**Risk Revolutions in Private Law**

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Genuine revolutions within private law appear to be thin on the ground, at least when taking the ‘longer view’.[[1]](#footnote-1) On some accounts, nothing deserving the title can be identified at all,[[2]](#footnote-2) and the story overall seems to be one of continuity and consistency, or at least of repetition.[[3]](#footnote-3) In seeking revolutionary moments in private law, this chapter turns instead to the influence in and on private law of much more general ‘paradigm changes’.

This move might raise suspicions: does the choice to focus in this way tend to devalue principled or internal accounts of private law?[[4]](#footnote-4) It is suggested that this focus raises pertinent questions which need not be perceived as threatening to the integrity of private law. For example, what if changes in society and styles of governance[[5]](#footnote-5) give private law new and no less important roles to play compared with its past? Could private law contribute to such changes, or form part of them, and if so is there a danger that this will take place without serious debate by legal scholars? In marked contrast to private lawyers’ traditional emphasis on continuity, we might consider John Braithwaite’s suggestion, in the context of shifting styles of regulation, that ‘[a] key to progress is to keep constructing new paradigms that sweep across the disciplines in ways that are responsive to the new realities of the world, but that fade, like Keynesianism, when those realities change’.[[6]](#footnote-6) It is unlikely that private law could remain insulated from such broad changes, particularly when they affect regulatory styles. Does private lawyers’ focus on internal patterns of continuity and consistency therefore risk missing significant paradigm changes — in the context and function of private law?

This chapter addresses such questions by exploring the relationship between ‘risk revolutions’ and private law. In doing so, it examines the relationship between the development of private law, and broader societal changes which, in this instance, have already been widely described as paradigm-changing. In debating the relationship between private law and broader dynamics and change, the chapter does not assume that private law is a passive recipient of external developments: significant social changes might engage and even mobiliseprivate law, and private law may make a distinct contribution to such changes.

I will suggest that private law has been directly and indirectly affected by broad developments in societal approaches to risk, and that it still is and will continue to be. While statutory developments form an essential element of ‘private law’, I will suggest that the influence of these broader developments also affects private law as it is developed in the courts. Some of this influence, historically, is clearly documented and subject to a good deal of consensus; though its nature and extent are certainly controversial. More recent changes however are more diffuse and their nature, let alone their impact, is harder to discern. These changes tend, I suggest, to raise the question of the extent to which private law contributes to, and indeed helps to constitute, society’s evolving responses and approaches to risk, security, and responsibility.[[7]](#footnote-7) A contributing role for private law seems more likely given observation of the increasing decentralisation of risk management and rise of meta-regulation;[[8]](#footnote-8) rhetorical affirmation of a clear distinction between ‘public’ and ‘private’ despite observable blurring of the boundary between these;[[9]](#footnote-9) and rebirth of uncertainty and individualised responsibility.[[10]](#footnote-10) All of these have been part of latter day depictions of ‘risk revolution’ and indeed of regulatory developments more generally.[[11]](#footnote-11) If these are features of more recent risk (r)evolutions, does private law help to shape evolving societal responses to risk, and to negotiate the balance between risk, security, and responsibility?

The chapter falls into four parts. Part I introduces the key notions of security and responsibility developed in the chapter, and offers an overview of ‘risk revolutions’ for the purposes of the discussion here. Part II focuses on a first alleged paradigm shift concerning risk, which I refer to as a ‘security revolution’, and its potential impact on private law. Part III explores an apparent reversal of fortunes in societal conceptions of risk from the latter part of the twentieth century onwards, and the apparent revival of both ‘responsibility’ and uncertainty, with attendant changes in regulation and governance: whether this is correctly seen as a new revolution or not, what is the nature of this change and of its likely effect on private law? Part IV asks whether there is any evidence, in tort law in particular, of the influence of more recent ‘revolution’.

1. **Risk Revolutions and Private Law**
2. Security and Responsibility

When interpreting ‘risk (r)evolutions’ and their impact on private law, this paper will use two additional labels, namely ‘security’, and ‘responsibility’. An initial risk revolution is labelled here as a ‘security’ revolution; later (and earlier) developments are described as more centrally engaging ‘responsibility’. ‘Security’ in this context refers to the state of being protected from the consequences of adverse risks. This may be very general (producing a sense of or perhaps expectation of security); or it may be specific (security against particular risks may be put in place, for example through contractual terms, or insurance). ‘Responsibility’ in this context refers principally to bearing the consequences of risks and particularly of risk decisions; it may also imply a duty to hold safe from risks (and therefore to provide security); or to act responsibly in relation to risks (for example, to minimise those risks).

These notions are to some extent in tension; but it is important to be clear that the two are not mutually exclusive social phenomena. Rather, notions of security and responsibility are and have been mixed in different ways as notions of risk evolve: notions of responsibility are affected by the growth in security techniques, while the delivery of security is affected by changing notions of responsibility. The notions are nevertheless commonly used to typify very different responses to risk. Thus, changes in the function of risk may be interpreted as turns towards or away from security; and turns away from security are often justified or explained in terms of responsibility. Developing responses to risk may thus be typified in terms of their balance between security, and responsibility; equally importantly, they may be explored in terms of the *types* of security and responsibility that they engage.[[12]](#footnote-12) In Part IV, it is suggested that the cost of security is increasingly an issue of concern in private law; and that this can be observed in the courts, as well as in legislation.

1. Risk Revolutions: a brief overview

Changing social responses to and uses of risk have a strong claim to be called ‘revolutionary’. So far as a first and widely recognised ‘risk revolution’ is concerned (explored in Part II), it is particularly common to use the language of paradigm shifts. This is the shift identified with the growth of insurance, and (linked with this) the birth of social security and the welfare state, from the turn of the twentieth century onwards. Writing from a Foucauldian perspective, Francois Ewald has described the twentieth century as displaying a dominant paradigm of ‘solidarity’. This, he has argued, achieved a radical transformation from a (proposed) nineteenth century paradigm of ‘responsibility’.[[13]](#footnote-13) Sociologists of risk have described a ‘first modernity’ during the same period, where security was to be based on a ‘scientific utopia’, making the unsafe consequences and dangers of decisions ever more controllable.[[14]](#footnote-14) If such consequences could not be avoided, they could be compensated: risks could be spread.[[15]](#footnote-15) ‘Late modernity’ on the other hand is associated with some features of the further risk revolutions discussed in Part III.[[16]](#footnote-16) Similarly, but focusing much more narrowly on employer liability, the end of the nineteenth century has been said to have seen a shift, from ‘free labor’, to a ‘new paradigm of risk and insurance’.[[17]](#footnote-17) Between them, these are broad observations. It might be noted that they also directly implicate the law of liability. Ewald’s nineteenth century paradigm of responsibility is not only exemplified but partly constituted byapproaches to contractual risk allocation, and this is what is superseded in the new paradigm of solidarity; Witt’s shift from free labour to risk and insurance describes the birth of workers’ liability; and the ‘scientific utopia’ identified by Ulrich Beck is one in which foreseen and planned liabilities can transform risk exposure into risk calculation because prevention can be supplemented with compensation.

In sum, it is widely accepted that there has been at least one revolution or paradigm shift in societal responses to, or uses of, risk, emerging at the turn of the twentieth century and strengthening over the following decades. And the initial paradigm shift of so-called ‘first modernity’, it is argued, plainly engages private law. Indeed, it is partly defined by changes in private law, and by public uses of liability.

But this chapter’s title adopts the plural form of ‘revolutions’, and it is widely accepted that the first paradigm shift is not the end of transformation in the social significance of risk. Scholars have identified further paradigmatic challenges engaging the social role of risk. It is tempting to see some of the new paradigmatic challenges as returns to the nineteenth century and a dominant ‘responsibility’ mode,[[18]](#footnote-18) inviting a more cyclical than binary notion of ‘revolution’, in which the turning wheel returns to its initial position. For lawyers, attached to the notion of stable concepts, this may be particularly tempting.[[19]](#footnote-19) But we should not assume too much from similarities in concepts and rhetoric, such as the resurfacing interest in ‘individual responsibility’. Most particularly, it is unlikely that what has been learned, achieved, or simply expected through the initial risk revolution could fail to influence the present shape of the law. I argue in Part III that it does not fail to do so: the influence of the security revolution continues to be a definitive frame for current questions.

