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# **Regulatory Offences: The Quest for a Non-Criminal Approach to Penal Liability**

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## Abstract

The thesis of this paper is that there has developed a distinctive, fair and appropriate approach to imposing penal liability in regulatory contexts, and that this approach does not involve proof of the subjective intent of the accused. Described here as the strict liability offence, with due diligence defence established on a balance of probabilities, this non-intentional approach to penal liability should not be viewed as simply an offshoot of the criminal offence, since its historical origins, evolution, function, justifications and implications are unique to regulatory contexts. Its widespread use in regulatory legislation of many common law countries is testament to its practicality and fairness, while its comparative scarcity in the United States is perhaps partial explanation for the chaotic and unsatisfactory nature of regulatory penal law in that jurisdiction.

To explore the veracity of these claims, the paper adopts a varied approach. First, in Part One, historical analysis of the origins and early forms of regulatory offences is undertaken. This historical analysis reveals the ancient lineage of the modern regulatory offence, with use of non-intentional, objective negligence as the basis for penal liability extending back to pre-Biblical societies. A distinctive stream of non-intentional “petty offences” for commercial misconduct is identified as emerging in medieval England. The Industrial Revolution, and the associated harms caused by it, is described as a catalyst event prompting judicial re-consideration of the appropriateness of the intent requirement when addressing commercial misconduct.

This is followed in Part Two by an examination of the conception and development of the strict liability offence in the modern era in Canada, with comparisons to the use of regulatory offences in Australia, New Zealand, the United Kingdom, United States, Netherlands and Germany. The recognition of the strict liability offence by the Supreme Court of Canada has put the Canadian judiciary in the vanguard in terms of developing an approach to penal liability which is particularly suited to the exigencies of modern regulatory activity, and so it is a focus of attention. Of particular interest is the fact that the strict liability offence was recognized by the Supreme Court prior to the introduction of the *Canadian Charter of Rights and Freedoms*, with its explicit protections of the rights of accused persons, and yet the offence has since survived *Charter* challenges. Examination of judicial and legislative recognition and usage of non-intentional regulatory offences in the United States, the United Kingdom, Australia, New Zealand, Germany, and the Netherlands reveals universal recognition of the need to use some form of non-intentional offence to address regulatory misconduct, but wide variations in terms of what is considered acceptable. The similarities and divergencies are discussed in an attempt to find common elements.

In Part Three, a jurisprudential perspective to use of regulatory offences is provided, focussing on the underlying legal principles at play. A focus of analysis is the possible justifications for the strict liability offence as a choice-based system of penal liability which maximizes individual liberty. Comparisons are made with both the “true crimes” model and the absolute liability offence type. Part Three also includes an examination of the possible catalyst effect of the strict liability offence with reasonable care defence as a motivator for industrial sectors to develop preventative “self-regulatory” systems to ensure due diligence. Finally, overall conclusions to the thesis are provided.

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## Chapter One -- Introduction and Overview of Thesis

*Coal dust in an underground mine ignites, causing a shaft to collapse, killing twenty six miners. In the aftermath, it is not clear that mine management intentionally or knowingly caused harm, but there is evidence suggesting a failure to take reasonable care in maintaining the mine operations, as required by worker health and safety legislation.<sup>1</sup>*

*Over the course of one month, several motorists are killed on Ontario's highways by flying tires from eighteen-wheel tractor-trailer rigs. In the aftermath, it is discovered that the operators of these rigs were not keeping their trucks in good working condition as required by regulations. No one accuses the truckers of intentionally or knowingly harming the motorists, but it is apparent that they have not been exercising due diligence in maintaining their rigs. Liability can be avoided by establishing that all reasonable care was exercised.<sup>2</sup>*

*An unauthorized leak from an industrial sewage lagoon contaminates the local water supply, sending several citizens to the hospital with a variety of ailments. Investigation reveals that the industrial operator had failed to properly monitor its facilities. Unauthorized discharges are an offence under environmental legislation, punishable by imprisonment.<sup>3</sup>*

For centuries, societies have attempted to find both effective and fair ways to address non-intentional but nevertheless harmful misconduct such as that described in these opening scenarios.

The offences developed by courts and legislators -- which take varying forms -- have been

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<sup>1</sup> Scenario similar to Nova Scotia Westray mining disaster as described in Peter Richard, Commissioner, *The Westray Story: A Predictable Path to Disaster* (Report of the Westray Mine Public Inquiry) (Nova Scotia: Government of Nova Scotia, 1997). [Http://www.gov.ns.ca/legi/inquiry/westray/execsumm.htm](http://www.gov.ns.ca/legi/inquiry/westray/execsumm.htm). In Canada, worker health and safety offences have been characterized as strict liability in nature (for definitions of strict liability, see below), as discussed in *R. v. Ellis-Don Ltd.* [1992] 7 O.R. (3d) 320.

<sup>2</sup> Scenario similar to incidents occurring in Ontario, as described in such articles as K. Brown, "Cumberland man charged after truck-wheel deaths," *Ottawa Citizen*, March 14, 1997, p. B7. Motor vehicle safety in Ontario is regulated pursuant to such legislation as the Ontario *Highway Traffic Act*, RSO 1990, c. H.8, as amended. Road safety offences have generally been characterized as strict or absolute in nature: see, e.g., *Reference re: s. 94(2) of the Motor Vehicles Act*, (1985) 24 DLR (4th) 536, as discussed in greater detail below. For an example of an Ontario court decision pertaining to "flying wheels," characterizing such offences as strict liability in nature, see, e.g., *R. v. Robbins* [1996] O.J. No. 4220 (Ont. Court of Justice, Provincial Division). See generally, S. Hutchison, D. Rose, P. Downes, *The Law of Traffic Offences* (2nd ed.) (Scarborough: Carswell, 1998).

<sup>3</sup> For a similar scenario, see *R. v. Gulf of Georgia Towing Co. Ltd* [1979] 3 WWR 84, pertaining to s. 36(3) of the federal *Fisheries Act*, RSC 1985, c. F-14, as amended.

referred to as “quasi-criminal,” “public welfare,”<sup>4</sup> “civil,”<sup>5</sup> “negligence,”<sup>6</sup> “regulatory,”<sup>8</sup> “administrative,”<sup>9</sup> “strict liability”<sup>10</sup> and “absolute liability.”<sup>11</sup> To make matters particularly confusing, some of the terms used to describe the offences -- in particular, “strict liability” -- have been given different meanings by different courts in different jurisdictions.<sup>12</sup> In spite of considerable differences, one from the other, these variously described offences share some basic common characteristics: they tend to be part of regulatory regimes which set out special obligations for persons engaged in distinctive activities, the regimes are usually directed at protecting the “common good” rather than particular victims (although particular victims may be

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<sup>4</sup> E.g., see Wright J. in *Sherras v. De Rutzen* [1895] 1 Q.B. 918 at 922, and Lord Reid in *Sweet v. Parsley* [1970] AC 132 (as discussed in greater detail *infra*).

<sup>5</sup> E.g., see Justice Jackson in *Morissette v. U.S.* 342 US 2246 (1952); and F. Sayre in “Public Welfare Offenses,” (1933) Col. L. Rev. 55 (as discussed in greater detail *infra*).

<sup>6</sup> So described by Justice Dickson in *R. v. City of Sault Ste. Marie* [1978] 40 CCC (2d) 353 at p. 357 (as discussed in greater detail *infra*).

<sup>7</sup> *Ibid.*, at pp. 364-65. See also, Law Reform Commission of Canada, *The Meaning of Guilt: Studies in Strict Liability* (1974), p. 32, as discussed in greater detail *infra*.

<sup>8</sup> Per Dickson J. in *R. v. City of Sault Ste. Marie, op cit.*, at p. 357. See also, Richardson, J. in *Civil Aviation Department v. Mackenzie* [1983] NZLR 78, as discussed in greater detail *infra*.

<sup>9</sup> Per Dickson J. in *R. v. City of Sault Ste. Marie, op cit.*, at pp. 364 - 65, as discussed in greater detail *infra*.

<sup>10</sup> *Ibid.*, at p. 357.

<sup>11</sup> *Ibid.*, and see *Reference re section 94(2) of the Motor Vehicle Act (B.C.)* [1985] 2 SCR 486 (discussed in greater detail *infra*).

<sup>12</sup> For example, in Canada, per *Sault Ste. Marie*, a strict liability offence is an offence adjudicated by the ordinary courts where an accused can be convicted upon proof of the actus reus of the offence, unless the accused can establish on a balance of probabilities that he or she exercised reasonable care or acted upon a reasonable mistake of fact. In the United States, and elsewhere to some extent, a strict liability offence is one where conviction follows upon proof of the actus reus of the offence, with no defence of reasonable care or reasonable mistake of fact available. In Canada, this offence would be referred to as one of absolute liability (e.g., see *Sault Ste. Marie*). For the purposes of this thesis, the Canadian definitions of strict and absolute liability will be used unless denoted otherwise. In the United States, there are “offenses” and “defenses,” whereas in Canada and elsewhere, there are “offences” and “defences.” Throughout this thesis, the Canadian spelling will be used, unless quoting from an American source.

protected in the process), the offences are frequently directed to preventative action rather than past harm, and penal convictions can normally be obtained without proof that an accused “knowingly” or “intentionally” engaged in the misconduct.<sup>13</sup> Adjudication is by the ordinary courts (i.e., not by a specialized administrative tribunal), and in some situations, imprisonment may be imposed as a penalty.<sup>14</sup> For the purposes of this thesis, these offences are referred to as “regulatory” or “public welfare” offences. In Commonwealth jurisdictions, these regulatory offences are extensively used to implement public policies ranging from consumer protection,<sup>15</sup> to pollution control,<sup>16</sup> food safety,<sup>17</sup> natural resources management,<sup>18</sup> worker safety,<sup>19</sup> health

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<sup>13</sup> An expanded discussion of distinctive criteria associated with regulatory offences is provided later in the thesis.

<sup>14</sup> For example, in *Sault Ste. Marie*, a decision pertaining to an environmental offence, imprisonment was available as a possible punishment (as discussed in greater detail in Part Two of the thesis).

<sup>15</sup> E.g., see s. 52 of the *Competition Act*, RSC 1985, c. C. c-34, as amended, pertaining to misleading advertising, as discussed in *R.v. Wholesale Travel Inc.* [1991] 67 CCC (3d) 193. See also s. 39 of the U.K. *Consumer Protection Act, 1987* (all discussed later in the thesis).

<sup>16</sup> E.g., see s. 16 of *Ontario Water Resources Act*, RSO 1990, c. O.40, and s. 13 of the *Environmental Protection Act*, RSO 1990, c. E.18, as discussed in *R. v. Bata Industries Ltd.* [1992] 9 O.R. (3d) 331 (strict liability offences). See also the U.S. *Refuse Act*, 1899 33 USC Para. 407, and U.S. *Rivers and Harbours Act*, 1899. (absolute liability offences).

<sup>17</sup> E.g., see the U.S. *Food, Drug and Cosmetic Act* 21 USC para. 331.

<sup>18</sup> E.g., the commercial fishery, as regulated under the federal *Fisheries Act*, *op cit.*, as discussed in *R. v. Gulf of Georgia Towing Ltd.*, *op cit.*, and forestry resource management, as regulated under the Nova Scotia *Lands and Forests Act*, R.S.N.S. 1967, as discussed in *R. v. Maidment* (1984) 7 D.R.R. (4th) 171.

<sup>19</sup> E.g., see s. 37 of the Ontario *Occupational Health and Safety Act*, RSO 1990, c. O.1, as discussed in *R. v. Ellis-Don Ltd.*, *op cit.*

protection,<sup>20</sup> transportation of dangerous goods<sup>21</sup> and highway traffic control.<sup>22</sup> In Canada, there are an estimated 97,000 regulatory offences contained in federal legislation,<sup>23</sup> while in the U.S., there are an estimated 300,000 “regulations that can be enforced criminally”,<sup>24</sup> and in the U.K., there are more than 3500 non-intentional offences.<sup>25</sup> While these offences were originally developed and used to address comparatively minor incidents of misconduct, with equally minor penalties,<sup>26</sup> today such offences are increasingly being used to address serious misconduct and are attracting significant penalties, including imprisonment.<sup>27</sup>

Underlying the wide diversity of regulatory offences types and nomenclature, there is an equally broad spectrum of views concerning their legitimacy, necessity, and effectiveness. Many

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<sup>20</sup> E.g., see s. 113 of the U.K. *Food and Drugs Act 1955*, as discussed in M. Levi, “Business Regulatory Offences and the Criminal Law,” *The Company Lawyer* Vol. 5, No. 6, 251 - 258, at p. 252.

<sup>21</sup> E.g., see the B.C. *Transport of Dangerous Goods Act*, S.B.C. 1985, c. 17, Part 5.

<sup>22</sup> E.g., see s. 130 of the Ontario *Highway Traffic Control Act*, RSO, c. 1990, op cit.. Under s. 10 of the U.K. *Road Traffic Act, 1960*, driving without due care and attention is a summary offence.

<sup>23</sup> Law Reform Commission of Canada, *Policy Implementation, Compliance and Administrative Law*, Working Paper 51 (Ottawa: Government of Canada, 1986), at p. 38.

<sup>24</sup> Per J. Coffee Jr., “Does ‘Unlawful’ Mean ‘Criminal’?: Reflections on the Disappearing Tort/Crime Distinction in American Law,” [1991] 71 *Boston University Law Review* 193 - 246, at p. 216. Coffee Jr. states that there are an estimated “300,000 regulations that can be enforced criminally.” Coffee Jr. was quoting Stanley Arkin, “a well-known practitioner in the field of white collar crime.” Although Coffee Jr. does not define precisely what he means by “regulations that can be enforced criminally” he uses the term in the context of a discussion of “public welfare offenses” which he had defined as offences with comparatively small penalties where intent need not necessarily be proven to obtain conviction.

<sup>25</sup> Per Justice, *Breaking the Rules*, 1980, as cited in M. Levi, “Business Regulatory Offences...” *op cit.*

<sup>26</sup> As discussed by F. B. Sayre, “Public Welfare Offenses,” (1933) 33 Col. L. Rev. 55. Note, however, that even in the nineteenth century imprisonment has occasionally been attached to absolute liability offences (as discussed in Part I: Origins and Development of the Regulatory Offence).

<sup>27</sup> E.g., see s. 113 of the *Canadian Environmental Protection Act*, RSC 1985, 4th Supp., c. 16, and s. 146a(1) of the Ontario *Environmental Protection Act*, RSO 1980, c. 141, as amended. Coffee, Jr. *op cit.*, is one of the commentators who laments the development of large penalties for public welfare offences. Note, however, that the Canadian strict liability offence option is not in common use in the United States (as discussed *infra*).

courts (including the Supreme Court of Canada)<sup>28</sup> and commentators<sup>29</sup> have expressed repugnance toward offences of absolute liability, where penal liability is imposed based solely upon proof of the *actus reus* of the offence, without any requirement of proof of intent and no excusing defences. Following the introduction of the *Canadian Charter of Rights and Freedoms*<sup>30</sup> in 1982, absolute liability offences with imprisonment available as a penalty were found in most circumstances to be in violation of the *Charter*.<sup>31</sup> Similarly, in Germany, such offences are not constitutionally allowed.<sup>32</sup> Yet in the United States, the U.S. Supreme Court has provided strong words of endorsement for absolute liability offences, even where imprisonment is available as a penalty.<sup>33</sup> Absolute liability offences with jail penalties have also been upheld in the Netherlands.<sup>34</sup>

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<sup>28</sup> E.g., see *Sault Ste. Marie, op cit*, in England, in *Reynolds v. G.H. Austin & Sons Ltd.* [1951] 2 KB 135, at p. 148, the Court of King's Bench expressed its disapproval for an offence which held a man vicariously liable for the acts of another whom he could not reasonably be expected to influence or control, calling it "pouncing on the most convenient victim."

<sup>29</sup> E.g., see P. Johnson, "Strict Liability: The Prevalent View," in Kadish, ed., *Encyclopedia of Crime and Justice*, 1518, at pp. 1520-21; see also, Law Reform Commission of Canada, *The Meaning of Guilt: Studies in Strict Liability, op cit.*, at pp. 21 - 25.

<sup>30</sup> Part I of the *Constitution Act, 1982*, being Schedule B of the *Canada Act 1982* (U.K.), 1982, c. 11.

<sup>31</sup> *Reference re section 94(2) of Motor Vehicle Act (B.C.), op cit.* Discussed in greater detail *infra*.

<sup>32</sup> As discussed in Michele Franke, "A Study of German Alternatives to Traditional Criminal Prosecution and their Adaptability to the Canadian Legal System" University of Montreal Masters of Law Thesis (1985). German regulatory offences are discussed in greater detail in Part Two of the thesis.

<sup>33</sup> E.g., see strong indications of support for such offences from the United States Supreme Court in *United States v. Balint* 258 U.S. 250 (1922), and *United States v. Dotterweich* 320 U.S. 277 (1943), as discussed in greater detail in Part Two of the thesis.

<sup>34</sup> As discussed in D.J. Van Zeben and M. Mulkey, "Choosing Among Criminal, Civil Judicial, and Administrative Enforcement Options: A Comparative Discussion of United States and Netherlands Experience," in *International Conference on Environmental Enforcement* (U.S.: EPA et al., Conference Proceedings Sept. 22 - 25, 1992, Budapest, Hungary, Vol. I), pp. 397 - 415. Dutch regulatory offences are discussed in greater detail in Part Two of the thesis.

In the late 1970s, a “half-way house” offence between absolute liability offences on the one hand and intentional offences (true crimes) on the other was given the unanimous approval of the Supreme Court of Canada,<sup>35</sup> and subsequently judicially recognized in New Zealand.<sup>36</sup> This was the so-called strict liability offence whereby conviction follows upon proof of the *actus reus* of the offence unless the accused establishes on a balance of probabilities that he or she exercised reasonable care (due diligence) or acted because of a reasonable mistake of fact. Variations on this offence are also common in the United Kingdom,<sup>37</sup> Australia<sup>38</sup> and other Commonwealth countries.<sup>39</sup> Even though the strict liability offence was intended to alleviate some of the harshness of the absolute liability offence, it still has attracted criticism. Some have suggested that only proof of subjective intention provides sufficient grounds for imposition of penal liability.<sup>40</sup> The strict liability offence has also been criticized on other grounds: putting the burden on the accused to establish due diligence on a balance of probabilities, it has been asserted, is an

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<sup>35</sup> *Sault, op cit.*

<sup>36</sup> E.g., see *Civil Aviation Department v. MacKenzie* (1983) N.Z.L.R. 78 - 97; and *Millar v. Ministry of Transport* [1986] 1 NZLR 660. New Zealand regulatory offences are discussed in greater detail in Part Two of the thesis.

<sup>37</sup> In *Sweet v. Parsley* [1970] A.C. 132, Lord Pearce speaks of admission of the defence of reasonable mistake of fact as being a “sensible half-way house.” While the due diligence defence has been recognized in legislation it has not been accepted to the same extent by the courts. See, e.g., M. Levi, “Business and Regulatory Offences....” *op cit.* Regulatory offences in the United Kingdom are discussed in greater detail in Part II of the thesis.

<sup>38</sup> E.g., see *Proudman v. Dayman* (1941) 67 CLR 536, which recognizes a defence of reasonable mistake of fact. For discussion of the status of the reasonable mistake of fact defence in modern Australia, see Part II of the thesis.

<sup>39</sup> E.g., see G. Peiris, “Strict liability in Commonwealth Criminal Law,” (1983) 3 *Legal Studies* pp. 117 - 145.

<sup>40</sup> See, e.g., Dr. Turner, *The Modern Approach to Criminal Law* (1945), at p. 195, as discussed in H.L.A. Hart, *Punishment and Responsibility: Essays in the Philosophy of Law* (Oxford: Clarendon Press, 1970), at pp. 138 and 149.

unacceptable violation of the presumption of innocence.<sup>41</sup> Moreover, requiring that individuals and firms be duly diligent is in the eyes of some too uncertain a standard when serious penalties including imprisonment are available.<sup>42</sup>

Nevertheless, the concept of an offence where accused persons can escape liability by establishing that they exercised reasonable care or made a reasonable mistake of fact has received considerable support from commentators<sup>43</sup> and judges, including the majority of the Supreme Court of Canada, and courts in New Zealand.<sup>44</sup> Commentators have noted that much of the harm produced by industry is not so much intentional misconduct as it is the result of a failure to exercise reasonable care, and that therefore a penal approach which suspends the requirement of mens rea and instead focuses on negligent misbehaviour is both necessary and fair.<sup>45</sup> As one scholar puts it, “We can and do teach ourselves to take care when we know that, if we do not, we will be punished.”<sup>46</sup> Empirical evidence from the environmental arena suggests that many spill violations are the result of accidents, not of intentional misconduct.<sup>47</sup> Both judges and scholars have suggested that an offence which throws the burden on the accused to demonstrate

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<sup>41</sup> See, e.g., Lamer C.J. in *Wholesale*, *op cit*.

<sup>42</sup> E.g., see Coffee Jr., *op cit*.

<sup>43</sup> E.g., see C. Howard, *Strict Responsibility* (London: Sweet & Maxwell, 1961); H.L.A. Hart, *op cit*.

<sup>44</sup> As discussed in J. November, “Public welfare/Regulatory offences: Judicial criteria for definition and classification,” in 1990 *NZLR* 236 - 239 and 365 - 370. For more detailed discussion of New Zealand regulatory offences, see Part II of the thesis.

<sup>45</sup> E.g., see I. Paulus, “Strict Liability: Its Place in Public Welfare Offences,” (1977-78) 20 *Crim. L.Q.* 445; see also Swaigen and Bunt, *Sentencing in Environmental Cases*, (Ottawa: Law Reform Commission of Canada, 1985), at p. 45.

<sup>46</sup> Stuart, D., *Canadian Criminal Law* (3rd ed.) (Scarborough, Ont: Carswell, 1995) at p. 229.

<sup>47</sup> Swaigen and Bunt, *Sentencing in Environmental Cases*, (Ottawa: Law Reform Commission of Canada, 1985), at p. 45.

reasonable care in order to avoid liability recognizes the impossibility in many cases for prosecutors to prove negligence.<sup>48</sup> Moreover, putting the burden on the accused to establish reasonable care may encourage actors to implement preventative measures, and take on greater responsibility for managing their own activities<sup>49</sup> -- in the process better protecting society at large and reducing administrative responsibilities of government.

As even this cursory summary of the case law and scholarly commentary suggests, there is no shortage of divergent viewpoints about the propriety, necessity and utility of non-intentional offences. The purpose of this paper is to explore the rationale for and use of non-intentional offences which are attached to regulatory regimes, focusing in particular on the “half-way house” strict liability offence. Analysis centres on the historical, legal and philosophical justifications for the strict liability offence when imprisonment is a possible penalty, and the implications flowing from its use. While strict liability offences are not without weaknesses and limitations (some of them alluded to *supra*), the position taken in this paper is that, as part of a properly constructed regulatory regime, such offences provide a fair, appropriate and effective means of encouraging persons to take responsibility for their actions, while at the same time providing a necessary level of protection for the broader affected community. Moreover, although its rationale and mode of operation are different from the “true crimes”<sup>50</sup> model, arguments can be made that strict liability

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<sup>48</sup> E.g., Dickson, J., in *Sault, op cit.*, at p. 373; Richardson, J., in *MacKenzie, op cit.* at p. 85, and see Peiris, *op cit.*, at pp. 135 - 136; see also, J. Swaigen, “Negligence, Reverse Onuses and Environmental Offences: Some Practical Considerations,” (1992) 2 JELP 149 - 188, at pp. 167 - 169.

<sup>49</sup> See, e.g., comments to this effect in N. Strantz, “Beyond Sault Ste. Marie: The Creation and Expansion of Strict Liability and the ‘Due Diligence’ Defence,” [1992] 30 *Alta. L. Rev.* 1233 - 1257, at p. 1256. Discussed in greater detail in Part III of the thesis.

<sup>50</sup> So-called by Dickson, J., in *Sault, op cit.*, as discussed in greater detail *infra*.

offences are consistent with notions of individual liberty, the desire to maximize individual choice, and contemporary concerns with minimizing government administrative burden.

Viewed initially as an exception to the generally accepted approach requiring proof of intentionality before penal liability can be attributed, and as a compromise between two inappropriate extremes, the strict liability offence has emerged in the late twentieth century as an essential component of many regulatory regimes. In light of the unique philosophical and legal justifications for its use, and its apparent effectiveness in encouraging regulated actors to take on primary responsibilities for compliance, the time may be ripe to recognize the strict liability offence as a distinct, integral and legitimate instrument in the spectrum of penal approaches to liability, and not simply an adjunct to the intentional, “true crime” model. By so doing, it may be possible to more fully take advantage of the features of the strict liability offence. Used wisely and appropriately, in a manner which draws on its special characteristics, functions, and conceptual underpinnings, the strict liability offence has much to offer as a means of encouraging compliant behaviour and fairly addressing negligent misconduct. Indeed, analysis suggests that jurisdictions such as the United States, which have yet to fully embrace the strict liability offence and thus take advantage of its features, may have been disadvantaged in the process. American judges, plaintiffs and defendants have been left to struggle with inappropriate offence types and approaches, to the apparent detriment of accused persons and the general population.<sup>51</sup> As a result, the paper argues that there is considerable potential for an expanded role for strict liability offences in United States and elsewhere.

To explore the veracity of these claims, the paper adopts a varied approach. First, in Part

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As discussed in greater detail in Part II of the thesis.

One, historical analysis of the origins and early forms of regulatory offences is undertaken. This historical analysis reveals the ancient usage of offences resembling the modern regulatory offence, with use of non-intentional, objective negligence as the basis for penal liability extending back to pre-Biblical societies. A distinctive stream of non-intentional “petty offences” for commercial misconduct is identified as emerging in medieval England. Preoccupations with intent (as opposed to evilness) and proof beyond a reasonable doubt are discovered to be evolving concepts of comparatively recent in origin. The Industrial Revolution (and the associated harms caused by it), is identified as a catalyst event prompting judicial re-consideration of the appropriateness of the intent requirement when addressing industrial misconduct.

This is followed in Part Two by an examination of the modern conception and development of the strict liability offence in Canada, with comparisons to the use of regulatory offences in Australia, New Zealand, the United Kingdom, United States, Netherlands and Germany. The recognition of the strict liability offence by the Supreme Court of Canada has put the Canadian judiciary in the vanguard in terms of developing an approach to penal liability which is particularly suited to the exigencies of modern regulatory activity, and so it is a focus of attention. Of particular interest is the fact that the strict liability offence was recognized by the Supreme Court prior to the introduction of the *Canadian Charter of Rights and Freedoms*, with its explicit protections of the rights of accused persons, and yet the offence has since survived *Charter* challenges. Examined in detail are the legal situation prior to recognition of the strict liability offence, the decision in *R. v. Sault Ste. Marie*, the subsequent application of the decision in *R. v. Sault Ste. Marie* decision, the introduction of the *Charter*, key early *Charter* decisions, direct *Charter* challenges to the absolute and strict liability offence types, and cases since the

strict liability offence has been constitutionally upheld.

Examination of judicial and legislative recognition and usage of non-intentional regulatory offences in the United States, the United Kingdom, Australia, New Zealand, Germany, and the Netherlands follows, revealing widespread recognition of the need to use some form of non-intentional offence to address regulatory misconduct, but wide variations in terms of what is considered acceptable. The similarities and divergencies are discussed in an attempt to find common elements. In particular, the situation with respect to both absolute liability and strict liability offence types is examined. It will be seen that, in comparison with Canada, New Zealand, and German courts, those jurisdictions where the judiciary has not formally approved and made widespread use of a negligence-based offence seem to have a less coherent approach to addressing regulatory misconduct. In some jurisdictions, such as the United Kingdom and Australia, the strict liability offence is regularly used in legislation but has not received formal approval by the courts. In others, such as the United States and the Netherlands, the absolute liability offence continues to receive judicial approval, even when imprisonment is available as punishment.

In Part Three, a jurisprudential perspective to use of regulatory offences is provided, focussing on the underlying legal principles at play. A focus of analysis is the possible justifications for the strict liability regulatory offence as a choice-based system of penal liability which maximizes individual liberty. Comparisons are made with the subjective intent “true crimes” model, *Criminal Code* offences of objective negligence, and the absolute liability offence type. Part Three also includes an examination of some of the potential implications flowing from use of the strict liability offence. A focus of analysis is the possible catalyst effect of the

reasonable care defence as a motivator for industrial sectors to develop preventative “self-regulatory” systems to ensure due diligence. Finally, overall conclusions to the thesis are provided.

In this thesis, a number of different approaches are adopted to explore the fairness, appropriateness and effectiveness of the strict liability offence with imprisonment as a penalty: an historical analysis, a comparative review of Commonwealth, American and continental European approaches, an examination of the philosophical foundations for such offences, and a review of some of the practical implications flowing from use of the strict liability offence type are all undertaken. A synthesis of this analysis which concludes the paper suggests that the strict liability offence seems to act as a powerful device for inducing compliant behaviour yet at the same is a fair method of imposing liability on persons who commit this type of misconduct. Analysis also suggests that more widespread acceptance of the strict liability offence type in some jurisdictions (especially United States) would have beneficial effects for both accused persons and the greater public.

## Part One -- Origins and Development of the Regulatory Offence

In approaching the issue of non-intentional but harmful regulatory misconduct, it is easy to start from the assumption that this phenomenon is recent in origin,<sup>52</sup> and that modern approaches to addressing such misconduct are unique and distinctive, so that there is little to be gained from sifting through the law books, records and thinking of earlier times. But, as Oliver Wendell Holmes once said, "the history of what the law has been is necessary to the knowledge of what the law is."<sup>53</sup> Kierkegaard echoed this sentiment when he stated that, "Life must be lived forward, but can only be understood backward."<sup>54</sup> While it is probably true that there are aspects of non-intentional misconduct of the type common today which have no analogue in previously existing societies, and while agreeing that law systems and values common today may very well be different from those in place in earlier times, historical research reveals considerable evidence that earlier societies developed to approaching wrongs and holding persons responsible that encompassed certain types of non-intentional misbehaviour. It will be seen, for example, that penal liability for failures to exercise reasonable care has deep roots in Western societies.

In this component of the thesis, historical analysis is divided into five main time periods: ancient (defined here as from around 2000 BC to the downfall of the Western Roman Empire at the end of the sixth century), early medieval (from 600 AD to about 1000 AD) and late medieval (1000 - 1799). Separate discussions of the nineteenth century and the early twentieth century are

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<sup>52</sup> At least insofar as such misconduct is widespread, and perhaps in terms of the pervasive damage inflicted by such misconduct.

<sup>53</sup> O. Holmes, *The Common Law*, Boston, 1949, p. 37.

<sup>54</sup> As quoted in I. Drapkin, *Crime and Punishment in the Ancient World* (Lexington, Mass.: Lexington Books, 1989), at p. xiii.

then provided. Analysis consists of a review of earlier rule-systems and laws pertaining to intentional and unintentional misconduct (including negligent misbehaviour), evolution of penal laws and thinking about these laws, and an exploration of what in the way of surrounding circumstances has changed over time which might bear on changes to the laws.

It will be seen that the “true crime” notion that the prosecution must prove a subjective mental element as well as an actus reus for every offence is a relatively modern concept, which really only took hold after the sixteenth century in England and originally applied in only a limited set of circumstances. The intentional true crime concept was then extended beyond its original purpose and realm and in the face of circumstances which called out for and variously were the beneficiaries of different non-intentional penal approaches.

Before engaging in this historical analysis, three points of caution are in order. First, because records from earlier times are often far from complete, it is not possible to speak with complete certainty about how exactly earlier rule systems and laws operated in practice. Second, it should be apparent that the nature of societies, rule systems, and laws were markedly different than they are today, so that the examples and discussion which follows should be taken as merely evidence of earlier approaches and thinking, and not a grand and systematic theory of history and law. Third, the historical discussion which follows is largely derived from secondary sources, and is not intended to be viewed as comprehensive analysis of the history of penal laws pertaining to intentional and non-intentional misconduct, but rather is a much more modest attempt to glean some basic insights concerning early thinking about how societies can and have addressed the questions of wrongs and responsibility. For these reasons, it is important not to read too much into the observations made here about earlier times and earlier laws and rule systems. But while

bearing these points in mind, there are still many points to emerge from historical analysis which are of thought-provoking and of relevance to our thinking today.

## Chapter 2 -- The Ancient Period

Even in the ancient period, there is considerable evidence that societies appreciated the need to attach liability for both intentional and what we would today refer to as negligent misconduct. The oldest known code of law yet to be found is said to be the Laws of Eshnunna,<sup>55</sup> dating from around 2000 B.C.. Eshnunna was a city in Mesopotamia, between the lower Tigris and lower Euphrates rivers (a part of modern-day Iraq), which was subsequently conquered by Hammurabi, the King of Babylon, in about 1720 B.C.. The Laws of Eshnunna set out edicts pertaining to both intentional and negligent misconduct. With respect to intentional misconduct, for example, by section 42, "If a man bit the nose of a man and severed [it] -- he shall weigh out one mina silver." Edicts can also be found pertaining to the severing of a man's finger (section 43), the breaking of a man's arm or leg (sections 44 and 45), the theft of crops (section 12), and sexual assault (section 31).

But while misconduct pertaining to biting, severing, breaking, theft, and assault are almost by definition intentional, the Laws of Eshnunna also included edicts which look remarkably like negligent misbehaviour. For example, section 58 of the Laws of Eshnunna stipulates the following:

If a wall was threatening to fall and the ward have had [it] made known to the owner of the wall, but he did not strengthen his wall, and the wall collapsed and caused a son of a man to die -- [it is a case concerning] life: decree of the king.<sup>56</sup>

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<sup>55</sup> Per Drapkin, *ibid.*, at pp. 18 - 25. Two clay tablets with the laws of Eshnunna were discovered in 1945 and 1949. Prior to that time, the popularly held conception was that the Code of Hammurabi were the oldest known codes. The Code of Hammurabi is examined below. The following discussion concerning the Eshnunna laws draws extensively on Drapkin.

<sup>56</sup> Drapkin, *op cit.*, at p. 25: Parenthesis added by Drapkin.

Similar offences pertain to oxes or vicious dogs which kill humans, and as with the collapsing wall offence, these offences include “notification” clauses whereby it is a necessary element of the offence that the ward make it known to the owners of the ox or dog that their animal needed to be guarded and controlled.<sup>57</sup> To the modern eye, these types of offences seem to be classic examples of penal liability attaching for failure to exercise reasonable care. Of course, in a modern strict liability offence with a due diligence defence, it would be possible for the accused wall owner to proffer an explanation as to why he did not strengthen the wall, or to demonstrate that he exercised reasonable care, and if accepted by the adjudicator, escape liability, but there is no mention of this exculpating defence in the Laws of Eshnunna. The fact that, for liability to attach, the “ward” must have communicated to the wall-owner that the wall was in need of repair suggests recognition (perhaps only at an intuitive level) of the need to provide a conscious opportunity for the accused wall owner to act in a preventative fashion before liability will be imposed. If a wall owner fails to take preventative action in spite of having been made aware of the wall’s “threatening” nature, the wall owner’s behaviour begins to resemble rather closely an example of what today would be characterized as recklessly negligent misbehaviour (i.e., the accused is imputed to be subjectively aware of the danger, and yet still the accused refuses to address the dangerous activity).

Engaging in pure speculation, perhaps the fact that the punishment is reserved for the “decree of the king” signifies a discretionary ability on the part of the king to take into account mitigating factors undertaken by the accused. Israel Drapkin, in *Crime and Punishment in the*

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Sections 54/55, and 56/57, at p. 24-25 in Drapkin, *op cit.*.

*Ancient World*<sup>58</sup> compares the punishment for the negligent wall owner with that of the negligent ox or dog owner:

In the cases of an ox or a dog, the law imposes a penalty of...silver, depending on whether the victim is a freeman or a slave, because the damage could be foreseen, and had the owner behaved with caution, the accident could have been avoided. But death caused by the collapse of a wall that was in disrepair is a capital case, because it was predictable and therefore always preventable. The responsibility for prevention rested with the owner of the wall. It is likely that the ruling concerning the collapse of a wall and similar rulings were laid down following actual occurrences, thus setting the precedent that was recorded for future use.<sup>59</sup>

Regardless, the concepts of foreseeable damage, and penal responsibility for prevention have a distinctively modern ring to them. These early examples of offences imposing penal liability for failure to exercise due diligence suggest that even ancient societies intuitively understood the concept of deterrence by punishing failures to exercise reasonable care as a means of encouraging diligence. As discussed below, this penal negligence concept is carried forward in succeeding ancient societies.

Slightly more modern than the Laws of Eshnunna, the Code of Hammurabi (circa 1700 BC) of the Babylonians included edicts addressing what looks strikingly similar to negligent misbehaviour. For example, section 229 of the Code of Hammurabi states:

If a builder build a house for any one and do not build it solid; and the house, which he has built, fall down and kill the owner; one shall put that builder to death.<sup>60</sup>

Several aspects of this offence are worthy of comment. Note first the fact that the persons subject to the offence are "builders" -- that is, those in the construction trade. The existence of an offence

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<sup>58</sup> *Op cit.*

<sup>59</sup> Drapkin, *op cit.*, at p. 25.

<sup>60</sup> Kocurek and Wigmore, *Sources of Ancient and Primitive Law*, Vol. I, Chapter XIV (Boston: Little, Brown, and Co., 1915), at p. 433.

specifically addressed to “builders” (i.e., tradespersons) foreshadows more modern regulatory approaches directed at particular commercial actors, who are assumed to possess certain skills, and others (i.e., the purchasers of their services) are reliant on their skill and care. Note as well that the offence is directed at house builders “who do not build it solid”. It would appear that, once the actus reus of the offence is established (i.e., that the builder built the house, that the house fell down, and that the owner was killed), then the accused builder may be able to escape liability by establishing that he did in fact “build it [the house] solid”. Thus, for example, if there was an earthquake, and all the houses in the surrounding environs suffered similar damage, then the accused might be able to argue that the house was built as solid as other houses (i.e., that the community standard of “reasonable care” had been exercised) and thus there were grounds for an acquittal. This, of course, is speculation, but, in the absence of evidence of how the offence was actually implemented, the plain language of the offence would seem to support this interpretation of an early form of a due diligence defence.

Unlike the Eshnunna offence pertaining to the wall owner discussed above, the Hammurabi offence does not include as an integral element a warning to the builder of an imminent danger, and thus there is no necessary implication of conscious risk-taking before liability is imposed. Thus, this offence resembles less an offence of recklessness (i.e., an offence requiring proof that the accused was him or herself subjectively aware of the danger, and yet acted or allowed misconduct to take place anyway), and more one of strict liability (i.e., where the issue is an objective inquiry as to whether the accused exercised reasonable care, regardless of whether he or she was subjectively aware of the risk). Note as well the seriousness with which such misbehaviour was treated: the penalty for negligent misbehaviour causing death is death.

The Old Testament is said to have been written over the period 1200 to 200 B.C.<sup>61</sup> It includes numerous prescriptions which suggest understanding of the distinctions between intentional, negligent, and accidental misconduct, and varying penalties depending upon the nature of the misconduct. Thus, while intentional killing is punishable by life, the lesser penalty of taking sanctuary in a "safe city" is available for an accidental killing.<sup>62</sup>

Echoing the earlier Code of Eshnunna, Exodus 21:28 includes the following prescription:

If...the ox has for some time past been a vicious animal, and the owner has been duly warned but has not kept it under control, and the ox kills a man or woman, then the ox shall be stoned, and the owner shall be put to death as well. If, however, the penalty is commuted for money payment, he shall pay in redemption of his life whatever is imposed upon him....

Thus, a failure to exercise reasonable care when addressing a foreseeable risk is punishable by death. Perhaps the possibility of commutation to a money payment indicates a readiness to consider explanations from the accused about what steps the owner of the ox took to prevent such accidents from taking place. However, this occurs as a consideration in sentencing rather than as grounds for acquittal.

The Talmud makes similar distinctions based on intentionality. For example, Drapkin summarizes some of the Talmudic offences as follows:

The Talmud goes into tremendous detail about how judges may determine whether or not there was intent to kill. If a man was rolling his roof with a roller and it fell on a man and killed him, or if he was letting down a casket from the roof or coming down a ladder and it or he fell on a man and killed him, he was guilty of unintentional homicide and sentenced to banishment. In the same three cases, if he were pulling up the roller or the casket or going up the ladder and he fell and killed a man, he was not to be banished because the

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<sup>61</sup> S. Sandmel, et al., eds., *The New English Bible with the Pseudepigrapha*, Oxford Study Edition (New York: Oxford University Press, 1976), at p. xix..

<sup>62</sup> Exodus 21: 12 - 14, in *Bible, ibid.*

cases were considered accidents. The general rule of law was that a crime committed during descent ends in banishment, for in descent the possibility of causing injury is greater, whereas the chance of injuring someone while ascending is somewhat less and therefore is considered an accident.<sup>63</sup>

Apparent here is a calculus of relative risk for varying types of non-intentional behaviour with harmful consequences.

The ancient Greeks (from ~1200 BC to ~200 AD) -- in particular, the philosophers Socrates, Plato, and Aristotle -- are credited by modern scholars with originating and developing a comparatively sophisticated understanding of personal criminal responsibility (replacing collective notions), including recognition of the central role played by intention and volition.<sup>64</sup> There is evidence from the writings of all three philosophers of the importance of intentionality and “voluntariness” as essential elements of liability. However, as discussed below, the exact meaning of these terms, and their interpretation, are not necessarily congruent with today’s versions.

In 399 B.C., the final year of his life, Socrates (~469 - 399 BC), was accused of “impiety and of corrupting young men”, and was found guilty of the charge.<sup>65</sup> Following the court’s pronouncement that Socrates was guilty as charged, Socrates was given the opportunity to speak to sentence. As part of that “apology”, Socrates says the following to Meletos (one of his accusers):

Oh dear me, Meletos! I so old and you so young, and yet you are so much wiser than I

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<sup>63</sup> Drapkin, *op cit.*, at p. 77.

<sup>64</sup> See, e.g., discussion in Drapkin, *op cit.*, at pp. 209 - 211. See also, J. Hall, “Interrelations of Criminal Law and Torts: I” (1943) *Columbia L. R.* 753 - 779, at 777 - 778.

<sup>65</sup> E. Warmington and P. Rouse, eds., *Great Dialogues of Plato*, (New York: New American Library Mentor Book), “The Apology (The Defence of Socrates)” at p. 423.

am! You know that bad men always do harm to those who are nearest about them, but good men do good; yet look at me -- have I indeed come to such a depth of ignorance that I do not know even this -- that if I make one of my associates bad I shall risk getting some evil from him -- to such a depth as to do so great an evil intentionally, as you say? I don't believe you there, Meletos, nor does anyone else in the world, I think; but either I do not corrupt, or if I do, I corrupt without meaning to do it. So you are speaking falsely on both counts. *But if I do it without intent, there is no law to bring a man into court for accidental mistakes such as this;* on the contrary, the law is that one should take him apart privately and instruct and admonish him; for it is plain that, if I learn better, I shall stop what I do without intent. But you shirked meeting me and instructing me; you would not do that, and you bring me to this court, where it is the law to summon those who need punishment, not instruction.<sup>66</sup>

It is worth emphasizing that at the point in time that this speech was made, Socrates had already been convicted, suggesting that in spite of his assertions indicating the contrary, the law at the time of his trial was such that a man could in fact be convicted of impiety and corruption of youth even though this was not the man's intent. It is certainly true that recognition of the importance of intentionality and voluntariness developed gradually in Greek law and philosophy,<sup>67</sup> so that perhaps Socrates was speaking more of how he wished the law to be at the time of his trial rather than how it actually was at that point. Note as well that Socrates speaks of accidental mistakes "such as this.": it is not clear whether his assertion about the need for intent, even if it were a correct statement of the law as it applied to the crime of impiety and corrupting young men, was of equal force to other laws (be they crimes, or commercial offences).<sup>68</sup>

Plato (~427 - 347 BC) developed a detailed classification of criminal offences. He divided crimes into those pertaining to: religion; the state; prevailing customs and family; and against

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<sup>66</sup> *Ibid.*, at pp. 431-432 (emphasis added).

<sup>67</sup> One commentator writes that in Homer's time (eighth century B.C.), "The basic distinctions between *dolus*, or guilt, negligence, and accident were still not established." Drapkin, *op cit.*, at p. 173.

<sup>68</sup> On the latter, see discussion below.

persons, and made distinctions depending on the status of the offender and victim.<sup>69</sup> Most importantly, for the purposes of this discussion, Plato attached integral significance to the intentions of accused persons and the voluntariness of actions. For example, Plato concluded that misconduct of man against man (“unjust acts”) was of three main types: misconduct associated with fear, that revolving around pleasure and desires, and thirdly, that associated with ignorance.<sup>70</sup> Plato concludes that murders should be distinguished “by the mark of deliberate intent or lack of intent, and to impose more severe penalties on those who slay with intent and in anger, and milder penalties on those who do so without intent and on a sudden.”<sup>71</sup> Note here that, while intentionality is considered to be deserving of the most severe penalties, nevertheless accidental, or non-intentional death is also subject to penalties. The “voluntariness” of actions is another important factor to be taken into consideration. However, even involuntary crimes are subject to penalty, and moreover the definition of “involuntary” is quite elastic. Thus, for example, Plato states the following:

And if one man kills another of his own act, but involuntarily, -- whether it be with his own unarmed body, or by a tool or a weapon, or by a dose of drink or of solid food, or by application of fire or of cold, or by deprivation of air, and whether he does it himself with his own body or by means of other bodies, -- in all cases it shall be accounted to be his own personal act, and he shall pay the following penalties...<sup>72</sup>

As used here, “involuntary” would appear to mean that an accidental chain of events could lead to liability.

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<sup>69</sup> T. E. Page, et al., eds. *Plato*, Book IX, “Laws” (Cambridge: Harvard Univ. Press, 1926, reprinted 1961), Vol. II, p. 209ff.; Drapkin, op cit., p. 208 .

<sup>70</sup> Page, *Plato, ibid.*, pp. 231 - 235.

<sup>71</sup> *Ibid.*, p. 245.

<sup>72</sup> *Ibid.*, p. 239 .

Finally, Plato separately discusses laws pertaining to trade.<sup>73</sup> His description of these laws suggests that the principles and understandings associated with murder and other personal wrongdoings may have limited or different application in the commercial sphere. Thus, for example, Plato states the following:

He that exchanges for money either money or anything else, living or not living, shall give and receive every such article unadulterated, conforming to the law....<sup>74</sup>

He that sells any article in the market shall never name two prices for what he is selling....and there shall be no puffing....He that is found out in selling any such article....shall be beaten....<sup>75</sup>

[With respect to] acts of fraud and wrongful acts done by sellers, the market-stewards and the Law-wardens, after making enquiry from experts in each trade, shall write out rules as to what the seller ought to do or avoid doing, and shall post them....to serve as written laws and clear instructors for those engaged in business in the market....<sup>76</sup>

Several aspects of these laws are noteworthy for present purposes. First, on the basis of a plain language reading of the edicts, and in the absence of evidence concerning how these trade laws were actually enforced, there does not appear to be a necessary intent-to-harm element to the offences (e.g., intent that articles be adulterated).<sup>77</sup> Second, the process of rule development, where State officials work closely with merchants to develop detailed rules to apply to particular trades, is remarkably similar to the regulation-making process associated with many of today's regulatory regimes.<sup>78</sup> In short, there is evidence to suggest that the concepts of liability and the

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<sup>73</sup> *Ibid.*, Laws Book XI.

<sup>74</sup> *Ibid.*, p. 401.

<sup>75</sup> *Ibid.*, p. 403.

<sup>76</sup> *Ibid.*, p. 405.

<sup>77</sup> Of course, it may be that intent was assumed from the nature of the misconduct.

<sup>78</sup> In Part Three of the thesis, we will see how the notion of "co-regulation," in which commercial interests play an active role in articulating preventative due diligence regimes, is encouraged through use of the strict liability offence.

processes for rule development of trade laws were quite different from laws pertaining to personal offences against the person, and in this regard resemble the conceptual and procedural differences of today's regulatory laws when compared with their "true crime" counterparts.

Plato taught Aristotle (384 - 322 B.C.) when the latter was in his formative educational periods. Building on the works of his teacher, Aristotle developed a "precise and definite theory" of criminal liability, stressing the importance of differentiating between voluntary and involuntary acts.<sup>79</sup> But while emphasizing the significance of voluntariness to determinations of liability, Aristotle believed that neither ignorance of the law nor carelessness should be grounds for avoiding punishment:

.....And we punish those who are ignorant of anything in the laws that they ought to know and that is not difficult, and so too in the case of anything else that they are thought to be ignorant of through carelessness; we assume that it is in their power not be ignorant, since they have the power of taking care.

But perhaps a man is the kind of man not to take care. Still they are themselves by their slack lives responsible for becoming men of that kind, and men make themselves responsible for becoming men of that kind, and men make themselves responsible for being unjust or self-indulgent, in the one case by cheating and in the other by spending their time in drinking bouts and the like.....to the unjust and to the self-indulgent man it was open at the beginning not to become men of this kind, and so they are unjust and self-indulgent voluntarily; but now that they have become so it is not possible for them not to be so.<sup>80</sup>

It is apparent from this excerpt, then, that Aristotle clearly felt that negligent misconduct was deserving of punishment, and that persons have the "choice" to be careful or not. We will return to discuss this notion in Part Three of the thesis where the philosophical underpinnings to

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<sup>79</sup> Drapkin, *op cit.*, p. 211.

<sup>80</sup> McKeon, R., ed., *Aristotle: The Basic Works of Aristotle* (New York: Random House, 1941), Book III, Ch. 5, at p. 972.

regulatory offences are explored.

From an intellectual and legal standpoint, the Roman Empire -- which commenced with the creation of the city state of Rome in about 500 BC and later extended over much of Europe in the first centuries after Christ, then collapsed at about the end of the sixth century (Western Empire) and 1453 (Eastern Empire) -- drew substantially on the foundation provided by the Greeks.<sup>81</sup> The greatest legacy of Roman law is undoubtedly the Justinian Code, compiled in the sixth century AD.<sup>82</sup> Like the Greeks, the Roman criminal law emphasized intentionality, and provided for lesser penalties where misconduct was the result of accidents. Thus, for example, the Lex Aquila (Twelve Tables), from the third century B.C., states as follows:

Anyone who burns a house or a heap of corn placed next to a dwelling is ordered to be first bound and scourged and then burnt to death, provided he did it consciously and knowingly. But if he has done it by accident, that is, by negligence, he is ordered to make good the damage or, if he is not capable of this, is punished more lightly.<sup>83</sup>

Note that the offence is framed in terms of a prohibited act which has the *potential* to be harmful, rather than toward actual inflicted harm. Thus, the offence talks of anyone who burns a house or corn “next to a dwelling”: the fear, quite clearly, is that burning a house or corn next to a dwelling *may* cause that dwelling to burn down, and lives to be lost. The offence thus deals with a *possible* harm to the public welfare rather than actual harm as an ingredient of the offence. This is

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<sup>81</sup> See generally, discussion in S. Painter, *A History of the Middle Ages: 284 - 1500* (New York: Alfred A. Knopf), at pp. 1 - 40. See also Drapkin, *op cit.*, at p. 213.

<sup>82</sup> Painter, *ibid.*, at p. 8.

<sup>83</sup> From the Justinian Digest, Twelve Tables, Chapter 47, 9, as discussed in F. Lawson, *Negligence in the Civil Law: Introduction and Select Texts* (Oxford: Oxford University Press, 1962) at p. 5 and pp. 176-77. Lawson suggests (at p. 176) that the word “negligence” may be a gloss which was added later. See also, generally, J. Strachan-Davidson, *Problems of the Roman Criminal Law* (Amsterdam: Editions RODOPI, 1969), esp. Vol. I, pp. 106 - 108; Vol. II, p. 173.

very common in modern regulatory offences where technical offences may seem trivial (e.g., to ensure that bolts on tires are tightened, that emission limits are followed, or monitoring reports submitted), but rare in conventional criminal offences, which tend to deal with direct harm (e.g., an assault, or a murder, where the harm to the victim is an integral component of the offence). Behind these technical violations are the potential for huge problems (e.g., an eighteen wheel truck crashing, or a large scale emission of pollutants contaminating the environment). In this regard, the fact that a potential rather than actual harm is addressed in the offence foreshadows modern regulatory legislation.

The second half of the offence pertains to punishment. An argument can be made that an order to “make good the damage” has a distinctly compensatory ring to it. On the other hand, the alternative of being “*punished* lightly” brings the sanctions back into the realm of penal law. It would thus appear as if some blurring of what would later be called tort and crime is evident in this particular offence.<sup>84</sup>

In short, then, there is considerable evidence from the ancient period that early law-makers understood the distinctions between intentional and negligent or accidental misconduct, and recognized that both intentional and negligent/accidental misbehaviour can be deserving of penal liability. Some of the offences would appear to be absolute liability in nature, but there are hints that discretion could be exercised by the adjudicator, which may have had the effect of modifying some of the apparent harshness.

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<sup>84</sup> Lawson, *op cit.*, at p. 11, suggests that there is considerable debate among scholars as to whether the Lex imposed criminal liability.

### Chapter 3 -- The Early Medieval Period (600 - 1000 AD)

From a legal standpoint, the period following the collapse of the Western Roman Empire, from 600 AD to 1000 AD, represented a definite step backwards.<sup>85</sup> This period was marked by limited and local social and commercial activity, with the dominant environment being one of instability and isolation and the dominant concern that of security.<sup>86</sup> Reflecting this breakdown in central control and instability, there was considerably less sophistication in the laws themselves, in thinking about laws, and institutions for their adjudication and implementation. The rise to prominence of Germanic tribes, be they Angles, Saxons, Jutes, Visigoths, Ostrogoths, Franks, Alemans, Gepidae, or others, signalled a transition from the elaborate and well-thought out Roman law to a more primitive "Lex Barbarorum"<sup>87</sup>:

German justice was administered in popular courts, assemblies of the people, presided over by the chief. Their law was primarily devoted to supplying alternatives to private

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<sup>85</sup> It is interesting to note that the Eastern (Byzantine) Roman Empire continued on unabated for another seven centuries, until its collapse in the 1400s. According to one author, commercial and industrial activity thrived during this period, and involved a heavy government component:

The more important industries were carried on by guilds or corporations strictly controlled by the state. Each corporation had the monopoly of its particular manufacture. The state regulated its purchasing of raw materials, the marketing of the finished product, the methods of manufacturing, prices and profits. Everything was carefully watched by government inspectors. Actually the craftsmen were employees of the state working under its direction. The result was a high degree of industrial stability, but little or no technological progress. Except for arms and armor the chief manufacturers were of luxury goods: silks, fine woolens, tapestry, jewellery, and ornamental articles of enamel and ivory.....Commerce was as closely controlled as industry. The two most profitable trades, those in grain and silk, were government monopolies, but all merchants were strictly regulated. (From: Painter, *op cit.*, at p. 39).

It would take until about the fourteenth century for Western Europe to rebuild itself to this level of commercial activity, with attendant regulatory structure. However, the Western European approach did not involve all-encompassing public ownership or control of the economic activity.

<sup>86</sup> See comment to this effect in J. Weber, "The King's Peace: A Comparative Study," (1989) 10 *J. of Legal History*, pp. 135 - 160, at p. 136; see also M. Weisser, *Crime and Punishment in Early Modern Europe* (Sussex: Harvester Press, 1979), at p. 29: "The overwhelming physical and social reality of the medieval world was isolation....Human contact was limited both in degree and kind...."

<sup>87</sup> The term "Lex Barbarorum" is used by G. Mueller, "Tort, Crime and the Primitive," [1955] 46 *J. of Criminal Law, Criminology and Police Science*, pp. 303 - 332, at p. 308 .

vengeance. If one man injured another, the latter brought a complaint before the court. The accused was then summoned to appear. If he did not come, he was declared an outlaw. In short, private vengeance was given official sanction. If the accused appeared, he could establish his innocence by having a number of men swear that he had not committed the offense. If he could not prove his innocence, he had to pay the injured party according to a fixed tariff, which varied according to the nature of the crime and the persons involved.<sup>88</sup>

Note that in this description the "accused"<sup>89</sup> is put in the position of proving innocence. Note as well the apparent lack of importance of intent. A Westgothic edict pertaining to homicide explicitly holds the perpetrator liable regardless of intent: "Whoever shall have killed a man, whether he committed the homicide intending to or not intending to....let him be handed over into the potestas of the parents or next of kin of the deceased."<sup>90</sup> It is perhaps drawing on this type of evidence that some commentators have concluded that:

....[l]egal history shews us that in the earliest period of our law, before the maxim as to mens rea became established, the mental processes of the wrongdoer were taken into account very little, if at all.<sup>91</sup>

.....a man had to pay for what he had done, and it made no difference what he may have been thinking or intending at the time.<sup>92</sup>

Yet even from this early period, there is evidence of some distinctions being drawn between intentional and non-intentional behaviour, and between wrongs deserving of compensable damage and those requiring punishment. Two "Lex Barbarorum" laws from around 600 A.D. serve to

<sup>88</sup> S. Painter, *op cit.*, at p. 22 .

<sup>89</sup> Admittedly, this modern, technical word is inappropriate to describe what is clearly a considerably less formal approach to addressing misconduct than is common to earlier or later societies.

<sup>90</sup> Westgothic law dating from somewhere between 400 and 900 A.D., per J. Wigmore, "Responsibility for Tortious Acts: Its History" (1894) 7 *Harv. L. Rev.*, 315 - 337, at p. 321.

<sup>91</sup> L. L. Radzinowicz and J. Turner, eds., Editorial Note in *Mental Abnormality and Crime* (1944) Nendeln, Liechtenstein: Kraus Reprint (1968) at p. x.

<sup>92</sup> *Ibid.*, at p. xi.

illustrate this: section 49 of Lex Thuringorum states that "[w]ho not wilfully but by some accident kills a human being or wounds him, shall pay the lawful compensation," while intentional offences such as section 24 of Lex Saxon, which addressed conspiracies against the king or kingdom, attracted penal sanctions (capital punishment).<sup>93</sup>

While there were brief periods of relative legislative activity and sophistication, such as during the reign of Charlemagne, who briefly unified Western Europe in the name of the Roman Empire in the year 800 AD, the more common state was one of instability, with unwritten, local customary law forming the bedrock of law across Western Europe.<sup>94</sup> While the meagre and hard life of indentured serfs was undeniably unpleasant, the comparative protection offered by a lord, and the manorial justice meted out as part of the feudal system, represented a measure of security in a world of violence and uncertainty.<sup>95</sup>

In England, the Germanic tribes of Angles, Saxons, and Jutes, who by 615 AD had settled large parts of the island,<sup>96</sup> were subsequently themselves attacked by the Danes in the following centuries. Eventually, the Danes settled in parts of England alongside the Anglo-Saxons. For a time, the law applying to Danes existed in parallel to that applying to Anglo-Saxons.<sup>97</sup> Plucknett describes Anglo-Saxon law in the period 600 - 900 A.D. as rudimentary in nature:

We must regard it as showing that the draftsmen ....had not yet achieved the first

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<sup>93</sup> All the foregoing from Mueller, *op cit.*, esp. at p. 309 ff.

<sup>94</sup> S. Reynolds, *Kingdoms and Communities in Western Europe, 900 - 1300* (2nd ed) (Oxford: Clarendon Press, 1997), at pp. 12 - 15.

<sup>95</sup> As discussed generally in Reynolds, *op cit.*, and Weber, *op cit.*.

<sup>96</sup> Painter, *op cit.*, at p. 31.

<sup>97</sup> Hudson, *op cit.*, at p. 17.

rudiments of a vocabulary which would enable them to analyse the law into such categories as 'crime', 'tort', 'property', 'procedure', and the like....<sup>98</sup>

The one aspect of Anglo Saxon law during this period which was comparatively elaborate, was the system of pre-ordained payments for wrongs (involving the "bot", "wer," "wergeld," and wite"), with differing amounts being stipulated depending on who suffered the wrong, and on what sort of physical harm was inflicted.<sup>99</sup> The "wer" and "wergeld" were monetary estimates of a man's worth, used for the calculation of payment following his unlawful death or injury, and the value of his oath, and penalties to the king.<sup>100</sup> While the "bot" was compensation payable to a victim or his relatives, it was also payment to a king or lord for an offence. A "wite," on the other hand, was a payment by way of punishment, generally to the king.<sup>101</sup> The dangers of a system which had the effect of reducing lives and injuries to monetary payment have been noted by some commentators.<sup>102</sup>

Even in such a basic, largely compensatory justice system some allowance was made for distinctions between intentional and non-intentional misconduct. Thus, for example, under the laws of King Alfred (900 - 925) it is stipulated that...

...if a man have a spear over his shoulder, and any man stake himself upon it, that he pay the wer without the wite. If he be accused of wilfulness in the deed, let him clear himself

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<sup>98</sup> Plucknett, T.F.T., *Edward I and Criminal Law* (Cambridge: University Press, 1960), at p. 3.

<sup>99</sup> *Ibid.*, at pp. 7 - 19 .

<sup>100</sup> Hudson, *op cit.*, at pp. 240 - 248. Note that the male pronoun is used because it is not clear from the author's research that the system of payments and compensations applied to women.

<sup>101</sup> *Ibid.*

<sup>102</sup> Plucknett, *op cit.*, at pp. 17 - 18.

according to the wite; and with that let the wite abate.<sup>103</sup>

Another edict from the laws of Alfred states the following:

Let the man who slayeth another willfully perish by death. Let him who slayeth another of necessity or unwillingly, or unwillfully, as God may have sent him into his hands, and for whom he has not lain in wait, be worthy of his life. If, however, any one presumptuously and wilfully slay his neighbour through guile, pluck thou him from my altar to the end that he may perish by death.<sup>104</sup>

Thus, although no divisions between tort and crime are evident, lawmakers from this period appear to have been somewhat cognizant of the distinction between intentional and non-intentional misconduct, and reflected such distinctions in the liability attaching to the misconduct.

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<sup>103</sup> F. Sayre, "Mens Rea," (1932) 45 *Harvard L. Rev.* 974 - 1026, at p. 982: see also Attenborough, F.L., ed., *The Laws of the Earliest English Kings* (New York: Russell and Russell, 1963), at pp. 79 - 81 (section 36 of the laws of King Alfred).

<sup>104</sup> Sayre, *ibid.*, 982. Sayre concludes that this passage is Biblical in origin.

## Chapter 4 -- The Late Medieval Period (1000 - 1799)

In a digest of English laws known as *Leges Henrici Primi*, compiled in 1118, which has been described as "containing a jumble of mixed rules from many sources but seeking to state a body of true English law that was neither Roman nor Canon law"<sup>105</sup> there are more examples of liability for accidental harm, apparently current in the eleventh century:

....if some one in the sport of archery or other form of exercise kill another with a missile or by some such accident, let him repay; for the law is that he who commits evil unknowingly must pay for it knowingly.<sup>106</sup>

In requiring that the wrongdoer "repay" there is a strong compensatory flavour to this particular liability.

According to some commentators, the idea that serious wrongs were committed not only against the individual and his or her family, but against the king, state, or country, and the general practice of punishing them by death, emerged in England in the tenth and eleventh century.<sup>107</sup> The Norman conquest of England by William I in 1066 marked the beginning of a particularly intensive period of consolidation of royal power through royal courts, which had the effect of furthering and solidifying the notion of "the King's Peace" and centralizing judicial power, even if the objectives of this consolidation were as much to increase revenue as they were to protect the public.<sup>108</sup> Continental Europe underwent much the same type of centralizing transformation, albeit

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<sup>105</sup> *Ibid.*, at p. 978.

<sup>106</sup> *Ibid.*

<sup>107</sup> Hudson, *op cit.*, describing Womald's thesis, at p. 20.

<sup>108</sup> Hudson, *op cit.*, at pp. 52 - 53.

at a somewhat later time period than in England.<sup>109</sup> One commentator has remarked:

Five centuries of violence, paralysis and uncertainty had created in the European heart a profound desire for security. When every chance might prove a mischance, when every moment might be one's last moment, the need for protection rose above every other concern, and to find a safe haven was about the most one asked from life.<sup>110</sup>

In short, at the beginning of the second millenium, the notion of the "King's Peace" was increasingly attractive for a combination of reasons including increased power and revenue as well defence, safety and security. Although not apparent at the time, the concept of the King's Peace would eventually broaden and transform from a focus on overt often-times political-oriented acts of violence to more subtle concerns with nuisance misconduct "which tend to the annoyance of all the king's subjects...",<sup>111</sup> and as such become precursors to the modern regulatory offence (as discussed *infra*).

The European-wide move toward territorial and judicial centralization signalled the beginning of the end of purely localized and variable justice, and the commencement of a movement toward conceptual and practical sophistication and consolidation in legal matters which is arguably still in progress today. All this having been said, the laws of the tenth, eleventh and twelfth centuries remained extremely basic and undeveloped. As one commentator stated,

Law between the tenth and early twelfth centuries was the undifferentiated, indeterminate, and flexible law appropriate to a society that was for many practical purposes illiterate (if not strictly illiterate), and it must be understood in those terms, not in the terms of later professional or academic law. In the words of Maine: 'the distinctions of the later jurists

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<sup>109</sup> Michael Weisser, *op cit.*, at pp. 51 - 52, talks of judicial centralization beginning to occur in earnest in England in 1000, followed by France a century later, and even later in Germany and Spain.

<sup>110</sup> J. Weber, *op cit.*, at p. 136.

<sup>111</sup> Shoemaker, R. *Prosecution and Punishment: Petty Crime and the Law in London and Rural Middlesex, c. 1660 - 1725* (Cambridge: Cambridge Univ. Press, 1991) pp. 29 - 20.

are appropriate only to the later jurisprudence.<sup>112</sup>

Nevertheless, with strengthening central organs of government, came the machinery and structure for rationalization and refinement:

As governments became more effective, and in particular as they extended their control over properly constituted law-courts, so the major units of custom tended to be assimilated to the areas under particular governments. By the later twelfth century the law practised in the royal courts of England was being discussed as a single whole, and by the thirteenth century French lawyers...were beginning to speak in terms of a 'common law' of their whole kingdom. Germans sometimes thought of Saxon, Swabian, and other provincial laws as separate, but sometimes of German law as one general body.<sup>113</sup>

In England, the path toward consolidation and sophistication would eventually lead to development of the civil-criminal (tort-crime) distinction, the demise of the type of local custom-based justice of guilds and merchant's courts, the creation of two classes of offences (felonies and misdemeanours), the rise in importance of "mens rea", and the move toward a rigorous proof and evidential process (among many other refinements). Since each of the above-mentioned developments bears directly on current issues associated with the non-intentional regulatory offences, they will each be discussed here.

### *The Tort-Crime Distinction*

Commentators suggest distinctions between civil and criminal pleas began to appear in English law in the late twelfth century, under the influence of Roman and canon law.<sup>114</sup> It was only in the eleventh century that Italian law schools were beginning to re-discover and draw on the Roman texts of Justinian, with their well developed classifications of wrongs, and emphasis on

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<sup>112</sup> Reynolds, *op cit.*, at p. 13.

<sup>113</sup> *Ibid.*, p. 43.

<sup>114</sup> Hudson, *op cit.*, at p. 56.

dolus<sup>115</sup> and intent. The impact of this re-discovery eventually spread to lawmakers throughout continental Europe and England.<sup>116</sup> It would appear that a factor underlying the re-emergence of the civil-criminal distinction in Europe was the re-building of state apparatus capable of undertaking actions on behalf of the greater community (personified as the king) -- apparatus which, except at a local level, had been largely absent in Europe since the fall of the Western Roman Empire. As mechanisms and concepts were developed to facilitate actions by royal officials in the name of the community, the question of what actions could and should be undertaken and carried out by individuals, and what actions necessitated the involvement of royal officials, became germane.

While the two criteria of compensation to individuals on the one hand, and the need for the preservation of order in the community on the other, were clearly of considerable importance in drawing distinctions between civil and criminal actions, the lines could not be neatly drawn in the twelfth and subsequent centuries, just as those lines cannot be drawn with complete certainty and accuracy today. Thus, for example, one commentator writes:

It is interesting...to recall that the writ of trespass, though civil in its main aspect, originated as a breach of the King's Peace. The writ alleged that the wrong of which complaint was made had been done by force and against the peace, though the force here described soon became a figment of the imagination. Yet as late as the reign of Edward II [i.e., the fourteenth century] the dual character of the action was maintained.<sup>117</sup>

Actions in nuisance have maintained the "dual character" to this day. Moreover, the origins of the

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<sup>115</sup> Fraud, deceitfulness, wilfulness.

<sup>116</sup> Reynolds, *op cit.*, at p. 15. The influence of Roman thinkers on early English legal writers such as Glanville and Bracton is discussed in W. Hug, "The History of Comparative Law," (1933) *Harv. L. Rev.* 1027 - 1070, at p. 1038.

<sup>117</sup> Kiralfy, *op cit.*, at p. 156.

regulatory offence are significantly linked to nuisance actions (as discussed in greater detail *infra*).

The practical and functional difficulties in distinguishing civil and criminal actions at this early stage did not disappear over time and indeed have been repeated in late 20th century discussions of the regulatory offence, where courts have noted that offences pertaining to impure food, traffic violations, and the like "are not criminal in any real sense, but are prohibited in the public interest," and "[a]lthough enforced as penal laws through the utilization of the machinery of the criminal law, the offences are in substance of a civil nature..."<sup>118</sup>

While we will return to the question of the civil/penal distinction in analysis of twentieth century regulatory offences undertaken later in the paper, what is important to note for current purposes is that from the time of the Lex Barbarorum when there was simply a single, general, catch-all category of "wrongs," through to the present, there has never been a sharp conceptual line separating civil and criminal actions, and that this reflects the reality that both civil and criminal actions can and do contain both remedial and punitive functions and components.<sup>119</sup> As a result it should not come as a surprise that the regulatory offence has functional and practical

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<sup>118</sup> Per Dickson J., in *Sault Ste. Marie, op cit*, at p. 357, as discussed in greater detail in Part Two of the thesis.

<sup>119</sup> Under the *Canadian Environmental Protection Act*, RSC 1985, 4th Supp., c. 16 (as amended) there are provisions pertaining to environmental offences which allow persons who have been harmed by an environmental emission contrary to the *Act* to come forward with specific claims for compensation, which can then be ordered to be provided as part of the sentencing process associated with regulatory offence enforcement actions.(s. 131) This, then, is a modern example of a "civil" compensatory function directly grafted on a penal enforcement measure. Another good example of a remedial provision grafted onto a penal enforcement measure is Ontario *Victim's Bill of Rights*, which treats a conviction for a personal injury offence as a statutory tort, leaving only damages to be assessed. At the same time, for civil actions in tort, certain claims of action require proof of intent and can include punitive damages: see, e.g., C. A. Wright and A. M. Linden, *Canadian Tort Law: Cases, Notes and Materials* (7th ed.) (Toronto: Butterworths, 1980), chapter 2 and 3. Here we have penal functions grafted on a largely remedial and compensatory liability system.

features drawn from both the civil and criminal streams, nor should this mean that the regulatory offence is deserving of treatment as an unacceptable aberration from the "pure" criminal model.

One observation emerging from this historical analysis is that the law has always been flexible and adaptable, adjusting to changing circumstances, be it in the twelfth century or the twentieth. The hallmark of English penal law appears to be its practicality, rather than an abstract, theoretical purity. It has continually crossed conceptual borders and created new categories, as need arises, only to break those and begin afresh when new circumstances warrant it.

#### *The Crimes/Misdemeanours Distinction*

As is the case today, it is impossible in historical analysis to pinpoint exactly what the distinction between crimes and misdemeanours or "petty offences" is, and exactly when this distinction became accepted. Instead, a loose grouping of offences linked by common characteristics such as their commercial nature, the relatively less serious penalties, the tendency to address potential as well as actual harm, and the lack of any immediate and obvious "moral" component, gradually developed over a course of centuries. Guild law represented a good example of an area of customary or local law which the royal courts and the common law eventually absorbed, and which over time became associated with the misdemeanour category of offences. The growth of merchant and craft guilds, along with the towns in which they operated, represented one of the first signs of a commercial revival, a revival which seems to have started in ninth century Venice, and then spread throughout continental Europe and England.<sup>120</sup>

Organizations of merchants and craftspersons formed guilds in each town, to ensure price

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Painter, *op cit*, at p. 221.

and quality and method of manufacture standards, and protect and promote the interests of the guild-members:

....when a merchant lost his stock in a wreck or at the hands of a robber baron, his fellows aided him to start again. If a man in another town refused to pay his debts to guildsman, the guild would seize the next inhabitant of the same town who came its way. When a member died, his fellows would bury him and care for his widow and children...Often the guild maintained a school to train the members sons.....on the economic side, the guild secured a monopoly of the town's business for his members. No one not a member could sell at retail in the town. If a foreign merchant brought goods to the town, he had to sell them to a member of the guild or at least pay a very heavy sales tax. Often the guild was the agent for his members in dealing with the lord.<sup>121</sup>

Lords (and eventually, Kings) gave the townsmen and merchants jurisdiction over commercial cases.<sup>122</sup> The towns would often grant charters authorizing inhabitants to form guilds and would frequently create "piedpowder" or "merchant's courts" to settle commercial disputes, with the merchants themselves sitting as judges.<sup>123</sup>

The regulation of the activity of commercial guilds was a comprehensive and intensive effort, involving control of the means of production (no use of new technologies without agreement of guild members), regulation of working and production conditions (no member was allowed to make goods cheaper or faster than the others, and limits were maintained on the number of hours of work), control of entry of who could enter the trade and apprenticeships, regulation of price and quality, and dispute resolution.<sup>124</sup>

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<sup>121</sup> *Ibid.*, at p. 229.

<sup>122</sup> Painter, *op cit.*, at p. 228; Kiralfy, *op cit.*, at pp. 103 ff.

<sup>123</sup> *Ibid.*

<sup>124</sup> Painter, *ibid.*, pp. 230 - 231; Reynolds, *ibid.*, pp. 69 - 70; R. Larmour, "A Merchant Guild of Sixteenth-Century France: The Grocers of Paris," (1967) 20 *Economic History Review* 467 - 481, at pp. 469 479; J. Kellett, "The Breakdown of Guild and Corporation Control over the Handicraft and Retail Trade in London," (1957-1958) 10 *Economic History Review* 381 - 394. Kiralfy, A. *Potter's Outlines of English Legal History* (fifth

In England in the twelfth, thirteenth and fourteenth centuries, evidence suggests a generally harmonious inter-play between royal and local or customary law concerning commercial regulation, with the extension of royal government into commercial life gradually increasing over time. Thus, for example, in 1196, the Assize of Measures established "that all measures throughout all England be of the same quantity"<sup>125</sup> but a mechanism for local enforcement was provided. In about the year 1200, King John issued a decree concerning the price of wine.<sup>126</sup> A charter was granted by Henry III in 1268 which recited that "pleas of merchandise are wont to be decided by law merchant in the boroughs and fairs."<sup>127</sup> The law merchant was recognized as part of the system of national law in the Carta Mercatoria in 1303 and in the Statute of the Staple.<sup>128</sup>

From a modern perspective, the guilds can be seen as representing a combination of now-familiar phenomena: the granting by government of franchise or monopoly powers to local groups over particular commercial activities,<sup>129</sup> delegated administrative rule-making and decision-making authority,<sup>130</sup> early worker regulation, early economic regulation, and early versions of unions.

Echoing similar divisions between commercial and criminal regulation visible in the

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edition) (London: Sweet and Maxwell, 1958), pp. 103 ff.

<sup>125</sup> Hudson, *op cit.*, p. 135.

<sup>126</sup> *Ibid.*.

<sup>127</sup> Kiralfy, *op cit.*, p. 103.

<sup>128</sup> *Ibid.*

<sup>129</sup> This is similar to the statutory granting of commercial monopoly over lawyering to law societies common in many jurisdictions today.

<sup>130</sup> Kiralfy, *op cit.*, 103-104.

writings of Plato concerning ancient Greece, intention seemed to play a limited role in commercial offence prosecution. Thus, for example, records from the "Fair Court of St. Ives" from 1293 describe a case concerning a conviction for selling wine "by a worthless pottle, false and unsealed."<sup>131</sup> There is no mention of intent playing any role in the charge,<sup>132</sup> although this may be because it was assumed. There are records of dozens of convictions concerning impure or adulterated food in the fourteenth century.<sup>133</sup> In one prosecution from 1316 in London, concerning adulterated bread, the summary of the case notes the following:

Alan de Lyndeseye, baker, and Thomas de Patemere, baker, were taken and brought before the Mayor and Aldermen at the Guildhall, on the Monday.....with bread of theirs made of false, putrid, and rotten materials; through which, persons who bought such bread were deceived, and might be killed. Therefore they were handed over for punishment by the pillory.<sup>134</sup>

Note no evidence of intent needed here for conviction, and reference to the potential for persons to be killed as a result of the offence (though no actual deaths apparently took place). Drawing on this historical material, one commentator<sup>135</sup> concludes that:

[I]t is uncontested that one may be guilty of violation by merely possessing the adulterated articles or of exposing them for public sale. The offense is complete without actual injury to anyone. The probability of damage suffices.<sup>136</sup>

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<sup>131</sup> Charles Gross, ed., *Select Cases Concerning the Law Merchant*, Vol. I, (London: Selden Society, 1908), p. 62.

<sup>132</sup> This is similar to a case of 1298, concerning underweight bread, described in Riley, *Memorials of London and London Life in the 13th, 14th and 15th Centuries* (London: Longman's, Green and Co., 1868), at pp. 38 - 39.

<sup>133</sup> See, eg., Riley, *op cit.*, at pp. 119 - 123, 139, 140.

<sup>134</sup> *Ibid.*, p. 121.

<sup>135</sup> J. Starrs, in "The Regulatory Offense in Historical Perspective," in G. Mueller, ed., *Essays in Criminal Science* (New Jersey: Rothman, 1961), pp. 233 - 267 .

<sup>136</sup> *Ibid.*, at p. 498.

On the other hand, there is evidence of decisions where a defence of lack of knowledge of adulteration was a successful ground for acquittal. For example, in a case from 1348 where a meat merchant named Agnes la Isomongere was accused of selling putrid and stinking meat "in deceit, and to the peril of the lives, of persons buying the same."<sup>137</sup> The accused was able to demonstrate that she bought the meat from a certain John Gylessone, "supposing that the same was good and proper, and without any default." At trial, Mr. Gylessone acknowledged that he had sold putrid meat to Ms. la Isonmongere. As a result, Ms. la Isonmongere was acquitted, while Mr. Gylessone was convicted. Nevertheless, in other cases, the claims of merchants that they believed that food was "good and proper for sale to mankind" were not successful, such as the case of John Russele, poulterer, in 1365, accused of selling putrid pigeons, where the court had cooks examine the pigeons and found them to be "not good or wholesome for mankind, but rather to the corruption of man etc.", and therefore convicted the accused Russelle.<sup>138</sup>

With the extension of the jurisdiction of royal courts and royal legislation specifically directed at regulating economic activity,<sup>139</sup> the increasing flood of new migrants into the cities, as well as changes in production technologies and economic conditions, the guilds gradually lost their ability to maintain their monopolies, to control entry into their fields, and to control the

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<sup>137</sup> From Riley, *op cit.*, at pp.240 - 241; For a similar case, see the decision concerning Thomas the Smyth and Nicholas Schyngal from 1320, at pp. 139 - 140 .

<sup>138</sup> *Ibid.*, at p. 328.

