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# STATUTORY INTERPRETATION AND MENS REA IN NON-*CRIMINAL* *CODE* OFFENCES

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## Introduction

The doctrine of mens rea is one of the most basic tenets of the criminal law. It enshrines the principle that no person may be convicted of a criminal offence unless his criminal act was accompanied by a guilty intention. Vague and amorphous though the doctrine may be, it lies at the heart of the criminal law.

In the middle of the nineteenth century, however, a new principle was recognized by courts in some cases. Known variously as absolute or strict liability, it was the antithesis of mens rea for it permitted an accused to be convicted upon mere proof of the actus reus of the offence. The prosecution was not required to establish any sort of mental element on the part of the accused nor was it open to the accused to attempt to exonerate himself by adducing exculpatory evidence as to his intention.

Absolute liability was usually applied to offences known as public welfare or regulatory offences; the terms are interchangeable. These were statutory offences and had not been crimes at common law. Usually they were enacted as part of a regulatory scheme to govern a specific activity such as the manufacture of food or drugs, the operation of factories or the sale of intoxicating beverages.

The law governing when an offence was one involving absolute liability developed haphazardly and never assumed a definitive shape. Instead a number of statutory interpretation maxims came to dominate; which maxim would be invoked by a court in any given case depended more upon the particular judge and accused than upon the offence-creating provision itself. In 1978, the Supreme Court of Canada finally addressed the issue directly in R. v. City of Sault Ste. Marie.[1] In that decision, the Court responded to the numerous critics of absolute liability by recognizing a third category of offences, to be known as strict liability offences. An accused charged with such an offence would be entitled, upon proof of the actus reus, to prove on a balance of probabilities that he had not been negligent, either because he had been operating under a reasonable mistake of fact or because he had exercised due diligence to try to prevent the commission of the offence.

Sault Ste. Marie was hailed as a landmark decision that would settle the law in this area once and for all. Needless to say, that did not happen. Although Sault Ste. Marie provided relief for many accused persons, it did not appreciably simplify the determination of the appropriate mens rea requirement for any given offence. Today it is still difficult to ascertain the mental component of many offences. Criminal Code offences rarely pose a problem since it is clear that a presumption of mens rea applies to them; offences outside the Code, however, still cause confusion. This paper will examine Sault Ste. Marie and its impact with a view to determining if the law is developing in a satisfactory manner or whether more radical reform is necessary.

A note on terminology may be useful. In this paper, offences for which conviction follows automatically upon proof of the actus reus, leaving the accused no opportunity to adduce exculpatory evidence as to his intention, are referred to as absolute liability offences; this is the name given to that class of offences in Sault Ste. Marie. Prior to Sault Ste. Marie such offences were more often referred to as strict liability offences, although the term absolute liability was also sometimes used. However, in view of the connotations that the term strict liability has taken on since <u>Sault Ste. Marie</u>, that term is only used in this paper in its <u>Sault Ste. Marie</u> sense, that is, as the new category of offences for which certain specific mens rea defences are available.

## Introduction

### Notes

1. [1978] 2 S.C.R. 1299, 40 C.C.C.(2d) 353, 3 C.R.(3d) 30, 21 N.R. 295, 7 C.E.L.R. 53, 85 D.L.R.(3d) 161 (S.C.C). All subsequent references to the case will relate to 40 C.C.C.(2d).

## Absolute Liability Prior to Sault Ste. Marie

### Origins of absolute liability

At common law mens rea was a constituent element of every offence except nuisance.[1] During the mid-nineteenth century, however, courts began to develop an exception to this rule where certain statutory offences were involved, holding that in some cases it was not necessary to prove mens rea in order to convict.[2] It is generally accepted that the first case in which absolute liability was applied to a statutory offence was the decision of the English Court of Exchequer in R. v. Woodrow.[3] In that case a tobacco dealer was convicted of possession of adulterated tobacco even though he had purchased the tobacco in the regular course of business and had no idea that it was adulterated. Shortly thereafter, and quite independently of the movement in England, courts in the United States began to apply absolute liability in certain cases.[4]

In his classic article entitled "Public Welfare Offences", F.B. Sayre noted:[5]

> The interesting fact that the development took place in both England and the United States at about the same time strongly indicates that the movement has not been merely an historical accident but the result of the changing social conditions and beliefs of the day.

He attributed the development of absolute liability in both countries to two factors: a shift in the emphasis of the criminal law from the protection of individual interests to the protection of public and social interests and the growing use of the criminal law system to enforce regulatory legislation.[6] Put simply, in the mid-nineteenth century, a vast amount of regulatory legislation began to be enacted to govern and control a wide variety of activities. Absolute liability was a way of handling in an expeditious fashion the sudden burden this placed on the courts. Its impact was lessened by the fact that, with a few notable exceptions,[7] absolute liability was generally applied only to regulatory offences which did not have the same connotation of moral turpitude as true criminal offences and which normally entailed only minor penalties upon conviction.[8] By the end of the nineteenth century, absolute liability was firmly entrenched in England, the United States and, ultimately, Canada.

Early Canadian caselaw

The caselaw shows that by the beginning of the twentieth century absolute liability was well-established in Canada.[9] The difficulty was, and remained, knowing when an offence would be held to be one of absolute liability and when proof of mens rea would be required. Although a number of English authorities were often cited by Canadian courts when considering this issue, the case most frequently invoked was Sherras v. DeRutzen,[10] a decision of the Court of Queen's Bench. Indeed, even after the Supreme Court of Canada finally issued its own statement on the subject of mens rea in 1957,[11] Sherras v. DeRutzen remained the authority to which reference was most often made.[12]

In Sherras v. DeRutzen, the appellant, the licencee of a public house, had been convicted of unlawfully supplying liquor to a police constable who was on duty. At the time that he was served, the constable had not been wearing the armlet that normally indicated that a constable was on duty. In holding that the conviction ought to be quashed because the appellant had honestly believed the constable to be off duty, Wright J. made the following statement:[13]

> There is a presumption that mens rea, an evil intention, or a knowledge of the wrongfulness of the act, is an essential ingredient in every offence; but that presumption is liable to be displaced either by the words of the statute creating the offence or by the subject-matter with which it deals, and both must be considered....

He then went on to list three principal exceptions to the rule that mens rea is presumed to be an essential element of an offence. He stated that no presumption applies to public nuisances or where the proceeding, although criminal in form, is really only a summary mode of enforcing a civil right. The exception that quickly became the most important, however, related to acts that "are not criminal in any real sense, but are acts which in the public interest are prohibited under a penalty". It was under this exception that the category of offences that came to be known as regulatory or public welfare offences fell.

From Sherras v. DeRutzen were distilled two general principles that were repeated over and over again in various forms throughout the Canadian caselaw. The first stated that a presumption of mens rea applied to all offences unless it was excluded expressly or by necessary implication. The second general principle somewhat inconsistently stipulated that where an offence was not criminal in any real sense, but simply involved activity prohibited under penalty in the public interest, no presumption would apply. Unfortunately, not even the Justices of the Supreme Court of Canada were able to agree on which of these two principles should be given priority.[14] So flexible were these principles that they essentially permitted the courts to do whatever they pleased. One is inevitably led to conclude that the outcome of any given case depended less upon the intention and wording of the statute under which the accused was charged than upon the individual judge's particular views on both mens rea in general and the specific case under consideration.[15]

As a rule, where a Criminal Code offence was at issue, the presumption of mens rea was applied, although there were exceptions.[16] Where the offence was found in a statute other than the Criminal Code, however, it was virtually impossible to predict which course a court would adopt. Indeed, often different courts reached opposite conclusions with respect to the same offence.[17] No attempt will be made here to canvass all the caselaw that developed in order to reconcile the decisions; reconciliation would be impossible. However, an examination of the caselaw does indicate that a number of distinct approaches were repeatedly adopted by courts in determining whether or not mens rea had to be proved.[18]

Sometimes a court merely applied the presumption of mens rea, even where the offence was clearly regulatory so that it could have fallen within the Sherras v. DeRutzen exception of an act prohibited under a penalty in the public interest.[19] In other cases there was simply a stark declaration by the judge that mens rea did not need to be proved for the type of offence under consideration.[20] It might be noted that throughout the period, both in England and Canada, there were even occasional suggestions that a presumption of mens rea no longer applied to any offence at all.[21]

Most often, however, courts embarked upon an exercise in statutory interpretation to determine whether the legislature had intended mens rea to be an element of the offence. The approach taken would depend upon which of the two principles derived from Sherras v. DeRutzen the court considered to be paramount.

Where a court started with a presumption of mens rea, it would look for signs that mens rea was intended to be excluded. This could involve an examination of the precise words used as well as a larger study of the legislation as a whole. One popular technique used to determine the intention of the legislature was to examine other offences found in the same act. Where some offences included specific mens rea words such as "knowingly" or "wilfully" and others did not, it was often assumed that the legislature had intended the latter group to be offences of absolute liability.[22] Occasionally, too, the penalty was considered since it was generally felt that an offence was more likely to have been intended to be absolute where the penalty was light.[23] This technique became especially popular after it was adopted by the Supreme Court of Canada in R. v. Beaver.[24]

Other courts began by deciding whether the offence in question fell within the Sherras v. DeRutzen exception as being "not criminal in any real sense, but prohibited under penalty in the public interest". This usually involved an examination of the type of statute in which it was contained in order to determine the evil sought to be prohibited. The Sherras v. DeRutzen exception could, of course, be very broad or very narrow depending on the will of the judge. The effect of being classed in this category also varied with the judge. Sometimes it automatically meant that mens rea was not required. More often, however, such classification meant only that no presumption applied; it was still necessary to determine whether the legislature had intended mens rea to be a component of the offence.

An examination of two decisions of the Saskatchewan Court of Appeal helps to illustrate the way in which this approach was susceptible to manipulation by a court. In R. v. Ping Yuen,[25] the Court upheld the accused's conviction on a charge of unlawfully keeping liquor on his business premises while in the business of selling soft drinks. It was readily admitted that the accused had bought the soft drinks in question in the normal course of business from a wholesale grocery house and that the only way he could possibly have known that some of the bottles contained more alcohol than was legally permitted would have been to open them and send the contents off for analysis. The Court acknowledged that it was unreasonable to expect him to do this but held that the protection of the public required the offence to be one of absolute liability.

This may be contrasted with the same Court's decision two years later in R. v. Regina Cold Storage and Forwarding Co. Ltd.,[26] where the Court quashed the appellant's conviction on a charge of unlawfully having liquor in a place other than a dwelling-house. The appellant owned a warehouse in which refrigerated space was rented out to persons wishing to store goods; the company was charged after it was discovered that someone has stored beer in the warehouse. A witness for the company testified that he had believed that the beer was temperance beer, not liquor. At trial, the judge entered a conviction on the grounds that the case could not be distinguished from Ping Yuen. On appeal, the Saskatchewan Court of Appeal overturned the conviction, distinguishing the case on the grounds that, unlike Ping Yuen, the act prohibited in this case was not prohibited in the public interest or for the public safety since no one could have been hurt by the appellant's actions in storing the beer. In contrast, a member of the public who had bought a soft drink from the storekeeper in Ping Yuen was endangered by the possibility of imbibing a beverage with an excessive alcohol content. Since the Sherras v. DeRutzen exception was therefore not applicable to the offence in Regina Cold Storage, the Court held that a presumption of mens rea applied.

It is also interesting to note that in Ping Yuen Turgeon J.A. stated that absolute liability must be applied, regardless of the hardship to the soft-drink merchant, because "to hold that in each case a guilty knowledge must be proved, would no doubt make the Act of no practical value".[27] In Regina Cold Storage, a conflicting justification was cited for finding the offence to be one requiring proof of mens rea. Haultain C.J.S. stated:[28]

> If the present conviction can be sustained, the result will be that no railway company, express company, or warehouseman, can safely receive goods in the ordinary course of business without an inspection and analysis of the contents of every box and receptacle. I would, therefore, hold that it was never the intention of the Legislature to expose any person to a penalty who, in perfect good faith and quite innocently, has or keeps liquor under the circumstances disclosed in the evidence in this case.

Since either justification could equally well have been cited in the each case, it is difficult to escape the conclusion that in both cases the Court simply determined the result that it wished to achieve and adopted the most appropriate principles to get it to that position.

Beaver and Pierce Fisheries

Two decisions of the Supreme Court of Canada did little to clarify the issue of when mens rea should be found to be a constituent element of an offence. In R. v. Beaver,[29] the accused was charged, inter alia, with possession of a narcotic, contrary to the Opium and Narcotic Drug Act. The accused argued that he had believed the substance in his possession to be sugar of milk and had therefore lacked the mens rea to commit the offence. The main issue before the Court was whether mens rea was a component of the offence. By a majority of three to two, the Court held that the accused could not be convicted without proof of mens rea; therefore mistake as to the nature of the substance in his possession was a defence to the charge. Cartwright J., writing for the majority, began with the basic premise that a presumption of mens rea applies in the absence of an indication of a contrary intention. Citing English and Canadian authorities, he held that even if the presumption did not apply in public welfare offences, a proposition about which he appeared to have reservations, the offence under consideration did not fall into that category. The purpose of the legislation was not to regulate trade in the public interest; it was "to forbid altogether conduct regarded as harmful in itself".[30] Furthermore, in light of the mandatory minimum sentence of six months imprisonment and a $200 fine that followed upon conviction, Parliament could not have intended liability to be absolute.

In a strong dissent, Fauteux J. adopted equally persuasive lines of authority in support of his conclusion that Parliament had intended the offence to be one of absolute liability. He carefully analyzed the structure of the Act and noted that the penalty was very onerous. He then stated:[31]

> All of these provisions are indicative of the will of Parliament to give the most efficient protection to public health against the danger attending the uncontrolled use of drugs as well as against the social evils incidental thereto, by measures generally centered and directed to possession itself of the drugs covered by the Act. The subject matter, the purpose and the scope of the Act are such that to subject its provisions to the narrow construction suggested on behalf of the appellant would defeat the very object of the Act.

In his view, this was public welfare legislation of the highest sort to which no presumption of mens rea should apply. Furthermore, the words of the provision under consideration made it very clear that lack of knowledge of the nature of the drug should not be a defence.

The Court's subsequent decision in R. v. Pierce Fisheries[32] reflects an even greater polarization among the justices of the Court. The appellant was charged with possession of undersized lobsters, contrary to the Lobster Fisheries Regulations under the federal Fisheries Act. Out of approximately fifty to sixty thousand pounds of lobster found on the company premises, at least twenty-six lobsters were found to be under the permissible minimum length. Once again, the issue before the Court was whether mens rea was a constituent element of the offence.

In a lone dissent Cartwright J. was even more emphatic than he had been in Beaver, stating that a mens rea requirement should be presumed for all offences unless ruled out expressly or by necessary implication. Although he acknowledged that in some cases the public interest might require absolute liability, he took the position that absolute liability should not be found in the absence of good reasons therefor. Indeed, he seemed almost to suggest that there was an onus on the Crown to show that absolute liability was required, stating:[33]

> There is no evidence before the Court as to whether a dealer in lobsters in the position of the defendant having occasionally, without fault or knowledge on its part, undersized lobsters on its premises and under its control would create so serious a danger of the destruction of the lobster-catching industry as to render it necessary in the public interest that, on the facts as found in this case, one blameless of any intentional wrongdoing and without any guilty mind must be convicted of a criminal offence albeit not one involving grave moral turpitude.

Ritchie J., writing for the rest of the Court, held that this was a classic public welfare offence to which no presumption of mens rea applied. He even provided some guidelines for recognizing a public welfare offence, citing the following reasons for finding that the offence under consideration fell into that category:

- the regulations were enacted to protect the fishing industry, an aim that was in the general public interest;
- when the offence was created a new crime was not added to the criminal law;
- no stigma would attach upon conviction.

As such, the offence fell within the Sherras v. DeRutzen exception of an act which in the public interest was prohibited under a penalty. Having determined that no presumption of mens rea applied, Ritchie J. analyzed the language of the Regulation and concluded that the offence had been meant to be one of absolute liability. In his view, where a mens rea element had been intended to be part of an offence, it had been expressly indicated in the drafting of the legislation.

Beaver and Pierce Fisheries share a common failing; in each case the Supreme Court of Canada declined to go beyond the specifics of the case to examine the underlying concerns and to articulate a philosophy of mens rea. The Court's failure to set out an "integrated approach" that would provide clear criteria for courts deciding subsequent cases has been criticized by academic writers.[34] On the subject of Beaver Paul Weiler writes:[35]

> On both sides, ... there is complete failure to speak to the general reasons in justification of mens rea or strict liability and, thus there is almost a total lack of real joinder of issue. Both opinions assume that there is a distinction between cases where mens rea is necessary and those where it is not, but neither purports to create any general standard for making the distinction. Nor could they intelligently formulate such a standard since at no time do they advert to the purposes or aims of either mens rea or strict liability.

Canadian law already had a surfeit of cases that reviewed the available techniques of statutory interpretation; what was required was a general review of absolute liability, its uses and abuses, and a philosophical and jurisprudential examination of when, if ever, absolute liability should be imposed. As a result, Beaver was of little assistance to lower courts which continued to refer to Sherras v. DeRutzen while often ignoring the more recent and supposedly authoritative Canadian decision on the subject.

Pierce Fisheries was not appreciably more useful to lower courts. It did add a gloss to Sherras v. DeRutzen by setting out guidelines for determining when offences should be classed as regulatory so as to fall within the exception. Since these guidelines were, however, simply reiterations of those that had developed through the prior caselaw their utility was limited.

Part of the problem was recognized by Paul Weiler who notes that in Beaver (and by extension in Pierce Fisheries) the Court insisted on treating the decision about mens rea as a legislative, rather than a judicial, one. He writes:[36]

> The legislation is said to exclude mens rea either explicitly or implicitly, and the search is on for the legislative intent, rather than for reasons which justify a judicial decision one way or the other.

By adopting such an approach the Court took refuge in the fiction of Parliamentary intention. Since legislation was the function of Parliament, not the courts, it was necessary to adopt the pretence that the Court was simply interpreting the will of Parliament. The truth was, however, that in most cases Parliament had given no thought at all to the question of the mens rea requirement of the offence. Therefore, whether it admitted it or not, the Court had no choice but to engage in judicial law-making.[37] Unfortunately, in both Beaver and Pierce Fisheries the Court refused to acknowledge that the notion of a legislative intention was a fiction; consequently, it was bound to follow the traditional approach and to apply the conventional techniques for determining what that intention was. The Court's insistence on maintaining the fiction of legislative intent prevented it from recognizing and analyzing the true problem so that it could articulate a reasoned and principled approach for determining when a presumption of mens rea should apply.

Rumblings of discontent

In its decisions prior to Sault Ste. Marie, the Supreme Court of Canada adopted a conservative approach and declined any invitation to break new ground. It therefore never questioned the basic premise that there were only two types of offences, absolute liability offences and those requiring proof of full mens rea.[38] Where the Supreme Court of Canada feared to go, however, others did not, as both academics and lower courts began to challenge the current state of the law. Many writers had long argued that in addition to being morally repugnant, absolute liability served no useful function, other than court expediency, since it had no deterrent value. Glanville Williams was one of the leading proponents of the view that the minimum standard of culpability for all offences, be they true crimes or public welfare offences, should be negligence.[39] In a passage that has subsequently been quoted countless times, Williams wrote:[40]

> There is a half-way house between mens rea and strict responsibility which has not yet been properly utilised, and that is responsibility for negligence. In nearly all the public welfare offences coming before the courts there has been at least negligence, on the part of the defendant or his servant, .... To put responsibility frankly upon personal negligence would not be a large practical change, but would better accord with the general sense of right, while not weakening the effectiveness of the legislation.

Williams' term "half-way house" came to be the phrase most often used to describe a proposed third category of offences based on negligence.

Discontent with the state of the law was expressed by the Law Reform Commission of Canada which recommended the abolition of absolute liability in its Studies on Strict Liability and later in its Report 3: Our Criminal Law.[41] In its place, the Commission suggested that, in all cases where absolute liability had formerly been invoked, a negligence standard be adopted. It further recommended that the onus should be reversed so that it would be up to the accused to prove that he had acted with due diligence to prevent the occurrence of the wrongful act.

In making its recommendation, the Commission took encouragement from the tantalizing suggestion made by Ritchie J. in Pierce Fisheries to the effect that the defences of mistake of fact, impossibility or even no-negligence might be available on the right facts. Ritchie J. had stated:[42]

> This is not a case where a quantity of lobsters, some of which turned out to be undersized, was "planted" on the premises of Pierce Fisheries by a trick, nor did the 50,000 or 60,000 lbs. of lobsters come to the respondent's plant by mistake or otherwise without its knowledge. ... As employees of the company working on the premises in the shed "where fish is weighed and packed" were taking lobsters from boxes "prepatory for packing" in crates, and as some of the undersized lobsters were found "in crates ready for shipment", it would not appear to have been a difficult matter for some "officer or responsible employee" to acquire knowledge of their presence on the premises.

The above quotation was seized upon by both the Commission and other commentators as leaving open the door for a defence of reasonable mistake of fact in appropriate circumstances.[43] Indeed, in Sault Ste. Marie, Dickson J. cited the statement by Ritchie J. as an indication that his three-category approach was not foreclosed by the Court's previous decisions.[44]

At the same time, Canadian courts began to express dissatisfaction with the current state of the law and, in a number of cases, they acted upon that dissatisfaction. Throughout the caselaw there had always been occasional suggestions that mistake of fact might sometimes be available as a defence, even in cases where it was not necessary for the Crown to prove mens rea in order to obtain a conviction. Usually this was based on the statement of Day

J. in Sherras v. DeRutzen that the effect of the absence of the word 'knowingly' in an offence was to cast the burden on the accused to prove lack of knowledge. An example of this approach is provided in R. v. Laroque (No.1),[45] where Coady J.A. held that, where the word 'knowingly' is not found in an offence, knowledge on the part of the accused will be presumed unless he proves that he did not have knowledge. He continued:[46]

> In other words the absence of mens rea is still open to him as a defence unless it is clear that the statute is absolute.

By and large, however, the courts rejected this approach as a means of introducing a third category of offence.[47] Presumably it was viewed as simply far too sweeping since it would, essentially, have reversed the burden of proof in every case where the word 'knowingly' was not included. As such it would have swept up many of the offences that the courts wished to characterize as full mens rea offences.[48]

In a number of cases courts actually gave effect to a three-category regime. The most persistent campaign to establish a half-way house was waged by MacKay J.A. of the Ontario Court of Appeal who, in a series of decisions, adopted and developed the theory of a half-way house with an onus on the accused to prove an absence of negligence on his part.[49] However when any of his decisions reached the Supreme Court of Canada, the Court simply ignored his reasons for judgment on that point.[50] From time to time, other Ontario judges also took up the call for a third category of offences.[51] Although the Ontario judiciary was the most activist in this regard, the half-way house approach was also adopted by the Appeal Division of the Alberta Supreme Court.[52] It was, however, rejected outright by several other provincial courts of appeal.[53]

A separate but related development occurred in the narrow area of environmental law. In a series of cases arising mainly under what was then s.32(1) of the Ontario Water Resources Act, courts recognized a defence based on a lack of fault or neglect. Once the Crown had proved the commission of the actus reus, the accused was allowed to prove that he had been without fault, or had not had any opportunity to prevent the harm from occurring.[54]

In calling for a third category of offences, the courts and commentators often referred to developments in the law in other jurisdictions. In particular ~~they~~ noted the Australian case of Proudman v. Dayman.[55] The accused in that case had been charged with permitting an unlicensed driver to operate her car. She argued that she had not known the driver did not have a licence, and, in fact, had honestly believed him to possess one. Although the High Court of Australia denied leave to appeal the conviction, in the course of his denial, Dixon J. made the following, much quoted, remark:[56]

> It is one thing to deny that a necessary ingredient of the offence is positive knowledge of the fact that the driver holds no subsisting licence. It is another to say that an honest belief founded on reasonable grounds that he is licensed cannot exculpate a person who permits him to drive. As a general rule an honest and reasonable belief in a state of facts which, if they existed, would make the defendant's act innocent, affords an excuse for doing what would otherwise be an offence.

This has widely been interpreted to mean that even where an accused has been charged with a minor regulatory offence, the defence of reasonable mistake of fact is available.

The three-category approach had also been accepted in other jurisdictions, most notably New Zealand.[57] Furthermore, several members of the House of Lords had flirted with the idea in Sweet v. Parsley, although it was not necessary to decide the issue in view of the approach their Lordships took in that case.[58] Consequently, by the time that the Supreme Court of Canada finally heard the appeal in Sault Ste. Marie, the groundwork had been laid for the Court to adopt the half-way house approach.

## Absolute Liability Prior to Sault Ste. Marie

### Notes

1. J.W.C. Turner, "The Mental Element in Crimes at Common Law" (1936), 6 Cambridge L.J. 31; R.M. Jackson, "Absolute Prohibition in Statutory Offences" (1936), 3 Cambridge L.J. 83.

2. For a somewhat different view, see L.H. Leigh, Strict and Vicarious Liability: A Study in Administrative Criminal Law (London: Sweet & Maxwell, 1982) at 11, where he argues that, in fact, signs of absolute liability were apparent much earlier.

3. (1846), 15 M. & W. 404.

4. Francis Bowes Sayre's article "Public Welfare Offences" (1933), 33 Col.L.Rev. 55, remains the classic work on the origins and early history of absolute liability in both England and the United States. For other early discussions, see: Jackson, supra note 1 and W.T.S. Stallybrass, "The Eclipse of Mens Rea" (1936), 52 L.Q.R. 60. Among the more interesting recent discussions of the origins of absolute liability are Peter Brett, An Inquiry into Criminal Guilt (Sydney: Law Book Co. of Australia, 1963) at 103ff; Jerome Hall, General Principles of Criminal Law, 2nd ed. (Indianapolis; Bobbs-Merrill, 1960) at 329ff; Claire D. Johnson, "Strict Liability Crimes" (1953-54), 33 Nebraska L.Rev. 462; Gerhard O.W. Meuller, "Mens Rea and the Law Without It: Rationale and the West Virginia Rule" (1956), 58 West Virginia L.Rev. 34. For an exhaustive study of the development of absolute liability in the context of English pure food legislation, see Ingeborg Paulus, The Search for Pure Food: A Sociology of Legislation in Britain (London: Martin Robertson, 1974).

5. Sayre, supra note 4, at 67.

6. Id. This explanation has tended to be the accepted one. For particularly interesting discussions, see Emilio S. Binavince, "The Ethical Foundation of Criminal Liability" (1964), 33 Fordham L.Rev. 1 at 27ff and Janet S. Harring, "Liability Without Fault: Logic and Potential of a Developing Concept", [1970] Wisconsin L. Rev. 1201. Leigh, supra note 2, advances a novel theory. In his view absolute liability was really an out-growth of the old, pre-Woolmington approach to proof in criminal cases. Its popularity spread as it proved to be an easy way of handling difficult matters of proof in the mass of regulatory legislation that proliferated in the late nineteenth century.

7. For example, in R. v. Prince (1875), 2 Crown Cases Res. 154, it was held that a mistaken belief that the girl was over sixteen years old was not a defence to a charge of taking an unmarried girl under sixteen out of the possession and against the will of her parents.

8. No attempt will be made here to canvass the arguments for and against absolute liability. This has been the subject of much heated debate in numerous books and articles. In general, most commentators have strongly disapproved of absolute liability because it imposes punishment on those who may be morally innocent: see, for example, Hall, supra note 4;

Glanville Williams, Criminal Law: The General Part, 2nd ed. (London: Stevens & Sons, 1961); Colin Howard, Strict Responsibility (London: Sweet & Maxwell, 1963); Smith and Hogan, Criminal Law, 5th ed. (London: Butterworths, 1983); G. Francis Jacobs, Criminal Responsibility, L.S.E. Research Monograph 8 (London: Weidenfeld & Nicolson, 1971); Rollin M. Perkins, "Criminal Liability Without Fault: A Disquieting Trend" (1983), 68 Iowa L.Rev. 1067; Law Reform Commission of Canada, Studies in Strict Liability (Ottawa, 1974); Brett, supra note 4; Henry M. Hart, "The Aims of the Criminal Law" (1958), 23 Law & Contemp. Probs. 401, to name just some of the more prominent critics. Absolute liability does, however, have its defenders or at least those who believe that there is a place for it in the criminal justice system: see Paulus, supra note 4; Paulus, "Strict Liability: Its Place in Public Welfare Offences" (1978), 20 Crim.L.Q. 445; Johnson, supra note 4; Steven S. Nemerson, "Criminal Liability Without Fault: A Philosophical Perspective" (1975), 75 Col.L.Rev. 1517; Nicholas N. Kittrie, "Mens Rea in the United States" in Proceedings of the 4th International Symposium on Comparative Law, Sept. 5-7, 1966 under the patronage of the Canadian and Foreign Law Research Centre (1967); Richard A. Wasserstom, "Strict Liability in the Criminal Law" (1960), 12 Stan.L.Rev. 731.

9. See, for example, R. v. Dias (1898), 1 C.C.C. 534 (N.B.Pol.Ct.); R. v. Perras (1904), 9 C.C.C. 364 (N.W.T.S.C.); R. v. Treanor (1908), 18 O.L.R. 194 (Ont.S.C.); R. v. Marsh (1908), 39 N.B.R. 119 (N.B.S.C.); R. v. Pickard (1908), 14 C.C.C. 33 (Alta.Dist.Ct.).

10. [1895] 1 Q.B. 918.

11. R. v. Beaver (1957), 20 C.R. 193.

12. This point is also noted by Paul Weiler in "The Supreme Court of Canada and the Doctrine of Mens Rea" (1971), 49 Can.B.Rev. 280 at 314, fn.49.

13. supra note 10, at 921.

14. R. v. Beaver, supra note 11; R. v. Pierce Fisheries, [1970] 5 C.C.C. 193.

15. In some cases, this result-oriented approach was quite blatant: see, for example, R. v. Binns (1941), 75 C.C.C. 386 (Sask.Dist.Ct.), where the judge declared that he arrived at his conclusion that proof of mens rea was required "with some satisfaction".

16. See, for example, the majority decision in Watts and Gaunt v. The Queen (1952), 15 C.R. 31 (B.C.C.A.), reversed by the Supreme Court of Canada (1953), 16 C.R. 290, where it was held that mens rea was not required to be proved where an accused was charged with failing to deliver up saw-logs to the proper owner, contrary to what was then s.394(b) of the Criminal Code. It appears not to have been a foregone conclusion that, in the absence of a clearly expressed contrary intention, a presumption of mens rea applied to Code offences: see, as an example, Robert Thompson, "The Criminal Act: An Analysis" (1975), 18 Crim.L.Q. 72. For cases where a court had to canvass the caselaw before ultimately concluding that the Code offence under consideration required proof of mens rea, see R. v. King (1962), 133 C.C.C. 1 (S.C.C.); R. v. Jollimore (1961), 36 C.R. 300 (N.S.S.C. in banco); R. v. Murray (1979), 11 C.C.C.(2d) 296 (P.E.I.S.C.).

17. See, for example, R. v. Breau (1959), 125 C.C.C. 84 (N.B.S.C.) and R. v. Vickers (1960), 127 C.C.C. 315 (N.B.S.C.), where different Judges of the same Court arrived at different interpretations of the mens rea component of the offence of unlawfully killing a moose, contrary to s.22 of the Game Act (N.B.). These decisions became the subject of a debate in the Criminal Law Quarterly: see Albert Mayrand, "The Rights of Animals or the Rights of Men" (1961), 4 Crim.L.Q. 48 and Gerard LaForest, "Mens Rea in Hunting Offences" (1962), 4 Crim.L.Q. 444.

For another example of conflict, compare R. v. Hyde, [1925] 2 D.L.R. 958 (Ont.Co.Ct.) and R. v. Burke, [1925] 3 D.L.R. 625 (Ont.Mag.Ct.). There was also considerable disagreement over the way in which offences under the Wartime Prices and Trade Regulations should be interpreted, even though s.2(2) of the Order-in-Council provided that all offences under the Regulations should be deemed to be offences under the Criminal Code: see Quebec Paper Box Co. Ltd. v. Ouvard (1944), 83 C.C.C. 1 (Que.C.A.); R. v. Skwarchuk (No.2) (1942), 78 C.C.C. 391 (Sask.Dist.Ct.); R. v. Kostynyk (1944), 82 C.C.C. 358 (Man.C.A.).

18. Much has been written on the subject of statutory interpretation techniques for determining whether mens rea was intended to be a requisite element of an offence. Among the more useful discussions are G.L. Peiris, "Strict Liability in Commonwealth Criminal Law" (1983), 3 Legal Studies 117; Richard Robinson, "Liability Without Fault in Criminal Statutes - Their Relation to Major Developments in Contemporary Economic and Social Policy: The Situation in Wisconsin", [1956] Wisconsin Law Rev. 625; Smith and Hogan, Criminal Law, 5th ed. (London: Butterworths, 1983); L.H. Leigh, Strict and Vicarious Liability: A Study in Administrative Criminal Law (London: Sweet & Maxwell, 1982); Gerald H. Gordon, The Criminal Law of Scotland, 2nd ed. (Edinburgh: W. Green & Son, 1978); Law Reform Commission of Canada, Studies in Strict Liability (Ottawa, 1974); Cross & Jones, Introduction to Criminal Law, 9th ed., ed. Richard Card (London: Butterworths, 1980). For an older Canadian discussion, reference may be made to George H. Crouse, "Case and Comment - Criminal Law - Mens Rea - Statutory Offences" (1934), 12 Can.Bar Rev. 53.

19. R. v. Vachon (1900), 3 C.C.C. 558 (B.C.Co.Ct.); R. v. McAllister (1913), 22 C.C.C. 166 (N.B.Co.Ct.); R. ex rel Jackson v. Hutchinson, [1925] 3 W.W.R. 744 (Sask.Dist.Ct.); R. v. Laverge (1951), 100 C.C.C. 265 (Ont.Dist.Ct.).

20. R. v. Treanor (1908), 18 O.L.R. 194 (Ont.S.C.); R. v. Marsh (1908), 39 N.B.R. 119 (N.B.S.C.); R. v. Sam Consentino Ltd., [1966] 1 C.C.C. 79 (Ont.C.A.).

21. See, for example, the dissenting reasons for judgment of Fauteux J. in R. v. Rees (1956), 4 D.L.R.(2d) (S.C.C.) at 419. In England this was suggested in Hobbs v. Winchester Corp., [1910] 2 K.B. 471 at 483 and Re St. Margret's Trust Ltd., [1958] 2 All E.R. 289. However, in a number of recent decisions, the House of Lords has indicated that notwithstanding these suggestions, the presumption of mens rea does still exist in English law; see Sweet v. Parsley, [1970] A.C. 132; Pharmaceutical Society of Great Britain v. Storkwain Ltd., [1986] 2 All E.R. 635; R. v. Court (1988), 87 Cr.App.R. 144. See also the decision of the Privy Council in

Gammon (Hong Kong) Ltd. v. Attorney General of Hong Kong, [1984] 2 All E.R. 503.

22. For cases in which this approach was adopted, see Campbell v. Jacques, [1959] C.T.C. 437 (Ont.Co.Ct.); Rex ex Rel. Grindey v. Piggly Wiggly Canadian Ltd., [1933] 2 W.W.R. 475 (Man.C.A.); R. v. Dias (1898), 1 C.C.C. (N.B.Pol.Ct.); R. v. Perras (1904), 9 C.C.C. 364 (N.W.T.S.C.).

23. R. v. Binns (1941), 75 C.C.C. 386 (Sask.Dist.Ct.) at 393; V.K. Mason Construction Ltd., [1968] 1 O.R. 399; R. v. King, supra note 16.

24. supra note 11.

25. [1921] 3 W.W.R. 505 (Sask.C.A.).

26. [1923] 3 W.W.R. 1387 (Sask.C.A.).

27. supra note 25, at 516. A similar concern for enforcement was often expressed in the caselaw; see, for example, R. v. Pee-Kay Smallwares, [1947] O.R. 1019 (Ont.C.A.) where Roach J.A. stated at 1033:

> If, on a prosecution for the offences created by the Act, the Crown had to prove the evil intent of the accused, or if the accused could escape by denying such evil intent, the statute, by which it was obviously intended that there should be complete control without the possibility of any leaks, would have so many holes in it that in truth it would be nothing more than a legislative sieve.

28. supra note 26, at 1391.

29. supra note 11.

30. Id. at 202.

31. Id. at 210.

32. supra note 14.

33. Id. at 197-198.

34. Stuart, Canadian Criminal Law: A Treatise, 2nd ed. (Toronto: Carswell, 1987) at 161. He makes the point even more forcefully in "The Need to Codify Clear, Realistic and Honest Measures of Mens Rea and Negligence" (1972), 15 Crim.L.Q. 160. Alan Hutchinson is critical for the same reason in "Sault Ste. Marie, Mens Rea and the Halfway House: Public Welfare Offences get a Home of Their Own" (1979), 17 O.H.L.J. 415.

One rather spectacular example of the failure of Pierce Fisheries to establish guidelines for the courts is the decision in R. v. Entremont (1973), 15 C.C.C.(2d) 395 (N.S.Mag.Ct.), in which the Court found that the Lobster Fishery Regulations did not create public welfare offences. The judge preferred the authority of lower court decisions over Pierce Fisheries and held that mens rea must be proved where a captain of a vessel is charged with unlawfully having lobsters on board where unbeknownst to him one of his crew has secreted a bag of lobsters on the ship.

35. Weiler, supra note 12, at 308; see also Weiler, In the Last Resort: A Critical Study of the Supreme Court of Canada (Toronto: Carswell, 1974) at 99 and 115-119. A similar criticism is implicit in Stuart, Canadian Criminal Law, supra note 34, at 156-165.

36. Weiler, supra note 12, at 314-315.

37. One is reminded of the comment by Lord Devlin in his speech to the Society of Public Teachers of Law, where he stated:

> The important thing is that on either view mens rea is implied in certain statutes and not in others, although there are no words in the statute itself to show a recognition of mens rea and judges provided for it on their own authority.
>
> One is bound to come to the conclusion that Parliament likes it this way. It is usual of course to pay lip service to what is supposed to be the intention of Parliament. The fact is that Parliament has no intention whatever of troubling itself about mens rea. If it had, the thing could have been settled long ago. All that Parliament would have to do would be to use express words that left no room for implication. One is driven to the conclusion that the reason why Parliament has never done that is that it prefers to leave the point to the judges and does not want to legislate about it. It would let itself in for niceties if it did and therefore much prefers to leave to the judges to determine, just as they used to do in the old days, what are the essential mental elements of an offence.

The speech is reproduced as "Statutory Offences" (1957-58), 4 J. of Public Teachers of Law (New Series) 206. In The Search for Pure Food: A Sociology of Legislation in Britain (London: Martin Robertson, 1974) at 62, Ingeborg Paulus takes issue with this statement, arguing that, at least in some cases, the mens rea requirement of an offence has been the subject of intense debate in Parliament.

38. For this it has been criticized by both Weiler, supra note 12, at 315-316 and Stuart, Canadian Criminal Law, supra note 34, at 162.