What of the role of risk in our own times? Notions of ‘risk’ retain their vitality and continue to play a key role in theories both of evolving ‘modernity’, and of regulatory or governance styles. Doubtless, present changes are harder to discern than those of the past: we are faced with richer sources of information and observation perhaps, but much less sense of the pattern of developments. More recent changes have been seen in terms of the return of uncertainty (or new appreciation of its inevitability and significance);[[20]](#footnote-20) in terms of a resurgence of individual exposure to and responsibility for risk (the limits of socialisation of risk);[[21]](#footnote-21) or in terms of a new willingness to ‘embrace’ risk and its possibilities.[[22]](#footnote-22) Moreover, further new uses of risk techniques give rise, in turn, to new risk challenges. Among these might be counted the extension of financial risk management to provide social goods (mortgages, pensions and the costs of care), which would previously have been the concern of the state. The hazards of this pattern of privatisation were dramatically exposed by the crash of 2008, but the trend continues. Societal dependence on risk management by an ‘expert’ private financial sector could itself be regarded as revolutionary. More recently still, there has been identified a further risk revolution whose watchword is not uncertainty nor the departure from ‘laws of large numbers’, but the availability and exploitation of even larger numbers to predictive effect: this is the revolution signified by the algorithmic mining of ‘big data’.[[23]](#footnote-23) That is a development whose challenges for private law this chapter cannot begin to attempt to meet. However, it underlines not only the centrality of risk to society, but also the way that large challenges associated with risk ‘revolutions’ continue to occur, both for the law and for society more broadly.

1. Risk in private law

Risk, then, has been identified as being at the core of social paradigm shifts over the last century. What of private law? Private law discourse without reference to risk is almost unthinkable. Of course, it is by no means obvious that the term ‘risk’ is used in private law, either generally or in specific areas, in the same way that it is used in risk society or regulatory theory, and plainly this complicates the inquiry in this chapter. Indeed, Pat O’Malley has argued that the law of contract is suffused not with ideas of calculable risk, but with notions of uncertainty.[[24]](#footnote-24) On this basis, O’Malley suggests that private law actors — whether individual or corporate — might be seen as ‘entrepreneurs of an uncertain future’, not as self-regulating consumers of expert-driven risk analysis. For O’Malley, one effect of this would be that the presence of incalculable risks may not induce the paralysis of decision-making that ‘risk society’ theory predicts — an important indicator that the logic of private actors tolerates solutions beyond the bounds of what is calculable. While the language of O’Malley’s inquiry may be unfamiliar to most private lawyers, it is worth holding the thought that notions of ‘risk’ in private law are not equivalent to fully calculable risks; and that they are ‘local’ to private law, not merely transposed from public policy. At the same time, they may remain effective means of governance.

Plainly this potential mismatch in language makes the job of identifying the role of risk in private law, and thus the possible influence of risk revolutions, much more complex. With this caveat, we can however note the pervasive presence of the language of risk in private law. For example, contracts are routinely analysed in terms of their allocation of risk to one party or another; remoteness of damage in tort has been analysed in terms of a so-called ‘risk principle’;[[25]](#footnote-25) and ‘voluntary assumption of risk’ is both a recognised defence in the law of tort, and a controversial means of assessing the extent and limits of tort duties. In occupiers’ liability, it has been clarified that there is no protection for trespassers against obvious risks;[[26]](#footnote-26) the field of employers’ liability is suffused with duties of risk assessment both through regulation and now at common law;[[27]](#footnote-27) and the ‘development risks defence’ is the most debated feature of the European products liability regime,[[28]](#footnote-28) effecting an overt allocation of costs between consumer and producer (rather than an allocation which is the result of applying some other more general concept).[[29]](#footnote-29) Though these notions of risk have very different origins, it might be argued that use of ‘risk’ terminology has more recently been on the rise in private law doctrine, but most particularly the law of tort, and this is sketched in Part IV. There, I will suggest that more recent uses of ‘risk’ in private law are associated with some distinctive ideas. The overall question is whether there is any link between these two things: the broader social developments in ‘risk’ and regulation roughly sketched in this Part; and evolution in the internal discourse within private law using the language of risk on the other. Do these phenomena appear to track one another in different time periods?

1. Risk and regulatory change

It is also important to note a deep link between regulatory change, and ‘risk revolutions’. This is a significant element in the influence of such revolutions over private law not least because of the changing division between and function of what would previously have been perceived as the public and private spheres. This may in turn signal a changed role for private law. This section briefly introduces those regulatory changes and the role that scholars have identified for risk; later Parts will consider the place of private law in relation to these.

While risk and security were central to the emergence of the welfare state, risk has more recently been identified as also being a key element in the rise of the ‘regulatory state’ or ‘new regulatory state’.[[30]](#footnote-30) The regulatory state is said to have been marked by a ‘decentering’ of the state, increased privatisation, and a recommendation that governments should increasingly ‘steer but not row’, devolving practical implementation of policy while retaining policy control.[[31]](#footnote-31) This ‘has seen the state reduce its role as a direct provider but increase its role as a regulator’, with the creation of a panoply of regulatory frameworks.[[32]](#footnote-32) The rise of regulation in these forms has inherently led to an emphasis on risk, but inevitably, it plays a very different role from the one it played in the emergence of a centralised welfare or security state. While there is an emphasis on the division between public and private, inherent in the very notions of privatization and deregulation, in practice this division is blurred, since the deregulatory elements of the shift can be overstated: the emphasis is on managed self-regulation and on mechanisms of ‘steering at a distance’; though this may also mean perusal of internal management processes which would otherwise be perceived as private.[[33]](#footnote-33) At the theoretical level, risk management is intimately linked to these developments as a pervasive ‘technology of governance’[[34]](#footnote-34) which facilitates self-regulation; for example, risk is an integral aspect of ‘management based’ regulation, by which regulators seek to assess the risk management processes of firms, rather than assessing compliance on an individual level.[[35]](#footnote-35)

This Part has offered a brief introduction to key aspects of the argument in this Chapter. First, it has introduced the ideas of ‘security’ and ‘responsibility’ as they are used in the Chapter; second, it has offered an overview of the ‘risk revolutions’ which will be explained in more detail in Parts 3 and 4; third, it has observed the extensive use of notions of ‘risk’ in private law, and flagged that these notions though well-established may themselves be subject to evolution; and finally, it has outlined the close link between risk, and changing styles of regulation. The following two Parts explore successive risk revolutions and their implications for private law in more detail.

**II. A Recognised ‘Security’ Revolution**

It is widely understood that during the late nineteenth and early twentieth centuries, there were broad social changes enabled and inspired by techniques of ‘risk’. As we have seen, these developments have been recognised as achieving paradigm shifts and even as giving rise to the birth of a ‘first modernity’. Though it is doubtless tempting to be able to give an account of radical transformation, seismic changes plainly occurred: the birth of social security and emergence of the welfare state were among the most significant. The ‘Keynesian’ or welfare state has been identified as central in provision of security goods to citizens, and in defining the relationship between the citizen and the state; but also in the expansion of direct state provision and regulation.

These changes, it has been argued, were facilitated by advances in technical understanding of risk and regularity and their application to a variety of social problems.[[36]](#footnote-36) To a degree, this was a ‘scientific’ revolution led by new expertise. This form of technical understanding could, unlike more recent developments such as the algorithmic expertise of the financial sector, be readily comprehended and applied by government and policy makers. In essence, a collective and aggregating approach was developed which would allow risks to be shared through a range of means including social insurance, but also — at the same time — new liabilities. ‘Risk’ in this context refers as much to a set of techniques, as it does to exposure to uncertain adverse outcomes. In the hands of Foucauldian theorists, risk was and continues to be a technology of governing.[[37]](#footnote-37)

In this guise, ‘risk’ (as security) may appear to be at odds with other technologies of governing, traditionally associated with private law. State provision of security goods may be associated with the growth of public rather than private law, and with increasing ‘juridification’ or intervention.[[38]](#footnote-38) One crucial aspect of security technology which may be seen as encouraging and underlining this change is the selection of regularity and predictability across large numbers; in contrast to a focus on the individual case and its ‘rights’ and wrongs. This is a technique shared by both insurers, and policy-makers (for example in the extension of social insurance to a range of life risks). The effective approach is to manage populations and aggregates. This might be thought a paradigmatic shift likely to weaken the impact of private law or to compromise its character. What then was the impact of the security revolution on private law? Did it simply bypass private law and replace it with more ‘public’ and collective solutions?

