*Judge-made risk regulation and tort law: an introduction**

Elbert R DE JONG, Michael G FAURE, Ivo GIESEN and Peter MASCINI**

I. Tort law and judge-made risk regulation

Although the tale about tort law and risks is almost as old as time itself, the concept of judge-made risk regulation is an odd one out in the world of tort law scholarship. Traditionally, tort law practitioners and (most) scholars understand the tort law system as an individual dispute resolution mechanism with its very *raison d'etre* to do justice in a bipolar relationship between the plaintiff and the defendant.[1] According to this conception, tort law offers a victim the possibility to hold the wrongdoer accountable for his alleged wrongful behavior and when he or she does so, a civil judge allocates the responsibilities in relation to the risks involved between the proceeding parties.[2] The judge determines the extent to which the plaintiff *or* the defendant is ex ante responsible for the management of the risk and whether the defendant ex post has to compensate the victim for the costs of the negative consequences of a risk that has materialised.

Central to the concept of judge-made risk regulation is,[3] first, the acknowledgement that tort adjudication may also have implications transcending the legal and non-legal interest of the litigating parties; this is indicated by the term "regulation" in the concept. The "risk" part of the concept indicates that judgements may also affect prospective behaviour and that tort law is not only an instrument for the post hoc compensation of wrongful behaviour. In other words, the concept of judge-made risk regulation indicates that a civil judge in a certain way also operates as a "semi-regulator".

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** Dr ER de Jong is Associate Professor at Ucall. From April 2017 to April 2018 he is a visiting fellow at the Institute of European and Comparative Law of Oxford University, funded by the Dutch NWO program Rubicon. Professor MG Faure is Professor of Comparative and International Environmental Law at Maastricht University and Professor of Comparative Private Law and Economics at Erasmus School of Law. He is also director of BACT. Professor I Giesen is Professor of Private Law at Utrecht School of Law, member of Ucall and research director of Utrecht School of Law. Professor P Mascini is Professor of Empirical Legal Studies at the Erasmus School of Law and director of BACT.

[1] See eg P Cane, "Using Tort Law to Enforce Environmental Regulation?" (2002) 41 Washburn LJ 427, 466, and the contributions of Kysar and Loth to this special issue, as well as E Weinrib, *The Idea of Private Law* (Oxford University Press 2012) 3.

[2] T Honoré, *Responsibility and Fault* (Hart Publishing 1999) 79.

[3] See also ER de Jong, "Private Law at the crossroads: judicial risk regulation in the context of health and environmental risks" in M Dyson (ed.), *Regulating Risk through Private Law* (Intersentia 2018).

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With this we mean that tort adjudication may have all sorts of implications for standard setting, monitoring and enforcement: the filing of a law suit may signal that an issue is contested, the ruling may influence perceptions of what conduct is considered "reasonable" and as such may amplify social norms, and the evidence that is taken into account by the judge in a lawsuit may inform policy makers and the public in general and as such may contribute to public debate and policy making. This means that civil judges need not necessarily set general standards in order for their judgments to have (significant) regulatory impact. Testing whether or not a defendant – which can also be a governmental body – is liable, can also indirectly impact regulation. Decisions by the judge in a tort case could lead to new or more stringent public regulation. It is for this reason that we focus on the civil judge as a "semi" regulator.

Recently, the concept of judge-made risk regulation has drawn particular attention as an instrument to redress alleged failures of governmental risk regulation. A most striking example of such judicial risk regulation is the famous but also contested Dutch *Urgenda* case. In that injunction case the District Court of The Hague ordered the Dutch State to cut its greenhouse emissions by 25% in 2020 compared to its emission levels in 1990. The legal basis for this duty of care was the doctrine of hazardous negligence.[4] Some experts expect that the Dutch government will win their appeal to the *Urgenda* case. Should this happen, then this lawsuit may still have had important consequences that exceed the issues at stake in this particular case. Besides, in 2017 in preliminary relief proceedings a civil judge ruled that, on the basis of a European directive, the Dutch government has to come up with an improved plan for air quality. In the proceedings on the merits the claims was, however, dismissed.[5] This decision was made in reaction to a lawsuit that the interest group "Milieudefensie" had filed, which was paid with crowdfunding. The success of the first *Urgenda* case may encourage others to file other lawsuits against the Dutch government for failing their duty of care.

