

嚴重特殊傳染性肺炎 的疫苗責任： 風險—效益之辯證(三)*

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

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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

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的，疫苗也不例外。本文將著重於英國、歐盟與美國之經驗，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83期，51-64頁。

然而在美國，「Comment *k*」在疫苗方面的重要性現在已有所消減，特別是在設計缺陷的索賠方面。1980年代，由於人們對DPT疫苗的擔憂，即指責其導致兒童殘疾和發育遲緩，「與疫苗有關的侵權訴訟大量增加」¹，最終每年都有200多起訴訟。這導致了DPT疫苗市場的不穩定，三家美國國內製造商中有兩家退出²。訴訟費用、疫苗價格的上漲、兒童疫苗市場的不穩定性和不可預測性，加上人們對於疫苗傷害獲得賠償的不確定性之擔憂加劇，導致國會通過了1986年全國兒童疫苗傷害賠償法（National Vaccine Act Injury Compensation Act of 1986, NCVIA）³。疫苗法的立法歷史表明，國會明確意圖將「Comment *k*」中關於不可避免不安全產品的原則編入法律⁴。然而，問題是，國會是否打算將設計缺陷訴訟從侵權制度中剔除？

1 Bruesewitz v Wyeth LLC (2011) 562 US 223, 227.

2 Ibid.

3 42 USC 300aa-1; See HR Rep No 99-908, 4-7 (1986); and, further, JB Apolinsky and JA Van Detta, ‘Rethinking Liability for Vaccine Injury’ (2010) 19 Cornell Journal of Law and Public Policy 537, 550-51。製造商在獲得負擔得起的產品責任保險以支付與疫苗傷害有關的損失方面存在著「巨大困難」，這也是一家製造商在1985年退出疫苗市場的明確原因：HR Rep No 99-908, 6 (1986)。

4 HR Rep No 99-908, 26 (1986)（「委員會在本法案中提出了Comment *k*，因為它希望Comment *k*中關於「無法避免的不安全」產品的原則，即在目前人類技術和知識水平下無法使其安全的產品，適用於法案中所涉及的疫苗，並且這些產品不成為侵權制度中的責任主體」）。