Private law has not been superseded in a wholesale way, though it has been argued that in some spheres it ought to have been, as security could be more effectively and efficiently provided in other ways.[[39]](#footnote-39) To some extent this argument depended on challenging the privateness of private law; and this was achieved by pointing to its costs and their distribution, typically through the burden of insurance. At the same time, socialised theories of private law tended to focus on the supposed absorption of contract to tort, as though tort was the more ‘collective’ and welfare-oriented.[[40]](#footnote-40) One explanation of this move is that as the *context* of tort’s operation became one of risk technique — security style — tort adjusted to this context by absorbing some of its thinking. The other is through the link between tort and insurance which distributes the burden of its costs.[[41]](#footnote-41)

The ‘security’ revolution was largely occupied with distribution, collectivisation, and — in the broadest sense — ‘insurance’. This notably included the rise of social insurance and workers’ compensation,[[42]](#footnote-42) for example. The latter illustrates that there was space for new liabilities in the transformed landscape: liability was one of the techniques or responses applied, though it was plainly only one among others. Market insurance of these liabilities became the norm, so that distribution within an enterprise (the model of workmen’s compensation) was met by distribution beyond it.

In the UK, the transition to workmens’ compensation and social security could have marked the decline of tort; but it did not.[[43]](#footnote-43) Rather, it could be said that the transition fromindividualised risk, tocollective risk or insurance, was effective both within, and outside the law of tort. The pre-existing bar to employers’ liability under the ‘fellow servant’ or ‘common employment’ rule was itself based on an assertion about assumptions or allocations of risk, so that its removal could be perceived as part of a less individualised approach to risk. Similarly, prior to the Workmen’s Compensation Acts,[[44]](#footnote-44) employers’ liability had been carved out to a limited extent,[[45]](#footnote-45) but that statute was interpreted as subject to party risk allocation in employment contracts, at least where an employer’s compensation scheme was provided. Insurance of such liabilities was also created by the market, not by policy design, and it was created immediately.[[46]](#footnote-46) Both the loosening of prohibitions on employers’ liability, and the creation of workmen’s compensation, marked a change in the perception of risk and its relation to liability. One was a change permitting liability at common law, though with limited compensation; the other was a new liability premised on risk not fault. Was the nature of the change different, or similar? In theoretical terms, the two are very different, and in terms of the identity and fortunes of tort law as private law, these would appear to be opposite developments. But to those engaged in securing liability to workers; and to those providing insurance through the market; the two developments will have been seen as similar. From some important vantage points therefore, tort and non-tort solutions had common effects, and also shared the common ‘technology’ of compensation and insurance.

In the UK, at the height of the risk revolution, there were parallel systems for distributing and allocating risk. These included social insurance; workmen’s compensation until its abolition; private first party insurance; liability insurance; contractual allocation; and tort liability. Tort liability began to expand in the same period.[[47]](#footnote-47) And as it started to expand, tort liability also attracted liability insurance beginning with employers’ liability. Thus private law liability took a distributive turn in its *impact*, regardless of what was happening *in theory*. Where different forms of liability operated alongside one another, the differences in theory may have appeared less significant than the commonalities of effect. Similarly, the eventual abolition of workmen’s compensation in the UK in no sense marked a reversal of the distributive turn. Instead, it was part of a broadening in social welfare provision, and industrial injuries became the subject of state, rather than industry, provision.[[48]](#footnote-48)

This risk revolution is described here as a ‘security revolution’. This may need justifying in a number of ways. First, are security and risk contradictory terms? The answer given here is no, on the basis that ‘risk’ techniques provided the means to achieving solutions based on pooling or distribution; crucially, also, they provided the means to protection from uncertainty and its effects. Second, why is it appropriate to define this revolution as particularly concerned with ‘security’? Protection from specific life risks lay at the heart of the initial revolution, even if later, this began to be generalised. The application of techniques of risk to social problems appeared to enable the state to protect individuals from the uncertainties of significant life risks. On some occasions, it was openly the case that the new forms of security were alternatives to the market — that is, contract — providing security for those who *could not be expected* to provide it for themselves. Entitlement to income replacement was provided to one degree or another, rather than mechanisms of charitable relief or other support; even so, the tort measure of full replacement of what is lost stands out as exceptional.[[49]](#footnote-49) Using tort remedies to achieve security would therefore be something of an awkward fit, and this is one reason why tort was criticised as a component of the security state. Whatever the theoretical position however, tort became part of the broader set of security provision.

The emphasis on security is also illustrated by road traffic liability. During this same period, road traffic also became a key concern, and the most regular form of tortious liability was developing. In the UK, through the Road Traffic Act 1930, liability insurance for road traffic accidents became compulsory. What then explains the introduction of compulsory liability insurance? It is suggested that it was the need to avoid insecurity (uncompensated injury), that was the most significant motivator: the trigger was, again, vulnerability to injury from a known and understood risk, that would strike with regularity, but unpredictably. This development therefore embodies both the need to *secure*,or provide security; and the use of distributive capability through both liability, and insurance. If insurance was at this stage compulsory for roads *but not* for employers, that reflects the fact that drivers were acknowledged to be individuals who could not necessarily provide the required compensation: the liabilities *required to be secured*.But now, we are beyond the scope of covering distinct groups who cannot be expected to cover themselves;[[50]](#footnote-50) instead, we are looking to cover all those who are exposed to the risk of tortious harm arising from road vehicles. It is suggested that a different, and significant judgment is thus introduced: the *cost of security* should be placed with motorists not victims.

It seems unlikely that this was based on a judgment about moral ownership of the risks.[[51]](#footnote-51) More likely, it is a judgment about how, practically, security from the risks of road traffic could be achieved. Road traffic liability places the *risk* of injury, through liability, with negligent parties, and with their insurers; and it makes that insurance compulsory; it thus seeks to provide *security* to all those exposed to risk, while protecting those who may be liable, at the ‘tort measure’ (full compensation); and it evidently uses techniques associated with risk and insurance to achieve this. Behind this is a clear public policy mandate, to the extent that insurers by agreement with government will also cover liabilities of uninsured and untraced drivers.

1. Security revolution and the context of private law

We have seen that the security revolution implicated liability to some extent from the start. It led to new liabilities that superseded contractual analysis that had barred tort liability; and led to creation of rival types of liability in contrast to tort; it also led to insurance of liabilities either in practice, or through legislative mandate. At the same time, tort did not shrink, but grew; over a few decades, as it grew, it seems to have acquired a reputation for being the ‘collectivist’ branch of private law. Its norms were essentially social norms; and its effect, too, was increasingly distributive. In growing, its *immediate* context, through social security provision, workmen’s compensation, and insurance, was now one of distribution and of approaches which were in some sense collective, recognising common risks and broadly insurance-like solutions. Only in a very limited sense can this be described as an ‘external’ revolution. Certainly it is much broader than private law; but it operates in the *immediate* context of private law; and affected the social role of private law directly.

1. After-effects

How broad was the security revolution in private law; and how long did its effects last? It was as late as the 1970s (the period where the security revolution was about to be clearly superseded), that it most clearly started to be suggested that private law was increasingly purposive, collectivised and protective, and that tort would or perhaps had begun to swallow contract.[[52]](#footnote-52) Could it be argued that it was still the security revolution which continued to *inspire* expansion in tort liability, and perhaps the growth in status of tort at the expense of contract for several decades? Some have argued, in effect, that it was. In *Total Justice*,[[53]](#footnote-53) Lawrence Friedman proposed that in the United States, but also in all Western democracies to one degree or another, an ‘expectation of total justice’ had evolved, which was a chip off ‘a larger, more significant block’, namely the welfare state itself.[[54]](#footnote-54) In this process, developments that are public or private still point in the same direction. Friedman’s proposal was that the reduction of uncertainty and the increase in security in some fields leads more or less inexorably to demand for the same sort of development in other fields. This proposes that the expansion of security through not only public, but also private law is led both by demand, and by availability of techniques for reducing insecurity — primarily, in the tort field, insurance; but the very notion of duty to avoid harm should not be discounted. Allied with the techniques of uncertainty reduction is, according to Friedman, a growing ‘rights consciousness’. For Friedman, there is no great surprise that private law moves in step with broader developments: a shared consciousness permeates them both, and this is in effect the consciousness of the times, as social expectation will be expressed both by claims, and by the adjudication of those claims.

Of course, Friedman’s analysis may be incorrect, or at least, his claims may be exaggerated. What counts for present purposes is the existence of such a perception; and the proposal of a general shared consciousness that includes, but is much wider than, private law. More recent developments might put private law’s approach to risk and uncertainty into a more distinct or specialised realm.