In addition, through claims for damages dealing with public authority liability or private actor liability, tort adjudication also has regulatory meaning. This effect is commonly accepted as a regulatory effect of the tort law system, which we will address below.

Starting from the insight that judicial risk regulation *in fact* takes place and that certain types of litigants, particularly interest groups, do use the tort law system for its regulatory impact and not necessarily for the purpose of individual dispute resolution, this special issue's emphasis is on the *legitimacy* and *suitability* of civil courts to operate as risk regulators. Before we discuss the major findings (Section IV) of the contributions in this special issue, we first address the central elements of the concept of judge-made risk regulation (Section II), then we provide some reasons why judge-made risk regulation is in the spotlights (Section III) and extract some of the questions that one then arrives at (Section IV). In the last section we (briefly) touch upon the meaning of the concept of judge-made risk regulation for future scholarship in the area of tort law and risk governance (Section V).

[4] District Court of The Hague, 24 June 2015, ECLI:NL:RBDHA:2015:7145. See, for a description of this judgment in light of judge-made risk regulation, ER de Jong, "Dutch State Ordered to Cut Carbon Emissions" (2015) 6(3) European Journal of Risk Regulation 448 and see Loth's contribution to this issue for an analysis of the legitimacy of this judgment.

[5] District Court of The Hague, 7 September 2017, ECLI:NL:RBDHA:2017:10171.

II. Three regulatory characteristics of tort adjudication

According to De Jong[6] tort cases can have regulatory implications in at least three ways.[7]

First, by deciding cases courts set standards. Although court rulings primarily have binding force between the litigants, courts also set precedences that determine the legally-required behaviour of non-litigants that, for instance, belong to the same industrial sector. Moreover, by deciding cases courts are performing an educational function:[8] court rulings provide society in general, policy makers and operators with guidance on the legally-required conduct and the interest that receive legal protection. Judicial decision-making leads to norm amplification, problem signalling, and the legal (de)legitimising of the way actors in society deal with risks.[9]

Second, tort adjudication could, as either an unintended or intended side effect, in fact affirm or alter the behaviour and/or risk policies of private actors and public authorities. A striking example of this effect of tort law is provided by Doug Kysar. In his contribution he discusses the successful nuisance litigation against the air pollution by an aluminium facility, in which the tort system "achieves a remarkable and underappreciated risk regulation effect". This single case led to proceedings against other aluminium facilities throughout the US. Moreover, as a result of this litigation, scientific understanding and public concern regarding pollution increased and it ultimately led to the passage of major national air and water pollution legislation in the US. In the end the litigation made smelting facilities ensure that their operations incorporate the best environmental and technological practices.

Lastly, central to the concept of judge-made risk regulation is the recognition of the fact that tort adjudication also affects the non-legal interests of litigants *and* third parties. In other words, court rulings can have extra-judicial effects, such as influences on the availability and costs of insurance, the availability of public funding for achieving policy objectives in case of public authority liability, or the willingness of actors to bring new products to the market and the implications of courts rulings for product prices.

III. The rise of judge-made risk regulation

The finding that tort law has regulatory implications as such is not world shocking. That begs the question why this journal should focus on judge-made risk regulation just now. It is clear that attention has been drawn to this theme because of high-profile cases dealing with alleged failing government risk policies, such as the *Urgenda* case or cases on air pollution policies in several European jurisdictions. But there are broader developments in the academic and socio-legal context in which tort law operates that makes the concept of judge-made risk regulation and the analysis of the role of

[6] See De Jong in this special issue.

[7] One could think of the following type of procedures: a request for an injunction against a public or private actor, public authority liability, judicial review of public acts, or private actor liability.

[8] See also AM Linden, *Canadian Tort Law* (5th edn, Butterworths 1993) 22–24, who speaks about the ombudsman function of tort law.