<sup>139</sup> J. Langbein, in *Prosecuting Crime in the Renaissance: England, Germany, France* (Cambridge, Mass.: Harvard Univ. Press) describes a remarkable proliferation of economic legislation in the 1400s, concerning laborers, cordswainers, wages, livery, weights and measures, candle manufacturer, the wool trade, apparel, livery and retaining, tile manufacturer, among other activities: see esp. p. 67. See also J. Bellamy, *Criminal Law and Society in Late Medieval and Tudor England* (New York: St. Martin's Press, 1984) esp. at p. 1, and p. 97.

behaviour of their own members.<sup>140</sup> However, the practical and flexible approach to commercial decision-making evident in the cases described above was absorbed into the common law which replaced it.

From a technical legal standpoint, violations of economic regulations such as those described above eventually came to be characterized as breaches of the King's Peace. This represented a remarkable transformation, since the breaches of the King's Peace originally described in *Leges Henrici* in the 1100s had been limited to activities with a decidedly violent or treasonous nature.<sup>141</sup> The process of transformation took place over several centuries and is described by R. Shoemaker, in *Prosecution and Punishment: Petty Crime and the Law in London Rural Middlesex, c. 1660- 1725*, as follows:

With the extension of the jurisdiction of the royal courts in the twelfth and thirteenth centuries, violations of the king's peace that were not punishable by forfeiture of the offender's life and property became punishable by fines payable to the king. In the late fifteenth and early sixteenth centuries, these trespasses came to be called "misdemeanours". Initially, wrongs that did not involve a breach of the peace were not covered by the criminal law, but numerous regulatory offences (especially violations of economic regulations....) were added by statute over several centuries, so that by the sixteenth century a wide range of local government was "carried on through the forms of the criminal trial."....The creation and modification of offences by statute continued through the seventeenth and eighteenth centuries.....By the late seventeenth century, therefore, the body of misdemeanour crimes had been enlarged far beyond offences against the peace.<sup>142</sup>

Studies suggest that "[p]erhaps nine times as many defendants were involved in misdemeanor

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<sup>140</sup> See, generally, Kellett, *op cit.*, and S. Thrupp, "Medieval Guilds Reconsidered" (1942) 2 *J. of Economic History* pp. 164 - 173

<sup>141</sup> As set out in Hudson, *op cit.*, p. 29.

<sup>142</sup> Shoemaker, *op cit.*, at p. 19; footnotes omitted. The following discussion draws substantially on Shoemaker.

prosecutions as in felony cases."<sup>143</sup>

Concomitant with the move to increase the range of activities which could constitute breaches of the King's Peace was the introduction and proliferation of a new royal official to administer justice: the justice of the peace. The office of the justice of the peace (JP) was created in the fourteenth century, and given the authority "to hear and determine felonies and trespasses done against the peace..."<sup>144</sup> Gradually, over the subsequent centuries, the powers of the justices of the peace were extended "not only with the expansion of the criminal court but also with the creation of a wide range of new administrative responsibilities."<sup>145</sup> For example, justices of the peace were empowered to set prices and weights for bread.<sup>146</sup> Essentially, the JPs represented a precursor to the modern administrative agency, yet at the same time the JP continued to exercise judicial responsibilities over conventional felonies.<sup>147</sup>

According to Shoemaker, many offences were indictable as nuisances, which were described as offences against the public, either by doing a thing which tends to the annoyance of all the king's subjects, or by neglecting to do a thing which the common good requires.<sup>148</sup> It can be seen that many types of regulatory offences could be characterized as "common good," nuisance types of offences. Thus, for example, there are reports from the seventeenth century of nuisance

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<sup>143</sup> *Ibid.*, p. 6.

<sup>144</sup> *Ibid.*, p. 20.

<sup>145</sup> *Ibid.*

<sup>146</sup> B. Harvey, *The Law of Consumer Protection and Fair Trading* (London: Butterworths, 1978), at p. 2. According to Harvey, it was not until 1836, on the adoption of Adam Smith's principle that competition was the best regulatory device, that this "assize" (law) was abolished.

<sup>147</sup> See generally, Weisser, *op cit.*, at pp. 93 - 95.

<sup>148</sup> Shoemaker, *op cit.*, at p. 29.

indictments for slaughtering animals within city limits, dumping filth on common land, keeping a bakehouse with ovens too close to other houses, and obstructing traffic.<sup>149</sup> Intention was not a necessary element in nuisance actions:

Nuisance was a strict liability crime from an early period. It was the vehicle by which the hundred, and turnpike and canal companies were made liable for faults such as failures to repair roads and bridges. While the common law indictment for nuisance was gradually superseded on the one hand by the equitable injunction and on the other by statutory offences under statutes like the Railway Clauses Consolidation Act, 1845, which created summary conviction offences for failure to maintain bridges, tracks and rights of way, its importance as an early measure of administrative control must be emphasised.<sup>150</sup>

With the widespread introduction of houses of correction in the late sixteenth and early seventeenth centuries, the option of imprisonment became increasingly available for breach of "petty offences."<sup>151</sup> In the late seventeenth and early eighteenth centuries, a series of decisions ruled that statutory offences such as keeping an alehouse without a licence were not indictable when another method of conviction existed (e.g., summary conviction).<sup>152</sup>

While royal justices of the peace increasingly became the adjudicative forum of choice for many misdemeanour actions, manorial (or leet) and borough courts continued to provide inspector services (e.g., through the Court Leet officer known as the aleconner)<sup>153</sup> and render decisions concerning economic offences in the late seventeenth and early eighteenth centuries. Thus, for example, there are records of merchants being convicted and fined by the Court Leet of

<sup>149</sup> *Ibid.*, at p. 132.

<sup>150</sup> L. Leigh, *Strict and Vicarious Liability: A Study in Administrative Criminal Law* (London: Sweet & Maxwell, 1982), at p. 11. Footnotes omitted.

<sup>151</sup> Shoemaker, *op cit.*, p. 37.

<sup>152</sup> *Ibid.*, at p. 30.

<sup>153</sup> Harvey, *op cit.*, at p. 3.

Savoy for improper weights and measures in 1689, poulterers being fined for selling impure pigeons in 1694, and convictions for underweight bread in 1709.<sup>154</sup> There is no evidence from the records of intent playing a role in these convictions.

In the second half of the eighteenth century, legislation pertaining to adulteration of some food productions provided some limited defences for accused persons and started to show some indication of recognition of the different implications flowing from inclusion or omission of language indicating an intent requirement in offences. In this regard, the legislation could be said to mark the beginning of a more sophisticated and modern approach to liability for regulatory misconduct. Pursuant to s. 24 of the *Bread Act of 1757*<sup>155</sup> ....

...any Perfon...who fhall make any Bread for Sale,.....which fhall be deficient in Weight....fhall forfeit and pay a Sum.....unless it fhall be made out to the Satisfaction of any fuch Magiftrate....that fuch Deficiency in Weight wholly arofe from fome unavoidable Accident in Baking or otherwife, or was occafioned by or through fome Contrivance or Confederacy.[In this period, the letter "s" was sometimes replaced with the letter "f".]

On its face, any defence of unavoidable accident would appear to necessitate an inquiry into what the accused had done to prevent an accident from occurring. As such, a defence of unavoidable accident seems to strongly resemble an early form of due diligence defence. It is noteworthy that while s. 24 conspicuously does not include any phrasing indicating intent, other offences in the Act expressly use the word "knowingly," such as knowingly adding allum (s. 21), corn (s. 22), or other grain (s. 23).

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<sup>154</sup> *Ibid.*, at pp. 3 - 4 .

<sup>155</sup> 31 Geo. II, c. 29. The full title of the Bread Act is "An Act for the due makign of Bread; and to regulate the Price and Affize thereof; and to punifh Perfons who fhall adulterate Meal, Flour, or Bread."

The *Bread Act of 1773*<sup>156</sup> includes a defence to a charge of adding in corn other ingredients into supposedly pure bread, if the accused baker can prove that he bought the flour from a miller who was adulterating the flour with other ingredients.<sup>157</sup> A later version of the Act, from 1795, includes a prohibition against adding allum, but unlike the 1757 Act, the word "knowingly" has been removed. Moreover, no defence is provided.<sup>158</sup> By s. 2 of the *Tea Act*, (1777),<sup>159</sup> it was made an offence to possess certain ingredients used in the making of imitation tea, but an accused could escape liability by satisfying the Justices that the ingredients were gathered with the consent of the owners of the trees, and that the ingredients were gathered for some other purpose and not the making of imitation tea. In *R. v. Banks* (1794)<sup>160</sup> the court held that omission of words denoting a mental ingredient in the definition of an offence (in this case, possession of embezzled goods) meant that conviction could follow on proof of the actus reus, subject to a defence on the part of accused demonstrating lack of mens rea. Taken together, this legislation and judicial activity is notable in at least two respects: first, it provides an indication of increased legal recognition of the implications of including or removing intent elements from these early regulatory offences, and second, it foreshadows the later development of the due diligence

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<sup>156</sup> 13 Geo. 3, c. 62 .

<sup>157</sup> Section 6.

<sup>158</sup> Section 3 of the "*Act to permit Bakers to make and sell certain Sorts of Bread.*" (1795) 36 Geo. 3, c. 22. The author could find no explanation for this legislative change. This provision is the subject of litigation in 1815, in the case of *R. v. Dixon*, as discussed *infra*.

<sup>159</sup> The full title being "*An Act for the more effectual Prevention of the manufacturing of Ash, Elder, Sloe, and other Leaves, in Imitation of Tea, and to prevent Frauds in the Revenue of Excise in respect to Tea*" 17 Geo. III c. 29 .

<sup>160</sup> 1 Esp. 143 at 146-47 .

defence.

From a comparative perspective, it is interesting to note that while England was beginning development of a rational distinctive approach to the use of regulatory offences, similar movements were afoot in continental Europe. For example, like England, the German local, customary legal tradition was subsequently influenced by Roman and canon law.<sup>161</sup> In 1532, the German Empire promulgated the "Constitutio Criminalis Carolina." Distinctions were made between deliberate and non-deliberate homicide, with both being subject to capital punishment, but the less deliberate killer by a "less gruesome" method.<sup>162</sup> Concerning falsification of weights and measures, both intentional and non-intentional misconduct is penalized. By article 113 of the Code, persons found guilty...

....shall be put to penal sanction, banished from the territory or flogged with rods upon his body or the like, according to the nature and character of the conviction; and it may be that when such falsification has been frequently substantial and wilful, the criminal should be punished with death....<sup>163</sup>

In sixteenth century Florence, firearms were tightly regulated, with a licensing regime limiting those who could lawfully carry weapons, and authority for police to enter homes in search of firearm violations, and stiff fines established as penalties. The author could find no evidence of intent playing a role in adjudication.<sup>164</sup>

In short, the period 1100 through 1800 saw a move away from undifferentiated wrongs

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<sup>161</sup> Langbein, *op cit.*, p. 140. The following discussion draws significantly on Langbein, see particularly Chapter 7, pp. 140 - 166.

<sup>162</sup> *Ibid.*, pp. 169 - 170.

<sup>163</sup> *Ibid.*, p. 173.

<sup>164</sup> Brackett, J., *Criminal Justice and Crime in Late Renaissance Florence, 1537-1609* (Cambridge: Cambridge University Press, 1992), p. 103.

toward a more sophisticated approach, including separation of the civil and criminal spheres, the development and proliferation of the "misdemeanour," "petty" or "nuisance" offence as an offshoot from the more serious felony type of breach of the king's peace. A parallel development of royal justice institutions and mechanisms gradually absorbed the local custom-based courts which had been dispensing justice on behalf of merchants and the public in many towns. The focus of these early regulatory offences was on potential for harm (i.e., actual injury may not have taken place) and annoyance to the common good. Intent seemed to play a variable, minimal role, although defences of lack of knowledge were occasionally successful. In the eighteenth century, there is evidence of increasing sophistication in some regulatory statutes, including use of differential offences and penalties, in some cases with intent and/or defences being recognized. Also evident are early versions of the modern administrative agency and inspectorial corps, with local government officials being equipped with price setting and inspection powers.

### *The Rise of Mens Rea*

With this background tracing the development of the regulatory offence during the period 1100 - 1700, we are now in a position to examine the rise in importance of mens rea to criminal offences over this same period, and the relevance of this to regulatory offences. We have seen evidence that, prior to 1100, in certain instances intent was a factor taken into account in determining penal liability or sentencing, but not universally so. We have also seen examples of liability attaching to non-intentional misconduct. It would appear that the author of the *Leges Henrici*, in attempting to summarize English law at that the time of writing (circa 1118), concluded that non-intentional activity was subject to liability when he wrote that "he who

commits evil unknowingly must pay for it knowingly."<sup>165</sup>

However, while some nineteenth century commentators seem to have accepted the *Leges Henrici* interpretation that the "English law has absolute liability origins" without too much further thought (e.g., Pollock and Maitland, Blackstone), other more modern scholars such as Francis Sayre have suggested that a more nuanced understanding is in order. In his excellent article "Mens Rea" in the 1933 *Harvard Law Review*, Sayre points to at least three factors to support his position that intent did play an important role in early penal liability: first, he suggests that intent seems to have been a material factor in determining the extent of punishment, from the very earliest of times.<sup>166</sup> Second, he indicates that, at least in the thirteenth century, the discretionary power of the king to provide a pardon in instances short of moral guilt became customary.<sup>167</sup> Third, he notes that even though early records may not have indicated it, the very nature of the majority of early offences "rendered them impossible of commission without a criminal intent."<sup>168</sup> Thus, for example, waylaying, robbery, housebreaking, and arson are by definition intentional offences.

For our purposes, what is interesting to note here is that, in contrast to the typical criminal offences described above, conventional regulatory offences such as those pertaining to impure or underweight food need not, by definition, be committed with intent. Nevertheless, transgressions of these laws, while lacking in intent, may have serious consequences, including injury and death.

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<sup>165</sup> As discussed in Sayre, (1933), *op cit.*, p. 978.

<sup>166</sup> Sayre (1933), *op cit.*, at p. 981.

<sup>167</sup> *Ibid.*, p. 980 .

<sup>168</sup> *Ibid.*, p. 981.

The question arises as to the relevance of traditional notions of criminal liability associated with intention when the focus of attention turns to non-intentional regulatory offences. We will return to this point later in the discussion.

Sayre points to two key influences which resulted in an increasing emphasis being put on the mental element of crimes, starting in the late 12th century. The first was the resuscitation of awareness and interest in Roman law, with its notions of *dolus* and *culpa*. The second, and more important influence, according to Sayre, was canon law, with its insistence on moral guilt. Bracton, a mid-thirteenth century scholar whose book, *De Legibus et Consuetudinibus Angliae*, was said to be highly influential on common law thinking at that time, drew substantially on both Roman and canon law for inspiration.<sup>169</sup> Bracton concludes that unlawful death can be committed in four different ways: as part of the administration of justice, by necessity, by desire, or by misadventure.

With respect to the latter, Bracton states that where an individual has killed another while "engaged in work of lawful kind and has not used due diligence [*diligentiam debitam*], blame shall be imputable to him."<sup>170</sup> Note the linking up of the three concepts of (1) someone being "engaged in lawful work"; (2) misconduct (i.e., death); and (3) a failure to exercise due diligence. While bearing in mind Maine's wise words that "the distinctions of the later jurists are appropriate only to the later jurisprudence"<sup>171</sup> this is nevertheless an extremely tantalizing statement, from the perspective of a late twentieth century study of regulatory offences. A distinctive feature of

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<sup>169</sup> *Ibid.*, p. 984.

<sup>170</sup> *Ibid.*, pp. 984-985.

<sup>171</sup> As cited by Reynolds, *op cit.*, at p. 13.

regulatory activity is that, unlike true criminal activity which is prohibited outright and which has no socially productive features, it is normally accepted and productive as long as it controlled. Thus, it is “lawful activity”, and, where conducted within prescribed limits with proper due diligence, it should not lead to socially harmful results. It may be the case that what Bracton had in mind was the situation of an archer who, without reasonable care, kills a fellow archer in the woods -- a situation of criminal negligence causing death. Nevertheless, Bracton’s discussion of death occurring where a person engaging in a lawful activity fails to exercise due diligence, is a remarkably prescient description of the strict liability regulatory offence with a due diligence defence, which was not recognized and approved by a Supreme Court in any jurisdiction before the twentieth century.

Sayres points out that at the time that Bracton wrote *De Legibus*, the idea of negligence was non-existent in English law, and that Bracton is here drawing directly from canon law for inspiration.<sup>172</sup> A brief discussion of canon law at around the time of *De Legibus* will show the linkages. At approximately the time that Bracton's digest was published, the Scholastic movement of systematized Christian logic, philosophy, and theology was gaining momentum and popularity in Europe. The writings of Thomas Aquinas in the 1200s were an important source of Scholastic thought during this period.<sup>173</sup> Aquinas's monumental and influential *Summa Theologiae* discusses, among many other things, the question of negligence, and its relevance to theological

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<sup>172</sup> *Ibid.*, at p. 985. The next reference which the author could find to concepts of negligence such as due diligence in English penal law is located in a seventeenth century legal text, and is remarkably similar to Bracton's original statement. See Sayre, *ibid.*, p. 1015.

<sup>173</sup> Aquinas was born in 1225 and died in 1274. In 1323 he was declared a saint. For a general discussion of the works of Aquinas and his influence, see the introduction to W. Baumgarth and R. Regan, eds., *On Law, Morality, and Politics: Saint Thomas Aquinas* (Indianapolis/Cambridge: Hackett Publishing Company, 1988).

thought. Drawing substantially on the newly resuscitated writings of Aristotle, Aquinas concluded that negligence -- which he defined as denoting lack of due solicitude -- is a sin.<sup>174</sup>

Aquinas elaborates on the meaning of negligence as follows:

Negligence is directly opposed to solicitude. Now solicitude pertains to the reason, and rectitude of solicitude to prudence. Hence, per contra, negligence pertains to imprudence. This appears from its very name, because,....a negligent man is one who fails to choose....; and the right choice of the means belongs to prudence. Therefore negligence pertains to imprudence.<sup>175</sup>

While developed in the context of a theological discussion, the careful linkages of the concepts of diligence, solicitude, prudence, choice, and negligence provide an indication of the fertile and surprisingly sophisticated and advanced thinking about the concept of negligence which was circulating in thirteenth century Europe. As is evident from Sayre's discussion of Bracton, in England and elsewhere in Europe, the crossover between religious and legal institutions and thinking in this period was significant.

Without intending to appear overly dramatic, one could maintain that the "seed" of the regulatory due diligence defence which did not bear fruit until the twentieth century, is clearly evident in the writings of Bracton and Aquinas, who in turn are drawing for inspiration on the thinking of Aristotle from before the time of Christ. As will be discussed later, the justifications for negligence being treated as a sin which were articulated by Aquinas are relevant in the late twentieth century as regulatory offences receive critical scrutiny.<sup>176</sup>

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<sup>174</sup> Aquinas, Saint Thomas, *The "Summa Theologica" of St. Thomas Aquinas* (London: Thomas Baker, 1918), Vol. 8, Q. 54, at p. 81 .

<sup>175</sup> *Ibid.*, p. 82.

<sup>176</sup> See, in particular the discussion of Chief Justice Lamer and Justice Cory in *R. v. Wholesale Travel Group Inc.* (1991) 84 DLR (4th) 161, of the varying degrees of "stigma" associated with crimes and strict liability regulatory offences (i.e., offences of negligence), set out in Part Two of the thesis.

Sayres concludes that, under the strong influence of the church with its emphasis on moral blameworthiness, and Bracton's persuasive analysis, with its mix of Roman and canon law inspirations, "[i]t was almost inevitable ....that the mental element in criminality should take permanent root."<sup>177</sup> Thus, for example, by the seventeenth century, such well known jurists as Coke and Hale had fully integrated the notion of *actus non facit reum nisi mens sit rea* into their writings, and moreover they had done so in a manner making it appear as if it were "settled doctrine."<sup>178</sup> However, in keeping with its origins, this early version of mens rea "smacked strongly of moral blameworthiness,"<sup>179</sup> of evilness and sinfulness. When it is considered that "[t]he early felonies were roughly the external manifestations of the heinous sins of the day..."<sup>180</sup> this is not surprising. However, when applied to some of the new statutory offences making their appearance in the fourteenth century (as discussed earlier), the application of the mens rea doctrine to these lesser misdemeanour offences was not so evident.<sup>181</sup> Eventually, in the nineteenth century, mens rea would begin to lose its close connection with morality and evil, and tend to focus instead on the idea of freedom of choice, and perception of right from wrong.<sup>182</sup> Freed of its original historical affiliation with morality and religion, it could then be applied (whether appropriately or not) to other concepts, as a universal principle of liability.

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<sup>177</sup> Sayres, *op cit.*, at p. 988.

<sup>178</sup> *Ibid.*, at pp. 988-989.

<sup>179</sup> *Ibid.*, at p. 988.

<sup>180</sup> *Ibid.*

<sup>181</sup> Sayres, *ibid.*, at p. 1003: "...judges were often at a loss to draw the line between the criminal and the civil aspects of trespass."

<sup>182</sup> Sayres, *ibid.*, pp. 1004 ff.

Sayres closes his analysis of the historical evolution of mens rea as follows:

The old conception of mens rea must be discarded, and in its place must be substituted the new conception of mentes reae.<sup>183</sup>

By this he appears to be referring to the need to acknowledge the inappropriateness of conceptions of morality, sin and evil, and recognition that there is no single precise requisite state of mind common to all crime.<sup>184</sup> His desire for a flexible, modern approach to intent or fault, unencumbered by earlier understandings of the concept, would appear to be the right frame of mind to bring to the question of fault in the area of regulatory offences.

Although the author could find no examples of regulatory offence decisions from the period 1100 to 1800 which directly discussed the application of the newly developed criminal conceptions of freedom of choice (voluntariness of actions) and right and wrong in a regulatory setting (perhaps because it was not so applied at that point), the question of the relevance of these more modern conceptions of mens rea to regulatory offence contexts is intriguing. Building nicely on much of the foregoing descriptive analysis, one commentator has stated the following:

.....from Aristotle and the scholastics to the present, perhaps the most difficult of all ethical problems has been posed by sheer inadvertence rather than by deliberate omissions, and the rationalization of popular judgments has been highly ingenious. Since volitional conduct was deemed essential to moral culpability, effort was strained to push the negligent behaviour back in time and to a point where it could be asserted with some degree of plausibility that the individual deliberately set upon the wrong path. Thus, though he behaves in ignorance and inefficiently, yet if he could have known and acquired skill, had he not sometime in the past willed wrongly, he is culpable for not having done so and hence for the present misconduct as well -- even though it is now impossible for him to exercise due care.<sup>185</sup>

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<sup>183</sup> *Ibid.*, p. 1026.

<sup>184</sup> *Ibid.*

<sup>185</sup> Hall, *op cit.*, at p. 778 .

Thus, the difficulties of integrating or retro-fitting conceptions of volition and intention with inadvertent misconduct are age-old, and have in fact been the subject of philosophical discussion since pre-Biblical times. It should be no wonder, then, that the melding together of these concepts would pose problems in both the conventional “true crime” setting, and the regulatory offence context.

How does this discussion of the early development of intent in criminal law apply to regulatory offences? Only a preliminary outline will be provided here, to be elaborated on later in the context of analysis of modern regulatory offence judicial decisions. One could make the argument that the distinctive nature of much regulatory activity (i.e., lawful, productive behaviour which often involves ongoing actions, rather than discrete, impulsive destructive acts such as those associated with conventional criminal conduct) compels an analysis of the regulatory actor's original voluntary choice to engage in an activity with known risks, and an assessment of his capabilities to engage in that work, and not simply analysis of intent at concerning the particular regulatory event which had harmful consequences.

While it is true that, from time to time, regulated actors can and do make conscious and deliberate decisions to engage in illegal activities, let us assume for the moment that the vast majority of regulatory violations do not occur due to deliberate attempts to engage in wrongdoing.<sup>186</sup> Thus, for example, most firms do not deliberately set out to pollute, adulterate food, harm workers, or mislead consumers. It is often difficult to say whether any particular choice was made by regulated actors to pollute, or to produce impure or under-weight foods. It would be possible, however, to determine that the regulated actor voluntarily agreed to undertake

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There is some empirical evidence to support this claim, as discussed in the introduction.

a regulated activity, knowing that harm could take place if reasonable care was not exercised, and that penal consequences might attach to them if they cannot demonstrate that they exercised reasonable care.

Indeed, this particular line of argument (that regulated actors choose to engage in activity with known risks, and to exercise reasonable care in so doing, and accept liability if they can't demonstrate due diligence) has been adopted by some twentieth century judges and commentators as a justification for imposing penal liability in cases of regulatory negligence, as discussed in greater detail later in the thesis. The discussion here represents an attempt to apply the concepts of mens rea and voluntariness articulated in the period 1100 - 1800 (which were originally developed to address conventional criminal misbehaviour) to regulatory misconduct.

With respect to the question of determining right from wrong, again it would appear that a different approach could usefully be undertaken when applying this criteria to regulatory activities, since frequently a particular technical regulatory obligation seems on its face to be morally neutral. Thus, for example, requirements to keep logbooks, or to inspect the tightness of wheelnuts on eighteen wheel transport trucks, to monitor and report on outflows, and many others, defy easy reduction to questions of right and wrong.<sup>187</sup> Yet in the larger scope of things, it is clear that the failure to comply with such technical obligations can have significant negative implications on the common good, and on individuals. Penalizing such misbehaviour may serve to ensure that the diligence that is needed to ensure that regulatory standards are met is in fact provided. This is a rough introduction to some themes and ideas which are elaborated on *infra*,

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<sup>187</sup> Although the statements of Aquinas about negligence being a sin discussed earlier are worthy of further exploration.

when judicial decisions concerning modern regulatory offences are analysed.

The conceptions of mens rea discussed in this portion of the thesis -- both in their original form pertaining to moral evilness and sin, and the later forms concerning voluntariness and right and wrong -- do not easily fit outside of their original application to the core heinous felony/sin category of offences in which they were developed. There would appear to be a need for some adaptation to make them appropriate to regulatory activity and misconduct. The story of the development of these criminal law concepts is a story of adaptation to different needs and circumstances. We have seen that it includes some philosophical elements which could potentially be elaborated on and refined in order to be made applicable to regulatory misconduct. As is discussed in greater detail later in the thesis, court decisions and legislation from the nineteenth and twentieth century reflect variously successful attempts to do this.

### *Standards of Proof*

During the period 1100 and 1799, as a form of modern regulatory offence began to take shape, and as intent emerged as an integral element in crime, the question of appropriate standards of proof began to receive critical attention. The twelfth and thirteenth centuries saw a move away from "irrational proofs" such as ordeal, or battle,<sup>188</sup> toward greater reliance on the personal knowledge of jurors. However, even as jurors began to take on a greater role, there were few rules and little structure imposed concerning evidence or standards for conviction in this period, and juries were "more statements about a defendant's character than about his factual guilt."<sup>189</sup>

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<sup>188</sup> As discussed in R. Ireland, "The Presumption of Guilt in the History of English Criminal Procedure," [1985] *Journal of Legal History*, 243 - 255; B. Shapiro, "*Beyond Reasonable Doubt*" and "*Probable Cause*": *Historical Perspectives on the Anglo-American Law of Evidence* (Berkeley: University of California Press, 1991); Hudson, *op cit.*, at pp. 71 - 77.

<sup>189</sup> Shapiro, *op cit.*, p. 3.

Historians suggest that in the thirteenth and fourteenth centuries, trial jurors were probably both gatherers and weighers of evidence, but witnesses did not seem to play a regular part in criminal prosecutions.<sup>190</sup> By the fifteenth century, jurors were listening to and evaluating evidence introduced by private accusers and government officials.<sup>191</sup> Reflecting a more complex and mobile society, jurors were no longer necessarily from the village where the offence occurred, and more reliant on the testimony of witnesses and documents.<sup>192</sup> Reflecting the increasing importance of witnesses to trial adjudication, in the sixteenth century, legislation was passed making witnesses compellable, and perjury a crime.<sup>193</sup>

Drawing on the influences of canon law (in particular the preoccupation of the scholastics with "proofs" and argumentation of theological principles), Roman law, and the increasing awareness of scientific approaches to proof, judges began to put increasing emphasis on the standard of proof to be employed by jurors.<sup>194</sup> In the late seventeenth century, the language in judges directions to juries focuses on the "conscience" of jurors being satisfied by the evidence. Moving toward a more reason-based approach, by the second half of the eighteenth century, the instruction "if you believe the evidence..." is often being replaced by "if you think the evidence..."<sup>195</sup> The concept of proof beyond reasonable doubt begins to appear in the law digests

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<sup>190</sup> Shapiro, *op cit.*, at p. 4. The following account draws substantially on Shapiro.

<sup>191</sup> *Ibid.*, at p. 5.

<sup>192</sup> *Ibid.*, at pp. 5 - 6.

<sup>193</sup> *Ibid.*, at p. 6.

<sup>194</sup> *Ibid.*, at p. 19 and pp. 116 - 118.

<sup>195</sup> *Ibid.*, at pp. 20 - 21.

during this period.<sup>196</sup> In the late eighteenth century "the satisfied conscience and reasonable doubt standards had become explicitly linked." Nevertheless, it took until well into the nineteenth century before the reasonable doubt standard was uniformly applied.<sup>197</sup>

Blackstone, writing in the late eighteenth century and attempting to summarize the law at that time, stipulates that in order to establish that the accused has committed an offence, all reasonable doubt in relation to the facts in issue ought to be eliminated.<sup>198</sup> He also noted that, with respect to "all [the] circumstances of justification, excuse, or alleviation, it is incumbent upon the prisoner to make out, to the satisfaction of the court and jury."<sup>199</sup> While the standard of proof in criminal cases, and the question of who holds what burden of proof on questions of facts and excuses was developed in relation to conventional crimes, its application in relation to regulatory offences would become a contentious issue in the twentieth century.

For present purposes, several points are deserving of emphasis emerging from this discussion of proof issues in criminal law. First, there was a very gradual evolution of the law of proof in criminal law over the period 1100 to 1800, with the concept of proof beyond reasonable doubt first appearing in law digests in the late eighteenth century, and the standard not being consistently applied until well into the nineteenth century. Thus, it is not accurate to claim that the reasonable doubt standard represents a standard which represents "one golden thread"

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<sup>196</sup> *Ibid.*, at p. 22 -23.

<sup>197</sup> *Ibid.*, at p. 24.

<sup>198</sup> Blackstone, *Commentaries on the Laws of England* (Boston: Beacon Press, 1962), book IV, ch. 14.

<sup>199</sup> Blackstone, *ibid.*, p. 201. Check; see also A. Stein, "From Blackstone to Woolmington: On the Development of a Legal Doctrine," (1993) Vol. 14 *Journal of Legal History*, pp. 14 - 27.

throughout the web of the English criminal law, as has been claimed by some twentieth century judges (as discussed *infra.*). Second, as summarized by Blackstone in the late 1700s, the reasonable doubt standard was intended to be applied by the prosecution to the facts in issue, while the accused was to bear the burden of satisfying judge or jury with respect to justifications, excuses, or alleviations. Thus, for example due diligence defences would appear to qualify as a “justification.” Third, the question of burdens of proof in criminal law were developed with a view to application to conventional crimes, and indeed, both the crimes themselves and the question of proof were inextricably associated with notions of morality, evilness and sin. These issues will be returned to in our analysis of twentieth century decisions, where the question of the application of proof standards and burdens to regulatory offences will emerge as significant points of contention.

#### *Summary -- The Late Medieval Period*

To summarize, the period 1000 to 1799 was the initial, formative era for the development of the modern regulatory offence. As the royal courts expanded their jurisdiction, local, customary law, including that pertaining to and administered by merchants and craftspersons through their guilds, was gradually absorbed into the common law. The notion of breaches of the King's Peace was broadened from addressing direct acts of violence and treason, to include nuisances and trespasses to "the common good", and the misdemeanour or petty offence was created. Reflecting the state's increasing intervention into commercial affairs, starting in the fifteenth century, a proliferation of statutory offences occurred pertaining to the regulation of economic activity.

Early offences concerning such activities as underweight bread or impure and adulterated food and alcohol tended to be absolute liability in nature, although occasionally a defence of lack

of knowledge was successful. Foreshadowing the modern administrative agency, the office of the justice of the peace rose to prominence as the primary means of administering justice in local communities, including adjudication of economic offences.

Reflecting the influence of both canon and Roman law, the courts began to emphasize the need for accused to be morally guilty before penal liability would be applied. It should be noted, however, that this new emphasis on moral guilt was developed largely in the context of felonies which were the rough equivalent of religious sins such as theft, assault, and arson, and where the very nature of committing the crime strongly implied intent. Gradually, this focus on the moral character of the accused was transformed into an emphasis on whether an accused voluntarily or deliberately engaged in misconduct, and could distinguish between good and evil. The application of these concepts to regulatory misconduct would appear problematic in the sense that merchants and manufacturers may not deliberately engage in misconduct (rather, they may fail to exercise reasonable care), and in many cases the nature of the regulated activity is technical, morally neutral and not clearly good or bad. During this period, the concept of due diligence was introduced into English legal thinking, drawing on religious and Greek philosophers for inspiration. As originally articulated, the concept seems remarkably appropriate to later usage in a regulatory offence context.

The concept of proof beyond reasonable doubt emerged gradually over the period 1100 to 1700 and was only consistently applied in criminal cases in the late 1700s. As summarized by Blackstone, the burden on the prosecution was to prove the facts of the crime beyond a reasonable doubt, while the burden fell to the accused to satisfy the jury concerning any defence or excuse. The beyond a reasonable doubt standard and allocation of evidential burdens were

largely developed in the context of criminal offences.

## Chapter 5 --The Nineteenth Century

### *The Rise of Industrialization*

The nineteenth century was a key period in the development of the regulatory offence. The rise of industrialization and the changes it provoked in terms of the use of technology, modes of production, commercial and economic organization, and societal impact stimulated attempts by legislators and courts to curb abuses. It marks the first time that the distinctive nature of regulatory activity (as opposed to conventional criminal activity) attracted widespread public attention, and in turn it was the first time in modern history that the legal community consciously considered non-intentional but harmful misconduct on its own terms, and not simply as a subset of conventional criminal misbehaviour.

The fact that many in the legal community concluded that industrialization necessitated a new, more intensive and tailored approach to control of commercial activity reflects their awareness of the limitations of conventional approaches, and of the serious negative consequences which could and did flow from the new methods of production and economic organization. One could argue that the initial reaction of some members of the bench and legislators to swing from reliance on one extreme penal tool (intentional offences) to another (absolute liability offences) reflected both the depth of their concern and their lack of sophistication about available options. Gradually, as the nineteenth century continued, a compromise solution between the mens rea and absolute liability extremes emerged.

"At the heart of the Industrial Revolution of the eighteenth century," Karl Polanyi writes, in his book *The Great Transformation*, "there was an almost miraculous improvement in the tools of production, which was accompanied by a catastrophic dislocation of the lives of the

common people."<sup>200</sup> The development of regulatory legislation, creating centralized and professional inspectorates charged with the responsibility of administering and enforcing standards by way of regulatory offences, was part of the nineteenth century response to the Industrial Revolution. Of course, the Industrial Revolution did not simply spring on eighteenth and nineteenth century England fully formed and without warning, and nor did responses to it. The story of the origins and development of the Industrial Revolution is too complex to be told here, and moreover it is beyond the scope of this thesis, but nevertheless some discussion of it is necessary, since it is a story of how a sea-change in socio-economic conditions provoked major changes in approaches to governing and, of particular importance for this thesis, to law.

Polanyi suggests that the Industrial Revolution was a key outward manifestation of a societal transformation which had started earlier, with such activity as the movement to enclose the commons in the fifteenth century.<sup>201</sup> The enclosure movement in turn upset the social order, breaking down ancient law and custom, destabilizing a rural, agrarian-based society, and triggering a massive migration to urban centres. As Ingeborg Paulus describes it in *The Search for Pure Food: A Sociology of Legislation in Britain*, "[i]ndustrialization broke 'the cake of custom', and in the process destroyed the established control apparatus of the local communities."<sup>202</sup> Ultimately the move to enclose the commons benefitted the wool industry, by opening up land for sheep pasture while simultaneously breaking down "an artificially maintained

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<sup>200</sup> K. Polanyi, *The Great Transformation* (Boston: Beacon Press, Sixth Printing, 1965), p. 33.

<sup>201</sup> *Ibid.*, pp. 34 - 35.

<sup>202</sup> I. Paulus, *The Search for Pure Food: A Sociology of Legislation in Britain* (London: Martin Robertson & Co. Ltd., 1974), at p. 21. Footnotes omitted.

uniformity of agricultural technique, intermixed strips, and the primitive institution of the common."<sup>203</sup> In the ensuing centuries, a chain reaction of events and opportunities came together to produce the Industrial Revolution in England:

....the expansion of markets, the presence of coal and iron as well as a humid climate favorable to the cotton industry, the multitude of people dispossessed by the new eighteenth century enclosures, the existence of free institutions, the invention of the machines, and other causes interacted in such a manner as to bring about the Industrial Revolution.<sup>204</sup>

But Polanyi suggests that "the rise of factory towns, the emergence of slums, the long working hours of children, the low wages of certain categories of workers, the rise in the rate of population increase, or the concentration of industries" were all incidental to one basic change -- the establishment of a market economy:

....once elaborate machines and plant were used for production in a commercial society, the idea of a self-regulating market was bound to take shape.....Since elaborate machines are expensive, they do not pay unless large amounts of goods are produced. They can be worked without a loss only if the vent of the goods is reasonably assured and if production need not be interrupted for want of the primary goods necessary to feed the machines. For the merchant this means that all factors involved must be on sale, that is, they must be available in the needed quantities to anybody who is prepared to pay for them. Unless this condition is fulfilled, production with the help of specialized machines is too risky to be undertaken both from the point of view of the merchant who stakes his money and of the community as a whole which comes to depend upon continuous production for incomes, employment, and provision.<sup>205</sup>

The negative societal repercussions flowing from industrialization were legion, and provoked regulatory responses which, in spite of continual resistance from industrial interests, gradually changed behaviour, and became more elaborate, sophisticated and comprehensive as the century

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<sup>203</sup> Polanyi, *op cit.*, at p. 37.

<sup>204</sup> *Ibid.*, at p. 40.

<sup>205</sup> *Ibid.*, at pp. 39 - 40.

wore on (as discussed below).

With some minor variations, the story is the same whether one looks at the question of regulation of food, drink or drug purity,<sup>206</sup> worker safety and health standards in factories,<sup>207</sup> general public health and sanitation,<sup>208</sup> and passenger ships.<sup>209</sup> The pattern goes something like this: at the beginning of the century, there is growing consciousness of a serious problem (often sparked by an epidemic, or a disaster of some sort),<sup>210</sup> mobilization of scientific, medical, and popular interests to address the issue, creation of a Parliamentary Commission to investigate the topic, and an initial legislative foray. Almost invariably the initial law is naive and inadequate, enforcement is haphazard and assigned to generalists (e.g., Justices of the Peace), and its patent inadequacies quickly revealed.<sup>211</sup> Then comes more Parliamentary Commissions, a second round of legislation which includes new powers and sharper obligations, and perhaps the creation of

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<sup>206</sup> E.g., see F. Filby, *A History of Food Adulteration and Analysis* (London: George Allen and Unwin Ltd., 1934; J. O'Keefe, *Bell and O'Keefe's Sale of Food and Drugs* (14th ed.) (London: Butterworth & Co., 1968); I. Paulus, *op cit.*; I. Paulus, "Strict Liability: Its Place in Public Welfare Offences." (1977-78) 20 *Criminal Law Quarterly*, 445 - 467.

<sup>207</sup> E.g., see B.L. Hutchins and A. Harrison, *A History of Factory Legislation*, 3rd Ed. (NY: August Kelley, Publishers, 1971); R. Dickson, "Legal Aspects of the Factory Act of 1856," [1981] *Journal of Legal History* 276 - 284; R. Dickson, "Industrial Safety: The Political Challenge: [1982] *Journal of Legal History* 188 - 195.

<sup>208</sup> E.g., see R. Lambert, *Sir John Simon, 1816 - 1904 and English Social Administration* (London: MacGibbon & Kee, 1963).

<sup>209</sup> E.g., see O. MacDonagh, *A Pattern of Government: The Passenger Acts and Their Enforcement, 1800 - 1860* (London: MacGibbon and Kee, 1961).

<sup>210</sup> E.g., in the case of the factories, there was an outbreak of infectious fever in cotton works in 1784 which attracted the attention of some members of the legal and medical community: see Hutchins and Harrison, *op cit.*, p. 7.

<sup>211</sup> As is described regarding early Factory Act legislation in B. Hutchins and Harrison, *op cit.*, at pp. 16 - 18; similar discussion by MacDonagh, *op cit.*, re: early passenger legislation, at pp. 61 - 64.

specialized and centralized inspectoral services.<sup>212</sup> Often this is followed by political and legal resistance by commercial interests, some judicial pronouncements confirming or refuting one or the other side's interpretation of the laws,<sup>213</sup> a disaster<sup>214</sup> or report indicating a serious problem,<sup>215</sup> more amendments,<sup>216</sup> the beginnings of a regular and accepted enforcement program,<sup>217</sup> some improvement in behaviour by industry,<sup>218</sup> then a broadening of the scope of legislation and its standards.<sup>219</sup>

Enforceable regulatory offences constituted an integral component of the new regulatory regimes. As I. Paulus describes it, in an article entitled "Strict Liability in Public Welfare

<sup>212</sup> E.g., with the introduction of the 1833 *Factory Act*, the following is stated by Hutchins and Harrison, *op cit.*, at p. 40: "It formed the turning point of factory legislation...one of the first instances of a special department of the central Government being created for the purpose of administering a particular Act."

<sup>213</sup> E.g., see description of *Ryder v. Mills*, [1850] 19 L.J. (N.S.) 82, an 1849 case in which Baron Parke ruled that the words of the Act were not specific enough to support rigorous enforcement, leading to the drafting of new legislation, as described in Hutchins and Harrison, *op cit.* pp. 104 - 107; on the other hand, see Paulus, *op cit.*, and below for discussion of how judicial interpretation of a provision in food adulteration legislation as requiring strict liability and not intentional misconduct aided enforcement efforts in the food purity movement.

<sup>214</sup> For example, in 1858, about 200 people were poisoned by consuming adulterated lozenges, sparking a new flurry of legislative action: Paulus, *Crim L. Q.*, *op cit.* at p. 452; in 1853, a spate of shipwrecks with large losses of life provoked new passenger legislation: MacDonagh, *op cit.*, p. 266.

<sup>215</sup> E.g., the 1844 report on the appalling conditions in mines, as referred to in Hutchins and Harrison, *op cit.*, at pp. 81 - 82.

<sup>216</sup> For example, the trajectory of factory legislation is as follows: the 1802 Act was followed by amending or consolidating Acts in 1819, 1833, 1844, 1847, 1864, 1867, 1874, 1878, 1891, and 1895. Per Hutchins and Harrison, *op cit.*, at pp. 279 - 280. See also the introduction of new sanitation legislation in London following the initial reports of the City of London Health Officer, in R. Lambert, *op cit.*, p. 152 ff.

<sup>217</sup> E.g., as described with respect to Passenger Act enforcement in O. MacDonagh, *op cit.*, p. 219.

<sup>218</sup> *Ibid.*

<sup>219</sup> E.g., factory legislation began as a concern with child labour in cotton factories, then turned its attention to women labourers, and hours of work of all labourers, then safety issues such as fencing around shafts, then broadened to include factories other than cotton, such as pottery manufacturers: see generally, Hutchins and Harrison, *op cit.*

Offences,"<sup>220</sup> the legal fixation with proof of intent was an obstacle to effective regulatory enforcement:

Some one hundred years ago people starved to death; were accidentally killed during work; lived in indescribably unhealthy and filthy conditions and, as a consequence, died of infectious diseases; died on overseas passages due to crowding, impure water, starvation and infectious diseases; were poisoned or made ill by unwholesome food -- all because means were lacking to prove that those who were exploitative or negligent were in fact guilty of morally reprehensible crimes. The history of the Passenger Acts, factory legislation, sanitary and public health regulations, and the food and drug laws, clearly shows that the overall abuses resulting from the industrial revolution, could only be curbed by a compulsorily enforced criminal law which suspended the requirement of mens rea. At the time strict liability interpretations were needed most, they served to ameliorate harsh abuses and to equalize to some extent certain disadvantages suffered by those without access to civil litigation.<sup>221</sup>

In the author's opinion, the assertion of Paulus that a large number of deaths and diseases occurred "all because means were lacking to prove" that those who committed offences were exploitatively or negligently guilty is perhaps a bit of an overstatement, but there is no doubt that legislators, the courts, and others became centrally concerned with the issue of the appropriateness of conventional preoccupations with intent in the context of misconduct where no intent may be evident.

### *The Early Years*

While many commentators point to mid- and later nineteenth century cases such as *R. v.*

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<sup>220</sup> I. Paulus, "Strict Liability: Its Place in Public Welfare Offences," (1977-78) 20 *Crim. L.Q.* 445. *Crim L. Q., op cit...*

<sup>221</sup> Paulus, *Crim L.Q., ibid.*, p. 451 (footnotes omitted).

*Woodrow* (1846)<sup>222</sup> *Fitzpatrick v. Kelly*, (1873)<sup>223</sup> *Roberts v. Egerton* (1874)<sup>224</sup> and *Sherras v. De Rutzen* (1895)<sup>225</sup> as the genesis of the modern era of regulatory offences, it is useful to begin examination of the era somewhat earlier. The 1814 case of *R. v. Dixon*,<sup>226</sup> provides an illustration of some of the difficulties associated with attribution of responsibility and liability in master-servant contexts, and an early example of judicial "finessing" of the mental element. The key elements of the decision are set out below, followed by an analysis of its salient points.

The case of *R. v. Dixon* was an appeal from a conviction by jury, and concerned an indictment against the owner of a bakery for "being an evil disposed person and.....unlawfully, falsely, fraudulently and deceitfully and for his own lucre....in breach of his trust and duty"<sup>227</sup> providing the Royal Military Asylum, an institution for the bringing up of children of military officers, with bread containing "divers noxious and unwholesome materials, not fit for the food of man," contrary to the *Bread Act*<sup>228</sup> of 1795. In particular, it was alleged that the bread contained large quantities of "crude alum," an "unwholesome ingredient."<sup>229</sup> There is evidence that children "complained of the badness of these loaves" and as a result the lumps of crude alum were discovered, but there is no indication that anyone was seriously harmed as a result of the

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<sup>222</sup> [1846] 14 M & W. 404.

<sup>223</sup> (1873) LR 8 QB 337.

<sup>224</sup> (1874) LR 9 QB 494.

<sup>225</sup> [1895]1 QB 918.

<sup>226</sup> (1814) 3 M. & S. 12.

<sup>227</sup> *R v. Dixon, ibid.*, p. 11.

<sup>228</sup> (1795) 36 G. 3, c. 22, s. 3.

<sup>229</sup> *R. v. Dixon*, op cit., at p.11. The use of alum in bread is prohibited under s. 3 of the 1795 Act.

incident.<sup>230</sup>

In apparent preparation for a defence based on the distinction between liability of principal and agent, the foreman of the defendant had testified that Dixon owned two baking establishments, that he, the foreman, had made this bread, and that he could not account for how the alum would be found in "the crude state."<sup>231</sup> The foreman also testified that he had no reason to suppose his master knew of any alum being mixed with the bread, although cross-examination "threw considerable doubt upon that point."<sup>232</sup> At trial, the judge left it to the jury to say whether the defendant knew of the alum being mixed, and the jury found the defendant guilty.<sup>233</sup>

Counsel for the accused moved for a new trial, on technical grounds which are not germane to discussion here. He proffered affidavits from physicians which indicated that alum mixed with bread in the proportions described would not be unwholesome.<sup>234</sup> Therefore, counsel maintained, if the defendant had known of the mixture of alum in bread in the proportions described, he would not have considered it harmful, and hence would not be liable. Moreover, counsel suggested that the defendant should not be found criminally liable for the action of his foreman, "because it is a maxim that the principal is not answerable for his agent criminally, but only civilly."<sup>235</sup> Additionally, counsel argued that the defendant should not be liable since he had

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<sup>230</sup> *Ibid.*, at 12.

<sup>231</sup> *Ibid.*

<sup>232</sup> *Ibid.*

<sup>233</sup> *Ibid.*, at p. 13.

<sup>234</sup> *Ibid.*

<sup>235</sup> *Ibid.*

not intended to harm the children, and "malus animus" was the essence of the crime.<sup>236</sup>

The court disagreed with counsel. First, Lord Ellenborough CJ held that the affidavits had shown no further than that alum was a "somewhat noxious" material, and therefore required great care by anyone who used it:

He who deals in a perilous article must be wary how he deals, otherwise, if he observe not proper caution, he will be responsible; and the statute having interdicted alum in the making of bread, shews that it must be considered as a perilous article.<sup>237</sup>

Concerning the issue of the liability of the master for his servant, Bayley J. indicated that:

...if a person employed a servant to use alum....the unrestrained use of which was noxious, and did not restrain him in the use of it, such person would be answerable, if the servant used it to excess, because he did not apply the proper precaution against its misuse.<sup>238</sup>

Moreover, the court held that it was peculiarly within the defendant's knowledge what materials he used. With respect to the argument that the defendant lacked the requisite intent, the Ellenborough CJ held as follows:

...it was an universal principle, that when a man is charged with doing an act, of which the probable consequence may be highly injurious, the intention is an inference of law resulting from the doing the act, and here it was alleged that he delivered the loaves for the use and supply of the children, which could only mean for the children to eat, for otherwise they would not be for their use and supply.<sup>239</sup>

As a result, the court rejected the motion for a new trial, and the conviction stood.

To the modern eye, the conclusions of the court seem harsh in regard to the principal-agent issue, the standard of care question, and the issue of intent. With respect to the question of

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<sup>236</sup> *Ibid.*, pp. 13 - 14.

<sup>237</sup> *Ibid.*, p. 14.

<sup>238</sup> *Ibid.*

<sup>239</sup> *Ibid.*

the liability of the principal for his agent the position adopted is essentially one of absolute vicarious liability by the master for the actions of his servant. The characterization of "absolute" is made because it does not appear as if the reasonableness of the master's actions vis-a-vis his servant would in any way supply a defence.

With respect to the standard of care issue, the position taken by the court has a modern ring to it, since the judges draw on concepts of voluntary assumption of risk, and make attributions about who is best suited to exercise control over risky activities. The court concludes that the standard of care required of the master is high, because a potentially harmful product is involved, necessitating that proper caution is exercised. Moreover, in an apparent tacit calculus of who, among master, servant, or consumer is in the best position to prevent the risk from occurring (and thus who should be responsible and liable should a risky activity occur), the court clearly chooses the accused (in the position of master) and attributes knowledge to the accused (i.e., "it was peculiarly within the defendant's knowledge what materials he used."). There does not appear to be any willingness by the court to examine whether the behaviour of the accused constituted a "due diligence" (as it would later be called in this context) exercise of control.

Finally, with respect to the question of intent to injure, it should be noted that at trial the judge left it to the jury to decide that the accused knew that alum was added to the mix and they decided that he did. On appeal, the court essentially transforms the inquiry concerning intent into little more than a *pro forma* review of whether the defendant intended to deliver bread for the purposes of eating. As such, at a practical level it renders an intent to harm standard into an absolute standard. In this regard, it foreshadows similar twentieth century American judicial interpretations which have read down the "knowledge" requirement in some regulatory

legislation.<sup>240</sup> It is worth noting that, in spite of the fact that the wording of the charge against Dixon emphasizes the significance of intent, through phrasings such as describing the accused as being "an evil disposed person" who "falsely, fraudulently and deceitfully and for his lucre" violated the law, the actual offence contained in the *Bread Act* is much more neutrally worded.

Section 3 of the *Bread Act* states:

....if any fuch [The letter "f" often used instead of "s".]....Loaves....fshall be deficient in Weight.....or if the fame fshall have in them Alum....every Perfon offending therein fshall be liable to the ....Penalties and Forfeitures...

As we shall see, later in the nineteenth century, some courts seized on seemingly "intentless" language such as this as the justification for expressly not imposing intent requirements in regulatory contexts. While it would appear this avenue was open to the court in *R. v. Dixon*, it was not followed, in favour of recognizing an intent element and then rendering it meaningless.

Arguably, the court felt compelled to "finesse" the intent requirement in recognition of its inappropriate application for this type of regulatory activity. From the standpoint of the public, the objective of the legislation is prevention of adulteration: how this adulteration occurred is a secondary concern (although it is an important one from a fundamental justice standpoint, as is discussed *infra*). Anticipating later developments discussed below, had the court ruled that a negligence offence was in place (i.e., an offence where, following proof of the *actus reus*, the accused could escape liability if reasonable care is established), the focus of attention would probably have been on whether Dixon had implemented an adequate system of controls (e.g., training, guidelines, spot-checks) over the behaviour of the foreman, and over the bread-making

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<sup>240</sup> As discussed *infra* in Part II, and see, e.g., R. A. Weidel, et al., "The Erosion of Mens Rea in Environmental Criminal Prosecutions," (1991) 21 *Seton Hall L. J.* 1100 - 1124.

process. In turn the accused and persons in positions similar to the accused would have been given a practical legal stimulus to exercise care over their employees and their activities. It is not clear what practical incentives and instructions for those in the baking trade emerge from the actual decision of the court in *R. v. Dixon*, with the exception perhaps of an incentive for individuals to not engage in such activity for fear of the arbitrary legal consequences which will be imposed on them.

In the 1815 case of *The King v. Vantandillo*,<sup>241</sup> the accused was charged with common nuisance, when she carried her child while infected with the small-pox along a public highway. She suffered judgment by default, and appeared before the Court of King's Bench for sentencing. In passing sentence, Le Blanc, J., stated that...

...if a person unlawfully, injuriously, and with full knowledge of the fact, exposes in a public highway a person infected with a contagious disorder, it is a common nuisance to all the subjects, and indictable as such. However, the Court was not disposed upon the present occasion to impute to the defendant an intention of being the cause of the consequences which had followed.<sup>242</sup>

The accused was sentenced to three years imprisonment. It appears clear, from Le Blanc, J.'s judgment, that common nuisance requires "full knowledge" of exposure of a contagious disorder in a public highway. However, in the case at bar, there was judgment against the accused in default, and so the issue of how it would be applied to this type of circumstance, is not entirely clear. Certainly the remark that "the Court was not disposed ...to impute ....an intention of being the cause....." suggests some recognition of the difficulties of proof as regards the intention element of the offence. Note as well that this was a case of an individual (i.e., not a firm) being

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<sup>241</sup> *King v. Vantandillo* [1815] 4 M.& S. 73 .

<sup>242</sup> *Ibid.*, p. 391 .

the subject of a prosecution, in a non-commercial setting. The case is included here as an example of how it was possible to use “early public welfare” conventional offences such as common nuisance to address health problems, at least insofar as they applied to individuals, even though such offences included a mental element.

### *The Middle Years*

As early as 1833, there is evidence of discussion among legislators about how to frame offences in a manner which addresses some of the harshness evident in the *R. v. Dixon* case. Thus, for example, the inappropriateness of using traditional crimes to address regulatory misconduct was the subject of an exchange of viewpoints in the House of Commons, as is evidenced by the following extract:

He did not understand the noble Lord [Althorpe] to object to machinery being properly boxed and guarded...but to the impropriety of attaching such a punishment as that of manslaughter for such comparatively small offences as an accident from machinery, where, in fact, the proprietor of the mill might not be to blame at all...in their wish to carry into effect benevolent designs, they had overlooked the magnitude of the consequences....<sup>243</sup>

That same year, the "Act to regulate the Labour of Children and young Persons in the Mills and Factories of the United Kingdom of 1833"<sup>244</sup> was passed, and its terms reflect a distinct effort to address some of the absolute liability aspects of *R. v. Dixon*. The Act contains a range of offences. There are explicitly intentional offences, such as those pertaining to falsification of information (s. 28) and wilful obstruction of inspectors (s. 32). There are offences where lack of intent is expressly made a defence, such as s. 29, concerning employment of underage workers, where

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<sup>243</sup> Mr. Hyett, House of Commons, July 1833, per W. Carson, "Some Sociological Aspects of Strict Liability and the Enforcement of Factory Legislation," (1970) 33 *Mod. L. Rev.* 396 - 412, at p. 396.

<sup>244</sup> 3 & 4 Will. IV., c. 103.

conviction will follow unless the adjudicator is satisfied that the employment was "without wilful Default". The intentional offences attract the most serious penalties (imprisonment) while the others are subject to only monetary penalties. By section 30, there is explicit exculpation of vicarious liability of the "Master of any Factory" *vis a vis* the activities of his or her employees where the adjudicator is satisfied that an offence was committed "without the personal Consent, Concurrence, or Knowledge of such Master": in such cases, the agent, or servant or workman who actually committed the offence can be convicted for the offence. Pursuant to s. 31, where an employee is convicted for an offence other than those where an explicit penalty is provided (i.e., s. 28, s. 29, and s. 32) the adjudicator has the discretion to reduce the penalty to a nominal sum "if it shall appear....that such Offence was not wilful nor grossly negligent." Logically, then, the effect of s. 31 is to denote that a host of minor offences such as failing to limewash the factory walls (s. 26) or failing to post a copy of the Act in a prominent place in the factory (s. 27) are absolute in nature, but that the harshness of the absolute offence can be diminished at sentencing, by reducing to minimal amounts those violations which were not wilful or grossly negligent.

Arguably, the effectiveness of the Act is severely handicapped by including a requirement of intent in the key offence of the Act (s. 29, pertaining to the hiring of underage employees), and by exculpating employer liability for any offences where no consent or knowledge has been given to the offending employee.(s. 30). Again, it would appear that in both cases a reasonable care defence would achieve the objective of the legislation (i.e., encouraging due diligence efforts on the part of employers so that they avoid hiring underage employees). An evolutionary process of amendments was made to the Factories Act legislation throughout the nineteenth century which eventually lead to provisions including a due diligence defence in the 1878 and 1901 version of

the legislation (discussed below).

In the 1840s, two court decisions pertaining to adulteration adopted an "absolute liability" interpretation of possession offences. In the 1842 case of *Attorney-General v. Lockwood*,<sup>245</sup> the accused Lockwood was a licensed keeper of a beer-shop, who was charged with the following statutory offence:

.....no....retailer....of, beer, shall receive...or have in his....possession ....any  
 ....liquorice.....or any article...whatsoever for or as a substitute for malt or hops...<sup>246</sup>

The accused had in his possession a large quantity of liquorice (500 lbs.). Adopting a plain but very strict interpretation of the provision, the court held that it was unnecessary to prove either that the accused had the liquorice to be used as a substitute for malt, or that he possessed the liquorice with any criminal intention. The court pointed out that a specific provision existed concerning possession for the purpose of adulteration, but that the legislators had in their wisdom added the second provision which did not include the "for the purpose of adulteration" language.<sup>247</sup> By way of explanation, the court stated "Very stringent provisions are sometimes enacted by the legislature for purposes of the general public good, involving great restrictions upon particular classes of men."<sup>248</sup> The *Lockwood* case is thus an early example of judicial deference to the perceived intent of the legislature to create an absolute liability offence.

In *R. v. Woodrow* (1846),<sup>249</sup> a licensed retailer of tobacco who had bought 54 pounds of

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<sup>245</sup> (1842) 9 M. & W. 376.

<sup>246</sup> 56 Geo. 3, c. 58, s. 2.

<sup>247</sup> *Lockwood*, at p. 396, per Lord Abinger, C.B.

<sup>248</sup> *Ibid.*, p. 401, per Alderson, B.

<sup>249</sup> *R. v. Woodrow* (1846), *op cit.*

adulterated tobacco (the tobacco was mixed with three pounds of sugar, three pounds of molasses, and three pounds of another saccharine matter), believing it to be pure, was charged with a possession of adulterated tobacco offence. The particular provision in the revenue legislation in question stated that:

....every ....retailer of tobacco, who shall....have in his possession...any tobacco....which shall have been manufactured with....any other matter....shall forfeit 200 pounds.<sup>250</sup>

The court held that mere possession was sufficient grounds for conviction. Pollock, C.B. stated:

It appears to me, that, in this case, it being within the personal knowledge of the party that he was in possession of the tobacco, (indeed, a man can hardly be said to be in possession of anything without knowing it), it is not necessary that he should know that the tobacco was adulterated; for reasons probably very sound, and not applicable to this case only, but to many other branches of the law, persons who deal in an article are made responsible for its being of a certain quality.....It may be said, that in this particular instance it works a great hardship, because it is expressly found....that the magistrates.....were of opinion that he personally had no knowledge of this violation of the law. If the law in a particular case works any hardship, it is either for the legislature to alter the law, or for the executive department of this branch of the revenue law to abstain from calling for the enforcement of the statute. ...the party is liable to the penalty, whether he is or is not aware that the commodity has been adulterated .....In reality, a prudent man who conducts this business, will take care to guard against the injury he complains of.....<sup>251</sup>

Several points can be made regarding Pollock, C.B.'s statement: first, it represents an apparent judicial acknowledgement that if the legislators want to over-ride the intent requirement, they may, and the court will not impose one, nor object to the practice.<sup>252</sup> Second, the assertion that a prudent man would guard against such an injury is perhaps simplistic, since no matter how prudent a man may be, this will not be a defence should adulteration be discovered. The effect of

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<sup>250</sup> 3 and 4 Vict., c. 18, s. 3; as set out on p. 410 of *Woodrow, ibid.*

<sup>251</sup> *Woodrow, ibid.*, at 415.

<sup>252</sup> As we shall see, later judges would not be so wholly deferential.

Pollock, C.B.'s "a prudent man will guard against the injury" approach is to equate possession of adulterated tobacco with imprudence, and no explanation will exculpate the accused from liability. Third, Pollock, C.B. seems to be making an implicit calculus that, between businessmen and consumers, it is businessmen who are best suited to ascertaining and controlling quality (i.e., "persons who deal in an article are made responsible for its being of a certain quality."). Thus, regulated actors must meet certain standards.

Concurring with Pollock, C.B. on this point, Parke, B. added:

It is very true that in particular instances it may produce mischief, because an innocent man may suffer from his want of care in not examining the tobacco he has received, and not taking a warranty; but the public inconvenience would be much greater, if in every case the officers were obliged to prove knowledge. They would be very seldom able to do so.<sup>253</sup>

Here we see an explicit judicial statement that public convenience (which seems to be synonymous here with administrative convenience) can over-ride an apparent personal injustice. Parke, B. also suggested that it was open to regulated persons to conduct a chemical analysis or get a warranty from the manufacturer or dealer. Because only a fine is available as a penalty, a warranty would allow the accused to obtain a civil payment from the manufacturer, but would not be recompense for the stigma associated with being convicted of an offence. Even if such steps had been undertaken (and were later revealed to be inaccurate or incorrect), they would not be a defence to a subsequent prosecution (as they would be with a due diligence defence).

Finally, Rolfe, B. noted that:

The power given ...to the commissioners [by section 98]...to forbear to prosecute where it shall appear to their satisfaction that any penalty....was incurred "without any intention of fraud, or of offending against this act," shews plainly that the forfeiture may be incurred

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<sup>253</sup>

*Woodrow, op cit.*, at p. 417.

though the party was morally innocent.<sup>254</sup>

It would appear that technically this particular contention is unassailable. It suggests that an accused can be convicted without there being any intent to commit an offence. One commentator has suggested that “it was not evident that this [the *Woodrow* case] was a criminal proceeding,” that the offence was really an indirect method of collecting tax from persons who were evading tax, and was not an offence pertaining to public health (even though it dealt with adulteration).<sup>255</sup> All of this appears to be true. Nevertheless, regardless of whether the statute is characterized as revenue legislation or public health legislation, the statute in question sets out offences, with penalties, and the judges seemed remarkably unperturbed that liability could be imposed without intent.

While the *Lockwood* and *Woodrow* decisions might suggest that courts had adopted a monolithically rigorous stance against commercial interests, and one favourable to the administrative convenience of government officials, this was certainly not the case. Thus, for example, in *Ryder v. Mills* (1850),<sup>256</sup> the Court of the Exchequer ruled against the interests of government inspectors by concluding that legislative obligations pertaining to maximum hours of work in a day did not prevent employers from putting in place “relay” teams of young workers, even though the effect of the “relay” practice was to defeat the objective of the legislation.<sup>257</sup>

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<sup>254</sup> *Ibid.*, at p. 413. This statement of Rolfe, B. was made during oral argument.

<sup>255</sup> Per R. Singer, “The Resurgence of Mens Rea: III -- The Rise and Fall of Strict Criminal Liability” [1989] 30 *Boston College L. R.* 337 - 408, at pp. 342 - 343.

<sup>256</sup> *Op cit.*.

<sup>257</sup> Use of relays made it difficult for inspectors to tell when child-employees began and ended their ten hour shifts. For greater discussion of the relay practice, and discussion of the case, see Hutchins, *op cit.*, pp. 102 - 107.

Another round of legislative amendments was necessary before the practice was stopped.<sup>258</sup> It is worth pointing out that throughout this period there continued to be many decisions concerning regulatory legislation where courts held that proof of intent was still required.<sup>259</sup>

While the nineteenth century court decisions discussed to this point all address statutory provisions, a strain of the original common law crime of common nuisance continued to exist and was applied to regulatory contexts throughout this period. In *The Queen v. Stephens* (1866),<sup>260</sup> the accused Stephens owned a quarry which bordered on a public navigable river. Rubbish from the quarry which had been piled by quarry workers was washed into the wall, and as a result navigation of the river was prevented. At trial, defence counsel had argued that Stephens was over 80 years of age, was unable to personally supervise the quarry, and had prohibited his workers from depositing rubbish in the river. It was claimed therefore that Stephens lacked any knowledge of the offence.<sup>261</sup> The trial judge had ruled that this was immaterial, that as proprietor of the quarry Stephens was the beneficiary and had a duty to take all proper precautions.<sup>262</sup> A jury convicted Stephens. At appeal, the Court of Queen's Bench agreed with the trial judge. Mellor, J. stated that an indictment in nuisance....

....is a proceeding of a criminal nature, but in substance I think it is in the nature of a civil

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<sup>258</sup> *Ibid.*, at p. 107. The "Ten Hours Bill" of 1847 was replaced by the "Normal Working Day" Bill of 1850.

<sup>259</sup> E.g., see the following adulteration cases: *R. v. Stevenson* (1862) 3 Fost & F. 106 (NP); *R. v. Jarvis*, (1862) 3 Fost. & F. 108 (NP); *R. v. Crawley* (1862) 3 Fost. & F. 109; *Core v. James* (1871) LR 7 QB 135, as described in F. Sayre, "Public Welfare Offenses,"(1933) *Columbia L. R.* 55 - 88, at p. 58, footnote 10.

<sup>260</sup> (1866) 1 LR 702 .

<sup>261</sup> *Ibid.*, at p. 703.

<sup>262</sup> *Ibid.*

proceeding, and I can see no reason why a different rule should prevail with regard to such an act as is charged in this indictment between proceedings which are civil and proceedings which are criminal.<sup>263</sup>

The idea that proceedings can be criminal but in substance civil in nature was to be repeated in later English and Canadian cases. In the context of the common nuisance proceedings in *Stephens*, it suggests judicial willingness at that time to forego the intentional requirement as it pertains to vicarious liability for a common law offence, and not just for statutory offences.

Mellor, J. elaborated on the notion of absolute vicarious liability as follows:

The prosecutor cannot proceed by action, but must proceed by indictment, and if this were strictly a criminal proceeding the prosecution would be met with the objection that there was no mens rea: that the indictment charged the defendant with a criminal offence, when in reality there was no proof that the defendant knew of the act, or that he himself gave orders to his servants to do the particular act he is charged with; still at the same time it is perfectly clear that the defendant finds the capital, and carries on the business which causes the nuisance, and it is carried on for his benefit; although from age or infirmity the defendant is unable to go to the premises, the business is carried on for him by his sons, or at all events by his agents. Under these circumstances the defendant must necessarily give to his servants ...all the authority that is incident to the carrying on of the business.....It appears to me that all it was necessary to prove is, that the nuisance was caused in the carrying on of the works of the quarry.<sup>264</sup>

In light of earlier analysis of the nuisance offence as breaches of the king's peace (i.e., annoyances to the commons and not just individuals) that could be considered the precursor of the regulatory offence, the willingness of the court to consider the remedial, non-retributive aims of the common nuisance action, to suspend concerns with knowledge, and impose absolute vicarious liability of a principal for his agent, are, while harsh, potentially significant to subsequent judicial

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<sup>263</sup> *Ibid.*, at p. 708.

<sup>264</sup> *Ibid.*, at p. 709.

interpretations of regulatory offences.<sup>265</sup> Indeed, as we shall see, the *Stephens* case is referred to with apparent approval in the 1895 decision of *Sherras v. de Rutzen* (discussed below).

### *The Later Years*

In the 1870s, two decisions concerning the sale of adulteration of food gave momentum to the idea of acceptance of absolute liability for regulatory offences. In *Fitzpatrick v. Kelly* (1873)<sup>266</sup> the accused Kelly, was charged with selling as unadulterated butter which was in fact adulterated, contrary to s. 2 of the anti-adulteration legislation.<sup>267</sup> Section 2 reads as follows:

Every person *who shall sell* any article of food or drink, with which, *to the knowledge of such person*, any ingredient or material injurious to the health of persons eating or drinking such article has been mixed, *and every person who shall sell as unadulterated* any article of food or drink, or any drug, which is adulterated, shall for every such offence, on a summary conviction of the same before two justices of the peace at petty sessions....forfeit and pay a penalty not exceeding 20 pounds.[emphasis added]

Note that, while the first offence set out in section 2 explicitly includes a "knowledge" requirement, the second offence does not. It was pursuant to the second offence that the accused was charged. At trial, the police magistrate held that it was necessary to prove the the butter when sold was represented as unadulterated, and that it was also necessary to prove that the respondent knew that the butter had been mixed with some other substance, with intent fraudulently to increase weight or bulk, and so he dismissed the information.

On appeal, Blackburn, J. (Quain, J., and Archibald, J. wrote concurring judgments), held

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<sup>265</sup> In so doing, the Court followed earlier cases such as *R. v. Medley* (1866) LR1 QB 702, in which the chairman and deputy chair of a company were held vicariously liable for a public nuisance committed by their employees even though the employees were not acting under the direction of the chair or vice-chair, and were acting without their knowledge. On the other hand, in other cases, the courts have required proof of knowledge to obtain a conviction for common nuisance: e.g., see *R. v. Vantandillo* (1815) 4 M & S 73, discussed earlier.

<sup>266</sup> *Op cit.*

<sup>267</sup> 20 & 21 Vict., c. 43; 23 & 24 Vict, c. 84; 31 & 32 Vict., c. 121; 35 & 36 Vict., c. 74.

that for the purposes of s. 2, it was not necessary for the clerk to state "This is adulterated," since the customer had asked for butter, and the accused had handed over the butter. With respect to the issue of intent, Blackburn, J. held that this was not required. Blackburn, J. noted that s. 1 includes an offence where wilful adulteration is included, and a larger penalty (50 pounds) is provided. By contrast, the second part of s. 2 does not include a wilful element:

So that, whereas the first clause requires knowledge on the part of the seller, and makes it an offence to sell articles adulterated so as to be injurious to health, whether he represents them as unadulterated or not; the second clause does not require knowledge, but that the seller should sell "as unadulterated" articles which are adulterated; that does not necessarily involve that he should expressly represent that the article is unadulterated, but that he should sell it in such a way as to lead the buyer to suppose that it is unadulterated, and he does this when he sells a simple article like butter by name as butter. The sale of an adulterated article as unadulterated may well be made punishable without knowledge on the part of the seller, for a very little trouble would enable a tradesman to ascertain, if he wishes to avoid all danger, that the articles he sells are not adulterated; or he may, if he likes, proclaim that he does not sell unadulterated articles, and then, unless they are adulterated to his knowledge so as to be injurious to health, he will be safe.<sup>268</sup>

Of course, Blackburn, J.'s solution of having the tradesman ascertain "for a very little trouble" that the articles are not adulterated would not necessarily protect the tradesman from being convicted under s. 3. Thus, for example, if the tradesman were to ask and receive an assurance from the wholesaler that a product was unadulterated, and the product was in fact adulterated, he would not be able to escape liability. On the other hand, if a due diligence defence was in place, there would be an opportunity for a careful retailer to avoid liability. Blackburn, J.'s second solution, of having the retailer proclaim that he does not sell unadulterated goods would undoubtedly not attract a tremendous number of clients (presumably, most clients would assume this to be the case and be shocked that it would be a selling point).

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*Fitzpatrick v. Kelly, op cit.*, at pp. 341-342.

In the second adulteration case, one year later, *Roberts v. Egerton* (1874),<sup>269</sup> the accused Roberts, a tea dealer, was accused of selling as unadulterated "green tea" which in fact was adulterated, contrary to s. 2 of the food adulteration legislation. Like Kelly in *Fitzpatrick v. Kelly*, the accused Roberts was charged under the second "no knowledge" offence. At trial, Roberts was convicted. On appeal, two of three judges upheld the trial judgment, following the essential logic of the earlier *Fitzpatrick v. Kelly* decision. While the *Fitzpatrick* and *Roberts* decisions produced considerable opposition from the legal and business communities which considered it an undue hardship and unfair,<sup>270</sup> the offences remained in the legislation and, according to one commentator, the legislation eventually came to be perceived by the business community as in their best interests.<sup>271</sup>

In 1875, in the case of *Bosley v. Davies*,<sup>272</sup> the Queen's Bench held that, in an offence against a licensed hotel keep who "suffers any gaming... on his premises" contrary to the Licensing Act, it was not necessary to show actual knowledge on the part of the hotel keeper that gaming was carried on. If evidence is provided showing circumstances from which it could be inferred that the hotel keeper knew what was going on, this constructive knowledge would be sufficient to establish liability. Counsel for the Crown pointed out that the word "knowingly" was

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<sup>269</sup> *Op cit.*

<sup>270</sup> As documented by Paulus, *CLQ, op cit.*, at p. 453.

<sup>271</sup> *Ibid.*, at p. 454. While Paulus does not elaborate on precisely why the legislation came to be perceived by the business community as in their best interests, the implication seems to be that there was some realization that continued resistance would not result in a roll-back of the rigour of the provisions, and that enforced legislation of this sort separated the good actors from the bad.

<sup>272</sup> (1875) 1 QB 84 .

purposely omitted by the legislature.<sup>273</sup> Counsel for the Crown also suggested that a conviction was good without proof of knowledge, and that the accused "can only discharge himself by proving that he has taken every reasonable precaution to prevent gaming on his premises."<sup>274</sup> In an exchange with counsel for the accused, Cockburn, C.J. said "a man may be said to "suffer" a thing to be done, if it is done through his negligence."<sup>275</sup> Counsel for the accused stated that the innkeeper was under a duty of taking reasonable precaution.<sup>276</sup> The court *per curiam* held that actual knowledge is not necessary, and that constructive knowledge was sufficient.<sup>277</sup> While the particular statement of the court *per curiam* does not directly speak of an offence of negligence, with a reasonable care defence, the statements of Cockburn, C.J. and the two counsel suggest that the essential elements of a "middle ground" negligence offence between absolute liability on the one hand, and "knowledge" crimes on the other, was being discussed by the legal community at the time.

Indeed, the 1875 *Sale of Food and Drugs Act*<sup>278</sup> includes, for the first time, a provision (section 5) exculpating an accused from liability for adulteration if the accused can demonstrate that he did not know that the article was adulterated, and that he could not with reasonable

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<sup>273</sup> *Ibid.*, at p. 88 .

<sup>274</sup> *Ibid.*, at pp. 87 - 88.

<sup>275</sup> *Ibid.*, at pp. 87.

<sup>276</sup> *Ibid.*, at pp. 88.

<sup>277</sup> *Ibid.*

<sup>278</sup> 38 & 39 Vict., c. 63.

diligence have obtained that knowledge.<sup>279</sup> Variations on the reasonable care defence begin to appear in other regulatory legislation as well. Section 87 of the *Factory and Workshop Act, 1878*<sup>280</sup> stipulates the following:

Where the occupier of a factory...is charged with an offence...he shall be entitled.....to have any other person whom he charges as the actual offender brought before the court....and if, after the commission of the offence has been proved, the occupier.....proves to the satisfaction of the court that he had used due diligence to enforce the execution of the Act, and that the said other person had committed the offence in question without his knowledge, consent, or connivance, the said other person shall be summarily convicted of such offence, and the occupier shall be exempt from any fine.

The effect of the provision is to prevent the imposition of absolute vicarious liability on factory owners where due diligence can be demonstrated.<sup>281</sup> A similar provision can be found in the *Coal Mines Regulation Act, 1872*.<sup>282</sup> One possible explanation for Parliament providing these amendments is early recognition that the objectives of the legislation (non-adulterated food, safe work environments) could be achieved without absolute liability through use of due diligence defences. A second possible explanation is that Members of Parliament were successfully lobbied by business interests.<sup>283</sup>

Nevertheless, in the late 1870s, the 1880s and early 1890s, more court decisions followed confirming that in certain circumstances persons can be convicted for adulteration without proof

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<sup>279</sup> Nevertheless, some courts would continue to hold that other provisions in the Act which do not use language suggesting intent, and which are not expressly subject to the due diligence defence under s. 5 are absolute liability in nature: see, e.g., *Parker v. Alder* (1898) 1 Q.B. 20.

<sup>280</sup> 41 Vict. , c. 16.

<sup>281</sup> Note that, in a clear example of legislation which differentiates on the basis of class, there is no similar provision available for employees.

<sup>282</sup> 35 & 36 Vict., c. 76, s. 64.

<sup>283</sup> For a good discussion of the political dynamics surrounding this legislation, see Paulus, *op cit*.

of intent.<sup>284</sup> The 1894 case of *Blaker v. Tillstone*<sup>285</sup> is notable for an articulation by counsel of a general rule of interpretation regarding offences where proof of intent was not necessary. Counsel Gore stated:

Prima facie it is necessary to prove a mens rea; where the prosecution is relieved from that necessity, it must be by virtue of a provision expressed or necessarily implied in the statute under which the proceedings are taken.<sup>286</sup>

As we shall see, this general rule was to receive the approval of the court in the following year, in *Sherras v. De Rutzen*.<sup>287</sup> The decision of *Sherras v. De Rutzen* is important on a number of levels. First, it represents an attempt to bring together and rationalize the disparate range of nineteenth century decisions in support of absolute liability. Second, it contains the first signs of judicial recognition that the existing approaches to characterizing offences as absolute liability in nature may need to be judicially modified to prevent patent injustices.

In *Sherras v. De Rutzen*, the accused Sherras held a license permitting him to operate a public drinking establishment, and was accused of supplying liquor to a constable while on duty without the authority of a superior officer, contrary to s. 16 (2) of the *Licensing Act, 1872*.<sup>288</sup> Of key importance to the case was the fact that the constable had removed his armlet, which apparently was a well known indication that a constable had gone off-duty. In fact, the constable

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<sup>284</sup> *Betts v. Armstead* (1878) 20 L.R. 771; *Pain v. Boughtwood* (1890) 24 L.R. 353; *Blaker v. Tillstone* (1894) 1 Q.B. 345; in *The Queen v. Tolson* [1886 - 90] All ER Rep. 26, 23 QBD 168, the Court, in the context of determining whether honest and reasonable belief was a good defence to bigamy, reviewed the usage of intent in bylaws pertaining to general welfare, health or convenience, and concluded that generally intent was not necessary .

<sup>285</sup> *Ibid.*

<sup>286</sup> *Ibid.*, at p. 346.