Friedman’s proposals are consistent with a further significant feature of the law of tort during this period: its attachment to generalisation, not only to broadening liability, but also to generalising principles or concepts. Is this part of the same phenomenon, or not? Tort duties might naturally be seen as carving out areas of security. If tort is seen as protective, then the trend to generalise tort duties could be seen as part of a generalisation in protectiveness and security. The development of increasingly broad and general tort concepts, like the ‘neighbour principle’ and other uses of ‘reasonable foreseeability’,[[55]](#footnote-55) assist with this expansion: the whole (extended) era of security revolution appears, overall, to be one of optimism in the capacity of the law and its concepts to provide not only security, but rational development through appropriate legal concepts or principles, probably mirroring optimism in the potential for improved security in general. At the same time, rising tort damages were not perceived to be an insurmountable burden for defendants, because of the prevalence of insurance. Hence the common law development in *Donoghue v Stevenson*,[[56]](#footnote-56) in which it was thought logically compelling that there ‘must be’ a general principle to make sense of individual instances, is in harmony with the contemporaneous Road Traffic Act insistence on liability insurance. Indeed, between these two developments, the seeds were sown for considerable expansion in UK tort law.[[57]](#footnote-57) None of this is of course entirely logical: tort could have been seen as increasingly irrelevant with the growth of the welfare state. But instead, it took on a security function. The cost of this security only gradually became a reason for *restricting* the growth of tort.

1. **Backwards or forwards with a new risk revolution**

As we have seen, there has been wide consensus that a revolution in thinking placed risk techniques at the service of social welfare in the period explored above; and that this was associated with growth of the welfare state. Certainly this altered the context in which private law operated, and I have suggested that rather than shrinking, as might have appeared logical for a branch of private law, tort instead grew during the same period. Its internal principles, though apparently independent of governmental influence, nevertheless remained in tune with the expectations of the security state.[[58]](#footnote-58) The links between tort and insurance were multiple and again encouraged the sense that tort and the security state were in harmony. More contentiously, it appears that this process of growth and the influence of security expectations continued for some considerable time. Only towards the end of this period, perhaps, were the links with social transformation fully appreciated.

More recently, there has been a more diffuse, but still broad recognition that we have entered at least one new era where the social function of risk has altered in potentially revolutionary style. Further, just as the ‘security revolution’ was associated with change and expansion in legislation with possibly unpredictable reactions from or influences upon private law, so also changing societal approaches to risk have been closely linked with changing regulatory styles. Risk is a central concern of new forms of regulation and a core concern of regulatory theory. Again, this engages a change in the relationship between private and public domains, with potential to influence the response of private law. In relation to tort law in particular, ‘risk’ has become a more visible preoccupation and an increasingly significant part of the language of decision making. It will be suggested in Part IV that some of this is at the expense of more general concepts.

Putting a date on these changes is of course difficult. Friedman, as we have seen, thought private law worked in order to satisfy expectations of security in the 1980s; and it seems he had not altered his view in 1994.[[59]](#footnote-59) In the UK, however, both private lawyers and scholars of regulation have identified significant changes at the end of the 1970s, into the 1980s. Atiyah wryly acknowledged that his work on the decline of freedom of contract had been less than prescient given its publication a few weeks after the election of Margaret Thatcher to the office of Prime Minister, and resultant ascendancy of privatisation and contractual paradigms.[[60]](#footnote-60) John Braithwaite dates the rise of the ‘New Regulatory State’[[61]](#footnote-61) to the 1980s also. Both in private and public law,[[62]](#footnote-62) and in the UK and Australia, there is a commonality here in the supposed date of revolution or paradigm shift. Given what was said above about the role of general principles in the extension of security through tort law, *Anns v Merton* was the pinnacle of attempts at stating general negligence principles in the UK,[[63]](#footnote-63) giving a prima facie entitlement to security and a potential role to policy factors in restraining that entitlement. The fall of *Anns* and restriction of negligence duties in tort in *Murphy v Brentwood* by the end of the same decade, is consistent both with this identification of the period of revolution, and with a possible response from private law.

Unlike the security revolution, this further era of change is not necessarily premised on new discoveries about risk, at least not at the state or governmental level. But it may well reflect a belief that smarter approaches to risk can be developed through the expertise of the private, and particularly financial sector.[[64]](#footnote-64) Expertise, therefore, is devolved (and with it, it has been suggested, authority too).[[65]](#footnote-65) In part, the new direction may be said to be about the perceived limits of the use of risk, and of attainable security, either in practical, or political terms. At the same time, there is a recognition of the limits of state action and expertise in many areas, and this has been associated with decentralisation of governance to private actors or, more subtly, the blending of private and public roles: private actors may be charged with state functions, and at the same time state entities are required to adhere to market rationality. The state itself is seen, increasingly, as vulnerable and in need of protection. In this process, in which ‘governance’ happens much more diffusely and there is a blurring of public and private entities, it is widely suggested that a ‘risk management paradigm’ has become ‘an important framing construct’; and that ‘risk assessment and management have become central organising principles for many organisations and institutions’.[[66]](#footnote-66) Thus, risk management can be seen as part of the decentralisation of risk decisions, rather than part of the centralisation that marked the first security revolution.

At the same time, it is recognised that there are limits to the degree of confidence with which certain risks can be predicted: ‘uncertainty’, which is said to have played a diminishing role in the growing expectations of the security revolution, returns with a vengeance. It is recognised for example that risks are distributed partly over time, not only over cohorts; if greater risks are taken, this may be masked by the specialised nature of the expertise which sometimes devises and creates those risks, and does not always successfully control them. Equally, and importantly for the present theme, the *cost* of security in any general sense is recognised. Politically, this cost is attacked, generalisation of security questioned on social and ethical,[[67]](#footnote-67) as well as economic grounds — though it is suspected that the latter reason is really at the core. At the same time, protective treatment given to some classes of claimant is criticised.[[68]](#footnote-68) There is a growing rhetorical focus on responsibility, particularly the responsibility of individuals to take care of their own risks or to bear the costs of their own activities or choices.

Why is it suggested that this focus is ‘rhetorical’? ‘Responsibility’ may in part be a justification for declining support which is, in fact, the product of the recognised costs of security. Beyond that, it is not altogether clear that renewed emphasis on responsibility is intended to lead to individual exposure to harm — though there certainly are signs of a growing willingness to allow such exposure, and a political attraction to doing this so as to influence behaviour. This is captured in the idea of the ‘active welfare state’, attempting to incentivise productive behaviour through highly stringent responses to failure.[[69]](#footnote-69) A willingness — even intention — to create groups excluded from the provision of security is also clear.[[70]](#footnote-70) But in the domain of private law in particular, it is suggested that the debate is more typically one about *which* source of security is most appropriate to a particular case, and to what extent; and *who* bears responsibility for securing the interests concerned. The core instance of this occurs where a case is brought between two insurers, in the name of insured parties, to determine which insurer bears the loss; but there are also other instances, since state support or first party insurance continue to offer avenues for security. In commercial disputes, the tussle may concern attempts by insurers to deflect liability not to other insurers, but to uninsured parties.[[71]](#footnote-71) In these instances, ‘responsibility’ is particularly likely to be invoked. In all these respects, the difference between the position in the nineteenth century, and the position in the present era, could not be more marked, despite the appearance of a common focus on responsibility: neither (non-marine) liability insurance,[[72]](#footnote-72) nor free health care, social security payments, or state occupational pensions, were available before their development as constitutive parts of the ‘security revolution’. For this reason, more focus on ‘responsibility’ and an apparent re-emphasis on the ‘private’ should not mislead us into thinking that we are back to the position in the nineteenth century. The *context* of private law is fundamentally altered; and this should inform our understanding of the concepts and principles that are applied.

Such developments do not only occur at the practical level. It is suggested that the generalised concepts that advanced the security function of the law of tort through the preceding era are also under pressure. The more recent trend is for more modulated, though equally imprecise or opaque concepts to be deployed, permitting considerable differentiation between cases.[[73]](#footnote-73) At a mundane level, these concepts are better adapted to restriction of the growth of liability than their predecessors without open-ended recourse to some apparently ‘external’ notion labelled ‘policy’.[[74]](#footnote-74) More contentiously, they may direct attention to some of the issues of risk allocation in light of rival sources of security than those general principles could. In other words, they are better adapted to assisting the choice between different sources of security than broad general principles couched in notions of fault and foreseeability: they draw attention to risk, security, and the cost of security.