39. Williams, of course, was not alone. Most writers in the United States, England, Canada and other common law jurisdictions adopted, and continue to adopt, the position that negligence should be the minimum standard, with or without a reversal of the burden of proof; see, for example, J. Ll.J. Edwards, Mens Rea in Statutory Offences, Vol.8 ~~in~~ English Studies in Criminal Science, ed. L. Radzinowicz, (London: Macmillan, 1965), reprinted by Kraus Reprint, Liechtenstein, 1968 at 216; Peter Brett, An Inquiry into Criminal Guilt (Sydney: Law Book Co. of Australia, 1963) at 116; Herbert L. Packer, "Mens Rea and the Supreme Court", [1962] Supreme Ct.Rev. 107 at 143-145; Colin Howard, Strict Responsibility (London: Sweet & Maxwell,

1963); Smith and Hogan, supra note 18, at 103; G. Francis Jacobs, Criminal Responsibility, L.S.E. Monographs 8, (London: Weidenfelf & Nicolson, 1971) at 171.

40. Glanville Williams, Criminal Law: The General Part, 2nd ed. (London: Stevens & Sons, 1961) at 262; part of this passage was quoted by Dickson J. in his reasons for judgment in Sault Ste. Marie.

41. Law Reform Commission of Canada, Studies on Strict Liability (Ottawa, 1974); Law Reform Commission of Canada, Report 3: Our Criminal Law (Ottawa, 1976).

42. supra note 14, at 204-5.

43. Law Reform Commission of Canada, Studies in Strict Liability, supra note 41, at 164; Keith B. Jobson, "Notes and Comments: Far from Clear" (1976), 18 Crim.L.Q. 294 at 307-308.

44. (1978), 40 C.C.C.(2d) 353 at 372.

45. (1958), 25 W.W.R.(N.S.) 431 (B.C.C.A.).

46. Id. at 433.

47. See, for example, R. v. V.K. Mason Construction Ltd., [1968] 1 O.R. 399 (Ont.H.C.).

48. For a pre-Sault Ste. Marie argument supporting the approach of Day J. in Sherras v. DeRutzen on the grounds that it would mitigate the harshness of absolute liability, see Jacques Fortin, le Mens rea en droit penal canadien, (University of Montreal thesis, 1971).

49. R. v. King (1961), 129 C.C.C. 391 (Ont.C.A.); R. v. Locke, [1965] 4 C.C.C. 182 (Ont.C.A.); R. v. Custeau (1972), 6 C.C.C.(2d) 179 (Ont.C.A.).

50. R. v. Locke, [1966] S.C.R. 254; R. v. King, [1962] S.C.R. 746. In "Sault Ste. Marie, Mens Rea and the Halfway House: Public Welfare Offences get a Home of Their Own", supra note 34, Alan Hutchinson is critical of the Supreme Court of Canada's refusal to address the issue when presented with these cases.

51. For example, R. v. V.K. Mason Construction, supra note 47; R. v. Hickey (1976), 12 O.R.(2d) 578 (Ont.Div.Ct.), per Estey C.J.H.C. (dissenting), rev'd (1977), 13 O.R.(2d) 228 (Ont.C.A.). As Hutchinson, supra note 34, notes at 419 fn.20, Estey was a member of the Supreme Court of Canada at the time that Sault Ste. Marie was decided.

52. R. v. Servico Limited (1977), 2 Alta.L.R.(2d) 388 (Alta.C.A.); R. v. Lambrinoudis (1978), 39 C.C.C.(2d) 12 (Alta.C.A.).

53. R. v. Board of Long Lake School Unit No.3 of Saskatchewan (1974), 18 C.C.C.(2d) 58 (Sask.C.A.), rejecting the three-category analysis adopted in the court below; R. v. Gillis (1974), 18 C.C.C.(2d) 190 (N.S.C.A.); R. v. Brydon (1974), 21 C.C.C.(2d) 513 (Man.C.A.).

54. R. v. Industrial Tankers Ltd., [1968] 4 C.C.C. 81 (Ont.Co.Ct.); R. v. Sheridan (1972), 10 C.C.C. 545 (Ont.Dist.Ct.); R. v. Cherokee Disposals and Construction Ltd. (1973), 13 C.C.C.(2d) 87 (Ont.Prov.Ct.); R. v. Liquid Cargo Lines Ltd. (1974), 18 C.C.C.(2d) 428 (Ont.Prov.Ct.). These cases are discussed and analyzed by Keith B. Jobson in "Notes and Comments: Far From Clear" (1976), 18 Crim.L.Q. 294. This article was relied on by Dickson J. in Sault Ste. Marie. For a criticism of the Jobson/Dickson interpretation of this line of cases, see Laura DiSanto and Shiela McAllister, "The Defence of all Reasonable Care" (1980), 18 Alta. L.R. 294. The disagreement between the two groups indicates just how difficult it is to tell what the courts were doing in those cases; the problem really appears to be the confusing of mens rea with actus reus.

A similar approach to that adopted in the environmental law cases appears to have been taken in R. v. Les-Mark Investments Ltd. (1972), 6 C.C.C.(2d) 383 (Ont.C.A.) and in R. v. Sawicki (1960), 32 W.W.R.(N.S.) 380 (Sask.Q.B.), but with no clear articulation of what the courts were actually doing.

55. (1941), 67 C.L.R. 536 (Aust.H.C.). For comprehensive discussions on the law in Australia, reference may be made to Colin Howard, "Strict Responsibility in the High Court of Australia" (1960), 76 L.Q.Rev. 547; Colin Howard, Strict Responsibility (London: Sweet & Maxwell, 1963), especially Chapter 5; Norval Morris & Colin Howard, Studies in Criminal Law (Oxford: Clarendon Press, 1964) at 201 ff; G.L. Peiris, "Strict Liability in Commonwealth Criminal Law" (1983), 3 Legal Studies 117. For a strong criticism of the Howard analysis of strict liability in Australia, see Peter Brett, "Strict Responsibility: Possible Solutions" (1974), 37 Mod.L.Rev. 417.

56. Id. at 539-540.

57. R. v. Strawbridge, [1970] N.Z.L.R. 909. For a discussion of New Zealand law on strict liability, see Pieras, supra note 55, and C.B. Cato, "Strict Liability and the Half-Way House", [1981] N.Z.L.J. 294.

58. Sweet v. Parsley, [1970] A.C. 132. Lords Reid, Pearce and Diplock all suggested that this approach might not be foreclosed in England.

## R. v. City of Sault Ste. Marie

In R. v. City of Sault Ste. Marie,[1] the Supreme Court of Canada finally responded to the clamour for reform. The facts of the case were quite simple. The City of Sault Ste. Marie had entered into an agreement with a waste disposal company, Cherokee Disposal and Construction Co. Ltd., for the disposal of all refuse originating in the city. Under the terms of the agreement, it was Cherokee's responsibility to furnish a disposal site and the necessary labour, material and equipment. As a result of Cherokee's disposal techniques, waste at the site polluted nearby rivers and both Cherokee and the city were charged under the Ontario Water Resources Act with causing or permitting the discharge or deposit of any material of any kind into any water that might impair the quality of the water. The waste disposal company was tried and convicted.[2] At trial the city was acquitted; after numerous appeals by both sides, the case came before the Supreme Court of Canada.

The question of whether mens rea was a constituent element of the offence was one of two issues before the Court. After disposing of the first issue, the Court took advantage of the opportunity to re-examine the problem of mens rea and absolute liability in the criminal law. Dickson J., writing for a unanimous Court, began with a consideration of what he called "the distinction between the true criminal offence and the public welfare offence".[3] What he actually discussed, however, was the mens rea requirement normally associated with each type of offence. Where an offence is truly criminal, he stated, usually conviction may follow only upon proof beyond a reasonable doubt that the accused had acted intentionally or recklessly with full knowledge of all the surrounding circumstances. In contrast, absolute liability permits conviction to follow upon mere proof that the accused committed the actus reus of the offence.

He then canvassed the arguments most frequently advanced for and against absolute liability. Of the arguments in favour, in his view, two predominated. Proponents of absolute liability, he noted, argue that the protection of social interests requires a high standard of care and attention on the part of those engaging in certain pursuits; they maintain that such people are more likely to take precautionary measures if they know ignorance or mistake will not excuse them. The second argument in favour of absolute liability is one based on administrative efficiency. Given the large number of cases before the courts and the difficulty of proving intention in most cases, it would impose too great a burden on the justice system to require proof of mens rea in every case. The minor penalties imposed and the lack of stigma attached to conviction are cited as justifications for this departure from the traditional rules of criminal liability.

Against these arguments, however, might be advanced arguments of even greater force. The Court's major objection was, quite simply, that absolute liability "violates fundamental principles of penal liability".[4] Those who are morally innocent should not be subject to punishment by the state. The argument that a higher standard of care results from absolute liability was dismissed by the Court on the grounds that there is no evidence to support the assertion.

Dickson J. then considered public welfare offences, noting that they involve a shift in emphasis from the protection of individual interests to the protection of public and social interests. At no time did he ever question the viability of the distinction between true crimes and regulatory offences or suggest that the line between the two categories might at times be hazy. The traditional division was simply accepted as the bedrock upon which all future discussion would be founded.

In his view, the current confusion in the law resulted from the "unfortunate tendency" of the courts to see the choice of mens rea requirements as confined to two alternatives, full mens rea or absolute liability. After surveying academic writing and caselaw from both Canadian lower courts and courts in other Commonwealth jurisdictions, he concluded that the most appropriate solution was to recognize a third category of offences, to be known as strict liability offences. In such cases, upon proof of the actus reus by the Crown, the accused should be given an opportunity to establish, on a balance of probabilities, that all reasonable care had been taken to prevent the occurrence of the offence.

Dickson J. described the three categories of offences under the new regime:[5]

> 1. Offences in which mens rea, consisting of some positive state of mind such as intent, knowledge, or recklessness, must be proved by the prosecution either as an inference from the nature of the act committed, or by additional evidence.
> 2. Offences in which there is no necessity for the prosecution to prove the existence of mens rea; the doing of the prohibited act prima facie imports the offence, leaving it open to the accused to avoid liability by proving that he took all reasonable care.

> This involves consideration of what a reasonable man would have done in the circumstances. The defence will be available if the accused reasonably believed in a mistaken set of facts which, if true, would render the act or omission innocent, or if he took all reasonable steps to avoid the particular event. These offences may properly be called offences of strict liability. ...
>
> 3. Offences of absolute liability where it is not open to the accused to exculpate himself by showing that he was free of fault.

Having set out the three categories, he then provided the following guidelines for determining into which category any given offence would fall:[4]

> Offences which are criminal in the true sense fall in the first category. Public welfare offences would, *prima facie*, be in the second category. They are not subject to the presumption of full *mens rea*. An offence of this type would fall in the first category only if such words as "wilfully", "with intent", "knowingly", or "intentionally" are contained in the statutory provision creating the offence. On the other hand, the principle that punishment should in general not be inflicted on those without fault applies. Offences of absolute liability would be those in respect of which the Legislature had made it clear that guilt would follow proof merely of the proscribed act. The over-all regulatory pattern adopted by the Legislature, the subject-matter of the legislation, the importance of the penalty, and the precision of the language used will be primary considerations in determining whether the offence falls into the third category.

Applying these guidelines to the offence under consideration, he held that it was clearly a public welfare offence; as such a presumption of strict liability arose. Since there was no indication that the legislature intended either to import mens rea or to create an absolute liability offence, he concluded that the presumption of strict liability had not been rebutted. Consequently, upon proof of the actus reus, it should have been open to the city to establish that it had taken all reasonable care to prevent the commission of the offence. Since there had been no opportunity at trial for the city to adduce such exculpatory evidence, a new trial was ordered.

The Court is to be applauded for finally addressing the underlying issues rather than adhering to its previous practice of applying tired principles of statutory interpretation in an attempt to discern the mythical intention of the legislature. Nonetheless, the decision leaves unanswered a number of fundamental questions. Indeed, it may not be too much to state that, having recognized a third category of offences and provided some broad guidelines, the Court simply abandoned the lower courts to fend for themselves under a new and more complicated regime.

True crimes and public welfare offences

The decision makes it clear that in determining the mens rea component of any offence, the initial question must be whether it is "criminal in the true sense" or whether it falls into the other category of regulatory or public welfare offences. If it is a true criminal offence, a presumption of mens rea will arise; if it is not, no presumption will apply and the offence will prima facie be one of strict liability. Unfortunately Dickson J. did not explore this essential threshold issue in any depth at all; the assumption seems to be that it is always clear when an offence is criminal and when it is regulatory. In describing public welfare offences, he used the Sherras v. DeRutzen[7] formulation of offences "which are not criminal in any real sense, but are prohibited in the public interest". As an alternative, he resorted to the civil offence analogy first suggested by the American academic Rollin Perkins;[8] Dickson J. stated:[9]

> Although enforced as penal laws through the utilization of the machinery of the criminal law, the offences are in substance of a civil nature and might well be regarded as a branch of administrative law to which traditional principles of criminal law have but limited application. They relate to such everyday matters as traffic infractions, sales of impure food, violations of liquor laws, and the like.

Attractive as these descriptions are, they are of little assistance in determining whether any particular offence should be classed as a public welfare offence. The Court, however, was positively voluble on the subject of public welfare offences in comparison to the assistance it offered on when an offence should be classed as criminal. The assumption clearly was that true crimes are so obvious that there is no need to delineate their characteristics.

In a subsequent decision, R. v. Prue; Baril,[10] the Supreme Court of Canada did partially clarify the issue of when an offence is a true crime by holding that a presumption of mens rea applies to all offences under the Criminal Code; from this it may be inferred that those offences fall within the category of true crimes. In that case both accused had been charged under what was then s.238(3) of the Code with driving while their licenses were under suspension in a province.[11] Neither accused had known that his licence was suspended at the time that he was stopped by the police. The issue before the Court was whether mens rea was a constituent element of the offence. Laskin J. stated:[12]

> [T]he very inclusion of an offence in the Criminal Code by that very fact must be taken to import mens rea, and there would have to be a clear indication against it before a Court would be justified in denying its essentiality. The Criminal Code is a code of outright prohibitions, distinguishable from regulatory offences created by other kinds of federal legislation. In this last-mentioned

class, it is understandable that there should be questions raised about the requirement of mens rea.

As a result of this decision, it is now clear that Criminal Code offences are to be classed in the first category of true crimes.[13] Where an offence is not included in the Code, however, there is no easy answer to the question of whether it is a true criminal offence so that the presumption of mens rea applies.[14] Therefore rules must be devised for making this determination. A number of possible approaches might be adopted.

i) constitutional law

One possibility would be to apply constitutional criteria to determine what constitutes a true criminal offence. Section 91(27) of the Constitution Act, 1867 gives the federal Parliament the power to legislate in relation to criminal law. Pursuant to s.92(15), the provinces may impose punishments to enforce laws made in relation to matters coming within their legislative jurisdiction; offences created pursuant to this power, however, cannot be true crimes for the purposes of constitutional law.

The constitutional law approach appeared to receive some endorsement from Dickson J. in Sault Ste. Marie when he stated:[15]

> The Ontario Water Resources Act is a provincial statute. If it is valid provincial legislation (and no suggestion was made to the contrary), then it cannot possibly create an offence which is criminal in the true sense.

Similarly, when Strasser v. Roberge came before the Supreme Court of Canada the following year, both the majority and dissenting reasons for judgment indicated that, because the offence was created by a provincial statute, it could not be truly criminal.[16]

There are, however, serious disadvantages to relying upon a constitutional analysis to determine when an offence is a true crime. In constitutional cases, courts have been faced with major problems of definition and have experienced great difficulty in establishing an appropriate test to determine what is criminal for the purposes of s.91(27). In 1922, in the Board of Commerce case,[17] Viscount Haldane stated that Parliament could only legislate under s.91(27) "where the subject matter is one which by its very nature belongs to the domain of criminal jurisprudence". It has been suggested that the effect of this very narrow definition could be to freeze the criminal law at some earlier time, perhaps 1867.[18] Sometime later, in Proprietary Articles Trade Association v. A.-G. Canada,[19] Lord Atkin rejected the Haldane test and propounded a new definition:

> The criminal quality of an act cannot be discerned by intuition; nor can it be discovered by reference to any standard but one: Is the act prohibited with penal consequences?

As Peter Hogg notes in Constitutional Law of Canada, this definition is far too broad for constitutional purposes since it would permit the federal government to expand its jurisdiction indefinitely simply by casting its legislation in those terms.[20]

Probably the most satisfactory test was that set out by Rand J. in the Margarine Reference:[21]

> A crime is an act which the law, with appropriate penal sanctions, forbids; but as prohibitions are not enacted in a vacuum, we can properly look for some evil or injurious or undesirable effect upon the public against which the law is directed. That effect may be in relation to social, economic or political interests; and the legislature has had in mind to suppress the evil or to safeguard the interest threatened.
>
> ...
>
> Is the prohibition then enacted with a view to a public purpose which can support it as being in relation to criminal law? Public peace, order, security, health, morality: these are the ordinary though not exclusive ends served by that law....

Even this test, however, does not provide a particularly useful guideline for determining when a law will be criminal; it merely sums up what is really rather obvious.[22]

The difficulties inherent in a constitutional law analysis become even more apparent when one examines the types of legislation that have been classed as criminal for Canadian constitutional law purposes. For instance, federal competition legislation, which to the uninitiated might seem to be regulatory rather than truly criminal, has been upheld under the criminal law power in a number of cases.[23] More recently, however, in A.-G. Canada v. Canadian National Transportation Limited,[24] only the majority decision accepted that the Combines Investigation Act was criminal law; the three dissenting justices held that it was not criminal law, but rather supportable under the federal trade and commerce power. Peter Hogg also suggests that it is becoming increasingly difficult to support Canadian competition law under the criminal power, noting that in the United States such legislation has been upheld under the commerce clause.[25]

The regulation of narcotics is another confused area. In 1933, it was suggested by Sayre that narcotics offences fell within the sphere of regulatory offences.[26] In England it would appear to be clearly established that narcotics legislation is regulatory in nature.[27] In Canada, however, narcotics legislation has traditionally been viewed as criminal. In 1953, the Supreme Court of Canada upheld the predecessor of the present Narcotic Control Act as legislation in relation to criminal law.[28] Subsequently, in R. v. Beaver,[29] the Court made it abundantly clear that the offence of possession of a narcotic was a true criminal offence. It was therefore rather surprising when, in R. v. Hauser,[30] a majority of the Supreme Court of Canada held that the Narcotic Control Act was not legislation in relation to criminal law but could be upheld under the general federal power to legislate for the peace, order and good government of the country. Some time later, in R. v. Wetmore,[31] the Court cited earlier caselaw and held that the Food and Drugs Act was made pursuant to the criminal law power; in that case the offences were the unsanitary storage and deceptive labelling of drugs, offences that could easily have been classed as regulatory had the Court felt so inclined.

A final example of the difficulties inherent in adopting a constitutional law standard is legislation governing firearms. In the United Kingdom such legislation is regulatory.[32] In Canada, however, such legislation is contained in the Criminal Code; consequently, it is presumed to be true criminal legislation.

It soon becomes clear that the constitutional definition of criminal law is of little assistance in determining whether an offence is a true crime or a public welfare offence. The aims of criminal law and constitutional law are very different; consequently it should come as no surprise that they categorize matters in different ways. Furthermore, in Canada, constitutional classifications are occasionally distorted by the need to achieve other socially desirable ends. Often the only way to ensure uniformity of legislation across the country is to characterize a matter as criminal law, so that Parliament may legislate. Aware of this basic fact of Canadian life, courts have sometimes been willing to stretch the category of criminal law to encompass areas that might otherwise be more appropriately described as regulatory. Thus narcotics, adulterated foods, competition law and firearms have been classed under the rubric of criminal law, even though in other countries they may be viewed as regulatory matters.

ii) mala in se/mala prohibita

In Sault Ste. Marie, Dickson J.'s description of public welfare offences as being "in substance of a civil nature"[33] suggests that he may have been influenced by the classic article by Rollin Perkins entitled "The Civil Offense".[34] Perkins is one of the leading proponents of the view that regulatory offences and true crimes may be distinguished along the lines of mala in se and mala prohibita. The mala in se/mala prohibita dichotomy has its origins in antiquity; the distinction was recognized by Blackstone as one of prime significance.[35] Acts that are mala in se are wrong in themselves; usually they were crimes at common law. In contrast, mala prohibita are not intrinsically wrong; they are wrong merely because they are prohibited by law.[36] Barbara Wootton has suggested that mala in se offences are really simply mala antiqua.[37] In general, it may be observed that mala prohibita tend to be offences of more recent origin.[38]

Perkins acknowledges that it can be difficult to determine into which category any given offence falls. In a recent article, he indicates that the determining factor should be "the extent to which punishment is premised on moral wrongdoing".[39] He therefore propounds the following test:[40]

> This gives the clue for classifying offenses as <u>mala in se</u> or <u>mala prohibita</u>. If the purpose of the penalty is to provide punishment for culpable conduct, it means that the act is wrong in itself; more specifically, it is <u>malum in se</u>. Conversely, if the purpose of the penalty is not to punish for culpable conduct but merely to enforce the provisions of a statute enacted for reasons unrelated to moral behavior, it means that the act is not wrong in itself; it is <u>malum prohibitum</u>.

Perkins cites the earlier article by Sayre and classifies as mala prohibita the same categories of offences that Sayre designated as public welfare offences.[41] Sayre himself, however, rejected the mala in se/mala prohibita distinction as the basis for determining whether an offence was a public welfare offence, calling it "an unsound criterion" to adopt, and adding[42]:

> Many offences which are held not to require proof of mens rea are highly immoral; and many requiring it are not inherently immoral at all.

The mala in se/mala prohibita distinction rears its head in various guises. In <u>Pierce Fisheries</u>, Ritchie J. noted that a new crime was not created when it was made an offence to possess undersized lobsters.[43] In <u>Beaver</u>, Cartwright J. talked of possession of a narcotic as being "conduct harmful in itself".[44] Even the Law Reform Commission of Canada, in <u>Report 3: Our Criminal Law</u>, could not completely escape importing some moral standard into the criminal law.[45]

Nonetheless, the distinction has been disapproved by most writers.[46] The essential difficulty is, quite simply, that moral values are neither static nor universally shared by all members of society. Over time values change so that what was once considered a minor regulatory transgression may come to be viewed as an act that is morally wrong in itself. Pollution and impaired driving are two illustrations of this phenomenon. Equally problematic is the fact that within a given society at a given time, all society members may not be able to agree on the moral turpitude inherent in certain offences. Minor narcotic offences are an example. Where moral standards and values are not constant, any attempt to definitively categorize all offences as either mala in se or mala prohibita must necessarily fail.

iii) badges of regulatory offences

Recognizing the difficulties inherent in any attempt to import moral criteria into the distinction between true crimes and public welfare offences, some commentators have tried to define regulatory offences by delineating their characteristics.[47] The Law Reform Commission of Canada has called these characteristics the 'badges of the regulatory offence' and related them to four different aspects of an offence:[48]

Law - Since regulatory offences generally do not require proof of mens rea, where an offence does <u>not</u> require proof of mens rea, it is probably a regulatory offence. As the Commission itself notes, this approach is rather circular.

Conduct - Usually regulatory law deals with specialists. Its concern is not with the citizen qua citizen but rather as a motorist or business person or factory owner. Furthermore, most conduct prohibited by regulatory law is not considered reprehensible since one single regulatory violation normally causes little or no harm. As a result, little stigma attaches.

Harm - In general the type of harm that regulatory law is aimed at is cumulative; it is the result of many separate acts which, when taken individually, cause little or no damage. Furthermore, the harm tends to be collective, affecting society rather than one identifiable victim.

Penalty - Since regulatory offences are usually subject to slight penalties, the lighter the penalty, the more likely the offence is to be regulatory.

It would be a simple matter to pick holes in the Commission's description of the 'badges of the regulatory offence'. As the Commission itself notes, even though such offences are supposedly punishable only by minor penalties, a quick look through the statute books reveals many that are punishable by imprisonment. Similarly it is overly simplistic to say that regulatory law is aimed at cumulative rather than individual harm. People injured in an unsafe workplace or poisoned by dangerous food additives suffer direct personal harm when regulatory legislation is violated.

Even excusing the list's shortcomings, however, the question remains -- what use is it? Most would agree on how the vast majority of offences should be characterized; it is those offences that fall in the grey area between true crimes and public welfare offences that cause problems. Those offences bear some of the 'badges' described by the Commission but will not fit neatly into all of them. All that a court adopting this approach could do would be to tally up how many badges apply and then determine whether the balance lay in favour of a crime or a public welfare offence. Included in this, of course, would have to be an assessment of the relative weight to be accorded to each 'badge'. Ultimately it is difficult to see how the process could be anything less than completely arbitrary and subjective. In fact, it would merely be a slightly updated version of what the courts did prior to Sault Ste. Marie and, as such, would be just as susceptible to manipulation.

iv) Supreme Court of Canada decisions

At one time or another, all three of the approaches discussed above have been considered by the Supreme Court of Canada in discussions of true crimes and regulatory offences. Constitutional criteria appear to have been approved by the Court in both Sault Ste. Marie and Strasser v. Roberge. In both Beaver and Pierce Fisheries, the inherent wrongness of the act was a consideration. The approach that seems to have been most consistently utilized by the Court, however, is the 'badges' method of determining whether the offence under consideration has the characteristics traditionally associated with public welfare offences.

In this determination, two 'badges' have figured most prominently -- stigma and penalty. Unfortunately the Court has not been consistent with respect to which of these 'badges' is the most important. At different times, in different decisions, the Court has held one or the other of these two badges to be the major criterion for determining whether an offence is regulatory.

In R. v. Beaver,[49] Cartwright J. examined the subject matter of the Opium and Narcotic Drug Act and determined that it was not public welfare legislation since it forbade conduct harmful in itself. Therefore a presumption of mens rea applied. Having concluded, however, that mens rea was a necessary element of the offence, he arrived at the same conclusion from another angle, stating:[50]

> If the matter were otherwise doubtful I would be drawn to the conclusion that Parliament did not intend to enact that mens rea should not be an essential ingredient of the offence created by s.4(1)(d) by the circumstance that on conviction a minimum sentence of 6 months' imprisonment plus a fine of $200 must be imposed. Counsel informed us that they have found no other statutory provision which has been held to create a crime of strict responsibility, that is to say, one in which the necessity for mens rea has been excluded, on conviction for which a sentence of imprisonment is mandatory.
>
> ...
>
> It would, of course, be within the power of Parliament to enact that a person who, without any guilty knowledge, had in his physical possession a package which he honestly believed to contain a harmless substance such as baking-soda but which in fact contained heroin, must on proof of such facts be convicted of a crime and sentenced to at least 6 months' imprisonment; but I would refuse to impute such an intention to Parliament unless the words of the statute were clear and admitted of no other interpretation.

In his dissenting reasons for judgment, Fauteux J. turned this approach on its head, arguing that the severe penalty was one indication that Parliament intended the offence to be one of absolute liability.[61]

In R. v. King,[62] the severity of the penalty was also a factor considered. The Court held that the accused could not be convicted of impaired driving, contrary to what was then s.223 of the Criminal Code, where he had not known that drugs administered by his dentist would leave him unfit to drive. Ritchie J. held that mens rea was clearly a constituent element of the offence, stating:[63]

> In my view the seriousness of the offence created by s.223 removes it entirely from the categories referred to by Wright J. [in Sherras v. DeRutzen] and this will be seen to be recognized by the mandatory provisions of s.223(b) and (c) which provide for mandatory imprisonment for a second offence.

In R. v. Pierce Fisheries,[64] however, Ritchie J. stressed lack of stigma as one of the main reasons for finding that the offence in question was regulatory. After noting that the regulation was enacted to protect the fishing industry, a reason that was in the general public interest, he stated:[65]

> I do not think that a new crime was added to our criminal law by making regulations which prohibit persons from having undersized lobsters in their possession, nor do I think that the stigma of having been convicted of a criminal offence would attach to a person found to have been in breach of those regulations.

No reference at all was made to penalty even though the maximum punishment was not light -- a one thousand dollar fine or a year in prison.

The stigma test adopted by the Court in Pierce Fisheries has been criticized by Fortin and Viau who argue that such an approach can only be applied intuitively by the judge hearing the case;[66] whether a stigma attaches to any given offence must necessarily be a subjective assessment. In contrast, they argue, judging by penalty is an objective criterion through which the legislature has made known its intention. They note with approval that, in decisions rendered since Sault Ste. Marie, the Supreme Court of Canada appears to have returned to using the severity of penalty as a major criterion.[67] Indeed, in R. v. Prue; Baril, Laskin C.J.C. stated:[68]

> This brings me back to the essentiality of mens rea to found a conviction under s.238(3). I should have thought that the fact that the offence may be prosecuted by indictment and carries in that respect a maximum two-year term of imprisonment would support the application of the general principle laid down in Beaver v. The Queen, supra.

However, in a recent pronouncement on the subject of mens rea, the Supreme Court of Canada has shown that the stigma test has not been forgotten. In R. v. Vaillancourt,[69] the Court struck down the constructive murder provision in the former s.213(d) of the Criminal Code on the grounds that it violated ss.7 and 11(d) of the Charter of Rights. Lamer J., with whom two other justices concurred, held that the provision contravened s.7 of the Charter because it permitted a conviction for murder even where the accused had not objectively foreseen that death might be a consequence of his actions. In view of the stigma attached to murder and the onerous penalties imposed upon conviction,

conviction on proof of anything less than objective foresight would violate the principles of fundamental justice. In concurring reasons for judgment, LaForest J. mentioned only the stigma that attached to a murder conviction in agreeing that the provision should be struck down.

The decisions of the Supreme Court of Canada, therefore, are not particularly helpful in determining when an offence should be classed as criminal or regulatory. The Court seems to suggest that the purpose of the legislation should be examined to determine whether the legislation is aimed at protecting a public interest or prohibiting acts wrongful in themselves. Some decisions of the Court also suggest that a moral component may still be considered, although the Court has refrained from explicitly adopting a mala in se/mala prohibita distinction. Apart from these very vague criteria, the Court has generally indicated that the severity of punishment and the stigma attached are important considerations. Which of the two is more important varies from case to case.

<u>v) conclusions</u>

In view of the foregoing, how is one to tell when an offence is regulatory and when it is a true crime? Clearly the constitutional standard is inappropriate. Similarly, applying the mala in se/mala prohibita distinction, whether in its traditional form or in its updated guise of asking, as did Ritchie J. in <u>Pierce Fisheries</u>, whether a new crime has been created, is unreliable since it is too subjective and too susceptible to variation with the passage of time. Finally, using the 'badges' of regulatory offences to determine if an offence should be so classified is virtually useless since the system breaks down at the very point that it is most needed -- in the gray area that separates the two classes of offences.

One is irresistably drawn to the conclusion that there is no definitive test for distinguishing between true crimes and public welfare offences. This, in turn, leads to a questioning of the very distinction itself. The line between crimes and regulatory offences is tenuous at best. Might it not therefore be better to acknowledge the tenuousness of the distinction and replace it with a more functional approach based on objective and easily ascertainable differences between various offences?

R. v. Sault Ste. Marie

Notes

1. (1978), 40 C.C.C.(2d) 353 (S.C.C.).

2. R. v. Cherokee Disposals and Construction Ltd. (1973), 13 C.C.C.(2d) 87 (Ont.Prov.Ct.). The decision was not appealed.

3. supra note 1, at 362.

4. supra note 1, at 363.

5. supra note 1, at 371-4.

6. supra note 1, at 374.

7. [1895] 1 Q.B. 918.

8. Rollin Perkins, "The Civil Offense" (1952), 100 U.Pa.L.R. 832.

9. supra note 1, at 357.

10. (1979), 46 C.C.C.(2d) 257.

11. This provision was subsequently declared to be ultra vires the federal Parliament in Boggs v. The Queen (1981), 58 C.C.C.(2d) 7 (S.C.C.).

12. supra note 10, at 261.

13. Laskin C.J.C's strong statement, however, has not always been applied quite as strictly as one might have expected. For example, in R. v. Maginnis (1981), 35 O.R.(2d) 141 (Ont.Dist.Ct.), Vannini D.C.J., after citing all of the leading authorities, held that the offence of possession of an unregistered restricted weapon, contrary to the Criminal Code, was an offence of absolute liability. In his view, if Parliament had intended the offence to fall into either of the other two categories, it would have included a phrase such as "without lawful excuse" as it had in other provisions in that Part of the Code. It is submitted that the case was simply wrongly decided. For other cases holding Criminal Code offences to be, at least in part, absolute liability offences, see Richard and Walker v. R. (1981), 24 C.R.(3d) 373 (N.B.C.A.) and R. v. Nobis and Somerville (1985), 13 W.C.B. 355 (Ont.Dist.Ct.).

14. For a case where a non-Code offence was held to be a true crime, see R. v. Coastal Glass & Aluminum Ltd. (1984), 17 C.C.C.(3d) 313 (B.C.S.C.), where Lander J. indicated that bid-rigging under the Combines Investigation Act was a true crime because it was a form of fraud. Similarly, in R. v. Ireco Canada II Inc. (1988), 65 C.R.(3d) 160, the Ontario Court of Appeal appears to have considered the offence of harbouring goods over $200 that were unlawfully imported into Canada, contrary to the Customs Act, to be a true crime.

15. supra note 1, at 375.

16. (1979), 103 D.L.R.(3d) 193 (S.C.C.). This point is also discussed by Drinkwalter and Ewart in Ontario Provincial Offences Procedure (Toronto: Carswell, 1980) at 7ff.

17. [1922] 1 A.C. 191 at 198-199 (P.C.).

18. Peter W. Hogg, Constitutional Law of Canada, 2nd ed. (Toronto: Carswell, 1985) at 399.

19. [1931] A.C. 310 at 324 (P.C.).

20. Hogg, supra note 18, at 400.

21. Reference re Validity of Section 5(a) of the Dairy Industry Act (Margarine Case), [1949] S.C.R. 1 at 49-50, aff'd sub nom. Canadian Federation of Agriculture v. A.-G. Quebec, [1951] A.C. 179 (P.C.).

22. Hogg, supra note 18, at 401, is critical of this formulation, stating that it is "really only a slightly more sophisticated formulation of Viscount Haldane's 'domain of criminal jurisprudence'". For an excellent article discussing and analyzing the three tests described, see Joseph J. Arvay, "The Criminal Law Power in the Constitution: And Then Came McNeil and Dupond" (1979), 11 Ott.L.R. 1

23. See, for example, Proprietary Articles Trade Association, supra note 19; Goodyear Tire and Rubber Co. v. The Queen, [1956] S.C.R. 303; R. v. Campbell (1965), 58 D.L.R.(2d) 673 (S.C.C.).

24. (1983), 3 D.L.R.(4th) 16.

25. Hogg, supra note 18, at 409. For a discussion, see Neil Finkelstein, "Note on A.-G. Can. v. Can. National Transportation Limited; R. v. His Honour Judge Wetmore" (1984), 62 Can.B.Rev. 182.

26. Francis Bowes Sayre, "Public Welfare Offences" (1933), 33 Columbia L.Rev. 55.

27. Smith & Hogan, Criminal Law, 5th ed. (London: Butterworths, 1983) at 92; see also R. v. Howells (1977), 65 Crim.App.C. 86 (C.A.).

28. Industrial Acceptance Corporation v. The Queen, [1953] 2 S.C.R. 273.

29. (1957), 26 C.R. 193 (S.C.C.).

30. (1979), 8 C.R.(3d) 89. For an interesting discussion of Hauser, see B. Hovius, "Hauser: Narcotic Drugs, Criminal Law, and Peace, Order and Good Government" (1980), 18 U.W.O.L.Rev. 505.

31. [1983] 2 S.C.R. 284.

32. R. v. Howells, supra note 27.

33. supra note 1, at 357.

34. Rollin Perkins, supra note 8.

35. 1 Commentaries 55-58.

36. For a general discussion of mala in se and mala prohibita, see: P.J. Fitzgerald, "Crime, Sin and Negligence" (1963), 79 L.Q.R. 351; P.J. Fitzgerald, "Real Crimes and Quasi Crimes" (1965), 10 Natural Law Forum 21; P. Devlin, The Enforcement of Morals (London: Oxford University Press, 1965) at pp.26-42.

37. Crime and the Criminal Law (London: Stevens, 1963) at 43.

38. This point is made by Jerome Hall in General Principles of Criminal Law, 2nd ed. (Indianapolis: Bobbs-Merrill, 1960) at 331.

39. Rollin Perkins, "Criminal Liability Without Fault: A Disquieting Trend" (1983), 68 Iowa Law Rev. 1067.

40. Id. at 1074.

41. supra note 26, at 73.

42. Id. at 71.

43. [1970] 5 C.C.C. 193 (S.C.C.) at 210.

44. supra note 29, at 202.

45. In its earlier papers, the Commission tended to emphasize the moral element in criminal law. See, for example, its discussion in Report 3: Our Criminal Law (Ottawa, 1976) at 19-20. In its more recent works, however, the Commission seems to be drawing away from its earlier position and placing a greater emphasis on external indicators of crime, especially penalty: see Report 30: Codifying Criminal Law, Vol.1 (Ottawa, 1986) at 13; Working Paper 54: Classification of Offences (Ottawa, 1986) at 25.

46. Hall, supra note 38, at 337ff; Glanville Williams, Criminal Law: The General Part, 2nd ed. (London: Stevens, 1961) at 119ff; Law Reform Commission of Canada, Studies in Strict Liability (Ottawa, 1974) at 167.

47. Unfortunately, the writers seem unable to agree on precisely what these characteristics should be. For a few examples, see James E. Starrs, "The Regulatory Offence in Historical Perspective" in Essays in Criminal Science, ed. Gerhard O.W. Mueller (South Hackinsack, N.J.: Fred B. Rothman & Co., 1961); Hall, supra note 38, at 330-31; Law Reform Commission of Canada, Studies in Strict Liability, supra note 46, at 165ff and 205ff; Sayre, supra note 26, at 70ff.

48. Law Reform Commission of Canada, supra note 46, at 205-208.

49. supra note 29.

50. Id. at 205-206.

51. Id. at 210.

52. (1962), 133 C.C.C. 1 (S.C.C.).

53. Id. at 15-16.

54. supra note 44.

55. Id. at 201.

56. Jacques Fortin and Louise Viau, "La réforme de la résponsabilité pénale par la cour suprême du Canada" (1979), 39 R. du Barr. 526 at 531-532.

57. R. v. Prue; Baril, supra note 10; R. v. Chapin, [1979] 2 S.C.R. 121. In this regard reference should also be made to the recent decision of the Supreme Court of Canada in Reference re Section 94(2) of Motor Vehicle Act (B.C.) (1985), 48 C.R.(3d) 289, where the Court held that absolute liability offences entailing a possibility of imprisonment upon conviction violate s.7 of the Charter of Rights.

58. supra note 10, at 260.

59. (1987), 60 C.R.(3d) 289 (S.C.C.).

## Regulatory Offences Requiring Mens Rea

Where an offence is a public welfare offence, rather than a true crime, Dickson J. indicated that it will prima facie fall within the second category of strict liability offences. At the time this concerned a number of commentators who predicted that the decision would result in an overall reduction of mens rea standards since the bulk of all offences would now be characterized as strict liability whereas before at least some of them might have been found to require proof of full mens rea.[1] It cannot be disputed that now most non-Criminal Code offences are treated as strict liability offences. However, any disadvantage is more than offset by the fact that offences that might previously have been found to be absolute are now usually treated as strict, thereby placing the accused in a much more favourable position.

