

## Applying the Precautionary Principle to Private Persons : Should it Affect Civil and Criminal Liability?

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Résumé de l'article

Le principe de précaution, né en droit international de l'environnement, est un concept prospectif : il sert à déterminer ce que l'on peut laisser se produire à l'avenir. L'objet de l'article est de déterminer si, en droit national, le principe de précaution doit avoir une application rétrospective. Y a-t-il lieu d'utiliser un comportement marqué par la prudence comme norme d'évaluation des actions passées d'une personne physique pour juger de la légalité de ses actions ? En droit civil, la réponse est « oui ». Appliquer le principe de précaution en droit civil abolit le critère de prévisibilité et transforme la responsabilité fondée sur la faute en une responsabilité stricte. En droit criminel, il ne convient pas d'appliquer rétrospectivement le principe de précaution. Exiger une action prudente de la part d'une personne accusée dans un contexte de droit environnemental transforme la responsabilité stricte en responsabilité absolue et engendre un risque de sanction criminelle même sans culpabilité.

# Applying the Precautionary Principle to Private Persons : Should it Affect Civil and Criminal Liability ?\*

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Bruce PARDY\*\*

*The precautionary principle, developed in international environmental law, is a prospective concept. It can be used to decide what should be allowed to occur in the future. The question addressed in this article is whether, in domestic law, the precautionary principle should be applied retrospectively. Should precautionary behaviour be used as a standard to apply to the past actions of private persons, so as to judge whether those persons have acted legally? In the civil realm, the answer is « yes ». Applying the precautionary principle in civil cases removes foreseeability requirements, and transforms liability based on fault into strict liability. In the criminal sphere, retrospective application of the precautionary principle is not appropriate. To require precautionary action on the part of an accused in an environmental prosecution transforms strict liability into absolute liability, and creates the potential for criminal punishment in the absence of culpability.*

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\* This article is based upon a paper presented at the 2001 Annual Meeting of the Canadian Association of Law Teachers in Quebec City, May 29, 2001. I would like to thank Professor Don Stuart of the Faculty of Law, Queen's University, for his helpful comments. Any errors are my own.

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*en droit national, le principe de précaution doit avoir une application rétrospective. Y a-t-il lieu d'utiliser un comportement marqué par la prudence comme norme d'évaluation des actions passées d'une personne physique pour juger de la légalité de ses actions ? En droit civil, la réponse est « oui ». Appliquer le principe de précaution en droit civil abolit le critère de prévisibilité et transforme la responsabilité fondée sur la faute en une responsabilité stricte. En droit criminel, il ne convient pas d'appliquer rétrospectivement le principe de précaution. Exiger une action prudente de la part d'une personne accusée dans un contexte de droit environnemental transforme la responsabilité stricte en responsabilité absolue et engendre un risque de sanction criminelle même sans culpabilité.*

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Intellectuals solve problems; geniuses prevent them. So Albert Einstein once observed. If that is so, the precautionary principle is an ingenious idea. The precautionary proposition is that action to protect the environment should be taken even in the absence of scientific proof of harm;<sup>1</sup> that decision makers should presume the existence of environmental risk

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1. « From a legal point of view the most important facet of the principle is that positive action to protect the environment may be required before scientific proof of harm has been provided »: D. FREESTONE and E. HEY, « Origins and Development of the Precautionary Principle », in D. FREESTONE and E. HEY (eds.), *The Precautionary Principle and International Law: The Challenge of Implementation*, Boston, Kluwer Law International, 1996, 3 at 13.

in the face of uncertainty,<sup>2</sup> and that the burden of proof should lie upon those who propose change.<sup>3</sup> Essentially, the precautionary principle promotes prevention of environmental harm.

As a preventative measure, the precautionary principle generally has prospective application. The principle can be applied to the process of developing rules and deciding on proposed developments because these are prospective decisions. They are decisions about what should be allowed to occur in the future. The precautionary concept can be applied by legislative and administrative decision makers to answer the question, « What should we do tomorrow ? »

This article addresses a more complex issue because it concerns applying the precautionary concept retrospectively instead of prospectively. Can the precautionary principle be used to assess legal liability for the actions of private persons after the fact ? Should individuals and corporations, whether manufacturing goods, spraying crops, disposing of waste, or harvesting lumber, be required to take the precautionary principle into account ? If so, they would be expected to assume that their activities create environmental risk. Behaviour inconsistent with the existence of such risk would produce civil and/or criminal liability.

Is applying the principle in this way a good idea ? Should it be used as a standard to assess the past actions of particular persons, so as to judge whether they have acted legally ? Is it appropriate to use the principle to answer the question, not « What should we do tomorrow ? » but « What should you have done yesterday ? » and, depending on the answer, impose liability ?