The continued growth of a body of private law, employing generalised ‘security type’ protective concepts and serving the increasing demand for security, sometimes at the expense of the newly vulnerable state, would appear inconsistent with a mode of decentralised governance or with the ideal of the responsible risk entrepreneur. Decision in accord with very generalised principles, particularly if focused on the fault of the defendant, may also be ill-suited to recognition of rival potential security sources. Underlining the political dimension of the set of changes described, in many jurisdictions, there has been movement to reform the law of tort — typically both reinforcing protection for government and re-emphasising individual responsibilities.[[75]](#footnote-75) It could be argued though that given the preoccupations of the regulatory state and its associated reliance on action ‘at a distance’, legislative reform of private law is not the expected paradigmatic response. These reforms forcibly alter those aspects of the law of tort which have become overly security-focused — or, from the reformers’ perspective, insufficiently responsibility-focused — and at odds with the direction of more recent risk revolution. But intervention in tort in this way is a centralised activity resulting from collective decision and, moreover, there are signs that such intervention is insensitive to the internal preoccupations of the regulatory domain that is private law. Rather than ‘restoring’ an earlier version of private law — as though this could be done without sensitivity to a changed context — it amounts to intervention introducing other political notions of responsibility. In the UK, this has not been typical of the development of tort law. Certainly, there has been no absence of political interest in the idea of responsibility and the possibility of ‘compensation culture’. But on the whole, tort law has itself *evolved* to exemplify restraint.[[76]](#footnote-76) Arguably then, it has become more suited to play its role in tune with the forms of governance sketched above, with notable restraint from at least 1990. Again, arguably, it is more closely in tune with these forms of governance than it ever was with the products of the security revolution. The participants in risk management who act as the litigants in private law;[[77]](#footnote-77) and the courts and lawyers themselves, may be seen as actors at a distance, steering risk more directly than central state agencies are able to do.

As we have already seen however, these developments do not amount to a general abandonment of security. Delivery of security through a multiplicity of potential means is combined with increasing emphasis on individual, as opposed to collective, responsibility. It is suggested that this is, increasingly, responsibility *for managing risks and security*. This includes avoidance of some blatant risks; but it would also include management of potential sources of security where risks are worth taking, or unavoidable adjuncts of chosen activities.

The hypothesis is that consecutive risk revolutions have left a complex relationship between security/distribution, and responsibility. This is likely to have both affected private law, and invoked private law in arriving at the current balance. Private law is not merely a recipient of external factors, but a component of their governance, and it helps to make or shape them.

It may be asked how these developments are thought to have come about. How do changes in private law come to ‘map’ broader or external developments? Perhaps the answer is partly offered by what has gone before in outlining the security revolution and the transition to new forms of risk governance. Namely, these are not starkly ‘external’ or ‘internal’ changes. What happens in private law is an inherent part of what ‘society’ chooses to do about risk. This is partly, but only partly, because there are policy and legislative elements to what is happening. Lawyers are easily capable of being at the forefront of policy thinking — particularly in relation to law. Litigants may also seek avenues for change in relation to risk — or legal liabilities may be an important aspect of the risks they face. This is particularly, but not only, the case where litigants are either insurers, or insured parties seeking to clarify their relationship to insurers. And the choice of using private law, either as litigant or legislator, is itself a choice with implications for the social role of risk. Private law may either be *responsive to*, or *partly constitutive of* changes in societal responses to risk. Or, of course, it may display elements of both.

For all these reasons, it is worth asking to what extent we can observe a changing emphasis within private law upon *responsibility* for risks; perhaps including responsibility for one’s *own* risk in particular? Does private law appear in any sense to be increasingly ‘steering’ or enforcing risk management by private actors? If so, is there in any sense a move away from security, and/or from the generalising concepts which encouraged private law to become increasingly protective? In the final section, we explore these questions with a focus on the law of tort.

1. **Tort, security, responsibility, and risk**

As we have seen, tort has, at some times in its recent history, been portrayed as security or welfare focused, and thus as more in tune with the distributive, collective approach of the security revolution than other aspects of private law. It was portrayed in this way largely in the 1970s — before the advent of a new revolution in both risk and governance. Progress towards further security might have appeared inevitable; with the main battleground being replacement of tort as a means of protecting from the *consequences* of harm (ie, security).

Now, this is no longer the dominant picture of tort. Tort is perhaps unavoidably protective. But the *limits* (and distribution) of its protection are being more actively defined. As we have seen, in many jurisdictions, this has taken the form of political ‘tort reform’ movements, and reforming legislation. In the UK, the revolution has been quieter and in some ways, is more interesting. Can private law change *from within* either in reflection of changing social approaches and priorities; or in order to influence those priorities? If private law is in some sense becoming more private, or, perhaps, more deferential about private interests and private ordering of security; and the blurring boundary between public and private is *in some contexts* being reworked;[[78]](#footnote-78) this does not mean that tort has ceased to operate as part of broader risk ‘evolution’. Rather, these developments in private law will be partly constitutive of how society responds to risk.

If tort law is indeed in some way either responsive to, or constitutive of, the further risk revolutions defined in the previous section, we might expect to see less universality in its principles and concepts and how they apply; more emphasis on individual responsibility to deal with, manage, or avoid exposure to risk, with an awareness of alternative sources of security; more deference to contractual risk allocation; and possible mirroring of contractual styles of thinking. It is suggested that all of these things have been on the rise in the law of tort over the last twenty years or so, and that the process is if anything escalating, though the questions asked of or by the law of tort continue to lead to significant, if subtle differences from contract. Indeed these features could be said to provide the key ‘story’ of the law of tort in this period. It may be objected that this is principally true only of the tort of negligence. Negligence, however, has a claim to be the key aspect of tort law where risk is concerned. Breach of duty in negligence has long been recognised as capable of being expressed in terms of reasonable risk,[[79]](#footnote-79) and foreseeability of harm is an ever-present aspect of the duty of care; and I will suggest below that aspects of vicarious liability and remoteness have both been reconceptualised in terms of risk in recent years. Thus much of the core of negligence liability can be — and often is — expressed in terms of risk. The question is whether the direction of change supports a positive answer to the question above. Three areas of development are selected here for illustration.

The first of these is the rise of voluntary assumption of responsibility and the associated concept of the scope of duty. Like ‘reasonable foreseeability’ in the 1970s, these notions are closely related and intended to dovetail together. While the ambition behind ‘reasonable foreseeability’ was to provide an overarching concept which could guide answers to both duty and remoteness questions in all cases in a clear and transparent way, the role of these newer concepts is to provide detailed reasons for differentiation between cases, and for determining the allocation of different risks between the parties.

Evidently, the shift from a broadly expressed ‘duty of care’ test in *Anns*, to a more complex and modulated approach in *Caparo v Dickman*,[[80]](#footnote-80)is consistent with a felt need to control liabilities. Looking more closely at English courts’ development of duty concepts, ‘voluntary assumption of responsibility’, or ‘voluntary assumption of risk’ may have a claim to be the concept that has proved most successful in the evolutionary race in recent years. Its role transcends boundaries, since it is regularly invoked in new contexts; and it appears to be taken seriously enough to transcend the need for ‘fairness, justice and reasonableness’ to be considered when an ‘assumption’ is thought to be present — it is thus, strikingly, sufficient reason on its own to recognise a duty of care is owed.[[81]](#footnote-81) Thus, on the face of it where responsibility is assumed, it is thought to be fair, just and reasonable for liability to follow. For now, the interesting features of this idea are that it expresses itself directly in terms of who has responsibility for the risk, and *which* risk is the responsibility of which party, even though the means of judging this is opaque. The second is that very opacity, and the variety of means that may be deployed in reaching the judgment as to assumption of responsibility.

Scholars have pointed out that the notion of an ‘assumption’ in this context is not closely aligned with the notion of the will of the parties, despite the usual meaning of the word, and despite the addition of the word ‘voluntary’.[[82]](#footnote-82) Voluntary assumption of responsibility lends itself to consideration of where, given the structure of the parties’ arrangements and the nature of their activities in relation to one another, it would be reasonable for responsibility to be intended to lie — or, perhaps, where reasonable parties might be expected to think it lay. This way of putting it, however, almost certainly still uses too much contractual language. Rather, there is emphasis on the nature of the relationship between the parties and the nature of the activity undertaken by the defendant and whether it was undertaken *for* the claimant and with what attendant responsibilities. While this vagueness is disliked by academics, it has proved a very resilient notion: in fact, it has spread, and it seems unlikely that this could be because it is *merely* a veil for other, more ‘real’ reasons. Rather, the question can be alternatively expressed as whether the defendant took on a security duty to the claimant — and if so, which security, and security from which risks.

A linked idea underlies the relatively new approach to defining the extent of liability encapsulated in ‘scope of duty’ analysis.[[83]](#footnote-83) Like ‘voluntary assumption of responsibility’, the idea has been roundly criticised by academics;[[84]](#footnote-84) but has proved more than resilient. It is not consistently used, and this inconsistency is one source of criticism; but there is no doubt that it has been added to the stock of concepts than can be used to differentiate between liability for one risk or another. Its function is to determine which risk and security duties attach to the activities of a given defendant, and in this guise although it can be used to limit the liability owed by one party to another, it is equally designed to determine *whose* responsibility it is (or at least is not) to avoid a particular risk, where there are multiple potential parties.