In Sault Ste. Marie, Dickson J. noted that the prima facie classification as a strict liability offence could be rebutted. Public welfare offences could be shifted into the first category of offences requiring proof of full mens rea where there was an indication of such an intention on the part of the legislature. He suggested, however, that such an intention would have to be made explicit, stating:[2]

> An offence of this type would fall in the first category only if such words as "wilfully", "with intent", "knowingly", or "intentionally" are contained in the statutory provision creating the offence.

The test proposed by Dickson J. for determining whether mens rea was intended to be an element of a regulatory offence was purely mechanical. His approach excluded any possibility of finding an implicit mens rea requirement in an offence; proof of mens rea would only be required where mens rea words were expressly used. The test, although arbitrary and mechanical, was easily applied and had the virtue of certainty. Unfortunately, it also severely circumscribed the power of a court to find a public welfare offence to require proof of mens rea in circumstances where, in the view of the court, proof of mens rea should be required.

Soon after Sault Ste. Marie, the Supreme Court of Canada had an opportunity to demonstrate how the rules set out in that case should be applied. In R. v. Chapin,[3] the accused had gone duck-hunting on a marsh. Unbeknownst to her, a small pile of grain had been placed quite close to the spot where she was shooting and she was charged under the Migratory Birds Convention Act regulations with hunting for migratory birds within one-quarter mile of a place in which bait had been laid. The accused was acquitted at trial, convicted on appeal and then acquitted again by the Ontario Court of Appeal which held that the offence was one requiring proof of full mens rea. Finally, the case came before the Supreme Court of Canada.

Dickson J., writing for a unanimous Court, began by noting that the prior history of the case revealed the difficulties courts had experienced in grappling with regulatory offences prior to Sault Ste. Marie. He then considered whether the offence was one that required proof of full mens rea. After remarking that one would be hard pressed to characterize the offence as a crime in the true sense, he continued:[4]

> Violation is punishable upon summary conviction and not indictment. One must note the absence of the usual signals connoting mens rea such as "wilfully" or "with intent". In contrast, to take an example, s.10 of the Migratory Birds

> Convention Act commences "Any person who wilfully furnishes false information to a game officer..."
>
> The Migratory Birds Convention Act is a regulatory statute enacted by the Parliament of Canada for the general welfare of the Canadian public, not to mention the welfare of ducks.

The above quotation demonstrates that Dickson J. himself did not fully appreciate the mechanics of the regime he had created. In Sault Ste. Marie, a fundamental distinction had been drawn between true crimes and regulatory offences; the way in which an offence was characterized would determine its prima facie mens rea requirement. Therefore the logical threshold question was how the offence was to be classified. Once that had been determined, the next step would then be to ascertain whether the presumption of strict liability was rebutted by an indication that a mens rea offence had been intended.

Unfortunately this was not the approach adopted by Dickson J. in Chapin. Instead he telescoped the two steps into one and embarked upon a general discussion of whether the offence was one requiring proof of mens rea. Rather than distinguishing clearly between the two ways in which an offence could be so categorized and discussing each in turn, he vacillated back and forth between them. Most of his discussion concentrated on the regulatory nature of the legislation. The discussion was, however, interspersed with references to the fact that there was no indication that the regulatory offence was intended by its drafter to import a mens rea requirement. Ultimately Dickson J. did get it right. Since the offence was not a true crime and did not contain any suggestion that mens rea was required, it was prima facie a strict liability offence. Nonetheless, the confusion in the analysis of the Justice who had actually written the decision in Sault Ste. Marie did not bode well for the future.

The Supreme Court of Canada's subsequent decision in Strasser v. Roberge[5] confirmed that it was experiencing difficulty in grappling with Sault Ste. Marie. In Strasser v. Roberge, the respondent Roberge was the president of a union local at a mine in Quebec. In an attempt to obtain a revision of salary levels while a collective agreement was still in force, a work stoppage occurred on one day in June and again over six days in July. Picket lines were set up and roads were blocked. Roberge did not appear for work on any of those days, nor did he ask the company for permission to be absent. The general manager of the mine laid two charges against Roberge, alleging that he, as an officer of the union, had participated in an illegal strike, contrary to various sections of the Quebec Labour Code. Roberge was found guilty by a judge of the Labour Court; on appeal the conviction was overturned. Leave was then granted to appeal to the Supreme Court of Canada.

One of the issues before the Court was the proper interpretation of the phrase "participation in a concerted cessation at work...". Both the majority and dissenting judgments agreed with the Quebec Superior Court that this phrase contained an intentional element since it required an "intent to abstain from working with the other employees"; the intentional element consisted of "the accused's individual intent to join the collective and concerted cessation of work".[6] The Court divided four to three, however, on the effect of such an implicit intentional element in a provincial statute.

Beetz J., writing for the majority, examined the decision of the Labour Court and concluded that it had treated the offence as one of strict liability. This, in his view, had been the correct approach. The offence could not be a true criminal offence since it was created by a provincial statute. Furthermore, although a provincial legislature could create an offence requiring proof of mens rea, such situations were "exceptional" and such an intention would have to be clearly indicated. He stated:[7]

> In R. v. Sault Ste. Marie, supra, Dickson J., suggested an almost mechanical test for determining whether an offence of this nature should exceptionally be treated like a truly criminal offence.

Shortly thereafter he added:[8]

> In the case of the offence before the Court, the legislator has not explicitly indicated in this manner his intention to require proof of the intentional element by the prosecution.

In his view, Sault Ste. Marie should not be seen as a mens rea case; the real issue had been the burden of proof in public welfare offences. His understanding of the ratio of the case is set out in the following passage:[9]

> [W]hat was held in R. v. Sault Ste. Marie, supra, as I understand that decision, was not that strict liability and absolute liability offences do not contain an intentional element, but rather, it was that the prosecution is not required to prove that element in order to obtain a verdict of guilt.

Consequently, there was no reason why an offence containing an intentional element could not be classified as strict. This simply meant that the Crown was relieved of the burden of proving that intentional element.

In a vigorous dissent, Dickson J. vehemently argued that the majority had misunderstood what he had said in Sault Ste. Marie. He re-iterated that the focus of that decision had been mens rea standards; it had not been intended to "shift the burden of proof of the mental element of intention"[10] to the accused in all non-criminal offences. He expanded upon his rather cursory statements in Sault Ste. Marie, explaining that there are two ways in which an offence may be found to require proof of mens rea. The offence may be a true criminal offence in which case there is a presumption that mens rea must be proved. Alternatively, the offence may be a public welfare offence in which the words of the enactment or the structure of the offence show that mens rea was intended to be an element of the offence. He stated:[11]

> In the first case, there is a presumption of mens rea. In the latter, there is no presumption, but the possibility of mens rea being directed where the appropriate words are employed by the provincial Legislature.

Although the provinces are incapable of creating true crimes to which the presumption of mens rea will apply, there is no reason why they cannot create offences drafted so as to indicate that they were intended to have a mens rea component.

Clearly stung by Beetz J.'s reference to his "almost mechanical test" for determining if a regulatory offence should be classed as requiring proof of mens rea, he acknowledged that he had been too hasty in Sault Ste. Marie and had failed to give this aspect of the case sufficient attention. He conceded that he had suggested that a public welfare offence would only fall into the first category if specific words were used and continued:[12]

> The use of the word "only" may well be too restrictive. The presence of words such as "wilfully" is conclusive in moving an offence into the first category of _mens rea_ offences. But the presence of these words in the offence-creating provision should not, I think, be exhaustive of the situations where a public welfare offence may require _mens rea_. There are many offences which impliedly require _mens rea_ by the very wording of the offence-creating provision, or by the nature of the act prohibited. ...
>
> It is one thing to suggest that there is no presumption of _mens rea_ applicable to provincial penal offences as public welfare offences. It is another thing entirely to treat that lack of presumption as if it were conclusive against _mens rea_ in all but exceptional circumstances. Presumptions afford nothing more than means of defining the elements of a case and allocating the burden of proving those elements as between the parties. The "presumption of _mens rea_" simply represents the criminal law's method of defining the elements of the offence, i.e., a mental element of intention or recklessness, and allocating the burden of proving that mental element to the prosecution. An absence of that presumption merely means that the Courts must work a little harder in considering the two questions: (i) what are the elements of the offence as worded and (ii) upon whom rests the burden of proving each of those elements?

He ended on a stirring note, soundly condemning the argument, accepted by the majority, that difficulties in enforcement justify shifting the burden of proof to the accused.

The majority decision in _Strasser_ v. _Roberge_ has been roundly criticized by commentators.[13] Don Stuart calls it "an astounding perversion of principle" that shows "a cavalier disregard of the presumption of innocence in the case of all regulatory offences".[14] Certainly the decision is troubling for its wholesale abandonment of so fundamental a tenet of the criminal law. In view of the sweeping scope of the majority judgment, it seems quite possible that the decision would not survive a challenge under s.11(d) of the _Charter of_

Rights, which provides constitutional protection for the presumption of innocence.

Although one can only deplore the majority decision in Strasser v. Roberge, the minority judgment of Dickson J. is also troubling in some respects. His approach requires the courts, once again, to analyze statutes closely in order to determine whether the legislature intended mens rea to be an element of the offence. Restrictive though it was, his "mechanical" test at least had the virtue of simplicity and ease of application and it eliminated the highly subjective assessment of the individual judge. His reversion to the subjective approach for determining whether mens rea was intended to be a component of an offence, which requires the application of principles of statutory interpretation to discern the will of the legislature, is a tacit admission of the failure of the grand aims of Sault Ste. Marie. In that case, he had obviously hoped to put the question of mens rea in regulatory offences to rest once and for all. His judgment in Strasser v. Roberge backtracks in the face of the realities of the way in which statutes are often drafted; it constitutes an acknowledgement of the limits of judicial law-making.

The courts have demonstrated their disapproval of the majority decision in Strasser v. Roberge in the most effective way possible -- they have simply refused to follow it. In Pichette v. Deputy Minister of Revenue of Quebec,[15] the Quebec Court of Appeal could easily have avoided the issue because the accused had been charged with "wilfully" evading or trying to evade payment of taxes. Since the offence itself contained one of the magic mens rea words, the Court could simply have said that this, in itself, put the offence in the first category. Kaufman J.A., however, went further. After quoting extensively from

Sault Ste. Marie and Strasser v. Roberge, he held that this was clearly one of the "exceptional situations" referred to by Beetz J. He examined dictionary definitions of the word 'evade' and concluded:[16]

> This is strong language, particularly for the attempt, and it imports a mental element even without the qualifying adverb.

The offence was therefore held to be one requiring proof of mens rea. As to the aspect of Strasser v. Roberge that would have reversed the burden of proof in such cases, it was completely ignored.

Equally difficult to reconcile with Strasser v. Roberge is the decision of the majority of the Alberta Court of Appeal in R. v. Brown and Ballman.[17] In that case the two accused appealed their convictions on charges of using bait for the purpose of hunting or taking big game, contrary to the Alberta Wildlife Act. Prowse J.A. quoted extensively from the reasons of Beetz J. in Strasser and then proceeded to follow the approach recommended by Dickson J., stating:[18]

> I do not take the statement:
>
> > "An offence of this type would fall in the first category only if such words as 'wilfully', 'with intent', 'knowingly' or 'intentionally' are contained in the statutory provision creating the offence."
>
> as a code requiring the use of those words, but merely as an expression of the nature of the mental element that must be found in the words used by the legislature in the particular enactment.

In his view, the use of the words "for the purpose of" made it clear that the legislature had intended the offence to fall within the first category. In a strong dissent, Belzil J.A. quite correctly pointed out that the majority's position did not conform with the majority judgment in Strasser and that, according to the Strasser v. Roberge analysis, the offence under consideration was clearly one of strict liability in which the prosecution was relieved of the burden of proving the intentional element of the offence.

The Quebec Court of Appeal recently declined, yet again, to apply Strasser in all its vigour.[19] In Latulippe v. Desruisseaux,[20] the Crown appealed the acquittal of a doctor on charges of receiving payment for falsely described services, contrary to the Quebec Hospital Insurance Act. After nodding in the direction of Strasser, Rothman J.A. stated:[21]

> I do not believe the words "with intent", "knowingly" or "wilfully" mentioned in Sault Ste. Marie, supra, were designed to be a closed test of indicative words requiring proof of intent or knowledge. The real point is whether or not the legislature, in the language it has used, has clearly indicated its desire that intent or knowledge on the part of the accused be proved by the prosecution if the accused is to be convicted.

He concluded that in using the words "falsely described", the legislature clearly intended to require proof of mens rea.

The potential of the decision in Strasser has fortunately never been realized. Recognizing a bad decision, the courts have simply consigned it to the graveyard. As a statement on mens rea in regulatory offences, its effect has been negligible; it has simply required the courts to skirt around inconvenient statements and to quote selectively. As a burden of proof case, it has been utterly and completely ignored. Unfortunately, however, the issue of when a regulatory offence will be found to require proof of mens rea remains confused. Following the lead of Dickson J. in Strasser, the courts have reintroduced the old notion of implicit mens rea thus reverting to the era that preceded Sault Ste. Marie. Once again there is no simple rule for determining whether mens rea was intended to be an element of the offence.

On a more positive note, however, the courts do appear to be acting more cautiously in assessing the intention of the legislature. One rarely sees the old-style, free-ranging discussions in which all the hoary canons of statutory interpretation are invoked. Instead, the courts tend to examine the actual words used in the legislation. As the cases surveyed above suggest, implicit mens rea usually now only becomes an issue when the offence contains such classic mens rea indicators as "falsely" or "for the purpose of". To this extent, then, there has been a marked improvement.

## Regulatory Offences Requiring Mens Rea

### Notes

1. See, for example, Alan Hutchinson, "Sault Ste. Marie, Mens Rea and the Halfway House: Public Welfare Offences get a Home of their Own" (1979), 17 O.H.L.J. 415 at 441; Robert J. Sharpe, "Strict Liability and Due Diligence in Public Welfare Offences: R. v. Sault Ste. Marie" (1979), 3 Can.Bus.L.J. 453 at 456; Mewett & Manning, Criminal Law, 2nd ed. (Toronto: Butterworths, 1985) at 150.

2. (1978), 40 C.C.C.(2d) 353 (S.C.C.) at 374.

3. [1979] 2 S.C.R. 120.

4. Id. at 129.

5. (1979), 103 D.L.R.(3d) 193 (S.C.C.).

6. Id. per Beetz J. at 217.

7. Id. at 222.

8. Id.

9. Id.

10. Id. at 197.

11. Id. at 198.

12. Id. at 199.

13. Gisèle Coté-Harper and Antoine Manganas, Principes de droit pénal général, (Cowansville: Yvon Blais, 1981), at 259; Daniel Jacoby and Gilles Létourneau, "Les soubresauts de Sault Ste. Marie et le droit pénal du Québec" (1981), 41 Rev. du Barr. 447 at 457-458; Stuart, Canadian Criminal Law: A Treatise, 2nd ed. (Toronto: Carswell, 1987), at 176; Mewett & Manning, supra note 1, at 150.

14. Stuart, supra note 13, at 176.

15. (1979), 29 C.R.(3d) 129 (Que.C.A.).

16. Id. at 137.

17. (1982), 29 C.R.(3d) 107 (Alta.C.A.).

18. Id. at 116.

19. As a result, Don Stuart has called for the Supreme Court of Canada to reconsider its decision in _Strasser_ v. _Roberge_: see Annotation to _Latulippe_ v. _Desruisseaux_ (1986), 50 C.R.(3d) 277.

20. (1986), 50 C.R.(3d) 277.

21. Id. at 286.

## Absolute Liability Offences

The presumption of strict liability may be rebutted where it appears that the legislature intended liability to be absolute. In Sault Ste. Marie, Dickson J. provided the following guidelines for determining when an offence will involve absolute liability:[1]

> Offences of absolute liability would be those in respect of which the Legislature had made it clear that guilt would follow proof merely of the proscribed act. The over-all regulatory pattern adopted by the Legislature, the subject-matter of the legislation, the importance of the penalty, and the precision of the language used will be primary considerations in determining whether the offence falls into the third category.

In R. v. Chapin,[2] the Supreme Court of Canada had the opportunity to apply these guidelines. The accused in that case had been charged under the Migratory Birds Convention Act regulations with hunting for migratory birds within one-quarter mile of a place where bait had been laid. After concluding that the offence was not one requiring proof of full mens rea, Dickson J. considered whether absolute liability had been intended. He remarked upon a disturbing oversight by counsel for both sides:[3]

> Accepting that this is a public welfare or regulatory offence, neither party mentions the approach taken by this Court in Sault Ste. Marie that "public welfare offences would prima facie be in the second category" of strict liability. The Crown merely lists the factors suggested as relevant in Sault Ste. Marie, viz., the over-all regulatory pattern, subject-matter of the legislation, in order to move the offence out of the second category and into the third.

He began his consideration of whether the offence was strict or absolute by noting that the language of the offence was straightforward; it began "No person shall". Yet the offence did not impose a strict prohibition on hunting. Instead it imposed numerous limits on the way in which hunting was to be conducted. The factor Dickson J. considered in greatest detail was the nature of the penalty involved. The Crown had argued that the summary conviction nature of the penalty was one reason why the offence should be held to be absolute. Dickson J., however, stated that although it was a summary conviction offence, the penalty could not be described as minimal for there was not simply a small monetary fine. Upon conviction a number of serious consequences might ensue. The Act provided for a minimum fine of ten dollars and a maximum fine of three hundred dollars or up to six months' imprisonment or both. Upon conviction there was also a mandatory prohibition against holding or applying for a migratory game bird hunting permit for one year and the Court was empowered to cancel <u>any</u> hunting licence and order that the accused not be permitted to obtain one for a given period. In his view, however, the most serious potential penalty was that power was conferred on a court to order forfeiture of the gun and any other equipment used in the violation. These penalties, he held, supported the prima facie classification of strict liability.

He flatly rejected Crown counsel's argument that enforcement would be difficult if liability were strict, stating:[4]

> The best that the Crown can do to shift this offence into the category of absolute liability is to suggest that the availability of a defence of reasonable care would considerably weaken the enforcement of the legislation.

> This may be true, but as Weatherston, J.A., observed, the problems that may be encountered in the administration of a statute or regulation are a very unsure guide to its proper interpretation. Difficulty of enforcement is hardly enough to dislodge the offence from the category of strict liability, particularly when regard is had to the penalties that may ensue from conviction. I do not think that the public interest, as expressed in the Convention, requires that s.14 of the Regulations be interpreted so that an innocent person should be convicted and fined and also suffer the mandatory loss of his hunting permit and the possible forfeiture of his hunting equipment, merely in order to facilitate prosecution.

He concluded that the Crown had not succeeded in rebutting the presumption of strict liability.

An analysis of the decision suggests that Dickson J. was most influenced by two factors: the onerousness of the penalty and the social utility of characterizing the offence as one of absolute liability. Although he also examined the structure of the legislation and the precise language of the offence, these factors received much less attention. Thus the decision seems to indicate that in determining whether the presumption has been been rebutted the courts should not simply and mechanically apply the ancient rules of statutory interpretation but should also consider the impact of their decision upon both the accused and society.

In determining whether offences were intended to be absolute, the courts have often referred to the guidelines set out in Sault Ste. Marie and Chapin. They also sometimes allude to the more detailed list set out by Estey C.J.H.C. in R. v. Hickey.[5] In that case, decided prior to Sault Ste. Marie, all three Ontario Divisional Court Justices hearing the case agreed that three categories of offences should be recognized; they differed only on how the offence of speeding should be classified. In his dissenting reasons for judgment, Estey C.J.H.C. made the following statement:[6]

> To determine whether the offence created is one of absolute liability ... the Court must examine the precise wording of the offence creating the provision, the contextual matter, the type of conduct regulated, the revealed purpose of the Act, the size, type and nature of the penalty imposed, and the stigma, if any, to be attached by the community to conviction. Perhaps a further consideration is the disrespect for the law to be engendered by an interpretation of a clear statutory directive which invokes or imports a defence foreign to the plain meaning of the words used by the Legislature.

In theory, these guidelines are useful. An examination of the caselaw, however, suggests that they have not been rigorously applied. On the other hand, the presumption of strict liability itself has often been completely ignored by the courts, as it was by both counsel in Chapin. As Chapin foreshadowed, the fact that regulatory offences are presumed to be strict apparently escaped the notice of many courts and lawyers in the years immediately following the release of Sault Ste. Marie. A rough survey of the caselaw decided in the early 1980's suggests that the presumption was explicitly applied in about half of the reported cases. In the rest, the courts proceeded as if the factors had to be weighed to determine into which of the two categories the legislature intended the offence to fall, with no hint that the Supreme Court of Canada had indicated on two occasions that the scales were weighted in favour of strict liability. In compensation, however, it did not seem much to matter whether or not the presumption was applied; the courts appear to have been just as likely to conclude that an offence was absolute when they applied the presumption as when they did not.

An illustration is provided by R. v. Cummins,[7] where the accused was charged with killing more game than was permissible, contrary to the Saskatchewan Game Act, 1967. In a detailed and carefully reasoned decision, Bellrose Prov.Ct.J. concluded that the offence was one of strict liability. In the course of his reasons for judgment, he made no reference to a presumption of strict liability; he simply canvassed the factors to be considered when choosing between the two categories. He finally concluded that the category of absolute liability offences should be quite small and restricted to situations where the legislative intent to impose absolute liability is expressed in the clearest fashion, stating:[8]

> In reality, such legislative provisions arise as a result of the courts having become too doctrinaire with the concepts of absolute liability without regard to the "luckless victim" and the role of fault within his activities. In view of the expanded options available to courts by the adoption of three categories, I would contend that only in the rarest of situations ought a court construe an offence as giving rise to absolute liability in the sense of rejecting the defences of due diligence or mistake of fact. The traditional tests of social purpose -- degree of penalty, clarity of language and enforceability -- remain valid only with reference to the fundamental question as to whether or not the legislature has clearly ruled out fault in the judicial determination of liability.

In contrast, in many cases where the presumption of strict liability was duly noted, the court ultimately came down on the side of absolute liability.[9]

As the 1980's advanced, the fact that there is a presumption that regulatory offences involve strict liability slowly gained recognition so that today the presumption appears to be applied in most cases. What is suprising, however, is the frequency with which courts still find that the presumption has been rebutted. Although courts are now much less likely to find an offence to be absolute, absolute liability has by no means disappeared.[10]

It seems quite clear in Sault Ste. Marie that Dickson J. expected that the category of absolute offences would be small. Indeed, one writer has suggested that Dickson J. would have been quite happy to jettison absolute liability entirely had he not felt the need to bow to the principle of Parliamentary supremacy.[11] The Supreme Court has recently reaffirmed, in passing, that it believes offences should not readily be found to be absolute. In Canadian Dredge and Dock Co. Ltd. v. R.,[12] Estey J., writing for the Court, briefly discussed the liability of corporations where an offence is absolute. He stated:[13]

> Where the Legislature by the clearest intendment establishes an offence where liability arises instantly upon the breach of the statutory prohibition, no particular state of mind is a prerequisite to guilt. Corporations and individual persons stand on the same footing in the face of such a statutory offence. It is a case of automatic primary responsibility. (emphasis added)

When offences will be found to be absolute

The courts have not adopted a uniform approach to the determination of whether an offence was intended to be absolute. Following Chapin, they have often stressed the importance of the severity of the penalty involved.[14] They have not, however, always so consistently followed Chapin on the significance of enforceability. In Chapin, Dickson J. firmly rejected the argument that difficulties in enforcement were a good reason to find an offence to be absolute. In Cummins, however, Bellrose Prov.Ct.J. took a diametrically opposed position, stating:[15]

> Recognizing that the elements of regulatory pattern, subject matter of the legislation, penalty and precision of language are of prime consideration in the categorization process, I nevertheless am of the opinion that the real question which ultimately determines the category is the effect on the enforcement of the offence or statute by the acceptance or rejection of the defences of due diligence and mistake of fact. All other considerations exist only in relationship to the question of enforceability.

Upon occasion courts embark upon an exercise in statutory interpretation reminiscent of the days prior to Sault Ste. Marie. For example, where statutory defences are expressly provided for certain offences but not for others in the same statute, courts have concluded that the legislature intended the latter to entail absolute liability.[16] Similarly, when one offence in a statute that was drafted after Sault Ste. Marie is specifically declared to be absolute, and another is not, it has been assumed that the legislature meant the second offence to be one of strict liability.[17] An interesting approach was adopted by Steele J. in R. v. Richardson[18] where he held that the offence of unlawfully trading in securities without being registered under the Ontario Securities Act was an offence of absolute liability. He observed that although the Act contained both serious and minor offences, the penalty for every offence was virtually the same. In his view, in the instant case the penalty was small in light of the gravity of the offence with which the accused had been charged; therefore absolute liability must have been intended by the legislature. However, minor offences punishable by the same penalty were clearly intended to be strict. Otherwise it would be unjust to exact such a severe penalty for such minor transgressions.

In R. v. Morrison and McKay,[19] the accused were charged under what was then s.123(2) of the Lands and Forests Act (N.S.), which provided:

> No person shall have in his possession any rifle, shotgun or other firearm, in or upon any forest or woods, or any path, wood road, road or highway passing by or through a forest or woods during the period from one hour after sunrise to one hour before sunrise, unless it is so encased or dismantled that it cannot be readily fired or made operable.

McDonald J.A. indicated that in his view one of the reasons Dickson J. classed the offence in Sault Ste. Marie as strict was that the words 'cause' and 'permit' were used. In contrast, the legislation under which these accused were charged was couched in absolute terms, stating that "No person shall". He concluded:[20]

> The legislative intent in enacting s.123 of the Act, was, of course to stop night hunting. The section is worded in clear, commandment like language and, in my opinion, creates, and was intended to create, an offence of absolute liability as such is defined in the Sault Ste. Marie case.

At the time that the case was decided, Chapin had not yet been released by the Supreme Court of Canada. McDonald J.A. could therefore not be expected to know that in Chapin the Court would hold that the words "no person shall" do not automatically create an absolute liability offence. Nonetheless, perhaps the majority of regulatory offences do begin with the phrase and then lay down a blanket prohibition; thus his approach would result in vast numbers of regulatory offences being found to be absolute. Notwithstanding the release of

Chapin, this 'absolute language of the statute' approach has been applied in a number of subsequent cases[21]; often McDonald J.A.'s reference to 'commandment like language' is specifically cited.[22]

In many cases, however, where an offence is held to be absolute, particularly those decided in the years immediately following Sault Ste. Marie, the court simply applies the factors suggested in Sault Ste. Marie and concludes that absolute liability was what the legislature intended. Often the fact that the statute was designed to protect the public is stressed. In these cases, there generally tends to be very little analysis of the reasons why this requires absolute as opposed to strict liability.[23]

What is most troubling about many of the absolute liability cases is the fact that significant penalties may often be exacted upon conviction. In R. v. Morrison and MacKay,[24] for example, the penalty was a fine of not less than $300 and not more than $500 or imprisonment for fourteen days or both. The Court was also empowered to seize and dispose of guns, firearms and ammunition. Nonetheless, McDonald J.A. felt that the penalty could not be considered "overly onerous in light of the nature of the offence".[25] In other cases, liability has been held to be absolute where there was a possibility of imprisonment upon conviction,[26] or that items might be forfeited,[27] or that a driver's licence might be suspended.[28] It seems difficult to characterize any of these as minor penalties, particularly in light of Dickson J.'s evaluation of the penalty in Chapin.[29] Often the courts contrast the penalty to the offence, suggesting that it is minor in relation the offence. Such an approach would appear to be misguided. Chapin indicates that the penalty should be viewed in absolute terms -- what are the repercussions for the accused if he is convicted without an opportunity to exculpate himself?

Defences

Academic writers have always asserted that non-mens rea defences should be available even where offences are absolute and prior to Sault Ste. Marie a number of Canadian courts had adopted that position.[30] In those cases, the impetus to make defences available would have been greater since the only alternatives facing the court were absolute liability or full mens rea. Admitting defences such as necessity and self-defence permitted the courts to mitigate the harsh results that attended a finding that liability was absolute. Once a third alternative became available to the courts, however, they might have been expected to retreat from this position.

In fact, the courts seem to be quite willing to accept that certain non-mens rea defences may still be available. In two recent decisions, the Ontario Court of Appeal has indicated that the fact that an accused has been charged with an absolute liability offence does not necessarily mean that no defences will be available to him. In R. v. Cancoil Thermal Corporation, Lacourcière J.A. stated:[31]

> Even in offences of absolute liability, where "it is not open to the accused to exculpate himself by showing that he was free of fault" (R. v. Sault St. Marie, supra), there is no reason why other general defences should not be available such as necessity, duress and coercion: see Smith and Hogan, Criminal Law, 5th ed., pp.100-101. The usual defences are available, except the defences of lack of intention, etc....

Similarly, in R. v. Metro News Ltd.,[32] Martin J.A. suggested, in an obiter statement, that "in offences of absolute liability, other defences such as insanity, automatism or duress are open to the accused".

The decisions of the Ontario Court of Appeal confirmed the approach already adopted by several lower courts. In R. v. Walker,[33] a police officer was charged with failing to stop at a stop sign, contrary to the Ontario Highway Traffic Act. At the time the offence was committed, he had been responding to a call that a robbery was in progress. Unfortunately, as a result of his failure to stop at the sign, he was involved in an accident that caused serious injury to the other driver. Having concluded that the offence was one of absolute liability, Zalev Co.Ct.J. went on to consider whether any defences might still be available to the officer. He indicated that he did not believe that in Sault Ste. Marie Dickson J. had turned his mind to such matters; all that he had considered was the defence of reasonable care. He then stated:[34]

> I have come to the conclusion that there are defences which may be raised notwithstanding the characterization of the offence under consideration as one of absolute liability. It is unnecessary for me to draft a list of such defences, and I refrain from doing so. I simply note that Professor Howard considered infancy, coverture, compulsion, insanity, automatism, intoxication, necessity, impossibility and inevitable accident, arriving at varying conclusions.

Reference might also be made to R. v. Allen[35] where Fitzgerald D.C.J. held that the offence of unlawfully operating a commercial motor vehicle with excess axle unit weight was an absolute liability offence. Having reached this conclusion, he then considered whether a defence of 'commercial impossibility' might be available to the accused. Although he held, on the facts of the case, that the defence was not available, he did suggest that there was no reason why it could not be invoked in the right circumstances.

After Sault Ste. Marie it might be argued that it is unnecessary to allow any defence where an accused is charged with an absolute liability offence. Indeed, to recognize that any defence might be available subverts the main justification for absolute liability -- ease of prosecution. Such an argument, however, suggests a fundamental misreading of Sault Ste. Marie. Notwithstanding Strasser v. Roberge, Sault Ste. Marie was a mens rea case; it recognized three categories of offences and set out the basic mens rea requirements for each. It did not purport to deal with all the traditional defences available to an accused. Therefore, to criticize the courts for restricting Sault Ste. Marie to mens rea defences is to miss the very essence of the case. Where a defence is not related to the mens rea component of the offence, Sault Ste. Marie simply has no application.

There is little doubt that certain defences should always be available regardless of the category of offence charged. Automatism, for example, goes to the actus reus, not mens rea; it is really an argument that the action was not voluntary. Similarly, infancy and insanity are defences directed at an accused's capacity to commit the offence.[36] Other defences such as duress, necessity and self-defence are volitional; although the accused may or may not have had the requisite mens rea, they excuse or justify the action.[37] Making these defences available to an accused will not contribute to the administrative efficiency of the court system. It will, however, ensure that the rights of accused persons are not totally sacrificed to expediency.

Charter of Rights

Sault Ste. Marie and Chapin have not eliminated absolute liability. Where the Supreme Court of Canada has failed using the common law, however, it may succeed using the Canadian Charter of Rights and Freedoms. Section 7 of the Charter provides:

> Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

It may be argued that whenever an accused is convicted of an offence without proof of full mens rea with respect to every element of the offence, the principles of fundamental justice have been violated. Although no court has yet been prepared to go this far, in a number of cases the Supreme Court of Canada has come surprisingly close.

The leading case is Reference re Section 94(2) of the Motor Vehicle Act (B.C.),[38] in which the Supreme Court of Canada considered whether s.94 of the British Columbia Motor Vehicle Act violated s.7 of the Charter and was consequently of no force or effect. Section 94(1) provided that anyone found driving a motor vehicle while his licence was under suspension or while he was prohibited from driving was guilty of an offence and liable on first conviction to a fine and to imprisonment for not less than seven days and not more than six months. Section 94(2) stated:

> Subsection(1) creates an absolute liability offence in which guilt is established by proof of driving, whether or not the defendant knew of the prohibition or suspension.

In an important and wide-ranging discussion on the scope of s.7, Lamer J., writing for the majority, rejected the substantive/procedural dichotomy of American jurisprudence that had been followed by some Canadian courts and adopted a totally different approach, holding that s.7 permits courts to review the content of legislation to determine whether it is in accordance with the "principles of fundamental justice" as they have developed in the Anglo-Canadian legal tradition.[39] He then considered whether absolute liability violates the principles of fundamental justice.

After repeating Dickson J.'s statement in <u>Sault Ste. Marie</u> to the effect that absolute liability violates fundamental principles of penal liability, he indicated that absolute liability does offend the principles of fundamental justice. This, however, is not to say that it necessarily offends s.7 of the <u>Charter</u>; it can only do that to the extent that it has the potential of depriving a person of life, liberty or security of the person. Clearly imprisonment has this effect, even where the imprisonment is only an option open to the judge; there is no need for the imprisonment to be mandatory as it was in s.94(2). Lamer J. therefore concluded that "an offence punishable by imprisonment cannot be an absolute liability offence".[40] He added:[41]

> Before considering s.94(2) in the light of these findings, I feel we are, however, compelled to go somewhat further for the following reason. I would not want us to be taken by this conclusion as having inferentially decided that absolute liability may not offend s.7 as long as imprisonment or probation orders are not available as a sentence. The answer to that question is dependent upon the content given to the words "security of the person". That issue is a live one.

As Lamer J. noted, the scope of the phrase "security of the person" ~~is~~, as yet, uncertain; that issue waits resolution by the Supreme Court of Canada in the appropriate case. However, he did leave open the tantalizing possibility that absolute liability may ultimately be held to violate s.7 in all but the most exceptional circumstances.

Although Lamer J. agreed with the British Columbia Court of Appeal that absolute liability does not violate s.7 per se, he was uncomfortable with that Court's statement that there are certain public welfare offences, such as pollution, where the public interest requires absolute liability; he remarked:[42]

> If, by reference to public interest, it was meant that the requirements of public interest for certain types of offences is a factor to be considered in determining whether absolute liability offends the principles of fundamental justice, then I would respectfully disagree; if the public interest is there referred to by the court as a possible justification under s.1 of a limitation to the rights protected at s.7, then I do agree.

Therefore, regardless of the type of legislation imposing it, absolute liability where there is a possibility of imprisonment will always offend the principles of fundamental justice. Nonetheless, in certain instances the Crown may seek to have the legislation upheld under s.1 of the <u>Charter</u>, notwithstanding the violation of s.7, where the imposition of absolute liability would constitute a reasonable limit that could be demonstrably justified in a free and democratic society. Lamer J., however, made it clear that success will be rare in such cases, stating:[43]

> Administrative expediency, absolute liability's main supportive argument, will undoubtedly under s.1 be invoked and occasionally succeed. Indeed, administrative expediency certainly has its place in administrative law. But when administrative law chooses to call in aid imprisonment through penal law, indeed sometimes criminal law and the added stigma attached to a conviction, exceptional, in my view, will be the case where the liberty or even the security of the person guaranteed under s.7 should be sacrificed to administrative expediency. Section 1 may, for reasons of administrative expediency, successfully come to the rescue of an otherwise violation of s.7, but only in cases arising out of exceptional conditions, such as natural disasters, the outbreak of war, epidemics and the like.

The decision, therefore, may be the beginning of the end for absolute liability.

The B.C. Reference was applied in an interesting and promising fashion by the Ontario Court of Appeal in R. v. Cancoil Thermal Corporation.[44] The accused in that case was a manufacturer charged under the Ontario Occupational Health and Safety Act with failing to ensure that proper safety measures were followed. The Court examined the structure of the Act and Regulations and noted that a statutory due diligence defence was provided for some offences but not for others. Since the statutory defence was not available for the offence with which the accused had been charged, the Court concluded that the legislature had intended an offence of absolute liability. However, the penalty for the offence was quite severe and included the possibility of imprisonment for up to twelve months. Consequently to find the offence to be one of absolute liability would mean that it violated s.7 of the Charter. Lacourcière J.A. therefore held that the offence must be treated as one of strict liability. The adoption of this approach in other cases might provide a simple and non-disruptive means of dramatically reducing the number of absolute liability offences without the need for legislative action.

A further sign of the Supreme Court of Canada's movement towards the constitutional entrenchment of the doctrine of mens rea is provided by its decision in R. v. Vaillancourt.[45] Although that case dealt with the constitutionality of the constructive murder rule in the former s.213(d) of the Criminal Code, and therefore involved a true crime of the highest sort, it is instructive as an indication of the direction in which the Court is headed. In a forceful decision, Lamer J., writing for the majority, held that s.213(d) violated both s.7 and s.11(d) of the Charter because it permitted an accused to be convicted of murder without proof beyond a reasonable doubt by the Crown of even objective foresight on the part of the accused. In the course of his reasons for judgment, Lamer J. made a number of sweeping statements that may ultimately affect the fate of absolute liability. He stated:[46]

> Any provision creating an offence which allows for the conviction of an accused notwithstanding the existence of a reasonable doubt on any essential element infringes ss.7 and 11(d).
>
> ...
>
> [W]hat offends the presumption of innocence is the fact that an accused may be convicted despite the existence of a reasonable doubt on an essential element of the offence, and I do not think that it matters whether this results from the existence of a reverse onus provision or from the elimination of the need to prove an essential element.

Admittedly these statements were made in the context of a discussion of the offence of murder. Nonetheless, if they are an indication of the Court's thinking on mens rea, the future effect of the Charter on absolute liability may be quite profound.

It therefore appears that a constitutionally protected doctrine of mens rea is appearing in Canada, although its scope is still unclear. This situation may be contrasted with that in the United States where, at present, there is no general constitutionally protected doctrine of mens rea although some state courts have struck down absolute liability provisions on constitutional grounds.[47] The United States Supreme Court itself has gone so far as to hold that "status crimes" involving purely passive conduct on the part of the actor combined with lack of knowledge as to legal requirements violate the due process clause of the Fourteenth Amendment.[48] The reluctance of the United States Supreme Court to afford constitutional protection to the basic requirement of mens rea has been heavily criticized in recent years[49] and several commentators have argued that the Supreme Court is, in fact, laying the groundwork for such a doctrine.[50]

For the moment in Canada all that is clear is that the potential range for absolute liability offences has been reduced substantially; in the future courts will have to reconsider many of the cases where offences were found to be absolute since they involved a potential penalty of imprisonment. Given the recent trend in the Supreme Court of Canada, there is cause for hope that absolute liability offences will come close to vanishing completely.

## Absolute Liability Offences

### Notes

1. (1978), 40 C.C.C.(2d) 353 at 374.

2. [1979] 2 S.C.R. 121.

