Disaster Risk Reduction in the Shadow of the Law

Michael Eburn

ANU College of Law, The Australian National University, Canberra, ACT, Australia

ABSTRACT

Law is a tool that can be used by interest groups to advance what they perceive to be their best interests, whether that is advocating for their right to build homes in hazard-prone environments or advocating against such development because of the social and economic costs of disasters. Identifying how interests are to be balanced, and responsibility for disaster risk reduction is to be shared, requires more than knowledge of local law. The allocation of responsibility must be negotiated with stakeholders, negotiation that takes place in the “shadow of the law,” that is, with an expectation of what the law requires and how others may behave to comply with legal obligations.

There are, however, some (reasonably) fixed legal rules that set the outer limits of possible negotiation. With reference to international law and the laws of Australia, the United Kingdom, and the United States (nations with a shared legal history based on the English common law), this chapter will identify some legal boundaries that help define the limits of shared responsibility. Identifying these boundaries helps to show where law’s shadow falls, and so empowers stakeholders by helping define what is possible in the negotiations for a safer community.

The modern view of disaster management is that governments, individuals, and communities must share responsibility for preparing for, responding to, and recovering from the impact of natural and other hazards (Victoria, 2010; COAG, 2011; Cabinet Office, 2013; FEMA, 2011, 2013). Recognizing that shared responsibility exists does not, however, determine how that responsibility is to be shared. As the Royal Commission inquiring into the 2009 Victorian (Australia) bushfires said “(s)hared responsibility does not mean equal responsibility” and “there are some areas in which the State should assume greater responsibility than the community” (Victoria, 2010, para 9.1). It is important for governments, communities, individuals, and the nongovernment sector to negotiate how responsibility is to be shared, who is to be responsible for what, and who owns the risk that comes with natural hazards.
It is said that bargaining or negotiation occurs in the shadow of the law (Depoorter, 2010; McAdams and Nadler, 2008; Stevenson and Wolfers, 2006; Mnookin and Kornhauser, 1979). People who have an interest in negotiating their respective rights do so with some expectation of how, if they cannot reach agreement, the law would resolve their negotiations: “the outcome that the law will impose if no agreement is reached gives each (party) certain bargaining chips—an endowment of sorts” (Mnookin and Kornhauser, 1979, p. 968). It is not only what outcome the law will impose that is relevant, but also an expectation of how others, if they comply with the law, will behave...

...where people have an incentive to coordinate their behaviour, law can provide a framework for understanding and predicting what others are likely to do. The shadow cast by law in these situations helps people predict not what a court is likely to do but rather what other people who are also aware of the law are likely to do.


It is assumed that governments and individuals have an incentive to coordinate their behavior in order to maximize resilience and minimize the impact of hazards, both personally and at a whole of community level. If shared responsibility requires negotiation, knowledge of the law allows the parties to understand each other’s legal obligations so that they can know what to expect from the other stakeholders, how the law might deal with any disputes or claims where agreement is not reached, and what rights and interests may be compromised or traded to achieve a desired outcome. Knowledge of the law will define the shadows within which the negotiations take place.

In the absence of legal knowledge, shared responsibility could be placed anywhere on the spectrum ranging from complete regulation to a complete laissez-faire approach to emergency management. The theoretical spectrum is shown Figure 15.1.

Neither of those extremes is acceptable; responsibility for emergency management has to sit somewhere in between, in part because of the practical realities; individuals cannot fully prepare themselves as they depend on others such as the weather bureau to warn them of impending danger; and no government can afford to have sufficient resources standing by in order to respond...
to every home threatened by wildfire, flood, or other hazard. Further, and the subject of discussion in this chapter, the extremes are not legally permissible or required. The law (discussed below) will not allow governments to simply abandon citizens to their own resources, neither does it require governments to guarantee individual safety.