[9] See Kysar in this special issue.

the civil courts as risk regulators of considerable relevance to both academics and legal practitioners.

First of all, the retrenchment of welfare states and austerity policies have made some (tort) scholars argue that tort law provides, or at least should provide, an instrument to redress alleged failures of the government in regulating risks in order to protect larger parts of society against health and environmental risks.[10] Tort law would be helpful in overcoming problems that governments encounter when regulating risks, such as scientific uncertainties, lobby practices, lack of means and public opposition. The question, however, remains whether and to what extent these are also factors that undermine the regulatory potential of tort law and the capability of a judge to operate as risk regulator.

Closely related to the foregoing, but perhaps even more important, is the acknowledgment by governments of the shortcomings of traditional command and control regulation on the one hand and the tendency to use private enforcement as a regulatory mechanism to overcome these shortcomings on the other. This development is embedded in a broader development in (European) legal systems to favour private enforcement and in that way to use private law as a mechanism to promote public interests. As a consequence, one can expect that the regulatory effects of tort law, as described in section II, will only become of more importance. However, as will be discussed by De Jong and Kysar, from a regulation perspective private enforcement through tort law also has its drawbacks: eg the specific case at hand might not be representative for the broader problem and judges might lack the information and specialism needed to get a clear overview of the regulation problem.

In addition, the broad and still increasing possibilities for collective redress for mass harm and public interest litigation in several civil law and common law systems cannot be left unnoticed, since court rulings in such proceedings by nature transcend the interests of the litigating parties or are relevant to larger groups of litigants and hence have regulatory implications. Moreover, especially in public interest litigation cases, interest groups essentially are using the tort law system for its regulatory purposes, since they aim to change the *status quo* in relation to risk policies of corporations or the government.

Lastly, the above-discussed regulatory implications of tort law are of increasing importance due to the nature and extent of health and environmental risks that might give rise to tort law litigation. Risks are present in many aspects of our daily and working life. Particularly, the potential risks of new technologies, such as biotechnology, robotics or nanotechnology, are present in many legal relationships, such as producer-consumer, government-civilians and employer-employee. Given the potential societal impact of judicial decisions that relate to such risks and the precedents such rulings set, such decisions might de facto have regulatory implications, although the extent to which this is actually the case depends of course on the content of the specific judicial decision dealing with these risks.

IV. Perspectives on judge-made risk regulation

The foregoing raises the question how these regulatory effects of tort law should be appreciated. Although judge-made risk regulation takes place in many civil law and

[10] See eg J Spier and U Magnus, *Climate Change Remedies* (Eleven International Publishing 2014).

common law jurisdictions,[11] it is still unclear what the concept of judge-made risk regulation implies for the understanding of the functioning of civil courts and their decision-making process in law suits involving risk and uncertainty. Next to this, the question arises whether and under what conditions tort law is a legitimate mechanism for risk regulation, given the foundations of the tort law system. In other words, is risk regulation a legitimate goal of tort law or should it merely be conceived as tort law's (beneficial) byproduct? Both issues will be addressed in this special issue more in depth. The main findings will be discussed in the following two sections. The first question relates to the functioning of the courts in cases involving (regulatory) risk problems.

1. The functioning of courts as risk regulators

Central to the concept of judge-made risk regulation is that the tort law system generates norms and incentives that are not only relevant for the parties to the proceedings, but also for third parties. Since courts must decide the cases that are brought to them, the issue to them is not whether or not to engage in decisions that (might) have regulatory implications, but *how* to engage.