3. Id. at 131.

4. Id. at 132.

5. (1976), 29 C.C.C.(2d) 23 (Ont.Div.Ct.), rev'd (1976), 30 C.C.C.(2d) 416 (Ont.C.A.), on the grounds that even if three categories of offences did exist, the offence of speeding was one of absolute liability.

6. (1976), 29 C.C.C.(2d) 23 at 27. For a minor reformulation of these guidelines, see R. v. Allen (1979), 59 C.C.C.(2d) 563 (Ont.Dist.Ct.) at 567.

7. [1979] 3 W.W.R. 593 (Sask.Prov.Ct.).

8. Id. at 606.

9. For example, see R. v. Kelly Landscape Contractors Ltd. (1980), 13 M.P.L.R. 67 (Ont.Co.Ct.); R. v. Trophic Ltd. (1980), 57 C.C.C.(2d) 1 (B.C.C.A.); R. v. Naugler (1981), 25 C.R.(3d) 392 (N.S.C.A.).

10. It was certainly the opinion of most commentators writing soon after Sault Ste. Marie was released that the number of absolute liability offences would be limited: see Mewett and Manning, Criminal Law, 2nd ed. (Toronto: Butterworths, 1985) at 150; M.J. Conklin, "Case Comment: Strict Liability: The Doctrine in Sault Ste. Marie - Judicial Creativity Gone Sour" (1982), Vol.3 No.5 Crown Counsel's Review 9 at 12. Similarly, courts have occasionally expressed a similar opinion; see, for example, R. v. Briand (1979), 32 N.S.R.(2d) 615 (N.S.Co.Ct.) at 622; Attorney General of Saskatchewan v. Cook (1983), 23 Sask.R. 236 (Sask.Q.B.) at 239.

11. Luc Tremblay, "Section 7 of the Charter: Substantive Due Process" (1984), 18 U.B.C.L.R. 201.

12. (1985), 19 C.C.C.(3d) 1 (S.C.C.).

13. Id. at 8.

14. See, for example, R. v. Laidlaw Transport Ltd. (1980), 4 M.V.R. 253 (Ont.Co.Ct.); R. v. Singh (1981), 63 C.C.C.(2d) 156 (Man.Co.Ct.).

15. supra note 7, at 603. This factor also heavily influenced the Court in R. v. Z-H Paper Products Limited (1979), 27 O.R.(2d) 570 (Ont.Div.Ct.) and R. v. Mannion Transportation Ltd. (1985), 31 M.V.R. 246 (Sask.Q.B.).

16. See, for example, R. v. Naugler, supra note 9; R. v. Grottoli (1978), 43 C.C.C.(2d) 158 (Ont.C.A.). For an example of a case where a judge refused to draw this inference, see R. v. Richardson (1981), 34 O.R.(2d) 348 (Ont.Div.Ct.), aff'd without decision as to whether the offence was strict or absolute (1982), 39 O.R.(2d) 438 (Ont.C.A.), leave to appeal to the Supreme Court of Canada denied (March 7, 1983), 9 W.C.B. 237. In the Divisional Court, Saunders J. said that the availability of a statutory due diligence defence for only some offences is not sufficient evidence that the legislature intended the other offences to be absolute.

17. R. v. Sutcliffe (1980), 8 M.V.R. 42 (B.C.S.C.); R. v. Cougle (1981), 34 N.B.R.(2d) 331 (N.B.Q.B.).

18. supra note 16. It should be noted that the other two judges on the panel expressly disagreed with him on this point.

19. (1979), 31 N.S.R.(2d) 195 (N.S.T.D.).

20. Id. at 204.

21. See, for example, R. v. Kelly Landscape Contractors Ltd., supra note 9.

22. See, for example, R. v. MacDonald (1980), 7 M.V.R. 123 (N.S.Co.Ct.); R. v. Maidment (1984), 61 N.S.R.(2d) 421 (N.S.C.A.); R. v. Canning (1980), 40 N.S.R.(2d) 177 (N.S.Co.Ct.). It should be noted, however, that the 'commandment like language' approach was expressly rejected in R. v. Lewis (1987), 81 N.S.R.(2d) 140 (N.S.Co.Ct.), where Hall J.C.C. specifically noted that Chapin had not been released when Morrison v. McKay was decided.

23. See, for example, R. v. Allen (1979), 59 C.C.C.(2d) 563 (Ont.Dist.Ct.); R. v. Trophic Canada Ltd. (1980), 57 C.C.C.(2d) 1 (B.C.C.A).

24. supra note 19.

25. Id. at 205.

26. See, for example, R. v. Trophic Canada Ltd., supra note 23, and R. v. MacDonald, supra note 22.

27. See R. v. Maidment, supra note 22.

28. See R. v. MacDonald, supra note 22.

29. In this regard it is interesting to contrast the approach of Gerein J. in R. v. Mannion Transport Ltd., supra note 15, where he considered a fine of $300 to be of sufficient severity to confirm his belief that the offence was one of strict liability.

30. R. v. Kennedy (1972), 7 C.C.C.(2d) 42 (N.S.Co.Ct.); R. v. Pootlass (1977), 1 C.R.(3d) 378 (B.C.Prov.Ct.); R. v. Breau (1959), 125 C.C.C. 84 (N.B.S.C.).

31. (1986), 27 C.C.C.(3d) 295 (Ont.C.A.) at 301-302.

32. (1986), 56 O.R.(2d) 321 (Ont.C.A.) at 334.

33. (1979), 48 C.C.C.(2d) 126 (Ont.Co.Ct.); see also R. v. Parsons (1981), 47 N.S.R.(2d) 267 (N.S.Co.Ct.).

34. (1979), 48 C.C.C.(2d) 126 (Ont.Co.Ct.) at 135.

35. (1979), 59 C.C.C.(2d) 563 (Ont.Dist.Ct.).

36. It is the position of most commentators that at least some defences should be available for absolute offences. Fortin and Viau, for example, suggest that insanity, infancy and automatism, at least, should be available; they would also allow self-defence and necessity: see "La réforme de la responsabilité pénale par la cour suprême du Canada" (1979), 39 Rev. du Barr. 526 at 558. Stuart, Canadian Criminal Law: A Treatise, 2nd ed. (Toronto: Carswell, 1987), at 174 would also allow these defences.

37. In general Canadian law has not emphasized the distinction between justifications and excuses; for a discussion, see Stuart, supra note 36, at 386-391. The Law Reform Commission of Canada, in Report 30: Recodifying Criminal Law (Ottawa, 1986) at 31, dropped an earlier recommendation made in Working Paper 29: The General Part - Liability and Defences (Ottawa, 1982), that the two should be distinguished in the new Criminal Code. In its Report, the Commission concluded that a clear line cannot be easily drawn since justifications and excuses often overlap. Necessity is cited as an example of a defence that sometimes operates as an excuse and sometimes as a justification.

38. (1985), 48 C.R.(3d) 289; hereinafter referred to as the B.C. Reference.

39. In doing so he appears to have accepted the approach recommended in the excellent article by Luc Trembly, supra note 11.

40. supra note 38, at 320.

41. Id.

42. Id. at 321.

43. Id.

44. (1986), 27 C.C.C.(3d) 295 (Ont.C.A.).

45. (1987), 60 C.R.(3d) 289 (S.C.C.).

46. Id. at 326-327.

47. State v. Lisbon Sales Book Co., 21 Ohio Op.2d 455; 182 N.E.2d 641 (1961) (statute criminalizing the manufacture of tablets or notebooks on which game records kept without regard to whether manufacturer intended or knew

that items would be so used); State v. Labato, 7 N.J. 137, 80 A.2d 617 (1951), (unwitting possession of a forbidden item); and see Smith v. California, 361 U.S. 147, 80 S.Ct. 215 (1959), where the Court declared unconstitutional a statute making the possession of obscene materials criminal without proof of knowledge, but on the grounds that the burden of inspecting every book sold, to acquaint the seller with the contents, tended to restrict First Amendment rights.

48. Lambert v. California, 355 U.S. 225, 75 S.Ct. 242 (1957).

49. Henry M. Hart "The Aims of the Criminal Law" (1958), 23 Law and Contemporary Problems 401; Herbert L. Packer "Mens Rea and the Supreme Court", [1962] Sup.Ct.Rev. 107; James J. Hippard "The Unconstitutionality of Criminal Liability Without Fault: An Argument for a Constitutional Doctrine of Mens Rea" (1973), 10 Houston Law Rev. 1039; Alan Saltzman "Strict Criminal Liability and the United States Constitution: Substantive Criminal Due Process" (1978), 24 Wayne Law Rev. 1571; C. Peter Erlinder "Mens Rea, Due Process, and the Supreme Court: Toward a Constitutional Doctrine of Substantive Criminal Law" (1981), 9 Am.J.Crim.Law 163.

50. Hippert, supra note 49; Erlinder, supra note 49.

## Strict Liability Offences

### Burden of proof

Where an accused is charged with a strict liability offence, the onus is on the Crown to prove the actus reus beyond a reasonable doubt.[1] Once this has been done, the burden shifts to the accused to establish, on a balance of probabilities, that he acted with due diligence or was operating under a reasonable mistake of fact. In Sault Ste. Marie, Dickson J. offered the following justification for shifting the burden of proof to the accused:[2]

> The correct approach, in my opinion, is to relieve the Crown of the burden of proving mens rea, having regard to Pierce Fisheries and to the virtual impossibility in most regulatory cases of proving wrongful intention. In a normal case, the accused alone will have knowledge of what he has done to avoid the breach and it is not improper to expect him to come forward with the evidence of due diligence. This is particularly so when it is alleged, for example, that pollution was caused by the activities of a large and complex corporation. Equally, there is nothing wrong with rejecting absolute liability and admitting the defence of reasonable care.
>
> In this doctrine, it is not up to the prosecution to prove negligence. Instead, it is open to the defendant to prove that all due care has been taken. This burden falls upon the defendant as he is the only one who will generally have the means of proof. This would not seem unfair as the alternative is absolute liability which denies an accused any defence whatsoever. While the prosecution must prove beyond a reasonable doubt that the defendant committed the prohibited act, the defendant must only establish on the balance of probabilities that he has a defence of reasonable care.

Dickson J. clearly considered the recognition of a third class of offences to be the most satisfactory way of dealing with the problem of absolute liability. In determining the characteristics of the new category of offences, however, he was faced with a number of options; it was by no means a foregone conclusion that strict liability offences would assume the form ultimately assigned to them in Sault Ste. Marie. Don Stuart has listed five compromise positions between subjective mens rea and absolute liability:[3]

1. subjective mens rea, with the onus of proof reversed;
2. gross negligence, tested objectively;
3. simple negligence, tested objectively;
4. category (2), with the onus of proof reversed; and
5. category (3), with the onus of proof reversed.

As he notes, Dickson J. adopted the last standard, which is the least favourable to the accused, without ever exploring the other possibilities.[4]

The standard adopted by the Supreme Court of Canada in Sault Ste. Marie was the one that had previously been recommended by the Law Reform Commission of Canada.[5] Unfortunately, the Commission had never really explained why it favoured reversing the burden of proof.[6] Prior to Sault Ste. Marie, some critics of absolute liability had recommended a reversal of the burden of proof in order to make enforcement easier; the practical advantages of absolute liability would be retained while the injustice of convicting the morally innocent would be eliminated.[7] Many other critics, however, preferred a simple negligence standard that would have left the burden of proof upon the Crown.[8]

Although this is not clearly articulated in his reasons for judgment, Dickson J. apparently concluded that the competing interests of the accused and the prosecution could best be served by reversing the onus of proof. He therefore took the rather extreme step of imposing a persuasive, or legal, burden on the accused to adduce exculpatory evidence. Where an accused bears a persuasive burden, he must establish his case on a balance of probabilities. Where he bears only an evidential burden, all he need do is adduce evidence to raise a reasonable doubt as to his guilt; the legal burden of proof remains on the Crown. Although legislatures have, with some regularity, imposed persuasive burdens upon persons charged with certain offences, it is somewhat surprising that the country's highest court would recommend a regime that abrogates such a fundamental principle as the presumption of innocence.

It is one of the most basic tenets of criminal law that the onus is on the Crown to prove the guilt of the accused beyond a reasonable doubt. The classic statement was made by Viscount Sankey in Woolmington v. D.P.P.:[9]

> Throughout the web of the English criminal law one golden thread is always to be seen, that it is the duty of the prosecution to prove the prisoner's guilt, subject to what I have already said as to the defence of insanity and subject also to any statutory exception. If, at the end of and on the whole of the case, there is a reasonable doubt, created by the evidence given by either the prosecution or the prisoner, as to whether the prisoner killed the deceased with a malicious intention, the prosecution has not made out the case and the prisoner is entitled to an acquittal. No matter what the charge or where the trial, the principle that the prosecution must prove the guilt of the prisoner is part of the common law of England and no attempt to whittle it down can be entertained.

In Sault Ste. Marie, Dickson J. himself raised the possibility of conflict with Woolmington only to dispose of it. In his view, Woolmington was concerned with crimes in the true sense; it did not deal with public welfare offences. Arguing that there was nothing in Woolmington to stand in the way of imposing a legal burden on an accused charged with a regulatory offence, Dickson J. remarked:[10]

> It is somewhat ironic that Woolmington's case, which embodies a principle for the benefit of the accused, should be used to justify the rejection of a defence of reasonable care for public welfare offences and the retention of absolute liability, which affords the accused no defence at all.

The comment seems both specious and misguided. The issue was not whether the defence of reasonable care should be available but rather whether the accused should have to prove it on a balance of probabilities or simply have to adduce enough evidence to raise a reasonable doubt. The remark suggests that Dickson J. himself was not quite clear in his mind about the distinction between the issues of mens rea and burden of proof. In a sense, it foreshadows the later, more profound, confusion shown by the Court in Strasser v. Roberge.[11]

Others have not dismissed Woolmington in quite such a cavalier fashion. In Sweet v. Parsley, where the House of Lords considered the issue of mens rea in narcotics offences, Lord Pearce saw Woolmington as standing in the way of adopting a half-way house requiring the accused to prove a defence on the balance of probabilities.[12] Don Stuart has also been highly critical of Dickson J.'s handling of the burden of proof issue in Sault Ste. Marie, pointing out that the Australian position is not nearly as clear as Dickson J. maintained.[13] As Stuart notes, there remains considerable doubt as to whether Proudman v. Dayman,[14] the case on which Dickson J. purported to base his half-way house, imposes a persuasive or merely an evidential burden on the accused;[15] the case itself is ambiguous. In Stuart's view, the accused should bear only an evidential burden because the presumption of innocence is too fundamental to be jettisoned so lightly.[16] Stuart also claims to have detected a slight retreat on the part of Dickson J. in his dissenting reasons for judgment in Strasser v. Roberge,[17] where he made reference to "the burden or one might perhaps better say the 'right and opportunity' of proving" that all reasonable care had been taken. It is, however, difficult to share his confidence that this is an early sign of a change of heart.

Certain judges also clearly share a concern about imposing a legal burden on an accused to prove his innocence. Such discomfort probably lay behind the suggestion made by Stuart C.J. in R. v. Gonder,[18] that perhaps strict liability offences will some day be separated into different categories. He said:[19]

> Strict liability offences may one day be further subdivided. For one class of strict liability offences reasonable care on a balance of probabilities may be a defence and for another class of strict liability offences a reasonable doubt may be a defence. This further possible subdivision of strict liability offences may depend upon the consequent penalties and potential risks to society flowing from the activities of the accused in determining the nature of the onus imposed upon the accused.

The critics of Sault Ste. Marie may eventually find their remedy in the Canadian Charter of Rights and Freedoms. Section 11(d) of the Charter provides:

> Any person charged with an offence has the right
>
> ...
>
> (d) to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal;...

The scope of s.11(d) was first considered by the Supreme Court of Canada in R. v. Oakes,[20] where the Court struck down a provision in the Narcotic Control Act that imposed a legal burden on an accused to prove that he was not in possession of drugs for the purpose of trafficking. In a resounding five to two decision, the Court reaffirmed the central role of the presumption of innocence in the criminal law. Dickson C.J.C., writing for the majority, called it "a hallowed principle lying at the very heart of the criminal law".[21] He summarized his position in the following fashion:[22]

> In general one must, I think, conclude that a provision which requires an accused to disprove on a balance of probabilities the existence of a presumed fact, which is an important element of the offence in question, violates the presumption of innocence in s.11(d). If an accused bears the burden of disproving on a balance of probabilities an essential element of an offence, it would be possible for a conviction to occur despite the existence of a reasonable doubt. This would arise if the accused adduced sufficient evidence to raise a reasonable doubt as to his or her innocence but did not convince the jury on a balance of probabilities that the presumed fact was untrue.

Section 11(d) was again considered by the Supreme Court of Canada in R. v. Vaillancourt[23] where the Court struck down the constructive murder provision in the former s.213(d) of the Criminal Code because it violated both ss.7 and 11(d) of the Charter. After citing the above passage from Oakes, Lamer J. stated:[24]

> It is clear from this passage that what offends the presumption of innocence is the fact that the accused may be convicted despite the existence of a reasonable doubt on an essential element of the offence and I do not think that it matters whether this results from the existence of a reverse onus provision or from the elimination of the need to prove an essential element.

An analysis of Oakes and Vaillancourt indicates that there are actually two different approaches to the presumption of innocence at work in these decisions. Unfortunately they are never clearly articulated and the Court seems to fluctuate back and forth between them. At certain points, the Court indicates that the presumption of innocence will be satisfied once the Crown has been required to prove every element of the offence beyond a reasonable doubt. At other times, however, the Court seems to suggest that a broader test should be applied so that the presumption of innocence will be violated in any case where an accused may be convicted even though a reasonable doubt exists as to his guilt. Whether or not the reversed burden of proof for strict liability offences is ultimately held to violate s.11(d) may depend upon which of these two approaches prevails.

If the narrower approach is accepted, it could be argued that the reversed burden does not violate s.11(d). The only essential elements of a strict liability offence relate to the actus reus of the offence; if the Crown were relieved of the need to prove an essential element of the actus reus, therefore, s.11(d) might be violated. By definition, however, mens rea is not an essential element of a strict liability offence. Under the 'essential elements of the offence' approach, the right to be presumed innocent is discharged once the Crown has been required to prove every element of the actus reus beyond a reasonable doubt. It is therefore irrelevant that a burden is subsequently placed on the accused to establish that he should be acquitted because he took all reasonable care.

If, however, the wider approach is adopted, there is a good argument that the reversed burden of proof violates s.11(d). This test focuses, not upon the point at which the Crown has proved its case, but rather on the point at which all evidence has been adduced and the trier of fact is ready to render a decision. It therefore takes into account that part of the trial during which evidence is adduced on behalf of the accused after the Crown has proved its case. At present, in order to be acquitted of a strict liability offence, an accused must tender evidence that satisfies the court on a balance of probabilities that he exercised all reasonable care. If he is unable to meet this burden he must be convicted even though he has adduced enough evidence to raise a reasonable doubt. Under the wider approach, this would amount to a violation of s.11(d) because it would permit the accused to be convicted even though there is a reasonable doubt as to his guilt.

The scope of the presumption of innocence in s.11(d) has recently been directly addressed by the Supreme Court of Canada in two decisions. As a result of these cases, it would appear that the issue of which approach will prevail has been resolved although the matter is not free from doubt because of the rather puzzling inconsistency between the two decisions.

In R. v. Holmes, the accused had been charged under what was then s.309(1) of the Criminal Code with possession of burglar's tools "without lawful excuse, the proof of which lies upon him".[25] The main issue before the five-member court was whether the words "without lawful excuse, the proof of which lies upon him" created an unconstitutional reverse onus provision. Dickson C.J.C., with whom Lamer J. concurred, adopted a broad approach to the interpretation of s.11(d). He held that the term "lawful excuse" must be interpreted widely to include all defences that were sufficient reason to excuse a person from criminal liability at common law. Since the onus was placed on the accused to prove lawful excuse on a balance of probabilities, s.11(d) was violated because it allowed an accused to be convicted even though there might be a reasonable doubt as to his guilt. He explained:[26]

> Any burden on an accused which has the effect of dictating a conviction despite the presence of reasonable doubt, whether that burden relates to proof of an essential element of the offence or some element extraneous to the offence but nonetheless essential to verdict, contravenes s.11(d) of the Charter. An accused must not be placed in the position of being required to do more than raise a reasonable doubt as to his guilt, regardless of whether that doubt arises from uncertainty as to the sufficiency of the Crown evidence supporting the constituent elements of the offence or from uncertainty as to criminal culpability in general.

In his view, any persuasive burden placed on an accused prior to the point at which the trier of fact was ready to render judgment must violate s.11(d) because it made it possible for a conviction to occur despite the existence of a reasonable doubt.

The opinion of McIntyre J., with whom LeDain J. concurred, is somewhat more diffcult to decipher. After examining the legislative history of the provision, he concluded that, although the phrase was now superfluous, it had originally been included for the limited purpose of providing the accused with a defence of innocent purpose which would otherwise not have been available. The phrase in no way required the accused to prove the general common law defences on a balance of probabilities. Thus, in his view, it did not violate s.11(d) because it did not relieve the Crown of the need to prove every element of the offence. He stated:[27]

> Where, then, as in the case at bar, proof of guilt beyond a reasonable doubt is required without the benefit of any presumption before any need for defence arises, s.11(d) of the Charter has not been offended. There has been no denial of the presumption of innocence. It has been overcome by proof according to law or by admissions of the accused, and the defence or excuse which is sought to be raised depends upon that fact. If he is convicted in the face of such a defence, it is not because he has been presumed guilty or because the commission of the crime has not been shown, but because his excuse was rejected after proof of the commission of the offence. An accused raising such a defence or excuse is not seeking relief because of an absence of guilt. He seeks relief despite his commission of the offence.

McIntyre J.'s reasoning is rather ambiguous and difficult to follow. He may be taken to have meant that since the defence of 'lawful excuse' was an added gift from the legislature that would not ordinarily be available to a person charged with a criminal offence, requiring the accused to prove it on a balance of probabilities would not violate s.11(d) because the Crown was still required to prove the entire offence beyond a reasonable doubt before there was any need for the accused to raise the defence. However, his reasoning is also susceptible to a broader interpretation so as to include any defence raised by the accused to excuse his conduct once all the elements of the offence have been proved. In other words, his decision may mean that, provided the Crown is required to prove every essential element of the offence beyond a reasonable doubt, s.11(d) will not be violated if the accused is then required to prove any excuse that would enable him to escape conviction on a balance of probabilities. Regardless of which interpretation is correct, under his analysis the presumption of innocence is discharged at some time prior to the final assessment of the evidence by the trier of fact. As such, his view of the scope of s.11(d) was more limited than that of Dickson C.J.C.

If the second interpretation of McIntyre J.'s reasoning is indeed what he intended, the reverse onus for strict liability offences arguably would not violate s.11(d) because the burden on the accused in such cases only arises after the Crown has proved all the essential elements of the offence. Since mens rea need not be proved, once the actus reus has been established the Crown's task is complete. When the accused subsequently raises a defence of due diligence or reasonable mistake of fact, he is not trying to establish an absence of guilt; that has already been established. Rather, in the words of McIntyre J., he "seeks relief despite his commission of the offence".

LaForest J., the fifth member of the court, concurred with McIntyre J.'s interpretation of the phrase in issue. He expressed no opinion, however, on the proper operation of s.11(d). The Court, therefore, was evenly divided on the proper approach to the presumption of innocence.

Whatever may have been McIntyre J.'s intentions in Holmes, he appears to have abandonned them by the time that the Supreme Court of Canada released its decision in R. v. Whyte[28] two months later.[29] In that case the Court unanimously endorsed the wider interpretation of s.11(d) in a decision delivered by Dickson C.J.C. who simply re-iterated his position in Holmes, stating:[30]

> [T]he distinction between the elements of the offence and other aspects of the charge is irrelevant to the s.11(d) inquiry. The real concern is not whether the accused must disprove an element or prove an excuse, but that an accused may be convicted while a reasonable doubt exists. When that possibility exists, there is a breach of the presumption of innocence.
>
> The exact characterization of a factor as an essential element, a collateral factor, an excuse, or a defence

> should not affect the analysis of the presumption of innocence. It is the final effect of a provision on the verdict that is decisive. If an accused is required to prove some fact on the balance of probabilities to avoid conviction, the provision violates the presumption of innocence because it permits a conviction in spite of a reasonable doubt in the mind of the trier of fact as to the guilt of the accused.

After Whyte, the issue of the proper interpretation of s.11(d) has arguably been settled.[31] It remains to be seen what effect this will have on the reverse onus in strict liability offences. Although the Supreme Court of Canada decisions discussed above involved true criminal offences, they clearly leave room for an argument that s.11(d) of the Charter is violated where a persuasive burden is placed on an accused charged with a strict liability offence. There is, of course, always the possibility that the reverse onus would be upheld under s.1 of the Charter as a reasonable limit that could be "demonstrably justified in a free and democratic society". So far, however, the Supreme Court of Canada has interpreted s.1 fairly narrowly so there is a good chance that the sweeping nature of the reverse onus for all strict liability offences might prove fatal.[32]

Surprisingly, the constitutionality of the reverse onus in strict liability offences has received very little judicial attention.[33] It was noted by Morrison J.A. in R. v. Maidment;[34] in his view, however, s.1 of the Charter would save the reverse onus in such cases. Nonetheless, it is surely only a matter of time until the reverse onus in strict liability offences is challenged in the courts. In light of the recent decisions of the Supreme Court of Canada, there is a good possibility that the persuasive burden currently imposed on the accused would be ruled unconstitutional.

Defence of all reasonable care

The defence in Sault Ste. Marie is often called the due diligence defence. This, however, is an inaccurate description since Dickson J. referred to the overall defence as one of all reasonable care; due diligence is simply one facet of that general defence. After referring to the Australian case of Proudman v. Dayman,[35] Dickson J. discussed the defence of all reasonable care:[36]

> This case, and several others like it, speak of the defence as being that of reasonable mistake of fact. The reason is that the offences in question have generally turned on the possession by a person or place of an unlawful status, and the accused's defence was that he reasonably did not know of this status: e.g., permitting an unlicenced person to drive, or lacking a valid licence oneself, or being the owner of property in a dangerous condition. In such cases, negligence consists of an unreasonable failure to know the facts which constitute the offence. It is clear, however, that in principle the defence is that all reasonable care was taken. In other circumstances, the issue will be whether the accused's behaviour was negligent in bringing about the forbidden event when he knew the relevant facts. Once the defence of reasonable mistake of fact is accepted, there is no barrier to acceptance of the other constituent part of a defence of due diligence.

At first glance this statement might suggest that the Court found there to be one general defence of no-negligence which required the accused to demonstrate that he took all reasonable care to avoid committing the offence. Upon analysis, however, it is clear that Dickson J. subdivided the general defence into two separate sub-categories; which sub-category applies in any given case depends upon whether the alleged negligence was in relation to circumstances or consequences. If the accused was ignorant of or mistaken about certain surrounding circumstances, he might raise the defence of reasonable mistake of fact. If, on the other hand, he had done his best to prevent the happening of certain consequences, the defence of due diligence would be available.

The failure of the courts to distinguish between these two analytically distinct aspects of the general defence is often apparent in the caselaw.[37] Even the Supreme Court of Canada itself has not always rigorously maintained the distinction. In R. v. Chapin,[38] Dickson J. concluded that the offence was one of strict liability. He then reviewed the evidence and determined that a new trial was not necessary and an acquittal should be entered. During his review of the evidence, he appeared to be referring to the reasonable mistake aspect of the all reasonable care defence. This was, unfortunately, never clarified and he simply concluded that the accused had in no way been negligent.[39]

Although this may seem like so much petty academic quibbling, there is a sound reason for insisting on maintaining the analytic distinction between the two aspects of the defence so that they do not merge into one vague defence of no negligence. By emphasizing the discrete nature of the two mens rea defences, it is possible to keep them distinct from the defences of general application, such as infancy, necessity and duress, which, it is suggested, should not be subject to the reversed onus of proof.[40] If mistake of fact and due diligence are collapsed into a no-negligence defence, the defences of general application are in danger of being subsumed in the larger defence and of being treated simply as examples of no negligence.

In a number of cases, courts have indicated that the common law defences of general application are available to persons charged with strict liability offences.[41] In R. v. Slovack,[42] for example, the accused, who lived in a national park, was charged with unlawfully killing game in a park, contrary to the National Parks Game Regulations, after he shot a bear that had appeared to be about to enter his child's bedroom. The Court held that the offence was one of strict liability and that therefore a defence of "non-negligent conduct" was available to the accused if he was able to establish that he took all reasonable steps to avoid the happening of the event. The Court noted that in Sault Ste. Marie Dickson J. had made no reference to the defences advanced by the accused in this case - necessity and self-defence - but added:[43]

> However, the concept of reasonableness may be relevant in these defences as well, although the evidentiary onus and the criteria of reasonableness may vary.

The Court concluded that the category of defences to strict liability offences set out in Sault Ste. Marie was not exhaustive and that both necessity and self-defence could be available in the right circumstances. Although the Court found that the accused in the case under consideration was entitled to rely on both defences, it did not discuss where the burden of proof lay.

Slovack demonstrates why it is necessary to keep the Sault Ste. Marie defences separate from the others. Although Sault Ste. Marie should have no application when non-mens rea defences are being relied upon, it is easy for a court to forget the distinction and to treat them as examples of no negligence that must be proved by the accused on a balance of probabilities.

The argument that the burden should not be reversed where an accused charged with a strict liability offence seeks to rely on one of the traditional criminal law defences has, unfortunately, not met with success in the Ontario Court of Appeal. In R. v. Cancoil Thermal Corporation,[44] Lacourcière J.A. held that the defence of officially induced error was available to an accused charged with a strict liability offence. He noted that, although the defence might overlap with the due diligence defence, it was a "separate and distinct defence" that could be asserted in the same way as other defences. He continued:[45]

> In the present case, it will be for the trier of fact to decide whether the accused has proved, by a preponderance of evidence, that he was misled by the inspector into thinking that the removal of the manufacturer's guard would not be a contravention of the law.

It can only be hoped that if and when the issue eventually comes to be considered by the Supreme Court of Canada, the unfortunate ruling of the Ontario Court of Appeal will not be followed.

Defence of mistake of fact

Where a mens rea offence is involved, an accused may not be convicted if he did not have full knowledge of all the surrounding circumstances constituting the offence. Although this is generally referred to as the defence of mistake of fact, in reality it is simply an assertion that there was no mens rea. If the accused was mistaken as to the surrounding circumstances and honestly believed in a state of facts that, had they been true, would have rendered his actions innocent, he lacked the mens rea to commit the offence and must be acquitted. For mens rea offences, the reasonableness of the accused's mistaken belief is irrelevant; all that matters is that the belief was sincerely held.[46] Reasonableness is significant only to the extent that the more unreasonable a belief is, the less likely a court is to believe that it was honestly held by the accused.

Although the defence of mistake as to surrounding circumstances is available to an accused charged with a strict liability offence, it operates in a somewhat different fashion.[47] First, the onus is on the accused to prove on a balance of probabilities that he was operating under a mistake of fact. In contrast, an accused charged with a mens rea offence need only raise a reasonable doubt as to his knowledge of the surrounding circumstances.[48] Secondly, where the offence is one of strict liability, it is not enough that the mistaken belief was sincerely held; the mistake itself must have been reasonable.

Unfortunately, having expressly imposed a reasonableness requirement on the defence of mistake of fact, Dickson J. in Sault Ste. Marie failed to indicate how reasonableness is to be judged or what standard is to be applied. As a result of this failure, however understandable it may be, the courts have essentially done as they chose, proving that reasonableness, like beauty, is in the eye of the beholder. For example, in R. v. Carter,[49] the accused appealed her conviction on a charge of driving while uninsured. She argued that she had honestly and reasonably believed that her husband had paid the insurance since it was agreed between them that it was his responsibility to take care of such matters. The Court held that, while the offence was one of strict, not absolute, liability, the accused had not discharged the onus upon her, stating:[50]

> The offence on her part flows from her failure to check if there was insurance in effect upon her husband's

> automobile. She made an honest mistake in believing that there was coverage, but her mistake arose out of lack of diligence on her part. Where there is such neglect, the defence of honest error must fail.

This may be contrasted with the decision in R. v. Azzoli,[61] where the accused was acquitted on a charge of driving while his licence was under suspension because he had reasonably believed that it had been reinstated. When he received the notice of suspension, he had told his secretary to do whatever was required to reinstate the licence; he then went to New York for three weeks. Without checking to ensure that the licence was reinstated, he drove his car when he returned. The Court held that it had been reasonable for him to assume that his secretary had done what she had been told to do.

Although the defence of reasonable mistake of fact has been successful in many cases,[62] the mistake of the accused must be characterized by the court as one of fact, not law. Mistake of law is not a defence to either a true crime or a public welfare offence.[63] The Supreme Court of Canada has held that the rule is broad, encompassing both knowledge of the existence of the law and knowledge of the scope and breadth of the law.[64]

One exception to the general rule has developed; that exception is generally known as officially induced error. In R. v. MacDougall,[65] the Supreme Court of Canada suggested that in the appropriate circumstances it might be a defence to argue that the accused was misled by a government official to believe that his actions were in accordance with the law. In that case, however, the circumstances did not warrant further consideration of the defence.

The availability of the defence of officially induced error, in Ontario at least, was confirmed by the Ontario Court of Appeal in R. v. Cancoil Thermal Corporation.[66] In that case the accused company took the position that its officials had been told by an inspector from the Ministry of Labour that it was safe to run a machine without a certain safety guard. The company was subsequently charged under the Occupational Health and Safety Act (Ont.) after an employee injured himself while cleaning the machine. Lacourcière J.A. acknowledged that the defence might have been available to the accused, stating:[67]

> The defence of "officially induced error" is available as a defence to an alleged violation of a regulatory statute where an accused has reasonably relied upon the erroneous legal opinion or advice of an official who is responsible for the administration or enforcement of the particular law. In order for the accused to successfully raise this defence, he must show that he relied on the erroneous legal opinion of the official and that his reliance was reasonable. The reasonableness will depend upon several factors including the efforts he made to ascertain the proper law, the complexity or obscurity of the law, the position of the official who gave the advice, and the clarity, definitiveness and reasonableness of the advice given.

It should be stressed that the defence of officially induced error is really separate and distinct from the defence of reasonable mistake of fact. Although the Court in Cancoil Thermal Corporation treated the defence as one involving a reversed burden of proof, it has previously been argued that this is not the correct approach. As an alternative means of distinguishing other defences of general application from the defence of officially induced error in order to avoid the undesirable reversal of onus, it might be argued that, indeed, Lacourcière J.A. was actually treating the error as a form of reasonable mistake within the Sault Ste. Marie defence. As such, it would be appropriate to reverse the burden since the Court was simply broadening the scope of the reasonable mistake of fact defence to include certain mistakes of law. Analytically incorrect as this may be, this interpretation is satisfying because it leaves untouched the general rule that defences of general application should not involve a reversal of the burden of proof where the offence is one of strict liability. Unfortunately, this does not actually appear to have been the position of Lacourcière J.A. who specifically noted that officially induced error was a defence distinct from reasonable mistake of fact.

Defence of due diligence

Most of the reported caselaw deals not with reasonable mistake of fact but with the defence of due diligence. This was actually the aspect of the all reasonable care defence applicable in Sault Ste. Marie. Although the Court held that there must be a new trial to determine if the accused had exercised due diligence, Dickson J. laid down some general guidelines to be applied where the accused, as frequently happens, is a corporation:[88]

> One comment on the defence of reasonable care in this context should be added. Since the issue is whether the defendant is guilty of an offence, the doctrine of respondeat superior has no application. The due diligence which must be established is that of the accused alone. Where an employer is charged in respect of an act committed by an employee acting in the course of employment, the question will be whether the act took place without the accused's direction or approval, thus negating wilful involvement of the accused, and whether the accused exercised all reasonable care by establishing a proper system to prevent commission of the offence and by taking reasonable steps to ensure the effective operation of the system. The availability of the defence to a corporation will depend on whether such due diligence was taken by those who are the directing mind and will of the

> corporation, whose acts are therefore in law the acts of the corporation itself.

One perversion of the due diligence defence should be disposed of immediately. In R. v. Molis the accused was charged with trafficking in a restricted drug[59]; on the basis of R. v. Beaver,[60] the offence was clearly one requiring proof of mens rea. In his defence, the accused argued that at the time that he began manufacturing the drug it had not been added to the list of restricted drugs. An amendment to the relevant Schedule of the Food and Drugs Act was subsequently published in the Canada Gazette indicating that the drug was now restricted. The accused, however, was unaware of its change in status.

Before the Supreme Court of Canada, counsel for the accused took the position that Sault Ste. Marie had created a defence of due diligence that should be available for any offence that is not one of absolute liability; in other words, a defence of due diligence should be available even for full mens rea offences. Unfortunately, instead of clarifying the question of when the defence of due diligence will be available to an accused, Lamer J. further confused it by stating:[61]

> It is clear to me that we are dealing here with an offence that is not to be considered as one of absolute liability and, hence, a defence of due diligence is available to an accused. But I hasten to add that the defence of due diligence that was referred to in Sault Ste. Marie is that of due diligence in relation to the fulfilment of a duty imposed by law and not in relation to the ascertainment of the existence of a prohibition or its interpretation.

In this statement, Lamer J. focused on the fact that a defence of due diligence will not apply where an accused made a mistake of law. Unfortunately, in emphasizing that aspect, he neglected to correct an equally grievous error -- that the defence of due diligence has any application to mens rea offences.[62] A careful analysis reveals that a defence of due diligence is not necessary for mens rea offences. Where an accused is charged with such an offence, the Crown must prove that the accused had the requisite mens rea, in this case knowledge. If the mistake had been one of fact, knowledge could not be proved by the Crown and the offence would not be made out. At most there would be an evidential burden on the accused to adduce evidence that would raise a reasonable doubt as to his knowledge. In that context evidence of due diligence might assist him but would not be required.

A full examination of the way in which the courts have applied the due diligence defence is beyond the scope of this paper. The defence has been applied to a wide variety of offences, many of which require a consideration and understanding of the specific activity or industry involved. The courts have generally adopted a flexible approach, acknowledging that what constitutes due diligence will depend on a wide variety of factors and will vary depending on the circumstances of each case. One of the most useful discussions of the factors involved may be found in R. v. Gonder,[63] where Stuart C.J. recommended a two-step approach for determining if due diligence had been established:[64]

> The approach consists of two stages. First, the existence of any general standard of care common to the

> business activity in question must be determined. Is there a standard practice commonly acknowledged as a reasonable level of care and did the accused act in accord with that standard? The second stage examines any special circumstances of the case which might require a different level of care other than the level suggested by the standard practice. Evidence of a standard practice is only one important component of that test, the ultimate test is the degree of due diligence required in the circumstances of each case.

He further discussed what should be considered in evaluating the special circumstances:[65]

> Reasonable care implies a scale of caring. The reasonableness of the care is inextricably related to the special circumstances of each case. A variable standard of care is necessary to ensure the requisite flexibility to raise or lower the requirements of care in accord with the special circumstances of each factual setting. The degree of care warranted in each case is principally governed by the following circumstances:
>
> (a) Gravity of potential harm.
> (b) Alternatives available to the accused.
> (c) Likelihood of harm.
> (d) Degree of knowledge or skill expected of the accused.
> (e) Extent underlying causes of the offence are beyond the control of the accused.