This chapter contributes to the discussion on developing shared responsibility by identifying what “the” law requires of governments and individuals. This analysis will identify some limits of shared responsibility. It will then be up to stakeholders to negotiate, within law’s shadow, how responsibility for effective emergency management is to be negotiated in their particular local, regional, and national context.

Before commencing the legal analysis, it must be acknowledged that no such thing exists as “the” law. Relevant law comes from many particular laws and, more importantly and with the exception of international law, what the law is varies from jurisdiction to jurisdiction. Differences exist between countries and also between states and territories within countries. The discussion of the law in this chapter will refer to international law and the law that has evolved from the English common law and will draw on the relevant laws of Australia, the United Kingdom, and the United States. Although the exact legal position will vary from jurisdiction to jurisdiction, the fundamental principles are likely to be similar.

15.1 INTERNATIONAL LAW

International law is suprajurisdictional. The subjects of international law are nation-states so that where states are bound by relevant international law, either by agreement or provisions of universal application, the law that applies will be the same for all.

Under international law the government of a disaster-affected state has primary responsibility for managing the response to the disaster and ensuring the relief of the affected communities. The United Nations

...recognizes the primary role of each State in caring for the victims of disasters occurring in its territory and stresses that all relief operations should be carried out and co-ordinated in a manner consistent with the priorities and needs of the countries concerned.

UNGA (1981); see also UNGA (1991).

Further, an “...analysis of General Assembly resolutions on disasters from 1981 until 2002 reveals an increasingly explicit emphasis on sovereignty” (Fidler, 2005, p. 472). Even though primary responsibility for disaster management lies with the government of the affected state, it does not follow that states are free to ignore the impact of disasters on their population or that the response to a disaster is not a matter of international concern. Apart from the humanitarian impulse, a legitimate concern exists with internationally
recognized human rights. Key rights that can be affected by disasters include the right to “life,” “economic, social and cultural rights,” and the “right to a standard of living adequate for...health and well-being...including food, clothing, housing and medical care...” (UNGA, 1948). The International Covenant on Civil and Political Rights provides that everyone has the right to life (ICCPR, 1976). The International Covenant on Economic, Social and Cultural Rights affirms a right to work in safe conditions, the right to social security, an obligation to protect the family and to provide special protection for new mothers and children, and that it is “the right of everyone to (enjoy) an adequate standard of living for himself and his family, including adequate food, clothing and housing” (ICESCR, 1976).

A natural disaster can impact upon these rights by causing death, dislocation, destruction of homes and livelihoods, and the spread of disease. Where this happens and the affected population is not provided adequate assistance by their own government, the affected state is not abiding by its obligations. In terms of the Covenant on Economic, Social and Cultural rights that is an obligation to “…take steps, individually and through international assistance…” (ICESCR, 1976, art 2(1)) to allow the population to realize their rights. Under the Covenant on Civil and Political Rights the parties have agreed “…to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant…” (ICCPR, 1976, art 2(1)). A state fails in its international obligations if it fails to adequately provide for the health and well-being of its citizens following a natural disaster.

Too much faith can, however, be placed on international law:

There is a massive implementation gap in international law, even in relatively wealthy countries with the resources to meet fundamental rights. In addition, enforcement of international law is limited. Individuals cannot generally enforce their rights under international law unless it has been incorporated into national law. Enforcement action by the international community raises the question of whether, and to what extent, it is reasonable to dictate national priorities to countries and regions with their own distinctive cultural concerns and their own urgent priorities.


Even so, the international community has recognized that there is a shared “Responsibility to Protect” where an affected population is not, or cannot be, protected by their own government. The International Commission on Intervention and State Sovereignty argued that international intervention into the domestic affairs of a sovereign state may be justified where there are

…overwhelming natural or environmental catastrophes, where the State concerned is either unwilling or unable to cope, or call for assistance, and significant loss of life is occurring or threatened.

