

Risk Theory and ‘Subjective Fear’: The Role of Risk Perception, Assessment, and Management in Refugee Status Determinations

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Abstract

Adjudicators deciding refugee claims often assume that people in danger will take prompt and effective steps to save themselves and will never willingly put themselves at risk. They rely on three articles of faith handed down by generations of judges: those who fear for their lives in their homelands will not delay in leaving; they will ask for protection immediately in the first safe country that they reach; and they will never return for any reason. These assumptions are not based on any evidence, and yet evidence is close at hand. For decades, psychologists, sociologists, anthropologists, economists and historians have studied how human beings perceive and respond to danger. This article reviews this research and concludes that before adjudicators could even potentially infer from these types of actions that a claimant was not afraid, or is lying, they must consider the psychological and cultural factors influencing the claimant’s risk perception, assessment, and management. It concludes that even when all these factors are taken into account, the well-documented variance in human response to danger makes ‘subjective fear’ judgments fundamentally unsound.

1. Introduction

Adjudicators deciding refugee claims often assume that people in danger will take prompt and effective steps to save themselves and will never willingly put themselves at risk. They rely on three articles of faith handed down by generations of judges: those who fear for their lives in their homelands will not delay in leaving; they will ask for protection immediately in the first safe country that they reach; and they will never return for any reason.

Under Canadian law, refugee claimants must demonstrate both an ‘objective’ and a ‘subjective’ basis to their claims. They must convince a member of the Immigration and Refugee Board not only that they are at risk, but also that they are genuinely afraid.¹ The Board regularly refuses protection to claimants who delayed in fleeing or in asking for protection,

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¹ *Canada (Attorney General) v Ward* [1993] 2 SCR 689 (Supreme Court of Canada).

or who dared to return home, on the grounds that in so doing they ‘acted in a manner inconsistent with a subjective fear of persecution’. These same three assumptions also serve to justify negative credibility findings, as they do in jurisdictions where ‘subjective fear’ is not considered a separate element of the Convention definition, on the basis that the claimants’ actions are so far from what could be expected of a reasonable person that they are simply ‘implausible’.

These assumptions are not based on any evidence, and yet evidence is close at hand. For decades, psychologists, sociologists, anthropologists, economists and historians have studied how human beings perceive and respond to danger. Their findings confirm that before an adjudicator could even potentially conclude from these types of actions that a claimant was not afraid, or is lying, he would have to consider the factors influencing her risk perception. How familiar was the risk? How appealing was it? To what extent did the claimant initially perceive it as controllable? He would need to explore her personal level of risk tolerance, her optimism bias, her previous experiences with this type of risk, and her emotional response. He would have to understand how she assessed the risk. What information did she use in making her decisions? How did she weigh competing dangers? He would need to investigate the psychological and cultural factors influencing her risk management strategies, and he would have to determine how all the above elements affected the pace of her decision making. Even with these factors taken into account, the well-documented variance in human response to danger makes judgments about ‘subjective fear’ fundamentally unsound.

2. Factors influencing a refugee claimant’s risk perception, assessment, and management

2.1 Familiarity

Two decades ago, psychologist Paul Slovic identified eighteen aspects of a risk’s character that affect how likely we are to worry about it. These factors are divided between two axes of influence, one representing the extent to which a risk is known or unknown and the other the extent to which it is ‘dreaded’.² Of significant relevance in a refugee claim is the fact that a person’s familiarity with a given risk is one of the key factors that influence how strongly he or she will respond to it. ‘Rare but memorable events’ stick in our minds; we tend to overestimate the likelihood of them happening to us, and we react to them emotionally. On the other hand, we underestimate the chances of ‘duller but more common ones’, even

² P. Slovic, ‘Perceptions of Risk’ (1987) 236 *Science* 280-5 at 282 [Slovic 1987].

when the actual chance of harm is significantly greater.³ As one researcher observes, 'non-experts consistently overestimate the likelihood of a major nuclear plant accident and underestimate the aggregate hazards of lawn mowing'.⁴

When a specific event – a spectacular multi-car pile-up, for instance – is part of a class of risk that is common and ordinary ('car accident risk'), even such a memorable example may not influence our perception. Multi-car pile-ups grab our attention when we see them on the news, but not for long. Because we are used to discounting this type of danger, it quickly fades into the background, even when we are confronted with death on a large scale. 'An accident that takes many lives may produce relatively little social disturbance (beyond that perceived by the victims' families and friends) if it occurs as part of a familiar and well-understood system'.⁵

Because 'car accident risk' is a recognized fact of life, 'part of a familiar and well-understood system', we are willing to inconvenience ourselves only minimally to protect ourselves from it. We regularly pressure our governments to regulate unfamiliar risks, such as new medicines and technologies; we rarely demand more stringent car-safety rules and restrictions.⁶ In fact, we do not even appreciate the regulations that we have. Most Canadian drivers break the speed limit, more than one in twenty admit to driving drunk or high,⁷ and twice as many do not fasten their seat-belts (despite sharing the road with those in the previous categories).⁸ With familiar dangers, rather than guarding against the risks themselves, we often guard against thinking about them, through mechanisms of 'thought suppression' and 'cognitive escape'.⁹ In lay terms, we simply ignore them and get on with our lives.

In April 2006, a young man in British Columbia was abducted at gunpoint outside his home. A week later, he was rescued by police who thwarted his kidnappers' plan to extort a ransom from his wealthy parents. The story ran on the front pages of the country's national newspapers for days. The event was both 'rare and memorable' – of the approximately 600 abductions in Canada each year, the majority are children abducted

³ Ibid.; C. A. Heimer, 'Social Structure, Psychology, and the Estimation of Risk' (1988) 14 *Annual Review of Sociology* 491-519 at 494.

⁴ L. Clarke, 'Explaining Choices among Technological Risks' (1988) 35 *Social Problems* 22-35 at 23.

⁵ Slovic 1987, above n. 2, 284.

⁶ Ibid., 283.

⁷ A. Picard, 'Drug-driving rate doubles in 15 years' *The Globe and Mail*, 12 Dec. 2006.

⁸ Transport Canada: Frequently asked questions (Road): <http://www.tc.gc.ca/road/faq.htm>.