One major distinction often made by the courts is whether the accused is an employer relying on numerous employees to follow the proper procedure or whether the accused is an individual who had greater control over the situation. This distinction was emphasized in R. v. Bucina where a taxi driver drove passengers into an area where liquor was prohibited.[66] Although the passengers had told the driver that they were not carrying liquor, they did in fact have liquor with them. The Court was clearly influenced by the fact that the passengers were intoxicated when they got into the taxi and focused on the control that the accused had in such a situation, stating:[67]

> Obviously the situation is different, and must be recognized to be so, when the court is dealing with a large organization with various echelons of servants within it, and, as in the case before the court today, when one is dealing with one driver in a motor vehicle who is in a position to be actually aware and cognizant of what transpires in his vehicle.
>
> In the present case, it would in my view not be an onerous burden to place on a defendant to establish that at least some steps were taken to ensure that liquor was not being transported by him. This would not necessarily involve a pat-down search of each passenger or opening of all luggage and packages, but would certainly involve more than asking intoxicated persons picked up from in front of a bar whether or not they had any liquor.

Thus it is clear that the standard required by the courts may vary depending upon the amount of control that the accused had over a situation. Where matters are within his personal control, a higher standard may be exacted; where he must rely on others to follow directions, a less stringent standard may be imposed. In the latter case, as <u>Sault Ste. Marie</u> suggests, all that the accused may be able to do is establish a system and attempt to ensure that it is carefully followed.

<u>Statutory defences</u>

One difficulty that has arisen is how <u>Sault Ste. Marie</u> applies when a specific defence is actually included in a statute. This increasingly becomes an issue as more and more statutes enact specific defences to offences contained in them.[64] Some courts have adopted the same approach often followed prior to <u>Sault Ste. Marie</u>, indicating that where a statutory defence applies to certain offences but not to others, the offences to which it does not apply should be construed as offences of absolute liability. There has been surprisingly little recognition given to the fact that those offences could equally well be strict liability offences for which the common law defences in Sault Ste. Marie could be available.

The decision of the Ontario Court of Appeal in R. v. Grottoli is an example of the way courts have often dealt with the issue.[69] The accused, the proprietor of a meat market, was charged under the Food and Drugs Act with selling food in a misleading manner after he cut up for the purchaser a side of beef that had been purchased in his store. After being cut up, the meat weighed considerably less than it had when purchased and when the side of meat was anatomically reconstructed, it was found that some of the best cuts were missing. The Act contained its own due diligence defence that was applicable only in certain circumstances; that defence was not available to the accused on the facts of the case. The Court therefore concluded that the offence must have been intended to be one of absolute liability.

Some courts, however, have objected to this statutory interpretation technique. It was expressly disapproved by two of the three judges of the Ontario Divisional Court who heard the case of R. v. Richardson.[70] Saunders J. noted that Sault Ste. Marie made it clear that offences should be found to be absolute only upon the clearest indication of such an intention. Therefore, he indicated, a court should not be quick to find offences absolute simply because a statutory defence applied to some offences and not to others.[71]

The recent decision of the Ontario Court of Appeal in R. v. Cancoil Thermal Corporation suggests that such offences may be less likely to be found absolute in the future.[72] The Court held that, although the statutory due diligence defence contained in the Act specifically applied only to certain offences, this did not necessarily render all the other offences absolute. Since some involved the possibility of imprisonment, a holding that those offences were absolute would result in a violation of s.7 of the Charter of Rights. Therefore, they should be treated as offences of strict liability for which the common law defence of due diligence was available.[73]

Often a statutory due diligence defence imposes more stringent requirements than the common law defence of due diligence. The issue has therefore arisen as to whether the common law defence has any application where a statutory defence exists. In R. v. Parsons,[74] the accused was charged with speeding contrary to the Motor Vehicle Act (N.S.). O'Hearn J.C.C. noted that the statutory defence available to an accused charged with speeding was narrower than the common law defence of due diligence. He held, however, that the statutory defence governed, stating:[75]

> Where the legislature has prescribed a defence of a nature analogous to 'due diligence' but defined in much narrower terms, there does not seem to be any justification for enlarging the defence to the ambit permitted generally under the canon of strict liability. The criteria given by Dickson, J., in Sault Ste. Marie apply fairly equally to all the offences enacted by Motor Vehicle Act, ss.90 to 97, and what distinguishes the offences enacted by ss.91, 92(2) and 94(1) is the statutory defence that applies to them. I am therefore of the opinion that while the offence in the instant case may be considered one of strict liability, the defence of due diligence with respect to the operation of the motor vehicle is subsumed and defined by the statutory defence in s.94(2), and does not exceed what that subsection permits.

The due diligence defence in s.37.3(2) of the old Combines Investigation Act was the subject of considerable litigation on this point. In R. v.

Consumers Distributing Co. Ltd.,[78] the accused company was charged under what was then s.36(1)(a) of the Combines Investigation Act with making a false or misleading representation to the public for the purpose of promoting a product. The Act itself contained the following statutory due diligence defence:

> 37.3(2) No person shall be convicted of an offence under section 36 or 36.1, if he establishes that,
>
> (a) the act or omission giving rise to the offence with which he is charged was the result of error;
>
> (b) he took reasonable precautions and exercised due diligence to prevent the occurrence of such error;
>
> (c) he, or another person, took reasonable measures to bring the error to the attention of the class of persons likely to have been reached by the representation or testimonial; and
>
> (d) the measures referred to in paragraph (c), except where the representation or testimonial related to a security, were taken forthwith after the representation was made or the testimonial published.

The statutory defence was therefore considerably more onerous than the common law due diligence defence described in Sault Ste. Marie. Although the Ontario Court of Appeal concluded that the company had met the requirements of the common law test, it held that this did not assist the accused since the common law defence had been excluded by the statutory defence. In the Court's view, it would defeat the intention of Parliament if the Court applied the lesser test.

The statutory due diligence defence in s.37.3(2) of the Combines Investigation Act was challenged on constitutional grounds in R. v. Westfair

Foods Ltd.[77] In that case the accused had been charged under s.36(1)(a) of the Act with making a false or misleading representation. Hravinsk J. agreed that the common law defence would have applied but for the existence of the stricter statutory defence. On the authority of Consumers Distributing, however, he held that the common law defence was excluded by the statutory defence. He further noted that the company had met the requirements of the common law defence but was unable to meet those of the statute. He then proceeded to consider whether the statutory defence was constitutional.

In his view, s.37.3(2)(c) and (d) went beyond requiring proof of due diligence by requiring the accused to show that he had taken reasonable measures to bring the error to the attention of the public. Thus, in order to rely on the statutory defence, the company was obliged to admit that the error had occurred, therefore admitting that it had committed the actus reus of the offence. If the accused did not believe that it had committed the actus reus, it could not take steps under paragraphs (c) and (d) to avail itself of the statutory defence and consequently no due diligence defence, statutory or common law, would be available to the accused. The offence thus became one of absolute liability. Although the case was decided prior to the release of the Supreme Court of Canada's decision in the Reference re s.94(2) of the Motor Vehicle Act,[78] the Court relied on the ruling of the British Columbia Court of Appeal in that case and found that this violated s.7 of the Charter since the potential penalty upon conviction was very severe. Therefore s.37.3(2) was declared to be of no force or effect. The same issue was subsequently considered by the Manitoba Court of Queen's Bench. In that case, however, the Court only struck down paragraphs (c) and (d) of the provision.[79]

The courts are clearly correct in holding that the common law due diligence defence does not apply where a specific statutory defence is created for a particular offence. It is easy to forget that Sault Ste. Marie only sets guidelines to assist the courts in determining what the legislature's intention was when that intention is unclear. Where the legislature has indicated a specific intention, however, Sault Ste. Marie can have no application. To hold otherwise would violate the principle of Parliamentary supremacy.[80]

Several courts have specifically referred to the fact that Sault Ste. Marie was not intended to create three airtight categories of offences. If the language of the statute is such that the offence does not fit into any one of the three neat categories, so be it; that is the prerogative of Parliament. In R. v. Parsons,[81] O'Hearn J.C.C. stated:

> Canadian legislatures are parliamentary in nature and can, within the classes of subject over which they have jurisdiction, create offences involving the most varied mental conditions. The categories in Sault Ste. Marie are, in fact, judicial guides in deciding what the unexpressed elements of the offence may be, as well of course, as the unexpressed defences.

Similarly, in Capozzi Enterprises v. R., Seaton J.A. noted:[82]

> If a statute fixes the boundaries of responsibility of an employer, there is no need to look to the cases to find them. This statute sets out a scheme that includes imposing certain liabilities upon licensees, employers, and occupants. Those provisions apply whether the scheme fits within the strict liability or the absolute liability concepts, or creates a concept that is unique. In short, when the statute is clear, it governs.

In this regard it is important to note that the legislature does often express a contrary intention, not only through the use of statutory defences but through its choice of statutory language in general. For example, the legislature sometimes creates offences that impose a negligence standard: careless driving is one example. In such cases it may be argued that the legislature has included a mens rea requirement, albeit one that is not normally used in criminal law. As such, the traditional criminal law rules should apply and the burden of proof should be on the Crown to prove all the elements of the offence including negligence.[83]

More troubling, however, is the willingness of the courts to take the availability of a statutory defence for one offence in an enactment as an indication that offences to which the defence does not apply were intended to be absolute. In Sault Ste. Marie, Dickson J. apparently expected the category of absolute offences to be quite small. Subsequent decisions of the Court suggest that the Court's thinking on this point remains the same.[84] A legislative intention to create absolute offences is only one explanation for the inapplicability of a statutory defence to a specific offence. An equally compelling explanation is that the legislature intended the common law defence to be available. Most statutory defences impose a higher standard than does the common law due diligence defence. Consequently it may be persuasively argued that it was the intention of the legislature to impose more stringent requirements for some offences while leaving other offences to be interpreted in light of the common law defence outlined in Sault Ste. Marie.

## Strict Liability Offences

### Notes

1. A good statement of the burden on the Crown in such cases may be found in R. v. Christman (1984), 29 M.V.R. 1 (Alta.C.A.) at 7.

2. (1978), 40 C.C.C.(2d) 353 (S.C.C.) at 373.

3. Stuart, Canadian Criminal Law: A Treatise, 2nd ed. (Toronto: Carswell, 1987) at 171. As Stuart notes, a similar list of alternatives is provided by Smith and Hogan, Criminal Law, 5th ed. (London: Butterworths, 1983) at 105. Smith and Hogan, however, merge simple and gross negligence.

4. The Court also made absolutely no reference to other, completely different, approaches that had been suggested by writers. For instance, R.W. Clarke had suggested in "The Defence of Impossibility and Offences of Strict Liability" (1969), 11 Crim.L.Q. 154, that a general defence of impossibility of compliance might be developed for absolute liability offences.

   In the United States, a defence generally known as the "powerlessness defence" or the "objective impossibility defence" has developed. The defence had its origins in the decision of the United States Supreme Court in United States v. Park, 421 U.S. 658 (1975), in which a large corporation and its president were charged under the federal Food, Drug and Cosmetic Act with storing food for sale in a building accessible to and exposed to contamination by rodents. Although the United States Supreme Court reinstated the president's conviction, Burger J. recognized that a defence of being powerless to prevent the injury might be available in some cases. It has been suggested that the defence might be extended to all absolute liability offences and not just to situations involving corporations and their management. For discussions of the defence see, inter alia, Norman Abrams, "Criminal Liability of Corporate Officers for Strict Liability Offences - A Comment on Dotterwich and Park" (1981), 28 U.C.L.A. L.Rev. 463; Kathleen F. Brickey, "Criminal Liability of Corporate Officers for Strict Liability Offences - Another View" (1982), 35 Vanderbilt L.Rev. 1337; Lynn Bledsoe, "Criminal Liability for Public Welfare Offenses: Gambler's Choice" (1979-80), 10 Memphis State U. Law Rev. 612; Beatrice Friedlander, "Criminal Law - Prosecution of Corporate Officials Under the Federal Food, Drug and Cosmetic Act - U.S. v. Park, 421 U.S. 658 (1975)" (1976), 37 Ohio State L.J. 431; Stephen C. Jones, "Individual Liability under the Federal Food, Drug and Cosmetic Act: The Defences Find a Defendant" (1984), 39 Food, Drug and Cosmetic Law J. 385.

5. Law Reform Commission of Canada, Report 3: Our Criminal Law (Ottawa, 1976) at 32 and Law Reform Commission of Canada, Studies in Strict Liability (Ottawa, 1974) at 33.

6. In a brief comment on the Law Reform Commission of Canada's Studies in Strict Liability, supra note 5, Brian Hogan indicated that he did not particularly like the reverse onus but he did not elaborate: see "Working Paper 2: Strict Liability" (1975), 7 Ottawa L.R. 259 at 260.

7. Gisèle Coté-Harper and Richard Coté, "Commentaires sur la résponsibilité stricte" (1975), 16 C. de D. 905 at 915.

8. Glanville Williams, Criminal Law: The General Part, 2nd ed. (London: Stevens & Sons, 1961) at 262; J.Ll.J. Edwards, Mens Rea in Statutory Offences, Vol. 8, English Studies in Criminal Science, ed. L. Radzinowicz (London: Macmillan, 1965), reprinted by Kraus Reprint, Nendlen, Liechtenstein, 1968.

9. [1935] Crim.App.R. 72 (H.L.) at 95.

10. supra note 2, at 367.

11. (1979), 103 D.L.R.(3d) 193 (S.C.C.).

12. [1969] 1 All E.R. 346 (H.L.) at 357-358.

13. Stuart, supra note 3, at 171-174.

14. (1941), 67 C.L.R. 536 (Aust.H.C.).

15. In Sweet v. Parsley, Lord Pearce read the decision in Proudman v. Dayman as imposing a legal burden; Lords Reid and Diplock, on the other hand, seem to have interpreted it as imposing merely an evidential burden. Colin Howard is the chief exponent of the legal burden interpretation; see, for example, Howard, "Strict Responsibility in the High Court of Australia" (1960), 76 L.Q.Rev. 547. The legal burden interpretation does appear to have been more widely adopted: see Smith and Hogan, supra note 3, at 105. Others, however, have argued that the decision imposes only an evidential burden: see Peter Brett, "Strict Responsibility: Possible Solutions" (1974), 37 Mod.L.Rev. 417. The British Law Commission recommended only the imposition of an evidential burden in Report No. 89: The Mental Element in Crime (1978) at 39.

16. See also Roland Penner, "Notes and Comments - Sweet v. Parsley: Disappointment and Danger" (1969), 3 Man.L.J. 63 at 65 where he expresses a preference for the evidential burden approach.

17. supra note 11, at 203.

18. (1981), 62 C.C.C.(2d) 326 (Y.Terr.Ct.).

19. Id. at 329.

20. (1986), 24 C.C.C.(3d) 321 (S.C.C.).

21. Id. at 333.

22. Id. at 343.

23. (1987), 60 C.R.(3d) 289.

24. Id. at 237.

25. (1988), 64 C.R.(3d) 97.

26. Id. at 112.

27. Id. at 122.

28. (1988), 64 C.R.(3d) 123.

29. In an article entitled "Holmes and Whyte: Zig-Zags on Reversing the Onus, Section 1 and Care and Control" (1988), 64 C.R.(3d) 143 at 143, Don Stuart refers to the two decisions as "bewilderingly inconsistent".

30. supra note 28, at 135-136.

31. This would not, however, appear to be the view of the Ontario Court of Appeal. In R. v. Andrews (1988), 43 C.C.C.(3d) 193, the accused had been charged with wilful promotion of hatred under what was then s.281 of the Criminal Code. Subsection (2) of that provision stated that an accused might not be convicted if he established that his statements were true. Krever J.A., with whom Grange J.A. concurred, refused to follow the decision of the Alberta Court of Appeal in R. v. Keegstra (1988), 43 C.C.C.(3d) 150, where s.281(2) was struck down on the grounds that it violated s.11(d). Instead, he noted the decisions of the Supreme Court of Canada in Holmes and Whyte and held that the provision did not violate s.11(d) because it did not relieve the Crown from proving an essential element of the offence. The third justice, Cory J.A., expressed no opinion on this point.

32. In The Presumption of Innocence (Toronto: Carswell, 1987), James C. Morton and Scott C. Hutchinson state at p.97 that s.1 will probably save the reverse onus for most strict liability offences. For an opposing view, see Isabel Grant, "Case Comment - R. v. Vaillancourt: The Constitutionalization of Mens Rea" (1988), 22 U.B.C.L.Rev. 369 at 381.

33. Although the issue was raised in R. v. Campbell (1987), 62 Nfld. & P.E.I.R. 176 (P.E.I.C.A.), it was expressly not considered by the Court and the appeal was allowed on other grounds.

34. (1984), 61 N.S.R.(2d) 421 (N.S.C.A.) at 428.

35. supra note 14.

36. supra note 2, at 367.

37. See, for example, R. v. Parsons (1981), 47 N.S.R.(2d) 267 (N.S.Co.Ct.); R. v. Carter (1985), 53 Nfld. & P.E.I.R. 145 (Nfld.Dist.Ct.); R. v. Squires (1986), 62 Nfld. & P.E.I.R. 48 (Nfld.Prov.Ct.).

38. (1978), 45 C.C.C.(2d) 333 (S.C.C.).

39. This is also noted by M.J. Conklin, "Case Comment: Strict Liability: The Doctrine in Sault Ste. Marie - Judicial Creativity Gone Sour" (1982), Vol.3, No.5 Crown Counsel's Review 9 at 12.

40. For a discussion of the reasons why traditional criminal defences such as necessity and self-defence should not be treated in the same fashion as the mens rea defences recognized in Sault Ste. Marie, reference should be made to the previous chapter entitled "Absolute Liability Offences".

41. R. v. Hammond, [1980] 1 W.W.R. 368 (Alta.Prov.Ct.); R. v. Phillips and Phillips (1980), 33 N.B.R.(2d) 50 (N.B.Q.B.); R. v. Cancoil Thermal Corporation (1986), 27 C.C.C.(3d) 295 (Ont.C.A.).

42. [1980] 1 W.W.R. 368 (Alta.Prov.Ct.).

43. Id. at 373.

44. (1986), 27 C.C.C.(3d) 295 (Ont.C.A.).

45. Id. at 304.

46. R. v. Beaver (1957), 118 C.C.C. 129 (S.C.C.); R. v. Pappajohn (1980), 52 C.C.C.(2d) 481 (S.C.C.).

47. For a good discussion, see R. v. Materi (1987), 56 Sask.R. 7 (Sask.C.A.).

48. As a result of the confusion between mistake as a defence and mistake as an absence of mens rea, the treatment of mistake by the courts is rather unusual. Since mistake of fact is really an absence of mens rea, there should be no onus on the accused at all; the burden is on the Crown throughout to prove that the accused had the mens rea to commit the offence. As a practical matter, however, the issue of mistake of fact will rarely come before the court unless some evidence is tendered to suggest that the accused was operating under a mistake. Consequently there may be an evidentiary burden on the accused to adduce evidence of lack of mens rea in order to escape conviction if that evidence has not otherwise emerged at trial.

49. (1985), 53 Nfld. & P.E.I.R. 145 (Nfld.Dist.Ct.).

50. Id. at 149.

51. (1983), 24 M.V.R. 205 (Ont.Prov.Ct.).

52. See, for example, R. v. Dakin (1981), 37 N.B.R.(2d) 208 (N.B.Q.B.); R. v. Richmond Plywood Corporation Ltd. (1981), 63 C.C.C.(2d) 99 (B.C.Co.Ct.); R. v. Robichaud (1984), 60 N.B.R.(2d) 1 (N.B.Q.B.).

53. See, for example, R. v. Bob, [1984] 2 C.N.L.R. 107 (B.C.Co.Ct.) and R. v. Metropolitan Stores (MTS) Ltd. (1987), 66 Nfld. & P.E.I.R. 241 (P.E.I.Prov.Ct.) where the accused were convicted of strict liability offences because the mistake was one of law, not fact.

54. R. v. Molis (1980), 55 C.C.C.(2d) 558 (S.C.C.).

55. (1982), 31 C.R.(3d) 3 (S.C.C.).

56. supra note 44.

57. Id. at 303.

58. supra note 2, at 377.

59. supra note 54.

60. (1957), 26 C.C.C. 193 (S.C.C).

61. supra note 54, at 564.

62. Molis is criticized for similar reasons in Stuart, supra note 3, at 177.

63. (1981), 62 C.C.C.(2d) 326 (Yukon Terr.Ct.).

64. Id. at 331.

65. Id. at 332-3.

66. [1985] N.W.T.R. 134 (N.W.T.Terr.Ct.).

67. Id. at 141.

68. For two rather interesting discussions of statutory defences in the United Kingdom, see L.H Leigh, Strict and Vicarious Liability: A Study in Administrative Criminal Law (London: Sweet & Maxwell, 1982) at 63-80 and Glanville Williams, Textbook of Criminal Law, 2nd ed. (London: Stevens & Sons, 1983) at 978-985.

69. (1978), 43 C.C.C.(2d) 158 (Ont.C.A.).

70. (1981), 34 O.R.(2d) 348 (Ont.Div.Ct.), aff'd on other grounds (1982), 39 O.R.(2d) 438 (Ont.C.A.).

71. Id. at 34 O.R.(2d) 359.

72. (1986), 27 C.C.C.(3d) 295 (Ont.C.A.).

73. For a brief discussion, see the Annotation by Don Stuart at (1986), 52 C.R.(3d) 189.

74. (1981), 47 N.S.R.(2d) 267 (N.S.Co.Ct.).

75. Id. at 273-274.

76. (1980), 57 C.C.C.(2d) 317 (Ont.C.A.).

77. (1985), 18 C.C.C.(3d) 178 (Sask.Q.B.).

78. (1985), 48 C.R.(3d) 289 (S.C.C.), aff'ing (1983), 33 D.L.R.(3d) 22 (B.C.C.A.).

79. (1986), 8 C.R.D. 775.05-01 (Man.Q.B.).

80. It goes without saying that constitutional restraints are an exception to this rule.

81. supra note 74, at 273.

82. (1981), 22 C.R.(2d) 249 (B.C.C.A.) at 252.

83. This point is also made by Mewett and Manning, Criminal Law, 2nd ed. (Toronto: Butterworths, 1985) at 151-152.

84. Canadian Dredge & Dock Co. Ltd. v. The Queen (1985), 19 C.C.C.(3d) 1 (S.C.C.); Reference re Section 94(2) of the Motor Vehicle Act, supra note 78.

Specific Words

A number of specific words are used by legislative drafters to indicate an intention to create a mens rea offence. In Sault Ste. Marie, the Supreme Court of Canada indicated that the terms 'wilfully', 'knowingly', 'intentionally' and 'with intent' are all mens rea terms. Notwithstanding the frequent use of these words, however, it is not always completely clear what they mean.

The two words most frequently used to indicate a mens rea requirement in an offence are 'knowingly' and 'wilfully'. Where they are used in a statute, they transform an offence that might otherwise have been one of strict or absolute liability into one requiring proof of mens rea. Although the caselaw rarely suggests that there is any difference in the way the words operate, careful analysis shows that they tend to perform slightly different functions when used in an offence-creating provision.

It appears that a drafter usually inserts the word 'wilfully' where he wishes to require mens rea as to the consequences or results of an action. For example, the offence of wilfully promoting hatred under s.319(2) of the Criminal Code requires the Crown to prove an intention to promote hatred.[1] In contrast, the word 'knowingly' is more frequently used where mens rea as to the surrounding circumstances is required. If an accused is charged with knowingly selling contaminated milk, for instance, he cannot be convicted unless it is proved that he knew that the milk was contaminated.

The distinction between the two terms is rarely noted by courts or scholars, perhaps because in many instances the use of one word may cover mens rea as to both circumstances and consequences. An example would be an offence such as wilfully killing a member of a protected species. Before the accused could be convicted of the offence, the Crown would have to establish that it was the accused's intention to kill the animal and also that he knew that the animal was a member of a protected species. Nonetheless, it may be argued that, since the two terms do tend to perform slightly different functions, the use of both terms in an offence-creating provision is not always redundant.

Where mens rea adverbs such as 'knowingly', 'wilfully' or 'intentionally' are used, they must apply to every element of the offence. It is not open to a court to chose certain elements of the offence to which they do not apply.[2] This rule was approved by the Supreme Court of Canada in R. v. Rees where the accused had been charged with "knowingly or wilfully" contributing to the delinquency of a juvenile. In his reasons for judgment, Cartwright J. specifically adopted Glanville Williams' statement to the effect that where 'knowingly' is used in a statute, it applies to every element of the actus reus.[3] An equally strong statement was made by Taschereau J.:[4]

> It is further submitted that the word "knowingly" has reference only to the quality of the act charged and not to the knowledge that the juvenile was in fact a juvenile. I do not believe that this contention can be upheld. A meaning must be given to the word "knowingly" in the statute, and it cannot be disregarded. I see no valid reason why it should be interpreted as relating only to the quality of the act, and not to the age of the child. The law makes no such distinction, and I would invade the legislative field if I did attempt to make any.

Knowingly

Sault Ste. Marie confirmed that where the word 'knowingly' appears in an offence to which a presumption of mens rea does not apply, full mens rea must be proved by the prosecution. Smith and Hogan go so far as to suggest that the word 'knowingly' "seems to be the clearest word which can be used" to introduce a requirement of mens rea into an offence.[5] This is also apparently the opinion of many legislative drafters; the Law Reform Commission of Canada found that the word 'knowingly', and related terms such as 'knowing' and 'knowledge', appeared six hundred and forty-seven times in the Revised Statutes of Canada, 1970.[6]

At one time it was thought that the effect of the word 'knowingly' in a statute was to shift the burden from the defence to the prosecution to prove that the accused had acted with knowledge. The origin of this rule was the decision of Day J. in Sherras v. DeRutzen, where he stated:[7]

> An argument has been based on the appearance of the word "knowingly" in sub-s.1 of s.16, and its omission in sub-s.2. In my opinion the only effect of this is to shift the burden of proof. In cases under sub-s.1 it is for the prosecution to prove knowledge while in cases under sub-s.2 the defendant has to prove that he did not know. That is the only inference I draw from the insertion of the word "knowingly" in the one subsection and its omission in the other.

This proposition was cited in the English caselaw for over half a century with virtually no critical comment from the courts.[8] However, in Roper v. Taylor's Central Garages (Exeter) Limited, Lord Devlin, in an admittedly obiter statement, rejected the proposition, stating:[9]

> All the word "knowingly" does is to say expressly what is normally implied, and if the presumption that the statute

> requires mens rea is not rebutted I find difficulty in seeing how it can be said that the omission of the word "knowingly" has, as a matter of construction the effect of shifting the burden of proof from the prosecution to the defence.

Subsequently both the Privy Council and at least one member of the House of Lords have suggested that Day J.'s proposition ought not to be followed[10] since it conflicts with the fundamental principles governing proof in criminal cases as set out in Woolmington.[11]

Although a few Canadian courts accepted the proposition,[12] in general it was not favourably received in Canada.[13] It was soundly rejected by Laskin J.A. in R. v. Slessor where he stated:[14]

> More important, knowledge or awareness of an accident is an element of the offence of which proof must be made by the prosecution; a person in care, charge or control of a car cannot be found guilty of a failure to stop and do the other things required by s.221(2) if he does not know that an accident has occurred: see Harding v. Price, [1948] 1 K.B. 695. Although s.221(2) does not use the word "knowingly", or its equivalent, and there is an assertion in the Harding case that its omission (having regard to the history of the English provision considered in that case) may simply shift the burden of proof, there is no comparable history here, and I do not think there is any ground of policy to alter in this case the general rule that where guilty knowledge is an ingredient of an offence, it must be established by the Crown.

The effect of the presence or absence of the term 'knowingly' in an offence, was, of course, finally resolved in Canada by the decision of the Supreme Court of Canada in Sault Ste. Marie. Interestingly, however, in one sense Day J.'s decision in Sherras v. DeRutzen may be seen as a forerunner of the half-way house approach adopted in Sault Ste. Marie because the presence or absence of the word 'knowingly' in a regulatory offence will often determine how the offence is to be classified and, consequently, who bears the burden of proving knowledge or lack thereof.[15] As a result, it may be argued that although Day J.'s proposition was rejected as a general rule, it has been re-introduced into Canadian law, albeit more restricted in scope, through Sault Ste. Marie.

Although the caselaw indicates that where the word 'knowingly' appears in an offence, it relates to every element of the offence, it does not apply to the legal effect of each element because lack of knowledge of the law is not an excuse.[16] Therefore where a person was charged with "knowingly, without lawful excuse or justification" selling or exposing obscene matter, it was held not to be a defence to the charge that the accused did not know that the matter was obscene within the meaning of the law. All that the prosecution needed to prove was that the accused knew that he was selling or exposing the matter and was aware of its general nature.[17]

What constitutes knowledge is, unfortunately, not always clear. In Roper v. Taylor's Central Garages (Exeter) Limited,[18] Devlin J. indicated that there are three degrees of knowledge: actual knowledge, imputed knowledge and constructive knowledge. Only the first two, however, are knowledge for the purposes of the criminal law. Lord Devlin's analysis was approved by the Ontario Court of Appeal in R. v. Woolworth Co. Ltd.[19] and would appear to represent the current state of the law in Canada.

Lord Devlin's second category of imputed knowledge is more usually known as wilful blindness, the term preferred by Glanville Williams. Despite some suggestion to the contrary,[20] wilful blindness is generally viewed as a type of knowledge rather than as a type of recklessness.[21] The Supreme Court of Canada recently confirmed the distinction between recklessness and wilful blindness in R. v. Sansregret, where McIntyre J. stated:[22]

> Wilful blindness is distinct from recklessness because, while recklessness involves knowledge of a danger or risk and persistence in a course of conduct which creates a risk that the prohibited result will occur, wilful blindness arises where a person who has become aware of the need for some inquiry declines to make the inquiry because he does not wish to know the truth. He would prefer to remain ignorant. The culpability in recklessness is justified by consciousness of the risk and by proceeding in the face of it, while in wilful blindness it is justified by the accused's fault in deliberately failing to inquire when he knows there is reason for inquiry.

As such, wilful blindness is a more stringent mens rea standard because it requires proof of a deliberate choice to remain ignorant whereas recklessness requires only proof of an awareness of the risk and a conscious decision to proceed regardless.

Where an offence can only be committed 'knowingly', most writers take the position that the Crown must prove actual knowledge or wilful blindness; it is not enough to prove recklessness. Mewett and Manning, for instance, write:[23]

> If the statute uses the actual word "knowingly" it would be difficult to argue that such an offence could also be committed recklessly.

Glanville Williams writes in even strongly terms:[24]

> The word knowing in a statute is very strong. To know that a fact exists is not the same as taking a chance whether it exists or not. The courts ought not to extend a mens rea word by forced construction. If, when Parliament says "knowing" or "knowingly", it does not mean actual knowledge, it should be left to say as much by amending the

> statute. Parliament can quite easily say: "knowing that the fact exists or being reckless whether it exists".

In his concurring reasons for judgment in R. v. Rees,[25] Taschereau J. expressly adopted Glanville Williams' view, holding that where the word 'knowingly' is found in a statute, recklessness is not enough to meet the mens rea requirement. Nothing said by any of the other justices in that decision conflicts with this proposition. A similar view has been expressed by lower courts on a number of occasions.[26]

Nonetheless, in narcotics cases the knowledge requirement has occasionally been extended to include recklessness. In R. v. Blondin,[27] Robertson J.A. indicated that the accused should not be convicted of importing a narcotic if he did not know it was a narcotic. However, he then considered how a jury could properly have found that the accused had the requisite mens rea to commit the offence:[28]

> They could have done so if they had found that Blondin had been paid to smuggle a substance illegally into Canada and either was reckless about what it was or wilfully shut his eyes to what it was, inferring therefore that he suspected that it might be a narcotic. (emphasis added)

There may well be occasions when it is inconvenient to interpret the knowledge requirement as strictly as most academic writers would like. This may account for the attempts of some law reformers to define the term 'knowledge' in such a way as to lower the standard although none goes so far as to suggest that it should extend to recklessness. The Model Penal Code definition of 'knowledge' contains the following provision:[29]

> Where knowledge of the existence of a particular fact is an element of an offence, such knowledge is established if a person is aware of a high probability of its existence, unless he actually believes that it does not exist.

This definition does not seem to go so far as to say that knowledge may include recklessness, but it arguably extends further than Canadian law at the present time.

In its Report 89: The Mental Element in Crime, the Law Commission in Britain recommended the following definition for the term 'knowingly':[30]

> A person knows of circumstances not only when he knows that they exist but also when he has no substantial doubt that they exist.

Again this lowers the standard of knowledge somewhat, although it clearly does not extend to recklessness. It should be noted that in Working Paper 31, upon which the Report was based, a minority of the Working Group had called for an extended definition much closer to recklessness.[31] They would have adopted the following definition:

> A person knows of circumstances not only when he knows that they exist but also when he knows that they probably exist.

In preferring the version finally adopted, the Commissioners felt that the minority's definition extended the term too far into the realm of recklessness. Furthermore, since it stretched the meaning of the word beyond its natural meaning, it could cause confusion in the mind of a jury.

In the final analysis it is difficult to see why there should be a problem about the interpretation of the word 'knowingly'. The meaning of the term is fairly clear to the layman and it is not unduly distorted by including wilful blindness within its scope as a reasonable solution to the problem posed by individuals who consciously choose not to know. The urge to extend the word beyond its natural meaning, however, seems somewhat perverse. If the legislature wishes to include recklessness, it can easily do so by providing that no person shall do the prohibited act 'knowingly or recklessly'. It is probably a fair criticism of drafters of legislation that they generally neglect to consider whether recklessness should be included when drafting an offence-creating provision. Nonetheless, the solution to the problem is more careful drafting, not an unnatural extension of the word actually used.

Wilfully

The word 'wilfully' appears frequently in offence-creating provisions in both federal and provincial statutes. The Law Reform Commission of Canada found that the terms 'wilful' and 'wilfully' were used three hundred and forty-two times in the Revised Statutes of Canada, 1970.[32] Nonetheless, the precise meaning of the term is far from clear. Some courts have suggested that it means simply that an action must have been intentional as opposed to accidental. At the other end of the spectrum, it has been held that an act will only be wilful where it was committed for the specific purpose of doing the prohibited thing or achieving the prohibited result.

In response to the widely conflicting caselaw, the courts have often taken refuge in the comforting statement that the meaning of the word will depend upon the context in which it is used.[33] An alternate approach would be simply to say that the word is capable of so many interpretations that it is almost meaningless. Referring to the variety of possible interpretations, Judge Learned Hand once reportedly said:[34]

> If I were to have the index purged, 'wilful' would lead the rest in spite of its being at the end of the alphabet.

Although the meaning of the word must always depend, in part, upon the context in which it is used, it should be possible to determine some general parameters for its meaning; if general limits cannot be set, the term becomes useless.[35]

The first issue that must be addressed is whether the word does, in fact, create a mens rea offence. Some courts have suggested that the use of the word 'wilfully' in a statute simply means that the act must have been done intentionally rather than accidentally. The leading case adopting this interpretation is R. v. Senior,[36] where Lord Russell of Killowen C.J. stated:

> Wilfully means that the act is done deliberately and intentionally, not by accident or inadvertence, but so the mind of the person who does the act goes with it.

This approach has also been adopted in a number of Canadian cases.[37]

Interpreting the word in this fashion, however, denudes it of any meaning at all since it is simply being used as a synonym for 'voluntarily'. All actions must be voluntary before an offence may be said to be committed, even where the offence is one of absolute liability. Consequently, if this were the only meaning to be attributed to the word, it would be superfluous.[38] This interpretation should mercifully have been dealt its death blow by the Supreme Court of Canada in Sault Ste. Marie, where Dickson J. indicated that the use of the word 'wilfully' in an offence that would otherwise be presumed to be one of strict liability, made it an offence requiring proof of mens rea. Thus the Court confirmed that 'wilfully' is not synonymous with 'voluntarily' but performs a mens rea function.[39]

Once it has been accepted that the term 'wilfully' imports a mens rea requirement, the more difficult question is the nature of that requirement. Many cases pose an uncertain standard; they say that the accused must have acted intentionally and known what he was doing but say little more. Often they cite contradictory cases making it clear that the Court did not fully understand all the implications of the question it had to decide.[40]

The most frequently cited Canadian definition is found in Ex parte O'Shaughnessy[41] where the accused was charged with wilfully committing an indecent act in a public place. Wurtele J. stated:[42]

> Wilfully means not merely to commit an act voluntarily but to commit it purposely with an evil intention, or in other words it means to do so deliberately, intentionally, corruptly and without any justifiable excuse.

This definition establishes a high standard, requiring the accused to have acted for the purpose of committing the wrongful act or achieving the wrongful end. A similar standard has been applied in other cases. In R. v. Griffin,[43] Grimmer J. stated that the word 'wilfully' implies "a deliberate purpose to accomplish something forbidden, a determination to execute one's own will in spite of and in defiance of the law".

The 'purpose' standard has been adopted in a series of cases involving charges of wilfully evading payment of taxes under what was formerly s.239(1)(d) of the Income Tax Act (Can.). The leading decision is R. v. Pavely,[44] where Bayda J.A. cited O'Shaughnessy and Griffin and then stated:[45]

> The word "wilfully" as used in the subsection under consideration, carries a distinct connotation of deliberate purpose and ulterior motive. To ascribe to the word a meaning which negates or overlooks that purpose or motive is to dilute the meaning of the word to a point where its use is rendered completely unnecessary.

This interpretation has been followed by other courts when considering the offence.[46]

The meaning of 'wilfully' was considered in depth by the Ontario Court of Appeal in R. v. Buzzanga and Durocher,[47] a case involving a charge of wilfully promoting hatred, contrary to what was then s.281.2(2) of the Criminal Code. The accused, two men who had been actively involved in a campaign to build a French-language school in Essex County, distributed a handbill expressing anti-French Canadian sentiments. They testified that their aim had been to rally the French Canadians in the community and to expose the prejudice that existed against them in order to bring a resolution to the dispute over the school.

On an appeal by the accused from their convictions, the only issue before the Court was the meaning to be attributed to the word 'wilfully' in s.281.2(2). Martin J.A. began by noting that the term has not been uniformly interpreted and that its meaning depends, to some extent, upon the context in which it is used. After stating that its primary meaning is 'intentionally', he surveyed the caselaw from other Commonwealth jurisdictions to reveal the variety of ways in which the word has been interpreted.[48] He then embarked on an exercise in statutory interpretation examining the offence and related offences; he concluded that in s.281.2(2) 'wilfully' meant an intention to promote hatred and did not extend to reckless promotion of hatred.

Martin J.A. made the point that the word 'wilfully' was not necessary to import mens rea; as it was a Criminal Code offence, a mens rea requirement was presumed. However, unless a contrary intention is indicated, recklessness will normally satisfy the mens rea requirement. He noted that although s.281.2(2) contained the term 'wilfully', the word was not used in s.281.1. Therefore he concluded that it was Parliament's intention to exclude recklessness from the mens rea component of the former offence while recklessness would suffice for the latter.