Its creation in response to a case involving losses in a rapidly falling property market is illustrative of the way that it identifies *responsibility* for risk management and specifies relevant risks. The notion of ‘responsibility’ here is not entirely vacuous; but neither is it captured by previous ‘remoteness’ notions. The question is not whether there was an intervening cause between the defendant’s wrongdoing, and the loss; nor the *Wagon Mound* question of whether the loss was ‘reasonably foreseeable’.[[85]](#footnote-85) Even leaving aside questions about the ‘type of loss’ which make *The Wagon Mound* testa very blunt instrument in this context, a falling market is, clearly, foreseeable, whether or not it is considered likely at any given time. Rather, what the notion identifies is the *extent* of the risk management role of various parties according to their functions and relationship.[[86]](#footnote-86) And this underlines another feature of the restraint of tort in the era of the regulatory state, namely recognition of the potential for over-concentrated liabilities with attendant insurance costs. The same phenomenon arguably underlies the protective attitude towards public authority liabilities in tort, particularly where liability/responsibility could potentially be placed with another actor whose involvement is risk-creation, rather than failure to avoid risk.[[87]](#footnote-87) The striking contrast between outcomes in tort claims in this context, and outcomes in human rights claims,[[88]](#footnote-88) may be partly explained on the basis that ‘damage’ is not the basis of human rights claims, and that responsibility for the economic consequences of ‘risk management’ is not a key operator in such claims.[[89]](#footnote-89)

The expanding law of vicarious liability offers a second important illustration of the centrality of risk and the emerging preoccupation with defining who bears the burden of the cost of security. The question typically is not who should have protected from harm, but much more openly who now bears the burden of the risk that harm would occur. In particular in relation to intentional torts, the need to consider the responsibility of an employer (or other) whose purposes were not being advanced by the activities of the tortfeasor ‘employee’ or equivalent has led to a new question, namely whether there was a sufficiently close connection between the employment or other relationship between tortfeasor and defendant, and the tort which occurred. In answering this question, the ‘risk’ of wrongdoing on the part of the employee or other in the course of that relationship is the key focus. But the question is not one of foreseeability of risk, for risks are by definition foreseeable, and the courts have long since stopped pinning their hopes on *degrees* of foreseeability.[[90]](#footnote-90) Rather, the question is whose risk this is, and the idea of ‘sufficiently close connection’ is the means to answer that very open-ended question.

Like voluntary assumption of responsibility, the idea of ‘close connection’ is intended to make the question less open-ended, and to offer a focus, and it is this type of concept that the courts find useful in the current risk era despite their evident imprecision. In the recent case of *Mohamud v William Morrison Supermarkets plc*,[[91]](#footnote-91) there was an effort to challenge the validity of the concept and to replace it with a perhaps clearer question, namely whether a reasonable person would consider the tortfeasor to be acting as a representative of the defendant at the time of the tort. This change was rejected and indeed it is a far narrower question, concerned with expectations and understanding. The flexibility of the ‘close connection’ question is both what makes it an evaluative notion, and what makes it a suitable way of narrowing the focus of a much bigger potential question, about where the responsibility for managing and avoiding risks associated with employment and other purposive activities should be said to lie. Importantly, even serious criminal wrongdoing is thus translated into a risk and it is plainly the management of this risk, rather than fault, which is the critical notion.

Road traffic liability provides a third important illustration of our themes. Where is the balance between security and responsibility in this important context? This area of liability is a staple of tort liability, as it has been throughout the periods surveyed. And of course, it is also a staple of the security revolution in tort. Unlike the two other illustrations offered, it is not an area where new tort concepts are being generated, and on the face of things, in relation to its concepts it is stable. However, this area of tort most neatly exemplifies the themes of risk-based governance, and the layering of responsibility over structures designed to deliver security.

Does the presence of compulsory liability insurance negate the individualised responsibility of negligent drivers, while preserving the security of the injured victim? Compulsory liability insurance is itself not a responsibility-free zone. Rather, it inherently gives rise to a new responsibility, namely to insure. This responsibility is keenly enforced and promoted, not surprisingly, by insurers. In this context, the ‘public’ role of insurers in delivering a policy of security is plain: road traffic insurance must comply with the stringent statutory requirements; and the cases of uninsured and untraced drivers are governed by agreements between insurers and the state.[[92]](#footnote-92) The public policy goal of delivering security through the insurance market in this context is plain, and can be compared with the provision of flood insurance in the era of intensified flooding events. In return, both in the case of road traffic and in the case of flooding, insurers are important contributors to policy debates. At the same time, motor insurers seek to influence behaviour directly, for example through creating information about uninsured drivers and passing relevant information to police forces. One such strategy deploys the law of tort itself. Increasingly in recent years, the Motor Insurers’ Bureau — which is responsible for compensating the victims of torts on the part of uninsured and untraced drivers — has included in its strategy the pursuit of uninsured tortfeasors.[[93]](#footnote-93) As in other areas, insurers may thus be among the key promoters of ‘responsibility’ in the law of liability.[[94]](#footnote-94) The nature of responsibility here is however directly derived from and oriented to the need to promote security.

1. **Conclusions: revolution upon revolution?**

The two phenomena explored — the security revolution, and apparent reversal of the wheel toward responsibility in the era of new forms of governance and regulation — have left complex relationships between security and distribution, and between liability and responsibility, which are likely to have both affected private law, and to have invoked private law in arriving at the current balance. As argued earlier, what has been learned and achieved through the initial risk revolution could not fail to influence the present shape of the law. ‘Security’ is still a working goal and ambition — it is not being given up. But the *cost* of security is increasingly in issue. This is as true of costs regimes and the provision of private law as a ‘resource’, as of any other aspect of the structures reviewed here.

The new era might seem to represent the triumph of truly ‘private’ law over a conception of the field as increasingly socialised. If this is so, the key issue might not be about changes in (internal) academic fashion, but about changes in the context of private law. However, it has been suggested that this is, in any event, not precisely to the point. What has been learned in the ‘security’ revolution now provides the context for the operation of private law. A more restrained — and restraining — set of concepts and principles is being promoted, sensitive to risk allocation and rival potential sources of security. These concepts may fail tests of clarity and predictability, but they do so in favour of directing decision-makers to the question of where it is reasonable to place the costs of security. This is itself more in tune with the current era of risk governance, than earlier tort law could hope to be in tune with the security revolution, since the practical fit between private law and security in the welfare sense was never complete at a theoretical level.

In the current era, the generalisation of principle which scholars have associated with ‘autonomous’ private law — which might have as its ambition a relatively timeless approach to party interactions — is heavily compromised as courts and litigants seek ways of negotiating risk and security. But it is suggested that the more complex and responsive notions such as assumption of responsibility and ‘close connection’ which we have explored are themselves private law’s contributions to conditions of uncertainty. Their opacity is part of the reason for their staying power, since they are highly adaptable. Nevertheless, they are not empty. Rather, they direct the courts’ attention to questions about the burden of security.

Finally, and returning to the questions in our introduction, there is reason to suggest that in the present era, private law not only reflects, but is also part of, social change; and none more so than in connection with risk, responsibility, and the costs of security.