In the sections below, I will argue that in the civil realm, the answer is « yes » : the precautionary principle should be used to evaluate the past actions of defendants in civil cases. It is not presently applied in this manner by courts, and probably will not be in the foreseeable future. In the

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2. *Greenpeace New Zealand Inc. v. Minister of Fisheries*, [1995] 2 N.Z.L.R. 463 (Gallen J.): « [T]he precautionary principle ought to be applied so that where uncertainty or ignorance exists, decision-makers should be cautious. »
  3. A. JORDAN and T. O'RIORDAN, *The Precautionary Principle in U.K. Environmental Law and Policy*, CSERGE Working Paper GEC 94-11, London, Centre for Social and Economic Research on the Global Environment, 1994, cited by D. VANDERZWAAG, « The Precautionary Principle in Environmental Law and Policy : Elusive Rhetoric and First Embraces » (1998) 8 *J.E.L.P.* 355 at 359. VanderZwaag suggests that determining a precise meaning for the precautionary principle is difficult for at least four reasons : « definitional generalities, definitional variations, unresolved philosophical debates, and the vast spectrum of measures suggested to operationalize precaution » *id.* at 358.

criminal sphere, the answer is the reverse : I will argue that the precautionary principle should not be applied in prosecutions for environmental offences. However, at least one court has taken an equivalent step, and if there is a trend, it is in this direction.

## 1 Civil liability

### 1.1 Transforming fault-based liability into strict liability

To test the application of the precautionary principle in the civil realm, consider the following scenario involving a leather tannery. The tannery uses a chemical, an organochlorine called perchloroethene, or PCE, to degrease pelts. PCE is delivered in large drums that are carried by forklift to a reservoir that feeds a degreasing machine. The forklift tips the drum and pours PCE into the reservoir. When PCE is poured in this manner, a few drops commonly spill onto the concrete floor of the tannery.

During the period that this practice occurs, PCE is not thought to be harmful. It is not on any list of prohibited or regulated substances, and regulatory authorities do not test for its presence in drinking water. PCE is also known to be highly volatile, meaning that it evaporates easily and quickly. When small amounts of PCE spill on the ground, they can reasonably be expected to evaporate before they seep into the ground.

A few years later, PCE is discovered in the groundwater near the site of the tannery. Somehow, despite its volatility, PCE found its way through the floor and into the ground before it evaporated. The contaminated groundwater is the water supply for a local municipality. Regulatory authorities have determined that PCE is harmful to human health, and updated regulations stipulate that drinking water must not contain PCE. If a party with rights to the water supply brings a civil action for compensation, what should be the result ?

Liability on the part of the leather tannery on these facts is consistent with the application of the precautionary principle in civil actions. It is consistent with strict liability, for this is the effect of applying the precautionary principle :<sup>4</sup> it removes fault elements, and particularly the require-

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4. « The precautionary principle may be considered as a theory and justification for strict liability for environmental harm rooted in the law of obligations or tort law with the goal of compensation for victims in case of harm ; the precautionary principle also may be understood broadly as a duty to take precautionary action and avoid risk » : C. TINKER, « State Responsibility and the Precautionary Principle », in D. FREESTONE and E. HEY (eds.), *supra* note 1, 53 at 55.

ment of foreseeability,<sup>5</sup> from the cause of action. The precautionary principle is essentially a renunciation of foreseeability as a relevant consideration. The principle says, «Assume the worst, the unexpected, the unproven, and act accordingly.» What was reasonably foreseeable to the defendant is irrelevant, for the point of the precautionary principle is that in the absence of definitive proof to the contrary, environmental risk should be expected and assumed. Thus, the fact that the kind of damage caused was unforeseeable would not prevent liability from being imposed.

On the other hand, imposition of liability on the above facts is not consistent with the current state of the law. In order for civil liability to result, objective fault, especially in the form of foreseeability of harm, must be established. The scenario above is essentially that from *Cambridge Water Co. v. Eastern Counties Leather Plc.*,<sup>6</sup> a 1994 decision of the House of Lords. In that case, the tannery, Eastern Counties Leather, used PCE for degreasing pelts from sometime in the 1960s until 1991. Until 1976, PCE was delivered to the tannery in drums, and when the chemical was required, a forklift would tip a drum and pour PCE into a tank at the base of the machine. The trial judge found that during this period there were regular spillages of relatively small amounts of PCE onto the concrete floor of the tannery. It was not until sometime during the 1980s that new standards for drinking water were introduced, and PCE found its way onto a list of regulated substances. PCE is highly volatile, and is generally thought to evaporate rapidly. The trial court found that before 1976 a reasonable supervisor at the tannery would not have foreseen that such spillages would have caused any kind of environmental harm. It was not reasonable to anticipate either that PCE would enter the groundwater or, having done so, would produce «any sensible effect upon water taken down-catchment, or would otherwise be material or deserve the description of pollution.»<sup>7</sup>