He refused, however, to limit the scope of the word to circumstances where the accused's conscious purpose was to bring about a certain result. After reviewing the caselaw and the academic writing in the area, he concluded that a person acts intentionally, and therefore wilfully, where he foresees that the consequence is certain or substantially certain to result from his conduct.[49] Martin J.A. stated:[50]

> I agree, however (assuming without deciding that there may be cases in which intended consequences are confined to those which it is the actor's conscious purpose to bring about), that, as a general rule, a person who foresees that a consequence is certain or substantially certain to result from an act which he does in order to achieve some other purpose, intends that consequence. The actor's foresight of certainty or moral certainty of the consequence resulting from his conduct compels a conclusion that if he, none the less, acted so as to produce it, then he decided

> to bring it about (albeit regretfully), in order to achieve his ultimate purpose. His intention encompasses the means as well as his ultimate objective.
>
> I conclude, therefore, that the appellants "wilfully" (intentionally) promoted hatred against the French Canadian community of Essex County only if: (a) their conscious purpose in distributing the document was to promote hatred against that group, or (b) they foresaw that the promotion of hatred against that group was certain or morally certain to result from the distribution of the pamphlet but distributed it as a means of achieving their purpose of obtaining the French-language high school.

The intention standard described by Martin J.A. is somewhat lower than the purpose standard set out in O'Shaughnessy and Griffin. In addition to acts committed for a specific purpose, it also encompasses situations where the accused knew that a certain consequence was virtually certain to ensue even if it was not his purpose to bring about that particular consequence. As such, the intention standard catches situations that might not be caught by the purpose standard. Nonetheless, most writers have tended to treat intention and purpose as being almost synonymous on the grounds that any attempt to distinguish between them soon degenerates into meaningless semantic quibbling.[61]

The Ontario Court of Appeal subsequently appears to have adopted the same intention standard in interpreting the word 'wilfully' in a provincial statute. In R. v. Dilorenzo; Bancroft,[62] the Court considered the meaning of the term as used in s.189a(3) of the Ontario Highway Traffic Act; that provision permits a court to impose a more severe penalty where it is satisfied that a person who failed to stop for a police officer, as required under s.189a(1), "wilfully continued to avoid police while a police officer gave pursuit". Although Robins J.A. did not discuss the point in great detail, he cited Buzzunga and

Durocher and held that "[t]he word "wilfully" in this context means with the intention of avoiding the police".[63]

Regardless of any minor differences, all the cases discussed above clearly exclude recklessness from the ambit of the term 'wilfully'. Where Criminal Code offences are concerned, there is an excellent statutory interpretation argument that recklessness ought not to be included in the definition of wilfulness. Part XI of the Criminal Code, entitled 'Wilful and Forbidden Acts in Respect of Certain Property', specifically defines the word 'wilfully' or the purposes of that Part; s.429(1) provides:

> Every one who causes the occurrence of an event by doing an act or by omitting to do an act that it is his duty to do, knowing that the act or omission will probably cause the occurrence of the event and being reckless whether the event occurs or not, shall be deemed, for the purposes of this Part, wilfully to have caused the occurrence of the event.

The word 'wilfully' is therefore expressly extended to encompass reckless acts.

It may be argued that if Parliament had intended to include recklessness within the scope of wilfulness throughout the Criminal Code, it would not have been necessary to include the definition in Part XI. It should be noted, in this regard, that in R. v. Rese,[64] Laskin J.A. referred to the definition of 'wilful' in Part XI as an "extended meaning", thereby providing support for the argument that where the word 'wilfully' is used in the rest of the Code, recklessness is excluded.[65]

Nonetheless, some caselaw does indicate that reckless conduct may be wilful.[66] In Buzzanga and Durocher, Martin J.A. suggested that, although 'wilfully' in s.281.2(2) did not include recklessness, it might in other contexts. The approach that he adopted in that case suggests that it might even have such a meaning when used in other provisions of the Criminal Code.

In a few Canadian cases, wilfulness has been held to include recklessness where an accused has been charged with a Criminal Code offence. In R. v. Dahl,[67] the accused appealed his conviction, under what was then s.285 of the Code, for "wanton or furious driving or other wilful misconduct" that resulted in bodily harm while the accused was driving. The issue in that case was whether there had been wilful misconduct on the part of the accused. Gillivray J.A. stated:[68]

> It is enough for me to say in my opinion the words "wilful misconduct" as used in sec.285 mean an act done consciously and intentionally which the doer knew or as a matter of law is presumed to have known was wrongful in the circumstances, and that in my opinion the words "wilful neglect" as used in sec.285 means an omission consciously and intentionally made which was known or as a matter of law is presumed to have been known to the person guilty of the omission to be wrongful in the circumstances.
>
> These definitions which I venture to put forward are intended to cover and I think do cover the case of a person who consciously and intentionally does an act or makes an omission with reckless disregard of whether his act or omission be wrongful or not.

Similarly, in R. v. Stone,[69] a case involving a wilful breach of a probation order contrary to the Criminal Code, it was indicated that in order for the breach to be wilful, "the failure or refusal to comply with a probation order must be with evil intent or bad motive or with indifference to the consequences".

A novel suggestion for reconciling the different interpretations of the term 'wilfully' was provided in R. v. Goodman,[60] a case involving a charge of wilfully obstructing a peace officer in the execution of his duty.[61] Robertson J.A., with whom Smith J.A. concurred, suggested that the meaning to be attributed to the word 'wilfully' in the Criminal Code would depend upon the seriousness of the offence within which it was found. In his view, where the offence was a serious one involving a significant penalty with a long term of imprisonment, the O'Shaughnessy interpretation might well apply. However, where the offence was less serious, involving only a fine or a brief period of incarceration as the maximum penalty, a lesser standard should apply so that there would be no need to demonstrate an evil intent. He stated:[62]

> It would be sufficient to show that the accused knew what he was doing and intended to do what he was doing and was a free agent.

Fortunately, Robertson J.A.'s solution to the problem does not ever appear to have been followed. The standard he proposed for less serious offences is clearly superseded by the Supreme Court of Canada's reaffirmation of the applicability of the presumption of mens rea to Criminal Code offences. Furthermore, it is simply unacceptable to suggest that the meaning of a word used numerous times in a statute should vary according to the seriousness of the offence involved.[63] The decision does highlight, however, the major difficulties that the use of the word 'wilfully' has posed for the courts.

There is no easy solution to the problem created by the extensive use of the word 'wilfully' in statutes. In the absence of legislative guidance or a definitive general statement by the Supreme Court of Canada as to the way in which the term should be interpreted, the courts will continue to interpret it on a case by case basis. Although it is clear that the word imports mens rea, the precise mens rea requirement will continue to vary depending on the case. As a result, sometimes recklessness will suffice and sometimes nothing less than proof of purpose will be required for conviction.

In view of the lack of consensus as to the meaning of the word, the best solution would appear to be to dispense with it altogether. This was the approach adopted in the United States by the drafters of the Model Penal Code. In contrast, the drafters of the proposed new U.S. Federal Criminal Code found it so difficult to eliminate the term that they simply defined it as encompassing the more specific culpability terms, 'intentionally', 'knowingly' and 'recklessly', that were defined in the Code.[64]

In light of the problems surrounding the word 'wilfully', drafters of legislation would do well to try to avoid using it wherever possible. Certainly, there are almost always other terms that could be used. The most useful are probably 'intentionally' or 'purposely'; the Law Reform Commission of Canada has recently expressed a preference for 'purposely' because it does not carry so many complicating connotations as the word 'intentionally'.[65] Since normally wilfulness will not include recklessness, there should rarely be occasions where the drafter would need a substitute word to encompass both intention and recklessness. Should such a mens rea requirement be desired, however, there would appear to be no reason why the phrase 'recklessly or intentionally' should not be used. Verbosity may generally be undesirable, but there are some occasions upon which clarity demands it.

Cause and permit

Adverbs such as 'wilfully' and 'knowingly' are included in an offence-creating provision to indicate that there is a mens rea component to the offence. They modify the verb that helps to detail the actus reus of the offence; in themselves they do not form part of the actus reus. In contrast, certain verbs found in offence-creating provisions are sometimes, in themselves, said to contain a mens rea component. Although there are a number of verbs that have been analyzed in this fashion, the verbs 'cause', 'permit', 'allow' and 'suffer' are perhaps the most common.

For the purposes of this paper, the words 'permit', 'allow' and 'suffer' will be treated as if they bear the same meaning. Although some courts and writers have attempted to find distinctions in the meanings of the three words, in reality any distinction must be so fine as to be irrelevant.[66] J.Ll.J. Edwards writes:[67]

> All the evidence available suggests that each and all of the epithets "permits", "suffers" and "allows" is designed to embrace the same conduct. Unless, therefore, some hidden meaning, known only to the legislature or the parliamentary draftsman, has yet to be released, the hope might be expressed that in future legislation the numerous permutations which we have already examined might, with advantage, be considerably reduced.

English academics in particular have sought in vain to reconcile the copious caselaw on the issue of whether words such as 'cause' or 'permit' contain a mens rea component or whether they are words of absolute liability.[68] Since there is caselaw going both ways on statutes that are virtually indistinguishable, this is a thankless task. Because most of these academics disapprove of absolute liability, they tend to argue that the modern trend is to find a mens rea requirement in these verbs. Thus decisions such as Alphacell Ltd. v. Woodward,[69] in which the House of Lords upheld the conviction of a company on a charge of 'causing' pollution to enter a river without requiring proof of mens rea, cause them much grief and lead them to draw some extremely tenuous distinctions in an attempt to confine a disagreeable decision to the most narrow circumstances.[70]

A survey of the Canadian caselaw prior to Sault Ste. Marie indicates that a divergence of views was apparent in the decisions of Canadian courts. Some insisted that it was not possible to permit, suffer or cause an event to happen without mens rea.[71] Others held that these words did not import a mens rea requirement and that conviction might follow upon proof only of the wrongful act.[72]

Still other courts were clearly unhappy with either alternative. Requiring mens rea, particularly in master/servant cases, meant that the accused employer would normally be acquitted and the purpose of the legislation frustrated. However, in the view of these judges, the natural meaning of the words 'cause' and 'permit' did seem to entail some sort of knowledge that one was causing or permitting a thing to happen. Therefore, what E.G. Ewaschuk has called an "objective" standard was sometimes imposed.[73]

Such a standard was applied by the Ontario Court of Appeal in R. v. Royal Canadian Legion.[74] In that case the accused, an incorporated fraternal club that held a liquor licence, was charged with "permitting drunkenness to take place" on the premises, contrary to what was then s.53(4) of the Ontario Liquor Licence Act. The Court held that the Act contained three sorts of offences: those that required proof of mens rea, those that did not require proof of mens rea and those that provided that a licensee should not permit or suffer certain acts or conduct on the premises. In relation to the third class of offences, the Court stated:[75]

> In the unabridged edition of the Oxford English Dictionary we find amongst the definitions for the word "permit" that of "not to prevent". In our opinion, the words "permit or suffer" in s.53(4) are used in this connotation. Adopting this meaning ss.(4) would then read: "No person holding a licence under this Act shall not prevent in the premises for which the licence is issued -- drunkenness".

A similar standard seems to have been applied by McPherson C.J.M. in the decision of the Manitoba Court of Appeal in R. v. Millar.[76] It is interesting to note that in Sault Ste. Marie,[77] Dickson J. cited both Royal Canadian Legion and Millar as cases holding that the word 'permit' led to absolute liability. In fact, the standard imposed in those cases was actually much closer to the strict liability classification described in Sault Ste. Marie than it was to absolute liability since it essentially established a negligence standard.[78]

In view of the confusion surrounding the interpretation of words such as 'cause' and 'permit', it is not surprising that the legislature often felt compelled to include the word 'knowingly' before such verbs.[79] Commentators who argued in favour of a mens rea interpretation of these words were critical of this practice since it undermined their contention that a knowledge requirement was implicit in them.[80] The practice did, however, have the virtue of making the intention of the legislature clear.

The law on this point was finally settled in Sault Ste. Marie where the Supreme Court of Canada adopted an entirely different approach to resolving the question. In Sault Ste. Marie, the actual offence under consideration was what was then s.32(1) of the Ontario Water Resources Act which made it an offence to "discharge, deposit or cause or permit the discharge or deposit of any material ... that may impair the quality of the water". The issue before the Court was whether a mens rea requirement should be read into the words 'cause' or 'permit'. Dickson J. began by considering the subject-matter of the legislation and concluded that pollution offences were public welfare offences. Consequently, no presumption of mens rea applied. After reviewing the conflicting authorities on the mens rea component of the words 'cause' and 'permit' he stated:[81]

> The conflict in the above authorities, however, shows that in themselves the words "cause" and "permit" fit much better into an offence of strict liability than either full mens rea or absolute liability. Since s.32(1) creates a public welfare offence, without a clear indication that liability is absolute, and without any words such as "knowingly" or "wilfully" expressly to import mens rea, application of the criteria which I have outlined above undoubtedly places the offence in the category of strict liability.

As such, once the actus reus of the offence had been proved, the accused could still avoid liability by proving that it had exercised due diligence to prevent the occurrence of the event.[82]

It is not entirely clear what Dickson J. meant in the first sentence quoted above. It could be argued that he was saying that the use of the words 'cause' or 'permit' in an offence indicates that it is one involving strict liability. Considering his decision as a whole, however, it seems improbable that this was his intention. Presumably what he meant to say was that words such as 'cause' and 'permit' are most often found in regulatory offences; consequently the offences in which they are found will most frequently be strict liability offences.

Therefore, with any provision containing words such as 'cause' or 'permit', the initial question should be, not what is the mens rea component of the word in this case, but rather, in what type of offence is it located. In the rare case where such a word is found in a true criminal offence, there will be a presumption that full mens rea must be proved. Although the issue does not appear to have received much reasoned consideration in the caselaw, the better view would seem to be that the mens rea requirement would normally be satisfied by proof of recklessness.[83]

In most cases, however, such words will be found in public welfare offences. The presumption then will be that, in the absence of an indication of a contrary intention, liability will be strict. The defences of due diligence and reasonable mistake of fact will consequently be available. Since words such as 'cause' and 'permit' will normally be interpreted in the context of public welfare offences, drafters of legislation should always consider whether it is intended to create a mens rea offence. If that is the case, it will be necessary to include terms such as 'knowingly' in the offence-creating provision.

There is a small body of caselaw decided after Sault Ste. Marie in which the meaning of words such as 'cause' and 'permit' has been considered.[84] In these cases the courts appear to have adopted the Sault Ste. Marie approach. For instance, in R. v. Central City Investments Ltd.,[85] the corporate accused was acquitted at trial on a charge of permitting a person under the age of nineteen to be in a beverage room, contrary to the Liquor Control Act (N.B.). An appeal by the Crown was dismissed on the grounds that the offence was one of strict liability and the accused had discharged the onus of proving that it had exercised due diligence. In reaching this conclusion, the Court first determined whether strict or absolute liability had been intended and then assigned a meaning to 'permits' based on the type of offence in which it was located.

Similarly, in Donline Haulage Inc. v. The Queen,[86] the corporate accused appealed its conviction on a charge of permitting a commercial vehicle to operate where the axle unit weight of the dual rear axles exceeded the allowable weight, contrary to the Highway Traffic Act (Ont.). The Court analyzed the provision under which the company had been convicted and concluded that it had been intended to impose strict, not absolute, liability. The word 'permits' was then interpreted in light of this finding.

## Specific Words

### Notes

1. R. v. Buzzanga and Durocher (1979), 49 C.C.C.(2d) 369 (Ont.C.A.).

2. For further discussion on this point, see Glanville Williams, Criminal Law: The General Part, 2nd ed. (London: Stevens & Sons, 1961) at 148 and 168; Glanville Williams, Textbook of Criminal Law, 2nd ed. (London: Stevens & Sons, 1983), at 123.

3. (1956), 115 C.C.C. 1 (S.C.C.) at 12.

4. Id. at 5.

5. Smith & Hogan, Criminal Law, 5th ed. (London: Butterworths, 1983) at 109. One anomalous exception to the rule that the use of the word "knowingly" requires proof of knowledge is what Glanville Williams calls the licensee cases which normally involve pub owners who had delegated the management of their business to a servant. In these cases it has been held that the owner may be convicted of knowingly committing an offence, even when he was absent from the premises, because his delegate's knowledge is imputed to him. For discussions of these decisions, of which most commentators disapprove, see Glanville Williams, Criminal Law: The General Part, supra note 2, at 270ff; P.T. Burns, "Vicarious Liability in the Criminal Law" (1966), 1 Otago L.R. 134; J.Ll.J. Edwards, Mens Rea in Statutory Offences, Vol.8 in English Studies in Criminal Science, ed. L. Radzinowicz, (London: Macmillan, 1965), reprinted by Kraus Reprint, Nendeln, Liechtenstein, 1968, at 217ff; A.E. Jones "Vane v. Yiannopoullos and the Criminal Liability of Licensees", [1965] Crim.L.Rev. 401.

6. Law Reform Commission of Canada, Studies in Strict Liability (Ottawa, 1974) at 185 n.93.

7. [1895] 1 Q.B. 918 at 921.

8. For a discussion of this rule in the United Kingdom, see Edwards, supra note 5, at 90ff and Colin Howard, Strict Responsibility (London: Sweet & Maxwell, 1963) at 63ff.

9. [1951] 2 Times L.R. 284 (K.B.) at 288.

10. See Lim Chin Aik v. The Queen, [1963] 2 W.L.R. 42 (P.C.); Warner v. Metropolitan Police Commissioner, [1968] 2 W.L.R. 1303 (H.L.) per Lord Pearce at 1342.

11. [1935] Crim.App.R. 72 (H.L.).

12. See, for example, R. ex rel. Burns v. Menkin (1957), 118 C.C.C. 306 (Ont. Mag.Ct.); R. v. Nat Bell Liquors, Ltd., [1920] 3 W.W.R. 522 (Alta.C.A.); R. v. McLeod (1954), 14 W.W.R. 97 (B.C.C.A.) per O'Halloran J.A. at 107.

13. See, for example, R. v. Bruin Hotel Ltd. (1954), 12 W.W.R.(N.S.) 387 (Alta.C.A.). In the vast majority of cases, it was ignored.

14. [1970] 1 O.R. 664 (Ont.C.A.) at 678; see also R. v. Lick (1974), 18 C.C.C.(2d) 477 (Ont.C.A.) at 483-484.

15. For a pre-Sault Ste. Marie argument favouring the adoption of Day J.'s approach, see Jacques Fortin, "le Mens rea en droit pénal canadien" (University of Montreal thesis, 1971).

16. R. v. Molis (1980), 55 C.C.C.(2d) 558 (S.C.C.).

17. See, for example, R. v. Cameron, [1966] 4 C.C.C. 273 (Ont.C.A.), leave to appeal refused (1967), 1 C.R.N.S. 227 (S.C.C.); R. v. McFall (1975), 26 C.C.C.(2d) 181 (B.C.C.A.).

18. supra note 9.

19. (1974), 18 C.C.C.(2d) 23 (Ont.C.A.) at 30.

20. See Don Stuart, Canadian Criminal Law: A Treatise, 2nd ed. (Toronto: Carswell, 1987), at 127 and 141ff, where he appears to equate wilful blindness with recklessness rather than with knowledge.

21. See Glanville Williams, Criminal Law: The General Part, supra note 2, at 157ff; Glanville Williams, Textbook of Criminal Law, supra note 2, at 125; Rollin Perkins, "'Knowledge' as a Mens Rea Requirement" (1978), 29 Hastings L.J. 953; Mewett & Manning, Criminal Law, 2nd ed. (Toronto: Butterworths, 1985) at 141ff.

22. (1985), 18 C.C.C.(3d) 223 (S.C.C.) at 235.

23. Mewett & Manning, supra note 21, at 120.

24. Williams, Textbook of Criminal Law, supra note 2, at 126.

25. (1956), 4 D.L.R.(2d) 406 (S.C.C.) at 410.

26. See, for example, R. v. Watson, [1965] 1 C.C.C. 13 (N.S.C.A.); R. v. Russell (1949), 8 C.R. 92 (N.B.S.C.); R. v. W.B.C. (1979), 8 R.F.L.(2d) 222 (Ont.H.C.).

27. (1970), 2 C.C.C.(2d) 118 (B.C.C.A.), aff'd on this ground (1971), 4 C.C.C.(2d) 566 (S.C.C.). See also R. v. Tewari (1987), 36 C.C.C.(3d) 150 (B.C.C.A.), where Blondin was expressly followed on this point.

28. (1970), 2 C.C.C.(2d) 118 (B.C.C.A.) at 131.

29. American Law Institute, Model Penal Code (Proposed Official Draft, 1962), s.2.02(7). For criticisms of the provision for failing adequately to cover wilful blindness, see Perkins, supra note 21, at 959ff. A somewhat lower standard that still does not amount to recklessness is also found in the definition of 'knowingly' in the proposed U.S. Federal Criminal Code in s.302(b). For discussions of the culpability provisions in the proposed federal Code, see Kenneth R. Feinberg, "Toward a New Approach to Proving Culpability: Mens Rea and the Proposed Federal Criminal Code" (1980), 18 Am.Crim.L.Rev. 123 and Weinrib, "Comment on Bases of Criminal Liability; Culpability; Causation: Chapter 3; Section 610" in Working

Papers of the National Commission on Reform of Federal Criminal Laws, Vol.1.

30. Law Commission (U.K.), Report 89: The Mental Element in Crime (1978) at 27. It should be noted that a slightly higher standard was adopted by the drafters of Report 143: A Codification of the Criminal Law: A Report to the Law Commission (1985). Although they claimed to have followed the Law Commission's approach "in substance", they preferred a somewhat different formulation. Their draft Code contained the following definition:

> 22. For the purposes of this Act and of any Code offence--
> (a) a person acts in respect of an element of an offence--
>
> ...
>
> "knowingly" when he is aware that it exists or is almost certain that it exists or will exist or occur.

31. Law Commission (U.K.), Working Paper 31: The Mental Element in Crime, (1970) at 30.

32. Law Reform Commission of Canada, Studies in Strict Liability, supra note 6, at 185 n93.

33. See, for example, R. v. Buzzanga and Durocher (1979), 49 C.C.C.(2d) 369 (Ont.C.A.) at 379; In Re City Equitable Fire Insurance Co., [1925] 1 Ch. 431 at 434. For criticism of the power this gives judges to define criminal offences by picking and choosing according to their whim, see Stephen J. Brogan, "An Analysis of the Term "Willful" in Federal Criminal Statutes" (1976), 51 Notre Dame Lawyer 786.

34. American Law Institute, 32nd Annual Meeting, Proceedings (1955) (unpublished), quoted in Goodrich, "Two Great Men", 39 American Law Institute Proceedings 522 at 523 (1962), quoted in turn by Peter H. Karlen "Mens Rea: A New Analysis" (1978), 9 U. Toledo L.R. 191 at 233 fn.151.

35. For a survey of the English caselaw on this point, reference may be made to J.Ll.J. Edwards, supra note 5 and Smith and Hogan, supra note 5, at 111-112. For a survey of the American caselaw, see Weinrib, supra note 29, at 148-151.

36. [1899] 1 Q.B. 283 at 290-291; see also In re Young and Harstons' Contract 31 Ch.D. 168. This approach seems to have flourished to a greater extent in the United Kingdom than in Canada. For recent English cases, see Maidstone Borough Council v. Mortimer, [1980] 3 All E.R. 552 (Q.B.) and R. v. Sheppard (1980), 72 Crim.App.Rep. 87 (H.L.). In Sheppard, Lord Diplock suggested that although this was not the "natural" meaning of the word 'wilfully', there might be cases where the term should be given a very narrow meaning so as not to require intention as to consequences. For a detailed discussion of the way in which the House of Lords interpreted the word 'wilfully' in Sheppard, see J.M.B Crawford and John F. Quinn, "The Limits of Intention in the Common Law" (1983), 8 U. Dayton L.R. 275.

37. R. v. Nein (1978), 10 A.R. 166 (Alta.C.A.) per Sinclair J.A. dissenting on other grounds; Brown v. Britnell & Co. Ltd. (1924), 27 O.W.N. 232 (Ont.H.C.); R. v. Bonner (1913), 4 W.W.R. 1255 (B.C.C.A.) per Martin J.A.; R. v. Worth (1983), 21 M.V.R. 89 (Ont.Co.Ct.).

38. A point made by Lord Diplock in R. v. Sheppard, supra note 36. See also Edwards, supra note 5, at 38-39.

39. This was also implicit in the approach of Ritchie J. to the interpretation of the Fisheries Act and its regulations in The Queen v. Pierce Fisheries Ltd., [1970] 5 C.C.C. 193 (S.C.C.) at 202.

40. For examples of cases in which it is impossible to tell what standard was being applied, see Duclos v. Pritchet (1952), 4 W.W.R.(N.S.) 625 (Man.C.A.) and R. v. Kent (1984), 40 Man.R.(2d) 245 (Man.Prov.Ct.).

41. (1904), 8 C.C.C. 136 (Que.K.B.).

42. Id. at 139.

43. (1935), 9 M.P.R. 84 (N.B.S.C.) at 92; see also R. v. Smith (1976), 3 C.R.(3d) 259 (Nfld.Dist.Ct.); R. v. Dupont (1976), 11 A.R. 150 (Alta.S.C.).

44. (1976), 30 C.C.C.(2d) 483 (Sask.C.A.).

45. Id. at 135.

46. R. v. Hefler (1980), 42 N.S.R.(2d) 288 (N.S.Co.Ct.); R. v. Chalifour (1986), 58 Nfld. & P.E.I.R. 155 (Nfld.Dist.Ct.).

47. (1979), 49 C.C.C.(2d) 369.

48. This is a popular subject for American writers: see, for example, Kim B. Stogner, "Securities Regulation: Criminal Liability Under the Oklahoma Securities Act - The Wilfulness Requirement" (1978), 31 Oklahoma L.R. 486 (three different interpretations under the Oklahoma Securities Act); Stephen J. Brogan, supra note 33 (four broad categories); Frank J. Remington & Orrin L. Helstad, "The Mental Element in Crime -- A Legislative Problem", [1952] Wisconsin Law Rev. 644 (at least six different meanings); Kenneth R. Feinberg, supra note 29, (seven variations on ~~the~~ scope and meaning of the term in the regulatory and corporate area alone). See also U.S. v. Murdock, 290 U.S. 389 (1933).

49. As such, he adopted the intention standard set out by Glanville Williams in Criminal Law: The General Part, supra note 2, at 38. This approach has been criticized by Don Stuart, supra note 20, at 133, on the grounds that foresight belongs to the domaine of recklessness and it serves no useful purpose to introduce it into the concept of intent.

50. ~~supra note 47, at 384-385.~~

51. The Law Reform Commission of Canada, in Report 30: Recodifying the Criminal Law (Ottawa, 1986), at 18-19, treats purpose and intention as being the same. Similarly, Mewett & Manning, supra note 21, at 112-113, suggest that it is "positively misleading" to attempt to distinguish between purpose and intention. Most other scholars have taken a similar position: see Stuart, supra note 20, at 128 and Williams, Criminal Law: The General Part, supra note 2, at 40-42. Smith and Hogan, supra note 5, at 48, suggest that although, in some cases, nothing short of purpose will

constitute intention, this is not true throughout the whole criminal law, and that, for the most part, substantial certainty as to the result will normally suffice. In contrast, in Report 143: Codification of the Criminal Law, supra note 30, at 65-66, the drafters elected to define both purposely and intentionally on the grounds that in certain instances the slightly narrower fault element of purpose is appropriate.

For an example of the uncertainty that has continued to pervade the law on this point, reference may be made to Hyam v. D.P.P., [1975] A.C. 55 (H.L.), where Lord Hailsham suggested, at 74, that intention could be distinguished from desire while Lord Diplock, dissenting on another point, suggested at 86 that no distinction could be drawn between a desire to produce an evil result and doing something that one knows will result even if it is not actually desired. Fascinating though this subject is, as a practical matter there seems to be little purpose in distinguishing between acts done for the purpose of achieving a certain result and acts done knowing that a certain result is virtually certain to occur. It may be argued that if, for some reason, the legislature wishes to catch only acts done for a specific purpose, there is nothing to prevent it from including the phrase 'for the purpose of' in the offence-creating provision.

52. (1984), 11 C.C.C.(3d) 13 (Ont.C.A.).

53. Id. at 22.

54. [1968] 1 C.C.C. 363 (Ont.C.A.).

55. A similar suggestion is made by Don Stuart in "The Need to Codify Clear, Realistic and Honest Measures of Mens Rea and Negligence" (1972), 15 Crim.L.Q. 160 at 167.

56. See Johnson v. Allen (1895), 26 O.R. 550 (Q.B.), where a deputy returning officer had allegedly wilfully refused to allow the plaintiff to vote, contrary to the Ontario Election Act. There is also British caselaw that adopts this position; see Holroyd (1841), 2 M & Rob. 339, 174 E.R. 308 and R. v. Sheppard, supra note 36.

57. [1936] 3 W.W.R. 385 (Alta.C.A.).

58. Id. at 406.

59. (1985), 55 Nfld. & P.E.I.R. 231 (Nfld.S.C.) at 235; see also R. v. Rees (1956), 4 D.L.R.(2d) 406 (S.C.C.) per Rand J. at 412.

60. (1951), 2 W.W.R.(N.S.) 127 (B.C.C.A.).

61. What constitutes wilfulness in the context of a charge of wilful obstruction of a peace officer has been discussed in a number of articles: see Clayton Ruby, "Obstructing a Police Officer" (1973), 15 Crim.L.Q. 375; Ursula Ross, "Two Cases on Obstructing an Officer", [1977] Crim.L.Rev. 187.

62. supra note 60, at 135.

63. His approach does mirror a trend noted by a number of commentators in the United States. It has been suggested that the courts employ a higher standard of wilfulness where the offence is a true criminal offence whereas in regulatory offences the standard is often quite low: see Brogan, supra note 33, at 788; Rollin Perkins, Criminal Law, 2nd ed. (Mineola, New York: The Foundation Press, 1969) at 780. Fortunately, no such trend seems to have appeared in Canada.

64. See Weinrib, supra note 29, at 128, where the author writes:

> Despite the confusion that the word has engendered, it has an accepted place in Federal criminal law and can be eliminated only with difficulty. The next best thing to eliminating it entirely is to attempt to give it a clear, fixed meaning. This has been done by providing that a person engages in conduct "wilfully" if he engages in it "intentionally", "knowingly", or "recklessly".

65. Law Reform Commission of Canada, supra note 51, at 18.

66. In Rockford Rural Council v. P.L.A., [1914] 2 K.B. 916, Darling J. discussed what he considered to be the difference between the words 'suffer' and 'permit'. Most academic writers, however, suggest that the three terms are virtually synonymous; see J.Ll.J. Edwards, supra note 5; Colin Howard, supra note 8, at 55; Smith & Hogan, supra note 5, at 112.

Canadian courts do not appear to have exercised themselves unduly over any distinction in meaning. Whenever the issue has been raised the courts seem simply to have held that the terms bear the same meaning; see, for example, R. v. Sawicki (1960), 32 W.W.R. 380 (Sask.Q.B.) ('permit' and 'allow' "practically synonymous"); R. v. Hawinda Taverns Ltd. (1955), 112 C.C.C. 361 (Ont.Co.Ct.) ('suffer' and 'permit'); R. v. Doble (1921), 35 C.C.C. 10 (B.C.C.A.) ('suffer' and 'permit'); R. v. Shatsky (1945), 1 C.R. 155 (Sask.Q.B.) ('suffers' not distinguishable from 'permits'); R. v. Servico Limited (1977), 2 Alta.L.R.(2d) 388 (Alta.C.A.) ('permits' synonymous with 'allow' or 'let'); R. v. MacLean and MacLean (No.2) (1981), 63 C.C.C.(2d) 204 (Ont.Dist.Ct.) ('allows' means 'permits'); Staul v. Crawford (1968), 64 W.W.R. 568 (B.C.Co.Ct.) ('suffer' means 'allow' or 'permit'). In contrast, however, in R. v. Wenberg, [1938] 1 W.W.R. 161 (Alta.S.C.) it was suggested at 163 that the word 'suffer' puts a greater responsibility upon the accused than if the words 'allow' or 'let' or 'permit' had been used.

67. supra note 5, at 163.

68. See, for example, the exhaustive study by Edwards, supra note 5; Smith & Hogan, supra note 5, at 112-115; Williams, Criminal Law: The General Part, supra note 2, at 163-168; Williams, Textbook of Criminal Law, supra note 2, at 126-127.

69. [1972] A.C. 824.

70. See Williams, Textbook of Criminal Law, supra note 2, at 938-939, where he draws a distinction between causing the actus reus of an offence to be done by another, which requires mens rea, and causing non-human events, which may require no knowledge. See also Smith & Hogan, supra note 5, at 115. The difficulties of an approach that attempts to impose a fixed and inflexible mens rea component for a verb were noted by Howard, supra note 8, at 55.

71. See, for example, R. v. Whelan (1908), 9 W.L.R. 424 (B.C.Co.Ct.) ('allow'); The King v. Irish (1909), 14 C.C.C. 458 (Ont.H.C.) ('permit'); R. v. Dobie (1921), 35 C.C.C. 10 (B.C.C.A.) ('permit' or 'suffer'); R. v. Stokes, [1924] 3 W.W.R. 869 (Alta.C.A.) ('permit'); R. v. North-Western Hotel Company Limited, [1943] 2 W.W.R. 182 (Sask.K.B.) ('suffer' or 'permit'); R. v. Shatsky (1945), 1 C.R. 155 (Sask.K.B.) ('suffer' or 'permit'); R. v. Hawinda Taverns Ltd. (1955), 112 C.C.C. 361 (Ont.Co.Ct.) ('permit' or 'suffer'); Freake v. Hammersley (1955), 36 M.P.R. 140 (Nfld.S.C.) ('allow'); R. v. Sawicki (1960), 32 W.W.R. 380 (Sask.Q.B.) ('allow'); R. v. Dianne Hotels Ltd. (1964), 44 C.R. 97 (Yuk.Mag.Ct.) ('permit'); R. v. Schill (1968), 64 W.W.R. 316 (Sask.Dist.Ct.) ('permit' or 'suffer'); R. v. Bd. of Long Lake School Unit No.30 of Saskatchewan (1974), 18 C.C.C.(2d) 58 (Sask.C.A.) ('cause' or 'allow'); R. v. Reynolds (1977), 34 C.C.C.(2d) 450 (N.W.T.S.C.) ('permit').

72. See, for example, R. v. Bruin Hotel Co. (1954), 12 W.W.R.(N.S.) 387 (Alta.C.A.) ('suffer' or 'permit'); R. v. Pecconi (1970), 1 C.C.C.(2d) 213 (Ont.H.C.) ('cause'); R. v. Ford Motor Co. of Canada Ltd. (1973), 12 C.C.C.(2d) 8 (Ont.Prov.Ct.) ('cause' or 'permit'); R. v. Cherokee Disposals and Construction Ltd. (1973), 13 C.C.C.(2d) 8 (Ont.Prov.Ct.) ('cause' or 'permit'); R. v. Industrial Tankers Ltd., [1968] 2 O.R. 142 (Ont.Co.Ct.) ('cause' or 'permit'); R. v. Chinook Chemicals Corp. Ltd. (1974), 17 C.C.C.(2d) 559 (Ont.Prov.Ct.) ('cause' or 'permit'); R. v. Power Tank Lines Ltd. (1975), 23 C.C.C.(2d) 464 (Ont.Prov.Ct.) ('cause' or 'permit').

73. E.G. Ewaschuk, "Corporate Criminal Liability and Related Matters" (1975), 29 C.R.N.S. 44 at 58.

74. (1971), 4 C.C.C.(2d) 196; see also the way in which this was interpreted in R. v. Dovco Holdings Ltd. (1977), 34 C.C.C.(2d) 317 (Ont.Div.Ct.).

75. Id. at 202-203.

76. (1953), 10 W.W.R.(N.S.) 146 (Man.C.A.); see also Clarke v. R. (1969), 5 C.R.N.S. 291 (Ont.Co.Ct.).

77. (1978), 40 C.C.C.(2d) 353 (S.C.C.) at 375.

78. As was noted by Dickson J. in Sault St. Marie, the new category of strict, as opposed to absolute liability, was applied prior to Sault Ste. Marie in R. v. Servico Limited (1977), 2 Alta.L.R. 388 (Alta.C.A.), a case involving the proper interpretation of the word 'permit'.

79. For cases involving 'knowingly permits', see R. v. Fellger (1954), 13 W.W.R.(N.S.) 132 (Alta.Dist.Ct.); Hinkey v. Matoba; Jenkins v. McDougall (No.2) (1952), 6 W.W.R. 85 (Alta.Dist.Ct.). For cases interpreting a statute using the phrase 'wilfully suffer', see R. v. Winberg, [1938] 1 W.W.R. 161 (Alta.S.C.) and Davidson v. Canadian Pacific Railway Company (1952), 9 W.W.R.(N.S.) 239 (Alta.Dist.Ct.).

80. Edwards, supra note 5, at 119-122. He does, however, acknowledge that there are occasions where the word 'knowingly' does have an additional role of its own over and above modifying permitting; Smith & Hogan, supra note 5, at 114.

81. supra note 77, at 375.

82. In "Sault Ste. Marie, Mens Rea and the Halfway House: Public Welfare Offences get a Home of Their Own" (1979), 17 O.H.L.J. 415 at 443, Allan Hutchinson is critical of the "result-oriented" basis of the decision and argues that the prior caselaw cited by the Court did not necessarily lead to the conclusion that the offence should be one of strict liability. However, an examination of the prior caselaw, particular Royal Canadian Legion, supra note 74, and Miller, supra note 76, does suggest that strict liability, as in Sault Ste. Marie, was exactly the approach that many courts would have preferred to adopt had the option been open. For an example, see R. v. Servico, supra note 78. In R. v. Bd. of Long Lake School Unit No.30 of Saskatchewan, supra note 71, the judge at first instance did place the offence in the "third category" of strict, as opposed to absolute, liability. On appeal, his approach was rejected on the grounds that there were only two categories of offences.

83. Williams, Textbook of Criminal Law, supra note 2, at 127; Williams, Criminal Law: The General Part, supra note 2, at 163. Older Canadian caselaw also seems to suggest this; see R. v. Dobie, R. v. North-Western Hotel Co. Ltd., R. v. Shatsky, R. v. Hawinda Taverns Ltd., R. v. Sawicki, R. v. Dianne Hotels Ltd., all supra note 71. These decisions were all based on the English case of Somerset v. Wade, [1894] 1 Q.B. 574, where it was held that a person could not be convicted of 'suffering' gaming in the absence of "knowledge, connivance, or carelessness" on his part. There is never any discussion in any of the cases about whether "carelessness" is enough to constitute mens rea; the quote is simply reproduced.

84. For other cases, see R. v. Aberdeen Paving Ltd. (1981), 45 N.S.R.(2d) 344 (N.S.C.A.); Ministry of the Environment v. Exolan Co. of Canada Ltd. (1981), 36 O.R.(2d) 530 (Ont.Prov.Ct.); R. v. Byron Creek Collieries Limited (1978), 8 C.E.L.R. 31 (B.C.Co.Ct.).

85. (1980), 30 N.B.R.(2d) 365 (N.B.Q.B.).

86. (1980), 4 M.V.R. 241 (Ont.Co.Ct.).