ICISS (2001), (4.20).
The United Nations General Assembly did not go so far. The General Assembly limited its endorsement of the Responsibility to Protect to cases where the affected population was subject to “genocide, war crimes, ethnic cleansing and crimes against humanity” (UNGA, 2005). Gareth Evans, Co-Chair of the International Commission on Intervention and State Sovereignty has since written that the response to natural disasters is “not normally, on the face of it, about protecting people from ‘genocide, war crimes, ethnic cleansing, and crimes against humanity’ but it is still the case that terrible natural catastrophes...cry out for humanitarian, protective response by the country’s own government and by anyone else in a position to offer assistance” (Evans, 2008a, pp. 65–66).

If the response to a natural disaster does not reach the high legal threshold to trigger the “Responsibility to Protect” principles, the response to a disaster remains a matter of international concern (Evans, 2008a, p. 69), as shown by the response to the devastation of Burma by Cyclone Nargis in 2008. Following the cyclone, the ruling military junta was reluctant to recognize the extent of the devastation or to allow the delivery of foreign assistance. France and the United Kingdom argued that the circumstances may have been sufficient to trigger forced intervention under the “Responsibility to Protect” (Evans, 2008b); this, coupled with pressure from Burma’s neighbors from the Association of Southeast Asian Nations, is credited with finally opening the door to allow international assistance to flow to the disaster-affected community (Evans, 2008a, p. 68). Even if the matter was not sufficient to trigger action under the Responsibility to Protect, “no one was to be heard saying that the Burma/Myanmar cyclone disaster, and the general’s response to it, was none of the rest of the world’s business” (Evans, 2008a, p. 68).

What follows from this brief review of international law is that the international community expects and requires governments to take primary responsibility for taking steps to reduce vulnerability to natural hazards in order to minimize the impact on recognized human rights (that is, to minimize the loss of life and infrastructure) and to respond to natural disasters. In the context of “shared responsibility” that is significant. International law makes it clear that the right-hand extreme in Figure 15.1, above, is not legally permissible; it is not open to governments to simply abandon their populations to their own devices and to suggest that their capacity to withstand the impact of natural hazards is entirely their own responsibility. Governments have responsibilities under international law and in particular international human rights law to take steps to protect their populations and to advance their rights to life, health, and shelter.

15.2 DOMESTIC LAW

When talking about domestic law in jurisdictions that have inherited their legal traditions from the English common law, two sources of law exist: legislation or statute law, and the judge-made common law.
15.2.1 LEGISLATION

The legislature (the Parliament or Congress) can pass laws that the executive arm of government, the relevant government departments and officials, must administer. Limits occur, however, on legislative freedom.

Constitutional limits are (reasonably) fixed points in domestic law (though Constitutions may be amended and are subject to interpretation by the domestic courts in particular by the High Court of Australia and the Supreme Courts of England and the United States). A Constitution, in particular written constitutions such as those in the United States and Australia, set limits on what governments and citizens can do and what they can expect from each other. The Federal Parliaments of both the United States and Australia are governments of limited jurisdiction; they may make laws only with respect to those subject matters assigned to them in their respective constitutions (Australian Constitution s 51; United States Constitution art 1). Negotiation on disaster risk reduction must take into account constitutional limitations, as stakeholders cannot expect governments to take measures that are beyond the government’s constitutional competence, even where those measures would reduce risk or vulnerability.

