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An Ounce of precaution

I was pleased to be asked to continue the “Laying Down the Law” column which I wrote for ea Magazine, and hope that those who have read it before will similarly be pleased to see it again. The purpose of the column has always been to explore legal themes which have a practical impact for environmental management in all its facets. The relationship between science, risk and the law has been a recurrent issue in this column, and one which is attracting ever-increasing attention.

The week in which I wrote this piece, in mid-May 2004, has featured as one of the major news items the Prince of Wales’ Reith lecture in which he called for a rebalancing of the dominant force of scientific rationalism by wisdom, respect and stewardship; as he put it “our sense of the sacred” in relation to dealings with the natural world. I believe that many, certainly myself included, welcomed his deeply thoughtful approach - so different to the spin and sound-bite of most contemporary views on the subject. Perhaps like me, you were also both pleased and interested to see how many scientists clearly felt and reacted as if threatened, insecure and defensive by his lecture. “Science” as an abstract concept may be objective, but scientists have as many prejudices and vested interests as any other sector of the population. Incidentally, I wonder if others react as suspiciously as I do to the use of the term “sound science”, usually employed to suggest that the science underlying the approach of the person using the term has somehow a quality and integrity lacking in the science underpinning other points of view. The Director of Operations of the Environment Agency recently inadvisedly used the term in his January evidence to the Commons Environment Sub-Committee, suggesting that the Agency offered industry “consistency through sound science”.

But to return to Prince Charles’ lecture. He referred to the precautionary principle in terms which bear setting out in full:

“The idea of taking a precautionary approach, in this [genetic engineering] and many other potentially damaging situations, receives overwhelming public support, but still faces a degree of official opposition, as if admitting the possibility of doubt was a sign of weakness or even of a wish to halt “progress”. On the contrary, I believe it to be a sign of strength and of wisdom. It seems that when we do have scientific evidence that we are damaging our environment we aren’t doing enough to put things right, and when we don’t have that evidence we are prone to do nothing at all, regardless of the risks.”

The precautionary principle is now a well-known concept in international, EC and domestic law. Numerous article and books have been written on the subject, and there have been cases which have danced around it in the UK, Australia and India, to name but three. Yet it still remains essentially a “nice sentiment”, as some commentators have described it. The problem is of course that by definition the precautionary principle in its application is about stopping people doing things they wish to do, usually for commercial gain, or at least restricting their ability to do those things. The principle therefore grates against traditional approaches of liberalism and the countervailing legal concept of proportionality.

The courts may have to face it in two contexts. First, in private law actions where an injunction is sought to restrain activity which has given or may give rise to damage. This in itself has two main problems. It is still basically true to say, as Lord Scarman did in the 1970s, that for “environment”, the private lawyer reads “property”. There is no right to protect, through private law, the unowned environment at large. This may to some extent become possible if the EC proposals for a directive on liability for environmental damage ever come to fruition, but that is highly uncertain and many years away. The much vaunted

Human Rights Act 1998, coming into force on 2 October 2000, is unlikely to assist greatly in this regard. Secondly, in the absence of imminent damage, the courts are unlikely to give redress unless there is a major shift in judicial attitudes. This quotation from an 1876 case is the antithesis of the precautionary approach:

“ It would have been wrong ... for this Court in the reign of Henry VI to have interfered with the further use of sea coal in London, because it had been ascertained to their satisfaction, or predicted to their satisfaction, that by the reign of Queen Victoria both red and white roses would have ceased to bloom in the temple Garden.”

The more likely context for precautionary disputes is in the field of public law, where the courts control and supervise administrative action. It is unlikely that a court would criticise a decision-maker for adopting the precautionary principle. But on the other hand, it is difficult to attack a decision-maker for taking an insufficiently precautionary approach. Courts can ensure due process in the sense of fairly taking into account material considerations, of which the need for precaution may well be one. But the weight which is accorded to precaution is likely to be regarded as a matter for the decision-maker. Faced with scientific uncertainty, the courts may need to find a new role, but at present they probably regard themselves as ill-equipped to play it. The possibly uncomfortable fact is that they will increasingly be faced with that role, as decisions are made by officials who, in Prince Charles' terms, fear to admit to the weakness of doubt or to be seen as an obstacle to new technologies which promise the earth but may well cost it.

Note

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