⁹ M. A. Hoyt, C. J. Nemeroff & D. M. Huebner, 'The Effects of HIV-Related Thought Suppression on Risk Behavior: Cognitive Escape in Men Who Have Sex With Men' (2006) 25 *Health Psychology* 455-61.

by their non-custodial parents.¹⁰ In Canada, kidnappings for ransom are, thankfully, newsworthy. Of the approximately 4,000 people abducted annually in Colombia, however,¹¹ most are kidnapped for ransom.¹² Kidnapping for ransom has become ‘big business’. It is ‘a major contributor to the treasury of the armed groups’¹³ and a fact of life for average Colombians. It is, sadly, ‘part of a familiar and well-understood system’. Yet when Colombian claimants try to explain to Canadian adjudicators how it was possible for them to carry on with their lives after receiving such a threat, they often fail. The Members simply find this implausible, even though, adjusting for population, as many people are abducted for ransom in Colombia in a given year as are killed in car crashes in Canada.¹⁴

For example, to understand the claimant’s response, a Member should consider trying to explain himself to an Amish insurance adjuster after crashing his car while speeding or drunk: he would have to explain why he took such a senseless risk to a man, who not only assesses car accident risk for a living, and listens every day to live testimony from people who have been injured in car accidents, but who cannot imagine for a minute pushing that kind of risk to the back of his mind – because he comes from a culture where ‘car accident risk’ has never been simply a fact of life. Then the Member might better appreciate the effect of familiarity on risk perception.

2.2 Appeal

Ms D fled her country, leaving her young children behind. She lived in exile for several months and then returned home because she could not bear the separation. The Member hearing her claim concluded that Ms D lacked a subjective fear of persecution because she ‘could not provide a reasonable explanation as to why she took the self-endangering step’ of going home.¹⁵ Ms R became a crack addict in Canada. In rejecting her claim, the Member acknowledged that Ms R had been sexually abused as a teenager and had subsequently suffered brutal domestic violence.

¹⁰ Statistics Canada: Crime Statistics in Canada, 2004 (Catalogue no. 85-002-XPE, vol. 25, no. 5); G. Graves and O. Wood, ‘Indepth: Missing Children: Streetproofing your kids’ CBC.ca, 21 Oct. 2003.

¹¹ R. Pshisva & G. A. Suarez, ‘“Captive Markets”: the Impact of Kidnappings on Corporate Investment in Colombia’ Working paper in the Finance and Economics Discussion Series, Divisions of Research and Statistics and Monetary Affairs, Federal Reserve Board, Washington D.C., Feb. 2006, 7.

¹² D. Williams, ‘Kidnapping is big business in Colombia’ CNN.com, 7 May 2001.

¹³ United Nations Office on Drugs and Crime, ‘Country Profile: Colombia’ (2003), 28.

¹⁴ 2,800 Canadians died in traffic fatalities in 2004, out of a population of 33 million (0.008%); 4,000 Colombians were kidnapped for ransom out of a population of 43.5 million (0.009%); ‘Car-crash deaths outnumber homicides: report’, CTV.ca, 8 Jan. 2006; CIA World Factbook, ‘Colombia’ 2006; CIA World Factbook: ‘Canada’ 2006.

¹⁵ Immigration and Refugee Board File TA5-10652. IRB cases cited in this paper were the subject of applications for leave and for judicial review to the Federal Court of Canada and are part of the public record.

She nonetheless concluded that Ms R was not really afraid of returning to her country. If she had been, she would not have become a crack addict, thereby risking deportation on criminal grounds.¹⁶

Like the friend who keeps passing you beers, your brain is an enabler: it does its best to give you what you want, whether it is good for you or not. If you want to take a particular risk very badly, this will not only affect how you weigh the pros and cons, it will also make you perceive the risk itself as less dangerous than it is.¹⁷ The appeal of street drugs (the 'spiritual and psychological highs', the escape, and the sense of community with other users) causes those who take them to perceive them as safer than they are.¹⁸ For surgeons, 'traditionally the most glamorous category of medical practitioners', the allure of 'status and the humanitarian rewards of specialist medical practice' reduces the perception of the risks associated with exposure to radioactive waste.¹⁹ And contrary to popular wisdom, studies suggest that the problem is not that we want to smoke because we misjudge or ignore the risks, but rather the reverse: we misjudge or ignore the risks because we want to smoke.²⁰

It is hard to imagine a risk that would appeal more strongly to Ms D than returning home to her young children. The Member who refused Ms R's claim underestimated, and to a breathtaking degree, how appealing an escape into crack must have seemed to this traumatized woman. Such an appeal would certainly have interfered with her perception of the risk of being caught, charged criminally, and deported – if such a risk were even on her radar. For many claimants, the appeals of home are obvious: family and friends, personal property, community, cultural identity, status, financial security. As discussed below, these factors will come into play when claimants decide whether or not to risk staying or returning home. They will also affect the extent to which they perceive home as safe.

2.3 Controllability

Most drivers feel safer behind the wheel than in the passenger's seat: 'we all feel better when we are in control, especially in a risky situation'.²¹ We

¹⁶ IRB File TA2-27279.

¹⁷ P. Slovic, E. Peters, & M. L. Finucane, 'Affect, Risk, and Decision Making' (2005) 24 *Health Psychology* (Suppl.) S. 35-40 at S. 36 [Slovic 2005].

¹⁸ N. J. Fox, 'Postmodern reflections on 'risk', 'hazards' and life choices' in D. Lupton (ed.), *Risk and Sociocultural Theory: New Directions and Perspectives* (Cambridge, 1999) 12-33 at 28.

¹⁹ S. Rayner, 'Radiation Hazards in Hospitals: A Cultural Analysis of Occupational Risk Perception' (1984) 60 *RAIN* 10-12 at 10, 12.

²⁰ F. X. Gibbons, T. J. Eggleston & A. C. Benthin, 'Cognitive reactions to smoking relapse: the reciprocal relation between dissonance and self-esteem' (1997) 72 *Journal of Personality and Social Psychology* 184-95; Slovic 2005, above n. 17, at S. 39.