Stakeholders can, however, expect governments to honor, and citizens may enforce, fundamental rights and guarantees. Handmer and Monson (2004) noted the difficulties in enforcing human rights in international law but recognized that

*National (or domestic) law offers greater opportunities for vulnerability reduction. Firstly, there is far greater scope for the enforcement of rights in national law, because individuals can bring actions in the courts to enforce their rights under national law. Public law (which regulates relationships between governments and their citizens, and is distinct from private law, which governs relationships between private citizens) is particularly useful in terms of reducing vulnerability, because the rights enshrined in national public law can be enforced by individuals against national governments, who are often those with the clearest responsibilities and the greatest resources for reducing vulnerability.*


The United States has various rights enshrined into the Constitution by the Bill of Rights. The United Kingdom, although lacking a written constitution, has fundamental documents such as the Magna Carta 1215 and the Bill of Rights 1688 that remain, at least in part, part of the domestic law (Lyon, 2003). The United Kingdom is also committed to protecting human rights through its adoption of the European Convention on Human Rights and the passage of the Human Rights Act 1998 (UK). Australia has no national human rights guarantees but it has adopted a number of international conventions into domestic law (Australian Human Rights Commission Act 1986 (Cth)) and human rights legislation does exist in some jurisdictions (Human Rights Act 2004 (ACT);
Charter of Human Rights and Responsibilities Act 2006 (Vic)). These provisions help cast law’s shadow by defining the commitments that governments have made to the well-being of their citizens.

Other law, that is local legislation, may provide remedies or require action to address risk. For example, the Civil Contingencies Act 2004 (UK) requires category 1 and 2 responders to prepare emergency plans and do other things in preparation for responding to an emergency. Those obligations could be enforced in local courts and help define responsibilities and obligations.

Domestic statutes are the output of the political compromise that is necessary in any law making. A particular Act that allows or requires action, such as buying back high-risk land, providing subsidized flood insurance, or mandating that people must evacuate in the face of an impending threat, all reflect a compromise on competing views and interests, views on the appropriate role of government, the appropriate role of personal autonomy, beliefs in the capacity of governments and individuals, the appropriate allocation of resources between various competing interests, etc. Within constitutional limits and obligations, governments may legislate to provide any number of risk reduction measures, or they may not. The choices they make reflect the political realities and cultural expectations of each society. These legislative actions are vitally important in developing resilience and reducing vulnerability but they are the *end point*, rather than the starting point, of the discussion on the limits of shared responsibility.

15.3 THE COMMON LAW

The other source of law, for common law countries, is the law developed by courts on a case-by-case basis. Historically, the Crown or government could not be sued but the Crown’s immunity has been abrogated by legislation (Judiciary Act 1903 (Cth), s 64; Crown Proceedings Act 1947 (UK), s 1; Federal Torts Claims Act 28 USC §1346(b); 28 USC §2674 (1946)). Today, the common law applies to governments as it does to citizens so governments can be sued for negligence, nuisance, and other common law wrongs.

15.3.1 No Duty to Rescue

*No observer would have any difficulty outlining the current state of the law throughout the common-law world regarding the duty to rescue. Except when the endangered person and the potential rescuer are linked in a special relationship, there is no such duty.*


People who are at risk from, or have been impacted by, a natural hazard are as much in need of rescue as a drowning person or a person trapped in a house fire, and, although we expect our government agencies to respond to those emergencies and use their very best endeavors to preserve life and minimize

In the High Court of Australia it was said

*The common law generally does not impose a duty upon a person to take affirmative action to protect another from harm... In principle a public authority...should not be regarded by the common law any differently from a citizen. It should not be considered to have an obligation to act. But the position of a public authority is not the same as that of a citizen... It has public functions and it has statutory powers which the citizen does not... The relevant concern of the common law is whether a public authority might nevertheless be considered to be under a duty of care which obliges it to exercise its powers in a particular way.*

(Crennan and Keiffel JJ).

As discussed above, national and state legislatures can and do pass laws creating government agencies and setting out their functions, powers, and responsibilities. Those statutes distinguish the statutory emergency service from the citizen and may give rise to a legal duty to aid others. In Australia, the United Kingdom, the United States, and across the world, state and national legislatures have established emergency response and emergency management agencies (Civil Contingencies Act 2004 (UK); Robert T. Stafford Disaster Relief and Emergency Assistance Act (Pub Law No 93–288) (US); Australia does not have national emergency management legislation, but see State Emergency and Rescue Management Act 1989 (NSW); Emergencies Act 2004 (ACT) and similar legislation in each state and territory). As the High Court judges noted, these agencies, equipped as they are with emergency powers and obligations, are different to citizens, but that does not prove that they owe a duty to come to the aid of individuals.

