the argument of the lack of an outcome is essential to claiming disconnection between the parties to a risky interaction, there are also arguments that show precisely that someone in particular may be negatively affected when he or she has been subject to risk.<sup>46</sup> For example, to impose a risk could have a harmful character, i.e. under certain conditions to be the passive subject of a risk may generate a damage that allows to link the parties. The ways in which such a thesis is defended, are different.

A first perspective appeals to the fact that a certain probability of serious harm may trigger adverse consequences in people’s mental health, such as high levels of stress, anxiety or phobia about the possible advent of the harm, which is considered harmful. In such cases there would be a linkage because of the harm.<sup>47</sup>

Another approach focuses on the mental representation of the result by the agent who puts another at risk by performing the behavior. Thus, some claim that when the risk is intentional and serious, there is damage to the dignity of the person who was the object of such harmful intent. This is based on the premise that the person should not be the target of conduct that seeks to cause harm.<sup>48</sup> This perspective, however, would refer to limited cases where there is *animus nocendi*, leaving out cases where there is a serious affectation to the person due to the risk, but there is no intention. Thus, it has also been said that leaving the outcome itself to chance, even if there is no intention, allows to evidence wrongfulness.<sup>49</sup>

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44 WEINRIB (2017), p. 181-182; MOORE (2011), p. 78.

45 See NOLAN (2013), TURTON (2015).

46 This objection can be taken as similar to the objection about the possibility that probability may have some moral significance, to which I referred to above.

47 In this regard, see GOLDBERG and ZIPURSKY (2002), p. 1634. On harms caused by imposing risk, the case of *Ayers v. Jackson Township* is usually discussed, where the Supreme Court of New Jersey granted as a remedy in favor of the plaintiffs the expenses of medical monitoring to ensure that the plaintiffs did not develop cancer, after having been exposed to toxic waste by the defendant, who negligently managed the waste in his charge.

48 PLACANI (2016).

49 SCHROEDER (1990), p. 152 and ff.

On the other hand, other approaches are somewhat more detached from the attitudes of the agent and focus on the significance of the risk to the passive subject. For example, people's preferences. It has been argued that when someone puts another person at risk, he or she act against the interests of the latter, understanding preferences as the situation in which one would like to be. Thus, if people prefer to be in the reference classes or groups that are less likely to be harmed, they will be harmed when such interests are opposed by putting them at risk.<sup>50</sup>

But there have also been arguments focusing on the fact that imposing a risk may harm in an immaterial sense, related to the options that are valuable to the subject. Based on the idea of autonomy expounded by Raz,<sup>51</sup> it has been maintained that risk means that some of the options that an autonomous subject would have, are no longer available, because they are legally not valuable due to the damage that they can trigger. In this sense, risk would entail the immaterial damage of eliminating valuable options for a person.<sup>52</sup>

Each of these theses may have explanatory difficulties. In fact, an interesting debate among some of their defenders has taken place, however, they all seem to agree in the fact that risk can also mean a setback in someone's interests, whether as options or as preferences. Even those who deny that risk may be a harm do not deny this setback, but rather the primary nature of those interests. It has been said, for example, that risk only causes someone's secondary interests to relapse, i.e. those deriving from primary interests, but it is not denied that there are interests affected, what may serve as basis for a claim against someone, or be to have a right against someone due to the setback of such interests.<sup>53</sup> Now, to describe something as "secondary" is quite debatable, considering that in our contemporary society we are highly exposed to risks and their associated serious consequences. Logically, we are interested in the risks we are exposed to, especially if we have no control over them, and this is the case even if we are not aware either of the fact that we are under risk or about the negative experience that this entails.<sup>54</sup> The mere fact of affecting such an interest may be sufficiently relevant to be considered unfair, and to entitle for a claim for imposing a burden that breaks the legal balance between the parties. Here, the purpose is

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50 FINKELSTEIN (2003), p. 973 and ff.

51 RAZ (1986), pp. 370-372. According to Raz, part of what is understood by being autonomous is having valuable and different options from which a person can decide.