1. D Ibbetson, ‘Revolutions in Private Law?’ this volume, ch 2. [↑](#footnote-ref-1)
2. The notion that private law has seen any revolutions was rejected by Geoffrey Samuel: G Samuel, ‘Have There Been Scientific Revolutions in Law?’ (Obligations VIII Conference, Cambridge, July 2016). [↑](#footnote-ref-2)
3. TT Arvind, ‘Paradigms Lost or Paradigms Regained? Legal Revolutions and the Path of the Law’ this volume, ch 4, arguing however that concepts must be understood in changing historical contexts. [↑](#footnote-ref-3)
4. An argument that has of course been had before: see C Fried, *Contract as Promise* (Cambridge, Harvard University Press, 1981) 3, pointing to the works which acted as a foil and catalyst for the development of his own argument. Fried lists works by Patrick Atiyah, Grant Gilmore, Morton Horwitz, Duncan Kennedy, Anthony Kronman, and Ian Macneil, all arguing that the law of contract is open to pursuit of community goals and standards rather than ‘neutrally endorsing’ goals and standards of the contracting parties. [↑](#footnote-ref-4)
5. See the discussion of ‘Risk and Regulatory Change’ in Part I; and generally, Part III. [↑](#footnote-ref-5)
6. J Braithwaite, ‘The New Regulatory State and the Transformation of Criminology’ (2000) 40 *British Journal of Criminology* 222, 235. [↑](#footnote-ref-6)
7. The role of ‘security’ and ‘responsibility’ is introduced in Part I. [↑](#footnote-ref-7)
8. J Black, ‘The emergence of risk-based regulation and the new public risk management’ (2005) *Public Law* 512, 513. [↑](#footnote-ref-8)
9. L Godden, F Rochford, J Peel, L Caripis and R Carter, ‘Law, Governance and Risk: Deconstructing the Public-Private Divide in Climate Change Adaptation’ (2013) 36 *UNSW Law Journal* 224. [↑](#footnote-ref-9)
10. For example, in relation to the insurance industry, R Ericson and A Doyle, *Uncertain Business: Risk, Insurance and the Limits of Knowledge* (Toronto, University of Toronto Press, 2004). [↑](#footnote-ref-10)
11. See the discussion in Parts I and III. [↑](#footnote-ref-11)
12. T Baker, ‘Risk, Insurance, and the Social Construction of Responsibility’ in Baker and Simon, *Embracing Risk: The Changing Culture of Insurance and Responsibility* (Chicago, University of Chicago Press, 2002). [↑](#footnote-ref-12)
13. F Ewald, ‘The Return of Descartes’s Malicious Demon: An Outline of a Philosophy of Precaution’ in T Baker and J Simon, *Embracing Risk*, n 12, 273. [↑](#footnote-ref-13)
14. The length of influence of this paradigm shift on private law is debated in Part IV. Arguably, the next paradigm shift began to make itself felt in the final quarter of the century, and particularly from the 1980s. [↑](#footnote-ref-14)
15. U Beck, ‘Living in the World Risk Society’ (2006) 35 *Economy and Society* 329, 334: ‘the security dream of first modernity was based on the scientific utopia of making the unsafe consequences and dangers of decisions ever more controllable; accidents could occur, as long as and because they were considered compensatible’. Ewald, above n 13, also speaks of a technical and scientific ‘utopia’ behind the paradigm of security. [↑](#footnote-ref-15)
16. See, eg, D Garland and R Sparks, ‘Criminology, Social Theory and the Challenge of our Times’ (2000) 40 *British Journal of Criminology* 189, 204, 198; Beck himself referred to a ‘second modernity’: ibid. [↑](#footnote-ref-16)
17. C Witt, *The Accidental Republic* (Harvard, Harvard University Press, 2004) 206. [↑](#footnote-ref-17)
18. Ewald, above n 13. [↑](#footnote-ref-18)
19. See Arvind, above n 3. [↑](#footnote-ref-19)
20. Ericson and Doyle, above n 10. [↑](#footnote-ref-20)
21. D Garland, ‘The Rise of Risk’ in Ericson and Doyle, *Risk and Morality* (Buffalo, University of Toronto Press, 2003) 62: neo-liberal governments ‘have deregulated markets and financial institutions, emphasized free enterprise, and taken steps to shift risk and responsibility onto individuals’. [↑](#footnote-ref-21)
22. Baker and Simon, *Embracing Risk,* above n 12. [↑](#footnote-ref-22)
23. K Yeung, ‘Algorithmic Regulation and Intelligent Enforcement’ in M Lodge (ed), *Regulatory Scholarship in Crisis* (Discussion Paper No. 84, LSE, 2016). [↑](#footnote-ref-23)
24. P O’Malley, ‘Uncertain Subjects: Risks, Liberalism and Contract’ (2000) 29 *Economy and Society* 460. [↑](#footnote-ref-24)
25. G Williams, ‘The Risk Principle’ (1961) 77 *LQR* 179. [↑](#footnote-ref-25)
26. *Tomlinson v Congleton* [2003] UKHL 47, [2004] 1 AC 46. [↑](#footnote-ref-26)
27. *Kennedy v Cordia (Services) LLP* [2016] UKSC 6, [2016] 1 WLR 597. [↑](#footnote-ref-27)
28. Directive 85/374/EEC. The UK version of the development risks defence is contained in the Consumer Protection Act 1987 s 4(1)(e). [↑](#footnote-ref-28)
29. The latter sort of approach can be seen as inherent in the ‘neighbour principle’ derived from *Donoghue v Stevenson* [1932] AC 562, in relation to the duty of care; and in the question of which risks it is reasonable to take, in relation to the standard of care. The latter is most clearly exemplified by the ‘Learned Hand’ approach in *US v Carroll Towing Co* 159 F 2d 169 (1947). [↑](#footnote-ref-29)
30. Braithwaite, above n 6, 228. [↑](#footnote-ref-30)
31. D Osborne and T Gaebler, *Reinventing Government* (New York, Addison-Wesley, 1992). [↑](#footnote-ref-31)
32. H Rothstein, M Huber and G Gaskell, ‘A Theory of Risk Colonization: The Spiralling Regulatory Logics of Societal and Institutional Risk’ (2006) 35 *Economy and Society* 91, 94–5. [↑](#footnote-ref-32)
33. Black, above n 8. [↑](#footnote-ref-33)
34. Braithwaite, above n 6, 225, explaining the synergies between theories of the ‘new regulatory state’, and Foucault’s interest in ‘governmentality’ through capacity for self-regulation. [↑](#footnote-ref-34)
35. N Gunningham, ‘Environmental Law, Regulation, and Governance: Shifting Architectures’ (2009) 12 *Journal of Environmental Law* 179, 189; for the continued prevalence of risk-based regulation, see R Baldwin and J Black, ‘Driving Priorities in Risk-Based Regulation: What’s the Problem?’ (2016) 43 *Journal of Law and Society* 565. [↑](#footnote-ref-35)
36. P Bernstein, *Against the Gods: The Remarkable Story of Risk* (New York, John Wiley and Sons, 1996); TJ Lowi, ‘Risks and Rights in the History of American Governments’ (1990) *Daedalus* 17. [↑](#footnote-ref-36)
37. Ewald, above n 13; Rose and Miller (1992) 43 *British Journal of Sociology* 173; T Lemke, ‘”The Birth of Bio-Politics”: Michel Foucault’s lecture at the College de France on neo-liberal governmentality’ (2001) 30 *Economy and Society* 190. [↑](#footnote-ref-37)
38. H Aasen, S Gloppen, AM Magnussen and E Nilssen, *Juridification and Social Citizenship in the Welfare State* (Cheltenham, Edward Elgar, 2014); G Teubner (ed), *The Juridification of Social Spheres* (Florence, European University Institute, 1987). [↑](#footnote-ref-38)
39. P Cane, *Atiyah’s Accidents, Compensation and the Law*, 8th edn (Cambridge, Cambridge University Press, 2013). [↑](#footnote-ref-39)
40. G Gilmore, *The Death of Contract* (Columbus, Ohio University Press, 1974) 87. [↑](#footnote-ref-40)
41. See the discussion in S Hedley, ‘The Unacknowledged Revolution in Liability for Negligence’ this volume, ch 9. [↑](#footnote-ref-41)
42. Or in the UK, Workmen’s Compensation. [↑](#footnote-ref-42)
43. For some reasons, including the commitment of the labour movement to the idea of liability based on fault, see J Steele, ‘Law Reform (Contributory Negligence) Act 1945: Collisions of a Different Sort’ in TT Arvind and J Steele, *Tort Law and the Legislature: Common Law, Statute, and the Dynamics of Legal Change* (Oxford, Hart Publishing, 2013). [↑](#footnote-ref-43)
44. The first of which was the Workmen’s Compensation Act 1897 (UK). [↑](#footnote-ref-44)
45. Employers’ Liability Act 1880 (UK). [↑](#footnote-ref-45)
46. R Merkin and J Steele, *Insurance and the Law of Obligations* (Oxford, Oxford University Press, 2013) 285. [↑](#footnote-ref-46)
47. The celebrated moment is the decision of the House of Lords in *Donoghue v Stevenson* [1932] AC 562. But note also the generally liberalising effects of legislative reforms, reviewed by S Hedley, ‘Tort and Personal Injuries, 1850 to the Present’ in Arvind and Steele, above n 43. [↑](#footnote-ref-47)