In Australia, the question of whether or not the common law will impose a duty of care requires a careful analysis of all the “salient features” (Graham Barclay Oysters v Ryan (2002) 211 CLR 540; Caltex Refineries (Qld) v Stavar (2009) 75 NSWLR 649) of the relationship between the parties to determine whether or not one party should be under a legal duty to aid the other. Tests vary across the United States but the California Supreme Court, for example, has said that deciding whether or not a duty of care is owed in particular circumstances...
...involves the balancing of a number of considerations; the major ones are the foreseeability of harm to the plaintiff, the degree of certainty that the plaintiff suffered injury, the closeness of the connection between the defendant’s conduct and the injury suffered, the moral blame attached to the defendant’s conduct, the policy of preventing future harm, the extent of the burden to the defendant and consequences to the community of imposing a duty to exercise care with resulting liability for breach, and the availability, cost, and prevalence of insurance for the risk involved.


In the United Kingdom, the question is whether it is “fair, just and reasonable” to impose a legal duty of care (Caparo Industries PLC v Dickman (1990) 2 AC 605).

Taking these considerations into account the courts have affirmed that the states’ rescue and emergency management agencies do not generally owe a duty to those in need of rescue, other than a duty not to make the situation worse (Stuart v Kirkland-Veenstra (2009) 237 CLR 215; Capital and Counties PLC v Hampshire CC (1997) QB 1004; Zack v City of Alameda (Cal, RG12632015, 11 February 2013)). Several theoretical justifications exist for the refusal to find a duty of rescue:

The most common relies on the distinction between placing limits on conduct and requiring affirmative conduct. This distinction in turn relies on the liberal tradition of individual freedom and autonomy. Classical liberalism is wary of laws that regulate conduct that does not infringe on the freedom of others. Some commentators have argued that mandating a duty to rescue might cheapen acts of Good Samaritans. Some commentators also argue that it might be difficult to limit an affirmative duty to aid others in peril from becoming a general duty of self-sacrifice. And in those instances when there are many potential rescuers, there may be no basis for choosing one on whom to place a rescue duty... Finally, determining factual causation tends to be more difficult when the tortious act entails a failure to prevent harm from occurring.

American Law Institute (2012), § 37.

When it comes to the state and its emergency services, the public nature of those services suggests that they do not owe a duty to individuals. When a fire brigade turns out in response to a fire, their primary obligation is to stop the fire spreading to other properties for the community benefit; that is, to stop the street, village, or town being lost to fire, rather than to protect the interests of the person whose property is already on fire (Capital and Counties PLC v Hampshire CC (1997) QB 1004). Furthermore, the emergency services are funded by the community as they provide that community benefit. Historically fire services were funded by insurance companies to protect the property of their policy holders, but having the fire service extinguish the fire conveyed a benefit to others. Insurance companies realized that extinguishing the fire in the house next to the insured property was a more cost-effective way to reduce their exposure than waiting for the fire to spread and then combating it. Either
way fire services brought a benefit to those that had not paid for it; in all the circumstances governments accepted that a coordinated community funded emergency service provided a whole of community benefit.

If the emergency services did owe a duty or care to individuals, it would affect the decisions they would have to make, including how to allocate resources and whether decisions could be made to forsake some properties for the greatest benefit. In dismissing an action against the New South Rural Fire Service (RFS) alleging negligence over their response to an uncontrolled wildfire on the outskirts of Sydney, Australia’s largest city, the trial judge said,

*The defendants could not have been expected to have concentrated their attentions on individual plaintiffs. They each had to consider the community as a whole. That included making choices, such as between fighting one fire or another, or between the assets of individuals, when deciding which house to save, and which house should be left to take the brunt of the fire so others could be saved.*

Warragamba Winery Pty Ltd v New South Wales (No 9) (2012) NSWSC 701, para 708.