52 OBERDIEK (2017), p. 88.

53 PERRY (2003), p. 1307.

54 In this regard, JAMES (2017), p. 6.

not to set out what the significance of a risk is to someone in order to say that to be under it may cause harm. However, under certain circumstances the risk has such a significance that to create a risk means to create a harm, or at least, leads to a significant situation that allows to address a claim against someone. This significance is usually related to people's practical reasoning and their very sense of freedom. Although risk does not seem to eliminate, or de facto, disable the means available to people to exercise their autonomy -and to that extent it could be different than harm-, an interference or legal interruption of people's autonomy is created. The interruption they produce seems to consist in directing behavior towards certain safe options that a reasonable man should adopt if he intends to preserve the means he has to express himself freely in the world. As Raz points out, "autonomy requires a choice of goods. A choice between good and evil is not enough... autonomy cannot be achieved by a person who must divert every action and thought to the task of survival...".<sup>55</sup> To this extent, it is clear that having to make decisions for the sake of protection restricts the scope of people's freedom and therefore, their autonomy.<sup>56</sup>

Thus, although the risk caused by a negative effect is not identified with a harm, there is an interpersonal wrong situation taking place between the parties of the interaction. In other words, there may be a wrong outcome even if there is no harm, because protection against harm is not the exclusive object of the rights and duties we have. As was pointed out, what makes justice act between the parties (especially corrective justice) is not the causation of a loss, but the a normative wrong that is considered legally relevant. Only in this way is possible to understand that there are losses that are not unlawful and unlawful situations that

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55 RAZ (1986), p. 379.

56 Now, some doubts could rise by the fact that not all attitudes towards risk are the same. Some people are averse to risk and would seek to avoid it and some others are prone to it or neutral. People who are prone to risk, for the same reason, will not see their decisions or the assessment of their options modified because of the risk. To that extent, the significance of risk cannot be the same for everyone. This observation, however, is not exclusive to risk. The perception that something is harmful is not shared by everyone either, but that does not prevent us from seeing its avoidance as something desirable or even from demanding that it be avoided. This is the only way to explain our standards of diligence, since the very perception of harm as something desirable cannot be assumed to be shared by the person who will be the victim of the harm. We have to appeal to an intersubjective assessment of what is right to do about the harm in order to prevent personal judgment from being imposed on others. Such an assessment is usually negative regarding the harm. In this line, those who are prone to risk can trust that it will not happen or will end up affecting them, but it does not seem reasonable to demand that others have the same trust regarding the risks created.

do not create losses (e.g. trespass,<sup>57</sup> nuisance,<sup>58</sup> assault<sup>59</sup> and some cases needed for an injunction remedy),<sup>60</sup> the latter being relevant according to the law background guiding the relationship.<sup>61</sup> If this is the case, is not possible to affirm that there is any conceptual impossibility for justice implying interpersonal liability to deal with risk impositions as well.<sup>62</sup> In this sense, an unlawful situation has as correlative a breach of law and does not depend on producing a factual loss or harm, but on the fact that a normative infraction has occurred between the two extremes. Additionally, there is a concept argument that risk does not fall into a vacuum but rather that we can infer who may be affected and, based on this knowledge, link the creator of a risk with those who are passive subjects, who may eventually see their rights against risk breached. To this extent, to create a certain type of risk may have a *dikaiologic* or bilateral structure, by virtue of which, A

57 The Restatement (Second) Of Torts § 158 affirms that there is a tort of trespass by the invasion of another's property, regardless of whether such action causes harm or not. This tort would give rise to the payment of even a symbolic compensation by the infringer in favor of the claimant owner.

58 A tort that is subject to liability may be committed for "private nuisance" arising even though the defendant's conduct does not result in harm. In *Birmingham Development Company Ltd v. Tyler*, the plaintiff argued that the defendant's wall put at risk of physical harm to workers carrying out construction work on its premises, so that such work could not be carried out safely. In *civil law* tradition, an action seeking to prevent such risk is found in the so-called "action for infliction of risk", provided for in several civil codes of Latin America (articles 2359 Colombian CC, 2333 Chilean CC, 2236 Ecuadorian CC and 2084 Salvadoran CC). An interesting more generic variation is found in the Argentine CC, which provides for preventive action in its art. 1711. By virtue of action, it is intended that those who are threatened by a risk may cease that risk by means of a private's law recourse. See DIEZ SCHWERTER (2016).

