

Risk, Responsibility and Sanctions, are the relationships between them today reasonable?

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Abstract

In our risk thinking we are trying to transform our fear and our uncertainty about future into operable statements. Risk and responsibility in the societies have increased in complexity over many years. Our limits for responsibility are expressed in the legislation - and in our own feelings. In a broad sense quite a lot of our intellectual resources are used to meet this challenge. At the end of the day the limits set by the society are expressed in the courts.

It is today more difficult to decide what actions of negligence in trade and industry which are due to penalties from the society. All cases in Norwegian courts after human accidents and pollution over a 12 year-period have been investigated and reported from University of Oslo. In too many of the cases investigated the prosecutors and partly also the courts have had too little knowledge of risk and responsibility, of accident investigation and of management systems in modern organisations. In too many cases the verdicts have been unjust. Knowledge of principles applied in risk analyses and in modern quality auditing is needed to improve the situation. Norway is part of a European judicial tradition and similar situations may exist also in other countries.

RISK

The concept of risk has its own attributes. These differ for instance from concepts such as uncertainty, hazards, danger and emergency. Risk however includes elements from all these concepts. It is a part of our everlasting uncertainty about the future. Therefore we can never «solve» the challenge of risk. We can only try to prepare, try to foresee and meet the eventual problems of the future. Risk is a part of our thoughts about the future, it is an intellectual part of our uncertainty about the future. Our analyses of risks can take care of many aspects of risk, fires, shipwreck, floods, explosions, oil spills etc. However they can not adequately incorporate our hopes and fears for the future. Some people are afraid of flying, others are afraid of lightning. People accept a higher risk in car driving than for instance in oil drilling. When analyzing risks in systematic safety management, we try to meet some of the thoughts and feelings of the average of the «population at risk», and our emergency thinking should also reflect such culture-based phenomena.

In our professional world there are several definitions of the concept of risk. Risk is a basis for our thinking and our treatment of events and phenomena which may occur in the future and which may include negative aspects. We often talk about «risk analysis» as our main analytical tool in this respect. We normally say that risk is a combination of the probability P , and the consequences C of events in the future. A crucial point is that the expression of a specific risk must be practical so it can become a basis for making decisions.

Of the two crucial parts of the risk concept the P -part is the least complicated. The P can be expressed quantitatively, but in other cases just be a strong opinion based on expertise for instance when evaluating the need for a new fire station. The C -part however is far more complex, and is also the main link over to concepts such as responsibility and legal sanctions.

It is crucial to be aware of the complex nature of the C -s. In all projects and planning of new enterprises all human based risk-taking has the positive C 's as the only goals. Serious organisations - and serious individuals - take risks only to obtain something positive. On the other hand the concept of risk always includes a possibility of one or more negative C 's. We will not make decisions involving a possibility for negative consequences - without an obvious possibility for a positive C .

Because both private and public managers first of all are interested in the positive part, the positive C-s of their decisions they have a negative attitude to the negative C-s of their decisions. What is normal to do in such a situation? That is to put other people to help them to tackle the eventual negative C-s. They use risk and emergency specialists to analyse the negative sides and to come up with solutions which make their decision acceptable. There is nothing principally wrong in this, but those involved should be conscious about their roles.

This aspect of risk management also includes organisations which set up emergency installations, procedures and organise people to tackle catastrophes and smaller accidents. The managers of such decisions also want that their emergency set up is adequate for all catastrophes in the future, they emphasize the positive C-s just as other managers..

It is the staffs of large organisations, external consultants and researchers in academic institutions which get the job of analysing the negative sides of a decision and putting forward thoughts which can help the decisionmakers to make their project acceptable. These specialists are normally only given the task to evaluate the negative C-s of the decision, not the positive. Therefore they concentrate on the negative aspects. The staffs and the consultants are only responsible for analytical evaluation of the negative sides. Afterwards it is the role of the responsible managers to take the ultimate decision if the project is good enough. In the end the responsible management will also be responsible for the decision whether the negative consequences are acceptable or not.

RESPONSIBILITY

The concept responsibility has several attributes:

- Responsibility must be directed towards something specific.
- A condition for responsibility is the existence of a split of responsibility of some kind for something between someone.
- A real split of responsibility for something exists only between equals, either persons or organisations.
- Within an organisation it is often said that responsibility can not be delegated, only authority.

Different kinds of responsibility may be divided into:

- Legal responsibility,
- responsibility / authority given by the top management of an organisation, to various levels in the organisation,
- moral / ethic responsibility.

The judicial system only deals with responsibility as described in the legislation.

During the last decades the size and the complexity of many companies and similar organisations have increased substantially. As a consequence the safety work to prevent accidents is today far more complex and challenging than earlier. This is the case also for emergency operations. This is also a real challenge to the judicial system. It is more difficult to find who is really lawfully responsible.

Each individual in an organisation however may be penalized legally, after actions of carelessness. In daily work within organisations however most of the employees have follow procedures and rules given by the management within the organisation. Within most organisations very few will normally know the legislation in detail and the sanctions attached to infringing the legislation. It is impossible for employees to distinguish between detailed regulations in the legislation on one side and the company's own procedures and rules on the other. For this reason several employees in Norway have really been taken by surprise and have had a very negative experience in court.