The need, in that case, to allocate resources across the state, to multiple fires, all pointed against a duty owed to particular individuals. That governments and agencies must make policy decisions on the allocation of resources both to the emergency services generally and in response to a particular emergency; they must set priorities for response and identify which assets to protect at the expense of others; and the fact that some decisions must be made in the face of a fast moving emergency, all move against a finding that a duty is owed to a particular individual (Graham Barclay Oysters Pty Ltd v Ryan (2002) 211 CLR 540; Leishman v Thomas (1958) 75 WN (NSW) 173).

### 15.3.2 Breach

Even if a duty exists to act for the benefit of an individual, the duty is not to guarantee safety but to take reasonable steps to respond to the risk (Gorman v Wills (1906) 4 CLR 764).

*The perception of the reasonable man’s response calls for a consideration of the magnitude of the risk and the degree of the probability of its occurrence, along with the expense, difficulty and inconvenience of taking alleviating action and any other conflicting responsibilities which the defendant may have. It is only when these matters are balanced out that the tribunal of fact can confidently assert what is the standard of response to be ascribed to the reasonable man placed in the defendant’s position.*


In some cases, “the response of prudent and reasonable people to many of life’s hazards is to do nothing” (New South Wales v Fahy (2007) 232 CLR 486, para 7 (Gleeson CJ); para 123 (Kirby J)). Just because a risk, such as a risk of loss due to flood, fire, or other natural hazard, is foreseeable, it does not follow that those agencies with the statutory mandate to manage the response
to the hazard have to ensure everyone’s safety. They have to take reasonable steps and sometimes that means decisions must be made on issues such as the allocation of resources, the determination of priorities, and assessment of what can and cannot be saved with the consequences that foreseeable losses occur. In simple terms, a decision not to commit resources to fight a fire or remove a person from danger from flood waters may not be a breach of duty even if the result is property loss or death.

15.3.3 Policy

As noted at the start of this chapter, the move in emergency management is to adopt policies to develop resilient communities. Although a resilient community depends on the presence of resilient individuals, the two concepts are not synonymous. In the field of disaster risk reduction, resilience is defined as

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\text{The ability of a system, community or society exposed to hazards to resist, absorb, accommodate to and recover from the effects of a hazard in a timely and efficient manner, including through the preservation and restoration of its essential basic structures and functions.}
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The commentary to the United Nations International Strategy for Disaster Reduction glossary adds that the “resilience of a community in respect to potential hazard events is determined by the degree to which the community has the necessary resources and is capable of organizing itself both prior to and during times of need” (UNISDR, 2009, p. 24). Critically what is being referred to are the resources and capacities of communities, not individuals. In a recent editorial on the response to wildfire it was said:

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\text{Among the priorities facing firefighters, defense and protection of human life and protection of private property ranks right at the top; protection of infrastructure, watersheds and cultural sites is next.}
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With respect, and with the exception of the primacy of human life, those priorities are in the wrong order. Protection of infrastructure, watersheds and cultural sites will enhance community resilience. If the infrastructure (e.g., utilities, roads, community assets such as schools, libraries, meeting places) and cultural sites are maintained, then the community will have better resources to recover. If those that are left can send their children to school, maintain their employment, resupply the shops, have building materials delivered, and retain their community identity through the culturally important assets that encourage tourists and locals to return, then the community may, in time, recover. If, on the other hand, the first priority is the protection of private property, then homes may be saved but without power, water, or those assets required to allow economic activity to return, the capacity to recover will
be reduced. If that analysis is correct then the loss of some private property, and even the loss of some lives, is not inconsistent with the objective of developing resilient communities. Furthermore, if government and their agencies owe their primary duty to advance the community good (Graham Barclay Oysters Pty Ltd v Ryan (2002) 211 CLR 540; Capital and Counties PLC v Hampshire CC (1997) QB 1004) then their duty is to take those steps that will best serve the community, which may mean directing resources to protect “infrastructure, watersheds, and cultural sites” ahead of private property interests.