<sup>287</sup> *Op cit.*

<sup>288</sup> (35 & 36 Vict., 94) .

was still on duty, even though not wearing his armet. Section 16 reads as follows:

If any licensed person

(1) Knowingly harbours or knowing suffers to remain on the premises any constable during any part of the time appointed for such constable being on duty....or

(2) Supplies any liquor or refreshment whether by way of gift or sale to any constable on duty unless by authority of some superior officer of such constable, or

(3) Bribes or attempts to bribe any constable....

he shall be liable to a penalty....

Sherras was convicted by a police magistrate, and on appeal at quarter sessions the conviction was upheld on the ground that knowledge that the police officer was on duty was not an essential ingredient of the offence.<sup>289</sup> Following an approach to interpretation which had been successful in many previous cases already discussed, counsel for the Crown pointed out that, while subsection (1) clearly uses the language of intent, subsection (2), on which the charge at bar was based, does not, and that therefore is an absolute prohibition.<sup>290</sup>

The Court of Queen's Bench unanimously overturned the conviction. Day J. stated that the accused had no intention to commit a wrongful act, and that the failure to include the word "knowingly" in ss. 16(2) only served to displace the conventional proof burden from the Crown to prove intent to the accused to establish that he did not *and that he had reasonable grounds for his belief* that the constable was not on duty.<sup>291</sup> (emphasis added)

Day J.'s judgment is notable in two respects. First, unlike the many previous 19th century decisions which have been reviewed here, it re-interprets the significance of failure to include the

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<sup>289</sup> Op cit., at p. 919.

<sup>290</sup> *Ibid.*, at p. 920.

<sup>291</sup> *Ibid.*, at p. 921.

word "knowledge" in the language of the offence to not signify absolute liability, but rather to denote a shifting of burden of proof of failure of intent to the accused. Second, it injects an objective burden of proof on the accused to establish "reasonable grounds" for his belief. With respect to the latter, this is a foreshadowing of a "reasonable care" or "reasonable mistake of fact" defence, in the sense that the accused's belief must be objectively reasonable in order to be acceptable.

Wright J. begins his judgment by agreeing with Day J.. Echoing the words of counsel Gore in *Blaker v. Gillstone*, he notes that:

....[t]here is a presumption that mens rea, an evil intention, or a knowledge of the wrongfulness of the act, is an essential ingredient; but that presumption is liable to be displaced either by the words of the statute creating the offence or by the subject matter which it deals, and both must be considered.<sup>292</sup>

Significant here is the fact that both the wording of the statute *and the subject matter* are germane to the issue of displacing the intent component. This signifies judicial awareness that certain activities may be more amenable to use of varying standards of liability than are others.

Wright J. then proceeded to classify the exceptions to the intent requirement into three categories. The first are "a class of acts which....are not criminal in any real sense, but are acts which in the public interest are prohibited under a penalty."<sup>293</sup> Wright J. gives as examples revenue statutes such as Lockwood, concerning the possession of liquorice, possession of adulterated tobacco such as in *Woodrow*, and the sale of adulterated food, such as in the *Fitzpatrick* and *Roberts* decisions. The second category "comprehends some, and perhaps all

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<sup>292</sup> *Ibid.*

<sup>293</sup> *Ibid.*, at p. 922.

public nuisances."<sup>294</sup> Wright J. gives as an example the *Stephens* case concerning disposal of waste into a navigable river. In so doing, Wright J. may be referring solely to vicarious liability of masters for the acts of their servants, or he might be indicating that there is no mental element in common nuisance even as committed by the servant. On this point the judgment is not clear. The third category concerns cases in which "although the proceeding is criminal in form, it is really only a summary mode of enforcing a civil right."<sup>295</sup> He cites as examples cases of unintentional trespass, unconscious dramatic piracy, and a bona fide but legally impossible right to fish. In effect, Wright, J.'s classification describes in general terms the class of activity which today are referred to as public welfare offences, where the common good rather than interests of any particular individual tend to be the focus of concern.

Wright J. concluded his judgment by stating:

It is plain that if guilty knowledge is not necessary, no care on the part of the publican could save him from a conviction under s. 16, sub-s. 2, since it would be as easy for the constable to deny that he was on duty when asked, or to produce a forged permission from his superior officer, as to remove his armlet before entering the public-house.<sup>296</sup>

In essence, Wright J. is recognizing the injustice of the absolute liability offence, and its failure to encourage due diligence. It is worth noting that unlike some of his judicial colleagues in earlier cases, Wright J. did not single out the nature of the penalty as a factor to be considered in characterizing offences as absolute or not.

### *Summary -- The Nineteenth Century*

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<sup>294</sup> *Ibid.*

<sup>295</sup> *Ibid.*

<sup>296</sup> *Ibid.*, at pp. 922 - 923.

The nineteenth century can be seen as a turning point for the regulatory offence, as its importance and its distinctive characteristics became recognized by the legal community and beyond.<sup>297</sup> When faced with the disasters, epidemics and accidents which accompanied the move toward industrialization, one of the initial reactions of the courts and legislators was to swing from intentional offences with their inappropriate requirement of intent, to absolute liability offences, with their ease of enforcement but frequent injustice to individual accused. Gradually the trend toward absolute liability offences gave way to legislative and judicial recognition of the need for a middle ground. This was reflected in some of the later regulatory legislation of the nineteenth century, and in *Sherras v. De Rutzen*, an 1895 judicial decision which included defences which hinted at allowing a defence of lack of knowledge on reasonable grounds to escape liability in situations where the wording of the offence omitted words indicating a mental element.

Throughout the period, courts showed considerable ingenuity in interpreting legislation in a manner which minimized the intent elements, and in drawing on and interpreting pre-existing common law notions of vicarious liability in criminal nuisance actions in a way which imposed absolute liability of employers for the actions of their employees. Thus, while it can be said that absolute liability offences were an invention of the judiciary in the nineteenth century it is more accurate to say that courts of this era drew upon a pre-existing stream of law where the intent element was downplayed, and, in conjunction with legislatures, recognized a class of statutory

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It should be noted that the development of professional bureaucracies in the nineteenth century coincided with a gradual rise in professionalism in the courts, with an influx of barristers and attorneys into the criminal courts, and a gradual refinement in the court rules of procedures. These factors all play into the increasingly sophisticated responses of courts to problems of industrial misconduct. See generally, W. Cornish and G. Clark, *Law and Society in England 1750 - 1950* (London: Sweet & Maxwell, 1989), at pp. 598 - 623.

offences pertaining to regulated activity where the Crown was not at first instance required to prove both the *actus reus* and *mens reus* of the offence. In their renowned opus, *The History of the English Law Before the Time of Edward I*,<sup>298</sup> first published in 1895, Pollock and Maitland neatly encapsulate the competing legal principles and practical concerns which came to a head in industrial England of the nineteenth century:

We may fairly remember in our ancestors' favour that in their day the inference that he who kills has meant to kill, or at least to wound, was much sounder than it would be now when, the blood-feud having been suppressed and murders being rare, we have surrounded ourselves with lethal engines, so that one careless act may slay its thousands. But in truth the establishment of a reasonable standard of responsibility is a task which can only be accomplished after many experiments. A mean must be found between these two extremes -- absolute liability for all harm done, and liability only for harm that is both done and intended. Even criminal law can not be satisfied with the latter of these standards.<sup>299</sup>

Pollock and Maitland point the way toward a more sophisticated compromise approach which while haphazardly available toward the end of the nineteenth century, would eventually be widely used in some jurisdictions in the twentieth century.

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<sup>298</sup> Pollock, E., and F. Maitland, *The History of English Law Before the Time of Edward I* (Cambridge: University Press, Re-issued 2nd ed., 1968 (First Edition, 1895), Volume II .

<sup>299</sup> *Ibid.*, p. 475.

## Chapter 6 -- The Early Twentieth Century

As the twentieth century begins, the legal landscape pertaining to non-intentional regulatory offences is in a considerably more developed and systematic state than it was a century earlier. Absolute liability offences have become a separate, recognized category of offences, judicially accepted and an integral component of many regulatory regimes. Variations on the basic absolute liability model have also appeared, in apparent recognition of the harshness of the pure absolute liability offence type. This depiction of the landscape is accurate not only for England, but also for other common law jurisdictions such as Canada, Australia, New Zealand, and the United States. Early twentieth century developments in each of these jurisdictions will be discussed here.

### *The Canadian Experience*

In Canada, there are examples of legislation incorporating variations on reasonable care defences to absolute liability offences from as early as the 1880s, and in the ensuing decades.

Section 33 of the 1887 Ontario *Factories Act*<sup>300</sup> states that:

....[w]here the employer is charged with an offence against this Act he shall be entitled, ....to have any other person whom he charges as the actual offender brought before the Court....and if after the commission of the offence has been proved the employer proves to the satisfaction of the Court that he had used due diligence to enforce the execution of the Act, and that the said other person had committed the offence in question without the knowledge, consent or connivance of him the employer, the said other person shall be summarily convicted of such offence and the employer shall be exempt from any fine, penalty or punishment.

Reflecting its influences, the wording of this offence is virtually identical to English Factories Act legislation of this period (as discussed earlier). The defence is more elaborate than a simple

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<sup>300</sup> RSO 1887, c. 208.

reasonable care defence, since the employer can only avoid liability if four conditions are met: first, the employer must identify and have brought before the court the individual (typically an employee) who committed the offence. Then, the employer must establish due diligence. Thirdly, the employer must establish that the person who did commit the offence did so without any knowledge, consent or connivance of the employer. Finally, the other person must be convicted. Only then will the accused employer escape liability. There is no equivalent reasonable care defence available to the non-employer accused. It is also notable that the penalty for keeping a factory so that the safety of any person employed therein is endangered is imprisonment for one year or a fine of \$500.<sup>301</sup>

Adopting a somewhat different approach, the 1877 Ontario *Public Health Act*<sup>302</sup> made it an offence to wilfully *or negligently* fail to comply with the regulations.<sup>303</sup> The effect of the provision is two-fold: first, it expressly incorporates a fault element, thereby eliminating any possible interpretation that offences can be committed without fault. Second, insofar as the offence applies to negligent misconduct, it puts the burden on the Crown to establish that reasonable care was not exercised. Until the Crown meets its burden to prove negligent non-compliance, the accused is under no obligation to demonstrate due diligence. Just how practical it is to expect the Crown to find and present evidence that demonstrates beyond a reasonable doubt that due diligence has not been exercised is not clear. The author could not locate any court

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<sup>301</sup> *Ibid.*, section 14.

<sup>302</sup> RSO 1877, c. 190.

<sup>303</sup> *Ibid.*, section 32.

decisions which interpreted the provision.<sup>304</sup>

Canadian motor vehicle legislation from early in the twentieth century also included reasonable care defences. For example, s. 46 of the Alberta *Motor Vehicle Act*<sup>305</sup> states that:

Upon any person being charged with an offence under any of the provisions of this Act, if the justice of the peace....trying the case be of the opinion that the offence was committed wholly by accident or misadventure and without negligence, and could not by the exercise of reasonable care or precaution have been avoided, such justice of the peace....may dismiss the complaint.<sup>306</sup>

It is not clear what the exculpatory phrasing additional to the simple "reasonable care" defence adds (i.e., proof that the offence was committed wholly by accident and without negligence) but it would appear to denote that nothing short of a clear-cut instance of reasonable care being demonstrated would result in an exculpation from liability. Note as well that the judge "may" not "must" dismiss the complaint.

Absolute liability offences can also be found in the early twentieth century Canadian legislation. For example, section 35(1) of the 1917 *Saskatchewan Temperance Act*<sup>307</sup> prohibits persons selling soft drinks from keeping liquor on the business premises. The Act contains no exculpatory reasonable care defences such as those found in the Ontario Factories Act or the Alberta and Manitoba Motor Vehicles Acts. In the 1921 decision *R. v. Ping Yuen*<sup>308</sup> the

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<sup>304</sup> For discussion of early Ontario factory legislation, see generally, E. Tucker, "The Determination of Occupational Health and Safety Standards in Ontario, 1860 - 1982: From the Market to Politics to...?" [1984] 29 *McGill L. J.* 260 - 311.

<sup>305</sup> SA 1911-1912, c. 6.

<sup>306</sup> See also s. 54 of the Manitoba *Motor Vehicle Act*, RSM 1913, c. 131: the author could not locate any court decisions on this provision.

<sup>307</sup> S.S. 1917 c. 23 .

<sup>308</sup> [1921] 3 WWR 505.

Saskatchewan Court of Appeal, citing *R. v. Woodrow*, held that the fact that the accused did not have any intent to commit the offence was not a defence.

On the other hand, in the 1923 decision *R. v. Regina Cold Storage and Forwarding Co. Ltd.*,<sup>309</sup> the Saskatchewan Court of Appeal interpreted a different but related possession offence provision in the *Saskatchewan Temperance Act* as not being absolute liability in nature, where the innocence and good faith of the possessor could be established. Haultain, C.J.S. stipulated that “[a]bsence of mens rea means an honest and reasonable belief by the accused of the existence of facts which, if true, would make the act against him innocent.”<sup>310</sup> Lamont, J.A. stated that the offence did not by express language take away the defence of mens rea.<sup>311</sup> In so doing, the court distinguished the *Ping Yuen* decision on the grounds that the offence in question in *Ping Yuen* pertained to merchants of soft drinks, whereas that under consideration in the case at bar applied to persons in a place other than a dwelling house. A storage company would not have any occasion or reason to inspect the contents of goods stored on its premises and therefore should not be liable for the contents. The language of the judgment is consistent with recognition of a defence of either reasonable mistake of fact (per Haultain, CJS), or lack of intent (per Lamont, J.A.),<sup>312</sup> because it would not be reasonable to interpret the legislature as requiring that storage persons, or railway and express companies know the contents of packages stored on their

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<sup>309</sup> [1923] 3 WWR 1387 .

<sup>310</sup> Per Haultain, CJS, at p. 1389.

<sup>311</sup> Lamont, JA, at p. 1393.

<sup>312</sup> Per Haultain, CJS at p. 1389 (reasonable mistake of fact) and Lamont, JA (lack of intent) at p. 1393.

premises or shipped in their vehicles.<sup>313</sup>

In short, the court refused to apply the absolute liability standard because of its patent unfairness, but struggled to reach a consistent conclusion on what form a defence would take. Nevertheless, Haultain, CJS's formulation of a reasonable mistake of fact defence is the earliest example the author could find of a Canadian court devising a negligence objective-based defence, in an attempt to address the injustice of absolute liability. The seed planted here would bear fruit more than fifty years later in the Supreme Court of Canada.

### *The New Zealand Experience*

Courts in New Zealand have acted in a similar fashion. In *R. v. Ewart*,<sup>314</sup> a 1905 decision of the New Zealand Court of Appeal, the court held that, unless the wording of a statute clearly evidenced a legislative intention to make an offence absolute in nature, then a defence of lack of mens rea existed. The case concerned an offence of selling obscene material which did not include words such as "knowingly." However, the Court held that it would be quite possible for a seller to be ignorant of the content of the material.<sup>315</sup> The key passage of Edwards J.'s judgment described the options open to the court as follows:

There are, therefore, two classes of cases under the statute law -- 1, those in which, following the common-law rule, a guilty mind must either be necessarily inferred from the nature of the act done or must be established by independent evidence; 2, those in which, either from the language or the scope and object of the enactment to be construed, it is made plain that the Legislature intended to prohibit the act absolutely, and the question of the existence of a guilty mind is only relevant for the purpose of determining the quantum of punishment following the offence. There is also a third class in which although from

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<sup>313</sup> Per Haultain, CJS, at p. 1391.

<sup>314</sup> (1905) 25 NZLR 709 .

<sup>315</sup> Per Edwards, J., at p. 733

the omission from the statute of the words 'knowingly' or 'wilfully' it is not necessary to aver in the indictment that the offence charged was 'knowingly' or 'wilfully' committed, or to prove a guilty mind, and the commission of the act in itself prima facie imports an offence, yet the person charged may still discharge himself by proving to the satisfaction of the tribunal which tries him that in fact he had not a guilty mind.<sup>316</sup>

As we shall see later in the thesis, the tri-classification of offences articulated by Edwards J. would be applied by New Zealand courts for more than sixty years following the *Ewart* decision (eventually superseded by adoption of an approach similar to that provided in the Canadian *Sault* decision).

While a defence of lack of knowledge is very fair to the accused, it would appear that a reasonable care defence would hold retailers to a higher standard, and would not appear to be an onerous requirement for a businessperson. For example, random checks by retailers of publications supplied by wholesalers or attestations made by them could be considered "reasonable practice." Although not a reasonable care defence, the court's decision to provide a defence of lack of mens rea indicates discomfort with the unfairness of an absolute liability offence.

### *The Australian Experience*

In Australia, a reasonable care defence can be found in the 1896 *Coal Mines Regulation Act of New South Wales*.<sup>317</sup> At the judicial level, prior to 1918, there were many examples of Australian courts following the English lead and finding offences to be absolute in nature.<sup>318</sup>

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<sup>316</sup> *Ibid.*, at p. 731.

<sup>317</sup> Section 48. As discussed in A. Hopkins and N. Parnell, "Why Coal Mine Safety Regulations in Australia are not Enforced," (1984) 12 *International Journal of the Sociology of Law* 179 - 194, at pp. 182 - 195.

<sup>318</sup> E.g., *Murphy v. Jones* (1877) 11 SALR 56; *Persse v. Smith* (1878) 4 VLR (L) 201; *Stephens v. Robert Reid & Co. Ltd.* (1902) 28 V.L.R. 82; *Dawson v. Jack* (1902) 28 VLR 634; *Dugdale v. Dight* VLR 783, as set out in C. Howard, *Strict Responsibility* (London: Sweet & Maxwell, 1963), at p. 114, fn. 114.

Commentators suggest that, starting early in the 1900s, a number of judges began to express discomfort with the idea of convictions of absolute liability regulatory offences when evidence existed that the accused acted without intent and in good faith.<sup>319</sup> As a result, by 1915, "it was clear that a strong stand had been taken by the High Court against strict responsibility for regulatory offences expressed in neutral language."<sup>320</sup> Nevertheless, some decisions continued to interpret regulatory offences as absolute in nature, with no defences available.<sup>321</sup>

Commentators point to the 1934 case of *Maher v. Musson*<sup>322</sup> and the 1941 decision of *Proudman v. Dayman*<sup>323</sup> as signalling the Australian High Court's position that a reasonable mistake of fact defence was available for non-intentional offences. In *Maher*, which addressed an offence of having "in his custody" an illicit spirit, Dixon J. stated that the terms of the offence in question....

....do not make knowledge of the illicit character of the spirits an essential element of the offence. To imply such a requirement would no doubt be possible, but in the case of a revenue statute of the tenor now in question, no presumption appears to arise in favour of that implication. Nevertheless, in the case alike of an offence at common law and, unless expressly or impliedly excluded by the enactment, of a statutory offence, it is a good defence that the accused held an honest and reasonable belief in the existence of circumstances, which, if true, would make innocent the act for which he is charged.<sup>324</sup>

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<sup>319</sup> *Gleeson v. Hobson* [1907] VLR 148; *Erson* [1914] VLR 144, as discussed in Howard, *ibid.*, at pp. 114 - 118.

<sup>320</sup> Howard, *ibid.*, at p. 118.

<sup>321</sup> E.g., *Duncan v. Ellis* (1916) 21 CLR 379; *Myerson v. Collard* (1918) 25 CLR 154, as discussed in Howard, *op cit.*, at p. 119.

<sup>322</sup> (1934) 52 CLR 100.

<sup>323</sup> (1941) 67 CLR 536.

<sup>324</sup> *Maher, op cit.*, at p. 104. Note that Dixon J. was one of four judges for the majority. One other judge concurred with Dixon J.'s reasoning. The two other judges for the majority were in essence in agreement, stating at p. 109, that "...[i]n our opinion it would be a palpable and evident absurdity to suppose that the

The significance of the distinction between criminal and regulatory offences is not as clearly articulated in *Maher* as it is in *Proudman*. In *Proudman*, the offence under consideration was that of permitting an unlicensed person to drive a motor vehicle contrary to the *Road Traffic Act* of South Australia. Dixon J. stated:

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.

The strength of the presumption that the rule applies to a statutory offence newly created varies with the nature of the offence and the scope of the statute. If the purpose of the statute is to add a new crime to the general criminal law, it is natural to suppose that it is to be read subject to the general principles according to which that law is administered. But other considerations arise where in matters of police, of health, of safety or the like the legislature adopts penal measures in order to cast on the individual the responsibility of so conducting his affairs that the general welfare will not be prejudiced. In such cases there is less ground, either in reason or in actual probability, for presuming an intention that the general rule should apply making honest and reasonable mistake a ground of exoneration, and the presumption is but a weak one.<sup>325</sup>

According to Dixon J., “statutory offences” pertaining to such “general welfare” issues as health and safety are to be distinguished from crimes, particularly with respect to the presumption of intent. Here the judicial characterization of the offence as regulatory (in today’s parlance) is crucial to its legal treatment. Because “reasonable mistake of fact” establishes an objective standard, the inquiry focuses on whether the mistake was the type that would be made by an ordinary prudent person. As such, the offence rests on an objective standard (and in this regard

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Legislature intended to expose the innocent messenger or carrier of spirits which are in fact illicit, but of whose character it is impossible that he should be aware to the drastic penalty imposed by section 74.”

<sup>325</sup> Dixon J. in *Proudman, op cit.*, at p. 540: Note that each of the three judges wrote a judgment, and concurred as to the result.

resembles the objective standard of negligence). Nevertheless, it is not immediately apparent that a defence of reasonable mistake is synonymous with that of a defence of reasonable care. This will be discussed in greater detail later in the thesis.

One part of Dixon J.'s judgment was not clear, and that was the question of the burden of proof. Dixon J. stated the following:

The burden of establishing honest and reasonable mistake is in the first place upon the defendant and he must make it appear that he had reasonable grounds for believing in the existence of a state of facts, which, if true, would take his act outside the operation of the enactment and that on those grounds he did so believe. The burden possibly may not finally rest upon him of satisfying the tribunal in case of doubt.<sup>326</sup>

While there are definitely indications in this statement suggesting that the accused need only raise a reasonable doubt as to whether a reasonable mistake of fact existed, and not establish it on the balance of probabilities (i.e., "establishing...in the first place....burden possibly may not finally rest upon him of satisfying the tribunal in case of doubt.") a leading Australian commentator has interpreted Dixon J. as calling for a balance of probabilities standard.<sup>327</sup> In another case from the same period, the 1936 case of *Sodeman v. The King*,<sup>328</sup> Dixon J. gave a more straightforward statement regarding the burden of proof, and the acceptability of a balance of probability standard:

Where by statute or otherwise the burden of disproving facts or of proving a particular issue is thrown upon a party charged with a criminal offence, he is not required to satisfy the tribunal beyond reasonable doubt. It is sufficient if he satisfies them in the same manner and to the same extent as is required in the proof of a civil issue.<sup>329</sup>

When comparing the clarity of the support by Dixon J. for a balance of probability standard in

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<sup>326</sup> Dixon, J., in *Proudman*, at p. 541.

<sup>327</sup> Howard, *op cit.*, pp. 105 - 109.

<sup>328</sup> (1036) 55 CLR 192.

<sup>329</sup> *Ibid.*, p. 216.

*Sodeman* (and in *Maher v. Musson*, before it) with the ambiguity in *Proudman*, an explanation might be the influence of *Woolmington v. The Director of Public Prosecutions*,<sup>330</sup> a 1935 English case concerning the presumption of innocence, which was decided at approximately the same time as *Sodeman*, and after *Maher v. Musson*. Later Australian decisions have concluded that the accused need only raise a reasonable doubt, pointing to the fact that *Proudman* was decided after *Woolmington*.<sup>331</sup> *Woolmington* is discussed in greater detail below. The issue of the appropriate standard of proof for reasonable mistake defences would recur in later cases pertaining to the due diligence defence, as discussed *infra*.

### *The American Experience*

Before focusing on the American use of regulatory offences in the early twentieth century, it is useful to review the formative U.S. experience with such offences in the 1800s. Somewhat parallel to the experience in England, Canada, New Zealand and Australia, courts and legislators in the United States developed a separate stream of non-intentional regulatory offences in the nineteenth century.<sup>332</sup> While remarkably similar in form and in usage to that developed through the English courts, some American commentators have concluded that the United States version of the non-intentional offence developed independently from that being articulated in English

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<sup>330</sup> *Woolmington v. The Director of Public Prosecutions* [1935] AC 462.

<sup>331</sup> E.g., per Gibbs C.J., in *He Kaw Teh v. The Queen* [1985] 157 CLR 523, at pp. 534 - 535, as discussed in greater detail in Part Two of the thesis.

<sup>332</sup> In these early cases, defences based on “not knowing” were not successful. E.g., *State v. Presnell* 34 N.C. 103 (1851); *Commonwealth v. Boynton* 2 Allen 160 (Mass. 1861) (cases pertaining to sale of alcohol where defences of not knowing that the buyer was intoxicated or not knowing that the beverage sold was alcoholic failed); *Commonwealth v. Farren* 9 Allen 489 (Mass. 1864) (conviction for selling adulterated milk where defence of not knowing milk was adulterated failed); *Commonwealth v. Raymond* 97 Mass.567 (1867) (killing a calf less than four weeks old contrary to Public Health Act where defence of not knowing calf was underage failed), as discussed in Sayre (1933), *op cit.*, pp. 62 - 67; see also R. Singer, *op cit.*, esp. pp. 364 - 373.

courts.<sup>333</sup> The first real scholar of regulatory offences, Harvard Law School's Francis Sayre, who first coined the phrase "public welfare" offence to describe the new category of offences,<sup>334</sup> found the fact that the American and English non-intentional offences had developed independently to be significant:

The interesting fact that the same development took place in both England and the United States at about the same time strongly indicates that the movement has been not merely an historical accident but the result of the changing social conditions and beliefs of the day. The development is the not unnatural result of two pronounced movements which mark twentieth century criminal administration, i.e., (1) the shift of emphasis from the protection of individual interests which marked nineteenth century criminal administration to the protection of public and social interests, and (2) the growing utilization of the criminal law machinery to enforce, not only the true crimes of the classic law, but also a new type of twentieth century regulatory measure involving no moral delinquency.<sup>335</sup>

Professor Sayre's observations about the changing nature of nineteenth century society, and the origin of the non-intentional offence echo those of other commentators discussed earlier who have suggested that industrialization and urbanization were part and parcel of a sweeping societal change that compelled the development of new legal responses. Sayre also stated that...

...[t]he decisions permitting convictions of light police offenses without proof of a guilty mind came just at the time when the demands of an increasingly complex social order required additional regulation of an administrative character unrelated to questions of personal guilt; the movement also synchronized with the trend of the day away from nineteenth century individualism toward a new sense of the importance of collective interests. The result was almost inevitable. The doctrine first evolved in the adulterated food and liquor cases was widely extended, and police offenses involving small monetary penalties came to be recognized as a special class of offense for which no mens rea was

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<sup>333</sup> Sayre (1933) *op cit.*, at pp. 62 - 64. Sayre notes that in the key early American decisions originating in Massachusetts, "...the English case of... *Woodrow*...strangely enough goes...unmentioned." (p. 64).

<sup>334</sup> Sayre defined "public welfare offenses" as denoting "the group of police offenses and criminal nuisances, punishable irrespective of the actor's state of mind, which have been developing in England and America within the past three quarters of a century..." Sayre (1933) *op cit.*, at p. 56, footnote 5.

<sup>335</sup> Sayre (1933), *op cit.*, at p. 67.

required.<sup>336</sup>

There were, however, a number of differences between the English and American development of the non-intentional offence. One commentator suggests that, while English courts approached absolute liability interpretations cautiously and reluctantly, "courts in the United States were far less reticent."<sup>337</sup> A significant portion of the American "movement" to non-intentional offences occurred in the area of liquor control, and the restriction of sales to (and thus protection of) minors. The rest pertained to a range of offences including those concerning housing, food, and consumer protection generally.<sup>338</sup> In terms of justifications for the absolute liability interpretation, courts used the familiar arguments found in English judgments, namely, difficulty to prove actual knowledge, the necessity of having effective law enforcement for the public good, the comparatively small penalties available; and judicial deference to perceived legislative intent.<sup>339</sup> Nevertheless, many courts continued to interpret such offences as requiring proof of intent.<sup>340</sup> Moreover, as in common law jurisdictions, some courts employed the defence of reasonable mistake.<sup>341</sup>

The use of public welfare offences continued and expanded in the early years of the

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<sup>336</sup> Sayre, *op cit.*, at p. 67. See also pp. 68 - 69.

<sup>337</sup> Singer, *op cit.*, p. 363. The following discussion draws extensively on Singer, esp. at pp. 363 - 368.

<sup>338</sup> Singer, *op cit.*, p. 363.

<sup>339</sup> See especially Singer, *op cit.*, at p. 367.

<sup>340</sup> E.g., *Adler v. State* 55 Ala. 16 (1876); *Faulks v. People*, 39 Mich. 200 (1878); *Miller v. State*, 3 Ohio St. 476 (1854), as discussed in Singer, *op cit.*, at p. 365.

<sup>341</sup> Eg., in Georgia and Indiana, some decisions allowed "reasonable mistake" as a defence to allegations of selling liquor to minors: *Bain v. State* 61 Ala. 75 (1878); *Marshall v. State* 49 Ala. 21 (1873); *Stern v. State* 53 Ga. 229, as discussed in Singer, *op cit.*, at p. 365.

twentieth century, with, for example, convictions without proof of intent in 1904 and 1905 for employing children under the age of fourteen.<sup>342</sup> In the 1910 decision of *Commonwealth v. Mixer*,<sup>343</sup> a case similar in fact situation but not in result to that of *R. v. Regina Cold Storage*, (discussed *supra*), the defendant driver of a transport truck was charged and convicted for the illegal transportation of a barrel containing liquor, even though he had no knowledge that the barrel contained liquor, and no way of knowing.<sup>344</sup>

The most significant American case considering the issue of non-intentional offences during the first half of the twentieth century was undoubtedly the 1922 United States Supreme Court decision of *United States v. Balint*.<sup>345</sup> The defendant Balint and another were charged with unlawful selling of a narcotic by selling the narcotic without using a written Internal Revenue Service order form, contrary to s. 2 the *Anti-Narcotic Act*.<sup>346</sup> The relevant portions of section 2 are provided:

That it shall be unlawful for any person to sell.....drugs except in pursuance of a written order of the person to whom such article is sold....on a form to be issued ....by the Commissioner of Internal Revenue. Every person who shall accept any such order....shall preserve such order.....in such a way as to be readily accessible to inspection by any officer.....Every person who shall give an order..... shall.....make....a duplicate.....and.....shall preserve such duplicate....in such a way as to be readily accessible to inspection....

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<sup>342</sup> *Overland Cotton Mill Co. v. People*, 32 Colo. 263 Pac. 924 (1904); *American Car and Foundry Co. v. Armentraut*, 214 Ill. 509, 73 N.E. 766 (1905); per Sayre (1933), *op cit.*, at p. 71, fn. 58.

<sup>343</sup> 207 Mass. 141, 93 N.E. 249 (1910).

<sup>344</sup> Per Sayre (1933), *op cit.*, at p. 81, fn. 96.

<sup>345</sup> 258 U.S. 250, 42 Sup. Ct. 301 (1922). See also *United States v. Behrman* 258 U.S. 280, 42 Sup. Ct. 303(1922) (heard and decided at the same time as *Balint* and reaching the same conclusion concerning intent).

<sup>346</sup> Of December 17, 1914, 38 Stat. 785, 786 (Comp. St. paras. 6287g - 6287q).

In essence, then, it can be seen that the *Anti-Narcotic Act* established a regulatory regime, complete with requirements that persons fill out written forms and admit to periodic inspections. Penalties for violation of the *Anti-Narcotic Act* included imprisonment for a maximum of five years.<sup>347</sup> At trial, the defendant had demurred (i.e., took exception to) the indictment on the ground that it failed to charge that they had sold the drugs knowing them to be such. The District Court sustained the demurrer and quashed the indictment. The Supreme Court was being asked to rule on the correctness of that demurrer.

Chief Justice Taft, speaking for the Court, disagreed with the District Court and concluded that the demurrer should have been over-ruled. The Chief Justice indicated that while there existed a general common law rule that scienter was a necessary element of every indictment and proof of every crime, including statutory crimes, that this rule had been modified in respect of prosecutions under statutes the purpose of which would be obstructed by such a requirement.<sup>348</sup> Chief Justice Taft noted that the objection that this modification would mean that someone ignorant of a crime could nevertheless be punished had been considered and overruled in an earlier case where it was held that in the prohibition or punishment of particular acts, the state may in the interest of public policy provide that he who undertakes the regulated activity does so at his peril and not have a defence of good faith or ignorance.<sup>349</sup> Taft cited many cases where courts have so ruled in regulatory measures where the emphasis "is evidently upon achievement of

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<sup>347</sup> Interestingly, there is no reference in the *Balint* judgment to the magnitude of penalties available under the *Anti-Narcotics Act*. It is Mr. Justice Frankfurter, in the later U.S.S.C. judgment *United States v. Dotterweich*, 320 U.S. 277 who notes the imprisonment penalty at stake in *Balint*, at p. 285.

<sup>348</sup> *Balint*, pp. 251-252.

<sup>349</sup> *Balint*, p. 252.

some social betterment rather than the punishment of the crimes as in cases of male in se."<sup>350</sup>

Moreover, the Chief Justice noted that similar English judgments have been made vis a vis the collection of revenue, and the provision of pure food.<sup>351</sup>

Mr. Chief Justice Taft indicated that the *Anti-Narcotic Act* had been characterized as a taxing act with the incidental purpose of minimizing the spread of addiction.<sup>352</sup> Reading section 2, Chief Justice Taft concluded that the emphasis of the section "is in securing a close supervision of the business of dealing in these dangerous drugs by the taxing officers" and that it "merely uses a criminal penalty to secure recorded evidence of the disposition of such drugs as a means of taxing and restraining the traffic."<sup>353</sup>

Its manifest purpose is to require every person dealing in drugs to ascertain at his peril whether that which he sells comes within the inhibition of the statute, and if he sells the inhibited drug in ignorance of its character, to penalize him. Congress weighed the possible injustice of subjecting an innocent seller to a penalty against the evil of exposing innocent purchasers to danger from the drug, and concluded that the latter was the result preferably to be avoided. Doubtless considerations as to the opportunity of the seller to find out the fact and the difficulty of proof of knowledge contributed to this conclusion.<sup>354</sup>

Accordingly, the Court concluded that the demurrer to the indictment should have been overruled.

While some American commentators have tried to minimize the impact of *Balint* by pointing out that the Court merely overturned a demurrer and did not itself directly uphold

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<sup>350</sup> *Ibid.*

<sup>351</sup> Taft at pp. 252-253 cites *R. v. Woodrow*, and *Hobbs v. Winchester Corporation* (discussed *infra*).

<sup>352</sup> *Balint*, p. 253.

<sup>353</sup> *Balint*, p. 254.

<sup>354</sup> *Ibid.*

absolute liability criminal offences,<sup>355</sup> it is difficult to deny the clear wording of the judgment in support of such offences. Particularly notable are the fact that the judgment was unanimous, the apparent judicial ready acceptance of the state's ability to prohibit or punish acts without providing a knowledge or fault based defence, and the failure to expressly consider the magnitude of penalty (imprisonment) at stake.

The case has been cited with apparent approval in many subsequent Supreme Court judgments. In 1943, in *United States v. Dotterweich*,<sup>356</sup> the United States Supreme Court ruled on an appeal of a conviction under the federal *Food, Drug, and Cosmetic Act*.<sup>357</sup> Both the accused Dotterweich, and his company, Buffalo Pharmacal Company Inc. were originally charged under paragraph 301 (a) of the *Act* which prohibits the introduction or delivery for introduction into interstate commerce of any ...drug...that is adulterated or misbranded." Any person violating the provision is guilty of a misdemeanour.<sup>358</sup> The company purchased drugs from their manufacturers and shipped them, repacked under its own label. Three counts went to the jury, two for shipping misbranded drugs and a third for so shipping an adulterated drug. The jury found the corporation not guilty but concluded that Dotterweich was guilty on all three counts.<sup>359</sup>

The Circuit Court of Appeals, one judge dissenting, had reversed Dotterweich's conviction on the ground that only the corporation was a "person" subject to prosecution, unless the

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<sup>355</sup> E.g., Singer, *op cit.*, at pp. 398 - 399.

<sup>356</sup> *Op cit.*

<sup>357</sup> *Food, Drug, and Cosmetic Act*. c. 675, 52 Stat. 1040, 21 U.S.C. paras. 301-392.

<sup>358</sup> Para. 303(a) .

<sup>359</sup> *Dotterweich*, p. 278.

corporation was a counterfeit corporation serving as a screen for Dotterweich. On that issue, the Government brought the case to the Supreme Court for *certiorari*, because this construction raised important enforcement implications under the *Act*.<sup>360</sup> The Circuit Court of Appeals based their decision on para. 303(c) of the *Act* which affords immunity from prosecution if a guaranty has been obtained from the seller that the product has not been adulterated or misbranded. The Circuit Court had found it difficult to believe that Congress expected anyone except the principal to get such a guaranty, or to make the guilt of an agent depend upon whether his employer had gotten a guaranty.<sup>361</sup>

Speaking for the Court, Mr. Justice Frankfurter noted that the purposes of the legislation touched phases of the lives and health of people which, in the circumstances of modern industrialism, are largely beyond self-protection:

The prosecution to which Dotterweich was subjected is based on a now familiar type of legislation whereby penalties serve as effective means of regulation. Such legislation dispenses with the conventional requirement for criminal conduct -- awareness of some wrongdoing. In the interest of the larger good it puts the burden of acting at hazard upon a person otherwise innocent but standing in responsible relation to a public danger. [He cites *Balint*.] And so it is clear that shipments like those now in issue are "punished by the statute if the article is misbranded....and that the article may be misbranded....without any conscious fraud at all."<sup>362</sup>

As a result, Mr. Justice Frankfurter concludes as follows:

The offense is committed, unless the enterprise which they are serving enjoys the immunity of a guaranty, by all who do have such a responsible share in the furtherance of the transaction which the statute outlaws, namely, to put into the stream of interstate commerce adulterated or misbranded drugs. Hardship there doubtless may be under a

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<sup>360</sup> *Dotterweich*, p. 279.

<sup>361</sup> *Dotterweich*, p. 280.

<sup>362</sup> *Dotterweich*, pp. 280 - 281.

statute which thus penalizes the transaction though consciousness of wrongdoing be totally wanting. Balancing relative hardships, Congress has preferred to place it upon those who have at least the opportunity of informing themselves of the existence of conditions imposed for the protection of consumers before sharing in illicit commerce, rather than to throw the hazard on the innocent public who are wholly helpless.<sup>363</sup>

Mr. Justice Frankfurter suggested that, rather than the statute attempting to delineate in what circumstances what officer would be held responsible for what illicit act, a better approach would be to rely on "the good sense of prosecutors, the wise guidance of trial judges, and the ultimate judgment of juries."<sup>364</sup> In this case, the trial court had left the question of the responsibility of Dotterweich for the shipment to the jury, and the jury had found sufficient evidence to support the verdict.<sup>365</sup> Frankfurter reversed the Circuit Court of Appeal's reversal of the conviction.<sup>366</sup>

Mr. Justice Murphy dissented (three others concurred with his dissent). Mr. Justice Murphy pointed out that in this case there was no evidence that Dotterweich ever knew of any adulteration, much less that he actively participated in it. Guilt therefore was imputed solely on the basis of Dotterweich's authority as president and general manager. Murphy also noted that interpreting legislation so that it would impute liability without "evil intention or consciousness of wrongdoing" should not be lightly undertaken.<sup>367</sup> Murphy found the failure of the statute to specifically refer to corporate officers to be a particularly telling point. He noted that "this court has never held the imposition of liability on a corporation sufficient, without more, to extend

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<sup>363</sup> *Dotterweich*, p. 284. - 285.

<sup>364</sup> *Dotterweich*, p. 285.

<sup>365</sup> *Ibid.*

<sup>366</sup> *Ibid.*

<sup>367</sup> *Ibid.*, p. 286.

liability to its officers who have no consciousness of wrongdoing."<sup>368</sup> In the absence of express language so indicating, Murphy expressed his reluctance to impute liability to a corporate officer who has no knowledge of the proscribed action.<sup>369</sup>

From the perspective of our analysis of regulatory offences, the key component of the *Dotterweich* decision is clearly the willingness of the majority of the Supreme Court to see absolute vicarious liability imposed on corporate officers for the misconduct of their corporations. Mr. Justice Frankfurter does not seem to feel particularly troubled by this prospect. It is worth emphasizing that the offence in question does provide for immunity from prosecution where a manufacturer's guarantee has been provided, and as such, could be viewed as a statutorily prescribed form of a "reasonable care" defence. But as to the imputed liability of the corporate officer, it is not clear why a defence of reasonable care would not achieve the objectives of the legislation (i.e., protection of the public) while reducing the harshness of absolute vicarious liability. At a more general level, Mr. Justice Frankfurter's judgment provides further support for the general conclusion reached in *Balint* and *Behrman* that absolute liability offences for public welfare purposes do not particularly trouble the Supreme Court, and are not perceived as fatally offending any constitutional principles.

Thus, at the end of the first half of the twentieth century, there is considerable evidence in the United States of a comparatively non-critical and receptive attitude towards absolute penal liability -- evidence which includes judgments of the Supreme Court addressing circumstances where imprisonment is available as punishment. In this regard, the American courts seem less

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<sup>368</sup> *Ibid.*, p. 288..

<sup>369</sup> *Ibid.*, at p. 293.

protective of the rights of accused than are those of some of their judicial counterparts in Canada, Australia, and New Zealand.

*The English Experience*

Although the 1895 decision of *Sherras v. de Rutzen* suggested some willingness on the part of the English courts to soften the effect of absolute liability characterizations by allowing a defence of lack of knowledge, a strain of "rigorous" absolute liability interpretations followed in its wake in the early twentieth century. Thus, for example, in the 1909 decision of *Provincial Motor Cab Co. v. Dunning*,<sup>370</sup> the defendant motor cab company was found guilty at trial of running one of their cars without a required rear light, contrary to the 1903 Motor Car (Registration and Licensing Order) issued by the Board of Trade. On appeal, the conviction was upheld. Lord Alverstone, C.J. stated:

Art. 11 of the ....Order, 1903....was for the protection of the public. A breach of that regulation is not to be regarded as a criminal offence in the full sense of the word; that is to say, there may be a breach of the regulation without a criminal intent or mens rea...The doctrine that there must be a criminal intent does not apply to criminal offences of that particular class which arise only from the breach of a statutory regulation.<sup>371</sup>

It is difficult to see what harm would be created by allowing a defence of reasonable care in circumstances such as this since it creates an incentive for regulated persons to be duly diligent yet still protects the public for those cases where prudence has not been exercised.

In 1910, the Court of Appeal heard the case of *Hobbs v. Winchester Corporation*,<sup>372</sup> concerning an alleged violation of the *Public Health Act*. The defendant Hobbs, a butcher, was

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<sup>370</sup> [1909] 2 K.B. 599 .

<sup>371</sup> *Provincial Motor Cab, ibid.*, p. 602.

<sup>372</sup> [1910] 2 K.B. 471 .

the subject of an inspection which revealed unsound meat. It is necessary to describe the facts underlying the decision and the decision itself in some detail because the case contains some of the strongest endorsements of absolute liability to be found in English judgments.

Pursuant to s. 116 of the *Act*, the inspector obtained an order from a justice of the peace to have the meat destroyed.<sup>373</sup> This was done. Then, a summons was taken out against Hobbs (apparently under s. 117, but this is not clear), who was acquitted. The reasons for the acquittal are not set out in the judgment. Hobbs then made a claim for compensation to an umpire, pursuant to s. 308 of the Act which allows for cases of damage arising from wrongful seizures of meat under s. 116. The umpire made an award to Hobbs. In his findings, the umpire noted that some of the meat was diseased, but the rest was sound. The umpire noted that Hobbs was unaware that the meat was diseased, as were his servants. Moreover, the umpire found that a man could not have discovered by any reasonable examination that the meat was unsound. Accordingly, the umpire awarded damages to Hobbs.

Upon that award a court action was brought, and in that action the court held that the plaintiff was entitled to certain heads of damage. The Winchester Corporation (which, as the local authority involved, would have had to pay the damages to Hobbs) appealed that decision to the Court of Appeal, claiming that s. 308, which allows claims for damage, has no application where the applicant was himself in default, inasmuch as he did in fact expose for sale and sell unsound meat.

The Court of Appeal concluded that the appeal should be allowed: that is, that Hobbs

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<sup>373</sup> The following description derived from the judgment of Cozens-Hardy, M.R., in *Hobbs, op cit.*, at pp. 476 - 478.

should not be entitled to compensation under s. 308 when he in fact did expose for sale unsound meat, in violation of s. 116. While the case was not an appeal of the s. 117 acquittal of Hobbs, the Court felt compelled to address the issue of whether it was possible to convict under s. 117 even though the accused had no knowledge that he was violating the Act. Section 117 states the following:

If it appears to the justice that any animal carcass [sic] meat....so seized is diseased.....he shall condemn the same, and order it to be destroyed....and the person to whom the same belongs ....shall be liable to a penalty not exceeding twenty pounds.....or, ....to imprisonment for a term of not more than three months...

While acknowledging that in *Sherras v. De Rutzen*, the Court in that case had held that absence of language of intent in the offence resulted in the prosecution being relieved of the burden of proving knowledge but left open the defence of lack of knowledge, the Court of Appeal in *Hobbs* concluded that s. 117 was an absolute liability offence, with no defence of lack of knowledge available. The decisions of the three judges are discussed below.

After determining that the object of the Act with regard to the sale of unsound meat was to prevent danger to the public health by the sale of meat for human consumption in a state or condition in which it is dangerous to human health,<sup>374</sup> Cozens-Hardy, M.R., noted that many other offences in the Public Health Act specifically included the word "knowingly", whereas it was missing in s. 117.<sup>375</sup> The Master of the Rolls also noted that in numerous previous cases courts had held in such circumstances that the offence was absolute in nature.<sup>376</sup> The fact that in this case

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<sup>374</sup> *Hobbs, op cit.*, at p. 476.

<sup>375</sup> *Ibid*, at p. 479.

<sup>376</sup> E.g., *Blaker v. Tillstone, op cit.*, cited at p. 480 in *Hobbs*.

imprisonment is available as a penalty was not considered persuasive:

The answer to that contention is that reliance may be placed upon the justices not to send a man to prison in a case where he did not know the meat was unsound. In such a case the justices would impose either a reasonable fine or no fine at all.<sup>377</sup>

Farwell, L.J., was of the same opinion. He posed the question: "Who is to take the risk of the meat being unsound, the butcher or the public?" and concluded:

In my opinion the Legislature intended that the butcher should take the risk and that the public should be protected, irrespective of the guilt or innocence of the butcher. The knowledge or possible means of knowledge of the butcher is not a matter which affects the public; it is the unsound meat which poisons them; and I think that the Legislature intended that the butcher should sell unsound meat at his peril. ....Sect. 117 deals with the meat so seized, and a penalty is imposed on the person to whom the same belonged....I find nothing in that section about knowledge or possible means of knowledge, and it is perfectly clear that knowledge is not required under s. 116.<sup>378</sup>

Kennedy L.J. was also of the same opinion:

Taking the cases as a whole and admitting that some of them might give some ground for such an argument, I think there is a clear balance of authority that in construing a modern statute this presumption as to mens rea does not exist...a difference has arisen owing to the greater precision of modern statutes. It is impossible now...to apply the maxim generally to all statutes.....A man takes upon himself to offer goods to the public for their consumption with a view to making a profit by the sale of them. Those goods may be so impregnated with disease as to carry death or at any rate serious injury to health to any one consuming them. To say that the difficulty of discovering the disease is a sufficient ground for enabling the seller to excuse himself on the plea that he cannot be reasonably expected to have the requisite technical knowledge or to keep an analyst on his premises, is simply to say that the public are to be left unprotected and must submit to take the risk of purchasing an article of food which may turn out to be dangerous to life or health. I think that the policy of the Act is this: that if a man chooses for profit to engage in a business which involves the offering for sale of that which maybe deadly or injurious to health he must take that risk, and that it is not a sufficient defence for any one who chooses to embark on such a business to say "I could not have discovered the disease unless I had an analyst on the premises." He has chosen to engage in that which on the

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<sup>377</sup> Hobbs, *ibid.*, at p. 481.

<sup>378</sup> *Ibid.*, at p. 481-482.

face of it may be a dangerous business and he must do so at his own risk.....<sup>379</sup>

In essence, the courts are articulating some of the key justifications for holding regulated persons to a high standard of care. As is discussed in greater detail in Parts Two and Three of the thesis, similar arguments are made time and again by the courts throughout the twentieth century. As for potential injustices caused by this arrangement, Kennedy L.J. concludes that this can be addressed at the sentencing stage, so that in cases of proof of no guilty knowledge, "the magistrate would probably inflict a merely nominal fine; and under modern legislation, I think, he need not even convict at all where there is only a trifling breach of the law; but in any case he has a wide discretion."<sup>380</sup>

While bearing in mind the well-justified observations of some commentators that, since the *ratio decidendi* of the case revolves around a civil law question of whether Hobbs was entitled to damages, and not whether s. 117 created an absolute liability offence, the remarks of the judges regarding the appropriateness of absolute liability offences should technically be considered *obiter dicta*,<sup>381</sup> the case has nevertheless been widely cited as twentieth century English judicial support for absolute liability.<sup>382</sup> Certainly, some of the sweeping statements of Cozens-Hardy M.R., Kennedy L.J. and Farwell L.J. probably earn the case the distinction of being one of the high-

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<sup>379</sup> *Ibid.*, at p. 483-485.

<sup>380</sup> *Ibid.*, at p. 485.

<sup>381</sup> Howard, *op cit.*, at p. 80; Singer, *op cit.*, at p. 352.

<sup>382</sup> E.g., Chief Justice Taft, speaking for the unanimous Supreme Court in *Balint, op cit.*, cites Hobbs for the proposition that in order to stimulate proper care, pure food laws may need to be structured so that the ignorant be punished: *Balint, op cit.*, at p. 252. In Canada, the Saskatchewan Court of Appeal in *R. v. Regina Cold Storage, op cit.* (discussed supra) also cited *Hobbs* as authority for the proposition that proof of intent is not necessary for statutory offences, at p. 1390.

water marks of English judicial endorsement for the concept of penal liability regardless of intent, or fault. The fact that imprisonment was available as a sanction, that this was explicitly acknowledged by the judges, and that still the court felt compelled to approve of the offence in its absolute liability form makes the ruling one of the most clear-cut English judicial endorsement of liability in the absence of evidence of intent or negligence.

The "assumption of risk" argument articulated particularly forcefully by Kennedy L.J., and Farwell, L.J. -- which holds that between merchant and customer, the merchant who has entered the economic activity voluntarily with a view to making a profit is better situated to assume the liability where violations take place, regardless of whether he could have prevented it and no matter how onerous or unfair this liability might be -- may appear, at first glance, to be compelling. After all, the argument goes, those who choose to engage in activities tend to be in a position of trust, probably have the best knowledge about possible harms, usually have the greatest ability to prevent harm from taking place, and stand to benefit the most should no violation take place.

In this type of situation, the application and enforcement of rigorous standards is arguably eminently justifiable, and it is reasonable to expect of these regulated actors that they exercise high standards of care, and expect significant negative consequences should they fail to meet those standards. But there would appear to be little merit, for the merchants themselves, or for the affected public, in holding persons liable even when they can demonstrate that they have done everything reasonable to avoid the violation arising. Indeed, by failing to allow for exculpation where proof of reasonable care can be provided, the law risks having the effect either of discouraging potentially productive and careful persons from engaging in a beneficial activity

altogether, or failing to provide incentives for those already undertaking the activity to exercise due diligence, since due diligence will provide no defence.

If the due diligence defence had been available in a prosecution of Hobbs, the whole nature of the inquiry would change from "Did Hobbs have knowledge that the meat was unsound?" -- an irrelevant question, from the standpoint of protecting human health -- to the more pertinent one of "Did Hobbs do everything that a reasonable person would do to prevent adulterated meat from being sold?" This latter approach compels the court and the accused to engage in a constructive exploration of methods of quality assurance, systems of management control, training, communication among employees, and the like. Surely this type of inquiry is more relevant, from both a fairness standpoint, and from the standpoint of protecting the public welfare, than are investigations of whether an accused did or did not actually know that harm was or could be taking place.

In 1935, the House of Lords pronounced on questions of the appropriate burden of proof in a murder case, *Woolmington v. The Director of Public Prosecutions*.<sup>383</sup> While the case did not discuss absolute or strict liability offences, it nevertheless articulates some principles regarding the appropriate proof burdens for crimes which, in the eyes of some,<sup>384</sup> should apply to both crimes and regulatory offences. For this reason, the case is discussed here.

In *Woolmington*, the accused was charged with wilful murder. His defence focused on a claim that the killing was, in fact, accidental. The trial judge had instructed the jury as to the

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<sup>383</sup> [1935] AC 462.

<sup>384</sup> E.g., D. Stuart, *Canadian Criminal Law* (3rd Ed.) (Scarborough, Ont: Carwell, 1995), at pp. 163

proper burdens of proof on both the prosecution, and the defence, and this was subsequently challenged as an inaccurate statement of the law. On appeal, the House of Lords was essentially asked to articulate the correct allocations and quantum of persuasive and evidentiary burdens of the prosecution and the defence. Viscount Sankey L.C., who wrote the judgment for the Court, conducted a long survey of the development of the law of criminal evidence and proof. He conceded that the law of evidence had been very fluid at earlier times,<sup>385</sup> and that the instructions to the jury provided by the trial judge (which included statements about burdens of proof resting on the accused) were in fact historically accurate.<sup>386</sup> However, Viscount Sankey L.C. concluded that, with the exception of insanity, where the onus is definitely placed on the accused to establish such a defence,<sup>387</sup> there should be no burden placed on an accused to satisfy the jury of his innocence and instead he or she should only need to raise a doubt as to his guilt.

The essence of Viscount Sankey L.C.'s judgment can be boiled down to one long paragraph:

Juries are always told that, if conviction there is to be, the prosecution must prove the case beyond reasonable doubt. This statement cannot mean that in order to be acquitted the prisoner must "satisfy" the jury. This is the law as laid down in ....*Rex v. Davies*....which correctly states that where intent is an ingredient of a crime there is no onus on the defendant to prove that the act alleged was accidental. 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

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<sup>385</sup> *Woolmington, op cit.*, at p. 478.

<sup>386</sup> *Ibid.*, at p. 473.

<sup>387</sup> *Ibid.*, at p. 475.

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.<sup>388</sup>

Applying this statement of principle to the case at hand, Viscount Sankey stated that the prosecution must prove death as the result of a voluntary act of the accused and malice of the accused. The accused is entitled to show that the act on his part was either unintentional or provoked. If the jury are either satisfied with his or her explanation, or are left in reasonable doubt whether the act was unintentional or provoked, the prisoner is entitled to be acquitted.<sup>389</sup>

The question of immediate relevance to non-intentional regulatory offences, is how (if at all) this statement of principle applies to defences to the strict liability offence such as the reasonable care or reasonable mistake of fact defence. On its face, *Woolmington* would appear to suggest that it is improper to impose a persuasive burden (i.e., a burden to establish the defence on the balance of probabilities) on an accused, so that an accused charged with a strict liability offence would be able to escape liability by merely raising a reasonable doubt that due diligence had been exercised. A functional analysis of the deficiencies of a mere reasonable doubt due diligence defence is provided later in the paper. The question to be examined here is whether the wording of *Woolmington* necessitates that no more than a evidentiary burden to raise a reasonable doubt that due diligence had been exercised is permissible (at least insofar as English courts are concerned).

The best way to undertake this analysis is to examine Viscount Sankey L.C.'s own words, line by line. Viscount Sankey L.C. begins by stating the following:

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<sup>388</sup> *Ibid.*, at pp. 481 - 482.

<sup>389</sup> *Ibid.*, at p. 482.

Juries are always told that, if conviction there is to be, the prosecution must prove the case beyond reasonable doubt.

The immediate question here is, where a strict liability offence is being considered, what is "the case" that the prosecution must prove? The prosecution must definitely prove beyond a reasonable doubt that a violation of the law has occurred. This is the *actus reus* of the offence. But there is no mental element that must be proven beyond a reasonable doubt. Thus, for example, the prosecution does not have to prove that the accused failed to exercise reasonable care or that a reasonable mistake of fact took place. Only by stretching the definition of "the case" to include possible defences which may be raised by the accused and which are not elements of the prosecution's case would it be possible to argue that somehow the prosecution must prove lack of reasonable care beyond a reasonable doubt. This seems an unlikely interpretation.<sup>390</sup>

Viscount Sankey L.C. continues as follows:

This statement cannot mean that in order to be acquitted the prisoner must "satisfy" the jury. This is the law as laid down in ....*Rex v. Davies*.... which correctly states that where intent is an ingredient of a crime there is no onus on the defendant to prove that the act alleged was accidental.

The first sentence appears to present an obstacle to a due diligence defence established on a balance of probabilities, since this clearly would be a situation where the accused was indeed put in the situation of "satisfying" the jury. But Viscount Sankey L.C. helpfully elaborates on the first sentence in the second, where he states "*where intent is an ingredient of a crime there is no onus on the defendant to prove.*" As intent is not an ingredient of the strict liability offence, there is no conflict.

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<sup>390</sup> On this point see also Howard, *op cit.*, esp. at pp. 39 - 41 (discussed further in Part Three of the thesis).

Next, Viscount Sankey L.C. states this:

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.

Commentators have pointed out the inaccuracy of the opening part of the statement indicating there "always" has been a golden thread duty on the prosecution to prove guilt except as regards insanity,<sup>391</sup> and indeed it contradicts some of Viscount Sankey L.C.'s own description of the earlier law.<sup>392</sup> The closing phrases of the statement expressly exclude the defence of insanity, or any statutory defences. The fact that both common law and statutory exceptions to the rule are considered acceptable by Viscount Sankey, L.C., demonstrates some flexibility. It is common in England and in other common law countries to include statutory due diligence defences in regulatory legislation (as discussed *infra*). Next, Viscount Sankey states:

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.

As Viscount Sankey L.C. has described it, "if there is a reasonable doubt ....*as to whether the prisoner killed the deceased with a malicious intention*" then the accused is entitled to an acquittal. Note that Viscount Sankey L.C. is referring to the two elements of the crime of wilful

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<sup>391</sup> E.g., see A. Stein, "From Blackstone to Woolmington: On the Development of a Legal Doctrine" (1993) 14 *J. of Legal History* 14 - 27, at p. 16. See also A. Zuckerman, "No Third Exception to the Woolmington Rule" (1987) 103 *Law Quarterly Rev.* 170 who states:

If Viscount Sankey LC had resisted the poetic urge, held back his felicitous phrases and had not made an historical statement, the substance of his conclusion would have been much less vulnerable and much trouble would have been saved. (pp. 170-171).

<sup>392</sup> For example, on p. 474 of *Woolmington, op cit.*, Viscount Sankey quotes from a 1762 text on homicide which states the following:

In every charge of murder, the fact of killing being first proved, all the circumstances of accident, necessity, or infirmity are to be satisfactorily proved by the prisoner...

murder (the actus reus and the mens reus) which must be proven by the Crown. Since in a strict liability offence action the prosecution would only need to prove the act beyond a reasonable doubt, and is under no obligation to prove failure to exercise reasonable care or that the mistake was not reasonable (i.e., these are not part of the prosecution's case) they stand outside of the principle which he is enunciating.

Finally, Viscount Sankey concludes as follows:

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 the case of wilful murder, "the guilt" of the accused is proven by establishing beyond a reasonable doubt that the accused intended to kill an individual. With a strict liability offence, "the guilt" of the accused can be established by proving the actus reus of the offence, without any mental element. So this statement presents no bar to strict liability offences. It can also be argued that Viscount Sankey, L.C. in enunciating the general rule, is propounding beyond the facts of the case. Indeed, he does not in the judgment consider any other type of crime other than wilful murder, and most certainly did not discuss in any way the application of his principle to absolute or strict liability offences. In short, this is a rhetorical flourish which surely presents no obstacle to the strict liability offence.

In summary, while it is possible to interpret *Woolmington* as rendering inoperative a defence of reasonable care, arguments can also be made that the *Woolmington* case articulates a principle regarding burdens of proof in *criminal* cases which in essence requires that the prosecution must prove all *elements of the offence* beyond a reasonable doubt, so that an accused is not left in the position of refuting these ingredients and instead needs only raise a reasonable

doubt about them to avoid liability. This would not necessarily pose an obstacle to the strict liability offence, where the prosecution need only prove beyond a reasonable doubt the actus reus of the offence to obtain a conviction, and where reasonable care is not an ingredient of the offence, but rather a matter of exoneration. Needless to say, we will return to the question of the application of the presumption of innocence to the strict liability offence later in the paper.

## **Part One Summary -- Origins and Development of the Regulatory Offences**

We have seen how, from pre-Biblical times, there have been in place penal offences designed to address not only the standard egregious, intentional violent misconduct one might expect to attract societal condemnation, but also failures to exercise reasonable care. Particularly notable from this early period is an offence in the laws of Eshnunna which carefully addresses advertent or subjectively negligent misbehaviour, and a penal offence from the Code of Hammurabi condemning to death the builder of a house who does "not build it solid" so that it collapses and kills the owner. The existence of this offence demonstrates how deeply rooted is the sense that those who engage in economic activities for personal gain, and upon whom others reasonably rely, are to be held to a high standard of care and appropriately punished should they fail to meet that standard of care. Although it is stretching meagre evidence beyond credibility to speculate on how the offence was actually applied, the wording suggests that a builder may have had a defence if he could show that he did in fact "build it solid." If this interpretation were correct, the Hammurabi offence would be the first recorded example of both a regulatory offence, and a form of due diligence defence.

Similar non-intentional "negligence" offences can be found in the Bible, and Greek law and thinking show particular sensitivity to the question of how to penally address unacceptable failures to exercise reasonable care. We also see descriptions of the regulation of commercial transactions, which are developed in consultation with the merchants, and cover such misconduct as double pricing and misrepresentations. The inter-relationships between law and self-regulation would be a recurring theme in subsequent societies and we will see in later chapters how it re-links with the strict liability regulatory offence in its most modern form. In Roman law there is

again evidence that negligent misbehaviour did attract sanctions, although the penalties were less serious than those available for intentional versions of the same misconduct.

Even in the more basic and primitive *Lex Barbarorum* period which followed the collapse of the Roman Empire, there is evidence that both intentional and accidental misconduct attracted sanctions, although there were no strong distinctions between tort and crime (i.e., compensatory/remedial and punitive/retributive) in this period. The Norman conquest of England signalled a movement toward consolidation of royal power, including through use of the royal courts, which marks the commencement of the development of the concept of breaches of the King's Peace and use of local royal justice administration. The concept of the King's Peace would come to denote legal actions against miscreants who engaged in activity deemed harmful to the interests of the king. This would gradually evolve as the point of delineation between criminal and civil (tort) compensatory actions. Misdemeanours, a strain of the King's Peace that eventually emerged and which built on and absorbed the thriving law of the guild, addressed non-intentional "nuisances" or annoyances to "the commons," and would eventually be eclipsed in importance by the increasing use of statutory measures attempting to regulate all manner of commercial activities. Generally, intent did not seem to play a major role in these misdemeanour offences, although occasional defences based on lack of knowledge were successful.

The more serious breaches of the King's Peace came to be called felonies, and tended to be much more closely associated with classic sins, morality, and canon law offences for the same types of activity. As such they attracted scholarly attention reflecting Roman and theological influences, and so the importance of intent, and standards of proof became increasingly evident in the thinking and law concerning felonies. As early as the twelfth century, there are references in

English legal texts to penal liability attaching to someone who by misadventure kills another while "engaged in work of a lawful kind" if due diligence has not been exercised. This reference has been subsequently attributed to canon law sources.

A review of theological literature from this period suggests a highly developed understanding of the concept of negligence. The thirteenth century writings of Aquinas (drawing on Aristotle) conclude that negligence -- being the opposite of prudence, which pertains to solicitude and reason, and choice of conduct -- is a sin. Although the concepts of intent (closely associated with an "evil mind" until at least the nineteenth century) and proof beyond a reasonable doubt were developed in the context of felonies, nevertheless, by the 1700s the influence of these concepts was so great that an assumption seems to have emerged that they also applied to misdemeanours or petty offences.

As the nineteenth century began, then, the stage was set for some sort of resolution of the clashing objectives, approaches and features of the misdemeanour or petty offences needed to enforce the proliferation of regulatory statutes that had emerged to address various problems associated with industrialization, and on the other, the "established" objectives, approaches and features of the true crime or felony model. Judicial decisions and legislation from this period show considerable frustration with the constraints of criminal law to address non-intentional but harmful behaviour, but also show concern about lack of fairness to accused persons should the requirement of proof of intent be removed.

By the end of the nineteenth century, a body of case law had developed which provided judicial support for the idea that, where the enforcement of food, drug, factory and mining safety, alcohol, revenue, and public health laws was concerned, absolute liability offences could in some

cases be justified. To justify this variation from the conventional criminal approach, the distinctive objectives, harms, and characteristics of regulatory activity were sometimes noted, and in some cases the magnitude and type of penalty was considered.

However, there had also emerged a range of offences and defences which attempted to address some of the harshness of absolute liability offences, while at the same time attempting to avoid imposition of the inappropriate true crime model. In several common law influenced jurisdictions, the first half of the twentieth century was a period of considerable experimentation and no apparent definitive stance on the issue of what was an appropriate or inappropriate form of regulatory offence.

The New Zealand Court of Appeal showed a willingness to alleviate the prosecution from the burden of establishing intent, but a sensitivity to the injustices this might cause by providing a defence of no intent. This approach would be favourable to accused persons but might not create any incentive for regulated actors to exercise reasonable care since this would not be a defence. The Australian High Court supported the establishment of a reasonable mistake defence, which showed considerable sensitivity to the needs for fairness on the one hand, and the desire for an effective standard on the other. Lower Canadian courts and legislation adopted various approaches similar to either the New Zealand, Australian or English absolute liability models, as well as using a due diligence defence, but no higher court had ruled on the issue.

By the 1930s, the United States Supreme Court had indicated strong support for the absolute liability model, even where imprisonment was available as a punishment, although lower courts and legislation showed considerably more variation in approaches. The English courts indicated a surprising willingness to support absolute liability offences -- surprising because the

most significant decision on the issue from the nineteenth century, *Sherras v. De Rutzen*, while approving of the absolute model, had itself applied the approach of shifting the onus of "no intent" to the accused. Then, in the 1930s, a criminal case pertaining to murder had included some sweeping pronouncements about burdens of proof in criminal cases, which if applied unthinkingly to regulatory offences, could potentially wreak havoc on the reasonable mistake and reasonable care defence approaches.

Thus, as the modern era of regulatory offences begins, several not necessarily consistent "streams" of regulatory offences can be identified, distinctive from the criminal approach, drawing to varying degrees on the earlier strains of misdemeanours and petty offences, and echoing the ancient law examined earlier. Taken together, it can be said with some certainty that in certain circumstances failures to exercise reasonable care have attracted penal attention from the earliest to times. The question remaining is whether these original examples of recognition for non-intentional regulatory offence types will be acknowledged and built upon, whether they will be subsumed and disappear, or whether some new and altogether different approach will emerge. This is a central consideration of the remaining chapters.

## Part Two -- Regulatory Offences in the Modern Era

The modern era, defined here as beginning in 1950, represents a period of growing sophistication in terms of both judicial and legislative understanding and usage of regulatory offences. In many jurisdictions, a combination of absolute liability offences, and more fair regulatory offences where certain defences are made available, is becoming increasingly common. Penalties attached to regulatory offences are also increasing, in apparent recognition of the significant harm that may result from regulatory misconduct.<sup>393</sup> As penalties increase, the need for an approach fully protective of the rights of accused becomes of central importance. Because Canadian courts have taken the lead in recognizing the strict liability offence with the due diligence defence, and have continued to do so even after new constitutional protections were introduced to protect the rights of accused persons, the Canadian experience is the focus of discussion here. Comparative analysis of the legal situation in Australia, New Zealand, the U.K., the U.S., Germany and the Netherlands is also undertaken.

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<sup>393</sup> See, e.g., the following comment by the author regarding increasing penalties for environmental offences:

What has also happened particularly in the past two or three years, has been an upward revision in the penalties attached to strict liability environmental offences. While ten or fifteen years ago, violation of environmental regulatory offences could typically lead to a maximum fine of \$10,000 or six months imprisonment, now the penalties provided are tending to be both more serious, and considerably more diverse. For example, persons who cause or permit oil and gas spills are liable upon conviction under the federal *Oil and Gas Conservation Act* to penalties of up to one million dollars per day or up to five years imprisonment. Similar magnitudes of penalties are available pursuant to s. 113 of the new federal *Canadian Environmental Protection Act*. In Ontario, corporations who pollute contrary to provisions of the Ontario *Environmental Protection Act* are liable upon conviction to fines of up to \$100,000 for repeat offences while individual repeat offenders can be imprisoned for up to one year. Corporate polluters in Manitoba can be fined up to \$200,000 per day for repeat offences and individual repeat offenders can be fined up to \$10,000 imprisoned for up to one year or both, pursuant to section 33 of the Manitoba *Environment Act*. Under the Ontario legislation, minimum fines are provided under certain circumstances. [footnotes omitted.]

Per K. Webb, "On the Periphery: The Limited Role for Criminal Offences in Environmental Protection," in D. Tingley, ed., *Into the Future: Environmental Law and Policy for the 1990's* (Edmonton: Environmental Law Centre, 1990), at p. 61.

## Chapter 7 -- Canada: The Pre-*Sault Ste. Marie* Era

In the period leading up to the Supreme Court of Canada's 1978 decision in *R. v. City of Sault Ste. Marie*,<sup>394</sup> one can observe a gradually mounting pressure in favour of recognition of a middle ground offence between the absolute liability type and true crimes. As discussed below, case law, articles, research studies, and statutory amendments from the period 1950 - 1978, indicate that considerable thoughtful work toward the middle ground offence was taking place in lower courts, by academics, by legal reform institutes, and by legislatures -- in fact, everywhere except at the Supreme Court of Canada, which continued to cling to the now-familiar binary absolute-offence-or-true crimes approach concerning offence interpretation, right up to the *Sault Ste. Marie* decision. The picture that emerges suggests that the Supreme Court reacted only once a sufficient "critical mass" of approval for the strict liability offence had developed in other quarters.

The 1957 Supreme Court decision of *Beaver v. The Queen*<sup>395</sup> is an example of the early, binary absolute-or-crime approach to offence interpretation. In *Beaver*, the accused had been charged with selling and possession of a drug without a licence, contrary to the *Opium and Narcotic Drug Act*. The case was appealed to the Court on the grounds that the trial judge had erred in his instructions to the jury. Several aspects of the instruction to the jury were questioned. For current purposes, the focus will be on only one ground: whether or not the accused Beaver could be convicted of possession in the absence of knowledge on his part that the substance in question was a drug.

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<sup>394</sup> [1978] 40 CCC (2d) 353 .

<sup>395</sup> [1957] SCR 531 .

According to the facts of the case, there was evidence to suggest the appellant thought the substance contained in the package in question was "sugar of milk" and not diacetylmorphine (the latter being a prohibited substance under the *Opium and Narcotic Drug Act*). While there is no explanation of what "sugar of milk" is, it is apparent from the decision that it was not considered an illicit substance under the *Act*. Pursuant to s. 4(1)(d) of the *Act*, every person who has in his possession any drug save and except under the authority of a licence is guilty of an offence. On indictment, the penalty for violation is imprisonment is not less than six months and up to seven years, a minimum fine of \$200 and not more than \$1000, and "at the discretion of the judge, to be whipped." By section 17, any person who occupies or is in possession of any place in which any drug is found shall, if charged with having possession without lawful authority, be deemed to have been so in possession unless he proves that the drug was there without his knowledge.

For the majority, Cartwright J. (concurring with by Rand and Locke JJ.) noted first the potential for someone to be in innocent possession of an illegal substance.<sup>396</sup> After reviewing earlier cases including *Sherras v. De Rutzen*<sup>397</sup> and *Hobbs v. Winchester Corporation*,<sup>398</sup> Cartwright J. concluded that the essential question is whether the accused had an honest belief, and that the reasonableness of that belief is merely relevant evidence to that essential question.<sup>399</sup> Cartwright felt that legislation pertaining to narcotics is not the same as that concerning

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<sup>396</sup> *Ibid.*, at p. 536.

<sup>397</sup> *Op cit.*

<sup>398</sup> *Op cit.*

<sup>399</sup> *Beaver, op cit.*, at p. 538.

wholesome meat, as was the case in *Hobbs v. Winchester*.<sup>400</sup> Moreover, he interpreted s. 17 as meaning no more than, if it was proven that a drug was in his cupboard, then the onus would shift to the accused to prove that he did not have possession of the drug.<sup>401</sup> Finally, Cartwright J. noted the serious penalties involved (i.e., a minimum sentence of imprisonment). In contrast, in *Hobbs v. Winchester*, the offence in question did not include a minimum term of jail (or whipping).<sup>402</sup>

In dissent, Fauteux J. (concurrented in by Abbott J.), followed the approach in *Hobbs v. Winchester* and other cases. Justice Fauteux described the regulatory machinery in place in the *Act*, including provisions pertaining to licensing, the control of manufacturing and distribution, and records keeping, and concluded that the *Opium and Narcotics Control Act* was indeed public health legislation similar to that under consideration in *Hobbs v. Winchester*.<sup>403</sup> Contrasting the case at bar with other legislation, he noted that other federal statutes such as the *Explosive Substances Act* included express provisions making "knowing" possession of an explosive an offence. Since the offence in question did not, he concluded that knowledge was not a component of the offence.<sup>404</sup>

In analysing the Supreme Court of Canada's decision in *Beaver*, note first the similarity of fact situations and statutory regimes between it and the United States Supreme Court decision in

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<sup>400</sup> *Ibid.*, at pp. 539 - 540.

<sup>401</sup> *Ibid.*, at p. 540.

<sup>402</sup> *Ibid.*, at p. 542.

<sup>403</sup> *Ibid.*, at pp. 546 - 547.

<sup>404</sup> *Ibid.*, at pp. 550 - 552.

*Balint* (discussed earlier). Yet note as well the divergent conclusions of the two Supreme Courts. It would appear that the severity of the penalty in *Beaver*, with minimum terms of imprisonment, was a particularly important strike against the offence being characterized as absolute in nature. Note as well that neither Cartwright J. for the majority, nor Fauteux J. for the dissent, seemed to consider any alternative other than absolute liability on the one hand or a true crime on the other. In fact, Cartwright J. made a point of disapproving the honest belief "reasonably held" option, except in a supportive, evidentiary capacity.

If the Supreme Court of Canada was simply applying the absolute or crime approach in a mechanistic fashion during this period, some of the lower courts were showing more imagination. In the 1965 Ontario Court of Appeal decision of *R. v. McIver*,<sup>405</sup> the accused had been convicted of careless driving under s. 60 of the Ontario *Highway Traffic Act*. A minimum penalty of \$10 or imprisonment for up to three years, as well as licence suspension was provided. At trial, the magistrate concluded that there was circumstantial evidence establishing negligence or carelessness (e.g., damage in a car accident on a clear day, and evidence that the accused McIver had consumed liquor) and so convicted the accused and levied a \$10 penalty.<sup>406</sup>

On appeal, Porter C.J.O., after noting *Sherras v. De Rutzen* and other cases, characterized the legislation as being "strict liability" in nature, so that conviction would follow upon proof of the actus reus of the offence.<sup>407</sup> Taking a different tack, MacKay J.A. (concurring in by two others) characterized the offence in question as being silent as to intent so that the Crown

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<sup>405</sup> (1965) 2 OR 475.

<sup>406</sup> *Ibid.*, at p. 477.

<sup>407</sup> *Ibid.*, at pp. 479 - 480.

need only prove the prohibited act and then the accused would be convicted, but then proceeded to add that the accused could avoid liability by showing "that the forbidden act was done without negligence."<sup>408</sup> As authority for shifting the onus to the accused, MacKay J.A. referred to the Australian cases *Proudman v. Dayman*,<sup>409</sup> and *Maher v. Musson*,<sup>410</sup> as well as the English case of *Sherras v. De Rutzen*, and other cases. MacKay J.A. noted that the Australian decisions dealt with the defence of reasonable mistake of fact. He concluded that the same principles were at play in a defence of no negligence, where the accused could establish reasonably unforeseeable mechanical failure, or some other circumstance as a good defence.

The *McIver* case represents a conscious early attempt by a Canadian court to introduce the due diligence defence, and as such is in this regard an important indication of judicial awareness of the need to find a fair and effective alternative between the two extremes of absolute liability on the one hand and intentional offences on the other. That having been said, it is worth noting that the offence in question in *McIver* was explicitly a negligence offence, where the Crown was under an obligation to prove carelessness beyond a reasonable doubt. Strictly speaking, this should mean that an accused need only raise a reasonable doubt that carelessness had not been exercised to avoid liability (i.e., an evidentiary and not a persuasive burden is imposed on the accused).<sup>411</sup>

The real test of the Canadian reception of the due diligence defence would be its

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<sup>408</sup> *Ibid.*, at p. 480.

<sup>409</sup> *Op cit.*

<sup>410</sup> *Op cit.*

<sup>411</sup> This interpretation of *McIver* was later supported in *R. v. Skorput* (1992) 72 CCC (3d) 294 (Ont. Prov Div, per Judge MacDonnell, at p. 300 - 301).

application to an offence where no fault element was expressly evident as an element to be proved by the prosecution -- an offence such as possession of under-sized lobsters, contrary to the federal *Fisheries Act*. This offence was the subject of consideration by the Supreme Court of Canada in *The Queen v. Pierce Fisheries Ltd.*<sup>412</sup> The accused Pierce Fisheries Ltd. was at the time of the alleged violation in possession of 50,000 to 60,000 pounds of lobster. A fishery officer visited the premises and found 26 undersized lobsters. Mr. Pierce, the President of Pierce Fisheries Ltd., denied that he had any knowledge of undersized lobsters on his property.<sup>413</sup>

Ritchie, J., with seven others concurring, citing *Sherras v. De Rutzen*, *Proudman v. Dayman*, and other cases, observed that there is a presumption at common law that mens rea is an essential ingredient of all crimes, but that this presumption is apt to be set aside in "statutes enacted for the regulation of individual conduct in the interests of health, convenience, safety and the general welfare of the public."<sup>414</sup> He distinguished the situation of possession of lobsters from that of narcotics possession (as in *Beaver*) because Cartwright J. in *Beaver* clearly felt that narcotics possession was a serious crime, and not simply a matter of public health.<sup>415</sup> Moreover, there were no words suggesting intent associated with the offence, as there were with other offences in the *Act*,<sup>416</sup> nor were there any "lawful excuses" provided as with other offences in the

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<sup>412</sup> [1971] SCR 5.

<sup>413</sup> *Ibid.*, at p. 20.

<sup>414</sup> *Ibid.*, at pp. 13 ff.

<sup>415</sup> *Ibid.*, at pp. 16 - 17.

<sup>416</sup> *Ibid.*, at pp. 17 - 18.

*Act.*<sup>417</sup> Ritchie J. observed that this was....