²¹ E. R. Blake, 'Commentary: Understanding Outrage: How Scientists Can Help Bridge the Risk Perception Gap' (1995) 103 *Environmental Health Perspectives* 123-5 at 124.

are less likely to take a risk seriously if we believe that we can affect our chances of being harmed by it.²² This holds true even when the steps that we take to reduce our risk affect it only minimally, if at all. We consistently give ourselves disproportionate credit for our risk-reducing actions and overestimate their effectiveness. Taking ineffective steps to reduce our risk may lead us to believe that the danger is less than it is, simply because we feel that we are doing something about it.²³

A person who has been warned that the brakes on her car need fixing or her tyres need changing may avoid driving on the highway. This may reduce her risk, but it is also likely to lead her to underestimate the danger of driving the car *at all*. Similarly, a claimant facing a threat may change his route to work, or his schedule, or his phone number. This may or may not reduce his actual risk, but the very fact that he has done it may make him feel safer.

2.4 Risk tolerance

Why do some people take more risks than others? As its name implies, risk tolerance (or ‘risk propensity’ or ‘risk acceptance’) is the measure of how much risk a person is willing to bear. Research has shown that risk tolerance is a basic personal orientation, which is largely constant and habitual: people ‘exhibit stable differences in whether they prefer or disdain risks’ and this propensity ‘tends to persist over time’.²⁴ Our risk tolerance may respond to situational control (if we take risks often enough that end well or poorly enough, this may eventually affect how we feel about taking risks),²⁵ but it does not respond easily. A string of losses will not dampen a gambler’s willingness to place bets. Despite experiencing ‘long-term negative expected value’, she is as likely as not to figure, “‘this is my lucky day’”, “my luck has to change” or “this number has to win”.”²⁶

²² Slovic 1987, above n. 2; N. D. Weinstein, ‘Why it won’t happen to me: Perceptions of risk factors and susceptibility’ (1984) 3 *Health Psychology* 431-57 [Weinstein 1984]; A. M. A. Smith & D. A. Rosenthal, ‘Adolescents’ perceptions of their risk environment’ (1995) 18 *Journal of Adolescence* 229-45; J. A. Kulik & H. I. M. Mahler, ‘Health status, perceptions of risk, and prevention interest for health and nonhealth problems’ (1987) 6 *Health Psychology* 15-27.

²³ See, e.g.: Weinstein 1984, above n. 22; N. D. Weinstein & W. M. Klein, ‘Resistance of personal risk perceptions to debiasing interventions’ (1995) 14 *Health Psychology* 132-40 at 133 [Weinstein 1995]; D. R. Rutter, L. Quine & I. P. Albery, ‘Perceptions of risk in motorcyclists: unrealistic optimism, relative realism and predictions of behaviour’ (1988) 8 *British Journal of Psychology* 681-96; K. J. Prentice, J. M. Gold & W. T. Carpenter, Jr., ‘Optimism bias in the perception of personal risk: patterns in schizophrenia’ (2005) 162 *American Journal of Psychiatry* 507-12 at 510.

²⁴ S. B. Sitkin & A. L. Pablo, ‘Reconceptualizing the Determinants of Risk Behavior’ (1992) 17 *The Academy of Management Review* 9-38 at 16-17 [Sitkin 1992].

²⁵ *Ibid.*; S. B. Sitkin & L. R. Weingart, ‘Determinants of Risky Decision-Making Behaviour: A Test of the Mediating Role of Risk Perceptions and Propensity’ (1995) 38 *The Academy of Management Journal* 1573-92 at 1587 [Sitkin 1995].

²⁶ D. W. Massaro, ‘Paradoxes of Gambling Behavior’ (1990) 103 *The American Journal of Psychology* 290-7 at 296.

A person's risk tolerance will affect whether or not she is willing to do something that she knows is risky. Drinking alcohol, smoking, having a dangerous job, not carrying insurance, holding stocks rather than bonds, even voting for the opposition rather than the 'devil you know' incumbent – all have been linked to a high risk tolerance.²⁷ Less obvious, however, is the fact that risk tolerance also affects a person's perception of what is risky. People with a high risk tolerance may underestimate risk, because they overlook signs of danger. They are less concerned about risk, and therefore less vigilant, than those with a lower risk tolerance.²⁸

The refugee definition says that a refugee must fear danger; it nowhere says that she must be a cautious person.²⁹ If when facing the same threat one claimant risks staying or returning home while another flees at the first opportunity and never looks back, this may say something about their orientation towards the risk and nothing about the risk itself.

2.5 Optimism bias

When it comes to health and safety risks, we can all agree on one thing: it may happen to you, but it is not likely to happen to me. This 'optimism bias' – the tendency to rate our own risk as significantly lower than that of our peers – seems to be a universal and highly resilient human psychological trait. We display it consistently in a broad variety of risk contexts.³⁰ When studies are specifically designed to try to reduce the optimism bias of their subjects, they fail (in some cases, the bias increases).³¹ Hypochondriacs display an optimism bias around health risks.³² Even clinical pessimists display an optimism bias.³³ Dr Neil Weinstein, foremost

²⁷ R. B. Barsky, F. T. Juster & M. S. Kimball, 'Preference parameters and behavioral heterogeneity: an experimental approach in the Health and Retirement Study' (1997) 112 *The Quarterly Journal of Economics* 537-79 [Barsky 1997]; S. Morgenstern & E. Zechmeister, 'Better the devil you know than the saint you don't? Risk propensity and vote choice in Mexico' (2001) 63 *The Journal of Politics* 93-119.

²⁸ Sitkin 1995, above n. 25, 1579.

²⁹ The U.N. Handbook on Procedures and Criteria for Determining Refugee Status makes this explicitly clear at paragraph 40: 'An evaluation of the subjective element is inseparable from an assessment of the personality of the applicant, since psychological reactions of different individuals may not be the same in identical conditions'. The Federal Court of Canada has also recognized this principle, e.g., by overturning a decision where the Board found that a claimant should have gone into hiding rather than continue his political activities: 'Such a gratuitous council of cowardice as the only standard of plausible behaviour can hardly be taken as an objective reflection by the Board'. *Giron v MEI* 1992 FCJ 418, para. 4.

³⁰ E.g.: Rutter, above n. 23; J. S. Green, M. Grant & K. L. Hill, 'Heart disease risk perception in college men and women' (2003) 51 *Journal of American College Health* 207-11.

³¹ Weinstein 1995, above n. 23.

³² A. J. Barsky, D. K. Ahern & E. D. Bailey, 'Hypochondriacal patients' appraisal of health and physical risks' (2001) 158 *The American Journal of Psychiatry* 783-7.