An example can demonstrate the difference between community and individual resilience. In the summer of 2010/2011, floods devastated the city of Brisbane, capital of the Australian state of Queensland. The floods were the worst since 1974. Approximately 22,000 homes and 7,600 businesses across 94 suburbs were flooded. In 2013, the estimated value of damage to council property alone exceeded A$355 million (Brisbane City Council, 2013). Notwithstanding this devastation it is clear that Brisbane has demonstrated resilience. Notwithstanding further flooding in January 2013, key economic data show that Brisbane has continued to thrive. As of January 2013, Brisbane contributes almost 50 percent of the Queensland economic activity, which in turn accounts for nearly 20 percent of the Australian Gross Domestic Product; employment in Brisbane has continued to grow at about 0.6 percent per annum; continued commercial growth of about 10 percent has occurred since 2011 (Quirk, 2013). Individuals may not be so resilient, some people will still be struggling to recover from the floods, some may have moved out of the Brisbane area, shops and businesses will have changed hands. Depending on how one defines “community” some communities may also remain affected, but at the macrolevel the evidence is that there was, and is, a resilient community; the city of Brisbane has been able to “absorb, accommodate to, and recover from the effects of a hazard in a timely and efficient manner” even if some individuals have not.

A government (whether local, state, or federal) committed to developing community resilience can show that community resilience does not require universal, individual resilience. It is not inconsistent with a policy committed to developing resilient communities to realize and even accept that some individuals will not be resilient to a particular hazard but a government, consistent with its policy choices, may choose to accept that trade-off.

15.4 DISCUSSION

We can now return to Figure 15.1. It has been argued, above, that the right-hand extreme of the shared responsibility spectrum is not tenable; international law and, where applicable, domestic guarantees of fundamental rights, means that governments cannot simply abandon their populations to their fate. The further analysis, above, shows that the left extreme is also unsupported;
governments and their agencies, even agencies that governments have chosen
to create with the express purpose of preparing communities for, and then
responding to emergencies, are not required to ensure the protection of
everyone. As the flood waters rise, or the fire burns across the urban interface,
the law only requires governments and their agencies to take reasonable steps
to mitigate risks to the community; legal responsibility for the protection of
private assets and for the consequences of decisions to respond to warnings or
directions to evacuate and a number of other decisions belong to the indi-
viduals affected.

It is from these extreme points that negotiation on how responsibility for
disaster risk management will be shared, can take place—negotiation that will
occur in the shadow of the law. What this brief identification of the legal
extremes has done is help identify where the shadow cast by the common law
of Australia, the United Kingdom, and the United States falls. We can
demonstrate this by modifying Figure 15.1, to produce Figure 15.2.

It is open for stakeholders to negotiate on how responsibility is to be
shared, that is, what aspects of risk reduction and response belong to the
government, and what belongs to individuals or community. In those negoti-
ations the parties know that governments cannot abandon their citizens to
nature’s fury, obligations exist that may be enforced (Handmer and Monson,
2004), these may require governments to provide minimum standards of
disaster relief, to ensure housing standards take into account the hazard
environment, that inappropriate development in hazardous areas is prohibited
or restricted, and that citizens are given access to information to inform them
of their risk and how to protect themselves. Equally the parties know that, if
left to the common law, governments are not legally obligated to save
everyone, nor are they legally obligated to make good all the damage that is
done by natural hazards. Some level of responsibility for preparation,
response, and recovery lies with each individual. Within those extreme

![Emergency management is a government responsibility — governments have obligations to protect the human rights of their citizens including the rights to life, shelter and health care.]()

![Emergency management is an individual responsibility. Individuals cannot expect governments and agencies to prioritise individual needs ahead of community needs so individuals have to make their own arrangements to protect themselves and private assets.](

**FIGURE 15.2** Shared responsibility in the shadow of the law.
points—within the shadow cast by the law—different countries, cultures, and communities can adopt a myriad of approaches to risk and risk management. The important lesson from this analysis is that the appropriate roles and responsibilities for governments and individuals are not, legally, self-evident.