...not a case where a quantity of lobsters, some of which turned out to be undersized, was "planted" on the premises of Pierce ....by a trick, nor did the ....lobsters come ....by mistake or otherwise without its knowledge. ....It cannot be suggested that no officer .....had knowledge of the fact that a big shipment ....was being packaged....but it was not proved that any of these people knew that there were any undersized lobsters in the shipment. As employers .....it would not appear to have been a difficult matter for some 'officer or responsible employee'.....to acquire knowledge of their presence....<sup>418</sup>

Ritchie J. concluded by stating that the case was similar to that of the 1846 tobacco adulteration case of *R. v. Woodrow* (*op cit.*, as discussed earlier) in that it was sufficient that the accused knew he had tobacco in his possession: lack of knowledge of the undersized lobster or the adulterated tobacco was not necessary. Indeed, "If lack of knowledge....constituted a defence....then I think it would in many cases be virtually impossible to secure a conviction."<sup>419</sup>

The lone dissent, Cartwright C.J., concluded that the offence of possession of lobster was not different from possession of narcotics, so that therefore the *Beaver* decision should be applied and knowledge was a necessary element of the possession offence.<sup>420</sup>

Apparent from this case is the gulf in sophistication between lower courts such as the Ontario Court of Appeal and that of the Supreme Court of Canada. Ritchie J. struggles with the idea that a defence of lack of knowledge would make convictions virtually impossible, and is seemingly fully cognizant of the impracticality of notions of knowledge of possession of illegal lobster when large quantities are involved, yet it does not occur to him that a defence of

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<sup>417</sup> *Ibid.*, at pp. 18 - 19.

<sup>418</sup> *Ibid.*, at p. 21.

<sup>419</sup> *Ibid.*, at pp. 21 - 22.

<sup>420</sup> *Ibid.*, at pp. 9 - 10.

reasonable mistake of fact might be an appropriate response for the court to take. This is particularly surprising given his reliance on *Proudman v. Dayman*, where the reasonable mistake of fact defence was explicitly made available to the accused. Taking a somewhat more charitable interpretation, one commentator from that era noted that "Ritchie, J., does not rule out all defences, he simply states that the Crown does not have to prove knowledge."<sup>421</sup>

In the early 1970s, the Law Reform Commission of Canada undertook an impressive, and much-needed systematic study of "strict liability" offences, consisting of empirical investigations concerning the pervasiveness of the offence and variations on it in legislation,<sup>422</sup> explorations of how strict liability offences were actually applied in practice,<sup>423</sup> and examination of the legal and policy arguments for and against strict liability.<sup>424</sup> The results of their research provided a coherent and thoughtful base of understanding to the issue, the type of analysis that is difficult for courts to obtain on their own, given their inherently "case-by-case" approach to law interpretation.

The studies concluded that, in 1969, about 90% of the offences found in federal (other than the Criminal Code) and provincial laws<sup>425</sup> were "strict" (that is to say, no element of intent was evident in the offence).<sup>426</sup> In almost three quarters of the offences, imprisonment was

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<sup>421</sup> Per Jolson, "Far from clear" (1976) 18 *Crim. L.Q.* 294, at p. 308.

<sup>422</sup> P. Fitzgerald and T. Elton, "The Size of the Problem," in Law Reform Commission of Canada, *Studies on Strict Liability* (Government of Canada: 1974) .

<sup>423</sup> P. Fitzgerald, "Strict Liability in Practice," in *Studies on Strict Liability, op cit.*.

<sup>424</sup> "Strict liability in Law" in *Studies on Strict Liability, op cit.*

<sup>425</sup> *Ibid.*, at pp. 58 - 59.

<sup>426</sup> *Ibid.*, at p. 51.

available as a punishment.<sup>427</sup> Research revealed that in most circumstances prosecutions under federal misleading advertising, weights and measures and food and drugs legislation were not undertaken unless some element of fault was evident.<sup>428</sup> Interestingly, enforcement officers felt that replacement of strict liability by negligence offences with reverse onuses would not be practical, since "defendants could always produce sufficient evidence of due care -- rigged if necessary -- to be acquitted, so that law enforcement would be impossible."<sup>429</sup>

With respect to the law, the researchers concluded that possible conviction for an offence when there has been no fault on the part of the accused offends principles of justice and fairness.<sup>430</sup> Moreover, they felt that the law needed to be clarified as to when if at all offences were strict and when they were not.<sup>431</sup> The researchers observed that the mischief regulatory laws aim to prevent is not the sporadic commission of isolated acts, but rather their negligent repetition.<sup>432</sup> As a result they suggested "let us recognize the regulatory offence for what it is -- an offence of negligence -- and frame the law to ensure that guilt depends upon lack of reasonable care."<sup>433</sup>

With respect to the due diligence defence, they concluded that "in regulatory law, to make the defendant disprove negligence -- prove due diligence -- would be both justifiable and

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<sup>427</sup> *Ibid.*, at p. 208.

<sup>428</sup> *Ibid.*, at p. 148.

<sup>429</sup> *Ibid.*

<sup>430</sup> *Ibid.*, at pp. 21 - 25.

<sup>431</sup> *Ibid.*, at p. 11.

<sup>432</sup> *Ibid.*, at p. 32.

<sup>433</sup> *Ibid.*, at p. 33.

desirable. Justifiable, since penalties are lighter and stigma less. Desirable, since it best achieves the aims of regulatory law."<sup>434</sup> In general, they concluded that imprisonment should be excluded.<sup>435</sup> The researchers felt that a discernable distinction existed between crimes and regulatory offences, evidenced in the law by a failure to include words of intent in the statute, in conduct since the type of activity dealt with in regulatory law which deals with specialists (e.g., motorists, merchants, employers) whereas criminal law pertains to all persons as citizens, in terms of harm (tends to be cumulative, may not have single identifiable victim, in contrast to criminal law where victims are normally immediately evident) and with regard to penalty (in practice, only comparatively small fines are typically levied).<sup>436</sup>

Drawing on the work of the Commission, commentators were reaching the same conclusions.<sup>437</sup> Adding to the momentum, between 1968 and 1974, more than twenty federal regulatory statutes were amended to include some form of due diligence defence.<sup>438</sup> Some provincial motor vehicle regulatory legislation also allowed judges to dismiss charges where the offence could not have been avoided by the exercise of reasonable care and was committed without negligence.<sup>439</sup> And finally, while there continued to be judicial holdings that regulatory

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<sup>434</sup> *Ibid.*

<sup>435</sup> *Ibid.*, at p. 38.

<sup>436</sup> *Ibid.*, at pp. 205 - 209.

<sup>437</sup> E.g., see Jobson, "Far From Clear," *op cit.*, at p. 309.

<sup>438</sup> *Studies on Strict Liability, op cit.*, at p. 232.

<sup>439</sup> *Alberta Motor Vehicle Act*, SA 1975, c. 56, s. 150. Note that this is in essence the same offence which was found in the 1911-12 version of the legislation, discussed earlier.

offences were absolute in nature<sup>440</sup> an increasing number of lower court decisions were supportive of a no fault, reasonable mistake, or due diligence defence.<sup>441</sup> To illustrate the atmosphere of judicial confusion on the eve of the *Sault Ste. Marie* decision, consider the Ontario Divisional Court and Court of Appeal decisions in *R. v. Hickey*.<sup>442</sup> In 1976, the Ontario High Court of Justice Divisional Court ruled (2:1) that the offence of speeding under s. 82 of the *Highway Traffic Act* did not require proof of mens rea, but that a defence of honest and reasonable mistake existed so that the accused Hickey would be in a position to establish on a balance of probabilities that his speedometer was faulty. The dissenting judge, Estey CJHC, citing Australian decisions as inspiration, set out a three-tiered classification of offences, with mens rea and absolute liability being the two extremes, and in the middle an offence where conviction would follow proof of the actus reus, unless the accused established that he had exercised reasonable care. He concluded, however, that, in light of binding Supreme Court of Canada decisions such as *Beaver*, the middle category did not exist, and that speeding fell into the absolute liability category. The Ontario Court of Appeal, on the other hand disagreed with the majority position taken by its colleagues at the Divisional Level, and concluded the offence was one where no defence of reasonable mistake of fact was available.<sup>443</sup>

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<sup>440</sup> E.g., *R. v. City of Barrie* (1970-71) 13 *Crim. L.Q.* 371 (pollution); *R. v. Industrial Tankers Ltd.* [1968] 2 OR 142 (pollution); *R. v. Gillis* (1974) 18 CCC (2d) 190 (speeding); *R. v. Rendall* (1975) 18 CCC (2d) 253 (speeding); *R. v. Brydon* (1974) 21 CCC (2d) 513.

<sup>441</sup> E.g., *R. v. Sheridan* [1973] 2 OR 193 (pollution); *R. v. North Canadian Enterprises Ltd.* [1974] 20 CCC (2d) 242 (pollution); *R. v. V. K. Mason Construction Ltd.* [1968] 3 CCC 62 (worker safety); *R. v. Custeau* (1971) 2 OR 250 (food and drugs).

<sup>442</sup> Divisional Court decision at (1976) 29 CCC (2d) 23; Court of Appeal at (1977) 30 CCC (2d) 416.

<sup>443</sup> (1977) 30 CCC (2d) 416.

In this period, there was no concerted and systematic campaign for recognition of a reasonable care defence to non-intentional regulatory offences. Instead, there seemed to be a much more ad hoc, groundswell realization from a number of quarters that the unfairness of absolute liability offences needed to be addressed, that the solution needed to be appropriate, practical and enforceable, and that the due diligence defence seemed to be the answer. The combination of movement at the legislative level in some jurisdictions toward recognizing the due diligence defence, plus careful and thorough law reform research in favour of the defence and scholarly commentary in support of it, and finally haphazard lower court recognition of a variety of fault-based defences, created a sort of "critical mass" of opinion for action on the issue, or at least an impressive body of suggestive guidance. This critical mass was all the more impressive for not being an organized campaign. Was it an idea whose time had come?

The table was set for the Supreme Court of Canada to respond.

## Chapter 8 -- Canada: The *Sault Ste. Marie* Decision

In *Sault Ste. Marie*, the City of Sault Ste. Marie was charged that it "did discharge, or cause to be discharged, or permitted to be discharged, or deposited materials into Cannon Creek....that might impair the quality of the water..." contrary to s. 32(1) of the *Ontario Water Resources Act*. Upon summary conviction, the penalty for a first offence was a fine of not more than \$5000, for a subsequent conviction a fine of not more than \$10,000 or to imprisonment for not more than a year, or both fine and imprisonment.

The City had contracted a private company (Cherokee) to dispose all refuse originating in the City. The agreement with Cherokee required the company to supply a site, labour and equipment to dispose of the refuse. The location selected bordered on Cannon Creek, and included freshwater springs which flowed into Cannon Creek. Cherokee covered these springs with material and then placed refuse on top. Seepage from this refuse entered the creek, and pollution resulted. Cherokee was charged for violating the *Ontario Water Resources Act*, and eventually convicted, and now the question was whether the City was also guilty.

Reflecting the churning uncertainty experienced by the Ontario judicial community at that time about the nature of the offence, the City had first been acquitted in Provincial Court, but convicted following a trial de novo on appeal by the Crown. The City then appealed successfully to the Divisional Court and the conviction quashed. The Court of Appeal then directed a new trial. This was appealed to the Supreme Court. From one court to the next, the judgments swung from characterizing the offence as one of "no intention" to requiring "mens rea" and back again,

with no middle ground taking root.<sup>444</sup>

Justice Dickson delivered the judgment for a unanimous Supreme Court. Citing *Sherras v. De Rutzen* (discussed earlier), he noted first that the type of offence at issue had been variously named, but that behind the diversity of names the key fact was that it was “not criminal in any real sense, but... prohibited in the public interest.”<sup>445</sup> Reminiscent of language which we have seen in a judgment by Mellor J. in the 1866 English decision of *R. v. Stephens*,<sup>446</sup> pertaining to an action in common nuisance<sup>447</sup> (although he does not attribute his wording), Dickson J. continues:

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.<sup>448</sup>

These opening words are important on a number of levels. First, they clearly set the tone that the offences have a long lineage, and are legion. Second, and more importantly, they signal a fundamental point which resonates through the judgment and indeed through subsequent decisions: the offences are penal, but they are not criminal.

Justice Dickson acknowledged that, for true crimes there has been a long-held presumption that persons would not be held liable without evidence of mens rea (be it intention or recklessness, but not negligence), and that nothing in the decision is intended to dilute this basic

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<sup>444</sup> *Sault, op cit.*, at p. 359.

<sup>445</sup> *Ibid.*, at p. 357.

<sup>446</sup> *Op cit.*

<sup>447</sup> Appropriately, the case dealt with water pollution caused by leaving material on a river's edge, and involved vicarious liability of an owner for the actions of his employees, as discussed earlier.

<sup>448</sup> *Sault., op cit.*, at p. 357.

principle.<sup>449</sup> On the other hand, for absolute liability offences, proof follows from proof of the actus reus even where the accused "was entirely without fault."<sup>450</sup>

Justice Dickson acknowledged the tension underlying the two offence types:

Public welfare offences obviously lie in a field of conflicting values. It is essential for society to maintain, through effective enforcement, high standards of public health and safety. Potential victims of those who carry on latently pernicious activities have a strong claim to consideration. On the other hand, there is a generally held revulsion against punishment of the morally innocent.<sup>451</sup>

By using the phrase "latently pernicious activities" Dickson J. captures a key distinguishing characteristic of regulatory offences -- namely the fact that, unlike most true crimes, where the danger and indeed the victim is often readily apparent, regulatory offences may address less visible, potential harm. And perhaps more significantly, Dickson J. foreshadows the Court's later post-*Charter* move in *Reference Re: Section 94(2) of the Motor Vehicle Act, op cit.*, to constitutionally limit the use of the absolute liability offence (at least insofar as imprisonment is a possible punishment).

While recognizing the societal need for high standards of care which underlie absolute liability offences, the alleged incentive created by such offences for individuals to undertake precautionary measures, the problems of enforcement were mens rea to be required, the generally slight penalties imposed, and the lesser stigma associated with conviction of public welfare

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<sup>449</sup> *Ibid.*, at p. 358 - 359. Later, at p. 362 Dickson J. exaggerates this point slightly, observing that "[w]here the offence is criminal, the Crown must establish a mental element, namely....intentionally or recklessly, with knowledge...or with wilful blindness." This overstatement, which is not germane to the decision, is discussed in greater detail *infra*.

<sup>450</sup> *Ibid.*, at pp. 362.

<sup>451</sup> *Ibid.*, at pp. 362 - 363.

offences, Dickson J. found the arguments against absolute liability to be "of greater force":<sup>452</sup> the most telling of these, said Justice Dickson, is that absolute liability violates fundamental principles of penal liability.<sup>453</sup> By using the word "penal liability" rather than "criminal liability" Dickson J. signalled his intention to articulate a set of principles of penal justice which clearly were intended to apply to both criminal and regulatory<sup>454</sup> offences.

Dickson J. challenged the notion that persons would have a greater incentive to take reasonable precautionary measures if no matter how much care is taken, this would not be a defence in the event of a violation.<sup>455</sup> Moreover, he questioned the propriety of convicting someone who had exercised reasonable care, and pointed to the cynicism and disrespect of the law which could flow from absolute liability convictions.<sup>456</sup> Even for minor offences, Justice Dickson noted, there is the opprobrium of conviction, the stigma, as well as the expense, time and

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<sup>452</sup> *Ibid.*, at p. 363.

<sup>453</sup> *Ibid.*

<sup>454</sup> Note that Dickson J. in *Sault Ste. Marie* seems to use the terms "public welfare" and "regulatory" offence inter-changeably (although he predominantly uses the term "public welfare"). While an argument can be made that the term "regulatory" connotes the existence of a legal structure including such features as regulations, inspections, and licenses, while "public welfare" puts no emphasis on legal structure and instead focuses on the protected beneficiaries (i.e., not so much a single victim as the broader community), the author follows the Supreme Court's lead and uses the two terms inter-changeably.

<sup>455</sup> *Ibid.*, at p. 363. To be more precise, Dickson J. stated that there is "no evidence" that higher standards of care results from absolute liability. Although there may be no statistical information on this point, an argument could be made that, if no defence of reasonable care was available, persons wishing to avoid being penalized would either strive for perfect compliance (which may necessitate extraordinary efforts, and not simply reasonable care) or avoid the activity altogether. It is submitted that this latter effect -- the disincentive created by absolute liability offences for law-abiding persons to engage in a potentially productive activity (when within prescribed limits) -- could have been usefully explored by Dickson J. to bolster his argument about the preferability of strict liability over absolute liability offences.

<sup>456</sup> *Ibid.*, at pp. 363 - 364. Note that, while a reasonable care defence is not available to persons accused of absolute liability offences, this is not to suggest that defences which do not serve to counter the fault element would not be available to an accused, such as self-defence, and necessity. See discussion of absolute liability offences *infra*.

exposure of a trial through the criminal process.<sup>457</sup> Raising the spectre of protecting the public interest is not a compelling argument for use of absolute liability, Justice Dickson suggested, since the public interest is equally involved in true crimes. Arguments about administrative efficiency also carry little weight, he concluded, since examples of negligence offences exist, and there is no evidence that they are administratively inoperative because of it. Finally, Dickson J. noted, while historically the penalty for breach of statutes enacted for the regulation of individual conduct in the interests of health and safety was minor, such was no longer the case, with large fines and imprisonment possible.<sup>458</sup>

In short, Dickson J. sought to undermine the credibility of arguments in favour of absolute liability. In fact, as we shall see, he set the tone for the later Supreme Court decision, *Reference Re: s. 94(2) of the Motor Vehicles Act, op cit.*, where the constitutionality of such offences was directly challenged. With the arguments in favour of absolute liability offences severely challenged, Dickson J. then turned his attention to an exploration of the alternatives. Noting the tendency of courts to choose from only the two "stark alternatives" of true crimes on the one hand, or absolute liability on the other, Dickson J. suggested that instead a middle position be adopted, where a defence of no negligence is available.<sup>459</sup> As authority for this proposition, he noted the existence of the reasonable mistake of fact defence in Australian law, as well as the support of certain English and American commentators for a half way house offence.<sup>460</sup>

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<sup>457</sup> *Ibid.*, at p. 364.

<sup>458</sup> *Ibid.*

<sup>459</sup> *Ibid.*, at p. 364 - 365.

<sup>460</sup> *Ibid.*, at p. 365.

Dickson J. extended the *Proudman* reasonable mistake of fact defence into a more general defence of reasonable care.<sup>461</sup> He did this by pointing out that cases such as *Proudman* focused on issues of mistake concerning a licence or a possession, where the inquiry had concentrated on whether or not reasonable efforts were made to know the facts which constitute the offence (e.g., that a licence had expired, or that an item in one's possession had certain unlawful characteristics). As such, the real question was whether or not due diligence had been exercised:

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.<sup>462</sup>

It is worth noting that the reasonable mistake of fact defence relates very directly and specifically to an element of the offence which must be proven by the prosecution, such as the validity of a licence. Logically, the same should be the case with a due care defence. That is, the accused must establish that reasonable care was exercised in relation to a specific element of the offence, and not simply be a general approach of reasonable care. For example, it should not be sufficient to establish that a company or individual had put in place practices evidencing due diligence. The issue will be whether with respect to *a particular incident* (e.g., a spill on a particular day) as articulated in a specific charge, the accused had put in place a reasonable set of precautionary measures designed to address that particular spill (i.e., the defence must relate to the essential elements of the offence to be proven by the prosecution). The fact that, unlike the reasonable mistake of fact defence, the reasonable care defence does not explicitly state *in relation to what a*

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<sup>461</sup> *Ibid.*, at p. 366.

<sup>462</sup> *Ibid.*, at p. 366.

reasonable care is owed may be a source of confusion to some.<sup>463</sup> Since Dickson J. was extending a reasonable mistake of fact defence into new territory, some discussion of the implications of this expansion would have been useful.<sup>464</sup>

Mr. Justice Dickson did not thoroughly explore the question of the appropriate burden of proof of an accused who wishes to use the due diligence defence. While quoting from Dixon J. in *Proudman* regarding the reasonable mistake of fact defence, his Lordship fails to examine Dixon J.'s wording concerning the burden of proof on this issue, which, as we have seen, is less than clear. He also draws on an ambiguously worded interpretation by Lord Pearce in *Sweet v. Parsley*<sup>465</sup> of Viscount Sankey, L.C.'s judgment in *Woolmington (op cit.)*. For this, Dickson J. has been subsequently criticized by one commentator.<sup>466</sup> Regarding *Woolmington*, Mr. Justice Dickson stated the following:

In *Woolmington's* case the question was whether the trial Judge was correct in directing the jury that the accused was required to prove his innocence. Viscount Sankey, L.C., referred to the strength of the presumption of innocence in a criminal case and then made the statement, universally accepted in this country, that there is no burden on the prisoner to prove his innocence; it is sufficient for him to raise a doubt as to his guilt. I do not understand the case as standing for anything more than that. It is to be noted that the case is concerned with criminal offences in the true sense; it is not concerned with public welfare offences. 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. There is nothing in *Woolmington's* case, as I comprehend it, which stands in the way of adoption, in respect of regulatory offences, of a defence of due care, with burden of proof resting on the accused to establish the defence

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<sup>463</sup> Indeed, this issue was later to arise in *R. v. Rio Algom* (1988) 66 OR (2d) 674, discussed *infra*.

<sup>464</sup> As is evidenced by *R. v. Rio Algom*, as discussed *infra*.

<sup>465</sup> [1970] AC 133, as discussed in greater detail *infra*.

<sup>466</sup> Canadian criminal law commentator Don Stuart, as discussed *infra*.

on the balance of probabilities.<sup>467</sup>

In observing that an accused need not prove his innocence in a criminal trial, and need only raise a doubt as to his guilt, Dickson J. may simply have been indicating that, where mens rea is an element of an offence, no persuasive burden rests on the accused to establish innocence, but that a different approach is necessary where there is no mental element to be proven by the prosecution.<sup>468</sup>

Unfortunately, Dickson J. does not clarify his reasoning on this point. His conclusion that it would be ironic for *Woolmington*, a case concerned with protection of the rights of accused persons, to be used to prevent acceptance of a due diligence defence for the benefit of accused persons currently with no defence, is less than satisfactory, if one compares the persuasive "on a balance of probability" due care defence not with no defence at all, but rather with an evidentiary "raise a reasonable doubt" defence. It is unfortunate that Dickson J. did not take the opportunity to explore this argument here. Later in the judgment, Justice Dickson discusses the practical reasons for support of a balance of probabilities due diligence standard, but in this section of the judgment it is the legal argument against application of *Woolmington* to public welfare offences which was being explored.

Mr. Justice Dickson missed the occasion to "unpack" the *Woolmington* judgment, to thus

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<sup>467</sup> *Sault*, *op cit.*, at pp. 366 - 367.

<sup>468</sup> This idea that an entirely different approach is necessary where intention is not an element of the offence seems to be supported by a later comment of Dickson J. in *Strasser v. Roberge* (1979) 103 DLR (3d) 193, at 202, where he observed that "[o]nce one has found an intentional element necessary to the commission of the offence, negligence becomes irrelevant, for the offence then falls into the first category, that of *mens rea* offences. Strict liability offences are offences of negligence. Just as negligence is irrelevant to the issue of intention in criminal responsibility, so also is intention irrelevant to 'responsibility for negligence.'" *Strasser v. Roberge* is discussed in greater detail below.

expose the comparatively recent vintage of the reasonable doubt presumption of innocence standard, the context in which this standard was developed (e.g., in relation to true crimes), the relevance of the moral and religious overtones in which it was developed, the failure of Viscount Sankey L.C. to consider contexts other than "wilful murder" when formulating his sweeping pronouncement, and the relevance of distinctions between essential elements of the Crown's case and defences (as was done in Part One of the thesis). If these issues had been considered, a distinct argument for why the presumption of innocence has a different content when regulatory offences are at issue could have been articulated (this would await the decision of Justice Cory in *R. v. Wholesale Travel Inc.*,<sup>469</sup> thirteen years later). Instead, Justice Dickson simply concluded that *Woolmington* does not apply, without providing any useful explanation.

But even if Dickson J. failed to undertake the rigorous analysis of *Woolmington* that would be preferred by scholars, he was nevertheless very clear that a different approach is necessary for regulatory offences, and it is one where a due diligence defence is established on a balance of probabilities. Mr. Justice Dickson cited for support commentators such as the pre-eminent Australian criminal law scholar, Colin Howard. In Professor Howard's book *Strict Responsibility*,<sup>470</sup> (which Dickson J. does not specifically mention by name), Howard very explicitly endorsed the balance of probabilities standard,<sup>471</sup> and engaged in the type of thorough analysis on this issue sought by scholars. His Lordship also quoted from the Law Reform Commission of Canada which is equally clear on the topic. In particular, Dickson J. stated:

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<sup>469</sup> [1991] 67 CCC (3d) 193.

<sup>470</sup> *Op cit.*, as discussed in greater detail *infra*.

<sup>471</sup> *Ibid.*, at p. 109.

The Commission advises...that (i) every offence outside the Criminal Code be recognized as admitting of a defence of due diligence; (ii) in the case of any such defence for which intent or recklessness is not specifically required the onus of proof should lie on the defendant to establish such defence; (iii) the defendant would have to prove this on the preponderance or balance of probabilities.<sup>472</sup>

It is worth noting, however, that both Howard and the Law Reform Commission recommended that the due diligence defence only be made available where imprisonment is not an option. The issue of the compatibility of due diligence on a balance of probabilities and the penalty of imprisonment would emerge as a major issue for discussion by the Supreme Court of Canada in *Wholesale Travel*, as discussed *infra*.

A survey of judgments of other courts bearing on the issue of due diligence is provided by Dickson J., but it is rather haphazard and not entirely convincing. For example, Dickson J. cited<sup>473</sup> the New Zealand decision of *R. v. Ewart, op cit.*, as support for the reasonable mistake of fact defence when in fact, as discussed *supra*, the New Zealand Court of Appeal in *Ewart* provided a defence of lack of knowledge (an objective standard involving reasonableness was not discussed in *Ewart*). Dickson J. noted<sup>474</sup> the judgment of McKay J.A., in the 1965 Ontario decision of *R. v. McIver* concerning careless driving as support for a defence of absence of negligence, but as discussed above, the terms of the offence would appear to require the Crown to prove beyond a reasonable doubt that the accused was careless, and so this makes the careless driving offence distinguishable from offences such as "permitting pollution" in the case at bar which are not framed to impose proof of carelessness as part of the prosecution's case. Dickson

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<sup>472</sup> *Sault, op cit.*, at pp. 370.

<sup>473</sup> *Ibid.*, at p. 366.

<sup>474</sup> *Ibid.*, at p. 367.

J. concluded<sup>475</sup> that the Supreme Court of Canada in *R. v. Pierce* (discussed *supra*) -- where Ritchie J. classified the offence of possession of undersized lobster as one not requiring any proof of knowledge -- did not preclude a defence of reasonable care, despite the fact that Ritchie J. had ample opportunity to provide such a defence.<sup>476</sup>

Nevertheless, Dickson J.'s analysis does demonstrate that *some* courts had approved of defences of lack of reasonable care established on a balance of probabilities (even though the number of decisions and the quality of reasoning was not necessarily ideal), and hence precedent existed for the Supreme Court to move in the direction it did. It should be noted that, in spite of the existence of many earlier decisions in support of a simple absolute-or-crime classification (as discussed *supra*), the Supreme Court was not barred from striking out in a new direction at any point.<sup>477</sup> Notwithstanding this, it is clear that Dickson J. felt uncomfortable about simply asserting that the previous decisions were wrong. While the attempt at fancy manoeuvring around earlier decisions such as *Pierce Fisheries* was probably not necessary, it is not entirely surprising given that the Supreme Court of Canada was adopting a radically new approach.

Having articulated legal arguments and court decisions in support of the due diligence defence on a balance of probabilities, Dickson J. then provided practical and functional

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<sup>475</sup> *Ibid.*, at p. 371 - 372.

<sup>476</sup> For example, in *Pierce, op cit.*, Ritchie J. discusses and dismisses the defence of lack of knowledge at p. 22 when he states that "[i]f lack of knowledge ...constituted a defence....then I think it would in many cases be virtually impossible to secure a conviction."

<sup>477</sup> A. Hutchinson, in "*Sault Ste. Marie, Mens Rea and The Halfway House: Public Welfare Offences Get a Home of Their Own*," [1979] 17 *Osgoode H.L.J.* 415 - 444, at p. 423 includes quotations from both then Chief Justice Laskin and Mr. Justice Dickson as saying that the Supreme Court can depart from previous decisions when an important new consideration arises, or where previous decisions were based on doctrine that was simply wrong.

justifications for putting the persuasive burden on the accused to establish all reasonable care. He noted the "virtual impossibility in most regulatory cases of proving wrongful intention"<sup>478</sup> and went on to state that...

...[i]n 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..... The 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.<sup>479</sup>

Note first that Dickson J. was careful to speak of the proof problems associated with *regulatory* cases. This would appear to build on points made by the Law Reform Commission of Canada discussed earlier that regulatory offences often pertain to potential rather than actual harm, that the harm can be cumulative and very diffuse, that the victims may be less obvious than those associated with typical crimes, and the activity more likely to be ongoing rather than involve a discrete and distinguishable moment of misconduct.<sup>480</sup>

In the context of this practical, functional discussion Dickson J.'s closing remark that the alternative to the persuasive burden due diligence defence is absolute liability appears justifiable. While it is true that a *legal* alternative to the persuasive burden due diligence defence exists (i.e., the evidentiary burden "reasonable doubt" standard), it is likely that Dickson J. viewed this alternative as impractical. It is submitted that, in the context of Mr. Justice Dickson's discussion

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<sup>478</sup> *Sault Ste. Marie, op cit.*, at p. 373. On this point, a former prosecutor, John Swaigen, has subsequently provided a more elaborate and perhaps convincing discussion of the value of the reverse onus, as is explored in the analysis of *Sault Ste. Marie* which follows.

<sup>479</sup> *Ibid.*

<sup>480</sup> See generally, *Studies in Strict Liability, op cit.*, esp. pp. 205 - 208, as discussed above.

about how burdens would work at an operational level, only *practical* alternatives were being considered, and this explains why no mention of the evidentiary burden standard is included. At this point in the judgment, Dickson J. had already noted the Law Reform Commission of Canada's empirical work on this topic, and indeed he explicitly cites the Commission's view that making the defendant prove due diligence is "both justifiable and desirable."<sup>481</sup>

It is worth reiterating that the Commission's extensive empirical work on due diligence was published shortly before the *Sault Ste. Marie* decision was heard by the Supreme Court, and in that work the Commission had directly and fully supported the practicality of the persuasive burden due diligence standard. Indeed, as we have already noted, the Commission observed in its work that regulatory enforcement agency officers were concerned that even the reverse onus due diligence standard would be too easily finessed by clever regulated actors.<sup>482</sup> Thus, while regrettably not made more explicit in the judgment, it is fair to conclude that Dickson J. failed to mention the reasonable doubt due diligence standard as an alternative to the balance of probability model because it was impractical, and at the same time the Law Reform Commission's studies suggested that the balance of probability standard was eminently practical.

Mr. Justice Dickson also considered the argument that the introduction of a due diligence defence and a shifting of a burden of proof might be better left to legislators.<sup>483</sup> To this, Dickson J. replied that absolute liability offences were themselves a judicial creation, as were numerous

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<sup>481</sup> *Sault, op cit.*, at p. 370.

<sup>482</sup> *Studies in Strict Liability, op cit.*, at p. 148.

<sup>483</sup> *Sault, op cit.*, at p. 373.

defences, such as that of reasonable mistake of fact, as articulated by Dixon J. in *Proudman*.<sup>484</sup> A more compelling argument might have been to speak in terms of the need for consistent treatment across regulatory sectors, and how unlikely this would be to achieve if left to one federal and ten provincial legislators. However, when it is considered that this decision was reached before the *Charter* was introduced (which, as is discussed *infra*, would give Canadian courts the ability to directly overturn legislation inconsistent with its terms), the less than forceful reasoning of the Court on this issue is perhaps understandable.<sup>485</sup>

With this background, Dickson J. then proposed a three-fold classification of offences:

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.<sup>486</sup>

Between offences of a "positive state of mind" and offences where there is liability without or

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<sup>484</sup> *Ibid.* As we have seen, it is more accurate to say that the absolute liability offence was a judicial creation developed with some cooperation from legislators. Moreover, we have also noted that defences to modify the harshness of absolute liability have been provided by legislators in some legislation, but only on a seemingly random basis.

<sup>485</sup> Certainly, a similar, "quietly reasoned" approach to justifying such judicial action would likely be necessary in jurisdictions such as the United Kingdom, New Zealand, and Australia, which do not have written constitutions enshrining individual rights akin to the *Charter* or the American *Bill of Rights*.

<sup>486</sup> *Ibid.*, at pp. 373 - 374.

"free of fault" lies the new category of "fault" or negligence offences. Yet it is perhaps self-evident that intentional offences are also fault offences, so that the category one "true crime" offences are presumptively offences of "subjective fault" while the new category two strict liability offences are examples of "objective fault" akin to the civil notion of negligence. The new strict liability offence represented judicial recognition of the need in the penal system to address misconduct where harm was not intended or egregiously negligent, but nevertheless there was a failure to exercise care as objectively determined.

Note as well that, within the new strict liability offence category, the distinction between reasonable mistake of fact and reasonable care defences is maintained. By framing the due diligence inquiry in terms of "consideration of what a reasonable man would have done *in the circumstances*" the court is allowing some flexibility to reflect the distinct situation of each accused.

In spite of Mr. Justice Dickson's comments that there is a generally held revulsion against punishment of the morally innocent, and his support of the argument that absolute liability "violates fundamental principles of penal liability", nevertheless, the three category scheme set out by Dickson J. preserves the absolute liability offence. However, if the criteria for characterizing offences acts to limit the number of offences found to be absolute in nature, then the fact that the absolute liability category is nominally preserved is perhaps of less importance.<sup>487</sup>

Thus, almost important as the categories themselves is the criteria and interpretive guidance as to when offences can be characterized as true crimes, strict liability offences, or

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<sup>487</sup> The practical effect of Justice Dickson's interpretive approach to minimize the opportunity for offences to be characterized as absolute in nature is discussed *infra*.

absolute liability offences. On this point, Dickson J. stipulated as follows:

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.<sup>488</sup>

The general effect of the interpretive guidance is straightforward: public welfare offences are to be interpreted as strict liability in nature with a due diligence defence unless it is clear that legislators wished an offence to include an element of intent, or liability without fault. In one fell swoop, the 90% of federal and provincial offences previously regarded as absolute liability in nature were to be regarded as strict liability unless wording indicated otherwise. Note that the interpretive guidance does not rule out the possibility of intentional public welfare offences. This would appear to be reasonable since there may be circumstances when legislatures might wish to specifically address regulatory misconduct which is conducted in a deliberate manner.<sup>489</sup> With respect to the absolute liability category, while Dickson J. stipulated that such offences may continue to exist, such interpretations are possible only where the Legislature makes it clear that this is so. Although penalties are one of the indicia of an absolute liability offence, there is no stipulation that, for example, imprisonment is not possible for absolute liability offences. As we

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<sup>488</sup> *Ibid.*, at p. 374.

<sup>489</sup> For example, environmental offences might generally be strict in nature, but deliberate behaviour could be deserving of separate offences and sanctions. This point is discussed in greater detail *infra*.

shall see, this awaited the introduction of the *Charter*.

Of course, the real test of the workability of the three-fold classification scheme, and the criteria for applying it, would be the experience of judges applying it to myriad fact situations arising in courts across Canada. However, the first test of its practicality was in the case at bar. Dickson J. quickly interpreted pollution offences as being public welfare in nature, so that no presumption of mens rea came into play.<sup>490</sup> Dickson J. substantiated his initial characterization by pointing out that since the Ontario *Water Resources Act* was uncontradictedly valid provincial legislation, it could not possibly create an offence which is criminal in the true sense.<sup>491</sup> Pursuant to the *Constitution Act, 1867*, only the federal government can legislate on criminal matters, but it is feasible that valid provincial regulatory legislation could include intentional offences.<sup>492</sup> Indeed, as we have seen, Dickson J.'s own scheme allows for this, since it stipulates that public welfare offences while presumptively non-intentional, could be rendered intentional by express wording to that effect.

Justice Dickson then examined the "permit" and "cause" wording of the pollution offence, and numerous conflicting interpretations by authorities as to whether these words indicated intent or lack of an intent (and therefore an absolute liability offence under the old "crime or absolute offence" approach to classification):

The conflict in the ...authorities, however, shows that in themselves the word "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

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<sup>490</sup> *Ibid.*

<sup>491</sup> *Ibid.*, at p. 374 - 375.

<sup>492</sup> On this point, see discussion of subsequent cases *infra*.

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.<sup>493</sup>

In examining the wording of offences, under the old approach where judges only had a choice between a characterization of an offence as absolute liability on the one hand or subjective intent on the other, the question of the efficiency of enforcement on the one hand (with absolute liability offences) or fairness on the other (with subjective intent offences) was starkly evident. It is submitted that the introduction of the less harsh, more fair, yet still administratively efficient middle ground category, with the availability of a due diligence defence for accused persons, should render it much easier for judges to classify ambiguously worded offences as strict liability in nature rather than to try to force-fit a mens rea interpretation in order to increase defences for accused persons or select an absolute liability interpretation to ensure effective enforcement. Courts in jurisdictions which do not recognize the middle ground defence would not have this luxury, and thus the "forced" interpretations would likely continue. Indeed, as we shall see, the failure of the middle ground to gain acceptance in the United States has arguably led to these types of distortions.

Having formally approved a new three-category offence scheme, and having applied interpretive criteria to characterize the offence in question as one of strict liability, with a due diligence defence, Dickson J. concluded that a new trial was necessary.<sup>494</sup> Nevertheless, he felt the desire to say a few words regarding the application of the facts of the case to the newly recognized strict liability offence. Taking into account the size, comparative sophistication, and

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<sup>493</sup> *Ibid.*, at p. 375.

<sup>494</sup> *Ibid.*, at p. 376.

legislative responsibility of the City of Sault Marie, Mr. Justice Dickson indicated that a municipality which contracted with a firm concerning waste disposal could be described as "discharging, causing or permitting" pollution:

The test is a factual one, based on an assessment of the defendant's position with respect to the activity which it undertakes and which causes pollution. If it can and should control the activity at the point where pollution occurs, then it is responsible for the pollution.<sup>495</sup>

He added that a municipality was in a somewhat special position by virtue of its legislative power, and that this had a bearing on whether or not the City would be viewed as in a position to control activity which it undertook: "A municipality cannot slough off responsibility by contracting out the work."<sup>496</sup> Moreover, the City had the ability to control whomever it hires, and supervise activity using its contract or by-law powers.<sup>497</sup>

Concerning the question of vicarious liability of an employer for the acts of an employee, his Lordship stated that "[t]he due diligence which must be established is that of the accused alone."<sup>498</sup> Expanding on this point, Mr. Justice Dickson established a four-tiered test of liability:

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.*<sup>499</sup> (emphasis added)

Many questions are left unanswered in this description of the due diligence test as applied to

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<sup>495</sup> *Ibid.*, at pp. 376 - 377.

<sup>496</sup> *Ibid.*, at p. 377.

<sup>497</sup> *Ibid.*

<sup>498</sup> *Ibid.*

<sup>499</sup> *Ibid.*

employers: for example, will "direction and approval" be interpreted to require explicit instruction, or will some notion of tacitness be sufficient? What will constitute a "proper system"? How will "effective operation" be determined?<sup>500</sup>

Clearly, from a judicial standpoint, introduction of the due diligence defence would necessitate that courts develop a good understanding of the inner workings of commercial operations, and this in turn would mean that counsel for the prosecution and accused would be compelled to provide the evidence necessary for courts to gain this understanding. Nevertheless, while multi-layered and perhaps even daunting, the test for due diligence is also remarkable for its rigour: note particularly that to satisfy the test, an accused must establish that he or she exercised "all" reasonable care. This would appear to suggest that it would not be sufficient, therefore, to simply show *some* indications of prudence: according to Dickson J.'s test, only a comprehensive approach to due diligence would pass muster.<sup>501</sup> It should be apparent from this test why at a practical, evidential level, shifting of the burden of proof is necessary where issues of reasonable care are concerned. There would appear to be no analogue to this where conventional subjective intent crimes and burdens of proof are concerned.

In Part I of the paper concerning the origins and development of the regulatory offence, the 1814 English case of *R. v. Dixon* was discussed. In that case, an owner of a bakery was ultimately held liable for the actions of his foreman in making adulterated bread. However, the court did not engage in the sort of sophisticated analysis described by Mr. Justice Dickson here,

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<sup>500</sup> These questions are addressed *infra*.

<sup>501</sup> The subsequent interpretations of courts as to what constitutes "due diligence" are discussed later in Part Two.

which simultaneously provides a fair and justice system of liability for the accused, while stimulating the employer to put in place a practical approach which tends to ensure that the regulatory objectives are achieved and thus the greater public interest protected. This dual function of the defence (i.e., both protection of the accused's interest and furtherance of public policy objectives) is one of the distinctive features of the defence which tends to be downplayed or ignored.<sup>502</sup> More will be said about the distinctive incentive effects and nature of the due diligence defence later in the paper.

With respect to the due diligence defence as applied to corporations, Dickson J. framed the key issue as follows: "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."<sup>503</sup> The effect of framing the defence in this manner would appear to be to provide a strong stimulus to "the directing mind and will" of the corporation to take an active role in matters the subject of public welfare offences, or risk the possibility of not meeting the grade. The meaning of the phrase "directing mind and will" is ambiguous, leaving to courts and counsel to refine and elaborate its contents through practical application. Following the Supreme Court of Canada's decision in *Sault Ste. Marie*, the City of Sault Ste. Marie was subsequently tried, convicted, and fined \$1000.<sup>504</sup>

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<sup>502</sup> E.g., in R. Mahoney's excellent article "The Presumption of Innocence: A New Era," (1988) 67 *Can. Bar. R.* 1 - 56, the public policy objectives served by the due diligence defence are not mentioned, and instead only the accused's interests are addressed.

<sup>503</sup> *Sault, op cit.*, at pp. 377-378.

<sup>504</sup> Per Stuart, *op cit.*, at p. 160.

*Analysis of Sault Ste. Marie*

It is possible to take issue with some technical aspects of *Sault Ste. Marie* -- in particular, the comparatively slender guidance provided by his Lordship on how to distinguish true crimes from public welfare or regulatory legislation, his overstatement concerning the necessity of the subjective mens rea element in criminal offences, his selective reliance on Canadian cases such as the dissent in *Hickey*, his failure to note the prosecutorial burden to prove "carelessness" in *McIver*, his legalistic efforts to distinguish *Pierce*, and his questionable reliance and analysis of Australian, New Zealand and English cases concerning burden of proof. To these points, answers are available:

(1) although it is true that Mr. Justice Dickson did not include an extensive discussion of the distinguishing features of regulatory offences, he does point to sources which do, including Professor Francis Sayre of Harvard, in his groundbreaking "Public Welfare Offenses" article, discussed earlier, Professor Colin Howard of Australia, and the Law Reform Commission of Canada, in numerous works. Regarding the crime/regulatory offence distinction, more will be said *infra*.

(2) Mr. Justice Dickson stated that "[w]here the offence is criminal, the Crown must establish a mental element, namely, that the accused who committed the prohibited act did so intentionally or recklessly, with knowledge of the facts constituting the offence, or with wilful blindness."<sup>505</sup> While welcoming this endorsement of the subjective standard, criminal law commentator Don Stuart has stated that this was always an overstatement, since even at the time of *Sault Ste. Marie* there were a number of *Criminal Code* offences where objective fault had been considered acceptable.<sup>506</sup> But while Dickson J.'s statement may have been an exaggeration, it reflected the Court's clear belief that the subjective awareness standard was the preferred one for true crimes, a preference which is borne out by the fact that to this day the majority of *Criminal Code* offences do incorporate

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<sup>505</sup> *Sault Ste. Marie*, at p. 362.

<sup>506</sup> Per Stuart, *op cit.*, at p. 193. Later in this part, the emergence of the "quasi-regulatory" category of *Criminal Code* offences (which have an objective fault element) is discussed. In Part Three of the thesis, which focuses on philosophical underpinnings to the strict liability regulatory offence, the justifications for objective negligence offences in the *Criminal Code* are tangentially explored.

subjective intent standards.<sup>507</sup> Moreover, Dickson J.'s preference for a subjective fault element for true crimes was operationalized in *Sault Ste. Marie* in the form of an endorsement of the presumption of subjective mens rea for true crimes -- a presumption which has been applauded by some commentators even while acknowledging that the subjective standard has rarely been accorded constitutional status;<sup>508</sup>

(3) while not large in number, as has been discussed, there were indeed a number of lower court Canadian decisions which had articulated and upheld a due diligence defence on a balance of probabilities, which Mr. Justice Dickson referred to in his judgment. And as the Court of final resort, Mr. Justice Dickson on behalf of the Supreme Court of Canada had every right to choose them over others, no matter if these cases were a distinct minority;

(4) similarly, the Supreme Court was within its authority to change its mind regarding earlier decisions such as *Pierce* (although simply coming clean and admitting it would have probably been a more straightforward way of going about it);

(5) while with respect to the burden of proof question, Dickson J.'s analysis of cases such as *Proudman*, *Ewart*, *Sweet v. Parsley* and *Woolmington* was inadequate and brief, this does not take away from the fact that strong support for a due diligence defence on a balance of probability standard existed, and was noted in his judgment (e.g., Colin Howard and the Law Reform Commission of Canada). Since the *Sault Ste. Marie* decision, John Swaigen, a former Crown prosecutor with extensive experience prosecuting strict liability offences in the environmental context, has come forward with a more elaborate and complete justification for the balance of probability due diligence defence standard.<sup>509</sup> Noting that Justice Dickson had been somewhat perfunctory in his explanation for the reverse onus when he simply stated that the information needed to prove negligence would usually be known only to the accused, Swaigen acknowledges that Dickson J.'s explanation might give rise to the suggestion that this is equally the case in criminal law.<sup>510</sup> "However," Swaigen notes, "there are important differences between the nature of criminal acts and the acts that constitute regulatory offences, and in the probability that

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<sup>507</sup> *Ibid.*, at pp. 193, 245, 246.

<sup>508</sup> See, e.g., D. Paciocco, "Subjective and Objective Standards of Fault for Offences and Defences," (1995) 59 *Sask. L. Rev.* 271, who states "...the longstanding presumption that true crimes are to be construed as mens rea offences persists. It is, therefore, safe to say that the principle of subjectivity....remains a central principle of criminal law and should continue to be influential in interpreting criminal legislation through the application and definition of defences and by influencing the decisions of legislators in the creation of new offences." Stuart, *ibid.*, makes a similar point at p. 193.

<sup>509</sup> J. Swaigen, "Negligence, Reverse Onuses and Environmental Offences: Some Practical Considerations," (1992) 2 *JELP* 149 - 188.

<sup>510</sup> *Ibid.*, at p. 168.

inferences of culpability can be drawn from the acts themselves.”<sup>511</sup> He elaborates on this point as follows:

These difficulties result in serious impediments to proving negligence in the regulatory context. Although the courts have often been reluctant to give effect to arguments of administrative efficiency or expediency in the context of fundamental rights, it is crucial that such concerns not be ignored when a lack of enforcement capacity can endanger human life and the environment. The importance of the reverse onus can be appreciated only if the difficulty of proving negligence is fully appreciated. In determining whether an accused is negligent, the prosecuting agency faces all the difficulties of proving civil negligence, and more.<sup>512</sup>

In particular, Swaigen notes that prosecutors lack the procedural tools used in civil negligence legal actions, such as pleadings, discoveries and the right to use admissions against interest as evidence, except under narrowly proscribed circumstances.<sup>513</sup> In some industrial contexts, where novel and non-repetitious activity is involved, the Crown will be hard-pressed to identify and establish what is the standard of care.<sup>514</sup> Moreover, standards of care in industrial settings are constantly changing.<sup>515</sup> Where corporations are concerned, there are the added difficulties associated with ascertaining who is the directing mind and will of the company, and determining the relationship between the conduct of the company and that of the employee who carried out the allegedly wrongful act.<sup>516</sup> Arguably, these are not the typical considerations facing prosecutors who are enforcing conventional subjective mens rea true crimes. There are also important incentive effects flowing from requiring regulated actors to arrange their affairs in such a manner that they can establish a due diligence defence.<sup>517</sup> Again, this is unlike the conventional true crimes context, where the conduct is typically prohibited outright and there is little opportunity to stimulate diligence. Swaigen concludes that the reverse onus plays an important role in protecting the Canadian environment and public health, and that reducing the onus creates a serious risk of significantly reducing the protection of the public against serious environmental

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<sup>511</sup> *Ibid.*

<sup>512</sup> *Ibid.*

<sup>513</sup> *Ibid.*, at p. 169.

<sup>514</sup> *Ibid.*, at p. 173.

<sup>515</sup> *Ibid.*, at p. 174.

<sup>516</sup> *Ibid.*, at pp. 168 - 169.

<sup>517</sup> *Ibid.*, at 166. This point regarding the incentive effect of the reverse onus is discussed in greater detail later in this Part.

harm.<sup>518</sup> While Swaigen's article focuses on the environmental context, the logic would appear to apply to many other regulatory contexts, such as food and product safety, transportation of dangerous goods, and worker safety.

In other words, none of the technical inadequacies of the decision fatally undermined any aspect of its argumentation. The fact that the *Sault Ste. Marie* decision was unanimous indicates that among the nine Supreme Court justices no fundamental disagreement existed with respect to any of its key tenets.

In addition, Justice Dickson in *Sault Ste. Marie* accomplished many things: he broke a logjam of conflicting decisions at the lower court level which was threatening to destabilize the regulated community; he identified the conceptual underpinnings of the cramped and narrow reasonable mistake of fact defence (i.e., a negligence-based defence) and on that basis logically extended it to its full conceptual form as a general due diligence defence; he addressed head-on the fundamental unfairness of the absolute liability offence and devised a just, practical, and elegant solution; he carefully balanced and reflected the fairness interests of the accused against the broader considerations of the general public in his articulation of the due diligence defence and his explanation of why it was necessary; and he chose a bold judicial solution offering the prospect of real change rather than awaiting piecemeal legislative action.

For all these reasons, the *Sault Ste. Marie* decision stands out as one of the most courageous, imaginative, practical, and farsighted judgments ever to emerge from the Supreme Court of Canada -- particularly in the pre-*Charter* era, when the Court's ability to directly and

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<sup>518</sup> *Ibid.*, at p. 167. Note that later in the thesis we will explore the proposition that the reverse burden of proof may have more of a stimulative effect on commercial regulated actors (e.g., those engaged in manufacturing, distribution, sales, and resource extraction and production) than it does on non-commercial regulated actors (e.g., ordinary drivers, hunters), and that courts might have intuitively recognized this by devising more onerous "due diligence" standards for the former than for the latter category of regulated actors.

substantively influence laws was considerably more constrained than it is now. Indeed, the author has not come across a judgment pertaining to regulatory offences in any of the jurisdictions examined which matches *Sault Ste. Marie* in terms of its boldness, concise public policy-oriented argumentation, nor simplicity, practicality and fairness of solutions devised.

### *Applying Sault Ste. Marie*

All lofty words of praise regarding the nature and gravity of the decision aside, the real test of the worth of *Sault Ste. Marie* would not be in its words, but rather its application. Of course, the story of the application of any judgment of lasting influence is an ongoing one, and this is definitely the case with *Sault Ste. Marie*. Indeed, in Part Three of the thesis, one of the most recently unfolding and promising implications of *Sault Ste. Marie* -- its possible catalyzing effect for firms to self-regulate and thus anticipate and meet due diligence standards -- is explored. For present purposes, questions concerning the application of *Sault* can be divided into two main categories. The first pertains to the workability and impact of the three-tiered offence classification approach. The second concerns the practicality of the due diligence or reasonable mistake of fact defence. Each of these is addressed below. Because the introduction of the *Charter* and its subsequent interpretation have added new wrinkles (although not substantively altered) the *Sault Ste. Marie* decision, the focus of discussion here is on the period immediately after *Sault Ste. Marie* was decided (e.g., 1978). Significant cases interpreting *Sault Ste. Marie* after the introduction of the *Charter* are examined in the next section.

### *The Workability of Sault Ste. Marie's Tri-Category Offence Classification System*

It seems axiomatic that any time a new classification scheme is developed which increases the number of categories to choose from, there will be a greater chance for divergent opinions and

approaches to emerge. Indeed, the author is on record as saying exactly that, in a 1986 study on pollution control.<sup>519</sup> Another has described the classification system as "highly unsatisfactory."<sup>520</sup> However, on the whole, most have concluded that in practice the system has proved workable.<sup>521</sup>

Questions concerning the impact of *Sault Ste. Marie* with respect to offence classification can be essentially boiled down into four main types:

(1) concerning the preliminary distinction between criminal and public welfare legislation, does *Sault Ste. Marie* provide sufficient guidance for courts to make consistent and informed decisions, or would there be confusion and divergencies in approaches?

(2) concerning absolute liability offences, would courts and legislators proceed to re-classify them as strict, in keeping with the guidance to this effect in *Sault Ste. Marie*, or would there be resistance?

(3) concerning strict liability offences, would the formula (both in terms of identification, and content) be followed, or would variations emerge?

(4) concerning mens rea offences, would the creation of the half way house strict liability offence deteriorate or erode the true crime category, or would it remain intact?

For the purposes of this paper, the author has drawn on existing sources<sup>522</sup> in an attempt to piece

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<sup>519</sup> "As is often the case with solutions, the Sault Ste. Marie decision corrected one problem only to create a new new set of difficulties.....identifying the offences which should now fit in the strict liability category." Per K. Webb: *Pollution Control in Canada: The Regulatory Approach in the 1980s* (Ottawa: LRC, 1986.), at p. 36.

<sup>520</sup> E.g., see Swaigen, *Regulatory Offences in Canada: Liability and Defences* (Scarborough, Ont.: Carswell, 1992), at pp. 43 - 44.

<sup>521</sup> E.g., Swaigen, *ibid.*, at p. 44, goes on to say, that "it is unlikely that a more precise classification system can be created by the courts, unless they adopt a rigid "key words" test, or arbitrarily determine classification by size or type of penalty alone." Stuart, *op cit.*, at 170, observes that there has been a "conscientious preoccupation" with the Sault regime, and (at p. 175) a legislative trend to incorporate due diligence defences into existing or new offences. More will be said on these points below.

<sup>522</sup> This portion of the paper draws substantially on Swaigen, *op cit.*, Stuart, *op cit.*, D. Saxe, *Environmental Offences: Corporate Responsibility and Executive Liability* (Aurora, Ont.: Canada Law Book Inc., 1990); M. Jeffery, "Environmental Enforcement and Regulation in the 1980's: *Regina v. Sault Ste. Marie* Revisited," (1984) 10 *Queen's L.J.* 43; S. Hutchison, D. Rose, and P. Downes, *The Law of Traffic Offences* (Scarborough: Carswell, 1998), and N. Strantz, "Beyond *R. v. Sault Ste. Marie*: The Creation and Expansion of Strict Liability and the "Due Diligence" Defence," (1992) 30 *Alta. L. Rev.* 1233 - 1257.

together a description of the impact of the *Sault Ste. Marie* decision on subsequent judicial treatment of regulatory offences.

*Preliminary Categorization as Public Welfare Legislation*

According to the *Sault Ste. Marie* tri-partite offence classification system, there is a presumption that a public welfare offence will be strict liability with a due diligence defence, unless legislators "made it clear" that the offence is to include a mens rea element, or is absolute in nature. Thus, the preliminary question triggered by *Sault Ste. Marie* is whether an offence can be classified as public welfare in nature, and therefore attract the presumption of strict liability, or whether it is a true crime, and is therefore subject to the usual presumption that intent or recklessness is an essential element of the offence to be proven beyond a reasonable doubt by the prosecution.

In *Sault Ste. Marie*, Mr. Justice Dickson provided minimal guidance as to the distinguishing characteristics of public welfare offences, and indeed, of public welfare legislation. Drawing on previous judgments, he concluded that such offences are civil in nature, and gave as examples such "...everyday matters as traffic infractions, sales of impure food, violations of liquor laws, and the like."<sup>523</sup> It is possible to extract from this slender list some basic characteristics of public welfare legislation, and indeed, as we have seen, the Law Reform Commission of Canada has identified some "badges" of regulatory offences, including whether there is language of mens rea in the statute, whether the regulatory law deals with specialists rather than all citizens (e.g., mine owners, merchants, motorists, factory owners, transporters of dangerous goods, hunters), and the nature of the harm addressed (e.g., public welfare offences often deal with potential rather

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<sup>523</sup> *Sault, op cit.*, at p. 357.

than actual harm, and the harm which is being addressed is often not intentionally inflicted, and is diffuse, cumulative, collective, and aggregate, with no clear victim). The nature and magnitude of penalty might be another factor, but this might not be conclusive.

It is submitted that these criteria were implicitly applied by Dickson J. in *Sault Ste. Marie*. After setting out the basic tri-partite offence classification system in *Sault Ste. Marie*, Mr. Justice Dickson then proceeded to apply it to s. 33(2) of the *Ontario Water Resources Act*. He first examined the subject matter of the legislation and concluded that prevention of pollution is a matter of great public concern, has always been unlawful civilly, and that pollution offences are enacted in the interests of public health.<sup>524</sup> Finally, he noted that the presumption of mens rea applies only to offences which are "criminal in the true sense."<sup>525</sup> As a result, he concluded that pollution offences are "undoubtedly" public welfare offences. While a strong argument can be made that pollution could also be made a crime where it is intentionally committed,<sup>526</sup> this would not appear to cause an insurmountable problem under *Sault Ste. Marie*. Following Dickson J.'s approach, a pollution offence contained in the *Criminal Code* would likely be presumptively characterized as a mens rea offence,<sup>527</sup> while a public welfare offence in regulatory legislation -- normally characterizable as strict liability in nature -- could explicitly include a mens rea element.

Using Dickson J.'s categorization of the *Ontario Water Resources Act* offence as a model, it would appear that all penal provincial legislation would *prima facie* be classified as public

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<sup>524</sup> *Ibid.*, at p. 374.

<sup>525</sup> *Ibid.*, at p. 375.

<sup>526</sup> E.g., see s. 115 of the *Canadian Environmental Protection Act*, concerning intentional or reckless harm to the environment.

<sup>527</sup> The reasons for this presumption are suggested in the next paragraph.

welfare in nature (and thus such offences would be presumptively strict liability in nature, subject to clear language suggesting otherwise). With respect to federal legislation, following Dickson J.'s approach, it would appear that an offence contained in the *Criminal Code* would probably be considered presumptively to be "criminal in the true sense". This would follow from the constitutional basis for the legislation (the criminal law power), the prevalence of language in *Criminal Code* offences suggesting subjective intent,<sup>528</sup> the generality of application of most offences (i.e., the offences tend to apply to all persons, and not a select group of specially regulated individuals), the focus on actual rather than potential harm, and the penalties. Concerning other federal legislation, characterization is likely to be slightly more problematic since some federal legislation outside the *Criminal Code* has been or could be characterized as criminal in nature.<sup>529</sup> However, for the most part such legislation is not likely to cause difficulties of characterization. Thus, for example, in the 1979 case of *R. v. Chapin*,<sup>530</sup> the Supreme Court of Canada analyzed an offence pertaining to duck-hunting contrary to the federal migratory birds legislation and quickly concluded it was a public welfare offence, based on the subject matter of the legislation, the exclusively summary conviction method of punishment (even though the

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<sup>528</sup> "At present most crimes still require subjective mens rea." Per Stuart, *op cit.*, at p. 193. See similar statements at pp. 245 and 246.

<sup>529</sup> E.g., the *Competition Act* has roots in criminal but has recently been characterized as valid federal legislation under the Trade and Commerce Power. The Competition Act is discussed in greater detail in the context of analysis of *Thomson Newspapers Ltd. v. Can. (Dir. Of Investigation and Research)* [1990] 76 CR (3d) 129 decision, and *R. v. Wholesale Travel (op cit.)*. The *Canadian Environmental Protection Act* would appear to be based on both criminal law and other federal heads of power. In *R. v. Hydro-Québec* (1997) 151 DLR (4th) the Supreme Court of Canada held that the protection of the environment, through prohibitions against toxic substances, constitutes a wholly legitimate public objective in the exercise of the criminal law power, and on that basis upheld the toxic substances provisions of the *Canadian Environmental Protection Act* as valid federal legislation. See generally, Hogg, *Constitutional Law of Canada* (Toronto: Carswell, 2nd Ed., 1995, especially chapter 20 (re: *Competition Act*) and chapter 29 (re: *Canadian Environmental Protection Act*).

<sup>530</sup> (1979) 45 CCC (2d) 333.

penalties included up to six months jail), and the absence of language suggesting mens rea.

While the guidance provided in *Sault Ste. Marie* on the crimes/public welfare distinction is minimal, it would appear that in practice courts have not had difficulty making characterizations concerning true crimes and public welfare offences. Although uncomfortable with the true crimes-public welfare offence distinction, Canadian criminal law commentator Don Stuart concludes that...

...[a]s a practical matter, it seems that all provincial offences and all federal offences independent of the *Criminal Code* other than drug offences can be safely classified as regulatory. There is as yet no Supreme Court authority classifying a *Criminal Code* offence as regulatory.<sup>531</sup>

Others have reached the same basic conclusion.<sup>532</sup> However, in recent years, characterization of several *Criminal Code* offences pertaining to driving and care and use of guns by some courts as “quasi-regulatory” in nature would appear to represent a new variation on the crimes-public welfare model. This new category is discussed in greater detail below.

#### *Absolute Liability Offences After Sault Ste. Marie*

Mr. Justice Dickson's condemnation of absolute liability offences as violative of fundamental principles of justice was thorough, and, coupled with the interpretive requirement that public welfare offences would be presumptively regarded as strict in nature, in the absence of clear statutory language to the contrary, it left little room for equivocation. With a few exceptions, *Sault Ste. Marie*, when coupled with post-*Charter* cases such as *Reference re:*

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<sup>531</sup> Stuart, *op cit.*, at p. 173.

<sup>532</sup> E.g., see Swaigen, *op cit.*, at p. 30. Later in the chapter, the *Wholesale Travel* case is discussed. In that case the Supreme Court examined a misleading advertising offence with a statutory variation on a due diligence defence, and a penalty of up to five years in jail under the *Competition Act*. The decision raised interesting questions about the crime/public welfare distinction, and the role of penalties in making such distinctions. Because the case was based on a *Charter* challenge, it is discussed in that context.

*Section 94(2) of the Motor Vehicle Act, op cit.*, seems to have stemmed and indeed reversed the tide of absolute liability offences in Canada, at least insofar as imprisonment is available as a punishment. Nevertheless, it is worth pointing out that, while a due diligence defence or reasonable mistake of fact defence is not available to persons charged with an absolute liability offence, this is not to suggest that no defences are available to persons charged with such offences. As criminal law commentator Don Stuart points out, defences which do not operate to negative mens rea are still available to absolute liability offences, such as self-defence, necessity, and perhaps others which are based on lack of proof of the actus reus of the offence.<sup>533</sup> Moreover, subsequent post-*Charter* Supreme Court of Canada decisions suggest that absolute liability offences with no imprisonment available may have a new lease on life with respect to corporations.<sup>534</sup>

Looking first at court decisions, commentators suggest that the pre-1978 binary absolute-or-crimes approach to offence classification has been effectively terminated. Criminal law commentator Don Stuart has concluded that there has been "a conscientious preoccupation" with the *Sault Ste. Marie* regime, with the result that there has been "a clear halt to the earlier overwhelming trend towards absolute responsibility for public welfare offences."<sup>535</sup> Instead, the

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<sup>533</sup> Stuart, *op cit.*, at p. 166.

<sup>534</sup> E.g., see the comments of Chief Justice Lamer in *Wholesale Travel, op cit.*, who states at p. 179:

[P]rovisions which applied exclusively to corporations could not be challenged on the basis that they combined absolute liability with imprisonment, for the simple reason that a corporation cannot be imprisoned.....In my opinion, when the criminal law is applied to a corporation, it loses much of its "criminal" nature and becomes, in essence, a "vigorous" form of administrative law. With the possibility of imprisonment removed, and the stigma which attaches to conviction effectively reduced to *money*, the corporation is in a completely different situation than is an individual.... (emphasis in original)

<sup>535</sup> *Ibid.*, at p. 170.

"unmistakable pattern has been one of reclassification of previously absolute liability offences to allow the new reduced fault defence."<sup>536</sup> Other commentators have reached the same conclusion.<sup>537</sup>

Still, in rare cases courts continue to characterize offences as absolute in nature.<sup>538</sup> An interpretive approach which has been used occasionally by Canadian courts<sup>539</sup> to uphold absolute liability offences resembles similar judicial interpretations which thwarted characterizations of offences as mens rea in the nineteenth century. The interpretive approach used is to find an express due diligence defence somewhere in the legislation, and then because of its non-association with another offence in that same legislation, the conclusion is reached that this latter offence must be absolute in nature.<sup>540</sup> The correctness of this approach turns on the strength of the presumption of strict liability now in place for public welfare offences, and the meaning of

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<sup>536</sup> *Ibid.*

<sup>537</sup> E.g., Swaigen, *op cit.*, at p. 33; see also N. Strantz, *op cit.*, especially at pp. 1256 - 1257.

<sup>538</sup> E.g., *R. v. Canadian International Paper Co.* (1983) 12 CELR 121 (Ont. Co. Ct.). The Court concluded that procedural breaches of environmental legislation such as those pertaining to licensing requirement transgressions are absolute in nature. Although the *Charter* was in effect at the time of trial, its potential impact was not discussed. Regarding application of the *Charter* to absolute liability offences, see discussion of *Reference Re: Section 94(2) of the Motor Vehicles Act, infra*. Other cases where absolute liability offences have been upheld include *R. v. Grottoli* (1979), 43 CCC (2d) 158 (Ont. C.A.) pertaining to s. 5 of the federal *Food and Drugs Act*; *R. v. Cappozzi Enterprises* (1981), 60 CCC (2d) 385 (BCCA) pertaining to s. 82 of the B.C. *Liquor Control and Licensing Act*; *R. v. Trophic Can. Ltd.* (1981) 57 CCC (2d) 539 (Man. Prov. Ct.) pertaining to s. 26 of the federal *Food and Drugs Act*; *R. v. Esso Resources Canada Ltd.* [1983] 46 A.R. 375 (NWT Terr. Ct.) pertaining to water pollution. Speeding offences have been held to be absolute liability in nature in British Columbia (*R. v. Geraghty* (1990) 22 MVR (2d) 57 (BCCA)) and Quebec (*R. v. Lemieux* (1978) 41 CCC (2d) 33 (Que.C.A.)), but strict liability in Nova Scotia (*R. v. Hicks* (1991) 35 MVR (2d) 311 (NS Co.Ct.)). The offence of failure of an emergency vehicle to stop at a red light (s. 124(16) of the Ontario *Highway Traffic Act*) has been characterized by the Ontario Court of Appeal as absolute in nature, per *R. v. Kurtzman* (1991) 66 CCC (3d) 161.

<sup>539</sup> E.g., by Blair J.A. (Martin J.A. concurring) in *R. v. Grottoli, ibid.*

<sup>540</sup> In the 1800s, it was failure of the legislators to include language of mens rea in one offence when it was expressly provided in other offences provisions in the same legislation which was used as the justification to uphold absolute liability offences. As discussed in Part One, *supra*.

Justice Dickson's counsel that this presumption is only to be relieved when "the Legislature has made it clear that guilt would follow proof merely of the proscribed act."

Courts have "read in" due diligence defences where they are absent from the descriptive language of the offence, including in situations where other offence provisions in the same statute expressly included the due diligence defence.<sup>541</sup> According to one commentator, the tendency in the years immediately following the *Sault Ste. Marie* decision for courts to infer absolute liability where other offences in the same public welfare statute had explicit due diligence defences has since abated.<sup>542</sup> In any event, the later Supreme Court of Canada decision of *Reference Re: Section 94(2) of the Motor Vehicle Act (op cit.)* has further curtailed the ability of courts to characterize offences as absolute in nature by stipulating that except in exceptional circumstances such offences offend the *Charter* where imprisonment is available as a penalty.<sup>543</sup> Following the guidance supplied in the *Motor Vehicle* case, in the subsequent 1995 Supreme Court of Canada decision of *R. v. Pontes*,<sup>544</sup> the majority held that an offence whereby an individual is "automatically and without notice" prohibited from driving a motor vehicle has wording which goes far towards establishing that it is an offence of absolute liability, but that because imprisonment is not a possible penalty it is constitutionally permissible. These cases are discussed in greater detail *infra*.

One commentator has indicated that "...absolute liability offences appear to be a vanishing

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<sup>541</sup> E.g., see *R. v. Cancoil Thermal Corporation* (1986) 52 CR (3d) 188 (Ont. CA).

<sup>542</sup> Swaigen, *op cit.*, at p. 41.

<sup>543</sup> This case is discussed in greater detail in subsequent sections of the thesis.

<sup>544</sup> *R. v. Pontes* (1995) 13 MVR (3d) 145 (SCC).

species."<sup>545</sup> Yet it should be emphasized that neither *Sault Ste. Marie*, nor subsequent post-*Charter* decisions of the Supreme Court of Canada, prohibit the use of absolute liability offences (except when imprisonment is available). Indeed, as mentioned earlier, some Supreme Court of Canada judges have suggested that, from a *Charter* standpoint, absolute liability offences short of imprisonment may be particularly well suited for addressing corporate misconduct.<sup>546</sup> In the final analysis, the *Sault Ste. Marie* decision stipulates that if legislators make it clear, there is no bar to the use of absolute liability offences (and the *Motor Vehicle* case reinforces this by saying that absolute liability offences are only constitutionally acceptable under the *Charter* where they use penalties which do not deprive persons of their liberty).<sup>547</sup>

#### *Strict Liability Offences After Sault Ste. Marie*

As was discussed earlier, prior to the *Sault Ste. Marie* decision, a number of federal and provincial statutes already included negligence offences -- some where the fault element was part of the actus reus offence, such as the careless driving offence discussed in *McIver*, and others incorporating variations on the reasonable care or reasonable mistake defences.<sup>548</sup> Indeed, at the federal level, it was noted that there was a flurry of legislation in the late 1960s and early 1970s passed which included variations on the due diligence defence.<sup>549</sup> In addition, after the *Sault Ste.*

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<sup>545</sup> Swaigen, *op cit.*, at p. 52.

<sup>546</sup> Per Chief Justice Lamer in *Wholesale Travel*, as noted earlier in this part.

<sup>547</sup> Imprisonment is used here as shorthand for deprivations of liberty contrary to s. 7 of the *Charter*. Thus, it includes the use of probation.

<sup>548</sup> Swaigen, at p. 102, refers to such variations as "reasonable diligence," "reasonable precautions," in addition to the more familiar due diligence and reasonable care formulations.

<sup>549</sup> As itemized in Law Reform Commission's *Studies in Strict Liability*, *op cit.*, at p. 247, fn. 17.

*Marie* decision, other express reasonable care-type defences were included in legislation<sup>550</sup> or pre-*Sault Ste. Marie* due diligence defences were modified.<sup>551</sup> Don Stuart, in *Canadian Criminal Law*, concludes that since *Sault Ste. Marie*, there has been a legislative trend to incorporate due diligence defences into some existing or new offences.<sup>552</sup>

Two basic questions arise from the variation of offence types all attempting to impose a negligence standard of liability. First, if there are any incompatibilities in terms of wording and effect among these offences and the model form of strict liability articulated in *Sault Ste. Marie*, must the *Sault Ste. Marie* formulation prevail? Second, what effect, if any, does the *Charter* have on this question? The second issue will be addressed in the context of the *Wholesale Travel* decision, discussed later in this Part. With respect to the first question, we must return to the language of Dickson J. in *Sault Ste. Marie*. Mr. Justice Dickson did not directly address this issue, and so it is necessary to extrapolate his position on the basis of what he did say about the classification system.

His Lordship stated that public welfare offences would *prima facie* be in the strict liability category, where the defences of reasonable mistake of fact or reasonable care would be available. However, it was possible for this presumption to be negated -- that is, a public welfare offence could have a subjective mental element, where intent must be proven by the prosecution, or a public welfare offence could fall into the absolute liability category, with no reasonable care

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<sup>550</sup> E.g., the *Canadian Environmental Protection Act*, s. 36.

<sup>551</sup> E.g., the federal *Fisheries Act*, s. 41(3), modified in 1990, to conform more closely with the *Sault* articulation.

<sup>552</sup> Stuart, *op cit.*, at p. 175.

defences available, or a distinctive hybrid category could be recognized<sup>553</sup> -- but only where statutory language made it clear that legislators desired these alternate formulations. In short, the *Sault Ste. Marie* tri-partite offence classification was articulated as a basic template outlining key model forms across the spectrum from absolute liability through to true crimes, but was not intended to prevent creative variations on those models as circumstances warranted.

Following this same approach, if legislators expressly provide a defence which is different than the formulation set out in *Sault Ste. Marie*, then in the absence of other constraints,<sup>554</sup> logic would suggest that this express different formulation should prevail. The difficulty is determining whether the different wording has any substantively different effect. Thus, for example, s. 33(8) of the 1970 *Fisheries Act*,<sup>555</sup> included the following due diligence defence:

[Persons would be found guilty upon proof of the actus reus of the offence] ...unless the accused establishes that the offence was committed without his knowledge and consent and that he exercised all due diligence to prevent its commission.

On first examination, this defence is more demanding on the accused than is the *Sault Ste. Marie* formulation, since to avoid liability the accused is expressly required to establish not only all due diligence, but also, that the offence was committed without either his knowledge or his consent.

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<sup>553</sup> For instance, as referred to earlier, Chief Justice Lamer in *Wholesale Travel* has suggested that separate absolute liability offences directed exclusively at corporations might be possible, and a new intermediate "quasi-regulatory" category of *Criminal Code* offences is emerging between the strict liability and true crime models. The Wholesale Travel decision and quasi-regulatory offence category are discussed in greater detail below.

<sup>554</sup> In the *Wholesale Travel* case, the terms of the *Competition Act* stipulated that an accused could escape liability for a misleading advertising offence only if he or she established due diligence *and* promptly retracted the offending advertisement. This prompt retraction element, which was a precondition of the due diligence defence, was held by the Supreme Court of Canada to be absolute liability in nature and inconsistent with ss. 7 and 11(d) of the *Charter*. Thus, as is discussed in greater detail later in the thesis, the introduction of the *Charter* had the effect of constitutionalizing the due diligence defence as a minimum acceptable fault element where imprisonment is available.

<sup>555</sup> RSC1970 c. F-14 .

The idea of "knowledge and consent" seems to imply "control" so that in effect an accused wishing to avoid liability is under an obligation to establish that he or she had no ability to prevent another person from committing the offence. However, a good argument can be made that, in contexts of organizational misconduct (e.g., a corporation or municipality), where vicarious liability is an issue, the common law (*Sault Ste. Marie*) notion of showing all reasonable care was intended to encompass demonstrations that all care was taken in relation to the degree of control which the accused had over the activity.<sup>556</sup> In the 1979 case of *R. v. Gulf of Georgia Towing Ltd.*,<sup>557</sup> the court concluded that there was no substantive difference between the two. However, courts have also reached the opposite conclusion.<sup>558</sup> One commentator has concluded that "[g]enerally, the courts have tended to equate statutory reasonable care defences with the common law defence, wherever possible."<sup>559</sup>

We have already noted that the introduction of the *Sault Ste. Marie* tri-partite classification has led to a general movement by courts to re-interpret absolute liability offences as strict liability in nature, as was clearly the intent of Mr. Justice Dickson. But what about the potential for courts to "force" seemingly neutrally worded strict liability public welfare offences into the mens rea category? For example, could an offence to "permit" an activity to take place

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<sup>556</sup> As discussed earlier, Dickson J. in *Sault Ste. Marie* stated at p. 377 that: "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."

<sup>557</sup> [1979] 3 WWR 84.

<sup>558</sup> E.g., *R. v. McKay* (1983) 4 FPR 304.

<sup>559</sup> Swaigen, *op cit.*, p. 102.

be interpreted as involving intent? Has this been a problem? It would appear not. John Swaigen in *Regulatory Offences in Canada: Liability and Defences*, summarizes the situation as follows:

The Supreme Court has expressly stated that "permit" usually connotes strict liability rather than mens rea. By necessary implication, since the Court held that the words "cause" and "permit" connote different means of committing the same public welfare offence, it is unlikely that the word "cause" can be construed to suggest mens rea. However, before the Supreme Court settled these issues, there was an essentially arid debate....as to whether "cause" connoted mens rea and whether "permit", "suffer", and "allow" connoted different levels of liability.....It is still open to the courts to find that notwithstanding that a word such as "permit" usually connotes strict liability, there are factors that justify overriding that presumption. Thus, the apparent certainty created by *Sault Ste. Marie* is susceptible to further erosion.<sup>560</sup>

Nevertheless, it would appear that there is little evidence of such an "erosion" taking place.<sup>561</sup>

Swaigen provides only one example of a court categorizing a seeming strict liability offence in public welfare legislation as one of mens rea.<sup>562</sup>

It would appear that creation of the middle ground strict liability offence has alleviated the pressure on courts to "force feed" characterizations of offences into either the absolute liability or true crimes category, depending on whether they felt that arguments of justice for the public or justice to the accused was more compelling in a particular case. On the other hand, where language of a public welfare offence is clear in suggesting absolute liability or mens rea, the *Sault*

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<sup>560</sup> *Ibid.*, at p. 37.

<sup>561</sup> It might be asked, "Why is this an erosion?" It is suggested that the erosion which Swaigen is referring to is an erosion from certainty as to the meaning of words like "permit", "cause", and "suffer." Thus, if courts were to interpret such words differently from one provision to another, this would detract -- or "erode" -- from the predictability in interpretation which would otherwise flow from the presumption of strict liability for public welfare offences called for by *Sault Ste. Marie*. But it should be stressed that the *Sault Ste. Marie* tripartite offence classification approach was not intended to prevent recognition of variations on the true crime, strict liability, and absolute liability offence types where language made it clear that the presumption of intent (for true crimes) and the presumption of strict liability (for public welfare offences) so warranted it.

<sup>562</sup> *R. v. Murphy* (1988) 88 A.R. 279 (Prov. Ct.). Swaigen, *op cit.*, at p. 38 concludes that the court's interpretation was incorrect.

*Ste. Marie* presumption of strict liability is properly negated.

*Mens Rea Offences After Sault Ste. Marie*

In *Sault Ste. Marie*, Mr. Justice Dickson indicated that offences which are "criminal in the true sense" presumptively fall in the mens rea category, where some positive state of mind such as intent, knowledge or recklessness must be proved by the prosecution. But Dickson J. stated that public welfare offences are not subject to the presumption of full mens rea, and would not fall into the mens rea category unless words such as "wilfully" or "with intent" were contained in the statutory provision creating the offence.<sup>563</sup> These stipulations by his Lordship raise two distinct questions pertaining to mens rea offences. The first pertains to "true crimes" and the potential for such offences to be characterized by courts as requiring less than subjective awareness, despite the presumption that they are offences of mens rea, because the Legislature "made it clear" that a fault element less than subjective mens rea was intended. Has this happened, and if so, in what circumstances? The second question pertains to mens rea offences located in public welfare legislation. Would the existence of the *Sault Ste. Marie* classification scheme curtail or prevent the recognition and use of mens rea offences in regulatory legislation? Both of these questions are addressed below, in turn.