³³ K. R. Fontaine, 'Effect of dispositional optimism on comparative risk perceptions for developing AIDS' (1994) 74 *Psychological Reports* 843-6. Interestingly, schizophrenics, who 'are often seen as compromised in their ability to appreciate risk information and their decision-making capacity', demonstrate slightly less optimism bias than their peers (and are therefore actually slightly more accurate in their risk perceptions). Prentice, above n. 23.

authority in this area and author of the well-known study ‘Why it won’t happen to me’, concludes simply, ‘People prefer to believe that their risk is below average and are reluctant to believe anything else’.³⁴

This innate optimism is what enables us, when facing a choice that we do not like, to convince ourselves that we have a better but unrealistic ‘third option’ – a cognitive illusion known as a ‘mirage’. A classic example is the person who, snacking on a bowl of nuts before dinner, does not want to ruin her appetite and must decide whether or not to put the bowl away. Realistically,

... the choice is between not eating any more nuts (because the bowl has been taken away) and eating all of the nuts. But because the decision to leave the bowl on the table is connected to a mirage choice of eating only a few more nuts, people commonly fool themselves into believing that they can choose between eating only a few nuts (their first choice even though it’s a mirage) and eating no more nuts (which they prefer to eating all the nuts).³⁵

Claimants often explain that they delayed in leaving their country, or chose to return home, because they pinned their hopes on a ‘mirage’. They hoped that the agents of persecution would eventually lose interest in them. Faced with two unpleasant options – live in danger or live in exile – they imagined a third, more optimistic, possibility: with time, the problem will resolve itself.

The adjudicator, however, comes to the hearing with an opposite bias. By definition, he is only ever exposed to those people for whom the problem did not resolve itself. The adjudicator has read the claimant’s story, and many others like it, and with the benefit of hindsight he knows ahead of time how it is going to end. Since all claimants’ stories end badly, he may come to assume that threats escalate and problems get worse. Seen through this competing normalization bias, the claimant’s natural optimism seems implausible.

2.6 Outcome history

The Loma Prieta earthquake that struck California in 1989 caused considerable damage in Santa Cruz and significant but lesser damage in San Francisco. In the weeks following, the public in both cities were warned repeatedly about the risk of aftershocks. Researchers studying the popular response to these warnings found that while the residents of both cities understood the risks in roughly equal numbers, the residents of Santa Cruz, not surprisingly, were more likely to personalize the warnings

³⁴ Weinstein 1984, above n. 22; Weinstein 1995, above n. 23, 139.

³⁵ Heimer, above n. 3, 496.

and to take the recommended precautions³⁶ – even though for part of this period the actual risk was higher in San Francisco.³⁷ More surprising, perhaps, is the fact that, after the earthquake, the residents of San Francisco were harder to convince to take precautions than they had been before it hit. The very fact that they had been spared the worst the first time created in their minds a strong normalization bias that interfered with their ability to personalize the subsequent risk: 'the first impact did not affect me negatively, therefore subsequent impacts will also avoid me'.³⁸ Similar findings have been reported in other studies of natural disasters.³⁹

This is a classic example of the effects on risk perception of 'outcome history' – the aggregate of a person's life experiences as they relate to a particular risk. Researchers describe a 'U-shaped relationship' between experience and risk perception: while a lack of direct experience may lead to (naïve) overconfidence, direct experience may also lead to (blasé) overconfidence. Like the residents of San Francisco, people who have dodged bullets 'may begin to focus selectively on the evidence of their past ability to overcome obstacles', or on their past good fortune, and therefore become more willing to engage in risky behaviour.⁴⁰

A smoker may know that every cigarette increases his risk of lung cancer. His worry about this risk should logically increase as the risk increases – with every cigarette. Paradoxically, however, the more he smokes the less dangerous smoking feels.⁴¹ While he may recognize intellectually that the risk is increasing, his perception of the risk is decreasing. This is because every time he smokes without getting lung cancer, he reinforces his 'smoking without getting lung cancer' outcome history; the more days that pass without incident, the more persuasive the statement 'I will not get lung cancer today'.⁴²

Similarly, the very fact that a claimant has been threatened repeatedly may decrease her sense of urgency. She may know that the risk is increasing and the worst may yet happen. It may happen tomorrow, but based on her past experiences, she feels that it will not happen today.

³⁶ D. S. Miletic & P. W. O'Brien, 'Warnings During Disaster: Normalizing Communicated Risk' (1992) 39 *Social Problems* 40-57 at 44 [Miletic 1992].

³⁷ *Ibid.*, 45.

³⁸ *Ibid.*, 53-4.

³⁹ J. K. Riad, F. H. Norris & R. B. Ruback, 'Predicting evacuation in two major disasters: risk perception, social influence, and access to resources' (1999) 29 *Journal of Applied Social Psychology* 918-34 at 922.

⁴⁰ Sitkin 1992, above n. 24, 14; B. L. Halpern-Felsher, S. G. Millstein & J. M. Ellen, 'The role of behavioral experience in judging risks' (2001) 20 *Health Psychology* 120-66 at 122-4.

⁴¹ Gibbons, above n. 20.

⁴² F. P. McKenna & M. S. Horswill, 'Risk Taking from the Participant's Perspective: The Case of Driving and Accident Risk' (2006) 25 *Healthy Psychology* 163-70 at 168.

2.7 Place attachment

A recent study explored the risk perception of Israeli settlers in the Gaza Strip. As the researcher noted, 'to an outsider, it should be difficult to understand what keeps the Israeli settlers risking their lives and those of their children by living in such a dangerous area'.⁴³ Why have they not fled? Where is their 'subjective fear'?

The study concluded that 'place attachment' was a significant factor motivating their decision to stay. Because of their emotional bond with their geographic community and their religious and political commitment to remaining, the settlers were willing to expose themselves and their families to the risks that they perceived.⁴⁴ The researcher also discovered, however, that despite their dangerous environment, they were not living each day in fear. Instead, their place attachment directly affected their perception of the risks that they were facing: the stronger their place attachment, the lower the perceived risk. Given the conflict between their commitment to staying, on the one hand, and the obvious danger, on the other, the subjects 'dealt with their cognitive dissonance by diminishing their perception of the risk'.⁴⁵

This effect will likely be intensified where the thought of having to flee her home makes a person not only distressed but also angry. Anger and fear have opposite effects on risk perception. While fearful people tend to overestimate risks, angry people often significantly underestimate them.⁴⁶

Faced with a danger that threatens to force them from their homes, many if not most claimants describe an internal struggle between their fear, on the one hand, and their heartbreak and anger, on the other. Rather than reflecting a lack of fear, their actions may show the consequence of this conflict. Claimants may initially resolve this dissonance in the same way the Israeli settlers do, by reducing their perception of the risk.