The action in *Cambridge Water* was brought in negligence, nuisance and under the rule in *Rylands v Fletcher*.<sup>8</sup> No liability was found to exist on the part of the tannery under any of these causes of action for a single

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5. In tort law, the term «fault» can have more than one meaning. It can be used in a narrow sense to refer specifically to negligent conduct; that is, conduct that falls below a standard of reasonable care. It may also be given a wider meaning that encompasses various kinds of failures to act reasonably, such as failing to contemplate a foreseeable consequence. The term is used in the wider sense in this article.

6. [1994] 1 All E.R. 53; [1993] H.L.J. No. 41.

7. *Id.* at paragraph 7 (H.L.J.).

8. (1866) L.R. 1 Ex. 265; (1868) L.R. 3 H.L. 330.

reason : the damage was not foreseeable.<sup>9</sup> The actions of the tannery had caused damage to the detriment of the plaintiff, but because the damage was not foreseeable, the tannery was not at fault and therefore was not liable.

## 1.2 Strict liability v. Liability based on fault

My opinion is that on these facts, the leather tannery should be liable. The precautionary principle should be applied in civil actions. Strict liability in these circumstances is a better rule than liability based on fault. The requirement for fault is very strong in the current law of torts, and strict liability is often presumptuously and prematurely dismissed as archaic and unjust. True strict liability requires causation only. There is no element of fault. Some tort causes of action, such as private nuisance<sup>10</sup> and the rule in *Rylands v. Fletcher*,<sup>11</sup> are traditionally referred to as forms of strict liability. If they ever were truly strict, they are no longer because of the requirement for foreseeability.<sup>12</sup> They are less fault-based than negligence because they do not require negligent conduct,<sup>13</sup> but they are not true strict liability regimes.

The question whether fault should be required in tort actions for compensation may be posed in two ways. One way is to ask : if a defendant has no reasonable expectation that her actions will cause harm, should she be found responsible for harm that does in fact result ? Put this way, imposing liability seems unjust. The defendant would be saddled with liability

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9. One of the important developments to come from the House of Lords judgment in *Cambridge Water Co. v. Eastern Counties Leather Plc.*, *supra* note 6, is the creation of a foreseeability requirement under the rule in *Rylands v. Fletcher*, *supra* note 8. Up until that time, *Rylands* was considered to be a rule of strict liability, whereas the action in private nuisance, from which *Rylands* originally came, had acquired fault requirements in the form of foreseeability of harm, a development triggered by the Privy Council's declaration in *The Wagon Mound No. 2 (Overseas Tankship (U.K.) Ltd. v. Miller Steamship Co. Pty.)*, [1967] 1 A.C. 617. See B. PARDY, « Requiem for *Rylands v. Fletcher* » [1994] *N.Z.L.J.* 130.

10. See e.g. Lord Simonds in *Read v. J. Lyons & Co. Ltd.*, [1947] A.C. 156 at 183 : « For if a man commits a legal nuisance it is no answer to his injured neighbour that he took the utmost care not to commit it. There the liability is strict, and there he alone has a lawful claim who has suffered an invasion of some proprietary or other interest in land. »

11. See e.g. A.M. LINDEN, *Canadian Tort Law*, 6th ed., Toronto, Butterworths, 1997, at 499 ; P. OSBORNE, *The Law of Torts*, Toronto, Irwin Law, 2000, at 297.

12. See *supra* note 9.

13. Except in Australia where *Rylands v. Fletcher*, *supra* note 8, has been subsumed under negligence : *Burnie Port Authority v. General Jones Pty. Ltd.*, [1994] 179 C.L.R. 520 (H.C.).

through no moral wrongdoing of her own. This question is inadequate because it does not fully identify the choice that must be made. The better question to ask is : as between two innocent parties, the actor and the victim, who should pay ? Someone must shoulder the loss. The two possibilities are the party who caused the damage, or the party who suffered it. Between these two, the one who caused the loss bears responsibility. The damage is a cost of the activity that the defendant carried out. If liability is not found, the effect is to thrust the cost of the defendant's activity onto the victim. The cost is externalized from the defendant to the plaintiff. In *Cambridge Water*, the contamination of the groundwater was caused by the tannery operation in the course of degreasing pelts. In other words, the water was contaminated for the purpose of degreasing pelts. Therefore, the cost of producing the leather consisted of the cost of the plant, equipment, and labour, the price of the pelts, the PCE, and the contamination of the water supply. The contamination of the water supply will not be a *private* cost for the tannery unless liability is found, but it is, in fact, a cost of the product irrespective of who ends up paying. If liability is not found, then the price of the pelts will not reflect the cost of cleaning the water, and therefore the victim with the dirty water will subsidize production of the leather.