With respect to the first question concerning the "true crimes" category, and the potential for courts to find certain of the offences in this category as not necessitating a subjective mens rea element in spite of the presumption of subjective mens rea which attaches to such offences, it must first be noted that, as discussed earlier, despite Dickson J.'s overstatement that "[w]here the

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<sup>563</sup>

*Sault Ste. Marie, op cit.*, at p. 376.

offence is criminal, the Crown must establish a [subjective intent] mental element...<sup>564</sup> there is no necessity that criminal liability only be imposed in cases of subjective fault, where language suggests otherwise. Indeed, the *Criminal Code* has long contained a number of offences which expressly include objective fault elements (e.g., incorporation of “reasonable” care, or steps in the language of the offence).<sup>565</sup> Perhaps the most high profile example of this objective fault approach in a *Criminal Code* context is with respect to offences concerning sexual activity with minors, or sexual assault, where consent is not a defence unless the accused “took all reasonable steps” to ascertain the age of the complainant or to ascertain that the complainant was consenting.<sup>566</sup> While the list of *Criminal Code* offences containing objective fault elements has been described as “haphazard”,<sup>567</sup> the lion’s share of *Criminal Code* offences continue to require subjective mens rea.<sup>568</sup> But what of those *Criminal Code* offences which in their wording,<sup>569</sup> approach,<sup>570</sup> or function<sup>571</sup> seem to resemble regulatory offences in the sense of imposing liability pertaining to controlled but not prohibited activities where objective negligence has been exercised? Have

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<sup>564</sup> *Sault Ste. Marie, op cit.*, at p. 362.

<sup>565</sup> E.g., *Criminal Code* section 79 concerning failure of a person possessing explosives to use reasonable care to prevent bodily harm or death.

<sup>566</sup> See “reasonable steps” defences in ss. 150.1 (4) and (5) (regarding sexual activity with minors), and s. 273.2 (b) (regarding sexual assault).

<sup>567</sup> Per Stuart, *op cit.*, at p. 231.

<sup>568</sup> Per Stuart, *op cit.*, at p. 245.

<sup>569</sup> E.g., the offence does not on its face include a subjective mens rea component, and may suggest a different fault element, as discussed below.

<sup>570</sup> I.e., the offence is part of or conceptually affiliated with a licensing or permitting or prescriptive regulation arrangement whereby the activity is allowed within certain parameters, as discussed below.

<sup>571</sup> I.e., the objective of the offence appears to be preventative concerning a particular potentially harmful misconduct as opposed to reactive to actual harm produced, as discussed below.

courts deemed that such considerations warrant overriding the presumption of mens rea that is associated with true crimes? One commentator has concluded that “[t]here is as yet no Supreme Court authority classifying a *Criminal Code* offence as regulatory.”<sup>572</sup>

### *The Quasi-Regulatory Criminal Code Offence*

Nevertheless, recently some *Criminal Code* offences pertaining to dangerous driving<sup>573</sup> and the careless use<sup>574</sup> or improper storage of guns<sup>575</sup> have been characterized as “quasi-regulatory” in nature.<sup>576</sup> With these types of *Criminal Code* offences, an objective negligence

<sup>572</sup> Stuart, *op cit.*, at p. 173.

<sup>573</sup> *R. v. Hundal* [1993] 1 SCR 867. Justice La Forest used the term “quasi-regulatory” to describe criminal offences such as dangerous driving. Speaking for the majority, Justice Cory drew on the licensing argument (which is described in some detail later in this part) to justify objective negligence (significant departure from the reasonable care standard) as the basis for fault in the *Code* offence of dangerous driving. Justice Cory’s version of acceptable objective negligence fault for dangerous driving allowed for consideration of the particular circumstances surrounding the incident. Subsequently, in *R. v. White* [1999] SCJ No. 28, June 10, 1999, concerning the constitutionality of a potentially self-incriminatory accident report statement made pursuant to a provincial *Motor Vehicle Act*, and its use in a subsequent *Criminal Code* proceeding, the Court suggested that the importance of driving, particularly for rural Canadians, may necessitate a modified, less rigorous application of the “licensing” argument since the ability to drive is a virtual necessity for some Canadians (e.g., rural Canadians), not voluntarily engaged in like most commercial activities (para. 55). Accordingly, the report was held inadmissible for the purposes of the *Criminal Code* proceeding.

<sup>574</sup> *R. v. Durham* [1992] 10 OR (3d) 596 (Ont. C.A.). In *Durham*, the Ontario Court of Appeal characterized the offence of careless use or storage of a firearm as regulatory in nature, with a due diligence defence established on a balance of probabilities available to an accused. The *Durham* decision has since been overtaken by *R. v. Finlay* [1993] 3 SCR 103, and See also *R. v. Gosset* [1993] 3 SCR 76, where the Supreme Court required a marked departure from the reasonable care standard, proof beyond a reasonable doubt by the Crown of failure to meet this standard, and a mere “reasonable doubt” due diligence defence. Note that the Supreme Court in *Finlay* and *Gosset* does not explicitly describe the careless storage offence as “regulatory” or “quasi-regulatory.”

<sup>575</sup> *R. v. Smillie* [1998] BCJ No. 2082 Sept. 10, 1998 (BCCA).

<sup>576</sup> Note that the label “quasi-regulatory” was used to describe the *Criminal Code* offences in question in only two cases, that of *Hundal*, per La Forest J., and *Smillie*, per Ryan J.A.. Nevertheless, it is submitted that the *Finlay* and *Gosset* decisions are consistent with this characterization. All of these decisions were rendered following the introduction of the *Charter*, and were challenged as unconstitutional. Supreme Court of Canada interpretations of the *Charter* have concluded that subjective fault is only rarely constitutionally required (see, e.g., Chief Justice Lamer’s remarks in *Wholesale Travel* to this effect, as discussed in greater detail *infra*), and that in many circumstances an objective fault standard (usually marked departure) will be considered acceptable, even for *Criminal Code* offences. With respect to the minimum acceptable *Charter* standards for offences, see discussion in the Charter sections of the thesis which follow.

fault element has been found acceptable (i.e., liability may flow from significant departures from the standard of reasonable care, or from failure to meet a prescribed standard, and not from advertent “knowing” violations of the law, with a reasonable doubt due diligence defence available). As Ryan J.A. for the British Columbia Court of Appeal in *R. v. Smillie* aptly puts it, the “regulatory heart of some criminal offences”<sup>577</sup> can be determined by examining the wording in the offence which does not clearly indicate the existence of a subjective awareness mental element (e.g., “careless” use of a firearm, storage of firearms “in a manner contrary to regulations”, “dangerous” driving), as well as conceptual links to licensing regimes to control the activity in question,<sup>578</sup> the “overall regulatory pattern,”<sup>579</sup> and an orientation in the offences toward addressing potential rather than actual harm.<sup>580</sup>

In such situations where the quasi-regulatory characterization of a *Criminal Code* offence seems apt, and an objective fault element found acceptable, there has nevertheless been considerable variation from the strict liability offence described by Dickson J. in *Sault Ste. Marie*. A “significant departure” from the reasonable care standard seems to be considered necessary (as opposed to the “civil” standard associated with the public welfare strict liability offence which does not require that the negligence be “gross”).<sup>581</sup> In some cases the fault element is contained

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<sup>577</sup> *Hundal, op cit.*, at para. 43.

<sup>578</sup> Per Cory J. in *Hundal, op cit.*.

<sup>579</sup> As in the case of the gun control offences in the *Criminal Code*, which include prescriptive regulations, as discussed in *R. v. Smillie, op cit.*.

<sup>580</sup> See discussion of these factors in *R. v. Smillie, op cit.*.

<sup>581</sup> As is the case with dangerous driving and careless use of firearms, per *Hundal, Finlay, and Gosset*.

wholly within the reasonable doubt defence of due diligence (as is the case with storage of firearms “contrary to regulation”) since the offence itself simply prescribes the acceptable standard.<sup>582</sup> In such situations, criminal liability will be imposed following proof beyond a reasonable doubt that the standard prescribed standard has been breached, unless the accused raises a reasonable doubt that due diligence was exercised. Whether the offence be one of careless storage, dangerous driving, or improper storage contrary to regulation, a mere reasonable doubt due diligence defence has been found acceptable.

A strong argument could be made that, had these offences been located not within the *Criminal Code*, but rather in separate legislation pertaining to the regulation of driving or care and storage of guns, they are more likely to have been characterized as public welfare in nature, and thus the presumption that they were strict liability in nature would take effect so that a due diligence defence established on a balance of probabilities would apply. It may be that the stigma associated with conviction of a *Criminal Code* offence (even if it contains an objective rather than a subjective fault element), when coupled with the possibility of imprisonment, may have been considered by the courts as sufficient to warrant the significant departure test and a mere evidential burden of proof for due diligence. It is difficult to say at this point how these variations from the strict liability model will affect enforceability.

#### *The Mens Rea Public Welfare Offence*

The second question pertains to mens rea offences located in public welfare legislation, and the effect of the *Sault Ste. Marie* classification scheme on the continued existence of such

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<sup>582</sup> E.g., s. 86(3) of the Criminal Code refers to storing firearms “in a manner contrary to a regulation...” Per *Smillie*.

offences. Mr. Justice Dickson in *Sault Ste. Marie* did not in any way rule out or cast aspersions over the inclusion in public welfare statutes of this type of offence. Rather, he simply indicated that a clear indication would be necessary to displace the presumption of strict liability.

While not large in numbers, it is not uncommon to find mens rea offences in public welfare legislation. They are essentially of two types. The first are associated with interference in the administration of legislation. Thus, for example, offences of supplying false information to government officials, or obstructing government officials are found in many regulatory statutes.<sup>583</sup> Since the type of misconduct which is being addressed through obstruction or false information offences necessitates a "positive state of mind" (to use Dickson J.'s words in *Sault Ste. Marie*<sup>584</sup>), and the element of intent may be inherent in the notion of falsification of records, it is not surprising that such offences would be classified as mens rea in nature.

The second type of mens rea offences contained in regulatory legislation are those pertaining to substantive misconduct which is the focus of control in the statute. These tend to be more rare, but again, it seems readily apparent that there can be circumstances where persons engaging in regulated activity intentionally, or recklessly cause harm. Thus, for example, some modern environmental legislation includes an occasional mens rea offence for intentionally or

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<sup>583</sup> See, e.g., s. 114 of the *Canadian Environmental Protection Act*, and s. 145 of the Ontario Environmental Protection Act. In *R. v. Safety-Kleen Canada Inc.* (1997) Ont. CA C22476 (Feb. 27, 1997), the Ontario Court of Appeal held that the Crown had to prove that, for the offence of supplying false information to a provincial officer, the Crown had to prove that the defendant knew the document was false. In the motor vehicle context, the offences of willfully avoiding a police officer, and failing to stop on signalling by a police officer, have both been held to require proof of subjective mens rea: per *R. v. Dilorenzo* (1984) 26 MVR 259 (Ont. CA).

<sup>584</sup> *Sault, op cit.*, at p. 373.

recklessly causing an environmental disaster.<sup>585</sup>

Since the presumption of mens rea does not apply in public welfare offences, is it also true that the burden of proof for mens rea offences located in public welfare legislation need not rest with the prosecution? This was the conclusion of the majority of the Supreme Court of Canada in the 1979 decision of *Strasser v. Roberge*.<sup>586</sup> In *Strasser*, the majority of the Court characterized the Quebec *Labour Code* as public welfare legislation, and the offence of "participating" in a strike or lock out contrary to the *Code* as a mens rea offence.<sup>587</sup> However, the majority also concluded that the burden of proof was on the accused to prove that he did not intend to participate, once the actus reus of the offence was proven (i.e., once it was proven that the accused worker had abstained from providing his services).<sup>588</sup> Beetz J. for the majority, indicated that while a province can create a full mens rea offence, it is only exceptionally that such an offence should be treated as a "truly criminal" offence. It was possible, they contended, to have a mens rea strict liability offence, where the burden of proof was shifted to the accused, because of the difficulty of proving intent.<sup>589</sup>

It is submitted that the majority position represents a mis-reading of the classification system set out in *Sault Ste. Marie*. The fact that Mr. Justice Dickson said so in his dissent in

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<sup>585</sup> E.g., offences of intentionally or recklessly causing an environmental disaster, per the *Canadian Environmental Protection Act*, s. 115. While to the knowledge of the author, this offence has never been used, and is likely to be extremely rarely committed, such offences may serve a symbolic role. See Webb, "On the Periphery: The Limited Role for Criminal Offences in Environmental Protection," in Tingley, ed., *Into the Future: Environmental Law and Policy for the 1990's* (Edmonton: Environmental Law Centre), pp. 58 - 69.

<sup>586</sup> (1979) 103 DLR (3d) 193.

<sup>587</sup> *Ibid.*, at pp. 216 - 225 .

<sup>588</sup> *Ibid.*, at pp. 223 - 224.

<sup>589</sup> *Ibid.*

*Strasser* is support for this position. In *Strasser*, Dickson J. elaborated on his remarks in *Sault Ste. Marie* about provincial offences which are not "criminal in the true sense."<sup>590</sup> It will be recalled that in *Sault Ste. Marie*, Dickson J. noted that true crimes were offences presumptively requiring a positive state of mind to be committed.<sup>591</sup> In *Strasser*, Justice Dickson explicitly said that "mere difficulty of enforcement cannot justify the shifting of the burden of proof of the mental element to the accused."<sup>592</sup> Justice Dickson went on to say that since the mental element was an essential element of the offence, the prosecution must prove it beyond a reasonable doubt.<sup>593</sup> Mr. Justice Dickson also pointed to the fact that negligence is a fundamentally different type of conduct, necessitating a different type of offence, and a different approach to framing offences:

Once one has found an intentional element necessary to the commission of the offence, negligence becomes irrelevant, for the offence then falls into the first category, that of mens rea offences. Strict liability offences are offences of negligence. Just as negligence is irrelevant to the issue of intention in criminal responsibility, so also is intention irrelevant to "responsibility for negligence."<sup>594</sup>

As Mr. Justice Dickson indicated in *Sault Ste. Marie*, the pre-eminent objective of public welfare offences is to require that regulated actors comply with high standards of care and attention, with the due diligence defence intended to ensure that those who take every reasonable precaution are not punished.<sup>595</sup> In other words, the reversal of burden of proof has an incentive effect on

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<sup>590</sup> *Strasser, op cit.*, at pp. 198 - 199.

<sup>591</sup> *Sault, op cit.*, at p. 373.

<sup>592</sup> *Strasser, op cit.*, at p. 203.

<sup>593</sup> *Ibid.*, at p. 204.

<sup>594</sup> *Ibid.*

<sup>595</sup> *Sault, op cit.*, at pp. 364 - 365.

regulated persons to exercise due diligence.<sup>596</sup> Thus, a host of factors justify the shifting of the burden of proof in strict liability offences, and not simply the difficulty of enforcement.

One commentator has indicated his preference for Dickson J.'s "compelling" reasoning in *Strasser*,<sup>597</sup> and has concluded that "lower courts have tended to ignore, side-step or flout" *Strasser*.<sup>598</sup> As a result, a potential mis-application of the *Sault Ste. Marie* classification which would have detracted from the rigour of the mens rea formula has been effectively curtailed.

In the opinion of this author, this brief review of cases and legislation since *Sault Ste. Marie* supports the conclusion that the *Sault Ste. Marie* guidance has generally proven practical, and has had the desired effect of improving the fairness to persons accused of regulatory offences (in the sense that persons accused of a public welfare offence are presumed to have a reasonable care or reasonable fact defence unless legislators have clearly indicated otherwise) while providing an effective and appropriate offence-type to address negligent misconduct.

Nevertheless, it is worth emphasizing that Dickson J. in *Sault Ste. Marie* was not attempting to create a judicial straitjacket to force courts and legislators into choosing from only his three categories. Rather, the three offence-types he described represent basic models, and the presumptions of mens rea (for true crimes) and strict liability (for public welfare offences) are merely points of departure. As long as offences respect the twin concerns with fairness for the accused on the one hand, and the need for protection of the broader public interest on the other, legislators should not feel constrained about varying from the basic models where circumstances

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<sup>596</sup> More is said on the incentive effect of the due diligence defence below.

<sup>597</sup> See Stuart, *op cit.*, at p. 168.

<sup>598</sup> *Ibid.*, at p. 169.

warrant, and judges should not resist such variations where they are clearly delineated and not in conflict with the basic precepts outlined in *Sault Ste. Marie* or the *Charter* (as discussed in greater detail *infra*).

Thus, for example, the apparent emergence of the “quasi-regulatory” *Criminal Code* offence category, an intermediate offence between the strict liability offence and the subjective mens rea “true crime” -- with significant penalties, and more protections for accused than those associated with strict liability offences, but less than those associated with mens rea true crimes -- should neither come as a surprise, nor necessarily be resisted. Indeed, the existence of such variations, were they to be compatible with the precepts set out in *Sault Ste. Marie* and any constitutional requirements,<sup>599</sup> would be further evidence of the viability and flexibility of the *Sault Ste. Marie* classification system.

#### *The Due Diligence Defence -- Is It Workable?*

A major innovation in *Sault Ste. Marie* was judicial recognition and support of the due diligence defence and/or reasonable mistake of fact defence, proven on a balance of probabilities. A host of questions arise concerning this defence: would it be too onerous on accused persons? Would it be too difficult or ambiguous for courts to apply? How would it affect enforcement? Generally, would it work in practice?

There have been thousands of cases applying the reasonable care or mistake of fact defences since the *Sault Ste. Marie* case was decided. What is attempted here is simply an overview of some highlights. The author's admittedly less than comprehensive review of case-law

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<sup>599</sup> The constitutional requirements for offences are discussed in the context of analysis of the *Charter*, below.

and literature suggests that in the vast majority of cases where a defence has been raised to a strict liability offence, it has been the reasonable care or due diligence defence, not the defence of reasonable mistake of fact. Because the examination of strict liability decisions undertaken by the author suggests that the reasonable care or due diligence defence is the defence most frequently invoked by accused persons, it will be the focus of discussion here.

The author's review of court decisions suggests that over time judges have gradually developed a comparatively sophisticated and comprehensive understanding of the concept of reasonable care or due diligence and its constituent components, and that a generally rigorous, objective standard of negligence is being applied. Within a year after *Sault Ste. Marie* was decided, Mr. Justice Dickson and the Supreme Court of Canada in *R. v. Chapin*, had an opportunity to elaborate on how the reasonable care defence should be interpreted. The case concerned an offence of duck-hunting contrary to federal migratory bird laws, where the hunter had hunted within a restricted distance of a baited area, in contravention of s. 12 (1) of the *Migratory Birds Convention Act*. Mr. Justice Dickson, for a unanimous Supreme Court, described the due diligence defence as follows:

An accused may absolve himself on proof that he took all the care which a reasonable man might have been expected to take in all the circumstances or, in other words that he was in no way negligent.<sup>600</sup>

While not greatly elaborating on his Lordship's earlier pronouncements on the subject in *Sault Ste. Marie*, *Chapin* served to re-emphasize two important points: first, that *all* reasonable care must be taken and that defendants must not be in *any way* negligent. Thus, the rigour of the standard was reiterated. Second, Mr. Justice Dickson noted that the expectations were dependent

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<sup>600</sup> *R. v. Chapin, op cit.*, at p.134.

on and took full account of "all the circumstances." This provides accused persons with considerable opportunity to bring to the court's attention the distinctive features or attributes of the accused's activity or operations, and as such tempers the "objectivity" of the standard as much as possible.

In the 1979 British Columbia Court of Appeal decision of *R. v. Gulf of Georgia Towing Co.*,<sup>601</sup> a case involving an oil spill caused by valves improperly left open, the Court held that simply establishing the existence of a good hiring and training process was not enough. Rather, a more hands-on and continuous supervisory role was necessary. Seaton J.A., drawing on the words of the trial judge in that case, indicated that...

... "reasonable precautions" must be held to include a close and continual scrutiny of the valves in question throughout the entire pumping procedure or, failing such scrutiny, some other method of ensuring that the valves in question would be closed and remain closed throughout.<sup>602</sup>

While this is undoubtedly a strict standard for the accused to meet, anything short of such a rigorous approach would have allowed the creation of "paper" due diligence defences by commercially regulated actors, arguably defeating the purposes of much regulatory legislation. The wording of Seaton J.A. also provides support for the idea of third party auditing and use of formalized management systems to ensure compliance. This promising potential by-product of *Sault Ste. Marie* is discussed in more detail in Part Three of the thesis.

In two important rulings from the early 1980s, Justice Stuart of the Yukon Territorial Court provided thoughtful and thorough discussions of the due diligence defence. In *R. v. Placer*

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<sup>601</sup> *Op cit.*

<sup>602</sup> *Ibid.*, at p.88.

*Developments Ltd.*,<sup>603</sup> Stuart J. described the due diligence defence under the *Fisheries Act* -- which he had characterized as being substantively similar to the common law defence set out in *Sault Ste. Marie* -- as follows:

To constitute a defence pursuant to this section, *all* due diligence must be exercised. While not tantamount to absolute liability, more than the care expected of an ordinary citizen is demanded. In the very least, the care must reflect the diligence of a reasonable professional possessing the expertise suitable to the activity in issue....No one can hide behind commonly accepted standards of care if, in the circumstances, due diligence warrants a higher level of care. Reasonable care implies a scale of caring. A variable standard of care ensures the requisite flexibility to raise or lower the requirements of care in accord with the special circumstances of each case. The care warranted in each case is principally governed by the gravity of potential harm, the available alternatives, the likelihood of harm, the skill required, and the extent the accused could control the causal elements of the offence.....The greater the potential for substantial injury, the greater the degree of care required.<sup>604</sup> (emphasis in original)

Stuart J.'s judgment provides a useful refinement to earlier court pronouncements, by elaborating on the need to tailor industry standards to the circumstances, and framing the degree of care in terms of risk, options, and control. In the 1981 case of *R. v. Gonder*,<sup>605</sup> Stuart J. noted that, in many industrial circumstances, due to the distinctive and rapidly changing nature of many operations, it would not be uncommon for there to be no single, well accepted standard of practice, and that at any rate existing standards only represent points of departure on the issue of what constitutes reasonable care for a particular accused.<sup>606</sup>

While it has been clear since *Sault Ste. Marie* that with reasonable mistake of fact, the key issue is whether there was a justifiable misunderstanding with respect to a fact directly pertaining

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<sup>603</sup> (1983) 13 CELR 42 .

<sup>604</sup> *Ibid.*, at p. 51.

<sup>605</sup> (1981) 62 CCC (2d) 326 .

<sup>606</sup> *Ibid.*, at p. 332.

to the offence (e.g., that a licence had expired), there was initially some confusion concerning the due diligence defence as to whether a general demonstration of reasonable care was all that was necessary or whether due diligence with respect to the particular incident the subject of the prosecution was necessary. In the 1988 decision of *R. v. Rio Algom*,<sup>607</sup> a case pertaining to a prosecution under the Ontario *Occupational Health and Safety Act*, the Ontario Court of Appeal provided some useful guidance:

...[T]he trial judge appears to have been satisfied that the respondent ...has kept safety foremost in its corporate mind at all times and has a good inspection and reporting system in effect to accomplish this purpose. Those are relevant facts to be kept in mind with respect to sentence. They do not, however, assist the respondent to avoid responsibility for the lack of care on its part which resulted in the unfortunate fatal accident. The respondent has failed to prove it was not negligent with respect to the circumstances which caused the accident.<sup>608</sup>

The *Rio Algom* decision is also important for its emphasis on foreseeability: if it was not likely that some danger (and not necessarily the precise form that the contravention actually took) would result, then the accused should not be held liable.<sup>609</sup> The 1995 case of *R. v. Northwood Pulp and Timber Co.*<sup>610</sup> provides an illustration of how the notion of foreseeability works in practice. In that case, a spill had occurred during a mill shut down, which, in the evidence of an expert witness, was extremely unusual.<sup>611</sup> The British Columbia Supreme Court held that the event was not reasonably foreseeable, and that therefore the accused should be acquitted. In the

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<sup>607</sup> (1988) 66 OR (2d) 674 (CA) .

<sup>608</sup> *Ibid.*, at p. 674.

<sup>609</sup> *Ibid.*, at p. 682.

<sup>610</sup> [1995] BJ No. 2380 (Nov. 10, 1995).

<sup>611</sup> *Ibid.*, at para. 42 - 49.

1997 British Columbia Supreme Court decision of *R. v. British Columbia Hydro and Power Authority*,<sup>612</sup> the Court held that a due diligence defence necessitates that an accused take all *reasonable* steps, *not* all *conceivable* steps, and acquitted the accused.

By the 1990s, an increasingly sophisticated and comprehensive approach to due diligence was being pursued by the courts. For example, in the 1992 decision of *R. v. Bata*,<sup>613</sup> Judge Ormston of the Ontario Court Provincial Division outlined the following range of questions to be asked in determining whether directors of a corporation had exercised due diligence.<sup>614</sup>

(a) Did the board of directors establish a pollution prevention "system" as indicated in *R. v. Sault Ste. Marie*. i.e., was there supervision or inspection? was there improvement in business methods? Did he exhort those he controlled or influenced?

(b) Did each director ensure that the corporate officers have been instructed to set up a system sufficient within the terms and practices of its industry of ensuring compliance with environmental laws, to ensure that the officers report back periodically to the board on the operation of the system, and to ensure that the officers are instructed to report any substantial non-compliance to the board in a timely manner?

I remind myself that:

(c) The directors are responsible for reviewing the environmental compliance reports provided by the officers of the corporation, but are justified in placing reasonable reliance on reports provided to them by corporate officers, consultants, counsel or other informed parties.

(d) The directors should substantiate that the officers are promptly addressing environmental concerns brought to their attention by government agencies or other concerned parties including shareholders.

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<sup>612</sup> *R. v. British Columbia Hydro and Power Authority* (1997) BCSC, BCJ No. 1744 (July 10, 1997).

<sup>613</sup> (1992) 9 OR (3d) 329.

<sup>614</sup> While the *Bata* case was specifically concerned with due diligence under s. 147 of the Ontario *Environmental Protection Act*, it is submitted that the principles it enunciated are applicable to due diligence under all Canadian regulatory statutes pertaining to commercial activities.

(e) The directors should be aware of the standards of their industry and other industries which deal with similar environmental pollutants or risks.

(f) The directors should immediately and personally react when they have notice the system has failed.<sup>615</sup>

The effect of this type of inquiry is arguably to hold directors accountable, encourage active participation in meeting the terms of regulatory legislation from top to bottom, and prevent benign neglect from setting in. In short, an approach to the achievement of high standards of care in commercial contexts, is beginning to be “fleshed out” in case law.

It may be that what is emerging is a variable standard which depends at least in part on the nature of the regulated activity and the regulated actor, with a more rigorous standard being applied to regulated actors acting in a professional or commercial capacity (e.g., directors, officers, and employees of corporations) than to those who are engaging in a non-commercial regulated activity (e.g., ordinary drivers, hunters). We have described above several examples of the courts holding commercial actors to a comparatively rigorous due diligence standard.<sup>616</sup> On the other hand, ordinary drivers have escaped liability for careless driving offences in cases of momentary inattention or errors of judgment.<sup>617</sup> The *Chapin* case discussed earlier is an example

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<sup>615</sup> *Ibid.*, at pp. 362 - 363.

<sup>616</sup> E.g., *R. v. Gulf of Georgia Towing*, *R. v. Placer Developments Ltd.*, *R. v. Gonder*, *R. v. Bata*, *R. v. Algom*, *op cit.*.

<sup>617</sup> See, e.g., *R. v. Namink* (1979) 27 Chitty's L.J. 289 (Ont.Co. Ct.). In *R. v. Stone* (1996) 21 MVR (3d) 59 (NSCA) the accused successfully avoiding conviction for a “failing to yield right of way to a pedestrian” offence when his attention was concentrated on making a left turn. See generally S. Hutchison, D. Rose and P. Downes, *The Law of Traffic Offences* (2nd ed.) (Scarborough: Thomson Canada, 1998), at pp. 151 - 169. In the 1953 Ontario Court of Appeal decision of *R. v. Beauchamp* (1953) OR 422, the Court concluded that a driver is required to exercise a reasonable amount of skill, and to do what an ordinary prudent person would do in the circumstances, with the factual standard shifting depending on road and environmental conditions that exist or may reasonably be expected. While the *Beauchamp* case pre-dates *Sault Ste. Marie*, it is submitted that its extensive discussion in Hutchison et al's 1998 Canadian text on traffic offences (see pp. 151 - 152) is a good indication of its continued relevance in a *post-Sault Ste. Marie* context.

of a comparatively lenient application of the due diligence defence to an individual hunter. In *R. v. Richardson*,<sup>618</sup> a 1981 decision of the Ontario Division Court which was upheld at the Court of Appeal level (leave to appeal was dismissed by the Supreme Court of Canada), it was held that the accused hunter had successfully raised a reasonable mistake of fact defence when he established that he had shot more deer than allowed but had reasonably believed that he had not killed the first deer which he had shot.

It is particularly with respect to regulated persons acting in a commercial or professional capacity that the incentive effect flowing from shifting the onus on the accused to establish due diligence may be most evident. This is arguably the case because, unlike ordinary drivers or Sunday hunters, commercial and professional actors operate in an environment where planning, cost-benefit analysis, systematic approaches, and consideration of the effects of legal liability regimes are part of doing business. A Canadian survey concerning the impact of regulatory environmental offence prosecution on corporate directors and officers indicated the sensitivity of the surveyed corporate officials to enforcement efforts.<sup>619</sup>

According to several commentators,<sup>620</sup> the introduction of the due diligence defence is

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<sup>618</sup> *R. v. Richardson* (1981) 62 CCCC (2d) 417 (Ont. Div. Ct.); affirmed (1982) 39 OR (2d) 438n (Ont. C.A.); leave to appeal refused (1983) 48 NR 228 (SCC).

<sup>619</sup> D. Saxe, "The Impact of Prosecution of Corporations and Their Officers and Directors upon Regulatory Compliance by Corporations," (1991) 1 *JELP* 91 - 109, at pp. 100 - 101. The survey also showed approval by these officers of an approach which sees them being held penally responsible if they could have prevented the commission of the offence and failed to do so. Saxe concludes at p. 109 as follows:

The survey may also provide empirical support for the social value of the due diligence defence. The higher environmental protection score of corporate executives who face only the possibility of prosecution, can most plausibly be interpreted as reflecting an assumption that those who do "the right thing" will not be chosen for prosecution. Only in this way do individual executives have the strongest inducement to prefer environmental protection over cost saving.

<sup>620</sup> As discussed below.

having a positive impact on the regulated community, spurring corporations to establish compliance programs, conduct audits, and engage in education programs.<sup>621</sup> One commentator observes that....

...ensuring the availability of a defence against successful prosecution is only one of many reasons industry has found it useful to establish operational standards showing "due diligence." An exercise of "due diligence" may prevent an offence altogether, or reduce the likelihood an offence will occur. When an innocent violation does occur, diligent attempts to comply with legislated standards, together with an undertaking to take remedial action, may avoid the laying of charges.<sup>622</sup>

Former Crown prosecutor John Swaigen has spoken positively about the effect of the due diligence defence on commercial actors in the environmental area. According to Swaigen, once the strict liability offence was recognized...

...[b]usiness people....began to take steps to implement "due diligence" policies and programs designed both to prevent negligence and to provide them with the strong evidence needed to obtain acquittal if they were charged with environmental offences. A few years ago, steps such as due diligence searches, environmental programs and environmental audits were the exception. Now they are the rule in large corporations.<sup>623</sup>

Although it would be difficult to prove empirically, it is very likely that the reverse onus played an important role in stimulating these sometimes costly preventive programs. The heavy onus on an accused to show due diligence in trial, combined with a substantial increase in the severity of penalties that could be imposed on conviction, made it economically attractive to institute such measures<sup>624</sup>.....The reverse onus plays an important role in protecting the Canadian environment and public health. Reducing the onus creates a serious risk of significantly reducing the protection of the public against

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<sup>621</sup> E.g., see N. Strantz, "Beyond *Sault Ste. Marie*: The Creation and Expansion of Strict Liability and the 'Due Diligence' Defence," (1992) 30 *Alta. L. Rev.* 1233 - 1257, at p. 1251.

<sup>622</sup> *Ibid.*, at p. 1250.

<sup>623</sup> John Swaigen, "Negligence, Reverse Onuses and Environmental Offences: Some Practical Considerations," (1992) 2 *JELP* 149 - 188 at p. 166. See similar statements from former Crown prosecutor Dianne Saxe in "Due Diligence: Reasonable Doubt Test Reaffirmed," (1991) 2 *Environmental Law Alert* (No. 3) pp. 1 - 3, at p. 2.

<sup>624</sup> *Ibid.*, at p. 166.

serious environmental harm.<sup>625</sup>

Government officials have made similar statements about the importance of the balance of probability reasonable care defence to enforcement.<sup>626</sup> Defence counsel have also acknowledged the stimulative effect of the due diligence defence.<sup>627</sup>

Thus, beginning with *Sault Ste. Marie*, and then proceeding through hundreds court decisions since that time, the efforts at the judicial level to articulate and flesh out the due diligence defence, to thereby decrease negligent regulatory behaviour and in turn, to better protect the public interest, may be bearing fruit. The move of some industry players toward self regulation, third party auditing, and the corporate imposition of formal quality management approaches as a response (at least in part) to the due diligence defence, is discussed in greater detail in Part Three of the thesis.

While the cases suggest that a high standard of care is required of regulated actors --

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<sup>625</sup> *Ibid.*, at p. 167. See similar statements from former Crown prosecutor Dianne Saxe in "Due Diligence: Reasonable Doubt Test Reaffirmed," (1991) 2 *Environmental Law Alert* (No. 3) pp. 1 - 3, at p. 2.

<sup>626</sup> E.g., see the comments of Mr. Chris Martin of the federal Competition Bureau, concerning the strict liability misleading advertising offences located in *Competition Act*, in "Competition Act's Regulatory System is Valid to Proscribe Misleading Ads," (1991) 61 *BNA Antitrust & Trade Regulation Reporter* (11-7-1991), pp. 589 - 590, at p. 590.

<sup>627</sup> The following description of defence counsel views is from "Courts Complicate Due Diligence Defence," *Law Times* Dec. 9 - 15, 1991:

Even though the due diligence defence makes her role as defence counsel more challenging, Mary Beth Currie, a partner in the labor department of McCarthy Tétrault in Toronto, believes that the onus encourages employers to take pro-active steps before an accident occurs. "I don't think that is a bad thing," she says. Hassell [Jim Hassell of Osler Hoskin & Harcourt] agrees. "It draws in the concept of responsibility, perhaps through the backdoor, but in effect it rewards employers which are safety-conscious and which are trying their hardest." Hassell goes on to say "Where you've got an employer who is working 110 percent to provide a safe workplace, to me it seems somewhat unfair that they should be responsible in a criminal sense when an employee is careless."

With respect to Hassell's latter point, it is submitted that an accused who has put in place a due diligence system to prevent accidents from taking place should be successful in raising a due diligence defence. For example, this was the outcome in the 1997 *R. v. B.C. Hydro* decision, discussed earlier.

perhaps particularly so for commercial and professional officials -- this is not to suggest that accused persons have been unable to successfully invoke due diligence defences.<sup>628</sup> One commentator has concluded that "[m]any acquittals are reported, but also some convictions where lack of negligence was not proved."<sup>629</sup>

From an enforcement standpoint, it is perhaps self-evident that prosecutions for strict liability offences are a considerably greater challenge for prosecutors than are absolute liability offences. Essentially, the due diligence defence puts a heavy burden on the prosecution and in turn on enforcement personnel to generate the evidence and build the case which is sufficiently convincing to defeat due diligence claims put forward by accused persons.<sup>630</sup> In the initial years following the *Sault Ste. Marie* decision, some commentators feared that the task of defeating due diligence claims made by accused persons might put government enforcement at an extreme disadvantage.<sup>631</sup> Commentators have also suggested that it has compelled government to adopt more complete and rigorous investigatory tactics.<sup>632</sup> It has been said that the costs of investigation have increased substantially.<sup>633</sup> In light of that as well as budget constraints,

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<sup>628</sup> See, e.g., above discussion of *R. v. Chapin*, *R. v. Northwood Pulp and Paper Co.*, *R. v. B.C. Hydro*, *R. v. Namink*, *R. v. Beauchamp*, *R. v. Stone*, and *R. v. Richardson*.

<sup>629</sup> Stuart, *op cit.*, at p. 170.

<sup>630</sup> As discussed in K. Webb, *Pollution Control in Canada: the Regulatory Approach in the 1980s*, *op cit.*, at p. 37.

<sup>631</sup> E.g., see J. Swaigen, "Procedure in Environmental Regulation," in P. Finkle and A. Lucas, *Environmental Law in the 1980s: A New Beginning* (Calgary: Canadian Institute of Resources Law, 1982) 85, at p. 94 - 95.

<sup>632</sup> M. Jeffery, "Environmental Enforcement and Regulation in the 1980's" *R. v. Sault Ste. Marie Revisted* (1984) 10 *Queen's L.J.* 43 at 68 .

<sup>633</sup> Per Swaigen, "Procedure...", *op cit.*, at p. 71. See also K. Webb, "Between Rocks and Hard Places: Bureaucrats, Law and Pollution Control," in R. Paehlke and D. Torgerson, eds., *Managing Leviathan:*

prosecutors have tended to become more selective.<sup>634</sup> This can be considered as a positive development in the sense that prosecutorial efforts are now focussed on where they will be most useful -- on conduct that appears negligent.<sup>635</sup> Conveniently, this improved focus means a more just approach to enforcement in the sense that only misconduct that is perceived as fault-based tends to be acted on. In the environmental context, it has been asserted that the length and cost of trials has also increased, as has the need for the services of expert witnesses.<sup>636</sup>

Synthesizing the foregoing discussion, what seems to emerge is that, while not without flaws, both the classification system set out in *Sault Ste. Marie*, and the new strict liability offence with balance of probabilities due diligence defence which was recognized in *Sault Ste. Marie* have generally proven to be workable. Absolute liability offences have become extremely rare, and the strict liability category has swelled to impressive pre-eminence in regulatory legislation. Commentators have observed that there are no examples of subjective mens rea true crime offences being re-characterized as strict liability offences. On the other hand, quite properly, the classification approach has not prevented judicial recognition of offences which, because of specific legislative language, do not fit into any of the three categories specified by Mr. Justice Dickson. The recent emergence of the "quasi-regulatory" type, an intermediate *Criminal Code* category between the strict liability offence and subjective awareness true crime categories, could be described as an example of this.

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*Environmental Politics and the Administrative State* (Peterborough, Ont.: Broadview Press, 1990), pp. 201 - 228, at p. 212.

<sup>634</sup> Swaigen, *ibid.*

<sup>635</sup> *Ibid.*

<sup>636</sup> *Ibid.*

The due diligence defence, while ambiguous, has gradually been fleshed out by the courts, and has in the opinion of several commentators encouraged considerable activity aimed at reducing negligence, particularly insofar as commercial actors are concerned. Due diligence defences have been successfully mounted both by commercial and non-commercial regulated actors, and there is reason to suggest that a less onerous standard is being applied to the non-commercial actors. Because prosecutions of strict liability offences can involve an inquiry into the due diligence activities of accused persons, these prosecutions have tended to be more involved and complex and hence more expensive than absolute liability offences, have necessitated development of more sophisticated investigatory efforts, and may lead to a more selective enforcement process than would be necessary with absolute liability offences. Selective enforcement policies tend to compel regulatory officials to concentrate their resources on cases where there is evidence of negligence, since these are the cases which hold the greatest potential for obtaining a conviction. In seeking to prosecute only “fault-based” violations, an argument can be made that a more fair method of enforcement is implemented than is necessary where absolute liability offences are involved.

In short, the foregoing analysis of how the *Sault Ste. Marie* decision has been interpreted and applied suggests that Justice Dickson articulated a workable approach to offence classification. In the introduction of the strict liability offence with due diligence defence *Sault Ste. Marie* it has provided a more fair approach to imposing liability than that offered by absolute liability offences, an approach which commentators believe stimulates regulated actors to exercise reasonable care.

## Chapter 9 -- Canada: The *Charter* Era -- Early Years

### *The Introduction of the Charter*

In 1982, four years after the *Sault Ste. Marie* decision, the most significant event in recent Canadian legal history took place: the *Canadian Charter of Rights and Freedoms* became law. As a constitutional document, the *Charter* binds both Parliament and provincial legislatures, and their respective governments.<sup>637</sup> Because it is part of the supreme law of Canada, any law that is inconsistent with its provisions is, to the extent of the inconsistency, of no force or effect.<sup>638</sup> Before the introduction of the *Charter*, it was possible for courts to rule that a particular law was *ultra vires* if it exceeded the jurisdiction of one or other level of government, but penal laws which were *intra vires* the federal government or provincial government were for all intents and purposes judicially unassailable except through indirect interpretive techniques. The *Sault Ste. Marie* decision represented a good example of the full exercise of this pre-*Charter* judicial power when the Supreme Court of Canada expressed extreme distaste for (but did not declare null and void) absolute liability offences, and articulated a presumption that offences located in public welfare legislation would be classified as strict not absolute liability offences, with a due diligence defence.

Sections 7 through 14 of the *Charter* articulate a host of rights of direct application to penal proceedings. In addition, a number of other provisions in the *Charter* are relevant to penal offences. For present purposes, only the basic structure and relevant provisions of the *Charter* as

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<sup>637</sup> Section 32(1).

<sup>638</sup> Per s. 52(1) of the *Constitution Act, 1982*.

it applies to penal offences are described. Following this, several key decisions interpreting the *Charter* are examined.

At the outset, it is worth noting that, while the *Charter* refers on a number of occasions to "offences",<sup>639</sup> "guilt",<sup>640</sup> "punishment"<sup>641</sup> and "imprisonment",<sup>642</sup> there is only a single reference to "criminal" law.<sup>643</sup> The *Charter* reference to "criminal" occurs in a subsection to a general provision pertaining to persons charged with an offence, and is not relevant to the concerns of this paper. The significance of the numerous *Charter* references to offences, punishment, and imprisonment, and the paucity of references to "criminal" provisions is arguably twofold: first, it suggests an attempt by the drafters to ensure that the *Charter's* provisions apply to all penal proceedings, and second, a desire to not necessarily import holus bolus the distinctions, concepts and interpretive lenses of specific models of penal liability into its provisions. Thus, in theory at least, in approaching *Charter* interpretation of penal laws and related government implementation activity, courts need not automatically adopt a conventional "criminal" approach.

Section 7 of the *Charter* stipulates that 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. Immediately evident in this provision is the interpretive leeway provided by such ambiguous terms as "right to life, liberty and security of the person" and "principles of

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<sup>639</sup> E.g., opening words to s. 11, and also ss. 11(a), 11(c), 11(f), 11 (h), 11(i) .

<sup>640</sup> Subsection 11(d), 11(g), 11(h), 11(i) .

<sup>641</sup> E.g., ss. 11(f), 11(h), 11 (i), s. 12 .

<sup>642</sup> E.g., s. 9, ss. 11(f) .

<sup>643</sup> Subsection 11(g).

fundamental justice". The relevance of this provision to a regulatory offence is dependent on how these phrases are interpreted. Thus, for example, while clearly capital punishment would constitute a deprivation of "life," and imprisonment a deprivation of "liberty," it is not immediately clear whether a large fine or withdrawal of a business licence could be considered a deprivation of security. Similarly, whether a particular form of proceeding (e.g., administrative, civil, penal) would be considered as being compatible with principles of fundamental justice or not is not entirely and immediately clear.

Section 8 indicates that everyone has the right to be secure against unreasonable search or seizure, but, as with s. 7, there is tremendous definitional ambiguity: What constitutes a search or seizure, and when is it unreasonable? Would it apply differently in regulatory contexts when compared with criminal contexts? How would such different treatment be justified?

Pursuant to s. 11, any person charged with an offence is guaranteed numerous rights, including the right to be informed of the specific offence, to be tried within a reasonable time, to not be compelled to be a witness, to be presumed innocent until proven guilty, to not be denied bail without just cause, to the benefit of a jury trial in certain circumstances, and others.

Concerning the s. 11(d) right to be presumed innocent, it is worth reviewing the language of the protection:

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.

Note that there is no reference here to burdens of proof. Thus, for example, nothing is being said about proof beyond a reasonable doubt, or on a balance of probabilities, or shifting of burdens to

the accused.<sup>644</sup> Nor, for that matter, does the protection indicate when a presumption of innocence is exhausted, and what constitutes being "proven guilty." This, of course, is of direct relevance to earlier discussions concerning the strict liability offence with the due diligence defence established on a balance of probabilities.

There are other significant and fundamental rights of direct relevance to persons in penal proceedings, outlined in sections 9, 10, and 12 through 14. In addition, beyond the ss. 7 - 14 "core" of legal rights, many other provisions can potentially apply to penal actions, including the "freedoms" section (s. 2), and the equality protections (s. 15). For purposes of possible challenges to regulatory offences, there are three other provisions of relevance to discussion here. The first is s. 24, which provides that anyone whose rights and freedoms have been infringed may apply to a court for the appropriate remedy. This is the "trigger" provision, and it ensures that issues associated with regulatory offences can be addressed, and where addressed the court will have the power to strike down or otherwise rectify *Charter* violations.

Pursuant to s. 33, it is possible for federal and provincial legislators to declare an Act or

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<sup>644</sup> In *R. v. Oakes* (1986) 26 DLR (4th) 200 (discussed in greater detail below), Chief Justice Dickson for the majority of the Supreme Court of Canada interpreted s. 11(d) at pp. 212 - 213 as follows: The presumption of innocence is a hallowed principle lying at the very heart of criminal law. Although protected expressly in s. 11(d) of the Charter, the presumption of innocence is referable and integral to the general protection of life, liberty and security of the person contained in s. 7 of the Charter....The presumption of innocence protects the fundamental liberty and human dignity of any and every person accused by the state of criminal conduct. An individual charged with a criminal offence faces grave social and personal consequences, including potential loss of physical liberty, subjection to social stigma and ostracism from the community, as well as other social, psychological and economic harms. In light of that, until the state proves an accused's guilt beyond a reasonable doubt, he or she is innocent. This is essential in a society committed to fairness and social justice. The presumption of innocence confirms our faith in humankind; it reflects our belief that individuals are decent and law-abiding members of the community until proven otherwise.

In the subsequent Supreme Court of Canada decision of *R. v. Wigglesworth* [1987] 2 SCR 541 (discussed in greater detail below), the Court held that s. 11(d) presumption applied to all "penal offences" (offences in which either imprisonment or large fines were available), and not just to criminal offences. However, the exact content of the presumption as applied to regulatory offences was not definitively decided in the case.

provision thereof to operate notwithstanding s. 2 and ss. 7 - 15 of the *Charter*. This declaration ceases to have effect after five years, although it may be re-enacted. This section represents one of two "override" provisions in the *Charter*, and as such could potentially be applied to any offence provision which contravenes *Charter* protections where a federal or provincial legislator felt that this was sufficiently important to warrant such an action. As regards offence provisions, no such over-ride has ever been attempted or, to the knowledge of the author contemplated. Arguably, its importance lies in its potentially liberating effect on judges' interpretation of the *Charter's* protections: since legislators *can* override the *Charter*, the argument goes, then courts should feel free to give the rights the full and liberal interpretation they deserve.

The second over-ride provision contained in the *Charter* is section 1, which states that the *Charter* guarantees the rights and freedoms set out in it "subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society." The self-evident effect of this provision is to explicitly allow for a balancing of the rights and protections afforded by the *Charter* to individuals against the rights of the greater collective. In so doing, the *Charter* recognizes that no rights or freedoms are absolute, and indeed that the rights and freedoms of one can conflict with those of others. Thus, the technical impact of the provision is that it is possible for an offence or an element of an offence to be considered in violation of the *Charter*, and yet, if it could be "demonstrably justified" as a reasonable limit, then the provision could still stand.

It is worth pointing out that earlier versions of this section gave considerably greater latitude for over-riding the *Charter's* protections. Thus, for example, in the 1971 "Victoria Charter," stipulated that the enshrined rights and freedoms could be over-ridden when it is

"reasonably justifiable" in a democratic society "in the interests of public safety, order, health or morals, of national security, or of the rights and freedoms of others...."<sup>645</sup> Note that the *Charter's* actual wording of "demonstrably justifiable" seems more strict than the Victoria Charter's "reasonably justifiable" terminology. The itemization of the various types of public interests in the Victoria Charter was not included in the final version of the *Charter*, thus providing courts with less guidance and more discretion as to acceptable justifications.

The 1980 draft of the *Charter's* section 1 was more condensed than the Victoria version. According to the 1980 draft, the enshrined rights were subject only to such "reasonable limits as are generally accepted in a free and democratic society..."<sup>646</sup> Again, it would appear that the *Charter's* final wording of "demonstrably justified" sets a higher standard of justification than does a "generally accepted" requirement. In short, this comparative analysis of section 1 suggests that the *Charter's* drafters ultimately chose to set the bar high as to when the *Charter's* protections could be overridden, and gave the courts considerable discretion as to how to interpret the override power.

Even with the benefit of this comparative analysis, as the *Charter* era began, it can be seen that many questions were left unanswered concerning the meaning of section 1, including what would constitute a "demonstrable" justification, and how justifications could be made. For current purposes, the importance of this provision, as with section 33, lies in its recognition that *Charter* rights are not absolute, and in the potentially liberating effect the provision could have on

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<sup>645</sup> Set out in R. Knopf and F. Morton, *Charter Politics* (Scarborough, Ont.: Nelson Canada, 1992), p. 38.

<sup>646</sup> Knopf and Morton, *ibid.*, at p. 39.

judges who would be under no obligation to constrain their interpretations of rights and freedoms, knowing that the ability to temper that interpretation with considerations of other competing rights could take place under section 1. In effect, the individualistic focus of the rights enshrined in sections 7 through 14 of the *Charter* are evidence of its liberalist, “autonomy maximizing” design, intended to protect citizen’s from the incursions of the State.<sup>647</sup> But, in a rather practical, Canadian compromise, these rights and freedoms can ultimately be modified where persuasive utilitarian “public welfare” arguments can be made.

With this brief overview it is now possible to turn our attention to the application of the *Charter* to regulatory offences. Of immediate interest are several basic issues: how would absolute liability offences fare under the *Charter*? In particular, would such offences be considered to violate section 7, with its protections against deprivations of life, liberty or security of the person except in accordance with principles of fundamental justice? If so, could such offences be upheld on public policy grounds as a reasonable limit under section 1? Similarly, would negligence offences pass muster under section 7? Even if so, would the defence of due diligence established on a balance of probabilities be considered offensive under s. 11 (d)'s guarantee of the right to be presumed innocent until proven guilty? If not, would they be justifiable under section 1? To answer these questions, it is necessary to examine how courts have interpreted and applied the *Charter's* provisions -- both where regulatory offences have been directly in issue, and where they have not, but nevertheless interpretations have been made which

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<sup>647</sup> Peter Hogg, in *Constitutional Law of Canada* 3rd. ed. (Toronto: Carswell, 1992), at p. 816, writes that “...all the *Charter* guarantees respect some aspect of individual liberty, dignity or privacy.” Note that, in characterizing ss. 7 - 14 of the *Charter* as having an individualistic focus, this is not meant to deny the definite collective orientation of other *Charter* provisions.

could have implications for regulatory offences.

### *Application of the Charter*

Before beginning analysis of the Supreme Court and other courts' application of the *Charter*, it is worthwhile to return briefly to the *Sault Ste. Marie* decision, and compare the analysis and application of principles of penal liability undertaken by Justice Dickson in this pre-*Charter* era case to the approach and principles suggested by the above-outlined initial reading of the *Charter*. The key question is, did the *Charter* add something new or different to the content and process of analysis undertaken by the Supreme Court of Canada in *Sault Ste. Marie*, and if so, what? We know that in *Sault Ste. Marie*, Mr. Justice Dickson first considered absolute liability offences, and considered the arguments for and against such offences. He found that such offences violated "fundamental principles of penal liability." It would appear as if his Lordship engaged in a form of intuitive pre-*Charter* section 7 analysis, and found the absolute liability offence wanting, and moreover, he had difficulty justifying such offences by arguments of administrative convenience, in an intuitive application of section 1.

With respect to the strict liability offence, Dickson J. found that a defence of no negligence ensured that the "morally innocent" were not found penally liable. This suggests compatibility with section 7's protections. Concerning section 11(d)'s presumption of innocence, Mr. Justice Dickson explicitly considered the formulation of the proof beyond a reasonable doubt standard in *Woolmington* and found it not applicable to defences contained in regulatory, non-intentional offences contained in public welfare legislation. He suggested that a balance of probabilities burden on the accused was reasonable where negligence was the fault requirement in question, and that no workable alternative existed. In light of the fact that the terms of s. 11(d)

on its face do *not* require proof beyond a reasonable doubt, and do not provide guidance on such issues as whether elements of the offence and defences should be treated the same for purposes of application of the presumption of innocence, Dickson J's analysis here does not seem to contradict the *Charter*. His comparison with alternatives resembles a section 1 "demonstrably justifiable" review of limitations on a *Charter* freedom or right.

On its face, then, there is nothing immediately and obviously evident in the *Charter's* terms which would suggest that the strict liability offence articulated and justified in *Sault Ste. Marie* would not pass muster, and on the other hand, Mr. Justice Dickson's analysis in *Sault Ste. Marie* points to potential problems with absolute liability offences under section 7. This should surely not be surprising. The *Charter* does not articulate any startling new concepts or protections which were not fully familiar to and recognized by the Supreme Court prior to its passage. The *Sault Ste. Marie* decision was decided a mere four years before the *Charter* was introduced, so there is little reason to think that the Court's position on issues of fundamental justice and the presumption of innocence would change: one could argue that really, only the power of the Court to act directly and authoritatively in the case of violation of fundamental principles has changed -- with the passage of the *Charter*, the Court now has the ability to directly overturn or otherwise alter a provision found offensive of the *Charter's* protections.

Two other points need to be kept in mind. First, the strict liability offence as described in *Sault Ste. Marie* was not a creature of statute: it was developed by the judiciary, and thus, strictly speaking, this is not a situation where a court was reluctantly deferring to the will of

legislators.<sup>648</sup> The strict liability offence as articulated in *Sault Ste. Marie* was a judicial creation. Second, the *Sault Ste. Marie* decision was a unanimous judgment of the Supreme Court. Thus, there was no dissent concerning its applications of the fundamental tenets and protections of penal justice -- tenets and protections which are apparently enshrined in the *Charter*.

Why, then, would a strict liability offence as articulated in *Sault Ste. Marie* be put in jeopardy by the passage of the *Charter*? It is submitted that there is a way that the *Charter* could be applied so as to overturn a strict liability offence. This could happen if two interpretative approaches were adopted: first, if the interpretations of individual provisions in the *Charter* were developed not with strict liability offences in mind, but rather with other offences, such as conventional mens rea true crimes. In such a situation, an inappropriate approach (e.g., a rigorous subjective "true crimes" approach) to *Charter* interpretation could be developed. Second, if provisions of the *Charter* were applied in a mechanistic fashion, so that each *Charter* protection was looked at as an individual stand-alone protection with no or little inter-action, among the various other protections, this could work against strict liability offences. For example, if the courts were to conclude that one protection would be applied in a flexible manner to recognize differences between criminal and regulatory contexts, but other protections were not given a "contextual" reading, then problems might arise. Thus, if a narrow "criminal" interpretation of *Charter* provisions was adopted, and regulatory contexts were only considered vis-a-vis some provisions and not others, then an offence which was created by the Supreme

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<sup>648</sup> Nevertheless, as we have seen, *Sault Ste. Marie* represented an attempt by the Supreme Court of Canada to develop a fair yet effective alternative to the absolute liability offence and true crime offence types, in the absence of a constitutional power to overturn any particular offence. As such, the Supreme Court of Canada may have indirectly been attempting to defer to the perceived will of the legislators (who had developed laws of both the absolute and true crime types).

Court of Canada four years prior to the *Charter* could end up being vulnerable to being overturned by application of the *Charter's* terms. As will be seen, something very similar to this scenario did in fact transpire.

For this reason, it is necessary to examine some *Charter* cases in the early years which do *not* directly concern regulatory offences, but where interpretations and approaches of *Charter* provisions were developed which have had a strong bearing on strict liability offences, as well as cases directly pertaining to strict liability offences. In addition, court interpretations of the application of the *Charter* to absolute liability regulatory offences are also examined.

#### *The B.C. Motor Vehicle Case*

In the 1985 decision of *Reference Re Section 94(2) of the Motor Vehicle Act*,<sup>649</sup> the Supreme Court of Canada was asked to determine the constitutional validity of an absolute liability offence with a minimum jail sentence. The seven judge Court unanimously found the offence to be in violation of section 7 of the *Charter*, although several different judges provided reasons. The decision of the largest faction, written by Lamer J. (as he then was, concurred in by four others, including Chief Justice Dickson) will be considered here.

Section 94(1) of the B.C. *Motor Vehicle Act*, stated as follows:

A person who drives a motor vehicle on a highway ....while ...his driver's licence.....is suspended....commits an offence and is liable....to a fine of not less than \$300 ....and to imprisonment for not less than 7 days.....

Pursuant to s. 94 (2), the following was added:

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.

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(1985) 24 DLR (4th) 536.

Note as a preliminary manner how the impugned provisions seem to reflect an attempt by the B.C. legislators to pay heed to the guidance provided by *Sault Ste. Marie* that in the absence of evidence that they have “made it clear” that an offence was intended to be absolute liability it will be characterized as strict liability in nature. Note, however, how s. 94(2) only speaks of guilt being established “whether or not the defendant *knew* of the prohibition...” Technically speaking, this would not appear to rule out the defence of exercising reasonable care. Thus, an even more careful way for the legislators to have ruled out a subsequent judicial characterization of the offence as strict liability in nature would have been to frame it so that it stipulated that guilt would be established “whether or not the defendant knew of the prohibition or exercised reasonable care to determine that he was the subject of the prohibition or suspension.”

Justice Lamer began his decision by reviewing the Court of Appeal's decision on this issue, where the offence had been ruled contrary to the *Charter's* s. 7, and not justifiable under section 1. Lamer J. noted that the decision seemed to focus on the existence of a mandatory minimum jail sentence, and that the issue of whether *any* combination of absolute liability and imprisonment was offensive to the *Charter* could not be clearly ascertained from the judgment of the B.C. Court of Appeal.<sup>650</sup>

His Lordship then acknowledged the expanded powers of the courts to review legislation as a result of the 1982 constitutional amendments:

The truly novel features of the Constitution Act, 1982 are that it has sanctioned the process of constitutional adjudication and has extended its scope so as to encompass a broader range of values. Content of legislation has always been considered in constitutional adjudication. Content is now to be equally considered as regards new constitutional issues. Indeed, the values subject to constitutional adjudication now pertain

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<sup>650</sup> *Ibid.*, at p. 543.

to the rights of individuals as well as the distribution of governmental powers.<sup>651</sup>

The next question, according to Lamer J., was whether the terms "principles of fundamental justice" have a substantive or merely procedural content.<sup>652</sup> His Lordship discounted comparisons with similar discussions revolving around interpretations of the American constitution, noting the specific powers of Canadian courts to over-rule legislation, as well as the "internal checks and balances" provided by ss. 1 and 33.<sup>653</sup> For Justice Lamer, the task of the court is to secure for persons "the full benefit of the *Charter's* protection," while avoiding adjudication of the merits of the public policy.<sup>654</sup> This necessitates a "purposive analysis" and the articulation of "objective and manageable standards" for the operation of the section.<sup>655</sup>

Justice Lamer stated that because only deprivation of liberty was considered in the *Motor Vehicle* proceedings, and no one took issue with the fact that imprisonment was a deprivation of liberty, his analysis of s. 7 would be limited to determining the scope of the "principles of fundamental justice" vis-a-vis imprisonment, and so he would not attempt to "give any further content to liberty nor address that of the words life or security of the person."<sup>656</sup> While this narrow approach follows the lead of the B.C. Court of Appeal, and as such is understandable, it fails to provide guidance on whether absolute liability offences in instances where imprisonment is

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<sup>651</sup> *Ibid.*, at p. 544.

<sup>652</sup> *Ibid.*, at p. 545.

<sup>653</sup> *Ibid.*, at p. 546.

<sup>654</sup> *Ibid.*

<sup>655</sup> *Ibid.*

<sup>656</sup> *Ibid.*, at p. 548.

not available would also be contrary to s. 7. Particularly in light of Dickson J's strong condemnation of absolute liability in *Sault Ste. Marie*, without distinction as regards to the form of punishment, this aspect of Mr. Justice Lamer's judgment is disappointing.

His Lordship concluded that the meaning of "principles of fundamental justice" was broad, and included a substantive component, and that this could be gleaned by looking at ss. 8 - 14 of the *Charter*, which were illustrative of the general s. 7 protections.<sup>657</sup> He observed that the principles of fundamental justice "have been developed over time as presumptions of the common law, others have found expression in the international conventions on human rights. All have been recognized as essential elements of a system for the administration of justice which is founded upon a belief in 'the dignity and worth of the human person.'"<sup>658</sup>

Justice Lamer summarized his position by stating that the principles of fundamental justice "are to be found in the basic tenets and principles, not only of our judicial process, but also of the other components of our legal system," and that "future growth will be based on historical roots."<sup>659</sup> Turning to the case at hand, Justice Lamer observed that "[i]t has from time immemorial been part of our system of laws that the innocent not be punished."<sup>660</sup> Referring to only two other cases which reiterated this principle, his Lordship then began examination of the *Sault Ste. Marie* decision. While repeating Dickson J.'s statements that there is a "generally held revulsion against punishment of the morally innocent," and absolute liability "violates fundamental principles of

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<sup>657</sup> *Ibid.*, at p. 549.

<sup>658</sup> *Ibid.*, at pp. 549- 550.

<sup>659</sup> *Ibid.*, at p. 557.

<sup>660</sup> *Ibid.*, at p. 558.

penal liability," Justice Lamer stated that an absolute liability offence will violate s. 7 "only if and to the extent that it has the potential of depriving of life, liberty or security of the person."<sup>661</sup>

Earlier in this thesis, we examined the development of the common law as it pertained to criminal law and regulatory offences. We noted that in fact there has been a long tradition of holding persons liable without fault, and that the nineteenth century saw a resurgence of absolute liability offences. None of this was referred to in Mr. Justice Lamer's judgment. The constantly changing and evolving nature of penal law was noted, thus allowing later courts to choose those aspects of earlier decisions which suited their needs. By leaving the definition of fundamental justice so vague, the Supreme Court in *Motor Vehicle* maintained considerable discretion to draw on earlier common law conceptions as they see fit, but at the same time has provided little indication about how and which conceptions might be called on. While it is understandable why Justice Lamer framed his judgment concerning the meaning of fundamental justice in the fashion he did, it is nevertheless disappointing from the standpoint of providing guidance to the public as to whether and to what extent the Court would choose to interpret and apply the phrase to particular regulatory contexts.

Justice Lamer concluded that any combination of imprisonment (including probation orders) and absolute liability is an unacceptable deprivation of liberty that offends s. 7.<sup>662</sup> His

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<sup>661</sup> *Ibid.*, at p. 559.

<sup>662</sup> *Ibid.*, at p. 560. In subsequent decisions, the Supreme Court of Canada has not directly addressed the question of whether imprisonment in default of a fine could be considered to be in violation of s. 7. In its 1990 report, *The Basis of Liability for Provincial Offences* (Ontario: Law Reform Commission, 1990), at p. 16, the Ontario Law Reform Commission noted that close to 30% of offenders in jail were there because they had defaulted on paying their fines. In *R. v. Richard* [1996] 3 SCR 525, the Supreme Court of Canada considered the constitutionality of the Nova Scotia *Provincial Offences Procedure Act*, and La Forest J. (for the Court) noted the following at para. 31:

In the case at bar....there is absolutely no possibility of imprisonment, since the penalties that can be

Lordship carefully emphasized that no decision was being made concerning absolute liability and punishments short of imprisonment.<sup>663</sup> With respect to the argument that the offence with imprisonment could be justified under section 1, Justice Lamer stipulated that only in exceptional circumstances such as natural disasters, the outbreak of war, and epidemics, would such arguments based on administrative expedience be effective.<sup>664</sup> His Lordship felt that the goal of ridding the roads of bad riders could not justify the risk of imprisonment of a few innocents, given that the alternative of an offence of strict liability "open to a defence of due diligence" was available.<sup>665</sup>

While this comparison to the strict liability offence suggests that a defence of no negligence would be an acceptable minimum level of fault under the *Charter*, his Lordship did not indicate whether a due diligence defence established on a *balance of probabilities* would pass muster. This would await a later decision when the *Charter's* s. 11(d) would be directly under consideration. In short, the absolute liability offence with imprisonment available as a penalty was held to be unconstitutional under the *Charter* (except when used to address emergency circumstances). The effect of the decision was to elevate *Sault Ste. Marie's* determination that absolute liability "violates fundamental principles of penal liability" to a constitutional requirement,

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imposed in proceedings initiated by means of a ticket are limited to fines, and the failure to pay a fine for contravening the Motor Vehicle Act can in no case result in imprisonment. Thus, the liberty component of s. 7 of the Charter does not come into play.

It would appear, then, that the one certain method for legislators to avoid raising *Charter* s. 7 liberty concerns with regulatory offences is to avoid any possibility of imprisonment, including in default of payment.

<sup>663</sup> *Ibid.*, at p. 561.

<sup>664</sup> *Ibid.*

<sup>665</sup> *Ibid.*, at p. 563.

but only insofar as imprisonment (or some other direct deprivation of liberty such as a probation order) was a punishment.

### *The Oakes Decision*

In the 1986 decision of *R. v. Oakes*,<sup>666</sup> the Supreme Court of Canada considered the constitutional validity of a reverse onus provision under the *Narcotic Control Act*. Pursuant to s. 8 of the *Act*, an accused who had been charged with possession of narcotics and was found in possession, was therefore required to refute a mandatory presumption of intent to traffic or face a penalty of imprisonment for life. The majority of the Court ruled that the reverse onus provision violated s. 11(d) of the *Charter* and was not justifiable under section 1, because there was no rational connection between the proven fact (possession of a narcotic) and the presumed fact (possession was for the purpose of trafficking) -- it was quite conceivable that an individual could possess a quantity of narcotics without any intention to traffic. Although the case concerned an intentional offence in the "true crimes" category, and therefore did not directly address the application of s. 11(d) and s. 1 to regulatory offences, the interpretation of s. 11(d) and s. 1, and the approach taken to applying these provisions, set standards of analysis which would later be applied to the strict liability offence.

The majority judgment (concurring in by four others) was written by Chief Justice Dickson.

Regarding the presumption of innocence, enshrined in s. 11(d), the Chief Justice stated that:

The presumption of innocence is a hallowed principle lying at the very heart of criminal law.....[It] protects the fundamental liberty and human dignity of any and every person accused by the State of criminal conduct. An individual charged with a criminal offence faces grave social and personal consequences, including potential loss of physical liberty, subjection to social stigma and ostracism from the community.....It ensures that until the

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<sup>666</sup> [1986] 26 DLR (4th) 200 .

State proves an accused's guilty beyond all reasonable doubt, he or she is innocent.<sup>667</sup>

Note here the references to "criminal law," "criminal conduct," and "criminal offences." Chief Justice Dickson then turned to the *Woolmington* case for support, where again the criminal law focus was explicit.<sup>668</sup> International covenants were also mentioned as evidence of the widespread recognition of the presumption of innocence.

The Chief Justice then concluded this portion of his analysis as follows:

In light of the above, the right to be presumed innocent until proven guilty requires that...an individual must be proven guilty beyond a reasonable doubt,...it is the State which must bear the burden of proof.....criminal prosecutions must be carried out in accordance with lawful procedures and fairness.<sup>669</sup>

Again, the criminal focus of Dickson CJC's remarks is apparent.

Chief Justice Dickson then looked at previous jurisprudence on reverse onus provisions, and considered earlier Supreme Court decisions which had applied a similar presumption of innocence contained in the non-constitutional *Canadian Bill of Rights*.<sup>670</sup> This jurisprudence included cases (i.e., *R. v. Appleby*<sup>671</sup> and *R. v. Shelley*<sup>672</sup>) where the Court had concluded that requiring by statutory provision that an accused prove beyond a reasonable doubt an essential element of an offence would be contrary to the *Bill of Rights*, but imposing a balance of probabilities standard on accused persons would be allowable, where there was a rational

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<sup>667</sup> *Ibid.*, at pp. 212 -213.

<sup>668</sup> *Ibid.*, at p. 213.

<sup>669</sup> *Ibid.*, at p. 214.

<sup>670</sup> *Canadian Bill of Rights*, SC 1960, c. 44, s. 2(f).

<sup>671</sup> (1971) 3 CCC (2d) 354 .

<sup>672</sup> (1981) 59 CCC (2d) 292.

connection between the proven fact and the presumption to be refuted by the accused. While attracted to the rational connection test, Dickson CJC felt that neither the case law developed under the *Canadian Bill of Rights* nor *Woolmington*, with its exception for statutory exemptions, was binding authority since the *Charter* was fundamentally different due to its constitutional character:

With this in mind, one cannot but question the appropriateness of reading into the phrase "according to law" in s. 11(d) of the *Charter* the statutory exceptions acknowledged in *Woolmington* and *Appleby*. In Canada, we have tempered parliamentary supremacy by entrenching important rights and freedoms in the Constitution. Viscount Sankey's statutory exception provision is clearly not applicable in this context and would subvert the very purpose of the entrenchment of the presumption of innocence in the *Charter*. I do not therefore, feel constrained in this case by the interpretation of s. 2(f) of the *Canadian Bill of Rights*. Section 8 of the *Narcotic Control Act* is not rendered constitutionally valid simply by virtue of the fact that it is a statutory provision.<sup>673</sup>

Note, that, by comparison, the balance of probabilities standard of due diligence imposed on accused in strict liability offences, is a judicial creation, not "simply" a statutory provision. Chief Justice Dickson has therefore not here made a determination as to whether a judicially developed and imposed exception to *Woolmington*'s articulation of the presumption of innocence would be treated any differently than a statutory exception.

The Chief Justice then looked at lower court judgments concerning the *Narcotic Control Act* reverse onus provision since the passage of the *Charter*, and found them to be solidly according a high degree of protection to the accused pursuant to the presumption of innocence.<sup>674</sup> He reviewed American jurisprudence and found that a variation on the rational connection test has been applied by American courts. Thus, for example, Dickson CJC quoted with apparent

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<sup>673</sup> *Oakes, ibid.*, at p. 217.

<sup>674</sup> *Ibid.*, at p. 220.

approval the following rational connection test from *Leary v. United States*,<sup>675</sup> per Justice Harlan:

....[A] criminal statutory presumption must be regarded as "irrational" or "arbitrary", and hence unconstitutional, unless it can at least be said with substantial assurance that the presumed fact is more likely than not to flow from the proved fact on which it is made to depend.<sup>676</sup>

Dickson CJC notes that because the statutory presumption under consideration in *Leary* was invalid under the above test, Harlan J. stated (at footnote 64) that:

....we need not reach the question whether a criminal presumption which passes muster when so judged must also satisfy the criminal "reasonable doubt" standard if proof of the crime charged or an essential element thereof depends upon its use.<sup>677</sup>

Thus, under American law, there would appear to be no constitutional bar to a criminal statutory presumption akin to that in place in the *Narcotic Control Act* if it can be said that the presumed fact (trafficking) is more likely than not to flow from the proved fact on which it is made to depend. While all of the foregoing is discussed in the context of criminal offences, and expressly concerning "essential elements" of offences, the test of constitutionality (i.e., the presumed fact more likely than not to flow from proved fact), would not appear to pose an insurmountable obstacle to strict liability offences with a due diligence defence. That is because in regulatory offences, a presumption of failure to exercise reasonable care is more likely than not to flow from proof of the act of the offence. Dickson, CJC suggested that in Canada the appropriate opportunity to apply the rational connection test would be in s. 1 analysis.<sup>678</sup>

After reviewing this body of law, Chief Justice Dickson concluded as follows:

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<sup>675</sup> (1969), 395 U.S. 6 .

<sup>676</sup> Per *Oakes, op cit.*, at pp. 220 - 221.

<sup>677</sup> Per *Oakes, op cit.*, at p. 221.

<sup>678</sup> *Ibid.*, at p 223.

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.<sup>679</sup>

Note that the articulation of the interpretation of s. 11(d) was derived in relation to a criminal offence where intent to traffic was in question, and that an essential element was presumed. In contrast, and as Dickson J. himself pointed out in *Sault Ste. Marie*, a strict liability offence is not a crime, and due diligence is an excusing defence, not an essential element of the offence.

Dickson CJC then proceeded to consider whether the reverse onus provision in the *Narcotic Control Act* could be justified under section 1 of the *Charter*. The Chief Justice developed a two part test, to be met by the party which wishes to uphold the limitation on the *Charter* protection (i.e., normally the government) on a balance of probabilities standard.<sup>680</sup>

First, the objective, which the measures responsible for a limit on a *Charter* right or freedom are designed to serve, must be "of sufficient importance to warrant overriding a constitutionally protected right or freedom."...It is necessary, at a minimum, that an objective relate to concerns which are pressing and substantial in a free and democratic society before it can be characterized as sufficiently important.

Secondly, once a sufficiently significant objective is recognized, then the party invoking s. 1 must show that the means chosen are reasonable and demonstrably justified. This involves a form of "proportionality test"....Although the nature of the proportionality test will vary depending on the circumstances, in each case courts will be required to balance the interests of society with those of individuals and groups. There are, in my view, three important components of a proportionality test. First, the measures adopted must be carefully designed to achieve the objective in question. They must not be arbitrary, unfair or based on irrational considerations. In short, they must be rationally connected to the

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<sup>679</sup> *Ibid.*, at p. 222.

<sup>680</sup> *Ibid.*, at p. 226.

objective. Secondly, the means, even if rationally connected to the objective in this first sense, should impair "as little as possible" the right or freedom in question.....Thirdly, there must be a proportionality between the effects of the measures which are responsible for limiting the *Charter* right or freedom, and the objective which has been identified as of "sufficient importance".<sup>681</sup> (cites to cases omitted.)

In the case at bar, after reviewing domestic and international reports, the Chief Justice concluded that the objectives of the provision (reduction of the problem of drug trafficking) were pressing and substantial, and so the first test was passed.<sup>682</sup> Turning to the three-part proportionality test, Dickson CJC concluded that the presumption of trafficking did not pass the first sub-test pertaining to rational connection. A possession of a small quantity of narcotics does not support the inference of trafficking.<sup>683</sup> The presumption was thus over-inclusive and not demonstrably justifiable. This was particularly so in light of the possibility of imprisonment for life.<sup>684</sup> Therefore, the Chief Justice concluded that the reverse onus violated the s. 11 (d) presumption of innocence, and was not justifiable under s. 1.<sup>685</sup>

The *Oakes* case is important for its elaboration on the meaning of s. 11 (d), and its development of tests of what constitutes demonstrable justification of limits of *Charter* rights under s. 1. From the standpoint of its application to the strict liability offence with due diligence defence proven on a balance of probabilities, several points emerge:

(1) the description of s. 11(d) was developed in relation to a true criminal offence;

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<sup>681</sup> *Ibid.*, at p. 227.

<sup>682</sup> *Ibid.*, at pp. 228 - 229.

<sup>683</sup> *Ibid.*, at p. 229.

<sup>684</sup> *Ibid.*, at p. 229 - 230.

<sup>685</sup> *Ibid.*, at p. 230.

(2) the requirement that an accused should not bear more than an evidentiary burden was in relation to "essential elements" of the offence;

(3) the tests for demonstrable justifications of limits to *Charter* rights hinges on there being a rational connection between the objective to be achieved and the measure taken, and demonstration that the measure offend the *Charter* right "as little as possible". The meaning of "little as possible" is not entirely clear, and could be an extremely rigorous standard if applied too literally.

The *Oakes* case is thus a good example of a Supreme Court of Canada decision concerning the *Charter* which has interpreted a particular *Charter* provision in a *criminal law context*. As a result, the logic and approach taken might not necessarily be appropriate when applied in a non-criminal setting. While a case can be made that the strict liability offence would not violate s. 11(d) due to the fact that it is not a criminal offence and the due diligence defence is not in relation to an "essential element," or alternatively that the offence would be justifiable under section 1 as a reasonable, proportional response to the problem of regulatory negligent misconduct, it is equally clear that the due diligence defence established on a balance of probabilities would be vulnerable to challenge if the interpretations of s. 11(d) and s. 1 were applied as articulated in *Oakes* without any adjustment for the different context.

#### *Other s. 11(d) and s. 1 Cases*

Once the Supreme Court had articulated in *Oakes* its interpretation of the meaning of s. 11(d) and the test for the application of s. 1, the question was whether or not the interpretations and tests would prove practical when applied in different circumstances. Shortly after the *Oakes* case had been decided, the Supreme Court of Canada had reason to reconsider the section 1 test in the context of Sunday closing laws. In the 1986 decision of *R. v. Edwards Books and Art*,<sup>686</sup>

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[1986] 76 DLR (4th) 1.

the Court concluded that the prohibition of commercial activity on Sunday violated the guarantee of freedom of religion under s. 2(a) of the *Charter*. However, the Supreme Court was prepared to uphold the law as a demonstrably justified limit under s. 1 of the *Charter*. The Court concluded that the objective of the law was to provide workers with a common day of rest, and that this was a pressing and substantial objective. The *Retail Business Holidays Act* made special allowances for small, but not large, retailers who observed Saturday as the sabbath. Dickson CJC relaxed the *Oakes* standard that measures which violate *Charter* rights must do so "as little as possible" by stating that such measures were still permissible where they do so as little as *reasonably* possible.

Thus, like a new shoe which pinches, the rigorous *Oakes* standard was subsequently adjusted and made more flexible by the insertion of the word "reasonable."<sup>687</sup> As Peter Hogg, in *Constitutional Law of Canada*<sup>688</sup> notes:

...the majority opinions in *Edwards Books* in effect recognized a margin of appreciation, which would tolerate a variety of different Sunday-closing laws. Indeed, the Court has since used the phrase "margin of appreciation" to describe its approach to the requirement of least drastic means. Certainly, the cases after *Edwards Books* have applied the requirement in a flexible fashion, looking for a reasonable legislative effort to minimize the infringement of the *Charter* right, rather than insisting that only the least possible infringement could survive.<sup>689</sup>

The insertion of the word "reasonable" is arguably only common sense: there is little value in searching out alternatives which offend *Charter* protections less, but are not practical. Note that it

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<sup>687</sup> For more detailed discussion of the evolution and impact of the Supreme Court's interpretations of section 1, see J. Kiedrowski and K. Webb, "Second Guessing the Law-Makers: Social Science Research in Charter Litigation," (1993) 19 *Journal of Canadian Public Policy* 379 - 397.

<sup>688</sup> 3rd. ed. (Toronto: Carswell, 1992).

<sup>689</sup> *Ibid.*, at pp. 880 - 881.

is Chief Justice Dickson who articulated the original, tight, "little-as-possible" *Oakes* test, and it is the Chief Justice who adjusted this to a "little as *reasonably* possible" test.

In 1987, the Supreme Court considered the constitutionality of the crime of constructive murder, in *R. v. Vaillancourt*.<sup>690</sup> In *Vaillancourt*, the accused was convicted of murder when an accomplice in a robbery whom the accused thought had an unloaded gun shot the victim. The accused possessed only a knife. Pursuant to s. 213(d) of the *Criminal Code*, culpable murder takes place when "a person causes the death of a human being while committing ... robbery ... whether or not the person means to cause death....and whether or not he knows that death is likely to be caused if...(d) he uses a weapon or has it upon his person during or at the time he commits...the offence....and the death ensues as a consequence." Lamer J. (for the majority, including Dickson C.J.C.) pointed out the the effect of the offence was to substitute proof of possession of a weapon during a robbery for proof of subjective foresight of the likelihood of death.<sup>691</sup>

Justice Lamer then noted that *Motor Vehicle* stood for the proposition that objective negligence was the minimum acceptable mental element when imprisonment was available as a punishment.<sup>692</sup> But for the purposes of s. 7, stated Justice Lamer, certain crimes, because of the special nature of the stigma attached or the available penalties, do require mens rea reflecting the

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<sup>690</sup> [1987] 47 DLR (4th) 399 .