2.8 Lay knowledge

As Mr J tried to explain, he was never tempted to make an asylum claim during the many years that he lived without status in Florida. To do so would have meant bringing himself to the attention of the American authorities, and the difficulties of winning a claim were well known in the Colombian ex-patriot community. Mr J believed that he was safer underground. From what he had heard, as long as he kept out of trouble with the law, the risk of being discovered was minimal.

⁴³ M. Billig, 'Is My Home My Castle? Place Attachment, Risk Perception, and Religious Faith' (2006) 38 *Environment and Behavior* 248-65 at 249.

⁴⁴ *Ibid.*

⁴⁵ *Ibid.*, 263.

⁴⁶ J. S. Lerner & D. Keltner, 'Fear, anger and risk' (2001) 81 *Journal of Personality and Social Psychology* 146-59 [Lerner 2001]; J. S. Lerner, R. M. Gonzalez & D. A. Small, 'Effects of Fear and Anger on Perceived Risks of Terrorism: A National Field Experiment' (2003) 14 *Psychological Science* 144-50 [Lerner 2003].

He was right, incidentally, on both counts. At the time, the United States was accepting roughly 11 per cent of Colombian asylum claims⁴⁷ (compared with 77 per cent in Canada).⁴⁸ By 2000, INS raids 'had become so rare that even top INS officials acknowledged that there was little risk of arrest for an undocumented worker, once across the border, unless he happened to get turned in by an employer',⁴⁹ and there was not much chance of that: in 2003, of the estimated 6.3 million undocumented workers in the United States, 445 were arrested at work.⁵⁰ Yet in rejecting his refugee claim in Canada, the Member found that Mr J was not genuinely afraid of returning to Colombia. The United States, after all, is a signatory to the Refugee Convention. If he were really afraid, he would surely have asked for protection.⁵¹

As is often the case where expert evidence and lay knowledge are at odds, the Member and Mr J have made different risk assessments 'not because they interpret the data in different ways ... but because they have different data'.⁵² The Member has a wealth of expert information at her fingertips. She can say with authority that the United States has signed the Refugee Convention because she has it in front of her, along with a binder filled with country conditions documents from a variety of official sources. Mr J could have sought out this information, but, like many claimants, he relied instead on 'lay knowledge', on what was commonly known in his social circle or reported to him by trusted members of his community.

The role of experts in assessing risk is a relatively new development, a defining characteristic of the Risk Society, as discussed further below.⁵³ In traditional, small, or rural communities, as well as in subcultures within large cities – such as Mr J's Colombian ex-patriot community – people often rely more on one another for risk information than on experts.⁵⁴ This is especially true in times of stress and uncertainty, when 'more reliance is placed on informal and unconventional channels' of risk information, such as word-of-mouth.⁵⁵

⁴⁷ Immigration and Refugee Board 'Response to Information Request' USA43419.E, Apr. 2005.

⁴⁸ Wei Wei Da, Latin American Research Group, 'Colombians in Canada: Contexts for Departure and Arrival' 2002: <http://www.yorku.ca/cohesion/LARG/PDF/Colombia-WWD-2002.pdf>, 5.

⁴⁹ K. Ellingwood, *Hard Line: Life and Death on the U.S.-Mexico Border* (New York: Pantheon Books, 2004), 232-3.

⁵⁰ D. R. Francis, 'Time to get real about enforcing immigration laws' *Christian Science Monitor*, 8 Aug. 2005.

⁵¹ Immigration and Refugee Board File TA2-15669.

⁵² Fox, above n. 18, 15.

⁵³ D. Lupton, 'Introduction: risk and sociocultural theory' in D. Lupton (ed.), above n. 18, 1-11 at 4 [Lupton, Introduction]; J. Tulloch & D. Lupton, *Risk and Everyday Life* (London: Sage, 2003), 3; M. Bell & J. Sheail, 'Experts, publics and the environment in the UK: twentieth-century translations' (2005) 31 *Journal of Historical Geography* 496-512.

⁵⁴ Tulloch, above n. 53, 129-30; M. Balshem, 'Cancer, Control, and Causality: Talking about Cancer in a Working-Class Community' (1991) 18 *American Ethnologist* 152-72.

⁵⁵ D. S. Mileti & J. D. Darlington, 'The Role of Searching in Shaping Reactions to Earthquake Risk Information' (1997) 44 *Social Problems* 89-103 at 89 [Mileti 1997].

The Member is falling into a common trap in refusing to recognize Mr J's lay knowledge as a valid source of risk information. Experts often fail to appreciate the role that lay knowledge plays in shaping the way in which non-experts register risk,⁵⁶ even when, as in this case, the information is arguably more relevant or more accurate.⁵⁷ This failure can cost lives. In a hospital, management's failure to appreciate that staff rely on lay knowledge undermines its risk reduction policies.⁵⁸ In the community, the medical authorities' failure to appreciate that people rely on lay knowledge interferes with the effectiveness of public health warnings.⁵⁹ And in a refugee hearing, an adjudicator's failure to recognize that lay people rely on lay knowledge can put a claimant's life at risk.

2.9 Non-embodied risks

Researchers distinguish 'embodied risks' – risks to physical health and safety – from 'non-embodied' risks.⁶⁰ '[L]ay people see risks as affecting not only their physical being but also their economic status, cultural identity, home "memory", relationships with others, social standing or status and emotional or psychological states'.⁶¹ When responding to the threats that we face, we do not necessarily give precedence to embodied risks.⁶² An adjudicator may imagine that a claimant is facing a choice between safety abroad and danger in her homeland. The claimant, however, sees serious risks on both sides.