One of the purposes of the foreseeability requirement is to guard against indeterminate liability. It serves this role poorly. The danger of indeterminate liability arises because a single tortuous act may have effects that reverberate down a long causal chain. If liability depended only upon causation, defendants could be saddled with liability « in an indeterminate amount for an indeterminate time to an indeterminate class. »<sup>14</sup> For example, if a motor vehicle knocks down an electrical transformer, loss will result not just to the electricity company, but also to enterprises that have their electricity cut off, suppliers that sell goods to those enterprises, employees who are laid off because of decline in business, retail outlets that sell goods to those employees, and so on. If the defendant driver was held liable to those affected in any way by the downed power line, liability would indeed be disproportionate to the wrong. Liability would be more proportionate if it was limited, for instance, to responsibility for the physical damage caused by the collision. Foreseeability is a disingenuous method of achieving such a result because it requires fictional answers to do so. It is, in fact, entirely foreseeable that large numbers of people will be affected by a traffic accident that brings down a power line. However, in order to

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14. *Ultramares Corporation v. Touche*, [1931] 255 N.Y. 170 at 179 (Cardozo C.J.).



prevent indeterminate liability, a court may well find that the loss experienced by most of those affected persons was not foreseeable. Thus, foreseeability is less a reason for limiting liability than it is an excuse. Furthermore, the foreseeability requirement prevents liability in cases where no danger of indeterminate liability exists. In *Cambridge Water*, for example, the plaintiff was denied compensation for physical harm caused by the defendant, and no extended causal chain was in issue.

The precautionary principle, applied retrospectively, is inconsistent with the rules of tort liability as they presently exist.<sup>15</sup> It is not compatible with the elements of negligence, nuisance or *Rylands v. Fletcher*, because all of these causes of action now require fault in the form of foreseeability. Whether the precautionary principle should be applied to tort actions for environmental harm depends upon whether those fault requirements are appropriate. Strict liability is more consistent with the dominant purpose of tort actions derived from actions on the case: to compensate. Tort liability is not primarily intended to punish defendants, but to compensate victims harmed by the actions of others. To require fault on the part of defendants before liability will be imposed frustrates that purpose,<sup>16</sup> and confuses the mandate with that of criminal law. The key determinant of liability should be causation, not fault. Thus, it is consistent with the purposes of tort law to apply the precautionary principle to the actions of alleged tortfeasors.

## 2 Criminal liability

### 2.1 Transforming strict liability into absolute liability

To test the application of the precautionary principle in the criminal sphere, consider the following scenario. An oil refinery has a pipe that pumps effluent into a body of water. The refining process uses methylcyclopentadienyl manganese tricarbonyl, or MMT, a gasoline additive. The refinery has a permit to use this chemical, under certain stipu-

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15. There are exceptions. For example, vicarious liability may be imposed on an employer for the tortious actions of an employee even where there is no negligence on the part of the employer and the actions of the employee are not foreseeable. « The law refers to such liability as 'vicarious' liability. It is also known as 'strict' or 'no-fault' liability, because it is imposed in the absence of fault of the employer »: *Bazley v. Curry*, [1999] 2 S.C.R. 534 at 539 (McLachlin J.).
  16. That is not to suggest that fault requirements, and negligence in particular, do not have useful and sensible roles to play in determining tort liability. See B. PARDY, « Fault and Cause: Rethinking the Role of Negligent Conduct » (1995) 3 *Tort L.R.* 143.

lated conditions, and a system to remove the MMT from its effluent before it reaches the water. The company tests its effluent more frequently than required by its permit. It also has an environmental management system to deal with spills, and an environmental risk assessment program that examines every aspect of the operation every five years. One of the restrictions to which the refinery subject is section 36(3) of the federal *Fisheries Act*,<sup>17</sup> which states :

[...] no person shall deposit [...] a deleterious substance of any type in water frequented by fish [...]

At the time the refinery is in operation, MMT is not considered to be harmful to fish. The Material Safety Data Sheet (MSDS) provided by the supplier of the MMT describes the kinds of hazards associated with the chemical. There is no indication in this information that MMT poses a danger to fish. Indeed, there is no published research from any source that suggests MMT is hazardous to fish.