59 Legally, it is stated that if someone's conduct causes another person to fear imminent violence against him, with the intention of provoking that fear in him, the tort of assault is committed. Strictly speaking, no actual risk is required to commit the assault, but it is in any event true that tort law in the common law considers the intentional infliction of risk that is conveyed as violence of imminent harm to be proscribed and considered to be a wrongful act that can be dealt with in this area of the law (see *Mbasogo v. Logo Ltd*).

60 According to the doctrine, an injunction can be preventively decreed even if no wrong has yet occurred. In this regard, BURROWS (2004), p. 543. Jurisprudentially, the affirmation of this rule can be found in *Redland Bricks v. Morris* (1970), *Lloyd v. Symonds & Ors Respondent* (1998) and *London Borough of Islington v. Margaret Elliott, Peter Morris* (2012).

61 WEINRIB (2017), p. 150.

62 Interestingly, WEINRIB (2017), pp. 181-182 opposes the assertion that a right to security is in accordance with a Kantian rights structure such as the one he uses. However, he also asserts that it is the impermissible risk that marks the incorrectness of the harm that occurs (2016, pp. 150-152) and that there can be unjust without harm, so his denial of the rights to security seems to require additional grounds.

commits a wrong against B by doing C and not an impersonal wrong where A does C.<sup>63</sup> Thus, whoever is passive subject of the risk has what WALLACE calls a “privileged position” for the claim against who creates a risk,<sup>64</sup> or an individual normative standing that allows him or her to demand for an obligation with two poles. By virtue of this normative standing, whoever is affected by the risk has certain powers against whoever has aggrieved him or her, so that he or she can file whichever legal actions he or she has to demand his or her rights interpersonally against another.<sup>65</sup> That said, to assert that risk generates reasons for anyone to claim seems ill-suited to the legal effects that risk created for those who consider their self-preservation valuable.<sup>66</sup> Although the risk hypothesis requires no harm, the fact that risk is conceptually linked to an undesirable outcome allows us to resource to our causal knowledge of that outcome, allowing us to identify who may be affected and to adopt a rational model with valid premises on the predictability of the outcomes of that risky behavior.<sup>67</sup> Thus, although causal considerations may not be sufficient to establish someone’s liability for the risk,

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63 DARWALL (2013a) p. 31.

64 WALLACE (2007), p. 29.

65 DARWALL (2013a), p. 36.

66 As argument against, it could be said that, as they are normative, this type of affectation only occurs in those who are averse to risk, so to extend a right against risk for everyone implies a sort of paternalism. However, behind the accusation of paternalism there are two assumptions that do not seem right. The first is that people who are susceptible to risk have a wide variety of options to avoid being subject to risk. This clearly denies contexts in which the safety options and costs of making safer choices are not available to the average person (a similar argument in DORFMAN, 2014). Second, they seem to assume that the significance of harm, unlike risk, would not depend on risk aversion, which is unfounded. Also, those who suffer harm may choose to forego any claim for it or may even consider it pleasant and that is not enough to understand that the harm ceases to be significant (in this respect, SHIFFRIN, 2012), which is not the case.

67 Obviously two scenarios can be identified when talking about causality and risk. The first, *ex ante* to the harm, supposes to characterize a behavior as risky insofar as it is able to cause a certain outcome, which we can identify according to our current knowledge (even if it is partial). The second, *ex post* to the damage, can suppose either that the damage was in deed caused by a behavior that was considered risky because the result was foreseeable, or where it is doubtful that the activity was in fact the cause of the outcome, despite the fact that it could be a foreseeably cause. Where the causal link is in doubt, it cannot be said that the risk is the necessary cause of the result. Indeed, if causation is explained in terms of needing a condition that is considered to be a cause, it would not be true that A, by increasing the risk that B will suffer C by making D, will cause or has caused C by making D. Now, it must be taken into account that not because D is not the cause of C, A is not liable to B for making D and for impairing his interests. There have been cases in which the causation requirement is interpreted more broadly and importance is given to the incorrect conduct of the defendant, in increasing the risk (e.g. *Fairchild v. Glenhaven Funeral Services Ltd.*).

they can be used as a basis for determining the scope of normative impact on which others are burdened by being subject to risk.