Even under the best of circumstances, people perceive leaving their home country as profoundly risky. A recent and comprehensive study of risk perception among Britons and Australians noted, for example, that 'a number of our interviewees nominated crossing geographical borders as itself the greatest risk they had taken in their lives',⁶³ precisely because they were risking the non-embodied losses cited above. As another study concluded, 'An epic risk is to move to a new country in search of a better life'.⁶⁴

⁵⁶ A. Grinyer, 'Risk, the real world and naïve sociology' in J. Gabe (ed.), *Medicine, Risk and Health* (Oxford: Blackwell Publishers, 1995); quoted in Fox, above n. 18, 21.

⁵⁷ Fox, above n. 18, 21; J. Popay & G. Williams, 'Public Health Research and Lay Knowledge' (1996) 42 *Social Science Medicine* 759-86.

⁵⁸ In one study, e.g., a hospital issued guidelines to its staff about how to avoid needlestick injuries. The staff was 'doubtful' about the usefulness of these guidelines, in light of their past experiences with needlestick accidents. When this was brought to management's attention, management simply denied the validity of the lay data, without considering how the staff's perception might affect their response to the guidelines. The study concluded that management's failure to take the staff's lay knowledge into account significantly weakened the policy's effectiveness. Grinyer, above n. 56, quoted in Fox, above n. 18, 21.

⁵⁹ Balshem, above n. 54; Popay, above n. 57.

⁶⁰ Tulloch, above n. 53, 25.

⁶¹ *Ibid.*, 41.

⁶² Billig, above n. 43.

⁶³ Tulloch, above n. 53, 43.

⁶⁴ Barsky 1997, above n. 27, 555.

A claimant who decides to stay or return home and risk the possibility of embodied harm to avoid the certainty of lesser non-embodied losses is following a well-established human risk response pattern. People as a rule tend to be 'risk seeking when faced with losses, risk averse when facing gains'.⁶⁵ In a classic experiment, subjects are given a choice. Pay \$80 and go on your way, or pick a card from a rigged deck. If it is red, pay nothing; if it is black, pay \$100. Most people would take the wager even when they know that 85 per cent of the cards in the deck are black.⁶⁶ Facing a potential loss, we are gamblers by nature. Most of us hate accepting losses voluntarily; we would rather risk greater loss for the chance of avoiding any loss at all.

For the claimant deciding whether to flee or stay behind, or whether to risk returning home, the stakes are very high on both sides – life versus the things that make life worth living. The claimant is facing the cruellest version of the above problem. Give up voluntarily the things that people all over the world risk their lives to protect (status, financial security, personal property, community, cultural identity, friends and family), or pick a card. If it is red, you can keep them all. If it is black, you die.

The fact that some claimants decide to risk their lives rather than give up everything dear to them is not implausible on its face. Adjudicators only see those claimants who eventually decide to flee their homes, and so fleeing may come to seem the only natural response. But faced with the above problem, many people the world over decide to pick a card. In the words of one Israeli settler in Gaza:

I am attached to this place, to the environment, and to the people I have lived with for many years. I feel I am an integral part of this place. I love this place. I breathe its air, the sea, the joint experiences with friends and neighbours. I know I am putting myself at risk for all that.⁶⁷

2.10 Passivity

When contemplating a risk, we are often tempted to overestimate the control that we can exercise over it. After we experience a negative event, however, the reverse is often true. We often downplay the amount of control that we were able to exercise over the situation that led up to it.⁶⁸ Some researchers suggest that this is an ego-protecting mechanism that helps us to avoid taking responsibility when things go wrong.⁶⁹ Others,

⁶⁵ Heimer, above n. 3, 497, 507; Lerner 2001, above n. 46, 148.

⁶⁶ Heimer, above n. 3, 497.

⁶⁷ Billig, above n. 43, 262.

⁶⁸ Weinstein 1984, above n. 22, 454.

⁶⁹ *Ibid.*

however, believe that we may react this way because we are suddenly confronted by the fact that our actions, which may in fact have reduced our risk, clearly did not reduce it enough. At such times, we are brought face to face with our powerlessness to *prevent* the harm and we may not see the point in even trying. In one study, a majority of motorcyclists took fewer safety precautions after having been involved in an accident.⁷⁰ In another, sick subjects were much less interested in learning how to reduce their risk of future illness than healthy ones. As one subject explained, 'I dressed warmly, took my vitamins, and I still got sick'.⁷¹

Experiencing even a minor negative event can cause 'reduced preventability perceptions', undermine a person's 'protection motivation' and lead to 'precaution abandonment'.⁷² The experience of significant trauma, therefore, can understandably have a profound effect on a person's sense of agency. A person may come to believe that she simply cannot affect the risks that she faces. Dr Judith Herman, professor of psychiatry at Harvard University, notes, for example, that someone suffering from Post-Traumatic Stress Disorder may feel 'indifference, emotional detachment, and profound passivity in which the person relinquishes all initiative and struggle'.⁷³

This passivity, as Canadian legal theorists note, often prevents claimants from taking the kinds of risk-reducing steps that the Immigration and Refugee Board 'typically associates with a genuine subjective fear'.⁷⁴ However, self-protective behaviour is far from instinctive:

... self-protective behaviour is a complex function of perceived risk (vulnerability), beliefs about the effectiveness of preventive behaviour (controllability), beliefs about one's own capacity to perform the behaviour (self-efficacy), and beliefs that others expect them to act or not to act (subjective norms).⁷⁵

Researchers studying passivity in women and girls have observed a lack of agency in 'date rape' situations, for example, where potential victims 'often do not see possible compromising situations as a series of decision points with alternatives'.⁷⁶ They tend instead 'to accept the outcome of a

⁷⁰ Rutter, above n. 23, 693-4.

⁷¹ Kulik, above n. 22, 25.

⁷² Rutter, above n. 23, 693-4; Weinstein 1984, above n. 22.

⁷³ J. Herman, M.D., *Trauma and Recovery* (New York: Basic Books, 1997), 42; quoted in M. Bossin & L. Demirdache, 'A Canadian Perspective on the Subjective Component of the Bipartite Test for "Persecution": Time for Re-evaluation' (2004) 22 *Refuge* 108-18 at 112.

⁷⁴ *Ibid.*

⁷⁵ Riad, above n. 39, at 919-20.

