

Has the Crown really demonstrated that the limitation on the *Right to Decline Medical Treatment* was reasonable and demonstrably justified?



Part 6: What Was the Role of the Precautionary Principle?

In his NZTSOS judgement, Justice Cooke began well by describing the ‘very significant evidential burden’ upon the Crown to demonstrate the lawfulness of the mandate order, stating:

*“What this means is that there is a **very significant evidential burden placed on the Crown to demonstrate** that the measures implemented by the Order are reasonable, and demonstrably justified in a free and democratic society.”* (para 54)

*“... **the Crown has the burden to demonstrate** that a measure that limits a fundamental right is demonstrably justified ... given the fundamental nature of the right ..., **the Crown has a reasonably high threshold to meet here.**”* (para 85)

He then described his dilemma when attempting to assess the Crown’s evidence:

“The respondents [i.e. the Crown] did not file independent expert evidence addressing the questions that had been addressed by the applicants’ [i.e. NZTSOS/NZDSOS] expert witnesses. For example, the Crown did not file any evidence from an expert epidemiologist. ... In addition the evidence filed by the Crown did not seek to respond to all the issues the expert evidence filed by the applicants addressed. Rather Drs Bloomfield and Town put forward their own views explaining why the vaccine was safe and effective. In effect I had two sets of expert evidence, effectively in parallel, on many of the important issues rather than evidence that directly responded to each other. All of this means that there is considerable difficulty involved in the Court making definitive findings on the disputed questions.” (para 89, 90)

In an attempt to resolve his dilemma, he turned to the ‘Precautionary Principle’, saying.

“... it seems to me that it [i.e. the precautionary principle] applies here. Again it does not remove, or reduce the burden that is placed on the Crown, but it is a principle that applies when there is uncertainty, as is the case here.” (para 93)

The Precautionary Principle has been used in environmental cases as a way to reduce risk from the introduction of a new technology where its effects are uncertain and there is the potential for harm.

“If each of the two conditions precedent or thresholds are satisfied – that is, there is a threat of serious or irreversible environmental damage and there is the requisite degree of scientific uncertainty – the precautionary principle will be activated.” (Justice Preston, *Telstra vs Hornby*)

We consider, however, that Justice Cooke erred in applying the Precautionary Principle for the following reasons:

1. It is contrary to the New Zealand Bill of Rights Act.

The New Zealand Bill of Rights Act 1990 (NZBORA) is very clear and precise concerning the **only** grounds under which a right (such as the right to refuse to undergo medical treatment) can be limited:

“The rights and freedoms contained in this Bill of Rights may be subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.”(s.5)

The critical phrase here is ‘demonstrably justified’. This means the onus is on the Crown to **demonstrate** why a limitation of a right is justified. If the Crown is unable to demonstrate the justification, then their action is contrary to the Bill of Rights and unlawful.

Justice Cook acknowledged this, but when confronted with “uncertainty” in the scientific evidence and inability to make “definitive findings”, rather than rule against the Crown, he invoked the Precautionary Principle to allow him to rule in the Crown’s favour. The important things to note are:

- Justice Cooke’s appeal to the Precautionary Principle is a clear indication that the Crown had not met its “very significant evidential burden” to demonstrate the order was justified.
- The Precautionary Principle is unable to override the explicit wording of the NZBORA, and produce ‘demonstrable justification’ where ‘demonstrable justification’ does not exist.

2. It moved the ‘burden of proof’ to the applicants (NZDSOS/NZTSOS)

When the Precautionary Principle is applied;

*“At this point, there is a shifting of an evidentiary burden of proof. A decision-maker must assume that the threat of serious or irreversible environmental damage is no longer uncertain but is a reality. **The burden of showing that this threat does not in fact exist or is negligible effectively reverts to the proponent** of the economic or other development plan, programme or project.” (Justice Preston, Telstra vs Hornby)*

A ‘Burden of Proof’ can be characterised as “an onus, or a rebuttable presumption in favour of one party, where an assertion will be presumed to be false if the burdened party fails to meet the required standard of proof.” Cooke maintained that his application of the Precautionary Principle **“does not remove, or reduce the burden that is placed on the Crown.”** In practice, however, this is exactly what happened.

As repeatedly seen in his statements, rather than requiring the Crown to prove the vaccine was safe, Justice Cooke now required the applicants to prove it was unsafe. Rather than requiring the Crown to prove the mandate was demonstrably justified, he now required the applicants to prove it was not.

“I am not satisfied that Dr Town’s evidence on this point is wrong.” (para 116)

“I do not accept the applicants’ expert evidence that there are unknown safety concerns relating to the Pfizer vaccine that mean that mandating it is not justified.” (para 161)

“ I do not accept that the education mandate was not demonstrably justified at the time of trial.” (para 138)

3. The Precautionary Principle was misapplied.

Justice Cooke had expert testimony of potential harm from the mandate. Rather than factoring this into a rigorous risk analysis, however, he simply dismissed it:

"I recognise the view of the applicants' experts that vaccination may make matters worse rather than better. But I am not persuaded of this."

This expert testimony, however, cannot be so easily dismissed. When confronted with scientific uncertainty, a correct application of the Precautionary Principle would have demanded an evaluation of the risk in both (i) not implementing the mandate and (ii) implementing the mandate.

(i) If the mandate was not implemented. Due to the high numbers of workers already vaccinated, the risk of transmission amongst the education workforce might increase by a maximum of 2.5%. This increase in risk is negligible, especially with a virus that was rapidly becoming endemic.

(ii) If the mandate was implemented. There was the acknowledged risk of serious harm, including myocarditis and death in those who would then be coerced to take the vaccine.

Where eminent scientists were warning of potential serious harm, a correct application of the Precautionary Principle should have been to demand caution and to ensure that the vaccine was not mandated until these concerns about serious harms had been rigorously addressed.