<sup>691</sup> *Ibid.*, at p. 410.

<sup>692</sup> *Ibid.*, at p. 414.

particular nature of the crime.<sup>693</sup> Theft, for example, requires proof of some dishonesty.<sup>694</sup> Similarly, murder requires proof beyond a reasonable doubt of subjective foresight. But Justice Lamer chose to strike down the offence on more narrow grounds, by showing that the offence violated s. 11(d).

Justice Lamer summarized *Oakes* and other cases as standing for the proposition that before an accused can be convicted of an offence, the trier of fact must be satisfied beyond a reasonable doubt of the existence of all of the essential elements of the offence.<sup>695</sup> In a new twist, he defined "essential elements" as including "not only those set out by the legislature in the provision creating the offence but also those required by s. 7 of the *Charter*."<sup>696</sup> In so doing, and perhaps without intending to do so, when *Motor Vehicle* is read together with *Vaillancourt*, Justice Lamer appears to have made the "reasonable care" defence associated with the strict liability offence an essential element of the offence, and thus, because it runs counter to the proposition set out in *Oakes* that the trier of fact must be satisfied beyond a reasonable doubt of the existence of all the essential elements of the offence, His Lordship seems to have indirectly indicated that a due diligence defence established on a balance of probabilities would violate s. 11(d). If this interpretation of *Vaillancourt* is correct, his Lordship may have affected the constitutionality of a completely different class of offence (i.e., the strict liability regulatory offence) without even mentioning the name of that type of offence, in the context of a discussion

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<sup>693</sup> *Ibid.*, at p. 415.

<sup>694</sup> *Ibid.*

<sup>695</sup> *Ibid.*, at p. 416.

<sup>696</sup> *Ibid.*

of a constructive murder offence. If the previous analysis is correct, the *Vaillancourt* case is a good example of the Court articulating propositions in criminal contexts which then have consequences in circumstances different from those the Court was actually considering.

At this point, all the cases concerning s. 11(d) decided by the Supreme Court pertained to *Criminal Code* offences, and so it was possible to maintain that perhaps the s. 11(d) presumption of innocence did not apply to regulatory offences. However, the 1987 decision of *R. v. Wigglesworth*<sup>697</sup> confirmed that s. 11(d) applied to both *Criminal Code* offences and other offences which attract "true penal consequences." In *Wigglesworth*, the accused, an Royal Canadian Mounted Police police constable, was charged with a "major service offence" under the *Royal Canadian Mounted Police Act*. Pursuant to the *Act*, cases were tried not by a regular court but by a police tribunal. Imprisonment was available as a punishment.

Wilson J. for the Court, articulated a two-prong test for application of s. 11. An offence would be subject to s. 11 protections if either the offence was by its very nature a criminal proceeding, or if it could lead to penal consequences.<sup>698</sup> In the case at bar, the offence was a disciplinary offence, not directed at promoting public order and welfare within a public sphere of activity, and so failed the "by its very nature" test.<sup>699</sup> However, the fact that imprisonment was available as a punishment resulted in the conclusion that the offence had true penal consequences, and so was subject to s. 11. In some cases, Wilson J. noted, the sheer magnitude of a fine might also result in a characterization of the offence as being subject to s. 11. In the course of her

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<sup>697</sup> [1987] 2 SCR 541 .

<sup>698</sup> *Ibid.*, at p. 559.

<sup>699</sup> *Ibid.*, at p. 570.

judgment, Wilson J. also observed that "[i]t cannot seriously be contended that, just because a minor traffic offence leads to a very slight consequence, perhaps only a small fine, that offence does not fall within s. 11."<sup>700</sup> Nevertheless, the exact content of the presumption as applied to regulatory offences was not definitively decided in the case.

In the 1988 decision of *R. v. Holmes*,<sup>701</sup> the Supreme Court considered the *Charter* constitutionality of a "lawful excuse" provision in a *Criminal Code* offence which imposed a burden on the accused to prove the excuse. The accused was charged under s. 309 of the *Code*, an offence of possession of instruments suitable for housebreaking. Section 309 provides that:

...everyone who, without lawful excuse, the proof of which lies upon him, has in his possession any instrument suitable for house-breaking...under circumstances that give rise to a reasonable inference that the instrument had been used or is or was intended to be used for house-breaking....is guilty of an indictable offence...

The accused argued that the lawful excuse provision violated s. 11(d) of the *Charter*. In an attempt to apply the s. 11(d) analysis of Dickson CJC in *Oakes*, three of five judges held that the "without lawful excuse" provision was an obsolete carryover from an earlier version of the offence so that there was no conflict with s. 11(d). In the alternative, two of the three judges held that even if the effect of s. 309(1) was to require a balance of probabilities defence, this would not violate s. 11(d) since it would arise only after the Crown had proven all essential elements of the offence.<sup>702</sup>

For the minority, Chief Justice Dickson viewed the lawful excuse as putting a burden on

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<sup>700</sup> *Ibid.*, at p. 559.

<sup>701</sup> [1988] 50 DLR (4th) 780 .

<sup>702</sup> *Ibid.*, at p. 709.

the accused to establish the excuse on a balance of probabilities, even though the Crown had proved all essential elements of the offence. As such, the lawful excuse provision violated s.

11(d):

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 none the less 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 or her guilt, regardless of whether that doubt arises from uncertainty as to the sufficiency of Crown evidence supporting the constituent elements of the offence or from uncertainty as to criminal culpability in general.<sup>703</sup>

Thus, while in the minority, the statements of Chief Justice Dickson in *Holmes* appear to tighten the *Oakes* standard considerably. Were this standard to be adopted by the majority, and were the Court to consider that the s. 11(d) presumption applied in the same manner to both crimes and regulatory offences, then the due diligence standard established on a balance of probabilities would appear to be a prima facie violation of s. 11(d).

Because Chief Justice Dickson found that the lawful excuse provision violated s. 11(d) it was necessary for him to engage in s. 1 analysis to see whether the provision could be justified as a reasonable limit. His Lordship concluded that the provision did not pass the "little as possible" standard since Parliament could have imposed a mere evidential burden on the accused.<sup>704</sup> This type of application of the s. 1 test, if applied to the due diligence defence on a balance of probabilities, would result in it being transformed into a mere evidentiary burden on the accused. Where evidence of due diligence is proffered by the accused, the Crown would then be compelled

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<sup>703</sup> *Ibid.*, at p. 695.

<sup>704</sup> *Ibid.*, at pp. 699 - 700.

to prove a lack of due diligence beyond a reasonable doubt. The impracticality of this approach when applied to negligence has already been discussed.

A short time after *Holmes* was decided, the Supreme Court of Canada heard another case concerning an alleged violation of s. 11(d) in the 1988 decision of *R. v. Whyte*.<sup>705</sup> The accused was charged with having care or control of a motor vehicle while his ability to drive was impaired by alcohol contrary to s. 234 of the *Criminal Code*. Pursuant to s. 237(1)(a) of the *Code*, where it is proved that the accused occupied the seat ordinarily occupied by the driver, he shall be deemed to have had the care or control of the vehicle unless he establishes that he did not enter the vehicle for the purpose of setting it in motion. The accused argued that this provision constituted a reverse onus provision which violated s. 11(d) of the *Charter*.

The accused was found in his car slumped over the steering wheel, the car parked at the side of the road, the hood warm, the keys in the ignition, the dashboard ignition light on, but the engine not running. Counsel for the accused conceded that his ability to operate a motor vehicle was impaired by alcohol when he was found by the police.<sup>706</sup> A unanimous Supreme Court agreed, in a judgment written by the Chief Justice, adopting the Chief Justice's minority position in *Holmes* that imposing a persuasive burden on the accused to prove *any* element of an offence was offensive under s. 11(d). However, the Court also found that the infringement of s. 11(d) was justifiable under s. 1. At trial, the judge had concluded that he had convicted the accused despite the existence of a reasonable doubt as to care or control: the accused had not established that he

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<sup>705</sup> (1988) 51 DLR (4th) 481.

<sup>706</sup> *Ibid.*, at p. 486.

did not have care or control on a balance of probabilities.<sup>707</sup>

Looking first at the s. 11(d) analysis of the Supreme Court, when the Attorney-General of Canada argued that the requirement to disprove a fact was collateral to the substantive offence, and thereby not subject to the rule in *Oakes* which applied only to essential elements, Chief Justice Dickson stated the following:

The short answer to this argument is that the distinction between 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.

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 as to the guilt of the accused.<sup>708</sup>

The Chief Justice noted that an accused who is proven to have been sitting in the driver's seat may not have had care or control of the car. There were other possible and reasonable explanations (e.g., to sit in the driver's seat of a taxi in order use a taxi radio to report an accident).<sup>709</sup>

Accordingly, the Chief Justice concluded that requirement that an accused establish the absence of care or control of the vehicle, an essential element of the offence, in spite of a reasonable doubt about the existence of that element, constituted a violation of the s. 11(d) presumption of innocence.

He then considered whether or not the balance of probabilities standard was a reasonable

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<sup>707</sup> *Ibid.*, at p. 494.

<sup>708</sup> *Ibid.*, at p. 493.

<sup>709</sup> *Ibid.*, at p. 494.

limit on a constitutional right under s. 1. Chief Justice Dickson concluded that the objective of the section (ensuring that persons do not drink and drive) was sufficiently important to warrant overriding a constitutionally protected right.<sup>710</sup> He noted that counsel for the accused had conceded this point.<sup>711</sup>

Concerning the rational connection test, his Lordship contended that there is every reason to believe that the person in the driver's seat has the care or control of the vehicle, and therefore there is a rational connection between the proven fact and the fact to be presumed. Second, concerning the "as little as possible" test, Dickson C.J.C. noted that the fact that consumption of alcohol is an element of the offence renders problematic the element of the intention.<sup>712</sup> The mens rea requirement for the offence of care or control is a minimal one.<sup>713</sup> A survey of earlier judgments found that courts had ruled that drunkenness negated any intention, on the one hand, while others decided that the offence was absolute liability in nature.<sup>714</sup>

On the one hand, it was repugnant to theories of criminal liability that a person could be convicted of an absolute liability crime, with no possibility of defence based on the mental state of the accused. On the other hand, as the Minister of Justice commented, it is shocking to hear that an accused could be acquitted of an offence for which consumption of alcohol is a required element, because he was too intoxicated to be guilty.<sup>715</sup>

The Chief Justice noted that although the accused was found slumped over the steering wheel in a

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<sup>710</sup> *Ibid.*, at pp. 495 - 496.

<sup>711</sup> *Ibid.*

<sup>712</sup> *Ibid.*, at p. 496.

<sup>713</sup> *Ibid.*, at p. 497.

<sup>714</sup> *Ibid.*, at pp. 497 - 498.

<sup>715</sup> *Ibid.*, at p. 499.

vehicle with the lights on, the keys in the ignition, the engine warm, the trial judge had found that in the absence of the presumption there would be a reasonable doubt as to guilt.<sup>716</sup> Accordingly, the Chief Justice found the balance of probability standard to be a restrained parliamentary response to a pressing social problem since it strikes a balance.<sup>717</sup>

It is important for the purposes of s. 1 analysis to view s. 237(1)(a) in the context of its over-all statutory setting. Parliament has attempted to strike a balance. On the one hand, the Crown need only prove a minimal level of intent on account of the fact that consumption of alcohol is itself an ingredient of the offence. On the other hand, where an accused can show that he or she had some reason for entering the vehicle and occupying the drivers' seat other than to drive the vehicle, the accused will escape conviction....<sup>718</sup>

Turning to the last prong of the *Oakes* test, his Lordship concluded that there was proportionality between the effect of the impugned measure and the objective being advanced, so that the third prong of the *Oakes* test -- the proportionality test -- was satisfied.<sup>719</sup>

The threat to public safety posed by drinking and driving has been established by evidence in this case and recognized by this court in others. While s. 237(1)(a) does infringe the right guaranteed by s. 11(d) of the Charter, it does so in the context of a statutory setting which makes it impractical to require the Crown to prove an intention to drive. The reverse onus provision, in effect, affords a defence to an accused which could not otherwise be made available.<sup>720</sup>

In short, although the reverse onus provision was found to be in violation of s. 11(d), it was considered a reasonable limit under s. 1.

Comparing this to the *Sault Ste. Marie* case (and in particular, the strict liability offence

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<sup>716</sup> *Ibid.*, at pp. 499 - 500.

<sup>717</sup> *Ibid.*

<sup>718</sup> *Ibid.*, at p. 500.

<sup>719</sup> *Ibid.*

<sup>720</sup> *Ibid.*

with due diligence defence established on a balance of probabilities), there are several noteworthy aspects to this decision. First, the Supreme Court's tightening of the *Oakes* interpretation of s. 11(d) to include any element of an offence, be it essential element or defence, would arguably not bode well for the due diligence defence. It would appear that the only distinction that can be made is that the offence considered in *Whyte* was criminal in nature so that perhaps the presumption could be said to have a different content when applied to regulatory offences. On the other hand, the Court's interpretations of s. 1 are somewhat encouraging. The similarities between strict liability offences and the "care or control" offence in question are striking. Both pertain to one of the classic regulatory activities -- driving a motor vehicle, where there is tremendous potential for harm necessitating a high standard of care from regulated individuals, and warranting a shifting of the burden of proof. The difficulty which the Court had attempting to find a conventional mens rea element in "care and control" is not surprising: indeed, "care and control" seems remarkably similar to the strict liability offence's "reasonable care" defence. Is it coincidence that once more Dickson CJC is the judge concluding that a balance of probabilities standard is reasonable?

Since *Whyte*, other Supreme Court decisions have considered the application of s. 11(d) to specific offence provisions, and where the conclusion has been reached that s. 11(d) has been violated, the Court has undertaken s. 1 analysis. In the 1990 decision of *R. v. Keegstra*,<sup>721</sup> the court considered the constitutionality of the *Criminal Code* offence against hate propaganda, which prohibits wilful promotion of hatred against an identifiable group, but which includes a

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<sup>721</sup>

[1990] 3 SCR 697 .

defence if the accused can establish on a balance of probabilities that the statements were true.<sup>722</sup>

The Court (Chief Justice Dickson, for the majority) concluded that even though the defence was not an essential element of the offence, it nevertheless could lead to a situation where an accused could be convicted in spite of reasonable doubt as to whether or not the statements were true. As a result, it violated s. 11(d). Nevertheless, it was justifiable under s. 1.<sup>723</sup>

In another 1990 decision of the Supreme Court, *R. v. Chaulk*,<sup>724</sup> the *Charter* validity of a balance of probabilities defence of insanity under *Criminal Code* s. 16(4) was under scrutiny.

Chief Justice Lamer, for the majority, concluded that the balance of probabilities defence violated s. 11(d),<sup>725</sup> but was justifiable under s. 1. In summarizing recent cases concerning the application of s. 1, Chief Justice Lamer stated the following:

Recent judgments of this Court....indicate that Parliament is *not* required to search out and to adopt the absolutely least intrusive means of attaining its objective. Furthermore, when assessing the alternative means which were available to Parliament, it is important to consider whether a less intrusive means would achieve the "same" objective or would achieve the same objective as effectively.<sup>726</sup>

His Lordship then considered the insanity provision, and heard arguments concerning the ease of the accused "faking" insanity under a mere evidentiary standard, and the difficulty of the Crown proving no insanity beyond a reasonable doubt.<sup>727</sup> As a result, the Chief Justice concluded that

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<sup>722</sup> Section 319.

<sup>723</sup> The Court also concluded that the offence violated *Charter* s. 2(b) freedom of expression, but was a reasonable limitation under s. 1.

<sup>724</sup> [1990] 3 SCR 1303 .

<sup>725</sup> *Ibid.*, at p. 1335.

<sup>726</sup> *Ibid.*, at p. 1341.

<sup>727</sup> E.g., pp. 1341-1342.

the balance of probabilities standard was reasonable:

...it is not the role of this Court to second-guess the wisdom of policy choices made by Parliament. In enacting s. 16(4), Parliament may not have chosen the absolutely *least* intrusive means of meeting its objective, but it has chosen from a range of means which impair s. 11(d) as little as is reasonably possible. Within this range of means it is virtually impossible to know, let alone be sure, which means violate Charter rights the *least*.<sup>728</sup> (emphasis in original text.)

This formulation of the test allows for a flexible comparative analysis of alternatives, rather than a simple mechanical application of the "little as possible" standard. As such, if applied to address the balance of probabilities due diligence standard, there is some reason for thinking that the provision could be upheld.

What emerges from these early cases interpreting sections 7, 11(d), and 1, is the following:

- (1) pursuant to s. 7, the minimum fault level where imprisonment is a possible penalty, is objective negligence;
- (2) the Court has not reached a definitive conclusion regarding whether a large fine, a licence suspension, or some other penalty could be considered in violation of the s. 7 protections, so that they too would attract a minimum fault protection;
- (3) thus, for the time being, absolute liability offences which do not impose as a penalty "liberty deprivations" (imprisonment or probation) would still appear to be allowed under s. 7, while the death knell has been sounded for the combination of absolute liability and imprisonment;
- (4) the minimum fault of objective negligence is considered to be an essential element of the offence, regardless of whether it is an element which must be proven by the prosecution as part of its case in chief, or is available as a defence. This position was articulated in the course of a decision pertaining to a "true crime";
- (5) the s. 11(d) presumption of innocence requires proof beyond a reasonable doubt by the prosecution of all the essential elements of the offence;

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<sup>728</sup>

*Ibid* at p. 1343 .

(6) it does not matter whether an accused is provided with an excuse, a defence, or any thing else, if it means that at the end of the trial it would be possible for a conviction to take place even though there was a reasonable doubt on some matter, then that is a violation of s. 11(d);

(7) originally, the Court had concluded that the presumption of innocence applied only to essential elements, but the test was tightened up over a series of subsequent cases;

(8) all of the cases in which the Supreme Court has articulated the content of s. 11(d) pertained to "true crimes";

(9) the Court has also concluded that the section 11 protections also apply to non-crimes which are intended to promote public order and welfare within a public sphere of activity, or where there are true penal consequences (which seems to include imprisonment, and very high fines);

(10) nevertheless, it is not clear whether the *content* of the s. 11 protections is always the same;

(11) even if an offence provision is in violation of s. 7, or s. 11, it can nevertheless be upheld as reasonable limit under s. 1;

(12) a test for assessing whether a limit is demonstrably justified has been articulated by the Court, and requires that the party wishing to uphold the limit establish the justification on a balance of probabilities;

(13) assuming that the objective of the provision in question is of sufficient importance, and that there is a rational connection between the proven facts and those which must be established by the accused on a balance of probabilities (these aspects of the s. 1 test have not proven to be difficult for the Crown to meet), the key test becomes establishing that the provision offends s. 11 "as little as possible";

(14) while initially the "little as possible" test appeared to be very rigorous, since then the Court has relaxed the test considerably so that first the test became "as little as *reasonably* possible," then the notion that existing provisions are given a "margin of appreciation" was allowed, and finally the means chosen must be within "a range";

(15) nevertheless, the s. 1 test as it applies to s. 11 (d) violations has been developed in relation to true crimes, and not regulatory offences.

The general conclusion reached is that, as interpreted by the Supreme Court of Canada, the

*Charter* presumption of innocence has developed into an extremely rigorous standard, but the

Court has at the same time shown a willingness to allow infringements of that standard where those infringements are within a range of alternatives perceived as minimally intrusive. While sections 7 and 11(d) represent the key *Charter* protections applying to strict liability offences (as tempered by s. 1), we have seen that the Supreme Court decisions pertaining to s. 11(d) have not directly addressed the content of the presumption of innocence as it applies to regulatory offences. Does it or should it have a different meaning when applied to regulatory offences? An indirect answer to this question might come from an examination of how the Court has interpreted other *Charter* protections when applied to regulatory contexts.

### *Section 8 of the Charter*

The Supreme Court has concluded that the s. 8 protections against unreasonable search or seizure have a different content when applied to regulatory as opposed to criminal contexts. The purpose of the provision, according to the Supreme Court in the 1984 decision of *Hunter v. Southam Inc.*,<sup>729</sup> is to protect a citizen's reasonable expectation of privacy. The expectation of privacy will vary depending on the nature of the search or seizure and the nature of the context within which the search or seizure would take place. Thus, for example, in the 1988 case of *R. v. Hufsky*,<sup>730</sup> a requirement to produce a driver's licence was considered by the Supreme Court to not be a search because "it did not constitute an intrusion on a reasonable expectation of privacy" since production of a licence or permit provided evidence of a status or compliance with a "legal requirement that is a lawful condition of the exercise of a right or privilege."<sup>731</sup>

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<sup>729</sup> [1984] 2 SCR 145 .

<sup>730</sup> [1988] 1 SCR 621 .

<sup>731</sup> *Ibid.*, at p. 638.

While there is no reasonable expectation of privacy concerning disclosure of a driver's licence to police authorities, there is an expectation of privacy concerning business records of a commercial entity. In the 1990 case of *Thomson Newspapers Ltd. v. Can. (Dir. of Investigation and Research)*,<sup>732</sup> the Court held that an order under the *Combines Investigation Act* (now called the *Competition Act*) to produce documents was a form of seizure, but nevertheless a reasonable and allowable one, for the purposes of s. 8. La Forest J., concluded that characterization of a statute as regulatory as opposed to criminal in nature would result in a different expectation of privacy, and in turn, a different application of the *Charter* protections concerning reasonable search and seizure.

Because this reasoning is of direct relevance to arguments that s. 11 might have a different content, it is discussed here in some detail. Concerning the different nature of s. 8 protections for regulatory legislation, Justice La Forest stated the following:

The application of a less strenuous and more flexible standard of reasonableness in the case of administrative or regulatory searches and seizures is fully consistent with a purposive approach to the elaboration of s. 8. As Dickson J. made clear in *Hunter v. Southam Inc.*...the purpose of s. 8 is the protection of the citizen's reasonable expectation of privacy....But the degree of privacy the citizen can reasonably expect may vary significantly depending upon the activity that brings him or her into contact with the state. *In a modern industrial society, it is generally accepted that many activities in which individuals can engage must nevertheless to a greater or lesser extent be regulated by the state to ensure that the individual's pursuit of his or her self-interest is compatible with the community's interest in the realization of collective goals and aspirations. In many cases, this regulation must necessarily involve the inspection of private premises or documents by agents of the state.* The restaurateur's compliance with public health regulations, the employer's compliance with employment standards and safety legislation and the developer's or homeowner's compliance with building codes or zoning regulations can be tested only by inspection, and perhaps unannounced inspection, of their premises. Similarly, compliance with minimum wage, employment equity and human rights legislation can often be assessed only by inspection of the employer's files and records.

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<sup>732</sup>

[1990] 76 CR (3d) 129 .

*It follows that there can be only a relatively low expectation of privacy in respect of premises or documents that are used or produced in the course of activities which, though lawful, are subject to state regulation as a matter of course. In a society in which the need for effective regulation of certain spheres of private activity is recognized and acted upon, state inspection of premises and documents is a routine and expected feature of participation in such activity.....there is a "large circle of social and business activity in which there is a very low expectation of privacy", and in which the "issue is not whether, but rather when, how much, and under what conditions information must be disclosed to satisfy the state's legitimate requirements."*

The situation is, of course, quite different when the state seeks information not in the course of regulating a lawful social or business activity but in the course of investigating a criminal offence. For reasons that go to the very core of our legal tradition, it is generally accepted that the citizen has a very high expectation of privacy in respect of such investigations....This expectation is strengthened by virtue of the central position of the presumption of innocence in our criminal law. The stigma inherent in a criminal investigation requires that those who are innocent of wrongdoing be protected against overzealous or reckless use of the powers of search and seizure by those responsible for the enforcement of the criminal law.<sup>733</sup>(underline is La Forest J., italics are the author's)

As is discussed below in greater detail, this sort of recognition of the distinctive nature of regulatory activity, and the different content of *Charter* protections when applied to regulatory contexts, is arguably of equal relevance to s. 11 analysis as it is to interpretations of s. 8.

Justice La Forest then proceeded to characterize the *Combines Investigation Act* as regulatory in nature.<sup>734</sup> He did this in spite of older case authority suggesting that the *Act* was based on the criminal law power,<sup>735</sup> and in spite of the use of offences which include imprisonment as a punishment.<sup>736</sup> Key to La Forest J. was the nature of the regulatory conduct:

There can be little doubt that the conduct prohibited by the *Act* is far removed from what

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<sup>733</sup> *Ibid.*, at pp. 196 - 198.

<sup>734</sup> *Ibid.*, at p. 200.

<sup>735</sup> More recent authority had characterized the Act as valid legislation under the trade and commerce power: as discussed at p. 198 of *ibid.*

<sup>736</sup> *Ibid.*, at p. 198.

is the typical concern of the criminal law system, i.e., the "underlining [of] crucial *social values*" (emphasis added) where "The sort of things prohibited -- acts of violence, dishonesty and so on -- are acts violating common sense standards of humanity" which we regard as meriting disapprobation and punishment.....At bottom, the *Act* is really aimed at the regulation of the economy and business, with a view to the preservation of the competitive conditions which are crucial to the operation of a free market economy. This goal has obvious implications for Canada's material prosperity.....The conduct regulated or prohibited by the *Act* is not conduct which is by its very nature morally or socially reprehensible. It is instead conduct we wish to discourage because of our desire to maintain an economic system which is at once productive and consistent with our values of individual liberty. It is, in short, not conduct which would be generally regarded as by its very nature criminal and worthy of criminal sanction. It is conduct which is criminal only in the sense that it is in fact prohibited by law.....<sup>737</sup>

...The *Act* is thus not concerned with "real crimes", but with what has been called "regulatory" or "public welfare" offences.....<sup>738</sup>

Noteworthy here is Justice La Forest's approval of the idea that regulatory conduct is fundamentally different from that of criminal conduct, and thus deserving of a different approach.

In this regard, Justice La Forest goes on to note that:

....the *Act* does not seek to prevent the proscribed conduct as an end in itself, but seeks instead to prevent the results to which it is believed the behaviour will lead....<sup>739</sup>

....*Given that all business ultimately benefits from the competitive conditions the Act is designed to protect, and given that the effectiveness of the Act in protecting these conditions depends on the existence of a compliance incentive other than regular or periodic inspection by anti-combines authorities, this stigma can be seen as a price that has to be paid in return for the continued enjoyment of the conditions upon which modern business depends.*<sup>740</sup> (italics are those of the author)

Justice La Forest concludes therefore that a lower expectation of privacy is provided to regulated actors, in exchange for the benefits of carrying on commercial activity. This type of "social

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<sup>737</sup> *Ibid.*, at p. 199.

<sup>738</sup> *Ibid.*, at p. 200.

<sup>739</sup> *Ibid.*, at p. 201.

<sup>740</sup> *Ibid.*, at p. 203.

contract” calculus engaged in by Justice La Forest, his examination of the regulatory nature of the *Combines Investigation Act*, his identification of distinctive features of regulatory activity, and his justification of the necessity for use of imprisonment, are arguably all equally relevant for s. 11 analysis as they are for s. 8 analysis.

In *Thomson Newspapers*, La Forest J. was one of five judges to render a judgment, and the only to engage in a detailed discussion of the distinction between criminal and regulatory legislation. In another 1990 Supreme Court case, *R. v. McKinlay Tpt. Ltd.*,<sup>741</sup> the Court followed Justice La Forest's approach, concluding that the *Income Tax Act* was regulatory legislation, even though imprisonment was available as a punishment when a taxpayer supplied false or misleading statements or records, or otherwise attempted to evade production of true information. Accordingly, an order under the *Act* compelling production of documents, while a seizure under s. 8, was nevertheless considered reasonable.

The Supreme Court's analysis of s. 8 is important to strict liability analysis under s. 11 and s. 1 because it supports the position that criminal and regulatory legislation are fundamentally different in character and warrant different approaches in terms of *Charter* protections. Against this backdrop of Supreme Court interpretations of the *Charter*, the Court finally addressed the question of the *Charter* viability of the strict liability offence, in the *Wholesale Travel* decision, considered next.

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<sup>741</sup> [1990] 76 CR (3d) 283 .

## Chapter 10 -- The *Wholesale Travel* Decision

In *Wholesale Travel*, thirteen years after the *Sault Ste. Marie* decision was reached, once again an offence of strict liability was the subject of consideration by the Supreme Court of Canada. Whereas in *Sault Ste. Marie*, the regulatory offence in question pertained to pollution control, in *Wholesale*, the offence was part of a regulatory regime pertaining to fair competition among businesses in Canada. Pursuant to s. 36(1) of the *Competition Act*, "no person shall, for the purpose of promoting .... any business interest... make a representation... that is false or misleading in a material aspect." As is typical of regulatory regimes, the offence addressed conduct which could endanger the safety and well-being of a vulnerable segment of society (in this case, consumers) who in most circumstances would not be well-situated to verify the accuracy of claims made by advertisers.<sup>742</sup> On its face, the offence appears capable of addressing both negligent and intentional misrepresentations. Following lobbying from the business community the *Act* was amended in 1976 to include a due diligence defence (established on a balance of probabilities).<sup>743</sup> The *Act* also requires that the accused make a retraction forthwith after the false or misleading representation is published.<sup>744</sup> Imprisonment (five years) is explicitly available as a possible penalty.<sup>745</sup>

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<sup>742</sup> E.g., advertising concerning weight-loss pills or devices, treatments to curtail smoking, "wonder" products capable of reducing gas bills, stopping rust, "sales" which are not sales, etc.: see generally, V. Black, "A Brief Word About Advertising," (1988) 20 *Ottawa L. Rev.* 509, esp. at pp. 541 - 542.

<sup>743</sup> Black, *ibid.*, at p. 523.

<sup>744</sup> S. 37.3(2). This proviso, which narrows the due diligence defence, was also the subject of consideration in *Wholesale*, and was found wanting. See discussion *infra*.

<sup>745</sup> S. 36(1).

*Section 7 Fault Analysis*

The variety of positions taken by the Supreme Court justices in *Wholesale* with respect to the *Charter* viability of the strict liability offence reflect differing interpretations of the importance and flexibility of *Charter* principles. As we have seen, the earlier *Motor Vehicle* and *Vaillancourt* cases had stipulated that, for purposes of s. 7 analysis, where an accused's liberty is potentially at risk, principles of fundamental justice dictate that negligence is the minimum fault requirement. However, in neither *Motor Vehicle* (absolute liability offence) nor *Vaillancourt* (constructive murder) was a strict liability (i.e. negligence) public welfare offence actually under consideration by the Court. As a result, in neither of these cases was there any detailed discussion of what would be the approved form and content for a negligence offence in a regulatory context, nor was it clear in what circumstances it would be acceptable for the minimum fault requirement of objective negligence to be used.

In *Wholesale*, for the first time, the Supreme Court was asked to squarely address the *Charter*-viability of a strict liability offence. Some of the judgments were clearer than others as to what are the legal circumstances in which the objective negligence fault requirement as opposed to full subjective mens rea would be considered acceptable, and why the lower standard would be permissible in those circumstances.

In this regard, Cory J. (L'Heureux-Dube J. concurring) was the most explicit and thorough in his analysis. For Justice Cory, the starting point was recognition of the need for a contextual approach to *Charter* interpretation, which would allow for the fact that a particular right or freedom may have a different meaning depending upon the context in which it is asserted.<sup>746</sup> A

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<sup>746</sup> *Wholesale, op cit.*, at p. 210.

negligence fault standard was appropriate for regulatory activity, Cory J. asserted, because of the distinctive characteristics of that activity. Criminal misconduct is typically so abhorrent to basic values that it is prohibited completely; regulated activity, on the other hand, is lawful within certain prescribed limits, but when performed negligently it has potentially adverse affects for the public or broad segments of the public.<sup>747</sup> The objective of regulatory regimes is to ensure that the conduct of regulated persons does not fall below a standard of reasonable care.<sup>748</sup>

It follows that regulatory offences and crimes embody different concepts of fault. Since regulatory offences are directed primarily not to conduct itself but to the consequences of conduct, conviction of a regulatory offence may be thought to import a significantly lesser degree of culpability than conviction of a true crime. The concept of fault in regulatory offences is based upon a reasonable care standard and, as such, does not imply moral blameworthiness in the same manner as criminal fault. Conviction for breach of a regulatory offence suggests nothing more than that the defendant has failed to meet a prescribed standard of care.<sup>749</sup>

The negligence standard, then, is an appropriate fault requirement because the target misconduct is lawful within certain limits. The misconduct is neither intentional nor inherently wrongful and repugnant,<sup>750</sup> but it is nevertheless potentially harmful. There is no necessary implication of dishonesty when a misrepresentation has occurred, so that the stigma from a conviction for misleading advertising is "very considerably diminished."<sup>751</sup>

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<sup>747</sup> *Ibid.*, at pp. 205 - 206.

<sup>748</sup> *Ibid.*, at p. 206.

<sup>749</sup> *Ibid.*

<sup>750</sup> *Ibid.*, at p. 205.

<sup>751</sup> *Ibid.*, at p. 209. Chief Justice Lamer reached the same conclusion at p. 180, as discussed below. Arguably, the stigma associated with conviction of an offence of negligence is not minimal: it is, after all, indicative of at least carelessness by a regulated actor who is legally obligated to behave in a responsible manner. However, it is clearly less than attaches to one who engages in intentional misconduct, and it is a *different and distinctive* stigma from that associated with conviction of truly criminal offences.

Cory J. argued that it is reasonable to employ the negligence fault standard because the regulated accused is in a different position than the criminal accused: he or she is in a position of responsibility vis-a-vis certain segments of society -- a position which given the potential for injury is evident to any reasonable person<sup>752</sup> -- and has the choice whether to engage in that activity. "The question then becomes not whether the defendant chose to enter the regulated sphere", says Justice Cory, "but whether, having done so, the defendant has fulfilled the responsibilities attending that decision..."<sup>753</sup> The "licensing concept" or argument, as Cory J. calls it, contends that those who choose to participate in regulated activities have, in doing so, placed themselves in a responsible relationship vis-a-vis the public generally or a segment of the public, and that it is reasonable and fair to impose certain legal consequences on those who choose to become regulated persons.<sup>754</sup> The only time when it would not be reasonable to impose these consequences on a regulated persons is when the activity in question is on its face so innocuous as to not alert a reasonable person that a regulatory regime is in place.<sup>755</sup> In the United States, Cory J. noted, courts have held that where dangerous products or materials are involved, "the inherently dangerous nature of the regulated activity...was sufficient to put the accused persons on

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<sup>752</sup> See discussion *infra*.

<sup>753</sup> *Ibid.*, at p. 213.

<sup>754</sup> Where a regulatory framework is established without use of a licence mechanism (e.g., when standards are simply set in legislation and regulations), there is arguably still an operating assumption that the regulated actors are capable of meeting the standards, and accept the responsibilities and legal implications associated with engaging in that specialized activity. There is more detailed discussion on this point in Part Three of the thesis..

<sup>755</sup> *Ibid.*, at p. 213.

notice that the conduct in question was regulated."<sup>756</sup>

In the case of misleading advertising, Justice Cory concluded that "[t]he appellant, having chosen to enter a regulated sphere of business activity, the regulation of which had received wide publicity, should have known that there would be regulations governing its conduct."<sup>757</sup> On the other hand, the requirements in the *Competition Act* that an accused must publish a "timely retraction" as a precondition to relying on a due diligence defence<sup>758</sup> were considered by Cory J. to violate s. 7 of the *Charter*, since it would be possible for there to be a conviction even though there was no fault.<sup>759</sup>

Other judgments in *Wholesale*, while supportive of negligence as the minimum acceptable fault requirement when imprisonment is a possible punishment, were less clear in articulating the circumstances in which it would be acceptable, and why it would be acceptable. Chief Justice Lamer, for example, would only go so far as to say (paraphrasing himself in *Vaillancourt*) that "...for certain crimes, the special nature of the stigma attaching to a conviction and/or the severity of the available punishment necessitate subjective mens rea."<sup>760</sup> The Chief Justice characterized the offence of misleading advertising as carrying "some stigma" but "...it cannot be said that the

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<sup>756</sup> *Ibid.*, at p. 214. Cory J. is paraphrasing from *U.S. v. International Min. & Chem. Corp* 402 US 558, 29 L Ed 2d 178, 91 S Ct 1697 at 402 US 565. American cases are discussed in greater detail *infra*.

<sup>757</sup> *Ibid.*, p. 214. While Cory J. does not mention it in his judgment, the Competition Bureau regularly publishes bulletins and other brochures concerning implementation of the Act, and provides advance rulings to requesting persons regarding particular issues of importance. Arguably, these various information dissemination activities of the Bureau act as "notices" to diligent regulated persons regarding acceptable and unacceptable practices.

<sup>758</sup> The combined effect of s. 37.2(3)(c) and (d).

<sup>759</sup> *Ibid.*, p. 230.

<sup>760</sup> *Ibid.*, at p. 179.

stigma associated with this offence is analogous to the stigma of dishonesty which attaches to a conviction of theft."<sup>761</sup> This is so because a conviction for contravening the misleading advertising offence could be indicative only of carelessness rather than an intention to mislead.<sup>762</sup>

Chief Justice Lamer indicated that, had the provisions applied solely to corporations, his *Charter* analysis would have been different, since imprisonment could not be available as a punishment.<sup>763</sup> Without the *Charter*-triggering threshold of a deprivation of liberty, Lamer C.J. saw the stigma possible upon conviction being reduced to that associated with money.<sup>764</sup> The clear implication of Lamer C.J.'s discussion is that absolute liability offences directed exclusively at corporations are likely to be difficult to challenge using the *Charter*. In these speculations, the Chief Justice is essentially signalling that absolute liability offences without imprisonment may yet become a "growth area" in regulatory law.

For the Chief Justice, however, the label "regulatory" or "criminal" offence, is by itself not determinative in the context of s. 7 minimum fault analysis. This was evident in his examination of the "timely retraction" provisos included in the *Competition Act* which had the effect of building extra conditions onto the due diligence defence. Crown counsel argued that this proviso was justifiable since the offence was regulatory in nature. Lamer C.J.C. disputed this contention. "In my view, whether this offence...is better characterized as "criminal" or regulatory" is not the

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<sup>761</sup> *Ibid.*, at p. 180.

<sup>762</sup> *Ibid.*

<sup>763</sup> *Ibid.*, at p. 179.

<sup>764</sup> *Ibid.*

issue."<sup>765</sup> The determinative factor, he claimed, was the existence of imprisonment as a possible punishment. "Jail is jail", the Chief Justice asserted.<sup>766</sup>

Although Lamer C.J.C. agreed that misleading advertising is a regulatory offence "the label loses much of its relevance when one considers that an accused faces up to five years' imprisonment."<sup>767</sup> There are problems with this "jail-is-jail, labels-are-meaningless" type of approach to *Charter* s. 7 interpretation: first, it seems to contradict the Chief Justice's own earlier discussion of stigma where in effect he claimed that the label of "misleading advertiser" does not carry the negative connotations of "dishonesty" which are associated with, for example, the label of "thief". Clearly, then, labels do play an important role in s. 7 analysis.

The second problem with the "jail is jail" assertion is its "baldness": it fails to recognize, for example, the distinction between a *mandatory minimum* sentence of imprisonment and an optional imprisonment sentence, or imprisonment in default of payment of a fine. In addition, it does not recognize any distinction between offences with maximum penalties of, for example, seven days, six months, one year, five years, or life imprisonment. Finally, it fails to recognize the fact that the *Charter* itself makes distinctions in terms of the protections it provides depending upon the length of imprisonment that is possible. Section 11 (f) of the *Charter* stipulates that "any person charged with an offence has the right...to the benefit of trial by jury where the maximum punishment for the offence is *imprisonment for five years or a more severe punishment.*" Thus, the drafters of the *Charter* appreciated that, for the purposes of determining

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<sup>765</sup> *Ibid.*, at p. 183.

<sup>766</sup> *Ibid.*

<sup>767</sup> *Ibid.*, at pp. 183-184.

appropriate *Charter* protections, it is not simply a question of “jail is jail” but rather a more nuanced inquiry into the length of imprisonment, with more protections being allocated for imprisonment beyond 5 years. While the Chief Justice is undoubtedly correct in noting that the mere existence of *any* possibility of imprisonment triggers a threshold s. 7 minimum fault requirement since it involves a potential deprivation of liberty,<sup>768</sup> hopefully this does not mean that a more graded judicial response to the varieties of ways in which imprisonment can be attached to an offence is irrelevant for *Charter* purposes.<sup>769</sup> Arguably, it is the context of this more nuanced discussion that the labels “regulatory” or “criminal” may indeed be significant, since they can potentially provide the conceptual and functional underpinnings for, among other things, differing fault requirements, differing expectations of privacy, and differing burdens of proof.

Although McLachlin J. concurred with the conclusions of Lamer C.J.C., she made “no comment” concerning “the significance of ‘stigma’”, nor did she elucidate under what conditions the minimum fault requirement of negligence might be acceptable.<sup>770</sup> La Forest J. was in “substantial agreement with the Chief Justice”.<sup>771</sup> While agreeing with Cory J. that there is a broad divide between true criminal law and regulatory offences, La Forest J. pointed out that in his earlier analysis based on this distinction in *Thomson*, the case dealt with a demand for business documents as a reasonable seizure within the meaning of s. 8 of the *Charter*, not the risk of

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<sup>768</sup> This, of course, is the *ratio decidendi* of *Motor Vehicles*.

<sup>769</sup> See e.g., discussion of “graded responses” to the presumption of innocence *infra*.

<sup>770</sup> *Ibid.*, at p. 232.

<sup>771</sup> *Ibid.*, at p. 198.

imprisonment in the context of s. 7.<sup>772</sup> More important than the labels were the values at stake, according to LaForest J.. Having said this, however, he was nevertheless "prepared to accept the requirement of due diligence as sufficient for *Charter* purposes in the case of regulatory offences and some criminal offences having a significant regulatory base (e.g., gun control....)"<sup>773</sup> In this regard, La Forest J.'s decision foreshadows the recognition of the quasi-regulatory *Criminal Code* category in *Hundal*, *Smillie*, and other cases (as discussed earlier).

Justice Iacobucci, with two others concurring, was "in agreement" with both Lamer C.J.C. and Cory J. that paragraphs (c) and (d) of s. 37.3(2) (the "timely retraction" provisions) infringed s. 7 of the *Charter* and were not justifiable under s. 1.<sup>774</sup> Justice Iacobucci did not otherwise comment on the minimum fault requirement and the conditions in which it would be considered acceptable.

Thus, while there was evident agreement by the Court that objective negligence was the minimum fault requirement for s. 7 purposes where imprisonment was available, a more precise delineation as to when this minimum fault requirement would be acceptable was not the subject of consensus. The judgment of Cory J. suggests that generally, with regulatory offences the negligence standard is appropriate, because the behaviour is not in itself morally abhorrent as with true crimes, but rather has negative societal consequences, and because of the "licensing argument" which holds that accused who are regulated persons are in a different position than accused subject to criminal offences: regulated persons are in a position of recognizable

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<sup>772</sup> *Ibid.*

<sup>773</sup> *Ibid.*, at p. 199.

<sup>774</sup> *Ibid.*, at p. 233.

responsibility vis-a-vis others, engaging in a potentially injurious but lawful activity which requires them to act with reasonable care. Lamer C.J.C., on the other hand, felt that the criminal/regulatory offence classification was of limited relevance for purposes of s. 7 fault analysis -- imprisonment was the crucial factor. Nevertheless, in his discussion of stigma, the Chief Justice elaborated distinctions which were consistent with a criminal offence/regulatory offence dichotomy.

### *Section 11(d) Analysis*

It is with respect to the content of the presumption of innocence (*Charter* s. 11(d)) and its application to strict liability offences, as well as its limitations justifiable under s. 1, that the divisions of opinion within the Supreme Court of Canada became most visible. Five of the nine judges were prepared to find that the due diligence defence on a balance of probability standard was acceptable either under s. 11(d) or, while violative of s. 11(d), it was nevertheless justifiable under s. 1. Two of the five (Cory J., concurred in by L'Heureux-Dube J.) held that in regulatory contexts where negligence was the fault requirement, the s. 11(d) presumption of innocence was not violated by reversing the onus. As a fallback they felt that even if it was a violation of s. 11(d), it was defensible under s. 1.<sup>775</sup> Justice Iacobucci (Stevenson and Gonthier JJ. concurring) concluded that the balance of probability due diligence defence violated s. 11(d) but was a justifiable limit under s. 1.<sup>776</sup> On the other hand, the four dissenters were in agreement that a due diligence defence established on a balance of probabilities violated s. 11(d) and was not justifiable under s. 1. Looked at another way, seven of nine judges agreed that a due diligence defence

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<sup>775</sup> *Ibid.*, at p. 230.

<sup>776</sup> *Ibid.*, at p. 234 - 236.

established on a balance of probabilities contravened s. 11(d): their only disagreement was whether the defence was justifiable under s. 1.

While strictly speaking, it cannot be said that the judgment of Cory J. is the majority decision on the issue, the rationale developed for finding the balance of probability due diligence defence in conformity with the presumption of innocence forms the intellectual basis for the judgment of the three who found s. 11(d) justifiable under s. 1. Justice Iacobucci, concurred in by Justices Stevenson and Gonthier, found that the due diligence defence established on balance of probability is a reasonable and demonstrably justified limit under s. 1 "for many of the reasons given by Cory J. in the context of his s. 11(d) analysis".<sup>777</sup> At the same time, it is probably fair to say that in many ways the minority dissenting position concerning s. 1 is a response to Cory J.'s approach.

For these reasons, review of the Court's approach to s. 11(d) analysis of the strict liability offence begins by examining the judgment of Justice Cory. In essence, on this issue, Cory J. builds directly on the foundation laid by Dickson J. in *Sault Ste. Marie*. Justice Cory also builds on his own analysis earlier in the case with respect to the s. 7 fault requirement. The position he adopts is based primarily on the "licensing argument" discussed earlier, and on practical considerations of enforceability. Following the Court's earlier decision in *Wigglesworth*,<sup>778</sup> Justice Cory accepts the proposition that the presumption of innocence enshrined in s. 11(d) of the *Charter* applies to regulatory offences;<sup>779</sup> however, he disputes the contention that it must have the same content and

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<sup>777</sup> *Ibid.*, at p. 233.

<sup>778</sup> *R. v. Wigglesworth* (1987) 37 CCC (3d) 385.

<sup>779</sup> *Ibid.*, at p. 222.

operate in the same manner as it does with respect to criminal offences. In this respect, Justice Cory calls on the words of Justice Dickson in *Sault Ste. Marie*. According to Dickson J., the "universally accepted" belief articulated in *Woolmington*<sup>780</sup> that "there is no burden on the prisoner to prove his innocence; it is sufficient for him to raise a doubt as to his guilt" was developed with respect to criminal offences in the true sense:

There is nothing in *Woolmington's* case, as I comprehend it, which stands in the way of adoption, in respect of regulatory offences, of a defence of due care, with burden of proof resting on the accused to establish the defence on the balance of probabilities.<sup>781</sup>

In short, the presumption of innocence has a different content with respect to regulatory offences than for true crimes.

For Cory J., as for Dickson J. before him in *Sault Ste. Marie*, the presumption of innocence as it applies to regulatory offences is initially satisfied upon the prosecution proving beyond a reasonable doubt that the *actus reus* of the offence has occurred.<sup>782</sup> Thus, for example, in the case of a misleading advertising prosecution, the Crown must prove beyond a reasonable doubt that the accused made the representation, that the general impression as well as the literal meaning of that representation was false or misleading, and that representation was false or misleading in a material respect.<sup>783</sup> Then and only then is it both fair and practical that the onus

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<sup>780</sup> *Op cit.*

<sup>781</sup> Dickson J. in *Sault Ste. Marie, op cit.*, at p. 367. This passage was quoted by Cory J. at p. 223 of *Wholesale, op cit.*, with emphasis added.

<sup>782</sup> *Ibid.*, at p. 227.

<sup>783</sup> None of these elements are necessarily straightforward in the complex modern world of advertising, where businesses frequently contract out the various aspects of composing an advertising campaign to specialists: eg., photography, advertising copy, graphic artists and layout, market survey services, etc.: see Black, *op cit.* at p. 563. Note that Cory J. did not specifically elaborate on the proof of *actus reus* involved in prosecuting an offence of misleading advertising, as is done here.

shift to the regulated accused to establish that all reasonable care was exercised.

The assertion that it is fair and practical to apply the presumption of innocence in this manner has both a theoretical and practical foundation. The first step is recognition of the fundamentally different position of regulated accused when compared with those accused of criminal wrongdoing. A regulated person, by engaging in a lawful but potentially injurious activity, is in a recognized position of responsibility in relation to others (e.g., an owner of a business vis-a-vis consumers, an employer vis-a-vis employees, an industrial polluter vis-a-vis the immediate community). The accused who is a regulated person is taken to have agreed to meet certain standards of care as prescribed by a government department or agency, and also to have accepted that should his conduct be proved beyond a reasonable doubt to have fallen below those standards, then he or she must demonstrate that all care had been exercised.

Thus, attribution of *knowledge and acceptance* of standards and the consequences of breaching those standards flow from the regulated person engaging in the activity itself.<sup>784</sup> That the regulated accused not merely raise a reasonable doubt that due diligence was exercised, but instead establish it on a balance of probabilities is a reasonable requirement, Cory J. contends, for practical and commonsense reasons.<sup>785</sup> Many of these reasons centre on the distinctive nature of regulated activity and negligence as a fault element. With criminal conduct there is typically no ongoing activity engaged in by the accused which is allowed by the State within prescribed conditions.<sup>786</sup>

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<sup>784</sup> *Ibid.*, at p. 227.

<sup>785</sup> *Ibid.*, at p. 224.

<sup>786</sup> Earlier in his judgment, at p. 206, Cory J. had characterized regulated activity as being "otherwise lawful activity" with "potentially adverse effects." Truly criminal activity such as murders, assaults, and

The purpose of regulatory offences is to prevent potentially injurious negligence<sup>787</sup> by creating in regulated persons a strong impetus for them to devote adequate attention to precautionary measures. It is evidence concerning this "ongoing attention to precautionary measures" which is the subject of a due diligence defence. Due diligence is not simply a question of an accused "directing his mind" towards a specific and discrete event: instead of proof of that fleeting moment of subjective intent connected to a truly criminal act as with criminal offences, it is proof that a regulated person has anticipated breakdowns, misinterpretations or accidents, and has put in place adequate preventative measures which is in issue.<sup>788</sup> In most circumstances, only a regulated person would be in the position of demonstrating that this ongoing, not fleeting attention had taken place.<sup>789</sup> And within a regulatory regime, it is the demonstrable exercise of reasonable care which the State wishes to encourage in regulated persons.<sup>790</sup>

With respect to truly criminal conduct, it is sensible and fair to impose on the Crown the burden of proving beyond a reasonable doubt that an accused intended to commit a crime, given the discrete and particular nature of the conduct and the fault in question: a criminal accused is typically not participating in an ongoing regulated activity which demands reasonable care to

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thefts is usually prohibited outright in our society, and is not an adjunct to regulatory regimes which allow intentional harm to be inflicted on others in certain circumstances. This example is that of the author, not of Cory J..

<sup>787</sup> *Ibid.*, at p. 206.

<sup>788</sup> *Ibid.*, at pp. 224 - 225.

<sup>789</sup> *Ibid.*, at p. 225.

<sup>790</sup> *Ibid.*, at p. 224.

prevent harm negligently inflicted on others.<sup>791</sup> It is neither reasonable nor practical to expect the Crown to be in a position of proving beyond a reasonable doubt that a regulated accused failed to exercise adequate ongoing attention to the many aspects of engaging in a regulated activity. Yet this would be the effect of lowering the due diligence defence burden on accused to merely raising a reasonable doubt, since "it is difficult to conceive of a situation in which a regulated accused would not be able to adduce *some* evidence giving rise to the possibility that due diligence was exercised."<sup>792</sup> Once an accused has satisfied this lower burden, then the Crown would be in the position of having to prove negligence beyond a reasonable doubt. Cory J. concludes, "Quite simply, the enforcement of regulatory offences would be rendered virtually impossible if the Crown were required to prove negligence beyond a reasonable doubt."<sup>793</sup>

Justice Cory, like Justice Dickson before him in *Sault Ste. Marie* and Justice Ritchie before him in *Pierce Fisheries*<sup>794</sup> does not point to any statistical or empirical evidence to support this proposition.<sup>795</sup> Undoubtedly, this type of evidence would be of great assistance to legislators and judges alike in the creation of regimes, but unfortunately it does not exist at this time. In the absence of statistical and empirical evidence, commonsense analysis will have to be sufficient. Commonsense analysis of the distinctive nature of regulated activity and of negligence in

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<sup>791</sup> Or if they are participating in an ongoing regulated activity which demands reasonable care, for their conduct to be considered criminal it must be committed in an intentional manner.

<sup>792</sup> *Wholesale, op cit.*, at p. 224.

<sup>793</sup> *Ibid.*, at p. 225.

<sup>794</sup> [1970] 5 CCC 193.

<sup>795</sup> Dickson J. in *Sault Ste. Marie* made the same assertion at p. 373, and Ritchie J. in *Pierce* made the assertion at p. 206.

comparison to criminal activity does appear to lend weight to the assertion.<sup>796</sup> With typical truly criminal activity, there is in many situations a clear and identifiable victim who can either verbally or in other ways provide the corroborative evidence necessary to support the proof of intent needed by criminal prosecutors.<sup>797</sup> On the other hand, with regulatory offences and activity, frequently pertaining to only *potentially* harmful conduct, *technical* contraventions which often have no clearly identifiable victim (or witnesses), it may be only the regulated person who will have the information which would be able to determine whether there was negligence or whether due diligence had been exercised. And given that a regulated person/accused is in a sense in a privileged position in society, notionally authorized to engage in a potentially injurious activity on the condition that he or she exercise reasonable care, it is eminently fair and appropriate that the regulated accused be in a position of having to demonstrate due diligence upon there being proof that a contravention had occurred.

Justice Cory points out that to make it possible for the Crown to prove negligence would necessitate the type of around-the-clock surveillance and inspection effort more in keeping with a

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<sup>796</sup> As Dickson J. asserted in *Strasser v. Roberge* (1979) 50 CCC(2d) 129 at p. 138, "Strict liability offences are offences of negligence. Just as negligence was irrelevant to intention so intention was irrelevant to 'responsibility for negligence.'" What Dickson J. seemed to be implying in *Strasser* was that different burdens and approaches to penal liability were necessary when regulatory negligence was at issue rather than criminal subjective intention. Thus, a balance of probability due diligence defence was reasonable for a strict liability negligence offence, but a shift of the burden of proof to the accused to prove lack of intention in the case of a *mens rea* offence would be inappropriate: see pp. 138 - 140. As was discussed earlier, Dickson J. in *Sault Ste. Marie* was rather perfunctory in his explanation for why a reverse burden of proof was necessary. A more elaborate explanation of the practical differences between proof of intentionality and proof of negligence, and the need for a reverse onus, was provided by former Crown prosecutor John Swaigen and discussed earlier in the context of analysis of the *Sault Ste. Marie* case.

<sup>797</sup> E.g., testimony of what was said prior and during the act, and/or forensic evidence.

police state than a free and democratic country.<sup>798</sup> There is thus a balanced inter-relation between the degree of intrusion possible through inspections and surveillance, on the one hand, and the degree of burden on an accused in a regulatory context which is quite different than what one would expect in true criminal contexts. The due diligence defence encourages preventative "self regulation" action by regulated person instead of more expensive and more intrusive activity by the State than is currently in use.<sup>799</sup> This notion of self regulation is crucial in relation to s. 1 analysis as well, as becomes apparent from examination of Justice Iacobucci's judgment.

Because Cory J. reaches the conclusion that a regulatory strict liability offence with a due diligence defence established on a balance of probabilities satisfies the s. 11(d) presumption of innocence requirement, there was no need for him to consider s. 1 arguments. "However," Justice Cory adds, "had it been necessary to consider the matter, the same reasons I have set forth in finding that neither ss. 7 nor 11(d) are necessarily infringed by strict liability offences can be justified under s. 1 of the *Charter*."<sup>800</sup> In effect, Cory J. has adopted a flexible and non-dogmatic approach to the interpretation of the *Charter's* presumption of innocence, one which follows the hierarchical formula of application set out in its provisions, but is not the prisoner of it. In this respect, it resembles rather closely Dickson J.'s pre-*Charter* approach to principle application in *Sault*: it is an approach which allows examination and adjustment of the *content* of principles (in this case, s. 11(d)) in light of the context of their application, rather than assuming that the

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<sup>798</sup> "Governments would be forced to devote tremendous expenditure, in terms of monetary and human resources, to regulatory enforcement mechanisms. Armies of investigators and experts would be required....[226] "Further, a marked expansion in enforcement mechanisms by definition implies an escalation in the intrusiveness of regulatory measures.": *ibid.*, at p. 227.

<sup>799</sup> *Ibid.*, at p. 227.

<sup>800</sup> *Wholesale, op cit.*, at p. 230.

principle itself is invariable regardless of the situation, and can only be limited in its harshness through a set of tests developed in relation to s. 1.

The advantage of this approach is that it is a more natural and contextual way of considering the nature, substance and limitations of a rule: it allowed Cory J. to reflect and conclude that the presumption of innocence has a different content in a regulatory setting than it does in a criminal setting.<sup>801</sup> For Cory J., this was not a matter of there being a "limit" on the principle, but rather the principle itself was different. Seven other judges adopted the more serial "first look at the principle, apply it, then look at its limitations in context" approach. In time, once the scope and content of *Charter* principles have been explored and agreed upon, the latter approach to *Charter* application will probably prevail, since it will be too onerous to expect courts to revisit the question of what is the content of each principle in every circumstance. But the serial approach to interpretation and application of s. 11(d) assumes that there is clear understanding and agreement of the content of the principle and that the content does not vary with the context.

The rest of the Court concluded that a due diligence defence established on a balance of probabilities violated s. 11(d). Essentially speaking for six others on this issue, Chief Justice Lamer strictly applied the criminal law presumption of innocence, without making any variation for the fact that a different fault element (objective negligence) and the different legal position of an accused (a regulated person, with responsibilities and legal consequences flowing from those

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<sup>801</sup> In this respect, it resembles the analysis by the Supreme Court of other *Charter* principles, such as La Forest J. in *Thomson* pointing out that the content of privacy in relation to s. 8 varies from a regulatory to a criminal setting. Cory J. makes note of La Forest J.'s approach earlier in his judgement at p. 215. La Forest J. disagrees with this approach as it applies to offences because of the different values involved. [pp. 198 - 199] It also resembles the SCC's approach to fault analysis under s. 7, where a different standard applies to regulatory offences than to criminal offences.

responsibilities) might necessitate a different approach to the presumption of innocence. For Lamer C.J.C., the essential fact was that an accused may be convicted while a reasonable doubt exists as to the fault element.<sup>802</sup> In his s. 11(d) analysis, the Chief Justice hinted that the presumption might have a different content if imprisonment were not a possible punishment.<sup>803</sup> Since imprisonment was available for the offence, and imprisonment is the determinative factor for s. 11(d) analysis, characterization of the offence as regulatory or criminal was in this respect inconsequential.<sup>804</sup>

### *Section 1 Analysis*

Having concluded that the due diligence defence violated s. 11(d), seven of the nine judges were then compelled to determine whether the violation could be justified under s. 1. This necessitated applying the tests set out in *Oakes*, as interpreted in subsequent decisions (e.g., *Chaulk*<sup>805</sup>). For Chief Justice Lamer and three others, the balance of probabilities due diligence standard could not be justified under s. 1. Iacobucci J. and two others follow Lamer CJ's analysis up to a point, but eventually uphold the *Sault Ste. Marie* form of the due diligence defence. The two streams of s. 1 judgments are examined below.

The Chief Justice began by characterizing the objective of placing the persuasive burden on an accused as ensuring "that all those who are guilty of false/misleading advertising are

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<sup>802</sup> *Ibid.*, at pp. 188 - 190.

<sup>803</sup> *Ibid.*, at pp. 189 - 190. Note again how the Chief Justice fails to make any distinctions between the variety of different impositions of imprisonment possible (eg., mandatory minimum sentence of imprisonment, imprisonment in default of fine, maximum of one week imprisonment, etc.).

<sup>804</sup> *Ibid.*

<sup>805</sup> *Op cit.*

convicted and to ensure that convictions are not lost due to evidentiary problems in proving guilt."<sup>806</sup> This was held to be an acceptable "pressing and substantial objective" for the purposes of the *Oakes* test.

A strong argument can be made that this characterization overemphasizes the conviction aspects but fails to recognize the general incentive impact it is intended to have on regulatees. As discussion of Cory J.'s approach suggests, the real value of placing the persuasive burden on accused is to stimulate regulatees to organize their affairs so as to minimize the likelihood of negligence arising. Because regulated accused will have the burden of persuading courts that their actions were duly diligent, they may have to put in place proactive measures which will prevent harm to the public. The improved ability to convict those who were not demonstrably duly diligent is part of this incentive effect on regulatee's conduct.

The Chief Justice uses language which paints the persuasive burden as being an unjust measure. He uses italics to make sure the point is not lost on the reader:

....the means chosen to achieve the objective essentially amounts to a decision by Parliament *to convict all those who do not establish that they were duly diligent, including some accused who were duly diligent (and for whom a reasonable doubt exists in that regard) but who are unable to prove due diligence on a balance of probabilities.*(emphasis in original)<sup>807</sup>

Note how the Chief Justice singles out *Parliament* as the decisionmaker, when in fact the Supreme Court of Canada in *Sault Ste. Marie* unanimously approved of the creation of the

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<sup>806</sup> *Wholesale, op cit.*, at p. 191.

<sup>807</sup> *Ibid.*, at p. 191.

common law due diligence defence established on a balance of probabilities.<sup>808</sup>

A characterization with the opposite emotive effect can just as easily be articulated:

...the means chosen to achieve the objective essentially amounts to a decision by Parliament and, until this decision, the unanimous Supreme Court of Canada, *to convict all those regulated accused who do not organize their affairs so that they would be in a position of being able to demonstrably show that they were duly diligent on a balance of probabilities.*

It will be seen that characterization of the means used to achieve an objective can in many ways pre-determine how the three-part proportionality test originally set out in *Oakes* will be applied.

Lamer C.J.C. was prepared to accept that the due diligence defence on a balance of probabilities met the first part of the *Oakes* proportionality test (the rational connection component), in that "[c]onvicting all those who are unable to establish due diligence on a balance of probabilities, including those who were duly diligent, is one way of ensuring...that the overall goal of ensuring fair and vigorous competition is attained."<sup>809</sup> Again, the way the Chief Justice framed the issue clearly reveals the ultimate conclusion he wishes to reach.<sup>810</sup>

However, the Chief Justice contended that a balance of probabilities due diligence standard did not meet the "as little as is reasonably possible" test<sup>811</sup> because other alternatives less

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<sup>808</sup> Note as well that a similar articulation can be made concerning the defence of insanity, which Chief Justice Lamer approved in *Chaulk*, as discussed *op cit.*

<sup>809</sup> *Ibid.*

<sup>810</sup> Thus, for example, even if a reasonable doubt due diligence standard were adopted, Lamer CJC's characterization would still have the effect of focussing on those who were duly diligent but did not meet the standard. For example, the test as applied to a reasonable doubt due diligence defence would state as follow: "convicting all those who are unable to meet the evidentiary reasonable doubt due diligence standard, *including those who were duly diligent*, is one way of ensuring....that the overall goal of ensuring fair and vigorous competition is attained."

<sup>811</sup> *Ibid.*

offensive to the presumption of innocence were available; in particular, if an evidentiary as opposed to a persuasive burden were used, then the accused could escape conviction by only raising a reasonable doubt that due diligence had been exercised.<sup>812</sup> For Lamer CJC, the reasonable doubt burden would "go a long way" in ensuring that those who were not duly diligent are convicted.<sup>813</sup>

This bald assertion that the burden would "go a long way" without any reasoned explanation as to why this would be the case is highly suspect. As has been discussed *supra*, there are good reasons to believe that the lower burden would defeat the objectives of the regulatory legislation. Not surprisingly, then, it is at this stage in Lamer C.J.C.'s analysis that Iacobucci J. (Stevenson and Gonthier JJ. concurring) parted ways. Justice Iacobucci noted that if the accused need simply raise a reasonable doubt as to due diligence, then in effect the Crown would be placed in the position of proving facts "largely within the peculiar knowledge of the accused."<sup>814</sup> Referring to Cory J.'s judgment, Iacobucci contended that this would make proof of public welfare offences virtually impossible and would effectively prevent implementation of public policy through prosecution.<sup>815</sup>

Iacobucci J. went on to note the specific incentive effect of requiring regulated accused to establish due diligence. Requiring the accused to merely raise a reasonable doubt as to due diligence...

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<sup>812</sup> *Ibid.*, at p. 192.

<sup>813</sup> *Ibid.*, at p. 193.

<sup>814</sup> *Ibid.*, at p. 235.

<sup>815</sup> *Ibid.* In substantiation of this point, see earlier analysis of *Sault Ste. Marie* case.

...would also not provide effective inducement for those engaged in regulated activity to comply strictly with the regulatory scheme including adopting proper procedures and record-keeping and might even have a contrary effect.<sup>816</sup>

In effect, the stimulus for regulated persons to take on the responsibility of undertaking "self regulation" activities such as internal audits, allowing authorities to "preview" planned actions which might contravene standards, and establishing industry standards in conjunction with government may be largely removed.<sup>817</sup> As a result, Justice Iacobucci concludes that Parliament could not "reasonably have chosen an alternative means which would have achieved the identified objective as effectively."<sup>818</sup> It can be seen here that Justice Iacobucci has in fact characterized the objective of the balance of probabilities due diligence defence differently than Lamer C.J.C.: the ultimate goal is to have regulated persons put in place systems which are demonstrably indicative of due diligence ("proper procedures and record-keeping") so that the scheme is more effective at preventing negligent-type harm.

The Chief Justice in his s. 1 analysis goes on to conclude that the balance of probabilities due diligence standard also cannot be justified under the final portion of the proportionality test because the effect of the means chosen is not proportional to the objective:

....here we are postulating legislation enabling the imprisonment of those who were duly diligent but could not prove it on a balance of probabilities, even though there might well have existed a reasonable doubt thereof. Sending the innocent to jail is too high a price.<sup>819</sup>

Such a conclusion is sensible as long as it is accepted that regulated accused and criminal accused

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<sup>816</sup> *Ibid.*

<sup>817</sup> For more on this point, see earlier discussion of the incentive effect produced by the reverse onus.

<sup>818</sup> Iacobucci, quoting Lamer CJC in *Chaulk* at p. 220 (CCC).

<sup>819</sup> *Wholesale, op cit.*, at p. 195.

are in identical positions, so that it is not reasonable to ask more of regulated accused than it is criminal accused, just as the Supreme Court of Canada has accepted that a regulated person has a reduced expectation of privacy when compared with non-regulated persons.

For Iacobucci J. (Stevenson and Gonthier JJ. concurring) it is eminently reasonable to expect regulated persons to be able to demonstrate due diligence. As a result, once again Justice Iacobucci disagrees with the Chief Justice:

As noted by Cory J. in his reasons, regulated activity and public welfare offences are a fundamental part of Canadian society. Those who choose to participate in regulated activities must be taken to have accepted the consequential responsibilities and their penal enforcement. One of these consequences is that they should be held responsible for the harm that may result from their lack of due diligence. Unless they can prove on a balance of probabilities that they exercised due diligence, they shall be convicted and in some cases face a possible prison term.<sup>820</sup>

It is clear that Justice Iacobucci is paraphrasing the components of the "licensing argument" discussed in the judgment of Cory J. and is in turn recognizing the fundamentally different position of regulated accused when compared with criminal accused.<sup>821</sup>

#### *Summary -- Wholesale*

The *Motor Vehicle*, *Thomson* and *Wholesale* decisions are ample demonstration that the Supreme Court is in the process of developing a rational, principled and fair approach to distinguishing criminal from regulatory regimes -- an approach which is considered in accordance with the *Charter*. This involves recognition that principles of fundamental justice may have different content and be applied differently in regulatory as opposed to criminal contexts. Thus,

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<sup>820</sup> *Ibid.*, at p. 235.

<sup>821</sup> This in spite of Iacobucci's own comment earlier that he was abstaining from commenting on the dichotomy articulated by Cory J. between "true crimes" and "regulatory offences.": *ibid.*, at p. 234.

for example, the notion of fault for true crimes ideally consists of subjective intent, although lesser fault standards may be allowed in some circumstances (as discussed earlier in the context of the emergence of the “quasi-regulatory” *Criminal Code* offence), and for regulatory offences with imprisonment available, objective negligence is acceptable. The notion of privacy, as regards inspections and collection of evidence pertaining to possible violations is more limited with respect to regulatory offences than it is concerning criminal offences. And the presumption of innocence as it pertains to criminal offences generally necessitates proof by the Crown of both the *actus reus* and *mens rea* beyond a reasonable doubt, whereas with regulatory offences, once the Crown has proven the *actus reus* beyond a reasonable doubt, the burden shifts to the regulated accused. While a reverse onus is considered by the majority of the Supreme Court of Canada to be contrary to the presumption of innocence as enshrined in the Charter’s s. 11(d), it nevertheless constitutionally justifiable under s. 1 to require that a regulated accused establish that due diligence was exercised on a balance of probabilities.

In each of these three decisions, it is apparent that the distinctive position of regulated persons in our society -- as persons given the privilege of engaging in lawful but potentially injurious specialized activity on the condition that they be responsible for exercising reasonable care -- has been recognized by the Supreme Court of Canada as necessitating a different approach to penal liability than that associated with truly criminal activity. In essence, there are significant legal consequences flowing from the decision of persons to engage in regulated activity. These legal consequences are serious, and have the intended effect of ensuring that regulated persons demonstrably exercise due care, and be prepared to establish that they have done so.

With respect to both s. 7 fault analysis and s. 8 privacy analysis, the Court has indicated

some willingness to recognize that context (i.e., a regulatory, as opposed to a criminal activity and regime) was important to understanding why principles have different content and apply differently. In the case of the presumption of innocence analysis, only a minority were willing to adopt the same approach; however, in the final analysis, five of nine judges were prepared to find that the balance of probability due diligence defence standard was acceptable either under s. 11(d) or, while violative of s. 11(d), was nevertheless justifiable under s. 1. Although from a consistency standpoint, it might be preferable for the Court to follow through with the same contextual approach to understanding s. 11(d) as they did with s. 7 and s. 8, ultimately what is important is that the theoretical and practical basis for the distinctive treatment of regulated persons is articulated and agreed upon by as large a majority as possible, since the enforceability of Canada's innumerable regulatory regimes hangs in the balance.

#### *Decisions Since Wholesale Travel Pertaining to Strict Liability*

Following the judgment in *Wholesale Travel*, the immediate outstanding question was whether the Supreme Court would regard it as a one-off decision, unique to the circumstances and language of the *Competition Act*, or instead consider it definitive with respect to strict liability offences regardless of the regulatory scheme in which they were located. If the Court adopted the former approach, this would allow it to review different regimes and devise different approaches for each. For example, the Court could conclude that a regulated accused operating under a legal regime pertaining to environmental protection would be required to raise only a mere reasonable doubt that due diligence had been exercised while a regulated accused operating under a worker health and safety regime should be subject to a persuasive burden to establish due diligence.

Within six months of *Wholesale Travel*, the Supreme Court ruled on two other decisions concerning strict liability offences and in so doing appears to have settled the question of whether a variable or unitary approach to due diligence would be adopted. In *R. v. Ellis-Don Ltd.*,<sup>822</sup> the Supreme Court considered the *Charter* viability of s. 37(2) of the Ontario *Occupational Health and Safety Act*. Pursuant to s. 37(1) of the *Act*, every person who fails to comply with a provision of the *Act* or an order made pursuant to it is guilty of an offence and on conviction is liable to a fine of not more than \$25,000 or to imprisonment for a term of not more than twelve months, or to both. By s. 37(2), a defence is available to certain of the offences if the accused can prove "that every precaution reasonable in the circumstances was taken."

In *Ellis-Don*, a worker had been killed in a construction accident. In a 2:1 decision, the Ontario Court of Appeal had ruled that requiring the accused to prove on a balance of probabilities "every precaution reasonable" as stipulated in s. 37(2) violated s. 11(d), and could not be saved by s. 1, since the alternative "raising a reasonable doubt" standard existed, and since a balance of probabilities defence would mean that an accused could be convicted even though a reasonable doubt existed.<sup>823</sup> In so doing, the Court of Appeal followed their own earlier decision in *Wholesale Travel*. The Ontario Court of Appeal ruling in *Ellis-Don* took place before the Supreme Court had overturned the Court of Appeal's judgment in *Wholesale Travel*. At the Supreme Court of Canada level, the Court unanimously reversed the Ontario Court of Appeal's decision in *Ellis-Don*:

We are all of the view that this appeal must succeed. The existence of a restriction to s.

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<sup>822</sup> [1992] 7 OR (3d) 320.

<sup>823</sup> *R. v. Ellis-Don Ltd.* 1 O.R. (3d) 193 (Ont. C.A.).

11(d) is governed by this Court's decision in *R. v. Wholesale Travel*....The section 1 analysis in *Wholesale* is applicable here, as there is no difference of substance between the nature of the legislation in that case and in this one.<sup>824</sup>

Thus, the Supreme Court extended their reasoning and conclusions in *Wholesale Travel* regarding strict liability offences from its original setting in competition legislation to health and safety legislation.

In *R. v. Martin*,<sup>825</sup> the Supreme Court considered the *Charter* viability of s. 13 of the federal *Export and Import Permits Act*, which stipulated that exporting certain animal skins without a permit contrary to s. 13 was an offence contrary to the *Act*. Pursuant to s. 19, every person who contravenes any of the provisions of this *Act* or the regulations is guilty of an offence, punishable on indictment to a fine not exceeding \$25,000, or to imprisonment for a term not exceeding five years or to both. At the Ontario Court of Appeal level, the Court had characterized the offence as one of strict liability, subject to the common law defence of due diligence, but following their own earlier decision in *Wholesale Travel*, they stipulated that the accused need only raise a reasonable doubt that due diligence existed. The Ontario Court of Appeal did not have the benefit of the Supreme Court's decision in *Wholesale Travel* at the time they made their decision in *Martin*. At the Supreme Court level, the Court unanimously followed their ruling in *Wholesale Travel* and upheld the due diligence defence on a balance of probabilities, saying that there was "no difference of substance between the nature of the legislation in that case and in this one."<sup>826</sup>

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<sup>824</sup> [1992] 7 OR (3d) 320, at 320.

<sup>825</sup> [1992] 1 SCR 838.

<sup>826</sup> *Ibid.*, at p. 838.

Taking the *Wholesale Travel*, *Ellis-Don*, and *Martin* cases together, we can see that strict liability offences with due diligence defences established on a balance of probabilities have survived *Charter* challenges directed at regulatory offence regimes pertaining to consumer protection, health and safety and environmental protection. Moreover, the Court has shown no inclination to depart from its analytical approach outlined in *Wholesale Travel*.

One of the most significant pollution control prosecutions in Canada in recent times, *R. v. Bata Industries Ltd.*,<sup>827</sup> took place while the *Wholesale Travel* decision was before the Supreme Court of Canada. At the time the *Bata* prosecution began, the Ontario Court of Appeal's decision in *Wholesale Travel* was binding in Ontario. It will be recalled that the Ontario Court of Appeal in *Wholesale Travel* had ruled that the due diligence defence established on a balance of probabilities was contrary to section 11(d) and not salvageable under s. 1, since it was considered that a less offensive alternative (merely raising a reasonable doubt) existed.

However, before the *Bata* decision had been handed down, the Supreme Court of Canada overturned the Court of Appeal's decision in *Wholesale Travel*, and reinstated the original "*Sault Ste. Marie*" version of the due diligence defence established on a balance of probabilities. Not mincing words, Provincial Court Judge Ormiston in *Bata* emphasized the significance of placing the onus of establishing due diligence on the defendant:

I must now consider the defence of due diligence as it relates to the defendant Bata. During the course of this trial, the nature of the due diligence defence changed dramatically. As the trial began, the defendants had only to raise a reasonable doubt on the issue. After the evidence was completed, but before submissions, the Supreme Court of Canada released *R. v. Wholesale Travel*...., which imposed upon the defendants the onus

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<sup>827</sup>

*Op cit.*

of establishing the defence of due diligence upon a balance of probability.<sup>828</sup>

Evident here is a clear understanding of the significance of maintaining the burden of proof on the accused to establish due diligence. In *Bata*, Judge Ormiston eventually concluded that the corporation, which had left 45 gallon drums of chemicals to corrode on its property, had failed to establish that it had 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. Counsel for Bata had submitted considerable evidence of due diligence, but this was not considered sufficient to establish due diligence. Taking into account Judge Ormiston's assertion of the significance of maintaining the persuasive burden of proof of due diligence on the accused, it seems apparent that Bata might very well have escaped liability if a mere reasonable doubt due diligence defence had been available, in spite of the evidence of rusting drums of chemicals, and testimony that Bata officials had failed to remove the chemicals because the cost of disposal were considered too high. Thus, it could be said that the practical significance of a persuasive burden on the accused for due diligence is amply demonstrated in this case.

The *Bata* case was significant in another respect as well. As part of the defendant's case, counsel argued that the statutorily prescribed duty on the part of directors to take all reasonable care was too vague and imprecise and thus in violation of the principles of fundamental justice.<sup>829</sup> In view of the possibility of restriction of liberty upon conviction, and in light of penalties available, counsel for the defendants submitted that the provisions of the offence constituted a

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<sup>828</sup> *Ibid.*, at p. 338.

<sup>829</sup> *Ibid.*, at p. 356 - 359. Note that Justice Ormiston chose to interpret a separate offence which explicitly imposed a duty to exercise reasonable care on directors as a strict liable offence. A later decision, *R. v. Commander Business Furniture Inc.* (1992) 9 CELR (NS) 185, interprets the offence as requiring proof by the Crown that a director has failed to exercise all reasonable care as part of the actus reus of the offence.

deprivation of the right to life, liberty and security of the person as guaranteed by s. 7 of the *Charter*. Judge Ormiston noted that in *R. v. Nova Scotia Pharmaceutical Society*,<sup>830</sup> the Supreme Court of Canada concluded that an offence of "unduly" limiting competition as prohibited by the federal *Competition Act* did not violate the *Charter*.

In *Nova Scotia Pharmaceutical*, the Supreme Court observed that while "unduly" is a question of law, the determination of what constitutes unduly was a question of fact. Applying that same approach to reasonable care, Judge Ormiston stated that "all reasonable care" is a question of law, but whether all reasonable steps were taken is a question of fact.<sup>831</sup> Judge Ormiston concluded that the defence of reasonable care centres around two issues: the foreseeability question (e.g., ought the directors, given the nature of the business of the corporation, reasonably foresee a likelihood of discharge), and the standards question (e.g., did they meet the reasonable precautions standards of their industry).<sup>832</sup> After considering all the factors enumerated in *Nova Scotia Pharmaceutical*, Judge Ormiston decided that a duty to take reasonable care is not void for vagueness:

The culpable activity is targeted by the legislation and the various factors that are to be considered by directors are enumerated in *R. v. Sault Ste. Marie*. What is reasonable and foreseeable at a particular time and place must be measured in light of the particular industry or activity and that determination will be made on the basis of the evidence at the trial.<sup>833</sup>

Ultimately, both Bata Industries Ltd., and several of its directors were found guilty of violating

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<sup>830</sup> [1992] 93 DLR (4th) 36.