The emergency management has a real challenge during the operations after a catastrophe or a big accident. On an international level responsibility of the different organisations and institutions involved may include an astonishing large number of organisations in different countries. The complexity is large also because the organisational arrangements differ between countries.

A good working organisational solution for emergency management requires that the whole system is analysed and tested for effectiveness and efficiency. This include of course that the responsibility between the various organisations are clear enough and adequate. One must also take into account that an emergency operation is more like a military operation as responsibility and authority are concerned. Operation of firefighting in a hotel or lifesaving in the Atlantic ocean requires discipline.

The ethics of responsibility is mostly a personal matter. Procedures and legislation however should

reflect basic ethic principles in the society.

In our professional life ethics deals also with possible conflicts between loyalty to our own organisation, to our colleagues and to our own integrity. An employee may come in conflict between the ethic loyalty to other employees on one side and the loyalty to the management on the other. This must be solved by the persons involved and it is easy to see that the decisions made by persons involved and the ultimate result could vary.

In some cases an employee can see that the management is in opposition with basic ethical principles or national legislation. In some rare cases the employee does not come through with his view within the organisation and has then two possibilities, either just to leave the company or to go out public with his opinion, so-called «whistle blowing.»

SANCTIONS

The legal situation regarding sanctions in general varies in many respects from country to country. In some countries the inhabitants may drive a car with alcohol in the blood. They are punished only if they are involved in an accident. In other countries it is forbidden to drive with alcohol in the blood. In some countries «good practice» or «as good as practical resonable» is an important basis, in other the requirements are quantified in detail. In some countries managerial and organisational requirements are specified in the legislation more extensively than in others. In some countries there has been a clear tendency in the legislation from punishment of individuals towards punishment of companies after accidents within the companies.

In spite of all these differences between countries some basics are the same:

1. - Every person is responsible for his own behaviour, his own actions.
2. - It is forbidden to behave / act in a way which hurt other people. This is the case irrespective if the act is deliberate or negligent.
3. - In principle every sanction should be the same irrespective of place and person.
4. - In addition to the effect on the direct punished person, the sanctions aim to have a general preventive effect in the society.

These 4 basic elements are however not simple to practice with justice in an industrialised country.

IS THE LEGAL PROTECTION TODAY ADEQUATE?

The reports from governmental commissions after several disasters in different countries over the past decades have shown a complex risk picture. They have also shown a high degree of complexity concerning responsibility. The responsibility of the chain of circumstances and actions which lead to the disaster, as well as the emergency operations after the disaster are complex. Inadequate human actions and inadequate safety systems have been revealed. Therefore in some cases prosecution and penalties have been the result.

In Norway the legislative system gives the prosecuting authority considerable influence on decisions made by the courts. Before trial in the courts the prosecutors:

- decide the investigative methods and the thoroughness of the investigation after an accident,
- choose the the legal ground for the indictment
- and they choose the defendants.

The courts can not deviate from the legal ground when making their decisions about sanctions and not deviate from the choice of defendants.

A report from University of Oslo(1) shows in many cases also lack of competence within the prosecuting authority and to some extent also within courts about modern management of big organisations and modern investigation methods. The result has been several verdicts based on far too weak evidence in courts after human made accidents in Norway. This is the case in about 1/5 of the 135 cases investigated. The situation is that when the prosecutors find revealed negligence they too often stop the investigation before all the essential causes and responsibilities have been identified.

On the other hand there are recommendations in some of the verdicts to change legislation and to install physical improvements. Practically none of them have been followed up by the authorities. In a few cases lack of these proposed improvements have lead to new fatal accidents.

An example: A driver of a tramcar drove 25 km/h at a place where the company had set the upper limit to 30 km/h. The court decided that the upper limit should be 10 km/h. The driver was punished after a fatal accident as the company was not prosecuted for giving instructions to its employees in contradiction with Norwegian law.

Another example: In a company with 8 employees the lower court decided after a fatal accident that a specific employee was not a «foreman» according to Norwegian law. According to this decision he was acquitted in court. The higher court found him in contrary to be a foreman and he was convicted. The top manager of the company had not appointed anyone in specific, but the company was not prosecuted for this omission, clearly against Norwegian law. The complexity of organisations with 8 employees is obviously in some cases too complicated for Norwegian judiciary.

A third example: In some cases investigated, documentation of procedures has been required, but in other cases where the risk for serious accidents also has been substantial, the company's «usual practice» without written material has been accepted by the court. There are obviously differing opinions throughout the courts when it comes to the documentation a company is required to submit.

ETHICAL ASPECTS

In general the inhabitants have a feeling that they have legal protection and are living within a good judicial system. However quite a number of employees in organisations which have met this system have good reasons to feel it otherwise.

This situation is to a great extent agreed upon in Norway also within the judicial system. The task and the problem is to get the right organisations, private and public to improve.

This situation has important ethical aspects. Today people dealing with risks and accidents in a responsible way may meet an incompetent judicial system after serious accidents. When we know it is possible and in accordance with the legislation to improve the situation, something systematic should have been done. Of most importance is that the prosecutors should be taught modern methods in:

- accident investigation and
- quality auditing.

References

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(Separate summary in English: An examination of judgements pronounced in Norway following accidents in workplaces. 5 p.)