#### IV. A POSSIBLE JUSTIFICATION

Now, while the burdens that one party imposes on another with the risk are relevant enough to suggest a legally relevant connection between them, other considerations moderate the interpersonal claims we may have. For example, although the extent of the risk may be determinable, the number of persons subject to it may be such that it is economically less burdensome for a representative of society (e.g. a public institution) or for those affected (e.g. a consumer association) to have the power to take legal action against who creates the risk. However, it is different not to give someone a direct legal remedy to exercise his or her right to certain security due to the implementation costs, than to directly deny someone the right to a certain level of security due to the costs of prevention. Only in the latter situation the interpersonal right against risk is fully denied, notwithstanding some arguments related to one's own morality that would prevent a particular right against risk. On their part, the theses appealing to contractualism arguments, focused on the interpersonal burdens arising from permitting or prohibiting a risk could also conclude that in some cases to prohibit or moderate the risk is excessive. However, such a view would be more favorable to the idea of a correlative right against certain risks, since burdens are not necessarily analyzed in terms of costs that are counterbalanced by benefits. It may be the case that a single person has strong reasons to object to the permission of a certain risk and to oppose in terms that lead to its prohibition or moderation.

Certainly, the contractualist perspective could provide an answer to the common criticism that a ban on risks implies to prohibit all kinds of actions and makes moral action by human beings impossible.<sup>68</sup> Firstly, a right against risk is not a right against all risk, but against those deviating from the acceptable standard according to the circumstances. Second, the eventual prohibition of a conduct would be applicable to others only insofar those conducts derive from the same type of activity, because within contractualism the advantages that activities have in general for the exercise of our freedom must also be considered valuable. In this order, not any action involving the risk of death, for example, should be prohibited, but only those conducts involving this risk that are part of

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68 WEINRIB (2017), p. 181.

an activity that could yield the same kind of advantages or benefits - distributed more or less equally - through a less dangerous course of action.<sup>69</sup>

The debate regarding the legitimacy with which judges would act if they were the ones to establish principles on when to permit a risk is inevitable. It would seem that the legislator is the one called upon to make such rules because he has been instituted to do so and he could be better informed about the relevant technical terms when regulating risk. But neither of these arguments is sufficient to undermine the idea of a judge distributing a right (and regulating risks, consequently).

On the one hand, it is known that a regulatory system that is complete should have a judge with enough authority to create a rule or interpret existing ones in such a way that he or she can issue a legal answer in situations that are not expressly regulated.<sup>70</sup> In this way, its power to create law is not exotic, but is part of a complete system of law. Thus, to interpret a rule protecting the integrity or autonomy of persons against the acts or conduct of others could be the basis for distributing such a right. On the other hand, legal proceedings are not unconnected with the technical information according to which a risk regulation is carried out by a legislative body. Therefore, there are enough mechanisms for introducing specialized information into judicial processes, so the judge could have sufficient epistemic tools to decide on the way in which a person is subject to risk.<sup>71</sup> The judge has no veto to the reasons the legislator has access to and the former is a rational subject who can inform himself as well. I do not intend to homologate the work of the legislator to that of the judge, but rather to highlight the distributive role the judge has respect to the rules of the law of torts.

Of course, at first it seems that drafting rules of conduct in a society would be better discussed among majorities or their representatives, so that all possible objections are put on the table. In general terms, this would support the idea that, given that so many factors are at stake in risk regulation, the judge should stick to what has been previously regulated about risk, leaving his creative powers only to cases of real legal gaps. However, there are two arguments that would reinforce the idea of judicial control over the risks regarding interpersonal interactions. These are arguments that have already been put forward by sociology and which could justify the idea of a law against imposing risks.

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69 Particularly, KEATING (2003) explore some safety standards for risk. Other similar due diligence principles are to be found in JAMES (2017), pp. 6-7.