Despite these factors, an effluent discharge from the refinery fails a toxicity test. What was understood about the substance turns out to be wrong. Subsequent research shows that MMT can indeed be harmful to fish. Furthermore, the substance supplied to the refinery turns out to be not pure MMT, but a compound called LP46 consisting of 46 % MMT and 54 % solvent, and the separator system at the refinery does not remove LP46 from the effluent.

Before proceeding further, a review of the hierarchy of offences in the criminal and quasi-criminal realm is appropriate. In *R. v. Sault Ste. Marie*,<sup>18</sup> the Supreme Court of Canada recognized three categories of offences : pure mens rea ; strict liability ; and absolute liability.<sup>19</sup> Mens rea offences are

17. *Fisheries Act*, R.S.C. 1985, c. F-14.

18. *R. v. Sault Ste. Marie*, [1978] 2 S.C.R. 1299.

19. *Id.* at 1325-1326. In theory, there are at least two other possibilities : negligence offences, in which the Crown would have the onus of proving actus reus and objective fault in the form of negligent behaviour ; and offences that employ a mandatory presumption of negligence, in which the accused would have to raise a reasonable doubt about negligence rather than establish due diligence on a balance of probabilities. THE ONTARIO LAW REFORM COMMISSION, *Report on the Basis of Liability for Provincial Offences*, Toronto, 1990, recommended the latter as an alternative to strict liability offences, but the idea was rejected by Iacobucci J. in *R. v. Wholesale Travel Group Inc.*, [1991] 3 S.C.R. 154 at 257-258. See D. STUART, « Wholesale Travel : Presuming Guilt for Regulatory Offences is Constitutional but Wrong » (1992), 8 C.R. (4th) 225 at 228-229. In *R. v. Ellis-Don Ltd.* (1992), 71 C.C.C. (3d) 63 (Ont. C.A.), the Supreme Court of Canada confirmed that it was not sufficient for an accused to merely raise a reasonable doubt about due diligence, and that the accused's burden of establishing due diligence on a balance of probabilities was constitutional.

« standard » criminal offences in which the Crown must establish not only the elements of the *actus reus*, but also actual awareness of the risk, often in the form of intent. Most pure criminal offences fall into this category. For example, the criminal offence of assault is satisfied by unwanted physical contact with another accompanied by the intent to make such physical contact.<sup>20</sup> Accidentally tripping over a crack in the sidewalk and falling into the person beside you does not constitute assault, even if you were rushing and not looking where you were going. The effect upon the victim may be the same in both cases, but intent of the actor is absent in the latter.

Absolute liability offences are found at the other end of the scale. The commission of an absolute liability offence is established upon proof only of a prohibited act. The presence or absence of fault, either subjective or objective, is irrelevant. Some regulatory offences, such as traffic violations, have been held to be absolute liability offences.<sup>21</sup>

Strict liability offences are found in between these two extremes. In a prosecution for a strict liability offence, the Crown must establish the commission of the *actus reus* beyond a reasonable doubt. In the absence of any other evidence, such proof results in conviction. However, unlike an absolute liability offence, a strict liability offence allows an accused to exculpate himself by proving due diligence: that he took all reasonable care to prevent the commission of the offence, or that he had a reasonable belief in a mistaken set of facts that, if true, would have resulted in the offence not occurring.<sup>22</sup> It is important to note the difference in the meaning of « strict liability » in the civil and criminal spheres. In tort, pure strict liability is liability in the absence of fault. It requires causation, but not negligence or foreseeability. In criminal law, strict liability means that the Crown has the onus of proving *actus reus*, and the accused may establish the absence of fault as a defence.

To return to the scenario above, the facts are essentially those from *R. v. Imperial Oil Ltd.*,<sup>23</sup> a decision of the British Columbia Court of Appeal. Imperial Oil was charged with, among other things, contravention of sec-

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20. *Criminal Code*, R.S.C. 1985, c. C-46, s. 265(1)(a): « A person commits an assault when without the consent of another person, he applies force intentionally to that other person, directly or indirectly. »

21. *R. v. Kurtzman* (1991), 4 O.R. (3d) 417 (C.A.).

22. *R. v. Sault Ste. Marie*, *supra* note 18 at 1326; *R. v. Rio Algom Ltd.* (1989), 66 O.R. (2d) 674 (C.A.).

