

POSTGRADUATE



# The precautionary principle in the common law tradition, with emphasis on COVID-19

Doan Thanh Hai, ABHL, 7 Dec 2025

# **The purpose of the study**

To study the [deeper] origin, rationale, and priority of the precautionary principle across the common law jurisdictions studied;

To study the application of the precautionary principle in COVID-19 jurisprudence of the common law jurisdictions studied;

These offer a view which helps to further compare the common law jurisdictions studied with jurisdictions in other traditions;

# Methods of the study

---

Study instruments and judgments across the legal system studied holistically, together with the system's values and vision;  
Critically revisit the history.

# Origin

UK	US	Aus	Can	NZ
<p>Earl of Caithness 1988: “Environmental policy must evolve on the basis of sound science, informed debate, foresight and a proper balance between development and conservation...”</p> <p>The White Paper “This Common Inheritance: Britain’s Environmental Strategy”: “[the precautionary principle] is similar to the responsible approach which the Government adopts on financial policy”</p> <p>ILGRA: “Although the precautionary principle was originally framed in the context of preventing environmental harm, it is now widely accepted as applying broadly where there is threat of harm to human, animal or plant health...”</p> <p>Influenza Pandemic Preparedness Strategy 2011; Ex parte Duddridge, Ex parte Eastside Cheese Company</p>	<p>The expression of PP concerning environment matters, e.g., House of Representative Report No. 294, 1977 presented at the 95th Congress, the Committee on Interstate and Foreign Commerce; House of Representative Report No. 91-1291 concerning OSH Act.</p> <p>But the language of “precaution” appears in The Federalist Paper No. 51, 57, Marshall v. United States, Jacobson v. Massachusetts, Muller v. Oregon, Holden v. Hardy</p>	<p>“It seems to me unnecessary to enter into this debate [on the incorporation of international law into domestic law] ... [T]he precautionary principle is a statement of common sense and has already been applied by decision-makers in appropriate circumstances prior to the principle being spelt out...” (Land and Environment Court of New South Wales, Leatch v. Director-General of National Parks &amp; Wildlife Service and Shoalhaven City Council, Nov. 23, 1993)</p>	<p>Ltée v. Hudson (Town): S.C.R. recognised the relevance of the precautionary principle in light of international law and the mentioning of the precautionary principle by other federal laws (some do not spell it out explicitly).</p> <p>The Krever Inquiry - Commission of Inquiry on the Blood System “Where there is reasonable evidence of an impending threat to public health, it is inappropriate to require proof of causation beyond a reasonable doubt before taking steps to avert the threat”</p> <p>2000 Health Canada Decision-Making Framework for Identifying, Assessing, and Managing Health Risks: that “a key feature of managing health risks is that decisions are often made in the presence of considerable scientific uncertainty”; the precautionary principle is one of the principles underlying the risk management decision-making process.</p> <p>Political risks: Harper v. Canada (Attorney General)</p>	<p>Section 7 NZ CDEM Act 2002 All persons exercising functions in relation to the development and implementation of civil defence emergency management plans under this Act may be cautious in managing risks even if there is scientific and technical uncertainty about those risks”</p> <p>Sustain Our Sounds Inc v New Zealand King Salmon Company Ltd</p>



>> The principle of governing risks of the political-legal structure

## COVID-19 jurisprudence

UK	US	Aus	Can	NZ
<p>Gardner and Harris: “precautionary principle was an obviously relevant consideration” “the fact that evidence is not conclusive does not mean that it carries no weight” “Ministers were obliged to weigh up not just the likelihood that non-symptomatic transmission was occurring but also the very serious consequences if it did so” “In this context it is important to recall ... the precautionary principle, in essence preparing on the basis that the worst could happen, throughout their response to COVID-19” See also, R(Hussain), R(Dolan)...</p>	<p>Not announce straightforwardly, but see South Bay United Pentecostal Church (2020).</p>	<p>Falconer -v- Chief Health Officer (Western Australia): “[t]he Chief Health Officer] is not required to postpone measures for lack of scientific certainty.” Loielo v Giles (Victoria) “the importance of weighing the impacts and benefits of public health measures” and the precautionary approach.</p>	<p>Federal level: Spencer v. Canada (Attorney General): “The precise question of when restrictions on particular social activities should be lifted during the pandemic is a dynamic and fact-intensive matter subject to reasonable disagreement. Our Constitution principally entrusts “[t]he safety and the health of the people” to the politically accountable officials of the States “to guard and protect.” When those officials “undertake[ ] to act in areas fraught with medical and scientific uncertainties,” their latitude “must be especially broad.” Where those broad limits are not exceeded, they should not be subject to second-guessing by an “unelected federal judiciary,” which lacks the background, competence, and expertise to assess public health and is not accountable to the people”.</p>	<p>Four Aviation Security Service Employees, Yardley, NZDSOS</p>

# Common accepted normative positions

## The allocation of responsibilities

Expert bodies: May offer second opinion or may actually make decisions. The de facto capability to make decisions is derived from legal and political mandate and thus must fulfil the mandate.

The legislative and executive authority (including expert bodies): Discretionary powers in both the sense of broad powers and precautionarily exercise of powers. Fully certain or consensus is not required for action, but a balance of probabilities and the reliance on best available information and credible expertise (Taylor v. Newfoundland and Labrador). However, generally, not exempted on the account of uncertainty or insufficient of information inasmuch as there is information that can support the fulfillment of political-legal mandate (R (Gardner and Harris)).