⁷⁶ D. G. MacGregor, M. Finucane & A. Gonzalez-Caban, 'Risk Perception, Adaptation and Behavior Change: Self-protection in the Wildland-Urban Interface', in B. Kent & C. Raish (eds.), *Wildfire and fuels management: Risk and human reaction* (Washington, D.C. [In press]); J. M. VanderMeer, 'Psychological Aspects and Family Dynamics of Adolescent Rape Victims', *National Criminal Justice Reference Service Abstracts*, 1976.

dangerous situation as an inevitable sequence of events'.⁷⁷ As these studies demonstrate, passivity is not only a consequence of trauma; it is itself a risk factor.

Like the subjects in these studies, a claimant may not see self-protective behaviour as an option. She may see no alternative to an 'inevitable sequence of events' beyond her power to control and may fall into a state of surrender. Far from being incompatible with a subjective fear of persecution, this is, unfortunately, a well-documented risk response among vulnerable people.

2.11 Defiance

So it doesn't matter what you do, you still die when your time comes. So it doesn't matter if you change your diet, or stop smoking, when your time's up it's up and there ain't nothin' you can do about it. But [at] least they lived to be happy and did what they wanted to do. That's the more important thing.⁷⁸

The above quotation comes from a subject in a study of an American working-class community with a significantly higher than average cancer rate. The author of the study, an anthropologist, had gone into this community as part of a public health outreach program to try to educate the residents about practical steps that they could take to reduce their cancer risk (such as modifying their diet, reducing their smoking, alcohol and caffeine consumption, avoiding sun exposure, etc.). Despite clearly perceiving the danger that they were facing, many of the residents were staunchly unwilling to follow any of her suggestions, and so the researcher set out to explore and understand the resistance that she was encountering. Why were these people responding so irrationally?

She concluded that what at first appeared to be apathy and 'fatalism' was in fact a form of 'defiance' against cancer, which her subjects personalized as 'cruel', 'evil', 'sneaky', and a 'minion of fate'. And 'as with most minions of fate ... to think about cancer, to try to prevent it, is to tempt fate'.⁷⁹ Like the subjects in the passivity studies, the residents in this community believed that their vulnerability was 'so complete that making lifestyle changes ... [was] useless'.⁸⁰ However, rather than going into a state of surrender, they chose to take a stand. They would rather keep their diets, their smoking, their caffeine, alcohol and sun, thank you very much. In the end, 'if you're going to get it, I think you're going to get it, and that's it'.⁸¹

⁷⁷ MacGregor, *ibid.*

⁷⁸ Balslem, above n. 54, 163.

⁷⁹ *Ibid.*, 161-2.

⁸⁰ *Ibid.*, 162.

⁸¹ *Ibid.*

However, when that day comes, a person has lived a good life if they can say that 'they lived to be happy and did what they wanted to do. That's the more important thing'.

Many refugee claimants tell of their initial outrage at the thought of being forced from their homes. As noted above, this emotional response may reduce their perceived risk. But it may also affect their risk management decisions. In a number of studies, 'territoriality' was cited as a key factor helping to explain why people refused to leave their homes in the face of environmental threats, even when their personal safety was clearly at stake.⁸² After 9/11, the American citizens who were most angered by the terrorist attacks were the least likely to take any precautions against terrorism.⁸³ The most defiant response was to do nothing: if we modify our lifestyle at all, then the terrorists have won.⁸⁴ If giving up *anything* feels like giving in, is it any wonder that many refugee claimants at first dig in their heels at the thought of giving up *everything*?

2.12 Faith

On 30 September 1995 in Ontario, Canada, a child could take a leisurely bike ride and enjoy the feel of the wind through his hair. The following day, when the mandatory helmet law came into effect, this same activity had become so dangerous that it was now against the law.⁸⁵ Bicycle helmets have been in use since at least the 1880s.⁸⁶ Assuming we loved our children before 1 October 1995, and given that the risk of bicycle head injuries is obvious, potentially fatal and easily addressed, how do we in Ontario explain our failure to tackle this problem sooner?

Some risks must simply be left to fate. Until very recently, Ontarians accepted that the risk of bicycle head injuries was one of them. If asked what she was doing to protect her child from bicycle head injuries, a parent in Toronto in the 1930s, or 50s, or late 80s might have explained, 'I worry about him, but I just have to trust that he'll be alright. It's out of my hands'. This response would seem perfectly natural to a farmer in medieval Europe, who perceived many of the risks facing his children as being beyond his sphere of influence.⁸⁷ In fact, most of the serious dangers that he faced

⁸² Riad, above n. 39, 920.

⁸³ Lerner 2003, above n. 46.

⁸⁴ This response dovetails conveniently with our 'status quo bias', our clinically observed aversion to change; see Barsky 1997, above n. 27, 569-71.

⁸⁵ Government of Toronto: 'The Bike Helmet Law and Fines' http://www.toronto.ca/cycling/safety/helmet/helmet_law.htm.

⁸⁶ Bicycle Helmet Safety Institute: 'The History of the Bicycle Helmet' <http://www.helmets.org/history.htm>.

⁸⁷ English children in the Middle Ages were 'left alone for long periods', largely unprotected and unsupervised, and often came to bad ends. Deaths by drowning, burning, falling and suffocating were common. One famous study of medieval coroners' records found that 68% of accident victims were children under the age of four (compared with 7.5 % in the modern United States). B. A. Hanawalt, 'Childrearing among the Lower Classes of Late Medieval England' (1977) 8 *Journal of Interdisciplinary History*, 1-22 at 14, 17.

were clearly beyond his ability to address personally: the weather could destroy his crops, the plague could strike his village, the neighbouring army could invade. From his perspective, the best defence against these dangers was to pray, participate in the proper rituals, and live a life that would not make God angry.