23. *R. v. Imperial Oil Ltd.*, [2000] B.C.J. (Quicklaw) No. 2031 (B.C.C.A.); (2001) 148 C.C.C. (3d) 367 (B.C.C.A.).

tion 36(3) of the *Fisheries Act*.<sup>24</sup> Contravention of section 36(3) is a strict liability offence,<sup>25</sup> and in its defence, the refinery argued due diligence. At trial, an acquittal was entered on the basis of that defence. The trial judge concluded that the accused's environmental risk assessment program would have identified the potential problems with MMT had the toxicity test failure not occurred when it did.<sup>26</sup> On appeal, the summary conviction appeal judge disagreed with the trial judge about the likelihood that the risk assessment program would have identified the problem. She reversed the acquittal and entered a conviction, despite noting that « [t]he problem [...] was that it was not known that MMT or LP46 was so lethal to fish. »<sup>27</sup> She rejected the argument of Imperial Oil « that it ought not to have been expected to have known of the toxicity problem because of the nature of the information from the supplier, the absence of information from the supplier as to toxicity, the lack of scientific literature and the many years of using the product without incident. »<sup>28</sup>

The Court of Appeal upheld the conviction, with the majority concluding that it was « not an answer for the appellant [Imperial Oil] to say that it had in general a good safety system, that it tested more frequently than necessary, and that it had a program which would likely have detected the hazard within the near future. »<sup>29</sup> The majority did not mention the precautionary principle, but in spite of acknowledging the absence of toxicity warning from the supplier and the lack of published scientific research, indicated that it was incumbent upon the accused to determine the toxicity of the chemical. The majority expressed its views in language consistent with the existence of the due diligence defence, but set the standard so high as to demand the benefit of hindsight in the actions of the accused. The dissenting Court of Appeal judge, Newbury J.A., expressed the view that the majority was « applying a standard of perfection »<sup>30</sup> to conclude that Imperial Oil did not conduct itself with due diligence. To insist upon « perfection » or the benefit of hindsight in the performance of due diligence is essentially to deny its availability, and thus to transform a strict liability offence into one of absolute liability.<sup>31</sup>

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24. *Fisheries Act*, *supra* note 17.

25. The offence is set out in section s. 40(2).

26. *R. v. Imperial Oil Ltd.*, *supra* note 23 at paragraph 31 (B.C.J.), Newbury J.A. (dissenting).

27. *Id.* at paragraph 32.

28. *Ibid.*

29. *Id.* at paragraph 28, Finch J.A.

30. *Id.* at paragraph 34.

31. See P. CASSIDY, « Prosecuting Made Easy », *The Lawyers Weekly*, 17 November 2000, 4.

## 2.2 Strict liability v. absolute liability

The constitutionality of strict liability offences was settled by the Supreme Court of Canada in *R. v. Wholesale Travel Group Inc.*<sup>32</sup> In that case, the Court decided that for regulatory or 'quasi-criminal' offences, it is constitutional to place the onus upon an accused to disprove fault. An accused may be given the burden of establishing due diligence on a balance of probabilities in order to avoid conviction of a regulatory offence. The Court held that it was consistent with the *Charter of Rights and Freedoms*<sup>33</sup> to limit the burden on the Crown to that of proving the actus reus of the offence. It cited a number of different reasons for coming to this conclusion, including the propositions that: (a) regulatory prohibitions are essential to public welfare;<sup>34</sup> (b) conviction of a regulatory offence is less serious than conviction for a 'true' criminal offence, and therefore carries less stigma;<sup>35</sup> (c) citizens voluntarily submit themselves to particular regulatory regimes by choosing to carry out particular kinds of activities,<sup>36</sup> and (d) evidence of fault is usually in the hands of the accused, thus making it difficult for prosecutors to obtain convictions if fault was included as an element of the offence.<sup>37</sup>

These justifications for departing from the requirement for subjective fault are not persuasive:<sup>38</sup> (a) regulatory offences are not more important to public welfare than Criminal Code offences. Pollution is undesirable, but polluters are not more dangerous than rapists and murderers; (b) conviction for many regulatory offences, including environmental offences, includes the possibility of imprisonment. If conviction for regulatory offences is really less serious than for 'true' criminal offences, they should not carry the possibility of incarceration,<sup>39</sup> the most severe penalty available in law;

32. *R. v. Wholesale Travel Group Inc.*, *supra* note 19.

33. Part I of the *Constitution Act, 1982*, enacted by the *Canada Act 1982* (U.K.) 1982, c. 11.

34. *R. v. Wholesale Travel Group Inc.*, *supra* note 19 at 233-239 (Cory J.).

35. *Id.* at 219-220 (Cory J.).

36. *Id.* at 228-232 (Cory J.); at 258-259 (Iacobucci J.).

37. *Id.* at 245-247 (Cory J.); at 257 (Iacobucci J.).