<sup>831</sup> *Ibid.*, at p. 358.

<sup>832</sup> *Ibid.*, at p. 359.

<sup>833</sup> *Ibid.*

the *Ontario Water Resources Act*.

Since then, the *Wholesale Travel* case has been applied in a wide variety of circumstances, by lower courts and by the Supreme Court. One of the components of *Wholesale Travel* which has been most frequently invoked in subsequent decisions is the argument articulated by Justice Cory that it is just and practical to hold regulated actors to a different and higher standard than accused persons who are not participating in a regulated activity -- the so-called "licensing justification."<sup>834</sup>

The apparent emergence of the quasi-regulatory *Criminal Code* category, an intermediate category between the strict liability public welfare offence and "true crime" offence types, denoting recognition and acceptance of the use of an objective negligence fault standard (usually a marked departure from the reasonable standard) for offences contained in the *Criminal Code* which have significant regulatory characteristics such as dangerous driving and the handling of firearms,<sup>835</sup> represents a not unexpected variation on the *Sault Ste. Marie* three-offence classification system (which, as discussed earlier, was never intended to create a judicial straitjacket), and a not unexpected outcome flowing from the Supreme Court of Canada's

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<sup>834</sup> E.g., see *R. v. Pontes* (1995) 13 MVR (3d) 145 (SCC), per Gonthier, dissenting (driving while prohibited); *R. v. Hundal* [1993] 1 SCR 867 (dangerous driving), per Cory, J.; *R. v. Smillie* [1998] BCJ No. 2082 (discussed earlier); *R. v. Lenihan* [1997] NSJ No. 93, (NSCA) (different right to counsel for driver of overweight truck as a regulated actor than for accused in a non-regulatory setting); *R. v. Fitzpatrick* [1995] 4 SCR 154 (per Justice LaForest: protection against self-incrimination has a lesser effect for regulated actors than for non-regulated accused, so that the captain of vessel charged with exceeding quota contrary to the *Fisheries Act* could not bar the prosecution from using fishing reports on grounds of self-incrimination). More recently, see *R. v. White* [1999] *op cit.*, where the Supreme Court suggested that driving as a regulatory activity may be different from commercially regulated activities in the sense that, for some drivers, it is a virtual necessity, and thus is not voluntarily engaged in to the same extent as other regulated activities.

<sup>835</sup> As discussed earlier. Key decisions include *R. v. Hundal*, *R. v. Finlay*, *R. v. Gosset*, *R. v. Durham*, and *R. v. Smillie*.

*Charter* interpretations to date (which have indicated that subjective fault is only constitutionally necessary for certain core high stigma offences such as murder and theft, and have approved a minimum fault standard of objective negligence where imprisonment is a penalty).

In this regard, the following observations of Ryan J.A. for the British Columbia Court of Appeal in *Smillie* seem to represent a good summation of the more flexible and nuanced approach to constitutional analysis of criminal offences which has emerged since the *Charter* has been introduced:

In *Vaillancourt* the statement that “at least negligence was required, in that at least a defence of due diligence must always be open to an accused who risks imprisonment” was made in reference to “even a mere provincial regulatory offence.” In *Finlay* the reference was simply to offences which carry a term of imprisonment. In my view *Finlay* reflects a recognition that the minimum fault requirements of any offence are contextually flexible and will depend on a number of factors. “True” criminal offences are presumed to require full mens rea, but as the offence moves down the continuum to acquire a regulatory aspect, that is, to impose sanctions for the prevention of harm rather than to punish for past conduct, the requirement for full mens rea diminishes.<sup>836</sup>

Where a *Criminal Code* offence contains a clear fault element in its terms, such as with “dangerous” driving, or “reckless” use of firearms, and that fault element is objective in nature, and the offence has evident regulatory aspects (e.g., affiliation with a regulatory regime which controls rather than prohibits behaviour, that imposes standards of care on persons and puts them in a position of responsibility vis-a-vis others), then proof beyond a reasonable doubt of a marked departure from the standard of care may be considered a constitutionally acceptable fault element to attract criminal liability. The accused can escape liability by raising a reasonable doubt that due diligence was exercised. This was the situation in *Hundal* for dangerous driving, and *Finlay* and

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<sup>836</sup>

*Smillie, op cit.*, at para. 48.

*Gossett*, for careless use of firearms. Where the *Criminal Code* offence does not include language indicating a fault element of negligence as part of its terms, and instead prescribes the acceptable conduct (e.g., requiring simply that guns be stored “in a manner contrary to...regulation”, as in the offence under examination in *Smillie*), then liability will establish on proof beyond a reasonable doubt that the prescribed regulatory standard of storage has been breached, but an accused can escape liability by raising a reasonable doubt that he or she was duly diligent in his or her efforts to comply with the regulation in question.<sup>837</sup>

Synthesizing Supreme Court of Canada *Charter* interpretations of offences to date, a spectrum of offence types now appears to be constitutionally possible:

(1) absolute liability offences are generally only permissible where imprisonment (i.e., deprivations of liberty) is not available;

(2) following Chief Justice Lamer’s dicta in *Wholesale*, absolute liability offences directed exclusively at corporations (where no possibility of imprisonment exists) may be a promising growth area in regulatory law;

(3) in regulatory contexts, the strict liability offence with due diligence defence established on a balance of probabilities is constitutionally sound, even where imprisonment is available, with no difference in content or procedural treatment depending on the regulatory context. Thus, simple and not gross negligence is acceptable, and a balance of probabilities due diligence defence is permissible, without variation, no matter whether the regulatory context be consumer-oriented economic regulation such as misleading advertising offences, environmental protection, or worker health and safety;

(4) supplementary elaborations on the due diligence defence which have absolute liability elements (e.g., such as the timely retraction provisions in the *Competition Act*, as discussed in *Wholesale*) will not be constitutionally acceptable if the offence includes imprisonment as a punishment;

(5) for quasi-regulatory *Criminal Code* offences (so-called by some judges), where there is an explicit fault requirement part of the offence, such as with dangerous driving or careless use of firearms, a marked departure objective fault standard appears to be

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<sup>837</sup> *Smillie, op cit.*, at para. 21.

acceptable, combined with a mere reasonable doubt due diligence defence. Where the Criminal Code offence stipulates the standard of care to be met (e.g., storage of guns as imposed by regulations), then upon proof beyond a reasonable doubt of breach of this standard, criminal liability will follow, except if the accused raises a reasonable doubt that due diligence has been exercised;

(6) the significance of the regulatory offence vs. true crime distinction as originally set out in *Sault Ste. Marie* remains crucial, as evidenced by the difference in constitutional treatment of the strict liability regulatory offence and the quasi-regulatory *Criminal Code* offence: characterization of an offence as a strict liability regulatory offence will allow the fault element of simple objective negligence and a balance of probability due diligence standard, whereas characterization as a quasi-regulatory *Criminal Code* offence appears to require the more restrictive significant departure objective negligence standard and a reasonable doubt due diligence defence;

(7) while the vast majority of *Criminal Code* offences are offences of subjective mens rea, only a small handful of *Criminal Code* offences with particular stigma such as murder and theft must contain subjective mens rea as a mental element for the purposes of *Charter* analysis.

In effect, then, the Supreme Court of Canada, through its *Charter* interpretations to date, building on the original tri-partite offence classification approach set out in *Sault Ste. Marie*, seems to be in the process of articulating a nuanced spectrum of offence types, capable of addressing a wide range of activities and actors through specialized offences which on the one hand seem appropriate to addressing the harm in question while on the other hand are protective of the rights of accused persons.

## Chapter 11 -- Regulatory Offences in the United States in the Modern Era

On the issue of regulatory offences, United States law is in some respects strangely undeveloped when compared with some of the other common law jurisdictions examined in this thesis. In contrast to Canada, for example, American offences of absolute liability, with imprisonment available as a punishment, have been expressly approved by the United States Supreme Court (as was discussed earlier). In most regulatory legislation only the two extremes of absolute liability offences and "true crime" intentional offences are usually found.<sup>838</sup> In this regard, the state of American regulatory law resembles that of England, and Canada in the late nineteenth century. The "middle ground" strict liability offence which emerged and gained favour in other 20th century Commonwealth countries has not firmly taken root in American soil.

The position taken here is that this has had a negative effect on American judges, on the regulated community, and the general public. It has compelled judges to attempt to force-fit fact-situations crying out for the exercise of due care into either the absolute liability or true-crime categories, distorting both in the process. In addition to being unfair to accused persons, this binary "absolute liability or mens rea" approach, with no middle ground due diligence defence, fails to create a direct incentive for regulated persons to exercise reasonable care.<sup>839</sup>

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<sup>838</sup> There are occasional examples of negligence offences included in regulatory legislation. For example, under the *Clean Water Act*, persons can be found criminally liable for either willful or negligent discharges contrary to the Act (see discussion below). However, this approach is rare, whereas in Canada, the United Kingdom, Australia and New Zealand, it is common. Moreover, unlike the Canadian courts, the United States Supreme Court has not articulated interpretive approaches to the characterization of offences so that non-intentional offences contained in regulatory legislation are presumptively strict liability in nature with a due diligence defence available unless clear wording suggests otherwise.

<sup>839</sup> This is not to suggest that such an incentive to exercise reasonable care might emanate from other sources, such as, for example, sentencing guidelines which reduce the size of fines where systems of due diligence are in place. As discussed in K. Webb, "Voluntary Initiatives and the Law," in R. Gibson, ed., *Beyond Compulsion: The Potential and Limitations of "Voluntary" Initiatives for Corporate Greening* (Peterborough: Broadview Press, 1999).

On the positive side, commentators have suggested that there do not appear to be any insurmountable barriers to courts reconsidering the absolute liability offence with imprisonment and ruling it unconstitutional, and at the same recognizing the more preferable (in the opinion of the author) strict liability offence type, following the Canadian lead in this regard.<sup>840</sup> As long as the renewed U.S. judicial interest in the rule of lenity<sup>841</sup> is not applied in regulatory offence contexts to limit the reasonable care defence (on the grounds that that defence is too ambiguous), there appears to be no impediment to the Canadian version of the strict liability offence gaining favour in the United States.

In this chapter, four main aspects of the American experience from 1950 to the present are discussed: first, the key decisions interpreting regulatory offences are critically examined, then the current state of regulatory offences is analyzed. Following that, the potential for a constitutional re-consideration of the American “strict” liability offence (i.e., the Canadian absolute liability offence) is explored. Finally, the rise of the rule of lenity and its potential applicability to regulatory offences is discussed.

### *Key Decisions*

Three early decisions of the United States Supreme Court from the period 1900 - 1950, in which the Court approved of the idea that liability can be imposed in the absence of any proof of culpability have set the tone for subsequent analysis of the absolute liability offence. In the 1922 decision of *United States v. Balint*,<sup>842</sup> as we have seen, the Court held that a conviction for sale of

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<sup>840</sup> As discussed below.

<sup>841</sup> The rule of lenity holds that ambiguity in offence language should be interpreted in favour of accused. Discussed in greater detail below.

<sup>842</sup> *Op cit.*

narcotics in a manner contrary to the *Anti-Narcotics Act* could be obtained even where there was no proof of intent. The penalty for violation was up to five years imprisonment.<sup>843</sup> The decision was unanimous, with the Court's reasoning basically focusing on two points: first, the Court's acceptance of the idea that Congress had weighed the possible injustice of subjecting an innocent seller to a penalty against the evil of exposing innocent purchases to danger from the drug, and second, the related belief on the part of the Court that this sort of regulatory measure emphasized achievement of some social betterment over punishment as in conventional crimes. The 1922 companion decision to *Balint, United States v. Behrman*,<sup>844</sup> essentially reached the same conclusion.

Similarly, in the 1943 decision of *United States v. Dotterweich*,<sup>845</sup> the Supreme Court held that the *Food, Drug, and Cosmetic Act* is "a now familiar type of legislation" in which Congress dispensed with the conventional requirement for criminal conduct -- awareness of wrongdoing. As a result, punishment for misbranding an article follows without there being any conscious fraud:

Hardship there doubtless may be under a statute which thus penalizes the transaction though consciousness of wrongdoing be totally wanting. Balancing relative hardships, Congress has preferred to place it upon those who have at least the opportunity of informing themselves of the existence of conditions imposed for the protection of consumers before sharing in illicit commerce, rather than to throw the hazard on the innocent public who are wholly helpless.<sup>846</sup>

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<sup>843</sup> The fact that a five year prison penalty was available was noted by Frankfurter, J., in *United States v. Dotterweich* (as discussed earlier), but not in *Balint* itself.

<sup>844</sup> *Op cit.*

<sup>845</sup> *Op cit.*

<sup>846</sup> *Ibid.*, at pp. 284 - 285.

Laudable though this approach might seem at first glance, it fails to consider or explain how a defence of reasonable care would lessen the protection to the public.<sup>847</sup> *Balint, Behrman* and *Dotterweich* set the tone for treatment of absolute liability offences contained in regulatory legislation in the second half of the twentieth century.

In the 1952 decision of *Morissette v. United States*<sup>848</sup> the United States Supreme Court analyzed the intentional element of paragraph 641 of 18 U.S.C, which provided that "whoever embezzles, steals, purloins, or knowingly converts" government property is punishable by fine or imprisonment (of up to one year).<sup>849</sup> The accused had openly entered a military base and taken three tons worth of spent metal bomb casings, which he then proceeded to flatten and sell. Morissette did not deny that he had taken the casings, and sold them, but he maintained that he honestly believed that they had been abandoned by the military, so that he lacked felonious intent. For the Court, Justice Jackson stated:

The contention that an injury can amount to a crime only when inflicted by intention is no provincial or transient notion. It is as universal and persistent in mature systems of law as belief in freedom of the human will and a consequent ability and duty of the normal individual to choose between good and evil.<sup>850</sup>

But, referring to cases such as *Balint* and *Behrman*, Justice Jackson noted that a new type of offence -- the public welfare offence -- has been developed to deal with the new problems of the

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<sup>847</sup> As discussed *supra*, it should be noted that the legislation does provide one possible defence: where a manufacturer's guarantee concerning a product is provided, immunity from prosecution is available.

<sup>848</sup> 342 U.S. 246 (1952).

<sup>849</sup> *Ibid.*, at p. 248.

<sup>850</sup> *Ibid.*, at p. 250.

industrial era which do not involve a mental element.<sup>851</sup> Drawing extensively on the Sayre article on “Public Welfare Offenses”<sup>852</sup> discussed earlier, Justice Jackson concluded that these offences were different in character than the original common law crimes and were acceptable where Congress had refrained from including an intentional element:

These cases do not fit neatly into any of such accepted classifications of common-law offenses, such as those against the state, the person, property, or public morals. Many of these offenses are not in the nature of positive aggressions or invasions, with which the common law so often dealt, but are in the nature of neglect where the law requires care, or inaction where it imposes a duty.<sup>853</sup>

This apparently promising move toward identifying the “neglect” and “care” elements of regulatory offences is not developed any further, so that Justice Jackson does not take the opportunity to articulate a defence of due diligence. Instead, he concludes that in the particular case, the offence in question was really a variation on the common law crime of theft, and as such required an intent to steal even though the provision did not expressly contain those words.<sup>854</sup> Justice Jackson expressly approved the earlier Supreme Court decisions in *Balint* and *Bherman* to characterize those particular offences as absolute liability in nature,<sup>855</sup> but distinguished them from the case at bar since the *Balint* and *Behrman* cases pertained to statutory, non-common law offences, unlike the case at bar:

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<sup>851</sup> *Ibid.*, at pp. 252 - 255.

<sup>852</sup> *Op cit.*

<sup>853</sup> *Morissette, op cit.*, at p. 255.

<sup>854</sup> *Ibid.*, at pp. 260 - 262.

<sup>855</sup> "The conclusion reached in the *Balint* and *Behrman* cases has our approval and adherence for the circumstances to which it was there applied. A quite different question here is whether we will expand the doctrine of crimes without intent to include those charged here." *Ibid.*, at p. 260.

[C]ongressional silence as to mental elements in an Act merely adopting into federal statutory law a concept of crime already...well defined in common law and statutory interpretation by the states may warrant quite contrary inferences than the same silence in creating an offense new to general law, for whose definition the courts have no guidance except the Act.<sup>856</sup>

Thus, although the judgment of Justice Jackson contains uplifting words about the importance of intent for crimes, and does in fact uphold a requirement of proof of intent to steal in the case at bar, the overall effect of the *Morrisette* decision was to solidify the earlier absolute liability stream of decisions of the Supreme Court. As one commentator puts it,

...[in] spite of Jackson's clear sympathy for limiting criminal punishment to the blameworthy, *Morrisette's* overall effect was to strengthen the authority of *Balint* and *Dotterweich*. The opinion makes it easy for a court to find that legislation intended strict [i.e., Canadian absolute] criminal liability, and it provides no support for a constitutional attack on strict liability.<sup>857</sup>

In the 1957 case of *Lambert v. California*,<sup>858</sup> the Supreme Court concluded that a municipal code which made it a crime to remain in Los Angeles for more than five days without registering if a person had been convicted of a felony was an offence necessitating proof of knowledge of the duty to so register. The Court reached this conclusion even though the offence did not make reference to any intent element. The Court noted that being in Los Angeles is not per se blameworthy. Hence, the mere failure to register was quite unlike the commission of acts or the failure to act under circumstances that should alert the doer to the consequences of his deed:

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<sup>856</sup> *Ibid.*, at p. 262.

<sup>857</sup> A. Saltzman, "Strict Criminal Liability and the United States Constitution: Substantive Criminal Law Due Process." (1978) 24 *Wayne Law Review* 1571 - 1640, at p. 1601.

<sup>858</sup> 355 US 225 (1957).

Many [registration] laws are akin to licensing statutes in that they pertain to the regulation of business activities. But the present ordinance is entirely different. Violation of its provisions is unaccompanied by any activity whatever, mere presence in the city being the test. Moreover, circumstances which might move one to inquire as to the necessity of registration are completely lacking.....Where a person did not know of the duty to register and where there was no proof of the probability of such knowledge, he may not be convicted consistently with due process. Were it otherwise, the evil would be as great as it is when the law is written in print too fine to read or in a language foreign to the community.<sup>859</sup>

In short, in circumstances such as the sale of food and drugs (as in *Balint* and *Dotterweich*), the existence or "notice" of a regulatory regime and the need for that regulatory regime is self-evident to individuals, and so a court's interpretation that intent is not necessary is reasonable. This is not the case with respect to a municipal "duty to register" crime imposed on persons with criminal records.

In the 1972 decision of *United States v. Freed*,<sup>860</sup> the United States Supreme Court considered the mental element attaching to the offence of possession of an unregistered firearm contrary to the *National Firearms Act*. The penalty for this offence was up to ten years imprisonment. At issue in this case was possession of hand grenades, which were included in the definition of "firearms" under the *Act*, and which by the terms of the *Act* were required to be registered. Following *Balint* and *Morissette*, the Court characterized the *Act* as a regulatory measure in the interest of public safety, for which proof of intent was not necessary:

The *Act* requires no specific intent or knowledge that the hand grenades were unregistered. It makes it unlawful for any person "to receive or possess a firearm which is not registered to him." By the lower court decisions...the only knowledge required to be proved was knowledge that the instrument possessed was a firearm.....The presence of a "vicious will" or mens rea....was long a requirement of criminal responsibility. But the list

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<sup>859</sup> *Ibid.*, at pp. 229 - 230.

<sup>860</sup> 401 US 601 (1972).

of exceptions grew, especially in the expanding regulatory area involving activities affecting public health, safety and welfare.<sup>861</sup>

Comparing the firearms regulatory regime with that in question in *Balint* (narcotics) *Morissette* (sale of government property) and *Dotterweich* (sale of adulterated food and drugs), the Court reached the following conclusion:

The present case is in the category neither of *Lambert* nor *Morissette*, but is closer to *Dotterweich*. This is a regulatory measure in the interest of the public safety, which may well be premised on the theory that one would hardly be surprised to learn that possession of hand grenades is not an innocent act. They are highly dangerous offensive weapons, no less dangerous than the narcotics involved in ...*Balint*....<sup>862</sup>

As a result, no proof of knowledge was necessary to gain a conviction under the *Act*.

Finally, in the 1975 case of *United States v. Park*,<sup>863</sup> the United States Supreme Court held that Park, the president of Acme, a food company, was vicariously liable under the *Food, Drug and Cosmetic Act* for adulterated food, even though Park had delegated normal operating duties to his Vice-President, had consulted with his officials about taking corrective actions, and did not believe there was anything more he could have done. The Court concluded that as long as an individual has a responsible relationship to the issue, personal participation is not necessary:

*Dotterweich* and the cases which have followed reveal that in providing sanctions which reach and touch the individuals who execute the corporate mission -- and this is by no means necessarily confined to a single corporate agent or employee -- the *Act* imposes not only a positive duty to seek out and remedy violations when they occur but also, and primarily, a duty to implement measures that will insure that violations will not occur. The requirements of foresight and vigilance imposed on responsible corporate agents are beyond question demanding, and perhaps onerous, but they are no more stringent than the public has a right to expect of those who voluntarily assume positions of authority in

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<sup>861</sup> *Ibid.*, at p. 607.

<sup>862</sup> *Ibid.*, at p. 609.

<sup>863</sup> 421 US 658 (1975).

business enterprises whose services and products affect the health and well-being of the public that supports them....The *Act* does not, as we observed in *Dotterweich*, make criminal liability turn on "awareness of some wrongdoing" or "conscious fraud". The duty imposed by Congress on responsible corporate agents is, we emphasize, one that requires the highest standard of foresight and vigilance, but the *Act*, in its criminal aspect, does not require that which is objectively impossible. The theory upon which responsible corporate agents are held criminally accountable for "causing" violations of the Act permits a claim that a defendant was "powerless" to prevent or correct the violation "be raised defensively at a trial on the merits." ...<sup>864</sup>

Technically, the *Park* case addresses the issue of vicarious liability of corporate officers for the acts of corporations, and does not focus on characterization of the offence as absolute or strict liability. However, the reasoning of the Court concerning the voluntary assumption of positions of authority in businesses which affect the public welfare is repeated here since it is language similar to that used by Cory J. in *Wholesale Travel* to justify strict liability regulatory offences. This having been said, the limited defence of "impossibility" available to corporate officers to avoid liability for the actions of the corporation is a far cry from the Canadian "reasonable care" defence.

It is perhaps readily evident to Canadian eyes that in any of *Balint*, *Morissette*, *Freed*, or *Park*, provision of a due diligence defence could potentially address the unfairness of convicting persons who exercise all reasonable care, yet not compromise the public welfare objectives of the statutes in question.

The long history of United States Supreme Court decisions approving absolute liability offences where imprisonment is available as a punishment has tempted judges to engage in fancy, tortured and unconvincing arguments to avoid the unfairness of an absolute liability

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<sup>864</sup>
*Ibid.*, at pp. 672 - 673.

characterization. The best example of this is the 1994 decision *Staples v. United States*.<sup>865</sup> As in *Freed*, the *National Firearms Act* was being considered, only this time the issue was whether it was an absolute liability offence to possess an unregistered machine gun, not a hand grenade. As in *Freed*, the wording of the provision was silent as to any mental element. Amazingly, the Supreme Court (majority opinion by Justice Thomas) managed to distinguish *Freed* and hold that the prosecution must prove beyond a reasonable doubt that the defendant knew the weapon he possessed had characteristics that brought it within the the statutory definition of machine gun (i.e. a weapon that automatically fires more than one shot with single pull of the trigger).

To do this, Justice Thomas rejected the Government's argument that the *Act* fits within the Court's line of precedent concerning "public welfare" or "regulatory" offences and thus that the presumption favouring mens rea does not apply in this case. While acknowledging that in earlier cases such as *Balint* and *Freed*, the Supreme Court had reasoned that as long as a defendant knows that he is dealing with a dangerous device of a character that places him in responsible relation to a public danger, he should be alerted to the probability of strict regulation, and is placed on notice that he must determine at his peril whether his conduct comes within the statute's terms, Justice Thomas in *Staples* concluded that guns do not fall within the category of dangerous devices as it has been developed in the earlier cases. This is so, Justice Thomas reasoned, because private ownership of guns has enjoyed a long tradition of being lawful so that the destructive potential of guns in general cannot be said to put owners sufficiently on notice of the likelihood of regulation to justify interpreting the provision as dispensing with proof of knowledge.

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<sup>865</sup>

114 S.Ct. 1793 (1994).

The dissent (Justices Stevens and Blackmun) wastes no time in pointing out the difficulties with such distinctions:

To avoid a slight possibility of injustice to unsophisticated owners of machineguns and sawed off shotguns, the Court has substituted its views of sound policy for the judgment Congress made when it enacted the *National Firearms Act*.... The Court is preoccupied with guns that "generally can be owned in perfect innocence." ... This case, however, involves a semiautomatic weapon that was readily convertible into a machine gun -- a weapon that the jury found to be "a dangerous device of a type as would alert one to the likelihood of regulation." .... These are not guns "of some sort" that can be found in almost "50 percent of American homes." .... They are particularly dangerous -- indeed, a substantial percentage of the unregistered machineguns now in circulation are converted semiautomatic weapons.....<sup>866</sup>

On a point by point basis, the dissent counters the reasoning of the majority. In the opinion of the author, there seems little doubt that the convoluted reasoning engaged in by Justice Thomas for the majority to avoid the unfairness of absolute liability (as exposed by the minority decision) would not have been necessary if the Canadian strict liability offence with due diligence defence had been available.

In addition to regulatory offence provisions which are silent concerning mens rea and which have been interpreted as absolute liability in nature, another set of regulatory offences explicitly uses the word "knowingly", but has been interpreted by courts in such a manner as to make the knowledge element virtually meaningless. It is submitted that courts have attempted to "read down" these knowledge offences in an effort to make them enforceable in regulatory contexts: essentially, the courts are unsuccessfully trying to reach the non-intentional "middle ground" offence available in Canada, but are not able to do so, and are instead distorting and diluting the "mens rea" category.

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<sup>866</sup>*Ibid.*, at pp. 1806-7.

In the 1971 decision of *United States v. International Minerals & Chemical Corp.*,<sup>867</sup> the Court considered the meaning of a provision pertaining to transportation of dangerous goods which indicated that whoever "knowingly violates any such regulation" would be subject to criminal sanctions. The Court held that although knowledge of the shipment of dangerous materials was required, knowledge of the regulation was not:

In *Balint* the Court was dealing with drugs, in *Freed* with hand grenades, in this case with sulfuric and other dangerous acids. Pencils, dental floss, paper clips may also be regulated. But they may be the type of products which might raise substantial due process questions if Congress did not require.... "mens rea" as to each ingredient of the offense. But where, as here and as in *Balint* and *Freed*, dangerous or deleterious devices or products or obnoxious waste materials are involved, the probability of regulation is so great that anyone who is aware that he is in possession of them or dealing with them must be presumed to be aware of the regulation.<sup>868</sup>

In effect, the Court here is applying the same concept of "notice" used in decisions such as *Balint* and *Freed* concerning offences which contained no express "knowledge" element. Only here the effect is to minimize the importance of the phrase "knowingly violates any such regulation."

The dissent (Stewart, Harlan, and Brennan) very directly observes that the effect of the majority decision is to delete the word "knowingly" from the offence:

....it is evident to me that Congress made punishable only knowing violations of the regulation in question. That is what the law quite clearly says, what the federal courts have held, and what the legislative history confirms....In dismissing the information in this case because it did not charge the appellee shipper with knowing violation of the applicable labeling regulation, District Judge Porter did no more than give effect to the ordinary meaning of the English language.<sup>869</sup>

While in practice "triers of fact would have no difficulty whatever in inferring knowledge on the

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<sup>867</sup> *Op cit.*

<sup>868</sup> *Ibid.*, at pp. 564 - 565.

<sup>869</sup> *Ibid.*, at pp. 565-566.

part of those whose business it is to know, despite their protestations to the contrary",<sup>870</sup> the same is not necessarily true of more casual shippers of goods. It is here that the de facto removal of the knowledge requirement by the majority could potentially result in injustice. If Congress had wanted to delete the word "knowing" from the provision, they could have, but they did not, so it should not be "read out" by the courts.

In the 1985 decision of *Liparota v. United States*,<sup>871</sup> the Court considered a federal statute governing food stamp fraud, and in particular the mental element in 7 USC para. 2024 (b)(1), which provided that "whoever knowingly uses, transfers, acquires, alters, or possesses coupons or authorization cards in any manner not authorized...." shall be guilty of a criminal offence. The question was whether the Government had to prove that the accused acquired and possessed the food stamps in a manner not authorized by statute or regulations and that he knowingly and willfully acquired the stamps, or alternatively that the accused knowingly did an act that the law forbids, purposely intending to violate the law. The former approach could be referred to as one of "general intent" (i.e., simple knowledge that he had acquired the stamps) while the latter is a "specific intent" approach (i.e., knowledge of the illegality of the purchase).

The majority of the Court concluded that Congress has not explicitly spelled out the mental state required. Quoting Justice Jackson's statement in *Morissette* that "intention is no provincial or transient notion", the majority concluded that the provision requires a showing that the accused knew his conduct was unauthorized by regulation.<sup>872</sup> Moreover, the majority noted

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<sup>870</sup> *Ibid.*, at pp. 569.

<sup>871</sup> 471 U.S. 419 (1985).

<sup>872</sup> *Ibid.*, at p. 425.

that this interpretation was in keeping with the rule of lenity for criminal cases, which maintains that in cases of ambiguity, the court should interpret in favour of the accused.<sup>873</sup> Finally, the majority declined to characterize the offence as "public welfare," noting that unlike regulation of handguns as in *Freed*, a reasonable person is not likely to know that acquisition of food stamps is regulated:

A food stamp can hardly be compared to a hand grenade, see *Freed*, nor can the unauthorized acquisition or possession of food stamps be compared to the selling of adulterated drugs, as in *Dotterweich*.<sup>874</sup>

To prove that an accused knew that his acquisition of food stamps was unauthorized, the Government may prove by reference to facts and circumstances surrounding the case that the accused knew that his conduct was unauthorized or illegal.<sup>875</sup> The dissent argued that if Congress wanted to include a knowledge of illegality requirement in a statute it knows how to do so.<sup>876</sup> The effect of the majority's judgment is to overturn the assumption that ignorance of the law is no excuse.<sup>877</sup> Again, with the benefit of the Canadian experience, a more sensible approach than either majority or dissent would appear to be to provide a due diligence defence.<sup>878</sup>

In the 1993 United States District Court of Delaware decision of *United States v.*

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<sup>873</sup> *Ibid.*, at p. 427.

<sup>874</sup> *Ibid.*, at p. 433.

<sup>875</sup> *Ibid.*, at p. 434.

<sup>876</sup> *Ibid.*, at p. 439.

<sup>877</sup> *Ibid.*, at p. 441.

<sup>878</sup> The due diligence to be exercised in this type of case might consist of making basic inquiries before purchasing the stamps. This would be similar to licenced establishments making inquiries before serving to possibly underage patrons.

*Reilly*,<sup>879</sup> the Court considered the meaning of a provision of the *Marine Protection, Research and Sanctuaries Act* imposing criminal liability for dumping obnoxious waste materials into the ocean if the defendant "knowingly violates" the *Act*. Following the approach in *International Minerals*, the Court held that it is not necessary to demonstrate that the defendant had knowledge of relevant provisions of the *Act*, only that the defendant consciously engaged in the acts alleged in the Information.<sup>880</sup>

It is submitted that the varying and seemingly inconsistent decisions interpreting regulatory offences where "knowledge" is an express element -- between, for example, *Liporata*, on the one hand, requiring specific knowledge of the regulation, and on the other, *International Minerals* and *Reilly*, where an explicit knowledge requirement is read down to mean "consciously engaging" in an activity -- reflect courts struggling with the inappropriateness of the intent requirement in regulatory contexts. Arguably, it is reasonable care which Congress wishes to encourage, and so no amount of fiddling with explicit intent requirements will achieve this, since intent is simply an inappropriate concept for the lion's share of regulatory activity.<sup>881</sup>

#### *The State of Regulatory Offences in the United States Today*

In spite of comments in favour of the importance of mens rea in decisions such as those of Justice Jackson in *Morissette*, the absolute liability offence with imprisonment available as a punishment is alive and well in the United States. In legislation as varied as environmental

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<sup>879</sup> 827 Federal Supplement 1076 (1993).

<sup>880</sup> *Ibid.*, at p. 1078.

<sup>881</sup> This is not to deny the utility of intentional offences in regulatory legislation in a supplementary capacity to address such activity as false reporting of information, or particularly egregious substantive violations.

protection,<sup>882</sup> narcotics,<sup>883</sup> adulterated food and drug products,<sup>884</sup> and gun control,<sup>885</sup> the absolute liability offence with imprisonment available continues to play an important role. One commentator describes the situation as follows:

It is frequently asserted that strict criminal liability is unjust, that legislatures ought to refrain from imposing it, and that courts at least ought to presume that legislatures did not intend to impose it unless that intention is explicitly stated. It has also been said that it ought to be unconstitutional. But American law is much the other way. The prevailing doctrine is that the injustice entailed in strict criminal liability is outweighed by the increase in prevention of crime it generates.<sup>886</sup>

While there are occasional examples of express negligent offences in regulatory legislation,<sup>887</sup> the vast majority are either absolute or "knowledge" offences. With respect to knowledge offences, the practice of courts reading down "knowledge" provisions has led to commentators dubbing the phenomenon as the "erosion of mens rea."<sup>888</sup>

While, from a Canadian perspective, the American state of regulatory penal offences adjudicated by the ordinary courts appears messy, ineffective, and lacking conceptual coherence, United States legislators and regulators have developed an extensive parallel civil (administrative)

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<sup>882</sup> E.g., see *Refuse Act*. See also the *Pennsylvania Solid Waste Management Act*, 35 Pa. Cons. Stat. Ann. para. 6018.101 - 1003 (Supp. 1991).

<sup>883</sup> E.g., *Balint, Behrman*.

<sup>884</sup> E.g., *Dotterweich*.

<sup>885</sup> E.g., *Freed*.

<sup>886</sup> Saltzman, *op cit.*, at p.1579.

<sup>887</sup> E.g., under the *Clean Water Act*, USC para. 1319(c).

<sup>888</sup> E.g., R. Weidel, J. Mayo, F. Zachara, "The Erosion of Mens Rea in Environmental Criminal Prosecutions," (1991) 21 *Seton Hall L. R.* 1100 - 1124.

penalty system.<sup>889</sup> While imprisonment is not available as a punishment, substantial monetary penalties can be levied.<sup>890</sup> Moreover, because civil penalty regimes are designed to be remedial and compensatory rather than punitive (with no possibility of imprisonment), liability can usually be imposed without any proof of culpability, and penalties can be levied by administrative officials and agencies in a considerably more expeditious manner than offences adjudicated through the ordinary courts.<sup>891</sup>

It can be argued that the growth in importance and sophistication of civil penalty regimes in the United States has taken the pressure off courts and legislators to devise effective court-based offences. While in some respects this may be true, it is arguable that the type of deterrent effect gained from the threat of imprisonment, and the gravity of harm possible for violation of regulatory norms necessitates that an effective and coherent court-based system of offences with imprisonment be available. Thus, the position taken here is that the civil penalty system in United States represents an important model for other jurisdictions, but it is a supplement to rather than a replacement for a court-based regulatory offence system.

### *A Constitutional Re-Consideration of Absolute Liability Offences*

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<sup>889</sup> See, e.g., C. Diver, *The Assessment and Mitigation of Civil Money Penalties by Federal Administrative Agencies*, Final Report to the Administrative Conference of the United States (May, 1979). A 1980 article states that "At last count, there were 348 statutory civil penalties, enforced by 27 federal departments and independent agencies. Of these 348 penalties, 141 are agency-assessed and 207 are court-assessed." Per W. Drayton, "Economic Law Enforcement" (1980) 4 *Harvard Environmental Law Enforcement* 1, at p. 3, footnote 3. For comparison of criminal and civil penalties in federal coal mine safety legislation, see D. Ryan, R. Schell, "Criminal Sanctions under the Federal Mine Safety and Health Act" (1983) 85 *West Virginia L. Rev.* 757 - 775, esp. at p. 758.

<sup>890</sup> E.g., in one recent case, civil penalties in the amount of \$1.5 million were levied against American Airlines. Per B. Fisse and J. Braithwaite, *Corporations, Crime and Accountability* (Cambridge: Cambridge University Press, 1993), at p. 10.

<sup>891</sup> As discussed in Diver, *op cit.*. See also U.S. v. Riley, *op cit.*.

Some American commentators have suggested that absolute liability offences should be considered fundamentally wrong as a matter of U.S. constitutional law,<sup>892</sup> and that the barriers to a constitutional challenge are not insurmountable.<sup>893</sup> In "Strict Criminal Liability and the United States Constitution: Substantive Criminal Law Due Process,"<sup>894</sup> Professor Saltzman concludes that the eighth amendment's ban on cruel and unusual punishment could be used to rule against absolute liability, and an argument can be made that the doctrine of mens rea which underlies the case against absolute liability is implicit in the Constitution's special treatment of criminal law.<sup>895</sup> Several commentators have suggested that a *Sault Ste. Marie*-type strict liability offence with due diligence defence might be considered a more acceptable constitutional minimum,<sup>896</sup> and some have pointed to the Canadian experience<sup>897</sup> as a possible model.

In the event that the United States Supreme Court should follow the lead of the Canadian Supreme Court (in the *B.C. Motor Vehicles Act*<sup>898</sup> decision) and hold that the American Constitution requires as a matter of substantive due process that negligence be the minimum

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<sup>892</sup> E.g., Saltzman, *op cit.*, and H. Packer, "Mens Rea and the Supreme Court," (1968) *Sup. Ct. Rev.* 107 - 152.

<sup>893</sup> Saltzman, *ibid.*

<sup>894</sup> *Ibid.*

<sup>895</sup> Saltzman, *ibid.*, at pp. 1573- 1574.

<sup>896</sup> E.g., Saltzman, *ibid.*, at p. 1585; Packer, *op cit.*, at pp. 109 - 110; S. Kadish and S. Schulhofer, *Criminal Law and its Processes: Cases and Materials* (Fifth Edition) (U.S.: Little, Brown and Company, 1989), at p. 316; W. Lafave and A. Scott, Jr., *Substantive Criminal Law* (St. Paul, Minn.: West Publishing Co., 1986, at p. 350.

<sup>897</sup> E.g., Kadish and Schulhofer, *op cit.*, at p. 316; R. Singer, "The Resurgence of Mens Rea: III -- The Rise and Fall of Strict Criminal Liability," (1989) 30 *Boston College Law Review* 337 - 407, at pp. 379 - 380. Note that Singer ultimately finds that an objective negligence offence sets the bar unacceptably low. See pp. 405 - 406.

<sup>898</sup> *Op cit.*

standard of fault where deprivations of liberty are possible, the supplementary constitutional issue would be whether a due diligence defence established on a balance of probabilities could pass muster as it did in Canada in *Wholesale Travel*. Following the authority of United States Supreme Court decisions such as *Patterson v. New York*<sup>899</sup> and *Martin v. Ohio*<sup>900</sup> there is good reason to believe that putting the burden of proof on an accused to establish due diligence on a balance of probabilities would be found constitutionally acceptable.

In *Patterson*, a case pertaining to murder in which the defence of extreme emotional disturbance had been raised (which would reduce the offence from murder to manslaughter) the Court held that the constitutionally mandated presumption of innocence meant that the prosecution needed to prove beyond a reasonable doubt all the elements included in the definition of the offence (as defined by the legislature). Since the due diligence defence is not part of the definition of the strict liability offence, there would appear to be no barrier to putting the onus on the accused to establish due diligence on a balance of probabilities.<sup>901</sup>

It should be noted that the *Patterson* case has been the subject of criticism<sup>902</sup> since in

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<sup>899</sup> 97 S. Ct. 2319 (1977).

<sup>900</sup> 480 U.S. 228 (1987).

<sup>901</sup> In *Martin v. Ohio, ibid.*, the United Supreme Court held that the due process protections included in the 14th amendment did not forbid placing the burden of proving self-defence on the defendant, since the state did not shift to the defendant the burden of disproving any element of the state's case. See also *Re Winship* 25 L. Ed. 368 (1970), in which the Supreme Court interpreted the constitutional presumption of innocence protections as making a distinction between the facts necessary to constitute the crime, which must be proven by the prosecution beyond a reasonable doubt, and true defences, which the prosecution need not disprove (i.e., the accused could be required to establish on a balance of probabilities, or even beyond a reasonable doubt). Regarding an example of an accused being required to prove a defence beyond a reasonable doubt, see, e.g., *Leland v. Oregon* 343 U.S. 790 (1952); later affirmed in *Rivera v. Delaware* 50 L. Ed. (2d) 160 (1976) (insanity defence). Foregoing largely derived from R. Mahoney, "The Presumption of Innocence: A New Era," (1988) 67 *Can. Bar. R.*, 1 - 56, esp. at pp. 24 - 33.

<sup>902</sup> E.g., see Saltzman, *op cit.*, at pp. 1631 - 1633.

effect it means that the level of constitutional protection is dependent on how an offence is defined by the legislature. This means that practically any offence can be defined in a manner so as to exclude certain elements and thus allow for affirmative defences being imposed on accused persons. It should also be noted that since the *Patterson* case addressed a true crime it would be possible for a court to develop a different approach for public welfare offences. It will be recalled that this would be in keeping with the approach articulated by Justice Cory in *Wholesale Travel*, who was drawing on earlier Supreme Court of Canada decisions which had indicated that the constitution provides different protections for regulated persons than for others.

#### *The Rule of Lenity*

Even if American courts were to hold that objective negligence represents the minimum constitutionally-acceptable fault standard, and were to conclude that a due diligence defence established on a balance of probabilities was compatible with constitutional principles, there remains one other possible obstacle to the adoption of the strict liability offence in United States: the rule of lenity. Pursuant to the rule of lenity, in situations where the terms of crimes are in some way ambiguous, accused persons are entitled to a complete shield from prosecution.<sup>903</sup> In the past, this rule for criminal offences has not been applied to offences considered to be part of "public welfare" legislation, where instead the ambiguity has been interpreted in favour of the public interest at stake (e.g., public health, public safety, environmental protection).<sup>904</sup> However, recently, the rule of lenity has been applied to environmental law contexts. For example, in

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<sup>903</sup> See discussion of the rule of lenity in S. Newland, "The Rule of Scalia: Statutory Construction and the Rule of Lenity," [1994] 29 *Harvard Civil Rights-Civil Liberties Law Review* pp. 197 - 229; and D. Filippi, "Unleashing the Rule of Lenity: Environmental Enforcers Beware!" [1996] 26 *Environmental Law* 923.

<sup>904</sup> As discussed in Newland, *ibid.*, and Filippi, *ibid.*

*United States v. Plaza Health Laboratories Inc.*<sup>905</sup> the U.S. Second Circuit Court found the meaning of "knowingly" in a *Clean Water Act* offence to be ambiguous, and on that basis the accused escaped liability.<sup>906</sup> Just as they applied the rule of lenity to *intentional* public welfare offences, so too could American courts decide that the rule of lenity applied to a *Sault Ste. Marie* form of strict liability offences. If they were to do so, the aspect of the strict liability offence likely to attract critical attention would be the "reasonable care" defence. An argument could be made that a reasonable care or due diligence standard is too ambiguous to attract penal liability.

On the other hand, persuasive arguments can be made that the notion of "reasonable care" is not impermissibly vague. As we have seen, in Canada, the duty to exercise reasonable care has survived *Charter* challenges on this basis.<sup>907</sup> In the United States, in the case of *U.S. v. Ragen*,<sup>908</sup> the Court held that "The mere fact a penal statute is so framed as to require a jury upon occasion to determine a question of reasonableness is not sufficient to make it too vague to afford a practical guide to permissible conduct." In short, while application of the rule of lenity to public welfare offences may mean that the strict liability offence is vulnerable to challenges on this basis, there is reason to believe that the reasonable care defence could withstand such challenges.

### *Summary*

The American experience with regulatory offences is ample proof of the point that constitutional protections of due process, and against cruel and unusual punishment, do not

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<sup>905</sup> (1993) 3 F.3d 643.

<sup>906</sup> Fillipi, *op cit.*, argues that this decision should not be followed.

<sup>907</sup> *R. v. Bata* [1992] 9 OR (3d) 329.

<sup>908</sup> (1941) 314 US 513.

necessarily ensure that absolute liability offences will be ruled unacceptable. In fact, an argument can be made that the express approval of the absolute liability offence type by the United States Supreme Court has decreased the pressure on the judiciary and legislatures to articulate a more fair alternative, as has developed in many Commonwealth countries. The development of an extensive array of civil or administrative penalty regimes operating outside the regular courts which normally avoid the necessity of proof of culpability is another factor reducing the pressure for the articulation of a half-way house strict liability offence of the type known in Canada and elsewhere.

As a result, the two penal offence options most commonly found in regulatory legislation are the extremes of absolute liability on the one hand, and "knowledge" offences on the other. This leaves American courts in the same situation that Canadian and other Commonwealth courts were in at the beginning of the twentieth century. Since neither of these offence types specifically addresses the most common type of regulatory misconduct (i.e., negligence/failure to exercise reasonable care), courts have attempted to re-interpret these offences in a manner which reflects the regulatory reality.

The unhappy but predictable result has been tortured judicial interpretations of offences to avoid the unfairness of absolute liability offences and equally dubious interpretations of explicit "knowledge" offences to minimize the intentional element. The need for the half way house strict liability offence seems readily apparent. Some American legal scholars maintain that there are no significant impediments to re-interpretations of the United States Constitution in a manner which would effectively ban absolute liability offences where imprisonment was available as a punishment and enshrine objective negligence as a minimum standard of fault. Moreover, there

appears to be support in the case law of the Supreme Court for the position that a due diligence defence established on a balance of probabilities could withstand constitutional challenges.

Finally, it would appear that there are good arguments to counter allegations that the rule of lenity could apply to the reasonable care defence in an attempt to pre-empt strict liability prosecutions.

In short, this admittedly cursory examination suggests that, while the current situation in the United States with respect to regulatory offences with penal sanctions can only be described as unfair and conceptually incoherent, when compared with the simple tri-offence classification system in Canada, there would appear to be no insurmountable barriers to development of a Canadian-style strict liability offence, and much to commend it. A more thorough review of actual regulatory enforcement practices, levels of compliance, and resources allocated would be necessary before any more definitive conclusions could be made about the efficacy of the American approach.

## Chapter 12 -- English Regulatory Offences in the Modern Era

In the analysis of English regulatory offences law up to 1950 which was undertaken earlier in the thesis, several conclusions emerged: first, English courts have regularly expressed a general revulsion toward the idea of penal liability in the absence of some proof of fault.<sup>909</sup> Second, in spite of this generally held revulsion, courts continued to uphold absolute liability offences in regulatory regimes even where imprisonment was available as a punishment.<sup>910</sup> Third, in an attempt to avoid characterizing offences as absolute liability in nature, some courts showed a willingness to shift the burden of proof of lack of knowledge (not lack of reasonable care) to the accused where offences lacked an obvious intentional element.<sup>911</sup> Fourth, at a legislative level, several regulatory regimes included defences of reasonable care.<sup>912</sup> Fifth, in *Woolmington*, a decision concerning the offence of murder, the notion of the presumption of innocence was described as meaning that the prosecution must prove its case beyond a reasonable doubt, so that there should be no conviction if a reasonable doubt remains concerning an element of the case. The application of *Woolmington* to regulatory offences was not clear.

The period from 1950 to the present has seen many cases pertaining to seemingly "non-intentional" regulatory offences, but no decisive judicial condemnation of the absolute liability offence along the lines of that which has occurred in Canada. Perhaps as a result of that lack of leadership from the courts, legislators have taken the initiative and increasingly are including the

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<sup>909</sup> E.g., *Sherras v. de Rutzen*, *op cit.*

<sup>910</sup> E.g., *Hobbs v. Winchester Corporation*, *op cit.*

<sup>911</sup> *Sherras v. de Rutzen*, *op cit.*

<sup>912</sup> E.g., factories and food and drugs regulation, as discussed *supra*.

strict liability offence with due diligence defence.<sup>913</sup> In this part of the thesis, some of the key cases in the post-1950s era will be discussed, and then the state of absolute and strict liability offences in regulatory legislation will be reviewed.

### *Key Decisions*

In the 1951 decision of *Reynolds v. G.H. Austin & Sons Ltd.*,<sup>914</sup> the King's Bench Division concluded that an offence under the *Road Traffic Act* of unlawfully permitting the operation of a return service without a road service licence was not an absolute liability offence even though there was no explicit "knowledge" requirement in the legislation. The case at bar concerned a situation of vicarious liability in the sense that the bus company which was charged with the offence had no knowledge that the organizer of a bus trip had placed an advertisement soliciting additional passengers in contravention of the *Act*. Devlin J. stated as follows:

....if a man is punished because of an act done by another, whom he cannot reasonably be expected to influence or control, the law is engaged, not in punishing thoughtlessness or inefficiency, and thereby promoting the welfare of the community, but in pouncing on the most convenient victim. Without the authority of express words. I am not willing to conclude that Parliament can intend what would seem to the ordinary man....to be the useless and unjust infliction of a penalty.....In these circumstances, it would be going further than any decided case has yet gone, and further than I am willing to go without the clearest authority, to construe the statute as imposing an absolute prohibition.<sup>915</sup>

While clearly expressing his abhorrence of the notion of absolute liability, Justice Devlin did not go the extra mile and suggest providing a reasonable care defence. Instead, he held the offence to be one requiring proof of knowledge.

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<sup>913</sup> As discussed below.

<sup>914</sup> [1951] 2 KB 135.

<sup>915</sup> *Ibid.*, at p. 137.

In the 1963 case of *Lim Chin Aik v. The Queen*,<sup>916</sup> the Privy Council followed the approach set out by Justice Devlin in *Reynolds*, holding that an immigration ordinance prohibiting persons from entering or remaining in a jurisdiction was not an absolute liability offence, even though the offence included no wording indicating intentionality. The Court concluded that the word "knowingly" must be read in. The Court noted that the offence was so articulated so that a mere passive continuance of behaviour heretofore perfectly lawful would become illegal, and as such must necessitate some proof of knowledge. Again, the possibility of a reasonable care defence was not discussed.

One of the first English High Court judgments to expressly refer to the "half way house" of strict liability with the due diligence defence was the 1970 House of Lords decision of *Sweet v. Parsley*.<sup>917</sup> The case pertained to an offence under the *Dangerous Drugs Act* aimed at persons concerned in the management of certain premises which were used for the purpose of smoking cannabis. The accused was a teacher at a school in Oxford who let rooms out in a house in the country, while maintaining a room in the house for her own occasional overnight use. Police found various illicit drugs and drug paraphernalia in the house. At the lower court level, justices had observed that she had no knowledge that the house was being used for the purpose of smoking cannabis. But they had also concluded that the offence was one of absolute liability, since there was no words indicative of intent in the provision.

Lord Reid observed that there were "at least two other possibilities" instead of an offence where "knowledge" must be proved by the prosecutor or one of absolute liability. First,

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<sup>916</sup> [1963] AC 160.

<sup>917</sup> [1970] AC 133.

"Parliament has not infrequently transferred the onus as regards mens rea to the accused" to be proved on the balance of probabilities.<sup>918</sup> However, Lord Reid goes on to note that "one of the bad effects of *Woolmington*....may have been to discourage its use."<sup>919</sup> The second alternative, according to Lord Reid, would be to substitute "gross negligence" as the mental element, so that, following the Australian case of *Proudman v. Dayman*,<sup>920</sup> an honest and reasonable belief would be a defence. Lord Reid observed that "[i]t may be that none of these methods is wholly satisfactory but at least the public scandal of convicting on a serious charge persons who are in no way blameworthy would be avoided."<sup>921</sup> In the final analysis, Lord Reid concludes that an accused "could not be convicted without proof of mens rea."<sup>922</sup>

Lord Diplock also expressed interest in a defence of reasonable mistake, and then proceeded to discuss the relevance of *Woolmington*:

*Woolmington's* case affirmed the principle that the onus lies upon the prosecution in a criminal trial to prove all the elements of the offence with which the accused is charged. It does not purport to lay down how that onus can be discharged as respects any particular elements of the offence....*Woolmington's* case did not decide anything so irrational as that the prosecution must call evidence to prove the absence of any mistaken belief by the accused in the existence of facts which, if true, would make the act innocent....What *Woolmington's* case did decide is that where there is any such evidence the jury after considering it and also any relevant evidence called by the prosecution on the issue of the existence of the alleged mistaken belief should acquit the accused unless they feel sure that he did not hold the belief or that there were no reasonable grounds upon which he could have done so. This, as I understand it, is the approach of Dixon J. to the onus of proof of honest and reasonable mistaken belief as he expressed it in *Proudman v.*

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<sup>918</sup> *Ibid.*, at p. 150.

<sup>919</sup> *Ibid.*

<sup>920</sup> *Op cit.*

<sup>921</sup> *Sweet v. Parsley, op cit.*, at p. 150.

<sup>922</sup> *Ibid.*, at p. 152.

*Dayman*....the accused does not have to prove the existence of mistaken belief on the balance of probabilities; he has to raise a reasonable doubt as to its non-existence.<sup>923</sup>

Notable here is the perceived difficulty associated with shifting a burden of proof caused by *Woolmington*. As for Lord Reid's interpretation of *Proudman v. Dayman*, as is discussed elsewhere in the thesis, this remains a matter of controversy. In the final analysis, while openly receptive to the idea of some sort of "half way house" offence between intentional offences and absolute liability offences, the majority of the House of Lords in *Sweet v. Parsley* concluded that because the offence in question was in the nature of a true criminal offence, therefore the offence incorporated a "knowing" element.

Just two years later, in the 1972 decision of *Alphacell v. Woodward*,<sup>924</sup> the House of Lords upheld a conviction under the *Rivers (Prevention of Pollution) Act 1951* of causing polluted matter to enter a river. Persons convicted of a second or subsequent offence pursuant to this provision could be imprisoned. The House of Lords concluded that the offence was one of "strict liability"<sup>925</sup> (which, as they defined it, meant that no defence of reasonable care or

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<sup>923</sup> *Ibid.*, at p. 164.

<sup>924</sup> [1972] AC 824.

<sup>925</sup> Note that J. Smith, and B. Hogan in *Criminal Law* (Fifth edition) (London: Butterworths, 1983), at p. 100, distinguish "absolute" and "strict" liability in English courts as follows:

...the need for a mental element is not ruled out completely by the fact that an offence is one of strict liability. It may be necessary to prove that D was aware of all the circumstances of the offence save that in respect of which strict liability was imposed. When the court holds that it is an offence of strict liability to sell meat which is unfit for human consumption, it decides that a reasonable mistake as to that particular fact is not a defence. It does not decide that any other defence is unavailable to D; and indeed, we have seen that a mistake as to other circumstances of the actus reus may afford a defence. There is no reason why all other defences should not be available as they are in the case of offences requiring full mens rea. Even when dangerous driving was an offence of strict liability, it was held to be a defence if D was in a state of automatism when he 'drove' the vehicle. ....

As so described, pursuant to the English version of "strict liability," Smith and Hogan have noted that it is not possible for an accused to exculpate himself through the grounds of reasonable mistake or all reasonable care. It is for this reason that the author characterizes the English version of "strict liability" as coinciding with the Canadian

reasonable mistake of fact was available), and that this type of offence was justifiable due to the "utmost public importance that our rivers should not be polluted."<sup>926</sup> After stating that the pollution offences in the Act represented the "prototypes of offences which are not criminal in any real sense, but are acts which in the public interest are prohibited under a penalty....",<sup>927</sup> Lord Salmon went on to state the following:

If this appeal succeeded and it were held to be the law that no conviction could be obtained under the Act of 1951 unless the prosecution could discharge the often impossible onus of proving that the pollution was caused intentionally or negligently, a great deal of pollution would go unpunished and undeterred to the relief of many riparian factory owners. As a result, many rivers which are now filthy would become filthier still and many rivers which are now clean would lose their cleanliness. The legislature no doubt recognised that as a matter of public policy this would be most unfortunate. Hence section 2 (1)(a) which encourages riparian factory owners not only to take reasonable steps to prevent pollution but to do everything possible to ensure that they do not cause it.<sup>928</sup>

In short, the House of Lords in *Alphacell* seems to have concluded that absolute liability offences are necessary when addressing truly regulatory matters such as pollution control which they characterize as not being criminal in any real sense, and moreover they believe that an offence structured to stimulate reasonable care (such as the strict liability offence with due diligence defence) would not set a high enough standard. It would appear the point of distinction between the rigorous absolute liability approach in *Alphacell* and the "knowledge" approach in *Sweet v. Parsley* rests on the characterization as the latter as truly criminal in nature and the former as not

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description of absolute liability offences.

<sup>926</sup> Per Lord Salmon, *ibid.*, at p. 848.

<sup>927</sup> *Ibid.*

<sup>928</sup> *Ibid.*, at pp. 848 - 849.

criminal in any real sense.<sup>929</sup>

In the 1977 case of *R. v. Howells*,<sup>930</sup> the English Court of Appeal concluded that the offence of possession of a revolver without a firearm certificate was one of "strict liability." They explicitly rejected the idea of including a defence of honest and reasonable mistake of fact because it "would be likely to defeat the clear intention of the Act."<sup>931</sup> In the 1977 decision of *Meah v. Roberts*,<sup>932</sup> a restaurateur was charged with an offence under the *Food and Drugs Act 1955*, after some restaurant clientele were served caustic cleaning fluid instead of lemonade. Pursuant to s. 113 of the *Act*, a due diligence defence was available if the accused could also prove that a third party was responsible. In the case at bar, the accused was able to prove that a third party was responsible, but the Divisional Court concluded that the accused had not demonstrated that he had taken all due precautions to prevent the sale of cleaning fluid as lemonade.

In *Gammon (Hong Kong) Ltd. v. Attorney-General of Hong Kong*,<sup>933</sup> a 1985 decision of the Privy Council, the Court characterized a building ordinance as designed to ensure public safety, and concluded that knowledge of the materiality of a deviation from plans and knowledge of a likelihood of a risk of injury or damage were not ingredients of the relevant offences under the ordinance. In so doing, the offences were tantamount to absolute liability in nature. No exploration of the halfway house strict liability offence with "due diligence" defence was

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<sup>929</sup> See, for example, an observation to this effect by P. Seago, *Criminal Law* (Second Edition) (London: Sweet & Maxwell, 1985), at p. 96.

<sup>930</sup> [1977] 2 WLR 716.

<sup>931</sup> Per Brown L.J., *ibid.*, at p. 725.

<sup>932</sup> [1977] 1 WLR 1187.

<sup>933</sup> [1985] AC 1.

considered. The Privy Council characterized the offences as absolute in nature despite the fact that the penalties upon conviction included a fine of up to \$250,000, and three years imprisonment.

In three cases from 1994,<sup>934</sup> the Divisional Court of Queen's Bench, and Court of Appeal applied *Alphacell* to s. 85 (1) of the *Water Resources Act*, holding that it is a "strict liability" offence with no defence of reasonable care. Subsection 85(1) of the *Act* states that "A person contravenes the section if he causes or knowingly permits any ....polluting matter.....to enter any controlled waters." Insofar as the provision attached liability to a person who "causes" polluting matter to enter waters, it is "strict" liability (i.e., absolute liability, from a Canadian standpoint, with no due diligence defence). Note that the penalty for violation of s. 85(1) on indictment includes imprisonment for up to two years.

Synthesizing the cases discussed, the approach of the English courts to non-intentional offences appears to be as follows: if the offence can be characterized as truly criminal in nature (as evidenced by such factors as the stigma attached to conviction, such as in the case of a drug-related activity akin to that described in *Sweet v. Parsley*), or if there is no way an accused could be convicted by the mere continuance of an activity heretofore perfectly lawful (such as in *Lim Chin Aik v. The Queen*), or the activity of a third party could create illegality without any participation of the accused (as in *Reynolds*) then the Courts are prepared to hold such offences as the type that includes a "knowing" or mens rea element.

On the other hand, where an offence pertains to a regulatory activity designed to protect

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<sup>934</sup> *Taylor Woodrow Property Management Limited v. National Rivers Authority, National Rivers Authority v. Alfred McAlpine Homes (East) Limited, and CPC (UK) Limited v. National Rivers Authority* [1995] 7 *Journal of Environmental Law* 55 -79.

the public from danger, such as pollution, or firearms, or building safety, as in *Alphacell*, *Howells*, and *Gammon*, the English courts appear prepared to consider such offences as absolute liability in nature (i.e., no reasonable care or reasonable mistake of fact defence), even when imprisonment is available as a punishment.

While English judges have explicitly discussed the fact that other non-English courts have included some form of reasonable mistake of fact defence, they have as yet failed to recognize such a defence to mitigate against the unfairness of characterization of an offence as being absolute liability in nature. To the best of the author's knowledge, the *Sault Ste. Marie* decision, with its formulation of the strict liability offence and reasonable care or due diligence strict liability defence has never been explicitly referred to in English judgments. A New Zealand judge has stated "There has been no indication that the English Courts are aware of the Canadian development or of the influence which it has had in New Zealand...."<sup>935</sup> In fact, the House of Lords in *Alphacell* seemed to suggest that an offence which merely stimulated reasonable care would not be sufficient. It is not clear that an absolute liability offence actually stimulates greater than reasonable care.<sup>936</sup> The decision of *Sweet v. Parsley* provides some evidence that the existence of *Woolmington*, with its stipulations concerning the presumption of innocence, seems to have caused concern from some English judges about the application of a balance of probability reasonable care defence.

Where a statute explicitly includes a reasonable care defence, such as that in the *Food and*

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<sup>935</sup> Per Cooke P. in *Millar v. Ministry of Transport* [1986] 1 NZLR 660, at p. 663. Case discussed in greater detail *infra*.

<sup>936</sup> Of course, it is equally true that one cannot say conclusively that the strict liability offence stimulates reasonable care.

*Drugs Act* as applied in *Meah v. Roberts, op cit.*, the English courts apply it without question, and without apparent concern about its presumption of innocence implications in terms of *Woolmington*. In contrast, in a jurisdiction such as Canada with a formal written constitution containing explicit presumption of innocence protections for accused persons, it is not possible for courts to turn a blind eye in such a manner (and thus treat offences so inconsistently) quite so easily. Hence, there has been no English decision equivalent to *Wholesale Travel* where the issue of the appropriate burden of proof for regulatory offences was the subject of discussion, and perhaps there is little prospect for one.

#### *English Regulatory Offence Legislation*

Many modern English regulatory regimes incorporate due diligence defences or negligence offences. For example, pursuant to s. 24(1) (b) of the *Trade Descriptions Act*, it is a defence if an accused can prove "that he took all reasonable precautions and exercised all due diligence to avoid the commission of such an offence." Note that the burden is on the accused to "prove" due diligence.<sup>937</sup> As such, it seems clear that merely "raising" a due diligence defence will not be sufficient. Similarly, under the *Food Safety Act 1990*, s. 21 provides a due diligence defence to be proved by the accused. Persons convicted under the *Act* can be imprisoned for up to two years. Under the *Consumer Protection Act 1987*, pursuant to ss. 39(1) it is a defence to a prosecution of any safety provision if the accused can show that he took all reasonable steps and exercised all due diligence to avoid committing the offence.<sup>938</sup>

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<sup>937</sup> For discussion of the *Act*, see K. Brinkworth and W. Whisson, "Trade Descriptions Act, Due Diligence and Reasonable Precautions," (1992) *Business Law Review* 143 - 145.

<sup>938</sup> See discussion in G. Envis, "'Thou Shall Not Market Dangerous Goods' -- Can Consumer Safety be a Reality?" (1992) *Business Law Review* 6 - 8.

On the other hand, under the *Environmental Protection Act 1990*, there is no reasonable care defence.<sup>939</sup> We have already seen that the *Water Resources Act 1991* includes non-intentional offences with no due diligence defence. Under both anti-pollution laws imprisonment up to two years is possible. According to recent accounts, Parliamentarians continue to believe that a due diligence defence would weaken the prosecution powers of environmental agencies.<sup>940</sup> In this regard they are obviously not familiar with the Canadian experience. There is also no due diligence defence available for offences included in the *Health and Safety at Work Act 1974*.<sup>941</sup> In short, both strict liability offences with due diligence defences and absolute liability offences with no such defences are common in modern English regulatory legislation, and penalties including imprisonment are frequently used in conjunction with these offences.

### *Summary*

English courts have indicated their distaste for absolute liability offences, but have nevertheless approved such offences even where imprisonment is available as a punishment in certain regulatory contexts. They have resisted the impulse to supply a due diligence defence, in some cases on the apparent belief that a reasonable care defence will set too low a standard, and in others due to apparent concern that such a defence might violate the presumption of innocence

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<sup>939</sup> Pursuant to s. 7(1), every authorization is subject to, among other conditions, a requirement (determined by the enforcing authority) that Best Available Techniques Not Entailing Excessive Cost (BATNEEC) will be used. Pursuant to s. 25(1), it is a defence in proceedings for failure to comply with the general implied condition to use BATNEEC, to show that no better BATNEEC was available. See R. Burnett-Hall, "The Environmental Protection Act 1990" (1991) *Business Law Review* 123 - 128.

<sup>940</sup> See A. Jones "Regulation, Crime and Pollution From Abandoned Coal Mines," [1996] 8 *J. of Environmental Law* 43 - 69, at p. 68.

<sup>941</sup> Note, however, that, pursuant to s. 3(1) of the *Act*, it shall be the duty of every employer to conduct his undertaking in such a way to ensure "so far as is reasonably practicable" that persons not in his employment who may be affected are not thereby exposed to risks to their health or safety." See G. Holgate, "Workplace Health and Safety: Absolute Liability Absolutely?" (1995) *Business Law Review* 132 - 134.

as articulated in *Woolmington*. As a result, courts have been left to interpret offences which contain no explicit knowledge requirement as either offences with an implied knowledge element or absolute liability offences, on a seemingly case-by-case basis.

In his *Textbook on Criminal Law*, Glanville Williams states that "...[i]n general, the authorities on strict [absolute] liability are so conflicting that it is impossible to abstract any coherent principle on when this form of liability arises and when it does not."<sup>942</sup> Legislators have nevertheless included due diligence defences in legislation pertaining to trade descriptions, consumer safety, and food safety legislation. Legislators have not included due diligence defences in environmental protection and worker health and safety legislation, so that in both of those regulatory contexts offences of absolute liability still function.

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<sup>942</sup> G. Williams, *Textbook on Criminal Law* (Second Edition) London: Stevens and Sons, 1983, at p. 910.

## Chapter 13 -- Regulatory Offences in New Zealand in the Modern Era

Earlier in the paper, it was seen that New Zealand courts have long expressed discomfort with the idea of absolute liability offences. In the 1905 decision of *R. v Ewart*,<sup>943</sup> concerning the sale of obscene material, the New Zealand Court of Appeal concluded that, unless the wording of the offence explicitly makes an offence absolute in nature, then a defence of lack of mens rea would be provided. While not going so far as to supply a reasonable care defence, *Ewart* showed judicial reluctance to impose absolute liability and a willingness by New Zealand courts to shift burdens of proof. As discussed below in greater detail, New Zealand courts would eventually approve the *Sault Ste. Marie* tri-categorization of offences, and thus recognize the strict liability offence with due diligence defence proved on a balance of probabilities. However, the path leading to adoption of *Sault Ste. Marie* and the subsequent application of the *Sault Ste. Marie* approach has many distinct characteristics reflecting New Zealand's particular legal "landscape."

For more than sixty years following *Ewart*, New Zealand courts continued to apply the technique of shifting the onus of proof on to the accused to prove lack of knowledge as a way of minimizing characterization of offences as absolute in nature. Then, in the 1969 decision of *R. v Strawbridge*,<sup>944</sup> a decision concerning the offence of cultivating cannabis, the New Zealand Court of Appeal modified the *Ewart* approach. The Court did this in response to two English decisions, the 1935 decision of *Woolmington*, and the 1970 case of *Sweet v. Parsley*.

In response to *Woolmington*, the Court concluded that shifting the onus of proof of lack

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<sup>943</sup> *Op cit.*

<sup>944</sup> [1970] NZLR 909.

of knowledge to the accused was contrary to the presumption of innocence, and so the burden on the accused of showing lack of knowledge was reduced from a persuasive to a mere evidentiary burden. Following a particular portion of Lord Diplock's reasoning in *Sweet v. Parsley*, the Court decided that if there is some evidence that the accused honestly believed on reasonable grounds that his act was innocent then he was entitled to be acquitted, unless there was a reasonable doubt on this point. Thus, an objective element -- reasonable grounds for a belief -- was injected into a previously entirely subjective knowledge requirement.

In the 1976 case of *Police v. Creedon*,<sup>945</sup> a decision concerning an offence of failing to yield the right of way at an intersection, the court concluded that absence of fault (reasonable mistake) was a defence, but once the defence was raised by the evidence, the burden ultimately rested with the prosecution to satisfy the Court beyond a reasonable doubt that there was fault. However, two of three judges indicated that, were it not for *Strawbridge*, they would have preferred to impose a persuasive burden of proof of lack of fault on the accused. Cooke P. pointed out that the rigorous approach to the presumption of innocence articulated in *Woolmington* was appropriate for true crimes, but that this was a statutory traffic offence.<sup>946</sup> Moreover, according to Cooke P., notwithstanding Lord Diplock's reasoning in *Sweet v. Parsley* as adopted in *Strawbridge*, in his view both Lord Reid and Lord Pearce in *Sweet v. Parsley* had seen merit in placing the onus to establish the defence on the accused.<sup>947</sup>

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<sup>945</sup> [1976] 1 NZLR 571.

<sup>946</sup> *Ibid.*, at p. 575.

<sup>947</sup> Per Cooke P., *ibid.*, at p. 586.

In the 1980 case of *Ministry of Transport v. Burnetts Motors Ltd.*,<sup>948</sup> another decision concerning a traffic offence, the Court noted favourably the Supreme Court of Canada's decision in *Sault Ste. Marie* and in particular Dickson J.'s imposition of a persuasive burden of proof on the accused to raise due diligence. Without deciding the issue, the Court concluded that what had been decided in *Strawbridge* and *Creedon* might need to be reconsidered in light of *Sault Ste. Marie*.

In the 1983 decision of *Civil Aviation Department v. MacKenzie*,<sup>949</sup> the majority conducted a review of the foregoing cases and other material, and concluded that for public welfare offences a defence of total absence of fault should be available, with the persuasive burden resting on the accused.<sup>950</sup> Accordingly, the offence of operating an aircraft in an unnecessarily dangerous manner contrary to the *Civil Aviation Act 1964*, with significant financial penalties and prison for up to one year, was characterized as strict liability in nature, with a "no fault" (due diligence) defence available to the accused to be established on a balance of probabilities.<sup>951</sup> The tri-offence classification approach set out in *MacKenzie* and in *Sault Ste. Marie* was confirmed in the 1986 decision of *Millar v. Ministry of Transport*,<sup>952</sup> where the Court noted that there would be a presumption against offences being characterized as absolute liability in nature unless there

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<sup>948</sup> [1980] 1 NZLR 51.

<sup>949</sup> [1983] NZLR 78.

<sup>950</sup> *Ibid.*, at p. 85.

<sup>951</sup> *Ibid.*, at p. 82.

<sup>952</sup> [1986] 1 NZLR 660.

was "clear legislative intent" to the contrary.<sup>953</sup>

Taken together, the effect of the decisions is that, as in Canada, offences in New Zealand today are classified as truly criminal, strict or absolute in nature. As in Canada, within the public welfare category, offences are assumed to be of the strict liability type in the absence of explicit language indicating otherwise. Thus, for example, in *Ministry of Commerce v. Woolworths (NZ) Ltd.*,<sup>954</sup> the District Court held that s. 16(2) of the *Weights and Measures Act 1987* concerning incorrect weight of goods was a strict liability offence, with a no-fault defence. As noted by one commentator, this conclusion was reached despite the existence of explicit defences short of "no fault" elsewhere in the legislation which could have been interpreted by the court as meaning that legislators did not intend that a no fault defence should be made available to the accused charged with an offence under s. 16(2).<sup>955</sup> It is the position of the author that this is a correct approach to interpreting regulatory offences, which minimizes the recognition of absolute liability offences unless there is clear language indicating that absolute liability is intended.

One unresolved issue is the effect of the *New Zealand Bill of Rights Act 1990* on the due diligence defence. Similar to ss. 11 (d) of the Canadian *Charter of Rights and Freedoms*, pursuant to ss. 25 (c) of the *New Zealand Bill of Rights*, "[e]veryone charged with an offence has...the right to be presumed innocent until proved guilty according to the law." As with section 1 of the Canadian *Charter*, by section 5 of the *Bill of Rights*, the rights and freedoms contained in

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<sup>953</sup> *Ibid.*, at p. 666.

<sup>954</sup> [1991] DCR 539.

<sup>955</sup> E. McDonald, "Absolute liability and the search for clear legislative intent" [1992] *NZLJ* 266 - 268.

the law are subject to "such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society." According to section 6 of the *Act*, "[w]henever an enactment can be given a meaning that is consistent with the rights and freedoms contained in this *Bill of Rights*, that meaning shall be preferred to any other meaning." However, since the *Bill of Rights* is not a constitutional document, there is nothing stopping Parliament from expressly providing otherwise than what is expressed in the *Bill of Rights*. Thus, by section 4, no court shall "hold any provision ...to be in any way invalid...by reason only that the provision is inconsistent..." with the *Bill of Rights*.

It is worth pointing out that, as in Canada and the United Kingdom, numerous regulatory statutes in New Zealand have expressly included "no fault" defences. For example, ss. 342(2) of the *Resource Management Act 1991* includes a "no fault" defence. Imprisonment is available as a punishment. The *Food Act 1981* includes strict liability offences with "all reasonable steps" defences available.<sup>956</sup> The *Clean Air Act 1972* also includes strict liability offences with a defence where certain activities "could not reasonably have been provided against."<sup>957</sup>

In conclusion, New Zealand courts have followed the Canadian lead, adopting the "half way" house strict liability offence with a "no fault" defence established on a balance of probabilities. In addition, some New Zealand regulatory legislation also includes explicit "no fault" defences to be proven by the accused.

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<sup>956</sup> Section 30.

<sup>957</sup> Section 51.

## Chapter 14 -- Regulatory Offences in Australia in the Modern Era

As was discussed earlier, the 1930s Australian High Court decisions of *Maier v. Musson*<sup>958</sup> and *Proudman v. Dayman*<sup>959</sup> demonstrated early recognition by members of the Australian judiciary (in particular, Dixon J.) of the need to develop some sort of objectively-based, non-intentional defence to otherwise absolute liability offences. The "honest and reasonable mistake of fact" defence articulated by Dixon J. in *Maier* and *Proudman* would become a key part of the inspiration for a full-fledged reasonable care or "no negligence" offence in Canada, but the same development has not occurred in Australia. Instead, there has been an ongoing debate about the burden of proof associated with the more limited reasonable mistake defence, and continued resistance to recognition on the judiciary's own initiative of a full due diligence defence. Nevertheless, at a statutory level, the "all reasonable precautions" defence has been made available in certain regulatory legislation. Below the highlights of the modern Australian approach to strict liability are described.

Early cases from the late 1940s and 1950s such as *McCrae v. Downey*<sup>960</sup> (licensing offence) and *R. v. Bonnor*<sup>961</sup> (bigamy) illustrate a continued belief on the part of some members of the Australian judiciary that *Maier* and *Proudman* called for a persuasive burden to be imposed on accused persons wishing to invoke the reasonable mistake of fact defence. In the state

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<sup>958</sup> *Op cit.*

<sup>959</sup> *Op cit.*

<sup>960</sup> [1947] VLR 194.

<sup>961</sup> [1957] VR 227.

of Victoria, as part of the *Health Act 1958*, a defence of "all reasonable precautions" has been included.<sup>962</sup> In the 1962 case of *Taylor v. Armour & Co. Pty Ltd.*<sup>963</sup> the Court held that the accused must establish all reasonable precautions on the balance of probabilities. In 1963, Professor Colin Howard of the University of Adelaide published his influential text, *Strict Responsibility*,<sup>964</sup> in which he expounded the view that a persuasive burden should be imposed on the accused to establish the defence of all reasonable care, and that the defence should be broadened to become one of no negligence, and not simply reasonable mistake of fact.<sup>965</sup>

In the 1970s, some Australian courts appear to have been influenced by United Kingdom decisions of that period such as *Alphacell* and *Sweet v. Parsley*, and as a result to characterize offences in a manner which afforded very limited defences to accused persons. For example, in the 1974 decision of *Marjury v. Sunbeam Corporation Ltd.*,<sup>966</sup> a New South Wales pollution offence of "causing" water to be polluted was characterized as an offence which did not include a mens rea element. Adopting the reasoning in *Alphacell*, the court held that no defence of reasonable mistake of fact was available. The Court did not provide a due diligence defence either, so that the fact that there had been no negligence was only considered in sentencing.<sup>967</sup>

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<sup>962</sup> Section 291. As discussed in M. and R. Gerkens, *Food Law in Australia* (Sydney, Australia: Law Book Company Ltd., 1985), at p. 134.

<sup>963</sup> [1962] VR 346.

<sup>964</sup> *Op cit.*

<sup>965</sup> *Ibid.*, at p. 109. Howard's work is discussed in greater detail in Part Three of the thesis.

<sup>966</sup> [1974] 1 NSWLR 659.

<sup>967</sup> Per N. Parpworth, "The Offence of Causing Water Pollution: A New South Wales Perspective," (1997) 9 *J. of Env'tal Law* 59 - 77, at pp. 62 - 63.

In a 1982 report entitled *The Burden of Proof in Criminal Proceedings*, the Australian Senate Standing Committee on Constitutional and Legal Affairs observed that the defence of reasonable mistake of fact is in practice confined to offences of strict liability in which no mental element or mens rea needs to be proved by the Crown. While favouring a reasonable mistake of fact defence with only an evidentiary burden, the report concluded "that the question of the appropriate burden of proof for the reasonable mistake of fact defence had not been authoritatively resolved in that country."<sup>968</sup>

In the 1985 decision of *He Kaw Teh v. The Queen*,<sup>969</sup> the High Court of Australia considered the mens rea element and the availability of defences associated with an offence of importing and possessing narcotics contrary to the *Customs Act 1901*. At trial, Tohurst J. had directed the jury that no specific state of mind, whether of motive, intention, knowledge or advertence need be proved by the Crown.<sup>970</sup> With respect to importation, if the accused could establish by a balance of probabilities that he had an honest and reasonable belief in a set of facts which, if they existed, would make his act innocent, that would afford a defence to the charge.<sup>971</sup> Concerning possession, Tohurst J. relied on the specific wording in the *Customs Act* to direct the jury that two defences were open to the accused, namely that he had a reasonable excuse for the possession and that he did not know that the goods in his possession had been imported into

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<sup>968</sup> Cited by Richardson, J., and McMullin J. in the New Zealand decision *Civil Aviation Department v. MacKenzie* (1983) NZLR 78 at p. 85 (Richardson J.), and p. 95 (McMullin J.).

<sup>969</sup> [1985] 157 CLR 523.

<sup>970</sup> *Ibid.*, at p. 563-64.