## Presumption of Innocence and Burden of Proof

A comprehensive analysis of the burden of proof in criminal law is beyond the scope of this paper. Nonetheless, as the previous discussion demonstrates, which party bears the burden of proof and the extent of that burden are often crucial at trial. Regardless of the mental element of the offence, which side has the onus of its proof or disproof may make the difference between conviction and acquittal.

The right to be presumed innocent until proven guilty is now guaranteed in s.11(d) of the Charter of Rights, which states:

> Any person charged with an offence has the right
>
> ...
>
> (d) to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal;....

In R. v. Oakes, the Supreme Court of Canada described the presumption of innocence as "a hallowed principle lying at the very heart of criminal law"[1] and held that s.11(d) had the following minimum content:[2]

> First, an individual must be proven guilty beyond a reasonable doubt. Secondly, it is the State which must bear the burden of proof.... Thirdly, criminal prosecutions must be carried out in accordance with lawful procedures and fairness.

The offence at issue in Oakes was possession of a narcotic for the purpose of trafficking, clearly a true criminal offence. Nonetheless, Dickson C.J.C. was interpreting s.11(d) of the Charter, a provision that applies to every person charged with an "offence". Since a public welfare offence is as much an offence as possession for the purpose of trafficking, the rules set out in Oakes should apply equally to the prosecution of federal or provincial public welfare offences.

It never seems to have been seriously doubted that, where the burden of proof lies on the Crown prosecuting a provincial offence, the Crown must prove its case beyond a reasonable doubt.[3] Similarly no case appears ever to have suggested that, where an offence is classed as regulatory rather than truly criminal, the Crown no longer bears the burden of proving beyond a reasonable doubt. Therefore, even where an accused is charged with a strict or absolute liability offence, the Crown must prove the actus reus beyond a reasonable doubt before the accused may be convicted.[4]

The second requirement under s.11(d), that is, that the Crown must bear the burden of proof, has proved more troublesome and has generated considerable caselaw. The rights guaranteed by s.11 are subject to s.1 of the Charter which provides that they may be restricted by "such reasonable limits proscribed by law as may be demonstrably justified in a free and democratic society". Therefore, provided that it can meet the test in s.1. a legislature may alter the general rule that the Crown bears the burden of proof.

Numerous exceptions to the general rule may be found in legislation. Sometimes a statute sets out special rules for certain types of offences; s.794(2) of the Criminal Code, which enacts special rules for summary conviction offences, is an example. Often, however, an offence itself is drafted in such a way as to modify the normal rules of proof, usually through the use of presumptions and other provisions that specifically cast a burden on the accused.[5] Where a statute contains a reverse onus provision that imposes a persuasive burden on the accused to prove or establish a given fact, the accused must do so on a balance of probabilities.[6] After Oakes, many true reverse onus provisions presently found in statutes may be ruled unconstitutional; some, at least, will probably be upheld under s.1.

Not all presumptions impose a legal burden on an accused. Some impose only an evidential burden so that they may be rebutted if the accused has adduced sufficient evidence to raise a reasonable doubt. In R. v. Proudlock,[7] a case decided prior to the Charter, the Supreme Court of Canada considered what was then s.306(2)(a) of the Criminal Code, which provided that evidence that an accused broke and entered a place was proof, in the absence of evidence to the contrary, that he did so with an intent to commit an indictable offence. Pigeon J. held that the words "in the absence of evidence to the contrary" created only a prima facie presumption against the accused and continued:[8]

> The burden of proof does not shift. The accused does not have to "establish" a defence or an excuse, all he has to do is raise a reasonable doubt. If there is nothing in the evidence adduced by the Crown from which a reasonable doubt can arise, then the accused will necessarily have the burden of adducing evidence if he is to escape conviction. However, he will not have the burden of proving his innocence, it will be sufficient if, at the conclusion of the case on both sides, the trier of fact has a reasonable doubt.

The Supreme Court of Canada has yet to consider whether presumptions such as the one considered in Proudlock violate s.11(d).[9]

So far most cases considering the presumption of innocence in s.11(d) have involved true criminal offences. Where public welfare offences are in issue, it is quite possible that courts will more readily invoke s.1 of the Charter to justify deviation from the normal rules of proof in criminal cases. Already there have been suggestions in various decisions of the Supreme Court of Canada that different Charter standards may apply to public welfare offences.[10] Therefore, while the courts may very strictly protect the presumption of innocence for true criminal offences, they may be prepared to accept lower standards for public welfare offences in the interests of administrative efficiency.

In order to demonstrate the impact that the allocation of the burden of proof may have, two illustrations are provided below. Both examples show how poorly the courts deal with questions of burden of proof and therefore serve to demonstrate the care that should be used in drafting offences to ensure that the burden falls where it is intended to fall. Without an awareness of the ways in which legislative intention as to burden of proof may be interpreted by the courts, attempts to provide certain defences for an accused may misfire and result in him bearing a burden to prove lack of mens rea where that was not the intention.

† Criminal Code, s.794(2)

One exception to the general rule that the Crown bears the burden of proof is the provision, found in various statutes, that stipulates that, where an accused claims that an exemption, exception or excuse operates in his favour, the burden is on him to prove this.[11] For example, s.794(2) of the Criminal Code provides:

> The burden of proving that an exception, exemption, proviso, excuse or qualification prescribed by law operates in favour of the defendant is on the defendant, and the prosecutor is not required, except by way of rebuttal, to prove that the exception, exemption, proviso, excuse or qualification does not operate in favour of the defendant, whether or not it is set out in the information.

Similar provisions may be found in a number of other statutes that create both true crimes and public welfare offences.[12] It should be noted that s.794(2) appears in Part XXVII of the Code which governs proceedings in summary conviction matters; there is no analogous provision for proceedings under the Code in indictable matters.

At first blush the provision appears to be quite sweeping; interpreted at its broadest it would reverse the burden of proof wherever an accused being tried for a summary conviction offence raised any defence at all! At least one court has suggested that the provision does operate in this fashion holding that, where an accused raises a common law defence such as necessity, the burden shifts to him to prove that defence on a balance of probabilities.[13] This broad interpretation has, however, been soundly rejected, most recently by the Supreme Court of Canada in R. v. Perka.[14]

The recent caselaw indicates that the scope of s.794(2) and analogous provisions is really quite narrow. Such provisions are intended to apply only where a statute broadly prohibits the carrying out of certain activities but then creates specific exemptions from the prohibition. Where an accused is charged under such a statute, the provision places the burden on him to prove that he falls within one of the exemptions.[15] This was recently clarified by the Supreme Court of Canada in R. v. Perka,[16] where the accused were charged with various offences under the Narcotic Control Act. When the accused raised the defence of necessity, the Crown argued that s.7(2) of the Narcotic Control Act, which is worded similarly to s.794(2), placed the burden on them to prove the defence. Dickson C.J.C. rejected the suggestion that s.7(2) should be applied in this fashion. He noted that the Narcotic Control Act contains broad prohibitions but then sets out a number of statutory exceptions to those prohibitions. He therefore concluded:[17]

> It seems clear that it is to these statutory exceptions that s.7(2) refers, and not to common law defences such as necessity. One who wishes to plead the possession of a licence or other lawful authority in response to a charge of importation bears, under s.7(2), the burden of persuading the trier of fact that such licence exists. One who pleads necessity bears no such burden. Section 7(2) does not place a persuasive burden as to the defence of necessity on the accused.

Provisions such as s.794(2) are codifications of old common law rules that had developed in relation to pleading.[18] The historical origins of the common law rule were examined in detail by the English Court of Appeal in R. v. Edwards.[19] The accused in that case appealed his conviction on a charge of selling intoxicating liquor without a licence; the main issue was who bore the burden of proving whether the accused had a licence. Lawton L.J. traced the development of the rule and concluded that it had developed from the ancient rules relating to the pleading of negative averments. As such, it was simply a codification of old pleading practices and was in no way connected with a requirement, suggested in some quarters, that the information had to be particularly within the knowledge of the accused before it would apply.[20] He stated:[21]

> In our judgment this line of authority establishes that over the centuries the common law, as a result of experience and the need to ensure that justice is done both to the community and to defendants, has evolved an exception to the fundamental rule of our criminal law that the prosecution must prove every element of the offence charged. This exception, like so much else in the common law, was hammered out on the anvil of pleading. It is limited to offences arising under enactments which prohibit the doing of an act save in specified circumstances or by persons of specified classes or with specified qualifications or with the licence or permission of specified authorities. Whenever the prosecution seeks to rely on this exception, the court must construe the enactment under which the charge is laid. If the true construction is that the enactment prohibits the doing of acts, subject to provisos, exemptions and the like, then the prosecution can rely upon the exception.

He further noted that the burden placed on the accused was not merely an evidentiary burden; once the rule was invoked, a persuasive burden shifted to the accused to prove on a balance of probabilities that he had been entitled to do the act. Lawton L.J. was, however, clearly uncomfortable with the potential scope of the rule. He remarked that the rule, "like nearly all rules", could be applied in an oppressive fashion; he then suggested that "the Courts have ample powers to curb and discourage oppressive prosecutors and do not hesitate to use them".[22] Lawton L.J.'s discomfort is readily understandable. Even limiting s.734(2) and analogous provisions to the narrow role prescribed for them in Perka and Edwards, they still constitute a serious violation of the presumption of innocence.

The Ontario Court of Appeal considered whether such provisions violate the presumption of innocence in s.11(d) of the Charter in R. v. Lee's Poultry

Ltd.[2]. The accused had been convicted at trial on a charge of operating a plant without a licence, contrary to s.16 of the Meat Inspection Act (Ont.). On appeal to a County Court Judge, the conviction was overturned on the ground that s.48(3) of the Provincial Offences Act, which is analogous to s.794(2) of the Criminal Code, violated s.11(d). The Crown then appealed to the Ontario Court of Appeal. Brooke J.A., speaking for the Court, confirmed that the scope of s.48(3) was very narrow. He cited Edwards with approval and held that, since s.48(3) derived from an old rule of pleading, it was not a true reverse onus provision and consequently did not violate the Charter.[24]

The analysis of Brooke J.A. does not stand up under scrutiny. Regardless of the origin of the provision, its effect is to cast a burden on the accused to disprove an element of the offence on a balance of probabilities. As such it arguably violates the s.11(d) standard set out by Dickson C.J.C. in Oakes:[25]

> In general one must, I think, conclude that a provision which requires an accused to disprove on a balance of probabilities the existence of a presumed fact, which is an important element of the offence in question, violates the presumption of innocence in s.11(d).

There is, however, always a possibility that such provisions may be upheld under s.1 of the Charter on the ground that the matter is one particularly within the knowledge of the accused and it would impose too great a burden on the prosecution to have to prove that no exemption applied.[26]

A question also exists as to whether a similar common law rule applies when offences are tried by indictment.[27] Since the Criminal Code makes specific provision for summary conviction offences, but is silent with respect to indictable offences, the better view is that there is no such reverse onus for indictable offences. If this is the case, however, an anomalous situation is created where offences are hybrid since the burden of proving exceptions and exemptions will shift depending on the way in which the Crown elects to proceed.[28] In such cases, it would certainly be open to an accused to argue that this results in a violation of his right to equal treatment under the law, guaranteed in s.15 of the Charter.[29]

The elimination of s.794(2) and analogous provisions, either through legislative action or a successful Charter challenge, would be highly desirable. As the situation stands now, the provisions are haphazardly applied and it is clear that many judges are not even aware that they exist. Furthermore, despite Perka and Lee's Poultry, these provisions continue to be applied to inappropriate offences. Where the legislature wishes to place the onus on an accused to prove that he was licensed or otherwise exempted from a prohibition, a specific provision should be included with the offence. Not only would this approach better serve the interests of justice, the selective targeting of specific offences might render the provisions less susceptible to challenge under the Charter.

'Without lawful excuse'

The phrase 'without lawful excuse' appears frequently in provisions creating both true crimes and public welfare offences; often there is a further stipulation that the onus of proving any lawful excuse is on the accused.[30]

Notwithstanding its frequent appearance, the meaning of the phrase is far from clear, a fact that has been the subject of unfavourable comment by certain judges.[31] In his text, Legislative Drafting, G.C. Thornton writes:[32]

> I think it is likely that many a draftsman uses the phrase "without lawful excuse" with none too clear a vision of what the phrase is likely to mean in the proposed context. This is not too surprising as the phrase has a comforting effect on one's liberal tendencies and anyway there is not much authority about it.

Until the recent decision of the Supreme Court of Canada in R. v. Holmes,[33] the caselaw provided little guidance as to what was meant by a 'lawful excuse'. In general the courts had declined to set out general rules governing what might constitute a lawful excuse on the grounds that each case must depend on its own facts and context. The approach was perhaps best described by Morden J.A. in R. v. Royka:[34]

> The use of the expression "without lawful excuse" in offence-creation provisions has long been a common one. No standard or comprehensive meaning can be ascribed to it. In the absence of a specific definition being given to it, its meaning has to be determined from the object of the legislation in which it appears and the subject matter of its immediate context.

In view of the wide variety of circumstances in which a 'lawful excuse' might arise, this judicial reticence is understandable. Unfortunately, the reluctance of the courts to delineate the limits of the phrase meant it was treated in a rather haphazard way, with little conceptual analysis of the way it should operate, regardless of the specific context. Although the matter has now been somewhat clarified by the Supreme Court of Canada in Holmes, the caselaw illustrates the confusion that may ensue when a term is used in legislation without a clear idea of what it is expected to achieve.

It appears that where a Criminal Code offence contains the words 'without lawful excuse', with no reference to who bears the burden of proof, the onus is on the Crown to prove beyond a reasonable doubt that the accused did not have a lawful excuse.[35] Arguably this should also be the case where the offence is one involving strict liability.[36] The difficulty that this requirement poses for the Crown has not escaped the notice of the courts. Some judges have suggested that very little proof may suffice and that it must often be drawn by inference from other proven facts.[37] Others have suggested that the phrase actually does cast an evidentiary burden on an accused to adduce some evidence of lawful excuse, although all he need do is raise a reasonable doubt as to his guilt.[38]

Most provisions containing a lawful excuse exception explicitly provide that the burden of proof is on the accused. The way in which the lawful excuse exception operates where it is so drafted was, until recently, the subject of considerable controversy. The only point of agreement seemed to be that the burden was shifted to the accused to prove the lawful excuse on a balance of probabilities.[39]

In the majority of cases in which such provisions have been considered, the courts appear to have favoured an interpretation that reversed the burden with respect to one of the essential elements of the offence, in many cases knowledge of an essential fact.[40] It is suggested that this approach is incorrect, both because it is inconsistent with basic canons of statutory interpretation and because it does not accord with either the fundamental tenets of criminal law or with s.11(d) of the Charter of Rights.

Where the lawful excuse provision in a true criminal offence makes no reference to who bears the burden of proof, the courts have indicated that in addition to proving all the elements of the offence, the Crown must also prove that the accused had no lawful excuse; as such the lawful excuse exception is treated as a superadded defence over and above those normally available to an accused.[41] From a statutory interpretation perspective this approach is correct since there would otherwise be no need to include the phrase. In criminal offences requiring proof of full mens rea it is implicit that the traditional common law defences such as drunkenness, duress and necessity will be available to an accused; there is no need to make specific provision for them when drafting an offence. Therefore, where additional words such as 'without lawful excuse' are included in a provision, it may be assumed that they import something beyond the regular common law defences.

There is no reason why the phrase should operate differently simply because words are included to reverse the burden of proof. If the phrase 'without lawful excuse' does not refer to any of the essential elements of the offence when it stands alone, it should not have this effect when a qualification is added. Surely the proper approach in such cases is to require the Crown to prove all the elements of the offence; after the case has been proved, the accused may then be permitted to establish that, although he did commit the offence in question, he had a lawful excuse for so doing.

This was the approach followed by the Ontario Court of Appeal in R. v. Santeramo,[42] where the accused appealed his conviction on a charge of possession of counterfeit money "without lawful justification or excuse, the proof of which lies upon him".[43] The sole issue before the Court was whether the Crown had to prove that the accused knew the money was counterfeit or whether, once the Crown had established that the accused had actually been in possession of counterfeit money, the burden fell on the accused to prove, on a balance of probabilities, that he had not known that the money was counterfeit.

In a carefully reasoned decision, the Court focused on the central role of the doctrine of mens rea in the criminal law and held that the phrase did not obviate the need for the Crown to prove knowledge on the part of the accused. Brooke J.A., speaking for the Court, went to great lengths to distinguish caselaw cited by the Crown as authority for the proposition that the onus was on the accused to prove lack of knowledge. By characterizing R. v. Robinson[44] as a case where the lawful excuse alleged had not been lack of knowledge but rather lack of intention to use the counterfeit coins as currency, he was able to treat inconvenient statements made by Laskin J. in the Supreme Court of Canada as obiter. Instead he adopted, as the basic principle upon which his judgment was founded, the classic statement made by Cartwright J. in R. v. Beaver:[45]

> The essence of the crime is the possession of the forbidden substance and in a criminal case there is in law no possession without knowledge of the character of the forbidden substance.

Applying Beaver to the offence under consideration, he concluded that the burden was on the Crown to prove knowledge on the part of the accused. In his view the effect of the phrase 'without lawful excuse or justification' was simply to provide the accused with an additional defence that might be raised once the Crown had proved beyond a reasonable doubt that the accused had been in possession of coins he knew to be counterfeit. Brooke J.A. explained:[44]

> The issue of lawful justification or excuse arises only after the Crown has proved beyond a reasonable doubt the elements of the offence. So in this case at the conclusion of the evidence if there was a reasonable doubt as to an element of the offence, the accused ought to be acquitted. If, on the other hand, the Crown has satisfied its onus in that regard beyond a reasonable doubt, then the trial Judge must consider if the accused has proved a defence of lawful justification or excuse by a preponderance of evidence....
>
> In my view, the inclusion of the words "lawful justification or excuse" ought to be so construed; that is to say, construed as adding a defence that would not otherwise be available under the section and not as limiting the meaning of the section by eliminating what would otherwise be an element in the Crown's case and the defence that it had not been proved.

Although Brooke J.A. did acknowledge that it was within the power of Parliament to create a criminal offence that operated in the way argued by the Crown, he indicated that it would take "clear unequivocal language" in order to do so. In the absence of a clear indication of such an intention, it would offend the basic principles of criminal law to interpret a provision in that manner.

Santeramo was decided before the Charter of Rights came into force in 1982. Since s.11(d) of the Charter now provides a constitutionally entrenched right to be presumed innocent until proven guilty, the Santeramo analysis might have been expected to gain some acceptance as a way to interpret similarly worded offences in a constitutional fashion. Instead, until the Supreme Court of Canada released its decision in Holmes v. R.,[47] the Santeramo approach was virtually ignored.

Indeed, Santeramo was flatly rejected by the majority judgment of the British Columbia Court of Appeal in R. v. Burge.[48] As in Santeramo, the offence under consideration was possession of counterfeit money. The Crown appealed the trial judge's decision to quash the indictment on the grounds that the phrase 'without lawful justification or excuse, the proof of which lies upon him' created a reverse onus provision that violated s.11(d). Carrothers J.A., with whom Cheffins J.A. concurred, held that Santeramo was wrongly decided and that once the Crown has proved possession of money that is, in fact, counterfeit, the accused's knowledge of its counterfeit nature is to be presumed. The accused is then entitled, as a matter of lawful justification or excuse, to prove on a balance of probabilities that he had not known that it was counterfeit.

The majority reasoning in Burge is open to criticism since Carrothers J.A. clearly did not fully understand the Supreme Court of Canada's decision in Oakes.[49] Throughout his reasons for judgment he failed to appreciate that, on his interpretation, the lawful excuse provision under consideration fell squarely within the class of reverse onus provisions prohibited in Oakes. At one point he explicitly stated that his interpretation did not place such a burden of proof on the accused with respect to an essential element of the offence; it merely required him to displace a presumption. Since the presumption involved knowledge that the money was counterfeit, surely an essential element of the offence, and required proof by the accused on a balance of probabilities, it is difficult to see how this did not have precisely the effect that he claimed it did not have.

Carrothers J.A.'s interpretation converted the offence into one of strict liability, imposing a burden on the accused to disprove an essential element of the offence; as such, it should have resulted in a clear violation of s.11(d) which could only be saved under s.1 of the <u>Charter</u>. Unfortunately, Carrothers J.A. also misunderstood the proper approach to s.1 as set out in <u>Oakes</u>. Under the <u>Oakes</u> analysis, the violation of s.11(d) might have been permissible if the Crown had proved it to be 'a reasonable limit prescribed by law that was demonstrably justified in a free and democratic society' under s.1. Instead of following this two-step process, however, Carrothers J.A. telescoped ss.11(d) and 1 and concluded that there was no violation of s.11(d) because the reverse onus was reasonable. Thus reasonableness was integrated into s.11(d) and did not have to be established by the Crown under s.1.

In a strong dissent, Hutcheon J.A. expressly adopted the approach of the Ontario Court of Appeal in <u>Santeramo</u>, calling it "a masterful analysis of Canadian, English and United States decided cases".[60] As a result, he did not have to consider <u>Oakes</u> or the way it had been misinterpreted by his colleagues.

The issue was finally addressed by the Supreme Court of Canada in <u>R.</u> v. <u>Holmes</u>,[61] where the majority of justices hearing the case opted for a <u>Santeramo</u>-type analysis. In that case the accused was charged with possession of house-breaking instruments "without lawful excuse, the proof of which lies upon him". The trial judge quashed the indictment on the grounds that the phrase created a reverse onus provision that violated the presumption of innocence in s.11(d) of the Charter of Rights. On appeal by the Crown, the Ontario Court of Appeal found that the provision did not contain a true reverse onus provision and that consequently there was no constitutional violation.[8-2]

Writing for the Court, Lacourcière J.A. began by noting that the Crown must prove all the elements of the offence beyond a reasonable doubt; only then did a burden shift to the accused to prove a lawful excuse on a balance of probabilities. He thus approved the Santeramo approach, albeit without mentioning the case itself. He then considered what circumstances might constitute a lawful excuse.

He divided lawful excuses into two categories. The second class of excuse was the kind envisaged in Santeramo. Lacourcière J.A. gave as an example an explanation that the accused was a plumber or a tradesman who used such tools to practice his trade. In such cases, where the Crown had proved all the elements of the offence beyond a reasonable doubt, it would be open to the accused to prove that since he was a plumber he had a lawful excuse for possessing the suspicious tools. The first category of excuse, however, was comprised of traditional common law defences such as duress, automatism, insanity and drunkenness, which normally an accused would not be required to prove. Lacourcière J.A. labelled these "extraneous excuses" since they would only be invoked by an accused to exculpate himself after the Crown had proved all the elements of the offence.[83]

Although this was not clearly articulated in the decision, he apparently believed the phrase 'without lawful excuse, the proof of which lies upon him' to have a two-fold effect. It provided the accused with an additional defence of innocent purpose. It also reversed the normal burden of proof for criminal defences by requiring the accused to prove certain defences on a balance of probabilities rather than simply permitting him to adduce evidence that raised a reasonable doubt. In his view this could not violate s.11(d) of the Charter because the accused would still to be presumed innocent until the Crown had proved all the elements of the offence. It simply altered the burden for proving defences that might exculpate the accused once it had been established that the offence had been committed.

In the Supreme Court of Canada, the five-member court agreed unanimously that the appeal should be dismissed and the case remitted for trial.[64] The Justices did not, however, all follow the same path in reaching this conclusion. McIntyre J., with whom two other Justices concurred on this point, adopted the approach set out in Santeramo and held that the words had originally been included in the offence to provide a defence of innocent purpose. In his view subsequent amendments to the provision had rendered the phrase redundant although it had been retained out of an abundance of caution. He insisted that it could not possibly have been intended to include traditional common law and statutory defences, stating:[65]

> The words "without lawful excuse" do not encompass excuses and justifications that would exist if those words were omitted from the section, and thus require proof by the accused. Manifestly, if the words were omitted from the Code, general common law excuses, such as duress or authorization by law, would continue to be available to the accused. The conclusion that these general common law excuses are not encompassed within the phrase "without

> lawful excuse", entails the further conclusion that these excuses need not be proved on a balance of probabilities since they are not affected by the words "the proof of which lies upon him". Consequently, these excuses are, and have always been, with respect to this offence, available to an accused on exactly the same basis as they are in any other criminal offence: as long as the accused can raise a reasonable doubt, he is entitled to an acquittal.

It is possible to quibble with the details of his reasons for judgment -- careful reflection suggests that the provision is not superfluous because there are still situations where the phrase may provide a defence for an accused. Nonetheless, the general thrust of his decision is clearly correct. Basic principles of criminal law stipulate that traditional common law defences will be available to an accused, regardless of whether the offence with which he is charged contains the words 'without lawful excuse'. Therefore, the only possible justification for including these words in an offence would be to provide a defence that would not otherwise be available.

A very different approach was followed by Dickson C.J.C. with whom Lamer J. concurred. In rather technical and legalistic reasons for judgment, he disagreed with the interpretation given to the phrase by the majority and instead adopted a position that closely resembled that taken by Lacourcière J.A. in the Court of Appeal. In his view, s.7(3) of the Criminal Code uses the word 'excuse' broadly when it provides that all common law justifications and excuses continue to be available under the Code.[56] Since Parliament has given no indication that it intended a more narrow scope for the word when it was used in the phrase 'without lawful excuse', it must be taken to have intended all excuses, not just that of innocent purpose, to fall within its ambit.[57] Therefore, whenever an accused seeks to raise an extraneous excuse to exculpate himself after the Crown has proved its case, he must prove it on a balance of probabilities.[88]

Dickson C.J.C.'s reasons for judgment are troubling in a number of ways. He ignores the fact that, notwithstanding the basic principles of statutory interpretation, the Criminal Code was drafted at different times with different objects in mind. Therefore it should not necessarily be assumed that any word is used consistently throughout the entire Code. Furthermore, the interpretation he gives to the phrase flies in the face of some of the most basic principles of criminal law. Surely more substantial evidence should have been required before Parliament was taken to have abridged such fundamental principles. Finally, and perhaps most damning, is the fact that the reasoning itself is faulty since he appears to have confused two related but distinct concepts. His decision is clearly based on the Lacourcière notion of extraneous excuses that may be raised once the Crown has proved its case. Nonetheless he repeatedly refers to excuses in apparent contrast to justifications, a distinction recognized in s.7(3) of the Criminal Code but which is by and large ignored in Canadian criminal law. As a result, this section of his reasons for judgment is difficult to follow.

After Holmes, the issue of the effect of the phrase 'without lawful excuse, proof of which lies upon him' should be finally settled. Although certain portions of his reasons for judgment suggest that McIntyre J. intended to confine his holding to the specific offence under consideration, the general statement that the phrase does not apply to those defences that would be available even if the phrase was not included in the provision is broad enough to apply to all offences. Since this is the only interpretation which accords with both the general principles of statutory interpretation and the fundamental tenets of criminal law, it may be hoped that it will prevail.[59]

The cases discussed above involved offences requiring proof of full mens rea. Where a provision creates a strict liability offence there is no reason, however, why a lawful excuse exception should not operate in the same fashion. The approach presupposes that the term 'lawful excuse' provides an accused with an additional defence beyond those that would normally be available to him. Where an offence is one of strict liability, there may be occasions where an accused may have a lawful excuse that cannot be categorized either as a reasonable mistake of fact or due diligence. In such cases, the inclusion of the phrase 'without lawful excuse' may provide a defence where an accused would otherwise have been convicted.

A question remains as to who should bear the burden of proof when a strict liability offence contains a lawful excuse exception that is silent as to the burden of proof. Although this issue does not appear ever to have received judicial consideration, the better view would seem to be that the burden would be on the Crown. Sault Ste. Marie was simply a mens rea case. Where defences not directly relating to mens rea are invoked by an accused, Sault Ste. Marie should have no application and the normal rules governing burden of proof should apply.

## Presumption of Innocence and Burden of Proof

### Notes

1. (1986), 24 C.C.C.(3d) 321 at 333.

2. Id. at 334-335.

3. R. v. DiLorenzo; R. v. Bancroft (1984), 11 C.C.C.(3d) 13 (Ont.C.A.); R. v. Ball (1978), 32 N.S.R.(2d) 579 (N.S.Co.Ct.); R. v. Peleshaty (1949), 96 C.C.C. 147 (Man.C.A.); R. v. Nat Bell Liquors Ltd., [1922] A.C. 128 (P.C.). See, however, Marc Rosenberg, "The Charter: Presumptions and the Duty on the Prosecution to Provide Evidence to the Defence" (1985), 31 M.V.R. 181 at 181-182, where he suggests that there is an argument that the reasonable doubt standard need not apply to provincial offences.

4. This is, of course, not to say that the legislature could not alter the reasonable doubt standard as long as it could meet the requirements of s.1. So far, however, this does not appear ever to have been an issue, presumably because the reasonable doubt standard is very deeply entrenched in Canadian criminal jurisprudence.

5. An idea of the types of presumptions that may be found in legislation is provided by Dickson C.J.C. in Oakes, supra note 1, at 330-331.

6. This was the type of reverse onus provision struck down in Oakes, supra note 1; see also R. v. Appleby (1971), 3 C.C.C.(2d) 254 (S.C.C.).

7. (1978), 43 C.C.C.(2d) 321 (S.C.C.).

8. Id. at 325.

9. It might be noted that in its recommendations for a new Criminal Code, contained in Report 30: Recodifying the Criminal Law (Ottawa, 1986), the Law Reform Commission of Canada appears to have eliminated virtually all presumptions. The Commission expressly states, at 72, that it was motivated in part by concerns over s.11(d) of the Charter.

10. See Reference Re Section 94(2) of the Motor Vehicle Act (B.C.) (1985), 48 C.R.(3d) 289 (S.C.C.); R. v. Vaillancourt (1987), 60 C.R.(3d) 289 (S.C.C.).

11. These provisions have been the subject of considerable academic criticism; see Marc Rosenberg, supra note 3; Rupert Cross, "The Golden Thread of the English Criminal Law", Rede Lecture, 1976 (Cambridge: Cambridge University Press, 1976).

12. For other examples, see Narcotic Control Act, R.S.C. 1985, c.N-1, s.7(2); Food and Drugs Act, R.S.C. 1985, c.F-27, ss.41(2), 50(2); Tobacco Products Control Act, S.C. 1988, c.20, s.19(3); Provincial Offences Act, R.S.O. 1980, c.400, s.48(3).

13. R. v. Kennedy (1972), 7 C.C.C.(2d) 412 (N.S.Co.Ct.).

14. (1984), 14 C.C.C.(3d) 385 (S.C.C.); see also R. v. Walker (1979), 48 C.C.C.(2d) 126 (Ont.Co.Ct.).

15. Reference should, however, be made to the recent decision of the House of Lords in R. v. Hunt, [1987] 1 All E.R. 1, where the scope of the common law equivalent of s.794(2) was extended. In "The Presumption of Innocence: A New Era" (1988), 67 Can.B.Rev. 1, Richard Mahoney provides a very interesting discussion of s.794(2) and the developments in England at 40-49. Hunt has been the subject of considerable controversy; see Francis Bennion, "Statutory Exceptions: A Third Knot in the Golden Thread", [1988] Crim.L.R. 31; D.J. Birch, "Hunting the Snark: the Elusive Statutory Exception", [1988] Crim.L.R. 221; Patrick Healy, "Proof and Policy: No Golden Threads", [1987] Crim.L.R. 355; Peter Mirfield, "The Legacy of Hunt", [1988] Crim.L.R. 19.

Exactly what constitutes an "exception, exemption, proviso, excuse or qualification" has proved to be a source of difficulty for the courts. For a survey of the caselaw, reference should be made to R. v. Hundt (1971), 3 C.C.C.(2d) 279 (Alta.C.A.) and to Drinkwalter & Ewart, Ontario Provincial Offences Procedure (Toronto: Carswell, 1981) at 190-192.

16. supra note 14.

17. Id. at 405.

18. For an interesting discussion of the historical development, see David Finley, "The Presumption of Innocence and Guilt: Why Carroll Should Prevail over Oakes" (1984), 39 C.R. 115 at 123-125.

19. (1974), 59 Crim.App.R. 213.

20. The Court's position that the rule in no way depended on a circumstance being peculiarly within the knowledge of the accused was at odds with much of the caselaw up to that point. For a discussion in which it is assumed that the basis of the rule is special knowledge on the part of the accused, see Glanville Williams, Criminal Law: The General Part, 2nd ed. (London: Stevens & Sons, 1961) at 901-904.

21. supra note 19, at 221.

22. Id. at 221. A similar concern does not, however, appear to have troubled the House of Lords in R. v. Hunt, supra note 15.

23. (1985), 17 C.C.C.(3d) ~~539~~.

24. In determining that s.11(d) of the Charter was not violated, he applied the test set out by the Ontario Court of Appeal in R. v. Oakes (1983), 2 C.C.C.(3d) 339. That test was subsequently rejected by the Supreme Court of Canada in Oakes (1986), 24 C.C.C.(3d) 321. However, in view of the approach adopted by Brooke J.A. to the interpretation of s.48(3), it seems unlikely that he would have reached a different result had the Supreme Court of Canada's test been applied.

Prior to the decision in Lee's Poultry, the Ontario Court of Appeal's test in Oakes was applied to uphold the constitutionality of s.794(2), then s.730(2), of the Criminal Code in R. v. Rogers (1984), 29 M.V.R. 126 (Ont.H.C.). In that case the Court found that a true reverse onus was created; however, the provision was saved because it met the Court of Appeal's 'rational connection' test.

25. (1986), 24 C.C.C.(3d) 321 at 343. The recent decision of the Supreme Court of Canada in R. v. Holmes (1988), 64 C.R.(2d) 97 suggests that the provision may violate s.11(d) by requiring the accused to prove an element of the offence.

26. This is precisely the course taken in R. v. Gray (1986), 30 C.C.C.(3d) 234 (B.C.Co.Ct.), where the Court applied Oakes to hold that what was then s.730(2) violated s.11(d) of the Charter but upheld the provision under s.1.

27. Section 794(2) has been applied, no doubt incorrectly, in some cases where the Crown has proceeded by way of indictment: see R. v. Volk (1973), 12 C.C.C.(2d) 395 (Alta.C.A.) and Duchesne v. The Queen (1976), 36 C.R.N.S. 365 (Que.C.A). There has been virtually no consideration, however, of whether a common law rule exists in Canada, similar to the one Edwards and Hunt indicate exists in England. There appears to be only one reported case in which the issue has been raised. In R. v. Cameron, [1966] 4 C.C.C. 273 (Ont.C.A.), leave to appeal to S.C.C. denied (1967), 1 C.R.N.S. 277, Aylesworth J.A. firmly rejected the suggestion that such a common law rule operated in Canada with respect to trials on indictment. Laskin J.A. also appears to have adopted this position, although he subsequently suggested that such a rule may apply in "licence or permit" cases. MacKay J.A. seemed to create his own common law rule, suggesting that there is an evidential, but not a persuasive, burden on an accused to prove that he acted with lawful excuse. Since the better view would therefore appear to be that no common law rule exists in Canada, it is probable that the recent English developments stemming from the decision of the House of Lords in Hunt will not be adopted in Canada.

28. It should, of course, be fairly clear that s.794(2) should not be applied at all to this offence, or, indeed, to most offences under the Criminal Code since they are not the type of offences for which the courts in Edwards and Lee's Poultry said the provision was designed. Part XXVII of the Criminal Code governs procedure in summary conviction offences under numerous regulatory statutes. It may therefore be argued that s.794(2) was included for the narrow purpose of reversing the burden of proof where an accused claims an exemption to a general prohibition contained in some other federal regulatory statute.

29. In light of recent s.15 decisions such as R. v. Andrews (Supreme Court of Canada, February 2, 1989), it seems unlikely that such a challenge would succeed.

30. Although this discussion concentrates on the phrase 'without lawful excuse', numerous variations may be found in statutes. Among the most common are 'without lawful justification or excuse', 'without lawful authority' and 'without reasonable excuse'. The reason for these

different formulations is unclear. For the purposes of this discussion it will be assumed that they all operate in the same fashion and bear similar, if not identical, meanings. Some doubt may be cast upon this last assumption by Dickson C.J.C.'s reasons for judgment in the recent decision of the Supreme Court of Canada in Holmes, supra note 25. This case is discussed in greater detail below.

31. R. v. Roberge (1980), 31 N.B.R.(2d) 670 (N.B.Q.B.); Cambridgeshire and Isle of Ely County Council v. Rust, [1972] 2 Q.B. 426.

32. G.C. Thornton, Legislative Drafting, 2nd ed. (London: Butterworths, 1979) at 281.

33. supra note 25.

34. (1980), 52 C.C.C.(2d) 368 (Ont.C.A.) at 374.

35. R. v. Yuman (1910), 17 C.C.C. 474 (Ont.C.A.); R. v. St. Clair (1913), 21 C.C.C. 350 (Ont.C.A.); per Hodgins J.A., leave to appeal to S.C.C. denied 1 C.R.N.S. 227; R. v. Cameron, [1966] 4 C.C.C. 273 (Ont.C.A.); R. v. Taylor (1970), 73 W.W.R. 636 (Y.T.Mag.Ct.). For a recent case, see R. v. Machtans (1987), 2 W.C.B.(2d) 294 (Alta.Prov.Ct.[Crim.Div.]).

36. See discussion infra.

37. R. v. Cameron, supra note 35, per Aylesworth J.A. with whom Schroeder and McLellan JJ.A. concurred.

38. R. v. McFall (1975), 26 C.C.C.(2d) 181 (B.C.C.A.); R. v. Cameron, supra note 35, where McKay J.A. stated that in his view there was an evidential burden on an accused to adduce such evidence.

39. R. v. Cameron, supra note 35, per McKay J.A. at 293. See, however, Glanville Williams, supra note 20, at 896-900, where he indicates that, although most courts have adopted the balance of probabilities standard, it would be preferable if the only onus on the accused was to raise a reasonable doubt.

40. Such an approach appears to have been accepted in the following cases, although none of the courts analyzed what they were doing: Tupper v. R. (1967), 2 C.R.N.S. 35 (S.C.C.); R. v. Kozak and Moore (1975), 20 C.C.C.(2d) 175 (Ont.C.A.). R. v. Robinson (1973), 10 C.C.C.(2d) 505 (S.C.C.) also appears to support this approach, notwithstanding Brooke J.A.'s attempts to interpret it differently, in R. v. Santeramo (1976), 32 C.C.C.(2d) 35 (Ont.C.A.).

41. For example, in R. v. McFall (1975), 26 C.C.C.(2d) 181 (B.C.C.A.), the accused was charged with possession of obscene films "knowingly without lawful justification or excuse". Taggart J.A. stated twice in his reasons for judgment that in his view the phrase presupposed the commission of the complete offence and that the phrase permitted an accused to show that he had an excuse or justification for committing the offence.

42. (1976), 32 C.C.C.(2d) 35.

43. See Mewett & Manning, Criminal Law, 2d ed. (Toronto: Butterworths, 1985) at 723, where the authors commend the approach in Santeramo for conforming with the normal requirements of the criminal law.

44. (1973), 10 C.C.C.(2d) 505.

45. (1957), 118 C.C.C. 129 (S.C.C) at 140.

46. supra note 42, at 44.

47. supra note 25.

48. [1987] 1 W.W.R. 641.

49. (1986), 24 C.C.C.(3d) 321 (S.C.C.).