38. See D. STUART, *supra* note 19.

39. Under section s. 40(2) of the *Fisheries Act*, *supra* note 17, every person who contravenes subsection 36(1) or (3) is guilty of « (a) an offence punishable on summary conviction and liable, for a first offence, to a fine not exceeding three hundred thousand dollars and, for any subsequent offence, to a fine not exceeding three hundred thousand dollars or to imprisonment for a term not exceeding six months, or to both; or (b) an indictable offence and liable, for a first offence, to a fine not exceeding one million dollars and, for any subsequent offence, to a fine not exceeding one million dollars or to imprisonment for a term not exceeding three years, or to both. »

(c) voluntary submission is a fiction. Regulation is so widespread in virtually all sectors of the economy that there is not much prospect of engaging in a productive enterprise that is not subject to regulation. Therefore, it is inaccurate to say that citizens choose to make themselves subject to regulation; and (d) evidence of fault is always in the hands of the accused, regardless of what type of offence is in question. This fact does not prevent the Crown from carrying the burden of proving mens rea in Criminal Code prosecutions.<sup>40</sup>

The judgment in *Wholesale Travel* found that strict liability was constitutional, but the conclusion is dependent upon the availability of the due diligence defence.<sup>41</sup> If a standard of conduct requiring « perfection » or the benefit of hindsight is applied to the due diligence defence, as in *Imperial Oil*, an accused's ability to satisfy its requirements are significantly diminished. If strict liability is moved closer to absolute liability, are the conclusions in *Wholesale Travel* still valid? Consider the route:

- 1) Strict liability, not absolute liability, was the compromise that the Supreme Court of Canada reached in *Sault Ste. Marie* between the interests of public welfare and the rights of the accused.
- 2) Strict liability, not absolute liability, was the category of offence that the Supreme Court of Canada determined in *Wholesale Travel* was a reasonable limit on the guarantee of presumption of innocence.
- 3) The justifications relied on by the Supreme Court of Canada in coming to that conclusion are weak.
- 4) In *Wholesale Travel*, the Court held that absolute liability accompanied by a possibility of imprisonment was unconstitutional.<sup>42</sup>

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40. « The trouble with these arguments of law enforcement expediency is that they could demonstrably justify any reverse onus clause for any type of crime » : D. STUART, *supra* note 19 at 229. Stuart quotes a pre-Charter observation of Mr. Justice Dickson in the Supreme Court of Canada judgment in *Strasser v. Roberge* (1979), 50 C.C.C. (2d) 129 at 139, that mere difficulty of enforcement « cannot justify the shifting of a burden of proof of the mental element to the accused, for if that were the case one could easily justify doing away with the presumption of mens rea and the presumption of innocence in criminal law proper. »

41. The court struck down requirements in the *Competition Act* that demanded a higher standard than reasonable care. See D. STUART, *Canadian Criminal Law*, 4th ed., Scarborough, Carswell, 2001, at 191.

42. Confirming its decision in *Reference re s. 94 of the Motor Vehicle Act (British Columbia)*, [1985] 2 S.C.R. 486; *R. v. Wholesale Travel Group Inc.*, *supra* note 19 at 195 (Lamer J.); at 253 (Cory J.); at 255 (Iacobucci J.).

- 5) Many strict liability offences may be punished by imprisonment.
- 6) Applying the precautionary principle to the due diligence defence would diminish its availability, and effectively transform offences of strict liability into absolute liability.

### 2.3 Passing the buck

MMT should not be getting into waterways, even through inadvertence. The fact that MMT did escape into water in the *Imperial Oil* case indicates that someone was not carrying out its responsibilities. In my opinion, that someone was not Imperial Oil. It was the state. Section 36(3) of the *Fisheries Act* does not specify a standard of behaviour or precisely define a prohibition. To create a strict liability offence with a vague statutory provision, and then to require precautionary action on the part of an accused, is essentially to say to private enterprises, « We do not really know what the rule is. We are giving you the job of making the judgment about when the standard might be breached. If you get it wrong, you are on your own. We will hold you criminally responsible for an action that only in retrospect has proved to be contrary to the provision. »<sup>43</sup>

Consider the wording of section 36(3). It states : « [...] no person shall deposit [...] a deleterious substance of any type in water frequented by fish [...] ». For private actors trying to figure out what they are and are not allowed to do, the definition of « deleterious substance » provided in the Act<sup>44</sup> does not assist. If the precautionary principle is to be applied to prosecutions for violation of this provision, private citizens and commercial

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43. In *Ontario v. Canadian Pacific Ltd.*, [1995] 2 S.C.R. 1031, the Supreme Court of Canada found a vague environmental prohibition constitutional. In his concurring judgment, Chief Justice Lamer stated that the availability of the defence of due diligence had no bearing on the question of whether the impugned provision was unconstitutionally vague (*id.* at 1043).