In his contribution De Jong deals with this question. His starting point is that tort law adjudication in situations of uncertainty and risks involves the possible occurrence of a false positive (ie accepting liability for a non-existing risk) and a false negative (ie denying liability for a real risk). False positives and false negatives have adverse consequences for the parties to the proceedings but – bearing in mind the regulatory effects of tort adjudication as described above – potentially also for non-litigants. One could think of errors related to over- or under-compensation, litigation costs, over-regulation (eg due to case law that amplifies too stringent norms and leads to excessive care) or under-regulation (eg case law that generates incentives for ostrich-like behaviour with respect to risks and uncertainty). This is referred to as a "chilling effect": the fear for negative consequences (like civil liability) could prevent regulators from issuing effective regulation. In light of the regulatory implications of tort law and the rise of public interest litigation and collective redress for mass harm, the relevance of considerations transcending this bipolar relationship is increasing. De Jong speaks about multi-polar reasoning. In fact, in several countries courts already take regulatory and multipolar considerations into account. However, as De Jong discusses, the possibilities for courts to engage in multipolar reasoning are restrained by the bipolar nature of tort law which gives rise to information and specialism deficits, which he illustrates by referring to issues in relation to setting the standard of care and examining causation.

Particularly in areas of technical or scientific complexity questions about the capacity and legitimacy of courts to set (regulatory) standards arise. In her paper, Lee deals with the

[11] See inter alia WK Viscusi (ed.), *Regulation through Litigation* (American Enterprise Institute–Brookings Institution 2002); AP Morris, B Yandle and A Dorchak, *Regulation by Litigation* (Yale University Press 2008) 1; B Ewing and D Kysar, "Prods and Pleas: Limited Government in an Era of Unlimited Harm" (2011) 121 Yale Law Journal 350; P Luff, "Risk Regulation and Regulatory Litigation" (2011) 61 Rutgers Law Review 73; MG Faure, "The complementary roles of liability, regulation and insurance in safety management: theory and practice" (2014) 6(6) Journal of Risk Research 689. See, in relation to Dutch courts, ER de Jong, "Private Law at the crossroads: judicial risk regulation in the context of health and environmental risks" in M Dyson (ed.), *Regulating Risk through Private Law* (Intersentia 2018); ER de Jong, "Rechterlijke risicoregulering bij gezondheids- en milieurisico's" [Judge-made risk regulation pertaining to health and environmental risks] (2015) Ars Aequi 872.

way in which civil courts construct norms of behaviour in cases involving complex risks and uncertainties. By taking the *Urgenda* case and asbestos case law in England as illustrations, she argues that on the one hand courts confer enhanced authority on certain knowledge claims and thereby shape legitimate scientific facts, whilst these knowledge claims on the other hand simultaneously enhance the legitimacy of judicial fact finding and standard setting. In other words, courts construct serviceable truth in the process of seeking it: the legitimacy of science and of law is mutually constitutive. This analysis provides valuable insights into how courts operate when standards of behaviour are ambiguous or contested and also raises questions about the legitimacy and adequacy of this process.

2. The legitimacy of judge-made risk regulation

The legitimacy of judge-made risk regulation can be assessed from several perspectives, such as law and economics, civil recourse theory and conceptions of the separation of powers doctrine. Interestingly from the several perspectives addressed in this special issue, the operation of civil courts as risk regulators can be legitimised on different grounds and arguments. However, from a law and economics perspective it is considered less problematic to assume that tort law may have direct regulatory effects by deterring behaviour and distributing risks than it is from the other perspectives, which use as their starting point that adjudication of private disputes is geared toward settling matters of right and responsibility within a particular, localised relationship rather than toward the setting of aggregate public goals. Consequently, the latter perspectives tend to focus on the indirect impact of tort law on risk regulation. This difference also determines whether it is deemed desirable or not that civil courts take their functioning as risk regulators into account at all when deciding specific disputes involving risks and uncertainty.

Starting from the civil recourse theory[12] Kysar argues that "[t]he justification for tort law in the regulatory state must rest on its role as a mechanism for imposing obligations of repair on the basis of ideas of personal responsibility," not on its supposed regulatory effects.[13] However, as he illustrates by a case example on nuisance litigation, the tort system *does* in fact play a significant role in the governance of risk and achieves a remarkable and underappreciated risk regulation effect. It does so, however, precisely by focusing narrowly on the traditional task of adjudicating alleged wrongs between private parties. The regulation effects are thus a beneficial by-product of tort law.