50. supra note 48, at 649.

51. supra note 25.

52. (1983), 4 C.C.C.(3d) 440.

53. Although this was never articulated, Lacourière J.A. was clearly adopting the 'true defence' approach discussed by Mahoney, supra note 15, at 3-13.

54. supra note 25.

55. Id. at 121-122.

56. Section 7(3) is now s.8(3) in R.S.C.1985, c.C-46.

57. His approach in this case may be contrasted with the one that he took in Perka, supra note 14, where he interpreted the phrase 'exception, exemption, provisio, excuse or qualification' very narrowly so as to include only those excuses set out in the statute as exceptions to the general prohibition. It did not include any of the regular defences that are normally available to all accused.

58. Dickson C.J.C. did ultimately uphold the challenged provision by stating that he would sever the unconstitutional reverse onus provision.

59. Regrettably, the Ontario Court of Appeal has recently given cause for concern in its decision in R. v. Ireco Canada II Inc. (1988), 65 C.R.(3d) 160. In that case the accused had been charged under the Customs Act with harbouring illegally imported goods "without lawful excuse, the proof of which shall be on the person accused". After stating that Holmes had turned on the particular offence under consideration, the Court declared the offence to be unconstitutional because the lawful excuse provision imposed the burden of proving mistake of fact on the accused! In view of McIntyre J.'s general statement, reproduced above at n.55, it is difficult to understand how the Court reached the conclusion that it did.

## Conclusions

When the Supreme Court of Canada released its decision in Sault Ste. Marie, it was received with eager anticipation. At last the Court had imposed order upon chaos by introducing a rational and coherent regime for classifying offences that would ensure fairness for accused persons yet not unduly interfere with the efficient administration of justice. Ten years later the bloom is off the rose and the shortcomings of Sault Ste. Marie have become more apparent. The Court's radical move in adopting a three-category regime blinded many to the fact that in a number of ways Sault Ste. Marie was a conservative decision. Apart from the recognition of a third category of offences, there was little in the decision that was ground-breaking and much that had been heard before. In fact, the revolutionary nature of even the third category is questionable when it is remembered that essentially all the Court did was accept the proposals advanced by the Law Reform Commission of Canada only a few years earlier.[1]

The Court retained, without discussion, the traditional distinction between true crimes and public welfare offences. Although it referred to the two types of offences with some frequency and propounded a scheme based on their fundamental differences, the Court provided virtually no guidelines for determining when an offence should be classed as one or the other. It was as if the distinction was so clear as to require no further discussion.

Similarly the Court was clearly uncomfortable with the notion of absolute liability. Nonetheless, it lacked the courage of its convictions and declined to abolish it entirely. It was almost as if the Court feared that absolute liability was so deeply entrenched in the criminal justice system that it was beyond the powers of the Court ~~to~~ rid it of the bane.

Finally, even the new class of offence could scarcely be said to be a radical assertion of the rights of accused persons. Of all the possibilities open to it, the Court chose the one that was least favourable to the accused. The Court seemed to be saying to its critics that, yes, we have given accused persons new rights, but we have only given them little new rights. The choice of strict liability with a reversed onus was clearly an attempt to please all sides. Academics would be delighted finally to see a negligence standard accepted for the majority of non-Criminal Code offences. Overburdened courts and prosecutors would be somewhat appeased by the imposition of a legal burden on the accused to rebut an allegation of negligence.

Ultimately, however, it is perhaps unfair to chastize the Supreme Court of Canada for failing completely to reform the law of mens rea in non-Criminal Code offences. There are limits to judicial law-making and, in Sault Ste. Marie, the Court came reasonably close to those limits. Absolute liability may have been the creation of the nineteenth-century courts. In the second half of the twentieth century, however, it is usually left to the legislature to effect reforms as substantial as the one effected in Sault Ste. Marie.

Some of the problems left unresolved, or indeed created, by Sault Ste. Marie have either been rectified under the Charter of Rights or show promise of so being in the future. The scope of absolute liability has been seriously curtailed and there is some cause to hope that it may eventually be consigned to well-deserved oblivion as part of the Supreme Court of Canada's apparent determination to recognize a constitutionally protected doctrine of mens rea.[2] Similarly, the guarantee of the presumption of innocence in s.11(d) of the Charter has proved to be a potent force.[3] Although so far it has been applied by the Supreme Court of Canada only to offences under the Criminal Code, there is room for hope that the reverse onus in strict liability offences may one day be successfully challenged.

In the end, however, it is up to Parliament and the provincial legislatures to enact the major reforms that are required to rationalize the law and impose a reliable and equitable system for classifying offences so that their mens rea component is easily ascertainable and the competing interests of the state and the accused are appropriately balanced. Such a reform would so fundamentally alter the law that it must be done by legislation; it is simply beyond the domain of the courts.

Canada, of course, is not the only country to have experienced difficulties in delineating appropriate mens rea requirements for offences. It is a source of concern in virtually every common-law jurisdiction. A number of solutions have been proposed. In the United States, a Model Penal Code has been prepared by the American Law Institute.[4] The Code establishes four carefully defined culpable mental states: purpose, knowledge, recklessness and negligence. No person may be convicted of either a felony or a misdemeanour under the Code unless he is proved to have acted purposely, knowingly, recklessly or negligently depending on the culpability requirement set out in the offence with which he is charged. Where an offence fails to specify the culpability requirement, general default standards are provided. The Code does not abolish absolute liability entirely; it merely confines it to a class of minor offences called violations. Punishment for violations may include fines, forfeitures or other civil penalties; it may not, however, include imprisonment.

Two major criticisms of these provisions of the Model Penal Code may be advanced. Although the Code confines absolute liability to a narrow class of offences, it does not abolish it. Secondly, as the Law Reform Commission of Canada has pointed out, the Code provisions relating to culpability requirements only apply to offences in the Code.[5] The Code does not contain a provision extending its application to offences found in other legislation. As a result, it does not resolve any problems that may arise with offences outside the Code.

A somewhat different approach was recommended by the English Law Commission in Report 89: The Mental Element in Crime.[6] The Commission recommended that statutory definitions of culpability terms be enacted; the three terms it chose were intention, knowledge and recklessness. Unlike the Model Penal Code, however, these definitions would apply to offences contained in all statutes because they would be contained in a statute of general application. The Commission even provided a draft act entitled The Criminal Liability (Mental Element) Bill.[7] The Commission recommended that all offences drafted after a certain date should expressly state the required mental element; if no mental element were specified, default provisions would fall in.

Further tentative recommendations on absolute liability had earlier been made in Working Paper 31: the Mental Element in Crime, upon which the Report was based;[8] the final Report, however, did not address the question. In the Working Paper, the Commission had not recommended the abolition of absolute liability. It had, however, suggested that an express intention to create an absolute liability offence should be required before an offence could be found to involve absolute liability. In general, it recommended that the minimum standard for liability be negligence; where negligence was the standard, there would be an evidential burden on the accused to rebut the presumption of negligence.[9]

The Law Reform Commission of Canada was highly critical of the Law Commission's recommendations in the Working Paper because of the potentially broad role for negligence, regardless of the type of offence or the gravity of the penalty. It wrote:[10]

> [W]e think that liability should depend to some extent on the gravity of the offence and the seriousness of the punishment. Insofar as the recommendations of the English Law Commission do not restrict liability for negligence to certain types of offences and punishments, negligence seems too low a standard of liability to receive such wide application in the criminal law.

The Law Reform Commission of Canada was thus clearly concerned that under the English scheme a negligence standard could be applied to a serious criminal offence.

In its own work the Law Reform Commission of Canada has taken what it considers to be the most desirable aspects of both the American and English proposals, corrected the inadequacies as it perceived them and adapted them to a Canadian context. In Report 30: Recodifying Criminal Law,[11] the Commission set out the first half of a proposed new Criminal Code. The first part of the new Code, known as the general part, sets out the general rules of mens rea that will apply to all offences in the Code as well as to offences in other federal statutes where imprisonment is a possible penalty. Complementing the recommendations in the Report are the tentative recommendations contained in the Commission's Working Paper 54: The Classification of Offences.[12] In the Working Paper, the Commission recommends the recognition of two types of offences, based on potential penalty upon conviction: 'crimes' which would be offences where there was a possibility of imprisonment and 'infractions' which would be less serious offences where imprisonment was not a possible penalty.

An analysis of the Commission's proposals reveals that the Commission may have successfully grappled with some of the issues that eluded the Supreme Court of Canada in Sault Ste. Marie. In Report 30, the Commission follows both the American and English leads in recommending that specific mental elements be statutorily defined.[13] The three terms defined by the Commission are 'purposely', 'recklessly' and 'negligently'.[14] Where one of these terms is used in any offence to which the general part applies, it will indicate the mens rea requirement of the offence. Where no specific mens rea term is found in the offence, a default requirement of purposefulness will apply.[15]

For the purposes of this paper, however, perhaps the most significant aspect of both Report 30 and Working Paper 54 is the way in which they deal with the problem created by the true crime/public welfare offence dichotomy. Section 1(4) of the proposed new Criminal Code states:[16]

> (a) This Title applies to any crime defined by this Code or any other Act of the Parliament of Canada.

(b) An offence defined by any other Act of the Parliament of Canada is a crime if the person who committed it is liable to be sentenced to a term of imprisonment as punishment.

The effect of this subsection is to render all the provisions of the general part, including the definitions of mental states and the default provision, applicable to any offence in any federal statute if the offence is punishable by a term of imprisonment. In essence, it defines a crime by the mechanical test of penalty and then ensures that the full panoply of rights is available to any person charged with such an offence regardless of the federal statute in which it is contained.

This recommendation is a considerable change from the recommendation earlier made by the Commission in Report 3: Our Criminal Law.[17] In that Report, the Commission held firm to the notion that there is an intrinsic difference between true crimes and public welfare offences and that the distinction must be maintained. The Commission emphasized that true crimes are serious wrongs that contravene the fundamental values of our society and to which a stigma deservedly attaches.[18] The Commission's previous recommendation, therefore, essentially perpetuated the mala in se/mala prohibita distinction.

This preoccupation with the intrinsic moral wrongfulness of true crimes led the Commission to recommend a virtually unworkable solution -- the Criminal Code would contain no offence that was not a true crime and all offences that were true crimes must be included in the Code. No true crime, which the Commission accepted as being generally identifiable by the fact that it was punishable by imprisonment, should be found outside the Code, even if it more properly belonged in another statute such as the Competition Act, the Bankruptcy Act or pollution legislation.[19] The Commission was clearly confused in its criteria. It recognized the useful, easily ascertained distinction of penalty, yet it could not relinquish its focus on the moral aspect of crime. This led it to recommend a highly impractical solution that would have caused immense confusion by severing major offences from their natural context and inserting them in the Code.

The years, and no doubt considerable critical comment, have apparently altered the Commission's perspective. The focus is now on penalty and it is penalty alone that determines the categorization of an offence. The Commission has not completely relinquished the notion that there is something about a crime that distinguishes it from other offences; glimmers of this may still be found in its works.[20] Nonetheless, this now takes a subordinate role to the more readily discernible criterion of penalty.

Under the new regime proposed by the Commission, those offences not categorized as crimes would be classed as infractions, that is, lesser offences not punishable by imprisonment. Since the potential penalty for the accused would be reduced, it would be less necessary to accord him all of the substantive and procedural protections and guarantees granted to a person charged with a crime.[21] The reduced protection and corresponding increased court efficiency would be compensated for by the reduced penalty to which the accused was exposed.

The Law Reform Commission of Canada's recent proposals have much to recommend them. In one fell swoop, the Commission has done what the Supreme

Court of Canada dared not do in Sault Ste. Marie -- it has eliminated the vague and subjective distinction between true crimes and public welfare offences as the means of determining how an offence should be treated and replaced it with a reliable, easily ascertained and objective criterion, the possibility of imprisonment. Although the test is mechanical, it may still be said to take the Commission's previous concern with society's abhorrence of certain acts into account. Indeed, it may be that the potential penalty upon conviction is the clearest possible indication of Parliament's view of the gravity of the offence. Parliament presumably indicates its disapproval of an action and the degree to which it considers it wrong and harmful to society by the punishment that it attaches to the commission of that action. Thus the more serious the offence, the more heavily it will be punished. Penalty should, in fact, be the most reliable guide to the intrinsic wrongness of an action since it represents the considered judgment of the members of Parliament, surely a more trustworthy guide than the sentiment of whatever judge happens to be hearing any particular case. Thus, the Commission has succeeded in proposing a workable and useful system that incorporates the moral concerns it expressed in previous works.

The Commission's proposals make it clear what the mental requirements of crimes would be under the new regime. A presumption of mens rea would no longer be necessary because a mens rea requirement would be incorporated into a crime by virtue of the provisions of the general part, even where the crime was contained in another federal statute. Since the class of offences to be known as infractions is a recent innovation of the Commission, it is not yet clear what the characteristics of those offences would be. One can only guess based on the earlier work of the Commission.

In its earlier work, the Commission soundly rejected absolute liability.[22] Unlike the American or English reformers, it was not prepared to retain any vestige of such an abhorrent doctrine. It seems probable that the Commission will not alter this position, particularly in light of the direction in which the Supreme Court of Canada appears to be heading on the subject of mens rea.

It is less easy to predict what the mens rea standard for infractions will be. Of course, there is no reason why infractions should not require proof of full mens rea where so drafted. In most cases, however, it appears that the mens rea standard will be lower. Most probably a negligence standard will be retained; the question is whether the burden of proof will remain a persuasive burden imposed upon the accused. In this regard it is instructive to note that in its proposed Criminal Code the Commission appears to have abandoned presumptions and reverse onus provisions; at one point the Commission explains it was in part motivated by concerns over potential violations of s.11(d) of the Charter.[23] It is therefore clear that Charter concerns are high on the list of the Commission's priorities and where there is fear that the Charter may be breached, the Commission will take care to try to avoid this result.

As a possible compromise, the Commission might do well to adopt the position recommended by the English Law Commission and stipulate that an accused bears an evidential as opposed to a legal burden to adduce evidence to rebut the presumption of negligence. The Supreme Court of Canada has yet to rule on whether such a presumption would offend s.11(d) of the Charter, but even if it were found to do so, there is a strong possibility it would be upheld as a reasonable limit under s.1 of the Charter.

The final question is the way in which the new mens rea rules for infractions should be set down in legislation. Having gone so far, it is unthinkable that the Commission would not recommend codification of the rules. One alternative would be to make an addition to s.1(4) of the proposed Code. The culpability definitions in s.2 could expressly be made to apply to infractions; this would be useful since there is always a possibility that purpose and recklessness may be the mens rea standard for certain infractions. Negligence, presumably the chief mens rea standard, would clearly be applicable. In order to complete the matter, however, further provisions would be required to deal with questions such as burden of proof. These would really have no place in the general part of the Criminal Code and would clutter it up unnecessarily.

Therefore, the preferable approach would be to include principles and rules governing infractions in a separate act. It might be most practical to enact an Infractions Act, rather than the Infractions Procedure Act that is currently envisaged. While the bulk of the new act would contain procedural provisions, it would begin with a general part that dealt with matters such as mens rea standards, available defences and burden of proof. It should also expressly state that the burden is on the Crown to prove the actus reus, regardless of the mens rea requirement of the offence. Since certain provisions in the general part of the Criminal Code would be equally applicable, they could be incorporated by reference, although ease of use suggests that it might be better simply to reproduce them in the new act.

If such an approach were adopted, the whole field of federal offences would be covered in a most satisfactory fashion. The initial classification of an offence would be determined by the possible penalty. Having ascertained which legislation governed, an examination of the wording of the offence to determine the culpability requirement would follow. Where the provision was silent, reference would be made to the default provisions. The search for a mythical legislative intent would be over.

This would still leave the whole domain of provincial offences. There does not appear to be any reason why a similar regime should not be adopted at the provincial level. Provincial offences legislation could be enacted dividing offences according to whether or not there was a potential penalty of imprisonment. Constitutionally this should not prove to be a problem since the provinces would not be trenching on federal jurisdiction in criminal law; all they would be doing is establishing a regime for punishing violations of their own constitutionally valid offences. For cosmetic reasons they might choose not to label offences punishable by imprisonment as crimes; any number of names could substitute.

The implementation of the reforms discussed above would be of immense benefit to the criminal justice system. They would also make the task of the legislative drafter considerably simpler. Unfortunately it seems unlikely that they will see the light of day in the foreseeable future since fundamental reform of the criminal law is rarely high on the list of priorities of politicians. Until they are enacted, however, the question of mens rea in non-Criminal Code offences will remain a vexed one with no easy answer.

## Conclusions

### Notes

1. See Studies in Strict Liability (Ottawa, 1974); Report 3: Our Criminal Law (Ottawa, 1976). Even then the Court did not dare to adopt the Commission's proposals in their entirety. Contrary to the recommendation of the Commission, the Supreme Court of Canada did not jettison absolute liability completely; it simply retained it as a third category of offence.

2. See, for example, Reference re s.94(2) of the Motor Vehicle Act (B.C.) (1985), 23 C.C.C.(3d) 289; R. v. Vaillancourt (1987), 60 C.R.(3d) 289.

3. See R. v. Oakes (1986), 24 C.C.C.(3d) 323 (S.C.C.); R. v. Vaillancourt, supra note 2; R. v. Holmes (1988), 64 C.R.(3d) 97; R. v. Whyte (1988), 64 C.R.(3d) 123.

4. Official Draft, 1962.

5. Jacques Fortin, "Note 4 - Other Alternatives" in Law Reform Commission of Canada, Studies in Strict Liability, supra note 1, at 234-235.

6. (London, 1978).

7. Id. at 52-67.

8. Working Paper 31: The Mental Element of Crime (London, 1970).

9. Many of the Law Commission's proposals were adopted by the drafters of Report 143: Codification of the Criminal Law: A Report to the Law Commission (London, 1985). Like the Commission, they defined standard culpability terms although they expanded the list of defined terms to seven and adopted somewhat different definitions. The definitions were to apply to all offences drafted after the Code came into force, regardless of whether they were contained in the Code or in other legislation. Where the offence did not contain an express fault requirement, a minimum requirement of recklessness would apply. The Code did not impose any restrictions on when absolute liability or negligence standards could be imposed; it merely provided that no offence could be found to be have such a mental element unless Parliament expressly indicated such an intention.

10. supra note 5, at 236.

11. Vol. 1 (Ottawa, 1986).

12. (Ottawa, 1986).

13. On this point the Commission has altered its position significantly from the position it took in Working Paper 29: The General Part - Liability and Defences (Ottawa, 1982). In the Working Paper, the Commission took the position that knowledge was a necessary element of criminal

culpability and drafted a virtually unreadable provision governing the mens rea requirements of criminal offences. Presumably the Commission received considerable negative reaction that encouraged it to approach the question in a different, and much more satisfactory, fashion.

14. supra note 11, at 20-21, s.2(4)(a) and (b).

15. Id. at 22, s.2(4)(d).

16. For some inexplicable reason, this provision has been omitted from the draft Code at the end of the Report, where it has been replaced by a provision dealing with consent: see supra note 11, at 98.

17. supra note 1; see also Studies in Strict Liability, supra note 1.

18. Report 3, supra note 1, at 33-35; Studies in Strict Liability, supra note 1, at 1-11.

19. Report 3, supra note 1, at 35-36; Studies in Strict Liability, supra note 1, at 37-38, 203-204.

20. See Working Paper 54: The Classification of Offences, supra note 12, at 25.

21. Therefore persons charged with infractions would not benefit from the proposed Code of Criminal Procedure. Instead the Commission recommends a separate regime, perhaps set out in legislation known as the Infractions Procedures Act, to govern procedure in such cases: see Working Paper 54, supra note 12, at 26-27.

22. See Report 3, supra note 1, at 32-33; Studies in Strict Liability, supra note 1, at 35.

23. See commentary to s.12(1) in Report 30: Recodifying the Criminal Law, supra note 11, at 72.

## Bibliography

Abrams, Norman. "Criminal Liability of Corporate Officers for Strict Liability Offences - A Comment on Dotterwich and Park" (1981), 28 U.C.L.A.L.Rev. 463

Armitage, A.L. "Statutory Offence - Presumption of mens rea - Sherras v. De Rutzen Revised", [1963] Cambridge L.J. 177

Arvay, Joseph J. "The Criminal Law Power in the Constitution: And Then Came McNeil and Dupond" (1979), 11 Ott.L.Rev. 1

Bennion, Francis. "Statutory Exceptions: A Third Knot in the Golden Thread?", [1988] Crim.L.R. 30

Best, Sharon E. "Criminal Law: Public Welfare Violations - Imposing Criminal Sanctions with a Strict Liability Standard" (1976), 28 U. Florida L.Rev. 596

Binavince, Emilio S. "The Ethical Foundation of Criminal Liability" (1964), 33 Fordham L.Rev. 1

Birch, D.J. "Hunting the Snark: the Elusive Statutory Exception", [1988] Crim.L.R. 221

Bledsoe, Lynn. "Criminal Liability for Public Welfare Offenses: Gambler's Choice" (1980), 10 Memphis State U.L.Rev. 612

Borre, Glen V. "Public Welfare Offenses: A New Approach" (1961), 52 J.Crim.L. 418

Brady, James B. "Strict Liability Offenses: A Justification" (1972), 8 Crim.Law Bulletin 217

Brett, Peter. An Inquiry into Criminal Guilt (Sydney: Law Book Co. of Australia, 1963)

Brett, Peter. "Strict Responsibility: Possible Solutions" (1974), 37 Mod.L.Rev. 417

Brickey, Kathleen F. "Criminal Liability of Corporate Officers for Strict Liability Offenses - Another View" (1982), 35 Vanderbilt L.Rev. 1337

Brogan, Stephen J. "An Analysis of the Term "Willful" in Federal Criminal Statutes" (1976), 51 Notre Dame Lawyer 786

Burns, P.T. "Vicarious Liability in the Criminal Law" (1966), 1 Otago L.Rev. 134

Cameron, Neil. "Mens Rea in Statutory Offences" (1980), 4 Crim.L.J. 301

Cato, C.B. "Strict Liability and the Half-Way House", [1981] N.Z.L.J. 294

Chisholm, Donald H. "Criminal Law - Crime without Mens Rea" (1937), 2 Missouri L.Rev. 225

Clark, R.S. "The Defence of Impossibility and Offences of Strict Liability" (1969), 11 Crim.L.Q. 154

Conklin, M.J. "Case Comment: Strict Liability: The Doctrine in Sault Ste. Marie - Judicial Creativity Gone Sour" (1982), Vol.3 No.5 Crown Counsel's Rev. 9

Côté-Harper, Gisèle and Manganas, Antoine. Principes de droit pénal général (Cowansville: Yvon Blais, 1981)

Côté-Harper, Gisèle and Côté, Richard. "Commentaires sur la responsabilité stricte" (1975), 16 C. de D. 905

Crawford, J.M.B. and Quinn, John F. "The Limits of Intention in the Common Law" (1983), 8 U.Dayton L.Rev. 275

Cross, Rupert. "The Golden Thread of the English Common Law", Rede Lecture, 1976 (Cambridge: Cambridge University Press, 1976)

Cross & Jones. Introduction to Criminal Law, ed. Richard Card, 9th ed. (London: Butterworths, 1980)

Crouse, George H. "Case and Comment - Criminal Law - Mens Rea - Statutory Offences" (1943), 12 Can.B.Rev. 53

Devlin, Sir Patrick. "Statutory Offences" (1958), 4 J. Public Teachers of Law (N.S.) 206

Devlin, Sir Patrick. The Enforcement of Morals (London: Oxford University Press, 1965)

Disanto, Laura and McAllister, Shiela. "The Defence of all Reasonable Care" (1980), 18 Alta.L.Rev. 294

Drinkwalter, W. Douglas and Ewart, J. Douglas. Ontario Provincial Offences Procedure (Toronto: Carswell, 1980)

Edwards, J.Ll.J. Mens Rea in Statutory Offences, Vol. 8, English Studies in Criminal Science, ed. L. Radzinowicz (London: McMillan, 1965), reprinted by Kraus Reprint, (Nendeln: Liechetenstein, 1968)

Erlinder, C. Peter. "Mens Rea, Due Process, and the Supreme Court: Towards a Constitutional Doctrine of Substantive Criminal Law" (1981), 9 Am.J.Crim.L. 163

Ewaschuk, E.G. "Corporate Criminal Liability and Related Matters" (1975), 29 C.R.N.S. 44

Feinberg, Kenneth R. "Toward a New Approach to Proving Culpability: Mens Rea and the Proposed Federal Criminal Code" (1980), 18 Am.Crim.L.Rev. 123

Finkelstein, Neil. "Note on A-G Can. v. National Transportation Limited; R. v. His Honour Judge Wetmore" (1984), 62 Can.B.Rev. 182

Finley, David. "The Presumption of Innocence and Guilt: Why Carroll Should Prevail over Oakes" (1984), 39 C.R.(3d) 115

Fitzgerald, P.J. "Crime, Sin and Negligence" (1963), 79 L.Q.Rev. 351

Fitzgerald, P.J. "Real Crimes and Quasi Crimes" (1965), 10 Natural Law Forum 21

Fortin, Jacques. "Le mens rea en droit pénal canadien", thesis, (University of Montreal, 1971)

Fortin, Jacques and Viau, Louise. "La réforme de la responsabilité pénale par la cour suprême du Canada" (1979), 39 Rev. du Barr. 526

Friedlander, Beatrice M. "Criminal Law - Prosecution of Corporate Officials Under the Federal Food, Drug and Cosmetic Act - U.S. v. Park, 421 U.S. 658 (1975)" (1976), 37 Ohio State L.J. 431

Gordon, Gerald H. The Criminal Law of Scotland, 2nd ed. (Edinburgh: W. Green & Son, 1978)

Grant, Isabel. "R. v. Vaillancourt: The Constitutionalization of Mens Rea" (1988), 22 U.B.C.L.Rev. 369

Hall, Jerome. General Principles of Criminal Law, 2nd ed. (Indianapolis: Bobbs-Merrill, 1960)

Hannan, A.J. "Mens Rea in Statutory Offences" (1942), 16 Aust.L.J. 91

Harring, Janet S. "Liability Without Fault: Logic and Potential of a Developing Concept", [1970] Wisconsin L.Rev. 1201

Hart, H.L.A. Punishment and Responsibility: Essays in the Philosophy of Law (Oxford: Clarendon Press, 1969)

Hart, Henry M. "The Aims of the Criminal Law" (1958), 23 Law & Contemporary Problems 401

Healy, Patrick. "Proof and Policy: No Golden Threads", [1987] Crim.L.R. 355

Hippard, James J. "The Unconstitutionality of Criminal Liability Without Fault: An Argument for a Constitutional Doctrine of Mens Rea" (1973), 10 Houston L.Rev. 1039

Hogan, Brian. "Working Paper 2: Strict Liability" (1975), 7 Ott.L.Rev. 259

Hogg, Peter. Constitutional Law of Canada, 2nd ed. (Toronto: Carswell, 1985)

Hovius, B. "Hauser: Narcotic Drugs, Criminal Law and Peace, Order and Good Government" (1980), 18 U.West.Ont.L.Rev. 505

Howard, Colin. "Strict Liability in the High Court of Australia" (1960), 76 L.W.Rev. 547

Howard, Colin. Strict Responsibility (London: Sweet & Maxwell, 1963)

Howells, R.W.L. "Mens Rea and the Enforcement of Statutes" (1966), 29 Mod.L.Rev. 206

Hutchinson, A.C. "Sault Ste. Marie, Mens Rea and the Halfway House: Public Welfare Offences Get a Home of Their Own" (1979), 17 O.H.L.J. 415

Jackson, R.M. "Absolute Prohibition in Statutory Offences" (1936), 6 Cambridge L.J. 83

Jacobs, G. Francis. Criminal Responsibility, L.S.E. Research Monographs 8 (London: Weidenfeld & Nicholson, 1971)

Jacoby, Daniel and Létourneau, Gilles. "Les soubresauts de Sault Ste. Marie et le droit pénal du Québec" (1981), 41 Rev. du Barr. 447

Jobson, Keith, B. "Notes and Comments: Far From Clear" (1976), 18 Crim.L.Q. 294

Johnson, Claire D. "Strict Liability Crimes" (1954), 33 Nebraska L.Rev. 462

Jones, A.E. "Vane v. Yiannopoullos and the Criminal Liability of Licensees", [1965] Crim.L.Rev. 401

Jones, Stephen C. "Individual Liability under the Federal Food, Drug and Cosmetic Act: The Defences Find a Defendant" (1984), 39 Food, Drug and Cosmetic Law J. 385

Karlen, Peter H. "Mens Rea: A New Analysis" (1978), 9 U.Toledo L.Rev. 191

Kittrie, Nicholas N. "Mens Rea in the United States", Proceedings of the 4th International Symposium on Comparative Law, Sept. 5-7, 1966.

LaForest, Gérard. "Mens Rea in Hunting Offences" (1962), 4 Crim.L.Q. 444

Law Commission (U.K.). Working Paper 31: The Mental Element in Crime (London, 1970)

Law Commission (U.K.). Report 89: Criminal Law: Report on the Mental Element in Crime (London, 1978)

Law Commission (U.K.). Report 143: A Codification of the Criminal Law (London, 1985)

Law Reform Commission of Canada. Studies in Strict Liability (Ottawa, 1974)

Law Reform Commission of Canada. Report 3: Our Criminal Law (Ottawa, 1976)

Law Reform Commission of Canada. Working Paper 29: Criminal Law - The General Part - Liability and Defences (Ottawa, 1982)

Law Reform Commission of Canada. Report 30: Codifying Criminal Law, Vol. 1 (Ottawa, 1986)

Law Reform Commission of Canada. Working Paper 54: Classification of Offences (Ottawa, 1986)

Leigh, L.H. Strict and Vicarious Liability: A Study in Administrative Criminal Law (London: Sweet & Maxwell, 1982)

Mahoney, Richard. "The Presumption of Innocence: A New Era" (1988), 67 Can.B.Rev. 1

Manchester, Colin. "The Origins of Strict Criminal Liability" (1977), 6 Anglo-American Law Rev. 277

Mayrand, Albert. "The Rights of Animals or the Rights of Men" (1961), 4 Crim.L.Q. 48

McAuley, Finbarr. "Mens Rea: A Legal-Philosophical View" (1982), 17 Ir.Jur.(N.S.) 84

Mewett, Alan W. & Manning, Morris. Criminal Law, 2nd ed. (Toronto: Butterworths, 1985)

Mirfield, Peter. "The Legacy of Hunt", [1988] Crim.L.R. 19

Morris, Norval & Howard, Colin. Studies in Criminal Law (Oxford: Clarendon Press, 1964)

Morton, James C. and Hutchison, Scott C. The Presumption of Innocence (Toronto: Carswell, 1987)

Mueller, Gerhard O.W. "Mens Rea and the Law Without It: Rationale and the West Virginia Rule" (1956), 58 West.Virg.L.Rev. 34

Mueller, Gerhard O.W., ed. Essays in Criminal Science (South Hachensack, N.J.: Fred B. Rothman & Co., 1961)

Nemerson, Steven S. "Criminal Liability Without Fault: A Philosophical Perspective" (1975), 75 Columbia L.Rev. 1517

Packer, Herbert. "Mens Rea and the Supreme Court", [1962] Supreme Court Rev. 107

Paulus, Ingeborg. The Search for Pure Food: A Sociology of Legislation in Britain (London: Martin Robertson, 1974)

Paulus, Ingeborg. "Strict Liability: Its Place in Public Welfare Offences" (1978), 20 Crim.L.Q. 445

Peiris, G.L. "Strict Liability in Commonwealth Criminal Law" (1983), 3 Legal Studies 117

Penner, Roland. "Notes and Comments - Sweet v. Parsley: Disappointment and Danger" (1969), 3 Man.L.J. 63

Perkins, Rollin. "The Civil Offense" (1952), 100 U.Pa.L.Rev. 832

Perkins, Rollin. Criminal Law, 2nd ed. (Mineola, New York: The Foundation Press Inc., 1969)

Perkins, Rollin. "'Knowledge' as a Mens Rea Requirement" (1978), 29 Hastings L.J. 953

Perkins, Rollin. "Criminal Liability Without Fault: A Disquieting Trend" (1983), 68 Iowa L.Rev. 1067

Reid, Alan D. "R. v. Sault Ste. Marie: A Comment" (1979), 28 U.N.B.L.J. 205

Remington, Frank J. & Helstad, Orrin L. "The Mental Element in Crime - A Legislative Problem", [1952] Wisconsin L.Rev. 644

Robinson, Paul H. and Grall, Jane A. "Element Analysis in Defining Criminal Liability: The Model Penal Code and Beyond" (1983), 35 Stanford L.Rev. 681

Robinson, Richard. "Liability Without Fault in Criminal Statutes - Their Relation to Major Developments in Contemporary Economic and Social Policy: The Situation in Wisconsin", [1956] Wisconsin L.Rev. 625

Rosenberg, Marc. "The Charter: Presumptions and the Duty of the Prosecution to Provide Evidence to the Defence" (1985), 31 M.V.R. 181

Ross, Ursula. "Two Cases on Obstructing an Officer", [1977] Crim.L.Rev. 187

Ruby, Clayton. "Obstructing a Police Officer" (1973), 15 Crim.L.Q. 375

Saltzman, Alan. "Strict Criminal Liability and the United States Constitution" (1978), 24 Wayne L.Rev. 1571

Sayre, Francis Bowes. "Public Welfare Offences" (1933), 33 Columbia L.Rev. 55

Schmeiser, Douglas A. "Offences of Absolute Prohibition" (1968), 10 Crim.L.Q. 392

Sharpe, Robert J. "Strict Liability and Due Diligence in Public Welfare Offences: R. v. City of Sault Ste. Marie" (1979), 3 Can.Bus.L.J. 453

Smith, J.C. & Hogan, Brian. Criminal Law, 5th ed. (London: Butterworths, 1983)

Smith, Miles. "The Value of Strict Liability", [1969] Crim.L.Rev. 5

Stallybrass, W.T.S. "The Eclipse of Mens Rea" (1936), 52 L.Q.Rev. 60

Stogner, Kim B. "Securities Regulation: Criminal Liability Under the Oklahoma Securities Act - The Wilfulness Requirement" (1978), 31 Oklahoma L.Rev. 486

Stuart, Don. "The Need to Codify Clear, Realistic and Honest Measures of Mens Rea and Negligence" (1972), 15 Crim.L.Q. 160

Stuart, Don. "Annotation to R. v. Cancoil Thermal Corp." (1986), 52 C.R.(2d) 188

Stuart, Don. Canadian Criminal Law: A Treatise, 2nd ed. (Toronto: Carswell, 1987)

Stuart, Don. "Holmes and Whyte: Zig-Zags on Reversing the Onus, Section 1 and Care and Control" (1988), 64 C.R.(3d) 143

Thomas, D.A. "The Purpose of Strict Liability" (1963), 26 Mod.L.Rev. 446

Thompson, Robert W. "The Criminal Act: An Analysis" (1975), 18 Crim.L.Q. 72

Thornton, G.C. Legislative Drafting, 2nd ed. (London: Butterworths, 1979)

Turner, J.W.C. "The Mental Element in Crimes at Common Law" (1936), 6 Cambridge L.J. 31

Wasik, Martin. "Shifting the Burden of Strict Liability", [1982] Crim.L.Rev. 567

Wasserstrom, Richard A. "Strict Liability in the Criminal Law" (1960), 12 Stan.L.Rev. 731

Weiler, Paul. "The Supreme Court of Canada and the Doctrines of Mens Rea" (1971), 49 Can.B.Rev. 280

Weiler, Paul. In The Last Resort: A Critical Study of the Supreme Court of Canada (Toronto: Carswell, 1974)

Weinrib, J. "Comment on Bases of Criminal Liability; Culpability; Causation: Chapter 3, Section 610", Working Papers of the National Commission on Reform of Federal Criminal Laws, Vol.1

Wechsler, Herbert. "Codification of Criminal Law in the United States: The Model Penal Code" (1968), 68 Columbia L.Rev. 1425

Williams, Glanville. Criminal Law: The General Part, 2nd ed. (London: Stevens & Sons, 1961)

Williams, Glanville. Textbook of Criminal Law, 2nd ed. (London: Stevens & Sons, 1983)

Wootton, Barbara. Crime and the Criminal Law: Reflections of a Magistrate and Social Scientist, 2nd ed. (London: Stevens & Sons, 1981)

## Statutory Interpretation and Mens Rea

## in

## Non-Criminal Code Offences

### Abstract


This thesis examines the way in which Canadian courts have approached the issue of mens rea in non-Criminal Code offences. Because such offences frequently do not contain any indication of the legislature's intention, the courts have been obliged to develop techniques for determining what the mens rea component of such offences should be.

Although mens rea was a constituent element of virtually all offences at common law, in the mid-nineteenth century courts began to recognize absolute liability as an exception to the rule where certain offences were involved. The thesis examines the statutory interpretation techniques used by the courts for determining whether an offence involved absolute liability or whether it required proof of mens rea.

As the thesis shows, considerable confusion reigned in this area until the release of the seminal decision of the Supreme Court of Canada in R. v. Sault Ste. Marie (1978), 40 C.C.C.(2d) 353. In Sault Ste. Marie, the Court recognized a third class of offences, to be known as strict liability offences, that conferred greater rights on an accused while still not requiring the Crown to prove mens rea. Unfortunately, Sault Ste. Marie itself was not without difficulty.

The thesis considers the problems created by the Court's failure to provide guidelines for distinguishing between true crimes and public welfare offences, the fundamental distinction that forms the bedrock upon which the Sault Ste. Marie regime is based. After examining a number of possible approaches, it concludes that no truly useful test can be devised for making the distinction.

Each of the three categories of offences is examined in turn. After a period of adjustment, the courts appear to have adapted fairly well to the new regime. Nonetheless, a number of problems remain. Uncertainty has arisen as to whether regulatory offences that do not contain an express mens rea term may have an implicit mens rea requirement. Furthermore, many offences have been found to involve absolute liability, even though the Supreme Court of Canada has, on several occasions, expressed disapproval of absolute liability.

The effect of the Canadian Charter of Rights and Freedoms on the regime in Sault Ste. Marie is considered. After reviewing various Charter decisions of the Supreme Court of Canada, the thesis concludes that these cases may have a significant impact in at least two ways. The number of absolute liability offences will probably be dramatically reduced. It is also possible that the reversed burden of proof for strict liability offences may be ruled unconstitutional because it infringes the presumption of innocence guaranteed by s.11(d) of the Charter.

The thesis discusses various specific words that have traditionally been used by legislative drafters to indicate a mens rea requirement. A survey of the caselaw indicates that the precise meaning of these words remains unclear. There is also a discussion of the role of the burden of proof in criminal law and the way that it interrelates with mens rea.

It is concluded that although Sault Ste. Marie provided greater rights for accused persons, it did not ultimately solve the problem of mens rea in non-Criminal Code offences. The thesis argues that this can only be done by legislation. After reviewing American and English proposals for reform, the recommendations of the Law Reform Commission of Canada are examined. The thesis endorses the Commission's proposal that two types of offences, crimes and infractions, be recognized and that the distinction between the two should be whether or not imprisonment is a possible penalty. Both types of offences should be governed by general principles codified in legislation. Only the enactment of such statutory rules will provide a fully satisfactory solution to the problem.