Law is a tool that can be used by interest groups to advance what they perceive to be their best interests, whether that is advocating for their right to build homes in hazard-prone environments or advocating against such development because of the social costs of the impact of disasters. Balancing these competing values, interests, and demands on resources is a political process (Davis, 1993), which means that different stakeholders can use their political influence and ability to affect the outcomes of policy choices. Developers with the ear of government may be able to use their influence to weaken building codes and development rules to maximize development at some cost to community safety; advocates for ecosystem protection, or wealthy residents who enjoy the natural environment, may affect the policy choices that may be used to reduce hazards from wildfire; a desire to allow population growth may bring pressure to release land on the wildland–urban interface or the floodplain even though they bring their own risk. Whether those outcomes are “good” or “bad” depend on one’s views, interests, and personal philosophy. If, as argued above, the appropriate roles and responsibilities for governments and individuals are not, legally, self-evident, then disaster risk reduction becomes one of the concerns that governments need to address (albeit an important one that comes with international and domestic legal obligations).

That reality could be disillusioning for those with a genuine interest in developing community resilience and protecting communities and individuals from foreseeable, inevitable natural hazards. Rather than be disillusioned, however, the message should be empowering; if those advocating for increased resilience and further risk reduction understand that they must engage in the political process and negotiate, in the shadow of the law, for desired outcomes, then they will be better informed and prepared to engage in the “art of the possible.” Emergency management professionals will, however, continue to be disappointed if they hope that claims that a certain policy choice will increase resilience or reduce disaster risk will trump all competing concerns or that their government must act on their advice.

15.5 CONCLUSION

This chapter has considered how law, in particular law based on the English common law tradition, addresses issues of risk and the responsibility of governments to manage risk reduction for the benefit of the community and individuals. It has been argued that the appropriate role of government is not self-evident. The Anglo-Australian-American common law does not require or

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1. “Politics is the art of the possible” (Bismark, 1867).
oblige governments to guarantee the safety of its citizens or to bear the risk of natural hazards. On the other hand, fundamental norms of international law that have been incorporated into national constitutions and domestic law do not allow governments to simply abandon populations to their fate.

Apart from these broad parameters, the position is open to negotiation. Legislators need to be persuaded that actions are necessary to reduce risk particularly if the decisions come at the expense of other priorities and interest. This message could be disappointing; to describe decisions as political is usually to imply that the decision is improper or made for impure motives, but politics is an essential tool, particularly in Western democracies, to resolve issues of competing values and interests (Davis, 1993). Seen in that light, the message is empowering; if the law is allowing inappropriate development or fails to recognize the resilience of local populations, then, rather than seeing the law as a barrier or fixed rules that must be accommodated, getting political and changing the law may become the emergency managers role. Getting political, however, requires recognition that there are other competing viewpoints, and the argument that changing the law will reduce risk is unlikely, on its own, to carry the day. As with any negotiation engaging with the opposing views will be necessary, and sometimes compromise will be called for.

This chapter contributes to that negotiating process by making explicit the political nature of the compromise but at the same time identifying some of those (reasonably) fixed points of law that identify some limits of legal obligation. Those points cast the shadow within which negotiation for laws that appropriately shares responsibility for risk management can take place.

REFERENCES


ICCPR — See International Covenant on Civil and Political Rights.


UNISDR — See United Nations International Strategy for Disaster Risk Reduction.


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