48. National Insurance (Industrial Injuries) Act 1946. [↑](#footnote-ref-48)
49. On the flawed provision of security through the three pillars of family, insurance, and state, see C Weisbrod, *Grounding Security* (Aldershot, Ashgate, 2006). [↑](#footnote-ref-49)
50. This was the notion behind the restriction of Workmen’s Compensation Act compensation to restricted (though gradually expanding) categories of ‘workmen’. [↑](#footnote-ref-50)
51. For current notions of responsibility in relation to road traffic, see part IV. [↑](#footnote-ref-51)
52. PS Atiyah, *The Rise and Fall of Freedom of Contract* (Oxford, Oxford University Press, 1979); Gilmore, above n 40. [↑](#footnote-ref-52)
53. L Friedman, *Total Justice,* paperback edn (New York, Russell Sage, 1994). [↑](#footnote-ref-53)
54. ibid 76. [↑](#footnote-ref-54)
55. For example, in order to solve problems of ‘remoteness’ after the *Wagon Mound*: see Part IV below. [↑](#footnote-ref-55)
56. n 29. [↑](#footnote-ref-56)
57. R Lewis, ‘Insurance and the Tort System’ (2005) 25 *Legal Studies* 85. [↑](#footnote-ref-57)
58. The expression ‘security state’ is used by Friedman, above n 53, ch 4. [↑](#footnote-ref-58)
59. This is when the paperback edition was published: see above n 53. [↑](#footnote-ref-59)
60. PS Atiyah, ‘Freedom of Contract and the New Right’, in PS Atiyah, *Essays in Contract* (Oxford, Oxford University Press, 2001) 356. [↑](#footnote-ref-60)
61. Braithwaite, above n 6. [↑](#footnote-ref-61)
62. Braithwaite’s influential discussion was aimed at criminologists, but drew on much broader regulatory theory to demonstrate the challenges for that discipline. [↑](#footnote-ref-62)
63. *Anns v Merton* [1978] AC 728, 751–2, setting out a general two stage ‘test’ for a duty of care in negligence. [↑](#footnote-ref-63)
64. Examined by S Johal, M Moran, and K Williams, ‘Power, Politics and the City of London after the Great Financial Crisis’ (2014) 49 *Government and Opposition* 400. [↑](#footnote-ref-64)
65. Braithwaite, above n 6. [↑](#footnote-ref-65)
66. L Godden, F Rochford, J Peel, L Caripis and R Carter, above n 9, 234; Black, above n 8; Rothstein, Huber and Gaskell, above n 32. [↑](#footnote-ref-66)
67. Through notions such as ‘compensation culture’ and a returning, rhetorical attachment to ‘responsibility’. [↑](#footnote-ref-67)
68. Consumers, for example, may continue to be framed as vulnerable and in need of protection. [↑](#footnote-ref-68)
69. See M Simpson, ‘“Designed to reduce people … to complete destitution”: human dignity in the active welfare state’ (2015) 1 *European Human Rights Law Review* 66. [↑](#footnote-ref-69)
70. In the UK, this was reflected in much of the ‘leave’ campaign during the ‘Brexit’ referendum of 2016. See now Prime Minister Theresa May’s stated preference, in her previous role as Home Secretary, to deprioritise the children of those who enter the country illegally when allocating school places: L Kuenssberg, ‘Theresa May had plan to deprioritise illegal migrant pupils’ *BBC* (London, 1 December 2016) http://www.bbc.co.uk/news/uk-politics-38165395. [↑](#footnote-ref-70)
71. Merkin and Steele, above n 46, ch 7. [↑](#footnote-ref-71)
72. This point was very clearly made by Kenneth Abraham: K Abraham, *The Liability Century: Insurance and Tort Law from the Progressive Era to 9/11* (Cambridge, Harvard University Press, 2008). [↑](#footnote-ref-72)
73. In the UK, this is exemplified by *Caparo v Dickman* [1990] 2 AC 605,and the subsequent developments of its ‘fair, just and reasonable’ and ‘proximity’ heads. [↑](#footnote-ref-73)
74. This is not to reject the sceptical academic claim that these concepts themselves are or may be used to give effect to policy judgments. But policy arguments are at least moderated by the attempt to fit them to the applicable concepts — and it is likely that this is the intention — to narrow and shape the available reasons. Indeed, the existence of any legal concept will guide and influence the perception of applicable reasons to some extent, however malleable. [↑](#footnote-ref-74)
75. On tort reform in Australia, see, eg, B McDonald, ‘Legislative Intervention in the Law of Negligence: The Common Law, Statutory Interpretation and Tort Reform in Australia’ (2005) 27 *Sydney Law Review* 443; K Burns, ‘Distorting the Law: Politics, Media and the Litigation Crisis: an Australian Perspective’ (2007) 15 *Tort Law Journal* 195. [↑](#footnote-ref-75)
76. This can only be stated to be ‘on the whole’. The availability of tort law as a resource for litigants is heavily affected by legislative reform of costs, for example — though here, senior members of the judiciary were closely involved in reshaping the applicable regime: see for example R Jackson, *Review of Civil Litigation Costs: Final Report* (HMSO, 2010). More clearly, reform of employers’ liability by removing civil remedies from a vast array of safety legislation is a significant outside intervention, again appearing like a reinstatement of an earlier conception of individual responsibility and deregulation: Enterprise and Regulatory Reform Act 2013 (UK) s 69. [↑](#footnote-ref-76)
77. Given the notion of individuals as risk entrepreneurs, this could in principle include individuals, as well as the more obvious market and insurance participants. Lawyers too must manage litigation risk; in the UK, evolving models of funding make this a central part of their activities. [↑](#footnote-ref-77)
78. This does not mean that private law has no important functions in relation to constitutional questions, for example. But in Friedman’s sense, it has become less welfare-oriented. [↑](#footnote-ref-78)
79. n 29. [↑](#footnote-ref-79)
80. [1990] 2 AC 605. [↑](#footnote-ref-80)
81. *Henderson v Merrett* [1995] 2 AC 145. [↑](#footnote-ref-81)
82. Use of the expression was pertinently dismantled at an early stage in its career: see K Barker, ‘Unreliable Assumptions in the Modern Law of Negligence’ (1993) 109 *LQR* 461; but critical reviews appear not to have stunted its use in any way. [↑](#footnote-ref-82)
83. Originating in the House of Lords’ decision in *South Australia Asset Management Corporation v York Montague Ltd* [1997] AC 191. [↑](#footnote-ref-83)
84. J Stapleton, ‘Negligent Valuers and Falls in the Property Market’ [1997] 113 *LQR* 1. [↑](#footnote-ref-84)
85. *Overseas Tankship (UK) Ltd v Morts Dock & Engineering Co Ltd (The Wagon Mound No 1)* [1961] AC 388. [↑](#footnote-ref-85)
86. See also *Haugesund Kommune v Depfa ACS Bank (No 2)* [2011] EWCA Civ 33, [2012] Bus LR 230. [↑](#footnote-ref-86)
87. Classic cases in the UK include *Gorringe v Calderdale* [2004] UKHL 15, [2004] 1 WLR 1057; *Mitchell v City of Glasgow* [2009] UKHL 11, [2009] 1 AC 874; *Hill v Chief Constable of West Yorkshire* [1989] AC 53. [↑](#footnote-ref-87)
88. In *Michael v Chief Constable of South Wales* [2015] UKSC 2, a human rights claim could proceed while a claim in negligence was struck out: here, the case concerned whether there had been a failure to respond appropriately to an emergency ‘999’ call; in *DSD v Commissioner of Police for the Metropolis* [2015] EWCA Civ 646, [2016] QB 161, a human rights claim for failure in investigation was able to proceed in circumstances quite similar to *Hill* itself. [↑](#footnote-ref-88)
89. Neither, of course, is damage the sole preoccupation of the law of tort: as explained above, the present observations are particularly aimed at the tort of negligence. [↑](#footnote-ref-89)
90. See, eg, the judgments of Lord Reid in *Dorset Yacht v Home Office* [1970] AC 1004, and Oliver LJ in *Lamb v Camden LBC* [1981] QB 625. [↑](#footnote-ref-90)
91. [2016] UKSC 11, [2016] AC 677. [↑](#footnote-ref-91)
92. A new Uninsured Drivers Agreement was signed in 2015, replacing the 1999 Agreement; note also the Untraced Drivers Agreement 2003. [↑](#footnote-ref-92)
93. R Merkin and J Steele, ‘Policing Tort and Crime with the MIB: Remedies, Penalties and the Duty to Insure’ in M Dyson (ed), *Unravelling Tort and Crime* (Cambridge, Cambridge University Press, 2014). [↑](#footnote-ref-93)
94. The link between insurers, and moral judgment, has been demonstrated in other contexts: Baker, above n 12; R Ericson, D Barry, and A Doyle, ‘The moral hazards of neo-liberalism: lessons from the private insurance industry’ (2000) 29 *Economy and Society* 532. [↑](#footnote-ref-94)