Faith – in a specific higher power or simply in fate – is a natural mechanism for processing those risks that we perceive to be beyond our sphere of influence, and it has been a key risk management strategy for most of humanity throughout most of human history.⁸⁸ The bicycle helmet law, however, mirrors a profound and unprecedented shift in risk perception, one that characterizes 'late modern' societies such as ours. Sociologist Ulrich Beck famously coined the term 'Risk Society' to describe cultures in which risk prevention has become each member's most important social duty, and in which fewer and fewer risks are accepted as being beyond an individual's direct power to control.⁸⁹ In the Risk Society, each individual is expected to tackle personally almost every conceivable kind of danger. We are expected to become highly skilled and attentive 'risk monitors and risk calculators'.⁹⁰ This entails participating in an endless process of vigilance and lifestyle modification,⁹¹ with the help of an ever-increasing number of specialized risk experts.⁹²

Our 'obsession' with risk prevention has been described by one theorist as 'a grandiose technocratic rationalizing dream of absolute control'.⁹³ In pursuit of this dream, new risks are continually being identified and brought to our attention. This is, after all, the Risk Society's main function: 'if you establish an apparatus for the identification of risks, it will identify as many risks as it can'.⁹⁴ As the recent American 'terrorist alert' warnings show, this applies even to risks that are transparently beyond our individual power to address.

For the first time, faith is no longer a culturally appropriate risk response, even to the devout; 'in its place is human agency – planning and risk avoidance'.⁹⁵ The result is that if we do rely on faith or leave risks to chance, we are being 'foolhardy, careless, irresponsible, and even "deviant"',⁹⁶ and many refugee claimants walk straight into the pointy end of this cultural bias. They explain that when the danger first arose, rather

⁸⁸ Lupton, Introduction, above n. 53, 4.

⁸⁹ Ibid.

⁹⁰ Stephen Crook, 'Ordering risks', in D. Lupton (ed.), above n. 18, 160-85 at 171; Tulloch, above n. 53, 4.

⁹¹ Crook, *ibid.*

⁹² Tulloch, above n. 53, 3-4; Bell, above n. 53, 507.

⁹³ D. Lupton, 'Risk and the ontology of pregnant embodiment' in D. Lupton (ed.), above n. 18, 59-85 at 75 [Lupton, *Ontology*].

⁹⁴ Crook, above n. 90, 180.

⁹⁵ Lupton, *Ontology*, above n. 93, 75.

⁹⁶ Tulloch, above n. 53, 10.

than flee immediately they continued on with their lives and did what they could – they prayed. If adjudicators conclude that this is surprising to the point of being unbelievable, no wonder. Unlike many claimants, adjudicators are steeped in the Risk Society. They spend their days assessing risk in the first culture in human history to believe that all risks are within the ambit of human control. Seen from this vantage point, the claimant's inclination to rely on faith may well seem baffling. Yet as Mary Douglas, anthropologist and pioneering researcher on risk perception and culture, concluded, 'the reason such behaviour seems baffling is the failure to take culture into account'.⁹⁷

While the problem of cultural bias in refugee status determinations has attracted academic and judicial interest,⁹⁸ the importance of cultural differences in risk management has so far been overlooked.⁹⁹ Adjudicators must recognize that they bring to the hearing a cultural risk-response perspective that claimants may not share. Without this insight, a claimant's natural risk management strategies may seem so bizarre as to be implausible.

2.13 Pace of decision making

Adjudicators are often concerned with a claimant's 'undue' delay in leaving her home or in asking for protection. Yet many of the factors that affect how we perceive risk (our individual outcome history, risk tolerance and sense of agency) also affect how quickly we make decisions responding to it,¹⁰⁰ and we often take longer to reach a decision that we find 'particularly difficult'.¹⁰¹ This is especially true for people suffering the effects of trauma, for, as discussed above, the experience of trauma can have a paralyzing effect on a person's ability to respond to a threat.¹⁰²

In a recent study, researchers interviewed parents whose newborn infants had suffered serious health complications. These parents had been forced to make potentially life and death decisions in a limited time. All the parents reported having been afraid: 'fear was undoubtedly the dominant

⁹⁷ Ibid.

⁹⁸ In the Canadian context, e.g., the Federal Court has held that the Board 'should not be quick to apply North American logic and reasoning to the claimant's behaviour' (*R.K.L. v. Canada (Minister of Citizenship and Immigration)* [2003] FCJ No. 162, para. 12), and the cultural preconceptions of Board members were recently explored in a comprehensive study (F. Crépeau, & D. Nakache, 'Critical Spaces in the Canadian Refugee Determination System: 1989-2002' 20 *IJRL* 50-122 (2008)).

⁹⁹ Although, on a related point, Bossin and Demirdache note that 'culture may be a factor in how people respond to danger', as cultural expressions of trauma may differ. Bossin, above n. 73, 111.

¹⁰⁰ S. Wally & J. R. Baum, 'Personal and Structural Determinants of the Pace of Strategic Decision Making' (1994) 37 *The Academy of Management Journal* 932-56 at 936; C. Snowden, D. Elbourne & J. Garcia, "'It was a snap decision': Parental and professional perspectives on the speed of decisions about participation in perinatal randomized controlled trials' (2006) 62 *Social Science & Medicine* 2279-90 at 2287.

¹⁰¹ Wally, *ibid.*; Snowden, *ibid.*, 2286.

¹⁰² Bossin, above n. 73, 112.

parental emotion'.¹⁰³ They described themselves variously as having been 'terrified, scared, petrified, frightened and panicking'. Yet their decision making pace varied greatly. 'Fear in one form or another underscored almost all elements of decision-making. It did not, however, drive all parents in the same direction'.¹⁰⁴ Some parents responded quickly and others took longer. Their fear was not a predictor of the speed of their decision making, nor for that matter of the decision that they would ultimately make. Adjudicators can expect to see a similar variety of responses among frightened people facing danger.

3. Conclusion

If considering the above factors sounds like a lot of work, it should. Among some Immigration and Refugee Board Members, 'The claimant's actions were inconsistent with a subjective fear of persecution' has become a shortcut to a negative decision.

If it sounds like more than a lot of work – if it sounds impossible – then adjudicators should not be in the business of judging the reasonableness of a claimant's risk response. Despite all the evidence presented in this article, human response to danger can be 'bewildering' even to the experts, and much of its well-documented variance 'still remains unexplained'.¹⁰⁵ 'Subjective fear' should have no place in a credibility assessment, and the drafters of the Convention never intended it to be the separate legal element that it has become under Canadian law.¹⁰⁶ Judgments about risk perception, assessment and management simply do not provide a solid basis for a life and death decision.

¹⁰³ Snowdon, above n. 100, 2283.

¹⁰⁴ Ibid.

¹⁰⁵ Riad, above n. 39, 918.

¹⁰⁶ For a fuller discussion, see Bossin, above n.73, 113-16.