The judiciary: Disciplined but not giving up. Depending on the interests at stake, the judiciary may apply different standards of review.

# **Common accepted normative positions**

## **The principles of the exercise of powers**

- Reasonableness;
- Due regard to relevant best available information and considerations;
- Balance of interests, rights, including costs and benefits, i.e., proportional action and measures;
- Anticipation and preparation for scenarios, including worst-case scenarios;
- Monitor of situations;
- Action and measures are of provisional nature;

# Differences

UK, Aus Can	US	NZ
<p>No strong demand for quantification and may accept administrative convenience (Eastside Cheese Company). Limitations on religious rights can be accepted provided that they are demonstrably justified in “a free and democratic society” (R(Hussain), Athavle, Attorney General of Ontario v. Trinity Bible Chapel et al). It is accepted that “different social factors contributing to the differentiating in risks”. The judiciary reads the <i>purpose</i> and <i>objective</i> of administrative behaviours in separation from other legs of the test.</p> <p>&gt;&gt; Risk mitigation strategy is accepted.</p> <p>However, repercussions of non-compliance against measures can be severe provided that they are not overbroad (Syndicat des métallos section locale 2008 c. Procureur général du Canada).</p>	<p><i>Can emphasis more in quantification</i> (Indus. Union Dep’t, AFL-CIO v. API, 448 U.S. 607 (U.S. July 2, 1980)) “Benzene Case”.</p> <p><i>May limit the power of agencies because the exercise of the power on society can be broad</i>, see and compare Benzene Case and NFIB vs Biden v. Missouri.</p> <p><i>Strong protection of religious rights</i>, Roman Catholic Diocese, Tandon, Justice Kavanuagh in Roman Catholic Diocese</p> <p>“[I]t does not suffice for a State to point out that, as compared to houses of worship, some secular businesses are subject to similarly severe or even more severe restrictions” but rather, “once a State creates a favored class of businesses, as New York has done in this case, the State must justify why houses of worship are excluded from that favored class”</p> <p>“requires the government to show that measures less restrictive of the First Amendment activity could not address its interest in reducing the spread of COVID-19. Where the government permits other activities to proceed with precautions, it must show that the religious exercise at issue is more dangerous than those activities even when the same precautions are applied. Otherwise, precautions that suffice for other activities suffice for religious exercise too”.</p> <p>Justice Gorsuch “Assuming all of the same precautions are taken, why can someone safely walk down a grocery store aisle but not a pew? And why can someone safely interact with a brave deliverywoman but not with a stoic minister?” (S. Bay United Pentecostal Church v. Newsom)</p> <p>&gt;&gt;&gt; Risk mitigation is not accepted. But see, Justice Kagan “Constitution does not require things which are different in fact . . . to be treated in law as though they were the same” and so “States must treat like cases alike but may treat unlike cases accordingly.”</p> <p>However, some cases which do not involve with constitutional rights or involve only with penumbra rights can be scutinised very lightly and the judiciary does not engage with hinting alternative measures, see Lochner, Buck v Bell, Korematsu.</p> <p>&gt;&gt;&gt; Locke’s precaution</p>	<p>Read whether measures actually or have the high possibility to achieve the purpose and objective of the relevant acts (Yardley).</p> <p>&gt;&gt; A more substantive scrutinization. However, it is inconsistent concerning deference and the extent of the scutinisation (See and compare decisions and reasons of Cooke J v Orewa, Grounded Kiwis Group).</p> <p>May consider individual circumstances and factors in detailed and the severity of measures and penalties for non-compliance with measures is considered (“the exceptions in the Order are limited, and generally do not vary depending on the individual circumstances of the person involved” (Yardley), See Grounded Kiwis Group).</p>

# Observations and conclusions

A general jurisprudential principle. Despite the de facto source that appears to people's eyes, the real source is the Common Law's legal philosophy, which recognises the centrality of "reason", "logic", "morality", and "abstract principles", rendering the common law precautionary principle close to the philosophical moderate precautionary principle (Compare with French jurisprudence or precaution in Marxist-Leninist systems).

Contentious concerning "reversal the burden of proof", but onus probandi is dynamic. Societal, contextual factors, which are available to the society, can be at the disposal of the determination of the judiciary without being further proved by the respondent(s) and the applicants must prove a prima facie case (R(on the application of Manchester Airports Holdings Ltd)). There are also nuances concerning other aspects.

Variations among jurisdictions can be observed, attributed to the value system: the US – Locken precaution, while the NZ jurisprudence takes a more substantive approach.

>> More consistent reasons may be needed (e.g., through judicial dialogue and scholarship);

>> Rebalance to soften the stance, e.g., more substantive assessment and instructive approach (not necessary stricter scrutiny) may be needed.

The background features a large, faint watermark of the University of Otago crest, which includes a shield with a star and a crown above it. The text is centered on a dark blue background with a yellow horizontal bar at the bottom.

**Thank you for your listening,  
and my appreciation to Otago  
Bioethics Department**

# The Oakes test

Three components are to be satisfied (i) the measures adopted must be rationally connected to the objective; (ii) the means chosen must impair as little as possible the right or freedom in question, i.e., the least drastic means, or minimum impairment, the law should impair the right no more than is necessary to accomplish the desired objective; (iii) there must be proportionality between the effects of the measures and the objective