44. In section 34, « deleterious substance » is defined as :

(a) any substance that, if added to any water, would degrade or alter or form part of a process of degradation or alteration of the quality of that water so that it is rendered or is likely to be rendered deleterious to fish or fish habitat or to the use by man of fish that frequent that water, or

(b) any water that contains a substance in such quantity or concentration, or that has been so treated, processed or changed, by heat or other means, from a natural state that it would, if added to any other water, degrade or alter or form part of a process of degradation or alteration of the quality of that water so that it is rendered or is likely to be rendered deleterious to fish or fish habitat or to the use by man of fish that frequent that water, and without limiting the generality of the foregoing includes

(c) any substance or class of substances prescribed pursuant to paragraph (2)(a),

operations will be required to do what government cannot or will not do itself, which is to determine and identify the circumstances that fall on either side of the line. The regulator thus avoids applying the precautionary principle to itself, and instead foists it upon parties with fewer investigative resources.

A better way to achieve the application of the precautionary principle is to apply it prospectively to the formulation of the statutory rule. Change the wording of the provision. The prohibition in the Fisheries Act could read : « [...] no person shall deposit a *foreign* substance of any type in water frequented by fish, unless the substance is specifically approved by regulation [...] ». This provision contains an effective application of the precautionary principle. The prohibition is broad but clear. Substances that are not normally found in water would be prohibited unless specifically approved *before* their release. The provision eliminates retrospective application of the principle. It removes the investigative and evaluative burden from private persons, and places it upon government where it belongs. It makes government legally and politically responsible. It prevents government from passing the buck.

Whereas the primary purpose of tort law is compensation, the primary purpose of criminal law is punishment. It is an essential difference. The focus in tort cases should rest on the loss caused by the defendant to the plaintiff rather than on the degree of blameworthiness of the defendant ; whereas in criminal cases, the subjective fault of the accused is of primary importance. Punishment requires culpability.

## Conclusion

Courts have not referred to the precautionary principle in bringing the law to its present state. Nevertheless, it is possible to speculate about what their view would be about applying a precautionary concept. In the civil area, the proposition probably would not be entertained. Courts would resist finding liability for consequences that were not foreseeable. Fault-based liability is firmly established in negligence, nuisance, and *Rylands v Fletcher* to the benefit of defendants and the detriment of plaintiffs. In the criminal realm, in contrast, courts have applied demanding standards for

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(d) any water that contains any substance or class of substances in a quantity or concentration that is equal to or in excess of a quantity or concentration prescribed in respect of that substance or class of substances pursuant to paragraph (2)(b), and  
(e) any water that has been subjected to a treatment, process or change prescribed pursuant to paragraph (2)(c).



establishing due diligence.<sup>45</sup> To require precautionary behaviour would not be a significant shift in approach. The court in *Imperial Oil* reached a result consistent with applying the precautionary principle to the issue of due diligence.

The law is now in the peculiar state of producing results opposite to what fundamental principles should dictate. If a person causes environmental harm that was not foreseeable, that person may be found guilty of a criminal offence but not civilly liable to compensate the victim for the loss. Such a result flies in the face of traditional expectations. It is not consistent with the purposes and roles that these two kinds of liability are intended to serve. Civil liability is, at root, about compensation for causation of harm, not about culpability. Criminal liability is about moral blameworthiness; often, causing harm is not even an element of the offence. Civil liability, requiring proof on a balance of probabilities, is supposed to be easier to establish than criminal liability. Criminal law is supposed to provide accused persons with the right of presumption of innocence and the protection of the Crown's burden of establishing guilt beyond a reasonable doubt.

A precautionary concept should be applied in civil cases, but not in criminal or regulatory prosecutions. The precautionary principle may be an ingenious idea, but it does not automatically produce ingenious results.

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45. See for example *R. v. Kurtzman*, *supra* note 21, and *R. v. Alexander*, [1999] N.J. (Quicklaw) No. 19 (Nfld. C.A.) (due diligence requires care related to the «particular event» giving rise to the charge, rather than a more general standard of care); *Ontario v. London Excavators & Trucking Limited* (1998), 40 O.R. (3d) 32 (C.A.) (an accused is not entitled to rely on information from other sources in determining the extent of risk); *R. v. Rio Algom*, *supra* note 22 (Court of Appeal entering a conviction despite the trial judge's finding that the accident was unforeseeable).