70 PAPAYANNIS (2016), p. 221.

71 In this regard, VÁZQUEZ (2015).

The first of these arguments obeys the circumstances of contemporary reality. As it has been well pointed out from sociology, modernity implies to be under risks, due to the industrial processes - many times disproportionate - we experiment in a first modernity.<sup>72</sup> The idea of living under conditions of permanent risk or of possible severe or irreversible harm set a context in which it would be justified not to add greater burdens to us than those we already impose on ourselves. Additionally, we no longer seem to be ignorant about how we could achieve certain ends or obtain certain benefits by using less risky alternative techniques or means, but our advances in science have also allowed us to think of other less risky options that weaken the justification for the riskier ones.

Secondly, when distributing rights at the legislative level, there may be a serious disconnection between the interests of those subject to risk and the regulatory role that representative bodies in a society would normally have. Lobbies from large economic sectors exert pressure on legislators and control mechanisms, in the end blurring the democratic role played by people's representatives in the institutions of public power. This delegitimizes their role and justifies greater direct participation by those interested in regulating what affects them. Unfortunately, it is easy to find covenants between the public sector and private companies for ineffective non-risk regulation or "self-regulation" of risk,<sup>73</sup> or also the legislative omission to regulate a risk that is known to be devastating for those exposed to it.<sup>74</sup> These circumstances show a sort of failing democratic representation of certain legislative bodies, which may be evidence of a form of abuse by the State

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72 BECK (1992), pp. 10-15.

73 An example of a private self-regulation arrangement is found in the case of sweet beverage producers in Colombia, according to which they committed to adopt prevention practices for certain types of consumers [on this: "Brands of soft drinks and tea restrict sale to minors" (May 19, 2016). *Portfolio*, (retrieved from [www.portafolio.co/negocios/empresas/empresas-firman-pacto-vender-gaseosas-escuelas-primarias-496073](http://www.portafolio.co/negocios/empresas/empresas-firman-pacto-vender-gaseosas-escuelas-primarias-496073))]. Subsequently, there have been complaints of non-compliance with this arrangement [see: "Sugar drink companies violate sales agreements in schools" (May 23, 2019). *Liga contra el silencio*, retrieved from <https://ligacontraelsilencio.com/2019/05/23/empresas-de-bebidas-Azucaradas-incumplen-acuerdos-de-venta-en-colegios/>]. Other non-governmental organizations have also made similar complaints and have called for regulation of the risk generated by the producers of these beverages [in this regard: "We call for the implementation of front-end warning labeling on food and beverages of Latin America" (August 9<sup>th</sup>, 2019), *Dejusticia*, retrieved from <https://www.dejusticia.org/pedimos-implantar-el-etiquetado-frontal-de-advertencias-en-alimentos-y-bebidas-de-latinoamerica/>].

74 Another example for the Colombian case is the banning of asbestos. Despite the fact that the carcinogenic effects of this substance have been known since 1978, and that in other countries its use was prohibited since the end of the last century (Europe prohibited it since 1999 by Directive IP/99/572 of the European Commission), in Colombia it was only until the previous year, with the issuance of Law 1968 of July 11<sup>th</sup>, 2019, that prohibited its use

when regulating sufficiently the security that citizens have entrusted to it. In this order, tort law would seem to be a tool through which distributive adjustments can be made with respect to risk regulation, when the judge decides on the claims presented regarding a wrongful risky interaction between individuals. The judicial distribution of rights would contribute to the regulation of risk and would allow a constant improvement in the reasonableness of the rules by which we behave before others.<sup>75</sup> Of course, if the judge is also not a reliable institution that can be a counterweight to the other branches of power, no area of law could make up for such serious democratic shortcomings.

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and created a public policy for substituting this substance. In this regard, OBSERVATORIO DE REDES DE ACCIÓN COLECTIVA (2018).

<sup>75</sup> This type of argument considers the role of our moral intuitions in the design of our legislation and contextualizes the law of torts to one in which the regulatory institutions are deficient. PRIEL (2019, § 50 and 51) asks for such a type of argument to be developed in the wake of the work he discusses with Keating. This is only a small contribution to that discussion.

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