Loth also accepts that traditionally the tort law system is not understood in terms of its regulation effects, but he argues that the operation of civil courts as risk regulators can be legitimate, ultimately depending on the perspective one takes. According to Loth the legitimacy of the court participating in societal risk regulation depends on the position of the court, the tools of the court, and the attitude of the court. In other words, they have their roots in constitutional law, civil (procedural) law, and professional ethics respectively. In constitutional law it makes a fundamental difference whether one takes a national or transnational approach to tort law. In civil (procedural) law the justification of risk regulation is not to be found in the traditional paradigms of

[12] See Kysar in this special issue. See also JCP Goldberg and BC Zipursky, "Tort Law and Responsibility" in J Oberdiek (ed.), *Philosophical Foundations of the Law of Torts* (Oxford University Press 2014) 17.

[13] Cane, supra, note 1.

substantive private law – the deontic and the functional paradigm – since the one justifies too much, while the other stops short. We may find the answer in civil procedural law, though, since courts not only see themselves as civil litigators (the traditional view), but as part of the political decision-making process (the public life conception of civil adjudication). Both constitutional and civil (procedural) law principles may be interpreted in an activist manner or with restraint, thus resulting in a broad or a restrictive interpretation respectively. When interpreted in an activist manner, they perfectly legitimise courts to correct failing government´s policies if individual rights are being infringed. From this perspective the maintenance of a system of checks and balances on a national, supra-national and global level requires courts to restore the balance if and when it is disturbed, by offering legal protection against failing policies.

Law and economics scholarship[14] highlights that tort law contributes to social welfare, in addition to its goal of individual dispute resolution. The legitimacy of tort law as a risk regulatory mechanism is based on its ability to contribute to "optimal" risk regulation; a situation where the risks of an activity are regulated to allow for a socially optimal level of the activity.[15] Adjudication via the civil court is seen as a public good: the (government subsidised) judge creates opinions in which risks are regulated and information is provided to the public at large, beyond the parties involved in the dispute; this aspect of adjudication is considered as a positive external effect. With respect to *judicial* risk regulation, the central question for a law and economics scholar correspondingly becomes: under what conditions should one favour judicial risk regulation above governmental risk regulation, and vice versa? Van Zeben's article outlines factors identified by law and economics scholarship as relevant in determining the relative strengths of judicial versus governmental risk regulation. These factors include, inter alia, the goals of the regulation (eg prevention or compensation); the characteristics of the risk involved; the parties to be regulated and to be protected; the possibility to deal with the lack or the availability of information at the side of the judge or the regulator; the costs of litigation versus regulation and the (expected) efficiency in achieving the particular regulatory goals through either litigation or regulation. Taking these factors into consideration provides additional extra-legal criteria against which to judge the legitimacy of judicial risk regulation.

V. To conclude...

An important general insight that comes out of this special issue is that the tort law system is inherently part of the risk regulation landscape, and vice versa. For scholars working in the area of risk governance and risk regulation, this implies that the idea of tort law as a regulatory device adds a new perspective to their object of analysis, in addition to more common instruments such as private regulation and public law. For tort scholars this means that risk regulation as an area of study has entered their

[14] For foundational work, see R Coase, "The Problem of Social Cost" (1960) 3 The Journal of Law and Economics 1; G Calabresi, "Some Thoughts on Risk Distribution and the Law of Torts" (1961) 70(4) Yale Law Journal 499; eg R Posner, *The Economics of Justice* (Harvard University Press 1983).

[15] S Shavell, "Liability for Harm versus Regulation of Safety" (1984) 13(2) The Journal of Legal Studies 357. See also Faure, supra, note 12.

domain. Tort scholars will increasingly have to realise that decisions with respect to risk regulation have consequences that go beyond the interests of the parties involved in the dispute. Adjudication in risk-related cases makes the judge a "semi" regulator. This obviously has important consequences for the nature of adjudication. As a downside to all this one needs to be aware, as the concept of judge-made risk regulation also makes clear, that the socio-legal risk regulatory landscape and certainly also its deficits is then also entering the tort law system and can influence the nature of tort adjudication. It is this interaction between regulation and tort law that makes judge-made risk regulation such a relevant and timely phenomenon to study for scholars working in both areas.