

# 嚴重特殊傳染性肺炎 的疫苗責任： 風險—效益之辯證(二)\*

Vaccine Liability in the Light of COVID-19:  
A Defence of Risk–Benefit (II)

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本篇中譯自Oxford University Press授權繁體中文



## 摘要

在20和21世紀，疫苗在推動醫學治療上扮演了至關重要的角色。然而，沒有任何醫療介入措施是毫無風險的，疫苗也不例外。本文將著重於英國、歐盟與美國

\*版權聲明：Richard Goldberg, Vaccine Liability in the Light of Covid-19: A Defence of Risk–Benefit, 30(2) MEDICAL LAW REVIEW, MEDICAL LAW REVIEW 243-267, <https://doi.org/10.1093/medlaw/fwab053>.

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關鍵詞：COVID-19、侵權（tort）、疫苗（vaccines）、風險—效益（risk–benefit）、產品責任（product liability）、醫藥產品（medicinal products）

DOI：10.53106/241553062023090083004

之經驗，探究律師在判定疫苗責任缺陷的情境下如何面對或迴避風險－效益，並探討風險－效益在評估COVID-19疫苗責任時所發揮的潛在作用。文中認為，在確認疫苗的缺陷性時，採用一種具有整體性、彈性的方法、涵蓋風險－效益分析，有助於評估由持續提供和供應疫苗所帶來的巨大公共利益，以及對個人和社區提供的免疫效益。如果確實出現有關COVID-19疫苗責任的案例，那麼COVID-19疫苗對個人和社區的免疫效益應該與確定缺陷性有關。此種針對缺陷性而具有整體性、彈性且涵蓋風險－效益分析的方法，可以有效地用於確定疫苗的安全性，並有助於減輕公眾對疫苗接種信心減弱所帶來的危險。

Vaccines have played an essential role in advancing medical treatment in the twentieth and twenty-first centuries. However, no medical intervention is risk free, and vaccines are no exception to that rule. This article considers how lawyers have confronted or eschewed risk-benefit in the context of determining defectiveness in vaccine liability, with emphasis on the UK, European Union, and US experiences. It explores the potential role that risk-benefit may play in assessing liability for vaccines against the COVID-19 pandemic. It argues that a holistic, flexible approach to determining defectiveness embracing risk-benefit allows consideration of the overwhelming public interest derived from the continued availability and supply of vaccines, as well as immunity conferring benefits on both the individual and the community. If cases do emerge concerning the liability of a COVID-19 vaccine, immunity conferring benefits on both the individual and the community of the COVID-19 vaccines should be relevant in any determination of defectiveness. Such a holistic, flexible approach to defectiveness embracing risk-benefit

can be used effectively to determine the entitled safety of a vaccine and may help to mitigate against the dangers of weakening confidence in the public's vaccine uptake.

本文上篇載於本報告第82期，77-91頁。

(二) 風險－效益在歐洲不明確的角色；風險溝通的失敗：  
*NW v Sanofi Pasteur MSD SNC*案

風險－效益考量的相關性在歐洲已有相當多爭議<sup>1</sup>。在設計缺陷方面，德國最高法院在2009年認為，成本－效益分析可能適合於確定產品是否存在設計缺陷。法院裁定，法院應特別考慮「生產成本、替代設計的可銷售性以及成本－效益平衡」，並在這方面明確提到「美國法律規定的風險效用測試」<sup>2</sup>。儘管所討論的設計缺陷並不在醫藥產品的範圍內（德國產品責任法的規定不適用於醫藥產品，醫藥產品被1976年藥品法（*Arzneimittelgesetz 1976*）（AMG）中的嚴格責任賠償制度所專門涵蓋），但該案例表明，風險－效益的概念與設計缺陷的責任有關<sup>3</sup>。更何況，AMG規定，在藥品方面，如果藥品的效益大於風險，就不能說有設計缺陷<sup>4</sup>。因此，在B型肝炎不

1 一般來說，見D Fairgrieve and R Goldberg, *Product Liability* (3rd edn, OUP 2020), 10.42-10.45。事實上，《產品責任指令》的起草人Taschner對風險效用法作為設計缺陷的檢驗標準極為挑剔：見H-C Taschner, 'Product Liability: Basic Problems in a Comparative Law Perspective' in D Fairgrieve (ed), *Product Liability in Comparative Perspective* (CUP 2005) 160。

2 BGH, 16 June 2009, VI ZR 107/08, 18。另見柏林高等地區法院對確定缺陷的風險－效益分析的重視（20 U 115/17, 27 May 2019 [23], [28](metal on metal prosthesis)）。

3 產品責任指令的主要設計者之一Taschner承認，風險－效益可能與確定廣大公眾合法期望的安全有關。Taschner (n 68) 161。

4 See § 84 AMG 1976, § 25(2)5 AMG 1976, and § 4 nos 27, 28 AMG 1976 (discussed in E Rajneri and others, 'Remedies for Damage Caused by Vaccines: A Comparative Study of Four European Legal