<sup>971</sup> *Ibid.*

Australia in contravention of the *Act*.<sup>972</sup>

At the High Court level, four of five judges concluded that the offence should properly be characterized as a "grave criminal offence" and as a result a presumption of mens rea is appropriate. The judges noted that a person convicted under the offence could be imprisoned for life. In light of this, the prosecution should bear the onus of proving that the accused knew that he was importing a prohibited import. Concerning the possession offence, knowledge of the accused that the goods in question were in the accused's custody, in the absence of a sufficient indication of a contrary intention, would be a necessary ingredient of the offence, because the word "possession" itself necessarily imports a mental element.<sup>973</sup>

After considering *Sault Ste. Marie*, Chief Justice Gibbs stated that "I am not sure that we can accept the opinion held in Canada that the defence of honest and reasonable but mistaken belief may be raised only in the case of regulatory offences."<sup>974</sup> It is not entirely clear why the reasonableness of a belief would be relevant for a crime where subjective intent is the mental element in question. No members of the Court approved of the full reasonable care defence set out in *Sault Ste. Marie*. In the opinion of Dawson J., it is not appropriate to derive a defence of no negligence from the more limited reasonable mistake of fact defence:

....the defence of honest and reasonable mistake stems from the common law requirement of a guilty mind and is not, as it is sometimes put, a defence based solely or even primarily upon the absence of negligence.<sup>975</sup>

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<sup>972</sup> *Ibid.*

<sup>973</sup> Per Gibbs CJ, *ibid.*, at pp. 539.

<sup>974</sup> *Ibid.*, at p. 535.

<sup>975</sup> *Ibid.*, at p. 592.

With respect, this seems an odd statement for Dawson J. to make, since the fact that the mistake must be reasonable necessarily compels the court to shift its inquiry from the guilty mind of the accused to that of others in similar circumstances -- the type of exploration of the reasonable man which is the hallmark of negligence.<sup>976</sup> While confusing and unclear in some respects, the judges for the majority were prepared to accept as a general proposition the availability of a reasonable mistake of fact defence, with the accused only bearing an evidentiary burden.<sup>977</sup>

Although *He Kaw Teh* represents recent Australian High Court approval of the reasonable mistake of fact defence with only an evidentiary burden on an accused for offences where there is no explicit mental element included in the offence, the Court did not provide the type of firm interpretative guidance as to characterization of offences as "grave criminal" (intentional), "strict" (i.e., Australian version, with reasonable mistake of fact a defence, with a mere evidentiary onus on accused) or absolute in nature, comparable to what was articulated by Dickson J. in *Sault Ste. Marie*. As a result, since *He Kaw Teh*, Australian courts continue to characterize offences as either absolute or "strict" (in the limited, "reasonable mistake of fact", evidentiary burden, Australian sense of that term) in a seemingly inconsistent manner. Thus, for example, in the 1989 decision of *Allen v. United Carpet Mills Pty Ltd.*,<sup>978</sup> the Supreme Court of Victoria held that an offence of "causing pollution" was absolute liability in nature, with the accused not able to avoid

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<sup>976</sup> See similar criticisms by B. Fisse, ed., *Howard's Criminal Law* (5th ed.) (Sydney, Australia: The Law Book Company, 1990), at p. 512, who states that "...for practical purposes liability to conviction subject to a defence of reasonable mistake of fact may be equated with liability based on negligence."

<sup>977</sup> See Gibbs CJ, *He Kaw Teh*, *op cit.*, at p. 535; Brennan J. at p. 574 - 575, and 582; Dawson J. at pp. 591 - 594. Gibbs notes at p. 534 that, if guilty knowledge is an element of an offence, an honest belief, even if unreasonably based, may negative the existence of the guilty knowledge, and thus lead to an acquittal.

<sup>978</sup> [1989] VR 323.

liability by raising a reasonable doubt that a reasonable mistake of fact had occurred. On the other hand, in New South Wales, in a 1992 decision, the majority of the Criminal Court of Appeal characterized a similar offence as being "strict" in nature, so that an accused could escape liability by pointing to evidence of a reasonable mistake of fact.<sup>979</sup>

In short, Australian courts have recognized a half-way house between offences with an explicit mens rea element, and absolute liability offences, and have referred to this mid-way offence as an offence of strict liability. However, the Australian version of strict liability is more limited than that adopted by Canadian and New Zealand courts in two regards: first, an accused can only escape liability on the grounds of a reasonable mistake of fact, not reasonable care or due diligence. Second, the accused only bears an evidentiary and not a persuasive burden with respect to the question of reasonable mistake of fact. Based on the limited review of cases undertaken by the author, it is not possible to determine whether the evidentiary burden reasonable mistake of fact defence which was approved in *He Kaw Teh* has proven fair or effective. Brent Fisse, a leading Australian criminal law commentator, and editor of *Howard's Criminal Law*<sup>980</sup> states that the 1986 New Zealand Court of Appeal decision of *Millar v. Ministry of Transport* (discussed earlier)...

.....puts the English, Australian and Canadian law into clearer perspective than does *Teh*. [The New Zealand decision of] *Millar* also reveals that Australian law now lags behind initiatives taken in Canada and New Zealand.<sup>981</sup>

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<sup>979</sup> *Australian Iron and Steel Pty Ltd. v. EP Authority* (1992) 29 NSWLR 497, per Abadee J., at p. 592.

<sup>980</sup> *Op cit.*

<sup>981</sup> *Ibid.*, at p. 532, footnote 37.

This suggests that a leading Australian commentator has not favourably viewed the *He Kaw Teh* decision. The conflicting judgments of *Allan* and *Australian Iron and Steel* demonstrate that Australian courts are still struggling with characterization of offences as "strict" (in the more limited Australian sense of the term) or absolute in nature. Finally, as in Canada, the United Kingdom, and New Zealand, statutory defences of "all reasonable precautions" can be found in some Australian regulatory legislation.<sup>982</sup>

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<sup>982</sup> For a recent example, see the all reasonable precautions defence provided in s. 17 of the Victoria *Food Act 1984*, No. 10082.

## Chapter 15 -- Regulatory Offences in Germany in the Modern Era<sup>983</sup>

Under West German law, since 1949, a distinction has been made between crimes and regulatory offences (which came to be known as Ordnungswidrigkeiten).<sup>984</sup> A regulatory offence, for the purposes of German law, is an unlawful and reproachable act punishable by a type of monetary penalty known as Geldbube.<sup>985</sup> For purposes of criminal record-keeping, the imposition of a regulatory offence monetary penalty is not a criminal penalty.<sup>986</sup> The vast majority of violations concerning traffic, health, safety, environmental control, zoning, anti-trust and other economic activities are framed as regulatory offences.<sup>987</sup> Imprisonment for regulatory offences is only possible where an offender refuses to pay or has not established an inability to pay.<sup>988</sup> Commentators have suggested that if there is a difference between the two types of offences, it is one of quantity or degree, and not of nature.<sup>989</sup>

Criminal liability is reserved for more harmful acts...but there is no clear-cut distinction in the nature of the offences since legislation repeatedly changed the classification of certain provisions. In general, minor offences and the violation of norms of a more technical

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<sup>983</sup> In this paper, "German law" will refer to the law of what was until recently West Germany. No reference will be made to the law of what formerly known as East Germany.

<sup>984</sup> M. Franke, "A Study of German Alternatives to Traditional Criminal Prosecution," Masters Thesis, Universite de Montreal, 1985, at p. 28.

<sup>985</sup> Defined in 1968 *Code of Regulatory Offences*, as described in Franke, *ibid.*, at p. 37. Franke discusses the distinction between the regulatory monetary penalty of Geldbube and the criminal fine of Geldstrafe, and notes that it has been called a labelling trick for apparently synonymous repressive sanctions.

<sup>986</sup> Franke, *ibid.*, p. 37.

<sup>987</sup> *Ibid.*, p. 22.

<sup>988</sup> *Ibid.*, p. 37.

<sup>989</sup> *Ibid.*, p. 29.

character such as road traffic regulations constitute Ordnungswidrigkeiten. The violation of a speed limit, for example, will be prosecuted as Ordnungswidrigkeit. Dangerous driving, however, if it is apt to cause severe harm, is a crime. Here it becomes clear that the distinction is mainly based on the increasing grade of harmfulness although the exact dividing line can only be drawn by regarding the actual statutes.<sup>990</sup>

Thus, the definitional distinctions in German law between criminal and regulatory offences have been described as "arbitrary."<sup>991</sup>

Nevertheless, there are significant legal differences between criminal and regulatory offences, especially with respect to adjudication bodies and procedures. With regulatory offences, the activities of investigation, prosecution, and sanctioning are undertaken by police and administrative bodies (with no trial by the regular courts)<sup>992</sup> whereas with crimes enforcement is by way of public prosecutors and criminal courts.<sup>993</sup> Even though regulatory offences are heard at first instance by "mere" police or other administrative bodies, recourse to the courts is available for contested cases.<sup>994</sup> As a result of streamlined procedures, regulatory offences are processed in a considerably more expeditious manner than crimes.<sup>995</sup> While the prosecution and adjudication of regulatory offences is carried out in a manner less protective of the rights of accused, the Constitutional Court of Germany, the European Commission of Human Rights and the European Court of Human Rights have all held that conferring the prosecution and punishment of minor

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<sup>990</sup> Per H.-U. Paeffgen, "Overlapping Tensions Between Criminal and Administrative Law: The Experience of West German Environmental Law," [1991] 3 *J. of Env'tal Law* 247 - 264, at p. 248, fn. 3.

<sup>991</sup> Franke, *op cit.*, at p. 47. See *infra* for discussion of the distinctions between criminal and regulatory offences.

<sup>992</sup> *Ibid.*, at p. 48.

<sup>993</sup> Paeffgen, *op cit.*, at p. 248.

<sup>994</sup> Franke, *op cit.*, at p. 53.

<sup>995</sup> *Ibid.*, at p. 50.

offences on administrative authorities is not inconsistent with the Constitution nor the European *Convention of Human Rights* since individuals can appeal any decision made against him or her to the regular courts.<sup>996</sup>

Corporations cannot be held liable under criminal offences, but can under regulatory offences.<sup>997</sup> In common law jurisdictions, corporations can be held liable under both criminal and regulatory offences through use of the "directing mind" theory.<sup>998</sup> While the German prosecutor has the duty to pursue all cases where a conviction is likely,<sup>999</sup> the German Code of Criminal Procedure was amended in 1975 to allow for the dismissal for "misdemeanours" where the guilt is slight, public interest is minimal, and restitutory promises are extracted from the accused.<sup>1000</sup>

As part of German constitutional due process requirements, the imposition of penal or quasi-penal sanctions (i.e., either imprisonment or monetary penalties) necessitates that there be proof of mens rea ("Schuld").<sup>1001</sup> In German penal law, mens rea is taken to encompass intention, recklessness, or negligence.<sup>1002</sup> For regulatory offences, a mental element of "mere" negligence is the rule and not the exception.<sup>1003</sup> For criminal or regulatory offences which are framed in terms

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<sup>996</sup> *Ibid.*, at pp. 52 - 53.

<sup>997</sup> *Ibid.*, at p. 44.

<sup>998</sup> See, e.g., *Canadian Dredge and Dock et al. v. The Queen* [1985] 19 CCC (3d) 1 (for criminal corporate liability) and *R. v. Sault Ste. Marie, op cit.*, (for regulatory offence corporate liability).

<sup>999</sup> Franke, *op cit.*, at p. 42.

<sup>1000</sup> *Ibid.*, at p. 23, and p. 57.

<sup>1001</sup> Franke, *ibid.*, at p. 38, Paeffgen, *op cit.*, at pp. 248 - 249.

<sup>1002</sup> Paeffgen, *ibid.*, at p. 249.

<sup>1003</sup> Franke, *op cit.*, at p. 40, fn. 112.

of negligence, the concept of negligence is defined as an objective, reasonable man standard, without any necessary subjective component.<sup>1004</sup> A German environmental law commentator has concluded that there is no need for absolute liability offences to address environmental misconduct, because "it is rare for a polluter not to be convicted because of lack of negligence."<sup>1005</sup> Thus, as in Canada and unlike the United States, the constitution has been used to establish a minimum mental element for the imposition of penal consequences, and that minimum mental element is objective negligence. However, unlike Canada, the minimum mental element of negligence is required for the imposition of either imprisonment or monetary penalties.

Similar to Canada, mistake of fact is only a defence to intentional crimes.<sup>1006</sup> Unlike common law jurisdictions where ignorance of law is no excuse, in German penal law, mistake of law or ignorance of law is a defence, but only where lack of knowledge of the law was unavoidable.<sup>1007</sup> However, German courts have held that "[i]n the field of complex and technical regulatory offences it is understood that anyone who engages in a regulated field or profession has to learn the applicable norms."<sup>1008</sup> In the belief of the German courts that regulated actors must be taken to know the regulatory norms, there is a resemblance to similar assumptions about regulated actors articulated by Canadian, American, United Kingdom and Australasian courts.

In summary, in German law, a distinction has been made between criminal and regulatory

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<sup>1004</sup> Paeffgen, *op cit.*, at p. 249.

<sup>1005</sup> *Ibid.*, p. 249.

<sup>1006</sup> Franke, *op cit.*, at p. 40.

<sup>1007</sup> *Code of Regulatory Offences*, section 11, para. (b), as discussed in Franke, *ibid.*, at p. 40.

<sup>1008</sup> Franke, *ibid.*, at pp. 40 - 41.

offences since 1949. While the distinction has been described as arbitrary in terms of which misconduct is considered criminal and which is regulatory, there are significant differences in terms of penalties (only a monetary penalty available for regulatory offences), and enforcement and adjudication (regulatory offence investigation and adjudication can be conducted by police and administrative bodies). As a matter of constitutional due process, imposition of penal or quasi penal liability -- encompassing either imprisonment or monetary penalties -- necessitates that there be proof of intent, recklessness, or negligence.

For regulatory offences, negligence tends to be the required mental element. Negligence is an objective, "reasonable person" standard. For the purposes of this thesis, perhaps the most valuable points to emerge from this comparative analysis are the conclusions of German legislators and commentators that the labelling by legislators of which offences are criminal and which are regulatory has been described as "arbitrary," that negligence is minimum acceptable constitutional required mental element for imposition of penal consequences, and the conclusion of commentators that the lack of availability of the absolute liability option has not represented a significant disadvantage. Finally, the conclusion of German courts that those engaged in regulated activity are assumed to understand the stipulated regulatory norms is remarkably similar to conclusions of common law courts examined earlier in the thesis.

## Chapter 16 -- Regulatory Offences in The Netherlands in the Modern Era

In contrast to German penal law, in Dutch law there is no bar to absolute liability offences, even where imprisonment is available as a punishment.<sup>1009</sup> Thus, for example, in the context of environmental offences, generally the prosecutor need not prove that the defendant engaged in misconduct knowingly or willfully.<sup>1010</sup> Nevertheless, where it can be demonstrated that the accused knew or had serious reason to suspect increased risk to the health of others, the magnitude of the penalty imposed can be increased.<sup>1011</sup>

Under the *Economic Crimes Act* (which encompasses environmental and other offences pertaining to "regulatory" contexts), the maximum penalty for intentional offences is up to two years of imprisonment, and for absolute liability offences, no more than six months imprisonment.<sup>1012</sup> Intentional environmental offences (which in addition to willful and knowing violations include those where persons ought to have known that the behaviour may have caused danger to the public health) may attract a longer limitation period than absolute liability offences.<sup>1013</sup> In Dutch law, since 1976 corporations can be held liable under either absolute or

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<sup>1009</sup> See both the *Economic Crimes Act*, and regulatory statutes pertaining to specific policy contexts, such as the *Air Pollution Act*, the *Soil Protection Act*, and the *Chemical Waste Act*, as discussed in D. J. Van Zeben and M. Mulkey, "Choosing Among Criminal, Civil Judicial, and Administrative Enforcement Options: A Comparative Discussion of United States and Netherlands Experience," in *International Conference on Environmental Enforcement* (U.S.: EPA et al., Conference Proceedings, Sept. 22 - 25, 1992, Budapest, Hungary, Vol. I), pp. 397 - 415, especially at p. 408, and as discussed below.

<sup>1010</sup> *Ibid.*

<sup>1011</sup> E.g., see s. 91 of the *Air Pollution Act*, or s. 78 of the *Soil Protection Act*, or s. 55 of the *Chemical Waste Act*, as discussed in Van Zeben, *ibid.*, at p. 408.

<sup>1012</sup> *Ibid.*, at p. 408.

<sup>1013</sup> *Ibid.*

intentional offences.<sup>1014</sup> In the use of absolute liability offences which impose imprisonment as a penalty, commentators have noted the similarity between the United States and Dutch experience.<sup>1015</sup> On the other hand, at least one Dutch scholar has expressed opposition to the concept of absolute penal liability.<sup>1016</sup>

In conclusion, in the penal law of the Netherlands, there are many examples of absolute liability offences for regulatory misconduct, and where persons are found guilty, imprisonment can be imposed as a punishment. While such offences have been criticized by some commentators, the existence of such offence and penalty structures in the Netherlands, alongside the German regime where absolute liability is not allowed, provides evidence that legal systems in continental Europe have achieved no more of a consensus on the proper minimum standard for the imposition of penal liability than have common law jurisdictions.

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<sup>1014</sup> Per S. Field and N. Jorg, "Corporate Liability and Manslaughter: should we be going Dutch?" [1991] *Crim. L.R.* 156 - 171, at p. 157.

<sup>1015</sup> E.g., Van Zebel, *op cit.*.

<sup>1016</sup> E.g., Professor I.M. Koopmans, Department of Criminal Law and Criminal Procedure, Tilburg University, Faculty of Law, personal communication, based on discussion of her doctoral thesis.

## **Part Two -- Summary: Regulatory Offences in the Modern Era**

The foregoing comparative review of regulatory offences in the period 1950 to the present reveals considerable divergences in approaches, from one court to another, but also some similarities. Analysis suggests that the absolute liability offence, where an offender can be convicted even though he or she has exercised reasonable care, has been the subject of considerable criticism in each jurisdiction studied. Nevertheless, this type of offence continues to survive in most jurisdictions, albeit on somewhat different terms depending on the legal system. It might have been assumed that those jurisdictions with formal constitutional protections of due process would be the most likely to severely curtail use of the absolute liability offence, but this has not been borne out in practice.

Thus, for example, the absolute liability offence with fines as penalties continues to survive in Canada, despite *Charter* fundamental justice protections. Only those absolute liability offences which potentially deprive accused persons of their liberty (e.g., imprisonment) are considered contrary to the *Charter*. In the United States, despite the existence of celebrated and revered constitutional due process requirements, the absolute liability offence with imprisonment has continued to survive unscathed. Only in Germany has the constitution been interpreted so as to ban outright the absolute liability offence.

In those jurisdictions examined which do not have explicit constitutional due process safeguards, the treatment of absolute liability offences is equally varied. In the United Kingdom, although courts have expressed reservations about and explored alternatives to the absolute liability offence, they have continued to approve of the absolute liability offence where neither a reasonable care or reasonable mistake defence is provided -- even where imprisonment is available

as a punishment. Nevertheless, at a legislative level, many regulatory regimes include offences which provide an “all reasonable care” defence, established on a balance of probabilities.

In Australia, absolute liability regulatory offences are rare. Instead, the existence of a “reasonable mistake of fact” middle ground alternative to the absolute liability offence has been recognized by leading courts since the 1930s. Recently there has been clarification by the High Court of Australia concerning the appropriate burden of proof for the reasonable mistake of fact grounds for liability, with the majority concluding that only an evidential burden lies on the accused. Some regulatory regimes include strict liability offences where defences of all reasonable care established on a balance of probability are provided. On the other hand, New Zealand has adopted the Canadian approach to offence classification, with the result that absolute liability offences are increasingly rare, and the strict liability offence with due diligence defence is common. In the Netherlands, the absolute liability offence with imprisonment continues to be used in regulatory contexts.

In the opinion of the author, the most dynamic and daring jurisdiction in terms of judicial treatment of regulatory offences is Canada. The introduction of constitutional protections of fundamental justice in 1982 has compelled a wholesale judicial review of all aspects of the penal law system. The strict liability regulatory offence, with a due diligence defence established on a balance of probabilities has survived *Charter* challenges, and so its pre-eminent role in regulatory legislation which began with the pre-*Charter Sault Ste. Marie* decision has been constitutionally entrenched. While there continue to be critics, in the opinion of many commentators the strict liability offence is an effective and fair alternative to the absolute liability offence.

The failure of American courts and legislatures to recognize this middle ground offence

has resulted in tortured decisions where courts have attempted to “force” intentional offences into the absolute liability category, or to interpret absolute liability offences as including an intentional element. It is submitted that both enforcement agencies and regulated accused would benefit from courts and legislatures recognizing a middle ground strict liability offence.

The widespread statutory use of the strict liability offence in Canada, the United Kingdom, New Zealand, and (to a lesser extent) Australia suggest that this type of “half-way house” offence has been found acceptable by courts and legislators. It is submitted that there are no significant and insurmountable obstacles to non-Canadian courts adopting the Canadian approach, which assumes non-intentional offences located in regulatory legislation to be strict liability in nature, unless express language necessitates characterization of the offence as either a true crime or absolute liability in nature. Indeed, there is much to commend this approach, from the standpoint of both regulatory efficiency and fairness perspectives. The fact that New Zealand courts have followed the Canadian approach suggests the feasibility of non-Canadian courts recognizing the strict liability offence and the presumption of strict liability for public welfare or regulatory offences.

### **Part Three -- Theoretical Underpinnings of the Regulatory Offence and the Way Ahead**

The historical analysis of non-intentional offences undertaken in Part One reveals a long tradition of societies imposing penal liability in circumstances of absolute liability or objective negligence, and the rise to prominence of a theory of penal liability which focuses on cognition or subjective awareness as the proper basis for imposing significant penalties. In Part Two, a review of the twentieth-century use of non-intentional regulatory offences in seven jurisdictions showed that, while legal systems, cultures and approaches differ widely from one jurisdiction to another, some form of regulatory offence is in use in each of the jurisdictions, imposing liability for other than subjectively intentional misconduct. The divergent explanations provided by courts and others in these jurisdictions for approving such offences were also discussed. While legal commentators and judges in all seven jurisdictions expressed distaste for absolute liability offences, this offence type has continued to be judicially tolerated or approved in many jurisdictions. Strict liability offences based on failures to exercise reasonable care have been well received by some courts, and are extensively provided for in the legislation of some jurisdictions, although others continue to resist such offences.

The purpose of this Part is to build on the historical analysis undertaken in Part One and the comparative review in Part Two, but to do so by stepping outside the historical and legal experiences of particular jurisdictions vis-a-vis regulatory offences, and instead to engage in a more fundamental exploration of the jurisprudential justifications for such offences, focusing on the strict liability offence type. Then, with this background, a brief consideration of possible future applications of the strict liability offence is undertaken.

## Chapter 17 -- Theoretical Underpinnings of the Strict Liability Offence

Penal systems reflect implicit and sometimes explicit decisions made by lawmakers on behalf of society about the appropriate balance to be struck among considerations of fairness, effectiveness, and efficiency when determining liability for individual misconduct.<sup>1017</sup> More broadly, penal systems are based on value judgments which on the one hand weigh the general public's interests in being protected from harm, and on the other the rights of individuals to liberty and freedom from undue State interference.<sup>1018</sup> A liberal approach to analysis of the proper conditions for the imposition of penal liability starts from the premise that such a severe sanction as imprisonment can only be used by the State where it is clear that the individual exercised his or her "free will" to violate a basic social norm and had the capacity to do so -- that is to say, where some element of individual cognition and control over the activity were present.<sup>1019</sup>

Drawing on the thinking of the English legal scholar H.L.A. Hart,<sup>1020</sup> and in particular his notion of law as a "choosing system," the focus of attention here is on justifying the use of imprisonment where persons fail to exercise reasonable care on the basis that individuals have a choice to exercise reasonable care or not, and therefore that strict liability is consistent with the

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<sup>1017</sup> See, e.g., Sayre, "Public Welfare Offenses," *op cit.*, and President's Commission on Law Enforcement (1967), as quoted in Kadish and Schulhofer, *op cit.*, at p. 1.

<sup>1018</sup> In exploring the justifications for penal liability vis-a-vis the pre-eminent rights and autonomy of individuals, the author here is conducting his analysis within a liberal paradigm, which starts from the primacy of the individual and individual autonomy. For a more complete discussion of the liberal philosophical underpinnings to regulatory offences, see C. Tollefson, "Ideologies Clashing: Corporations, Criminal Law, and the Regulatory Offence," (1991) 29 *Osgoode Hall L.J.* 705.

<sup>1019</sup> Tollefson, *ibid.*, draws a distinction between classical and pluralist liberal approaches, whereas for current purposes a more inclusive single definition of liberalism is adopted.

<sup>1020</sup> H.L.A. Hart, *Punishment and Responsibility: Essays in the Philosophy of Law*, Clarendon Press, Oxford, 1970.

liberal paradigm. Thus, although strict liability regulatory offences impose penal liability on a different basis than true crimes, both *mens rea* and strict liability approaches to imposing serious penalties reflect an appropriate balancing of fundamental rights, freedoms and concerns, and are ultimately based on the notions of individual choice, capacity, control, fault, and respect for individual autonomy. The position taken here is that because the strict liability offence respects such concepts pertaining to individual autonomy, it can be justified as a fair and appropriate approaches to imposing penal liability.

Rather than adopting the simplistic view that law is simply a method to prod individuals to do the right thing on pain of punishment, English legal philosopher H.L.A. Hart<sup>1021</sup> takes a more sophisticated interpretation of the function of law, describing legal regimes as “choosing systems”<sup>1022</sup> where an individual can escape liability and punishment if “excusing conditions”<sup>1023</sup> are in place. The key contribution of Hart’s approach is that it recognizes that excusing conditions protect citizens against the claims of the State:<sup>1024</sup>

Consider the law not as a system of stimuli but as what might be termed a *choosing* system, in which individuals can find out, in general terms at least, the costs they have to pay if they act in certain ways. This done, let us ask what value this system would have in social life and why we should regret its absence. Punishment is different from a mere tax on a course of conduct. But the concept of the law simply as goading individuals into desired courses of behavior is inadequate and misleading; what a legal system that makes liability generally depend on excusing conditions does is to guide individuals’ choices as to behavior by presenting them with reasons for exercising choice in the direction of

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1021 Hart, *op cit.*

1022 *Ibid.*, at p. 44.

1023 *Ibid.*, at p. 28.

1024 *Ibid.*

obedience, but leaving them to choose.<sup>1025</sup> (Emphasis in original text)

Implicit in this approach is an assumption that individuals are rational actors, capable of making reasoned decisions in favour of complying with the law or not when faced with choices which have penal consequences. Such an approach maximizes the opportunity for individual liberty while somewhat reducing the efficacy of the state's threats of punishment (since an individual can escape liability and thus punishment if the excusing conditions are present).<sup>1026</sup> Individuals can determine by their own choice what the future will be, and individuals can predict what that future will be (since the State acts as guarantor against the claims of others).<sup>1027</sup> There is thus a measure of predictability and freedom from arbitrary detention which flows from such a choosing system. Hart argues that contracts, wills and other civil law instruments are also choosing systems, with excusing conditions available, although the consequences are non-penal in nature. Thus, for example, wills, gifts, and contracts can be invalidated if the civil transactions were not entered into by individuals of their own free will, and voluntarily.<sup>1028</sup> These are excusing conditions in the civil context.<sup>1029</sup>

In a conventional mens rea-based criminal law system, the excusing conditions tend to revolve around the subjective mental element of the accused. Thus, for example, if an individual was at the time of the offence unconscious, mistaken about the physical consequences of his or

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<sup>1025</sup> *Ibid.*

<sup>1026</sup> *Ibid.*, at p. 46.

<sup>1027</sup> *Ibid.*, at p. 45.

<sup>1028</sup> *Ibid.*, at p. 28.

<sup>1029</sup> *Ibid.*, at p. 44.

her body movements, or mentally ill, these conditions could excuse him or her from criminal liability.<sup>1030</sup> Extrapolating from Hart's approach, the argument is made here that regulatory offences of strict liability in which the defence of due diligence are available are also part of a "choosing system" in which individuals can meaningfully determine in advance the legal consequences that will be imposed on them if they act in certain ways, and in which they are not arbitrarily penalized for their actions where they can demonstrate that they exercised reasonable care.<sup>1031</sup>

As with crimes, strict liability offences sacrifice much in efficiency and effectiveness in order to preserve individual autonomy and fairness. This is most evident when the strict liability offence is contrasted with its absolute liability offence counterpart, which may be more efficient than the strict liability type (i.e., it is easier to obtain a conviction where no defence of reasonable care exists, and so there are attendant time and energy resource savings for prosecutors and courts where absolute liability offences are employed) but can lead to convictions of those who are without fault (i.e., they have done everything reasonable to avoid breaking the law). It is for this reason that many judges and commentators have described the absolute liability offence as unfair, as we have seen in Parts One and Two of the thesis.

Hart views penal liability for inadvertent failures to exercise reasonable care as just and effective, stating that, if we are going in for the business of blaming and punishment at all, "...it

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<sup>1030</sup> *Ibid.*, at p. 28.

<sup>1031</sup> One could make the argument that absolute liability offences are also part of a choosing system, in that persons can choose to enter a regulated activity knowing in advance that if they commit an offence they will be held liable. However, with an absolute liability offence, they will be penalized even when they exercised reasonable care, and thus, no amount of due diligence (choosing to exercise reasonable care) will save them from liability. Thus, absolute liability offences are only in a very limited binary way (at the point of entry into a regulated activity) a part of a choosing system.

does not appear unduly harsh, or a sign of archaic or unenlightened conceptions of responsibility, to include gross, unthinking carelessness among the things which we blame and punish.”<sup>1032</sup> Hart articulates a two-fold test for determining liability for inadvertent negligence: first, did the accused fail to take those precautions which any reasonable man with normal capacities would in the circumstances have taken? And second, could the accused, given his mental and physical capacities, have taken those precautions? We will return later to Hart’s formulation of the negligence test, and his statement that “gross” carelessness is deserving of punishment later.

An important premise underlying use of objective negligence as a ground for liability (i.e., as with strict liability offences), espoused by several commentators, is that people tend to take greater care when there are serious consequences if they do not. Hart, paraphrasing Professor H. Wechsler, Reporter to the American Law Institute Draft Modern Penal Code, states that punishment for conduct which inadvertently creates improper risks supplies men with an additional motive to take care before acting, to use their faculties, and to draw upon their experience.<sup>1033</sup> “If the penalties were confined to negligent misconduct,” says Professor J. Hall, then “conviction might be defensible, not as punishment, but as instruction, as a stimulus to the creation of relevant sustaining mores.”<sup>1034</sup> From the standpoint of a person accused of committing a strict liability offence, it is submitted that the difference between punishment and instruction might seem a trifle academic. Perhaps a more relevant distinction is between general and specific deterrence, as suggested by Canadian criminal law commentator Don Stuart, who states that....

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<sup>1032</sup> *Ibid.*, at p. 136.

<sup>1033</sup> Hart, *op cit.*, at p. 138 and p. 157.

<sup>1034</sup> J. Hall, “Interrelations of Criminal Law and Torts: Part II” (1943) *Columbia L. R.* 967 - 1001, at p. 993.

....[a] strong case can be made for punishing some forms of negligent conduct on the basis of general and, less convincingly, specific deterrence. The imposition of criminal sanctions rests heavily on the admittedly unproven notion of deterrence and there seems little reason for not using the same rationale to penalize certain forms of negligent conduct. We can and do teach ourselves to take care when we know that, if we do not, we will be punished. We are often capable of becoming less inadvertent.<sup>1035</sup>

This understanding of the link between failure to exercise diligence and dire personal consequences has roots in our own personal experience, but is particularly appropriate in regulatory contexts. Thus, for example, at a personal level, we tend to take particular care around a hot stove, oftentimes because we have burned our fingers in the past, or have seen the harm caused to others who have touched a hot stove. But when the harm that we produce is not to ourselves, and not to an immediately self-evident victim, but rather to the public welfare (which tends to be the key protected interests of many regulatory regimes), we may not be aware that we have done harm or are potentially causing harm. In such cases, penalizing persons for failures to take care may serve the same deterrence-oriented purposes in regulatory contexts as do burnt fingers on a hot stove in the home.<sup>1036</sup>

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<sup>1035</sup> Stuart, *op cit.*, at p. 229.

<sup>1036</sup> It might be pointed out that there is a distinction between burning one's fingers on a hot stove and being penalized for failing to take care in a regulatory context where the harm is to the public welfare because the feedback about failure to take adequate care is considerably more direct and immediate with respect to burnt fingers than it might be with enforcement of regulatory offences. Clearly, the more certain and immediate the invocation of sanctions, the better, from a deterrence standpoint. In Canada, some regulatory agencies have begun to develop Compliance and Enforcement Policies, which explain in a clear and straightforward manner how the law will be enforced. Environment Canada's Compliance Policy for the *Canadian Environmental Protection Act* is discussed in greater detail in K. Webb, "Taking Matters Into Their Own Hands: The Increasing Role of Citizens in Regulatory Enforcement," (1991) 36 McGill L. J 770. It is submitted that such policies represent an attempt by regulators to communicate with regulated persons what the consequences of non-compliance will be, and thus to provide greater certainty about regulatory enforcement activity. The problems with expeditious implementation of sanctions remains, and must be balanced against the protections for the accused such as the due diligence defence, which, as discussed earlier, tend to make strict liability offence proceedings more complex, expensive, and lengthy. On the other hand, absolute liability offences can be invoked more quickly, but are less fair to the accused. Thus, a trade-off involving fairness and efficiency, and considering such issues as the significance of the misconduct in question, the penalties provided, is necessary, as was discussed in *Sault Ste. Marie, Wholesale Travel*, etc..

The technical nature of many regulatory prescriptions and prohibitions (e.g., “pollution discharges above .8 parts per million are prohibited”), and the diffuse nature of injury produced by failure to comply with these prescriptions and prohibitions (e.g., the damage to the environment caused by a single discharge can be difficult to discern) may mean that the gravity of harm or potential harm to society caused by committing a regulatory offence may not be as obvious to the perpetrator as it is with true crimes (where both the victim and the harm to the victim are often readily apparent). Needless to say, if the gravity of the transgression is not evident to the perpetrator, there is little opportunity for that individual to teach him or herself to take care. In this regard, having appropriate penalties available, and making use of those penalties, can play an important role in signalling to regulated actors the seriousness with which society treats transgressions of the law, and this in turn can encourage persons to be more diligent, to take preventative actions to avoid such transgressions from taking place.<sup>1037</sup> In the spectrum of penalties available, those which deprive convicted persons of their liberty are among the most serious penalties which can be levied, and potentially the most effective.<sup>1038</sup>

A legal system which makes liability depend on excusing conditions (e.g., the defence of reasonable care is an excusing condition for regulatory offences, just as self defence is an excusing condition for true crimes) guides the choices of behaviour of individuals by presenting them with

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<sup>1037</sup> Professor H. Wechsler (Reporter for the American Law Institute Draft Model Penal Code) holds that punishment for conduct which inadvertently creates improper risk “...supplies men with an additional motive to take care before acting, to use their facilities and to draw on their experience in gauging potentialities of contemplated conduct.” Per Hart, *op cit.*, at p. 138, footnote 6.

<sup>1038</sup> It is stated here that deprivation of liberty is “among the most serious” penalties which can be levied, because deprivation of life (capital punishment) remains the most serious. With respect to effectiveness, although it is not possible to provide hard statistical data on the deterrence value of imprisonment when compared with fines, it is possible to point out that while a wealthy person may be effectively immune from monetary penalties, imprisonment cannot be “passed off” on others. See, e.g., Coffee, *op cit.*, at 224.

reasons for exercising choice in the direction of obedience, but each actor is free to choose to engage in conduct which may attract liability. Regulatory spheres of activity in our society are in essence elevated legal “playing fields” where citizens have heightened expectations concerning those who operate in these areas -- i.e., that they are fit to do so and will observe standards and processes to protect the public good.<sup>1039</sup>

In exchange, the “players” gain access to activities which, although potentially harmful, can be particularly beneficial to the individual concerned, and often to society as well, when conducted within accepted limits. Thus, society expects that persons (natural and artificial) who operate planes, trains, automobiles, run mines, harvest forests or sea-beds, manufacture and sell goods, and who participate in myriad other activities can meet the high standards associated with performing those tasks, because the public depends on them to do so, and because those same persons are in a position to benefit significantly from properly engaging in the activities.

Regulatory instruments such as licences and approvals act as gatekeeping devices to these elevated legal playing fields, giving State officials an opportunity to assure themselves that parties are capable of exercising reasonable care,<sup>1040</sup> while at the same signalling to regulatees the potential dangers associated with the activity and the responsibilities associated with undertaking

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<sup>1039</sup> “The requirements of foresight and vigilance imposed on responsible corporate agents are beyond question demanding, and perhaps onerous, but they are no more stringent than the public has a right to expect of those who voluntarily assume positions of authority in business enterprises whose services and products affect the health and well-being of the public that supports them.” Per *U.S. v. Park* 421 US 658 (1975).

<sup>1040</sup> Hart: “...those whom we punish should have had, when they acted, the normal capacities, physical and mental, for doing what the law requires and abstaining from what it forbids, and a fair opportunity to exercise those capacities.” Per Hart, *op cit.*, at p. 152.

that activity.<sup>1041</sup> Professor Hall writes that “...regulations and the conditions of conforming to them presupposes regular inspection, licensing, and other administrative supervision.”<sup>1042</sup> The implicit contract between regulated individuals and society which is produced and symbolized by the issuing of a licence denotes knowledge by regulated persons of the nature of regulated activities, awareness of the harm that can take place should contraventions take place, recognition that high standards of behaviour are expected of them, and acceptance of the rules of the game in terms of procedures for determining liability.

Thus, for example, pursuant to the rules associated with strict liability offences, persons who enter the regulated field are presumed to exercise reasonable care, and to have the capacity to do so, so that if a violation of standards occurs on this elevated regulatory playing field, and it can be proven beyond a reasonable doubt that a regulated actor breached that standard, then the burden falls on that regulated actor to establish that he had done everything reasonable to avoid the breach from taking place. This formula for determining liability, while perhaps more onerous than what one might expect for a person not engaging in a regulated activity and thus lacking access to the potential benefits flowing from a grant of access to that regulated activity, is nevertheless deemed fair for one who is granted that access.

There are regulatory regimes where a prior administrative approval such as a licence or permit is not provided for in the law, where as a result there is no clear and self-evident governmental pre-assessment of the mental and physical capabilities of the regulated actors to

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<sup>1041</sup> See, e.g., Richardson, “Strict Liability for Regulatory Crime: the Empirical Research,” [1987] *Crim. L.R.* 295, at pp. 295 - 296, and Webb, “Regulatory Offences, The Mental Element, and the Charter,” [1989] 21 *Ottawa Law Review* 419 - 478, at pp. 452 - 453, and see Cory J., in *Wholesale Travel*, *op cit.*, as discussed earlier.

<sup>1042</sup> J. Hall, “Interrelations of Criminal Law and Torts: Part II” (1943) *Columbia L. R.* 967 - 1001, at p. 993.

undertake the activity in question, and where there is thus no explicit signal sent via issuance of the licence to the regulated actor that he or she has entered a regulated sphere where high standards of care are to be exercised and specially tailored rules for the imposition of penal liability exist. An example of this type of regulatory regime is that provided for under the federal *Competition Act* concerning improper marketing practices, where prosecution for offences of misleading or deceptive advertising can lead to the imposition of fines or imprisonment on individuals even though there is no licensing arrangement in place.

But even in such cases where there is no explicit “gatekeeping” in the form of a licence, there are usually signposts that a person has entered a regulated sphere: to give but a few examples, the commercial nature of the activity in question, the inherent position of dependence and trust that customers, workers, and the community will have that regulated activities which might be harmful are undertaken with all reasonable care, the issuance of government bulletins or guidelines concerning enforcement practices, the existence of specialized inspectors, a decreased expectation of privacy vis-a-vis government access to records, and obligations to monitor and report activities are but a few of the obvious indicators to put one on notice that a regulated “field” has been entered even where no explicit licensing arrangement is in place. Indeed, we have seen courts identify just these types of indicators of regulated activity as an explanation for imposing penal liability without proof of subjective intent.<sup>1043</sup> Thus, while the existence of a licence is the clearest indication that an individual has entered a regulated activity and is therefore subject to high standards of care, the mere fact that a formal gatekeeping device such as a licence

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<sup>1043</sup> E.g., as discussed in *Wholesale Travel, op cit.*, by Cory J., and as discussed Jackson J. in *Morrisette v. United States, op cit.*

is absent from a regulatory regime should not by itself be taken as a justification for not requiring an individual to exercise all reasonable care, where the indicators of regulated activity are evident.

It will be recalled that in Hart's opinion, only gross unthinking carelessness should be the subject of penal liability, and that a two-pronged test for determining liability for inadvertent negligence should be adopted which looks first at whether the accused failed to meet the reasonable care test, and second, examines the mental and physical capacities of the accused to determine whether the accused was capable of meeting the reasonable care standards. By itself, Hart's discussion of the formula for imposing penal liability for failure to exercise reasonable care might seem to be at odds with the more simple "civil" standard of negligence in the strict liability offence described by Justice Dickson in *Sault Ste. Marie*. The position taken here is that Hart's approach to objective negligence fault penal liability in circumstances of gross departures from acceptable standards which takes into account the capacities of the accused to meet those standards is reconcilable with Justice Dickson's regulatory objective negligence fault penal liability based on the civil standard articulated by Justice Dickson in *Sault Ste. Marie*.

To understand this position, it is useful to compare the concept of criminal negligence with that of civil negligence as used in a strict liability offence. It is submitted that Hart's articulation of the acceptable circumstances for the imposition of penal liability for inadvertent negligence was probably articulated with criminal negligence in mind. Were Hart to directly consider the distinctive circumstances in which the regulatory strict liability offence is used, there is good reason to believe that he, like the majority of the Supreme Court of Canada in *Sault Ste. Marie* and *Wholesale Travel*, would have concluded that an all reasonable care standard imposed on a regulated accused is fair and appropriate. Below the distinctions between criminal negligence and

regulatory negligence are briefly explored, using the Canadian experience as an example.<sup>1044</sup>

In Canada, criminal negligence is an offence located in the *Criminal Code*.<sup>1045</sup> Pursuant to s. 219 of the *Criminal Code*, every one is criminally negligent who, in doing anything, or in omitting to do anything that it is his duty to do, shows “wanton or reckless disregard for the lives or safety of others.” The penalties for criminal negligence are significant: every one who by criminal negligence causes death to another person is liable upon conviction to imprisonment for life,<sup>1046</sup> and if causing bodily harm, is liable upon conviction to imprisonment for up to ten years.<sup>1047</sup> In effect, because the offence is part of the *Criminal Code*, because it requires “reckless or wanton” misconduct (i.e., words signalling criminally reprehensible misbehaviour in the eyes of society), and in light of the fact that it contains significant penalties, there is a significant stigma associated with conviction for criminal negligence -- stigma which warrants particularly high protections for the accused and high thresholds of misbehaviour before liability is imposed, and stigma which is considerably higher than that associated for conviction of a strict liability offence, which is not part of the *Criminal Code*, does not involve “marked departure” misbehaviour, and may not attract such significant penalties.

The *Criminal Code* offence of criminal negligence is not per se a part of any regulatory

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<sup>1044</sup> While an attempt is made here to clearly and succinctly describe the essence and key elements of criminal negligence in Canada, and how it contrasts with regulatory negligence, it should be emphasized that Canadian criminal negligence offences have been and continue to be the source of much judicial and scholarly debate, and so what follows is necessarily a gross simplification of a dynamic and evolving situation. For a more complete analysis of the issue, including references to cases and scholarly articles, see, for example, D. Stuart, *Canadian Criminal Law* (3rd ed.), *op cit.*, esp. pp. 231 - 243, and D. Paciocco, *op cit.*.

<sup>1045</sup> It is also the fault basis for a number of other *Criminal Code* offences, such as dangerous driving, and careless use of firearms, as was discussed earlier.

<sup>1046</sup> Per *Criminal Code* s. 220.

<sup>1047</sup> Per *Criminal Code* s. 221.

regime, in contrast to strict liability regulatory offences. However, because the offence incorporates the notion of omission to do one's "duty," the criminal negligence offence can link up to a wide range of other offences. A duty for the purposes of the offence of criminal negligence, means a duty imposed by law.<sup>1048</sup> The *Criminal Code* variously imposes legal duties on persons, including a duty of care regarding explosives,<sup>1049</sup> and firearms,<sup>1050</sup> and concerning the provision of the necessaries of life.<sup>1051</sup> Particularly where negligence occurs outside of a regulatory context (e.g., with respect to provision by parents to children of the necessaries of life), there is an excellent and rational explanation for why only gross negligence should attract penal liability, and why the court should engage in an inquiry into not only what constitutes reasonable care, and whether there has been a gross departure from that standard, but also whether the accused had the mental and physical capacities to meet the reasonable care standard: namely, there is no elevated regulated field, complete with licences, inspectors, and reporting requirements. As a result, there has been no necessary prior assessment of fitness to enter the activity (as is often the case with regulated activity), no necessary ongoing governmental control and supervision of that activity, and no automatic reason to assume awareness of the "rules of the game" as with regulated spheres.<sup>1052</sup>

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<sup>1048</sup> Per *Criminal Code* s. 219(2).

<sup>1049</sup> Per *Criminal Code* s. 79.

<sup>1050</sup> Per *Criminal Code* s. 86.

<sup>1051</sup> Per *Criminal Code* s. 216.

<sup>1052</sup> The example chosen here focuses on an activity where there is no explicit "signalling" regulatory structure, with licenses, inspectors, regulations, etc.. But even where the criminal negligence is in some way associated with a regulatory activity or structure, such as is the case with dangerous driving, or careless use of firearms, an argument can be made that use of the gross departure test and an inquiry into the capabilities of the accused is warranted in light of the penalties and stigma associated with Criminal Code offences. See earlier

Therefore, there is good reason why courts should impose criminal liability in those circumstances only where there has been a large deviation from the acceptable standards and it is clear that the accused has the mental and physical abilities to meet the reasonable care standard. The stigma associated with conviction for a *Criminal Code* offence which hinges on marked departures from acceptable behaviour, and involves significant penalties is another factor which warrants such an approach. This “stand-alone” offence of criminal negligence would appear to be what Hart had in mind when he spoke of penal liability for gross negligence. While the Supreme Court of Canada’s recent rulings concerning criminal negligence are varied and not conclusive,<sup>1053</sup> it would appear as if the Court is basically moving toward Hart’s approach as to what constitutes acceptable minimum fault for purposes of *Charter* criminal negligence analysis: namely, an objective as opposed subjective fault approach, usually involving a gross departure from reasonable standards, and usually some consideration of the particular capability of the accused to meet the reasonable person standards.

It is submitted that a different approach to imposing penal liability for failure to exercise reasonable care is justified for persons engaging in regulated activity -- the strict liability offence approach. Where there is an ongoing relation with the State involving the imposition of

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discussion and approval of the emergence of the quasi-regulatory category, between the strict liability and true crime types.

<sup>1053</sup> E.g., in *R. v. Tutton* (1989) 69 CR (3d) 289 (SCC), the Supreme Court of Canada split 3:3 on whether there was a subjective element to a criminal negligence offence concerning parents who allegedly failed to provide necessities of life. In *R. v. Anderson* (1990) 75 CR (3d) 50 (SCC), the Court held that a marked departure was central to both objective and subjective approaches. In *R. v. Hundal* (1993) 19 CR (4th) 169 (SCC), the Court held that in an offence pertaining to dangerous driving, “the test for negligence is an objective one requiring a marked departure from the standard of care of a reasonable person.” (p. 177). In *R. v. Creighton* [1993] 3 SCR 3 (SCC), an unlawful act manslaughter was interpreted by the Court as an objective fault offence but no marked departure was necessary, since a predicate offence was involved. Moreover, the Court held (5:4) that no individual factors short of incapacity are to be taken into consideration.

prescriptive standards of behaviour through regulations, where inquiries into “fitness” to undertake the task are frequently a basic pre-requisite (e.g., as evidenced by a licence) of entry into the activity, and where the penalties attached and stigma associated with conviction are less than that associated with *Criminal Code* offences, it is reasonable to apply a civil standard of negligence rather than a gross departure standard. The emerging recognition of the quasi-regulatory category to address persons engaging in activities such as dangerous driving or misuse of firearms (as discussed earlier) represents an attempt by courts to provide more significant protections<sup>1054</sup> to those accused of *Criminal Code* objective fault offences with significant penalties and strong affiliations with regulatory regimes. It is suggested that the emergence of this new category of offences is not inconsistent with the philosophical analysis undertaken here.<sup>1055</sup>

The foregoing analysis suggests that the strict liability offence is a choice-based approach to liability in the sense that it offers individuals an “excusing condition” to avoid liability (i.e., defences of reasonable care, reasonable mistake of fact) just as true crimes offer excusing conditions (e.g., insanity). Both true crimes and strict liability offences employ fault-based approaches to liability, albeit the fault elements may be different for the two types of offences. The effect is that, as with crimes, strict liability offences sacrifice much in efficiency and

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<sup>1054</sup> E.g., the requirement that a gross departure from reasonable standards is necessary to attract liability.

<sup>1055</sup> On a practical level, it can be seen that the strict liability offence is better suited to address comparatively minor departures from the reasonable care standard which can have potentially significant consequences (e.g., a failure to conduct a safety check on tires), while *Criminal Code* objective fault offences are better suited to addressing circumstances where there are evident significant departures from acceptable standards (e.g., dangerous driving). This distinction underlines the three scenarios set out at the beginning of the thesis, which, it is submitted, are better suited for application of the strict liability offence than are *Criminal Code* objective fault negligence offences, unless there is an evident significant departure from reasonable standards. It is also suggested that because strict liability offences hinge on the concept of civil (simple) negligence, they are more appropriate for use in preventative enforcement efforts.

effectiveness in order to preserve individual autonomy and fairness. This is most evident when the strict liability offence is contrasted with its absolute liability offence counterpart, which may be more efficient than the strict liability type (i.e., it is easier to obtain a conviction where no defence of reasonable care exists, and so there are attendant time and energy resource savings for prosecutors and courts where absolute liability offences are employed) but can lead to convictions of those who have done everything reasonable to avoid breaking the law.

It is for this reason that many judges and commentators have described the absolute liability offence as unfair. Because persons can teach themselves to be more careful, the imposition of penalties for negligent misconduct acts as a stimulus for persons to exercise diligence. It is reasonable to impose a due diligence standard on regulated actors, since they are engaging in activities which necessitate the exercise of reasonable care for the protection of the public welfare and because in exchange the regulated actor receives certain privileges. This form of implied social contract between the State and regulated actors may be embodied in a licence, or simply be evident through the normal indicia of regulated activity.

## Chapter 18 -- The Strict Liability Regulatory Offence and the Future

To this point, the focus of the thesis has been on an examination of past and present non-intentional regulatory offences, and on the theoretical justifications for the strict liability offence. With this background, we are now in a position to consider the potential future applications of the strict liability offence. The central issue discussed here is the role the strict liability offence seems to be playing in stimulating self-governance activities by the private sector, non-governmental organizations and the greater community, and the compatibility of the strict liability offence with such proactive internally generated approaches to compliance.<sup>1056</sup> “Governance” has been defined as “the sum of the many ways individuals and institutions, public and private, manage their common affairs”:<sup>1057</sup>

It is a continuing process through which conflicting or diverse interests may be accommodated and cooperative action may be taken. It includes formal institutions and regimes empowered to enforce compliance, as well as informal arrangements that people and institutions either have agreed to or perceive to be in their interest.<sup>1058</sup>

Implicit in the notion of governance is recognition of the limits to what government can accomplish, and the largely untapped potential of non-governmental actors to undertake activities for the benefit of the greater community.

Throughout the thesis, it has been suggested that imposing a persuasive burden of proof on the accused to establish all reasonable care can play an integral role in making the regulatory

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<sup>1056</sup> Clearly, there is less opportunity for the development of such self management approaches when more commonplace regulatory activities such as driving a motor vehicle are considered. The focus of attention here is on use of the strict liability offence in commercial regulatory settings.

<sup>1057</sup> Commission on Global Governance, *Our Global Neighbourhood* (Oxford: Oxford University Press, 1995), at p. 2.

<sup>1058</sup> *Ibid.*

offence of negligence effective, and that if accused persons were merely required to raise a reasonable doubt that all reasonable care had been exercised, this might not provide sufficient impetus for regulated actors to be diligent. While a direct cause-effect relation between introduction of the balance of probabilities due diligence standard and the development of proactive self-management activities cannot be demonstrated, the reader was introduced earlier in the thesis to the comments of a number of commentators who have concluded that the due diligence requirement associated with the strict liability offence can act and indeed has acted as a catalyst for regulated actors to develop preventative standards and management systems, at least in part in an effort to avoid being found liable pursuant to a strict liability prosecution.<sup>1059</sup> In the article “Beyond *R. v. Sault Ste. Marie*: The Creation and Expansion of Strict Liability and the “Due Diligence” Defence,”<sup>1060</sup> author N. Strantz states the following:

....the pragmatic response of various industries to the availability of the “due diligence” defence to public welfare legislation has been swift and strong. Corporations have, on a proactive basis, developed corporate policies to reflect the corporation’s commitment to the public good, established “compliance programs” to “provide on-going evidence of reasonable preventative care” and have undertaken ongoing risk assessments, voluntary audits and education programs.<sup>1061</sup>

As discussed below, the development and implementation of these preventative management systems typically involves a host of players, including industry associations, individual private firms, standards bodies, auditors, civil society non-governmental organizations, community

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<sup>1059</sup> See, e.g., earlier discussion concerning the comments of J. Swaigen, in “Negligence, Reverse Onuses and Environmental Offences...”, *op cit.*, D. Saxe, in “Due Diligence: Reasonable Doubt Test Reaffirmed,” *op cit.*, N. Strantz, “Beyond *R. v. Sault Ste. Marie*: The Creation and Expansion of Strict Liability and the “Due Diligence” Defence,” *op cit.*. See also Cory J., and Iacobucci J. in *Wholesale*, as discussed earlier.

<sup>1060</sup> (1992) 30 *Alta. L. Rev.* 1233 - 1257.

<sup>1061</sup> *Ibid.*, at p. 1251 (footnotes omitted). See also M. Priest, “The Privatization of Regulation: Five Models of Self-Regulation,” (1997-98) 29 *Ottawa L. Rev.* 233 - 302, at p. 294.

representatives, as well as courts and governments, all operating against a backdrop of regulatory frameworks which require that regulated persons demonstrate on a balance of probabilities that they have exercised reasonable care if they wish to avoid liability.

The explanation for why a particular firm or an industry sector might adopt a proactive preventative management approach is complex, involving a wide range of factors. The circumstances are likely to be extremely rare where one can point with certainty to any single factor and claim authoritatively that that factor played a determinative role. Certainly, that claim is not being made here with respect to the strict liability offence and balance of probabilities due diligence defence and its impact on self-management practices of the regulated community. What is instead suggested here is that the development of such preventative self-management systems is entirely consistent with the strict liability offence, and indeed that proactive self-policing approaches works particularly well with the balance of probabilities due diligence defence. Two examples of self-management programs initiated in Canada are discussed below.

The Canadian Chemical Producers' Association (CCPA), with the assistance of environmental groups, community representatives and others, has developed a program known as "Responsible Care", which involves six detailed codes of practice concerning chemical plant operations, inspections of plants by third parties, and annual public reporting.<sup>1062</sup> It is a condition of membership in the CCPA that individual companies comply with the terms of the Responsible Care program.<sup>1063</sup>

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<sup>1062</sup> Per F. Bregha and J. Moffett, "The Canadian Chemical Producers Association's Responsible Care Program," in D. Cohen and K. Webb, eds., *Voluntary Codes in the Marketplace* (Ottawa: Government of Canada, forthcoming).

<sup>1063</sup> *Ibid.*

It is perhaps self-evident that the chemical industry is subject to a wide range of federal and provincial environmental legislation, which variously sets standards for emissions and operations of chemical facilities. As we have seen, the primary regulatory offence used to enforce environmental, health and safety and other public welfare legislation is the strict liability offence with due diligence defence. If a violation by a chemical company of a federal or provincial environmental law were to take place, that chemical company, and if it be the subject of an enforcement action, would have the opportunity of establishing that it exercised all reasonable care to avoid liability. If there is in place an effective preventative system, and that preventative system was developed with the input of many stakeholders, and the preventative system is rigorously implemented with the involvement of many stakeholders, a judge could hold that that management system constituted “reasonable care”.

The Responsible Care program could be used by the chemical industry to decrease the likelihood of accidents taking place, and where such accidents do take place, the Program could be used as part of a due diligence defence. The Responsible Care program has since been adopted in more than 35 other countries.<sup>1064</sup> Studies have shown that emissions levels have decreased substantially since the Responsible Care program has been in place.<sup>1065</sup>

Is it possible to assert conclusively that the reductions in emission levels are as a result of the Responsible Care program? Clearly, no. Undoubtedly, a wide number of factors can explain why the reductions in emission levels occurred, including improvements in technology, changes in the economy, perhaps an increasing awareness of the problem, and perhaps changes in the law

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<sup>1064</sup> *Ibid.*

<sup>1065</sup> *Ibid.*

(which is being continuously changed as new evidence concerning problem chemicals is discovered.

Can it be said categorically that the Responsible Care program was developed because of the existence of the persuasive burden “all reasonable care” defence attached to environmental protection regulatory regimes? Again the answer is clearly “no.” The creation of the Responsible Care program cannot be attributable solely to the existence of the persuasive burden “all reasonable care” defence: other pressures for creation of the Program might include the belief that preventative action might decrease the likelihood of a new round of regulations being imposed on the chemical sector, reductions in insurance premiums, shareholder pressure, and the desire on the part of the industry to improve its public image and decrease the likelihood of large-scale chemical plant disasters taking place which could negatively impact on the industry. One could point to the fact that the program has since been adopted in 35 other countries (many of which do not have a strict liability offence such as that in place in Canada and New Zealand) as evidence that the strict liability offence cannot possibly be the motivating factor for introduction of the program. However, it is equally fair to point out that the Responsible Care program was first developed in Canada, the jurisdiction where the strict liability offence was first articulated and where it is most widespread. This might not be mere coincidence.

Support for the contention that the strict liability offence has been an important element in encouraging the Canadian industry to seize the initiative and develop an extensive preventative approach to compliance might also be found by examining the development of the International

Organisation for Standardization's (ISO) 9000 and 14000 management systems.<sup>1066</sup> A wide range of industry, government, non-governmental organizations, and others participate in the development of ISO standards. Both the ISO 9000 and 14000 approaches involve elaborate checking and verification mechanisms in an effort to ensure consistent quality management processes and continual improvement. Both involve use of third party certification and auditing. Both are voluntary. With respect to both systems, Canada has been a leader in terms of development and implementation.<sup>1067</sup> Recently, a Canadian court required a convicted polluter to register to ISO 9000 as a term of sentence.<sup>1068</sup> In so doing, the court effectively imposed a "due diligence" management system on the accused.<sup>1069</sup>

What is clear is that Canada, home of the strict liability offence, has become a leader in the development of "industry-driven" standards which would seem in many circumstances to

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<sup>1066</sup> See e.g., International Organisation for Standardisation, *Environmental Management Systems: Specifications with Guidance for Use* (Geneva, ISO/DIS 14001, June 1995); S. Parto, "Aiming Low," in R. Gibson, ed., *Beyond Compulsion: The Potential and Limitations of "Voluntary" Initiatives for Corporate Greening* (Peterborough: Broadview Press, 1999).

<sup>1067</sup> This statement based on conversations of the author with Malcolm Phipps of the Canadian Standards Association's Quality Management Institute.

<sup>1068</sup> *R. v. Prospec Chemicals Ltd.* [1996] Alberta Judgment, No. 174, Alberta Provincial Court, January 25, 1996.

<sup>1069</sup> For more detailed discussion of this case, and the connections between due diligence defence and voluntary preventative approaches see: K. Webb, "The Legal Framework for Voluntary Arrangements: Present and Future," (paper prepared for and presented at the 1997 Learned's Law and Society Meeting, May, 1997); K. Webb, "Voluntary Initiatives and the Law," in R. Gibson, ed., *Beyond Compulsion: The Potential and Limitations of "Voluntary" Initiatives for Corporate Greening* (Peterborough: Broadview Press, 1999); K. Webb, and A. Morrison, "Legal Aspects of Voluntary Codes: In the Shadow of the Law," in D. Cohen and K. Webb, eds., *Exploring Voluntary Codes in the Marketplace* (Ottawa: publication forthcoming); K. Webb, and A. Morrison, "Voluntary Approaches, the Environment and the Law: A Canadian Perspective," in C. Carraro and F. Leveque, eds., *Voluntary Approaches in Environmental Policy* (Netherlands: Kluwer Publications, 1999).

effectively meet an “all reasonable care” defence requirement.<sup>1070</sup> Commentators have suggested that compliance with environmental management standards such as ISO 9000 or 14000 can reduce legal liability.<sup>1071</sup>

It is submitted that the strict liability offence is eminently suited for the circumstances of modern governing, where it is increasingly being realized that enforcement agencies cannot possibly inspect all possible regulated actors and detect all incidents of non-compliance.<sup>1072</sup> The strict liability offence provides Canadian regulators with a practical, effective tool of enforcement where incidents of non-compliance are identified, and at the same time the defence of all reasonable care seems to stimulate regulated actors to take the initiative to “protect themselves” by establishing preventative systems which courts might consider to be meeting the due diligence requirement.<sup>1073</sup>

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<sup>1070</sup> In a recent Ontario case, the court held that non-compliance with a recognized industry standard constituted evidence of lack of due diligence on the part of the accused: *R. v. Domtar* [1993] Ontario Judgments, No. 3415 (Ont. Ct. - General Division).

<sup>1071</sup> See e.g., Standards New Zealand, “Reducing legal liability with an ISO 14001 EMS,” *Standards New Zealand Environmental Newsletter* 1:1 (February 1996), p. 1; see also J. Melnitzer, “Fix environmental snags before seeking ISO 14000 certification,” *Law Times*, June 16 - 22, 1997, pp. 14 - 15.

<sup>1072</sup> See, e.g., the following comment by K. Webb, in “Voluntary Initiatives and the Law,” in R. Gibson, ed., *Beyond Compulsion: The Potential and Limitations of “Voluntary” Initiatives for Corporate Greening* (Peterborough: Broadview Press, 1999):

In light of cutbacks and continued budgetary pressures, governments may welcome non-regulatory approaches which decrease some of the enforcement burden on regulatory agencies. In a number of ways, industry participation in voluntary programmes can reduce government enforcement costs. Companies which comply with voluntary programmes may be less likely to be in contravention of the law. While government monitoring of all firms is essential, a complying company can save government the expenses associated with investigations and enforcement actions as well as remedial costs. Moreover, self-identification by industry of who is complying with voluntary programmes and who is not can assist government in targeting inspection and investigation efforts.

See also J. Cascio, “Implications of ISO 14001 for Regulatory Compliance,” paper presented to the *Fourth International Conference on Environmental Compliance and Enforcement*, Thailand, 1996. Available on Internet at: <http://www.inece.org/4thvol1/4toc.html>.

<sup>1073</sup> *Ibid.*

To be sure, when due diligence defences are raised, and preventative management approaches such as the Responsible Care program and the ISO 9000 and 14000 series are invoked in an effort to avoid liability, courts must be vigilant to examine the standards closely to ensure that they do indeed represent “all reasonable care” and that they are effectively implemented.<sup>1074</sup> Governments, too, must be vigilant in their monitoring of such standards, to ensure that they are adequate from a public perspective. In a 1995 case from New Zealand,<sup>1075</sup> the New Zealand District Court rejected assertions made by legal counsel that an American standard was appropriate and applicable to New Zealand circumstances, suggesting that it may be inferior to the New Zealand standard as a result of the way in which it was developed, or the circumstances surrounding its development. This type of judicial investigation of industry standards could very well lead to explorations of the roles played by domestic governments, industry, non-governmental organizations, and others in the development and subsequent implementation of a standard, as evidence of its reasonableness.

The overall effect of the due diligence defence seems to be to stimulate regulated actors to take on the primary responsibility to manage their own affairs in a proactive manner, thus decreasing the likelihood of harm arising and violations of the law taking place, while at the same time assisting enforcement agencies in their inspection and monitoring activities. In this regard, the promise of the strict liability offence as an effective and fair method of controlling regulatory

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<sup>1074</sup> As Stuart J. pointed out in *R. v. Gonder*, (1981) 62 CCC (2d) 326, at p. 332, industrial standards may represent only a point of departure for analysis of what constitutes due diligence in any particular case. The *Gonder* case was discussed in Part Two of the thesis in the context of consideration of what constitutes “reasonable care”.

<sup>1075</sup> *Department of Labour v. Waste Management NZ Ltd.* [1995] Court Registry Number 40040511262 (District Court, Auckland).

conduct may be just beginning to unfold.

While there remain important questions concerning determinations of what constitutes a reasonable care standard, and how audited information can be used by the prosecution,<sup>1076</sup> the argument is made that on the whole the articulation of preventative management systems such as Responsible Care and ISO 9000, appear to be a welcome development for regulated actors, for target beneficiaries of regulations, for government, and the public. Arguably, regulated actors would have less incentive to proactively take on these self-inspection responsibilities if they were only required to raise a reasonable doubt that they had exercised reasonable care. This would be a comparatively easy standard to meet, probably not warranting the development of standards and use of independent auditors, since regulated accused would not have to demonstrate -- that is, establish to the satisfaction of the court -- that due diligence had been exercised.<sup>1077</sup> Moreover, the shift of initial responsibility for compliance with the law from government to the regulated sector which accompanies "due diligence" self-regulatory programs is consistent with current efforts to reduce government interventions and leave the "details" to regulated actors. As we have seen, development and implementation of these preventative management standards and systems has opened the door to a host of other non-institutional actors, including community representatives, standards organizations, industry associations, non-governmental organizations, and professional auditors. In so doing, the due diligence defence stimulates multi-stakeholder governance initiatives, for the benefit of all concerned.

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<sup>1076</sup> As discussed in N. Strantz, *op cit.*, at pp. 1252 - 1255.

<sup>1077</sup> This argument has been made eloquently by Swaigen, *op cit.*, and Saxe, *op cit.* two former Crown prosecutors who specialized in enforcement in the environmental area.

### **Part III -- Summary: Theory and Future Applications of the Strict Liability Offence**

The investigation of the theoretical underpinnings of the strict liability regulatory offence undertaken here suggests that such offences can be justified as both fair and appropriate approaches to imposing penal liability on regulated actors. Drawing on the work of H.L.A. Hart, such offences were here characterized as components of legal choosing systems, providing individuals with the ability to find out the “costs” they will have to pay if they act in certain ways. In this regard, the strict liability offence maximizes the liberty of individuals (since individuals have the choice of exercising reasonable care if they wish to avoid liability), and minimizes arbitrary penal actions of the state (because convictions will not follow automatically upon proof of the actus reus of the offence), at the expense of a certain amount of administrative efficiency (when compared with the absolute liability offence).

To understand the fairness and appropriateness of the strict liability offence, it is necessary to view it in the context of the regulatory regimes in which it operates. These regulatory regimes function as “elevated level playing fields” in which regulated actors who are fit to undertake potentially harmful but productive activity may do so on the understanding that they must meet the “all reasonable care” standard and agree to abide by a rigorous adjudicative process which assumes that reasonable care has been exercised, so that proof of violation of that standard is an indication of guilt that can only be alleviated by demonstrating that due diligence was exercised.

A form of social contract is produced between the regulated actor and society, in which both stand to gain if the rules are followed. This social contract is most clearly manifested where a licensing or permitting regime is established, since this clearly evidences the “gatekeeping”

process whereby only privileged and technically capable persons gain entry to the elevated level playing field -- a playing field where society expects high standards and holds regulated actors in a position of trust.<sup>1078</sup> Imposing penalties on those who fail to exercise reasonable care is consistent with modern understandings of deterrence, since it is widely acknowledged that persons can and do learn to take more care when they know that serious consequences will arise if they do not.

Because the due diligence defence for strict liability offences must be established on a balance of probabilities -- a more onerous burden on the accused than a mere reasonable doubt due diligence standard -- this arguably provides a strong stimulus for regulated actors to put in place preventative systems, since demonstration of the effective operation of these preventative systems can allow regulated accused to escape liability. In Canada, the widespread adoption of voluntary codes by industry, such as the Responsible Care program by members of the Canadian Chemical Producers Association, and the leadership role played by Canada in developing the ISO 9000 quality management system, could in part be explained as resulting from the stimulus provided to regulated actors to adopt preventative operational approaches which decrease the likelihood of regulatory offences taking place, and potentially supply regulated actors with a defence, should violations take place. Those voluntary preventative approaches which involve affected third parties both in the development of the systems and in their implementation are most likely to be positively received by courts.

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<sup>1078</sup> This is as true for such commonplace regulated activities as driving a motor vehicle as it is for expensive and high profile industrial activity: in either case, a failure to exercise reasonable care can have drastic consequences for others, so that there is a reliance placed on regulated actors to meet the appropriate standard of care.

## Conclusions

In 1967, the United States “President’s Commission on Law Enforcement” stated that what most significantly distinguishes the criminal justice system of one country from that of another is the extent and the form of the protections it offers individuals in the process of determining guilt and imposing punishment. “Our system,” the Commission wrote, “sacrifices much in efficiency and even in effectiveness in order to preserve local autonomy and to protect the individual.”<sup>1079</sup> In a similar vein, Francis Sayre of Harvard Law School, an early commentator on the phenomenon of regulatory offences, remarked that all criminal law is “a compromise between two conflicting interests -- that of the public which demands restraint of all who injure or menace the social well-being and that of the individual which demands maximum liberty and freedom from interference.”<sup>1080</sup>

Although the President’s Commission and Professor Sayre referred specifically to “criminal law” and the “criminal justice system,” the fundamental tension between the autonomy and liberty of individuals on the one hand, and the need for effective protections of public welfare on the other, is also the key dynamic underlying use of regulatory offences from early times to the present. The position taken in this thesis is that there has developed a distinctive, fair, and appropriate approach to imposing penal liability (including imprisonment) in regulatory contexts -- an approach which effectively balances the conflicting needs for maximum individual autonomy and maximum protection of the public -- and this approach does not involve proof of the

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<sup>1079</sup> As quoted in S. Kadish, and S. Schulhofer, *Criminal Law and its Processes: Cases and Materials* (Fifth Edition) (U.S.: Little, Brown and Company, 1989), at p. 1.

<sup>1080</sup> F. Sayre, “Public Welfare Offenses,” (1933) *Columbia L. Rev.* 55 at 68.

subjective intent of the accused. Described here as the strict liability offence, with due diligence defence or reasonable mistake of fact defence established on a balance of probabilities, this approach to penal liability should not be viewed as simply an offshoot of the criminal offence, since its historical origins, function, evolution, justifications, and implications are unique to regulatory contexts.

The widespread use of the strict liability offence at the statutory level in many Commonwealth countries is testament to its practicality and fairness, while its comparative rarity in United States legislation is perhaps an indication that regulatory penal law is not as advanced in that jurisdiction as it is elsewhere. Certainly, the paucity of use of strict liability offences in the United States cannot be an indication of heightened concern for the interests of accused, since American courts have approved as constitutionally acceptable the absolute liability offence with imprisonment available as punishment. But while at a statutory level the strict liability offence is widely used in the Commonwealth jurisdictions examined in this thesis, only in Canada and New Zealand has the judiciary expressly endorsed this form of offence. If American, Australian, and United Kingdom courts were to expressly approve the strict liability offence, and directly restrict the use of the absolute liability alternative (at least insofar as imprisonment is available as a punishment), using interpretive approaches such as those developed by the Canadian and New Zealand judiciary, this could assist in reducing some of the incoherence, unfairness and confusion evident in court pronouncements from those jurisdictions.

Historical analysis has demonstrated that penal liability for failure to exercise reasonable care has existed since pre-Biblical times, and that courts ever since have felt the need to control non-intentional misconduct and hold persons penally responsible for such misbehaviour. This

need became particularly pressing with the introduction of large-scale industrial production especially in the nineteenth century, in light of the magnitude of harm which could unintentionally be produced by large-scale industrial processes, operations and products. Thus, the industrial revolution represented the period of time when the limitations of the criminal approach became particularly apparent and compelled courts and legislatures for the first time to systematically recognize the need for penal liability in incidents short of intentional misconduct. Only gradually, however, have courts and legislatures come to embrace a “half-way house” approach to penal liability which avoids the inappropriateness and limitations of intentional offences, yet also sidesteps the superficial attractiveness ( in terms of expediency) and unfairness of absolute liability offences. While “public welfare” offences of the late nineteenth and early twentieth century tended to have comparatively small penalties, this started to change as the twentieth century progressed, perhaps in recognition of the significant harm which could result from regulatory violations. As the size of penalties increased, so did the need to develop a fair and appropriate approach to imposing liability.

Historical analysis also revealed the comparatively modern origins and dynamic nature of many key concepts of criminal law, including the focus on subjective intention, the presumption of innocence, and proof beyond a reasonable doubt. This, it has been suggested, is important to bear in mind when examining regulatory offences, since there has been a tendency to treat the criminal law model as one of ancient and relatively unchanging character, and the regulatory offence as a recent “upstart”, when in fact neither of these assertions is true. For centuries, courts have shown a willingness to adjust and refine criminal law concepts and principles to reflect new thinking and realities, and there is no reason to think that this process of adjustment and refinement is

completed. Both criminal and regulatory law must continue to evolve to meet changing circumstances.

We have seen that the Supreme Court of Canada, drawing on research provided by the Law Reform Commission of Canada, and legal precedent and commentary from the United Kingdom, Australia, and New Zealand, was the first to formally approve the strict liability offence in the 1978 decision of *R. v. City of Sault Ste. Marie*.<sup>1081</sup> A review of cases since that decision, and commentaries concerning it suggest that the strict liability offence has proven workable, effective and fair. Moreover, we have seen that, while the absolute liability offence with imprisonment as a penalty has been ruled unconstitutional under the *Canadian Charter of Rights and Freedoms*, the strict liability offence has survived *Charter* challenges.

The fact that the Supreme Court of Canada has approved the strict liability offence as being compatible with the *Charter* is deserving of considerable emphasis, because the process of *Charter* scrutiny effectively embodies the search for an appropriate balance between individual liberty and societal protection underlying all penal justice systems. With constitutional protections ensuring that persons are not deprived of their rights to life, liberty and security of the person except in accordance with the principles of fundamental justice, and safeguards of the presumption of innocence, it is clear that protection of the autonomy of the individual is a key focus of the *Charter*. On the other hand, counter-balancing the protections designed to maximize individual autonomy and freedom is section 1, providing that *Charter* rights and freedoms are subject to reasonable limits prescribed by law which can be demonstrably justified in a free and democratic society. In essence, the tension between individual and societal protections underlying

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<sup>1081</sup>

*Op cit.*

penal systems of justice has been enshrined in the *Charter's* provisions, so that courts are required to balance competing interests and principles.

We have seen that the introduction of the *Charter* in 1982 provided Canadian courts with a unique opportunity to review many aspects of the penal justice system, and in the process to articulate a rational and coherent approach to both criminal and regulatory law. Although the Supreme Court's review is still ongoing, what is apparent in the decisions to date is the Court's clear recognition of the distinctive nature of regulatory law, and the need to interpret and apply the *Charter's* principles in different ways depending upon whether regulatory or criminal contexts are under consideration.

Emerging from the Court's rulings to date is mounting evidence of the development of a sophisticated, coherent and nuanced approach to penal law, where both criminal and regulatory features are considered and recognized on their own merit. Thus, for example, *Charter* decisions have revealed that natural persons possess greater constitutional protections than artificial persons, that persons who are participating in a regulatory regime may have lower expectations of privacy than those not engaging in a regulated activity, that imprisonment necessitates higher protections than penalties which do not deprive persons of their liberty, that proof of subjective intent may be necessary for certain high stigma serious offences, but that a fault requirement of objective negligence may suffice in other circumstances. Proof of significant departures from the objective reasonable person standard will be necessary for criminal negligence offences, while simple negligence will suffice where the offence is part of a regulatory regime. Although the burden of proof generally rests on the prosecution, it may shift to a regulated accused to establish due diligence on a balance of probabilities where the alternatives (e.g., the accused raising a mere

reasonable doubt) would likely defeat the broader societal objectives of the legislation (e.g., consumer protection, environmental protection, health law, traffic law, worker safety). Evident in the Supreme Court's analysis to date is the significance, as a preliminary matter, of identifying whether a regulatory context is involved, since once this characterization has been made, a different range of *Charter* protections may apply. We will return to this point below.

Perhaps because no other jurisdiction reviewed in this thesis has introduced in this century a comprehensive constitutional set of rights and freedoms akin to the Canadian *Charter*, there has been no similar recent and systematic review of criminal and regulatory law undertaken by courts in these other jurisdictions. As a result, with the exception of New Zealand, the state of judicial pronouncements in these jurisdictions concerning penal law tends to lack some of the coherence and vitality evident in Canadian judgments. Indeed, one can point to older decisions in several of these jurisdictions which appear to have dampened the enthusiasm of some courts for adopting the Canadian strict liability approach. In particular, the House of Lords decision in *Woolmington*<sup>1082</sup> concerning the presumption of innocence and the United States Supreme Court decision in *Balint*<sup>1083</sup> endorsing absolute liability offences might be viewed by some as impediments to judicial approval in these jurisdictions of the strict liability offence with reasonable care and reasonable mistake of fact defences established on a balance of probabilities. Nevertheless, it is submitted that there does not appear to be any fundamental obstacles preventing courts in these jurisdictions from distinguishing their earlier decisions and adopting the Canadian approach. Indeed, this is essentially what the Supreme Court of Canada did in its

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<sup>1082</sup> *Op cit.*

<sup>1083</sup> *Op cit.*

original, pre-*Charter*, *Sault Ste. Marie* decision and what the New Zealand Court of Appeal has done in *MacKenzie*<sup>1084</sup> and *Millar*.<sup>1085</sup>

Even though the state of judicial analysis of regulatory offences in the United Kingdom, Australia and the United States is not, in the opinion of this writer, as developed or as coherent as that in Canada and New Zealand, there is nevertheless evidence of recognition by the courts in each of these jurisdictions that regulatory offences are deserving of distinctive judicial treatment when compared with “true crimes.” Thus, for example, as we have seen, since the nineteenth century English courts have been recognizing the distinctive nature of public welfare offences, as evidenced in decisions such as *Sherras v. de Rutzen*,<sup>1086</sup> while Australian and American courts were doing the same in cases from the 1920s, 1930s and 1940s such as *Proudman v. Dayman*,<sup>1087</sup> *Balint*<sup>1088</sup> and *Dotterweich*.<sup>1089</sup> While continental European approaches to penal law are significantly different from those of the common law jurisdictions which were the focus of analysis in this thesis, nevertheless the examination of penal law in Germany and the Netherlands revealed that the legal systems in both of these jurisdictions also treat regulatory offences differently than “true crimes.”

In light of the fact that all of the legal systems examined seem prepared to acknowledge to

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1084 *Op cit.*

1085 *Op cit.*

1086 *Op cit.*

1087 *Op cit.*

1088 *Op cit.*

1089 *Op cit.*

some extent or another the existence of a distinction between regulatory and criminal offences, and bearing in mind the significant implications which can flow from this characterization, there is merit in articulating some of the “badges” of regulatory activity which have been identified by courts and commentators and discussed in the thesis. Hallmarks of regulatory activity and offences include: the diffuse nature of the harm (i.e., tends to be harm “to the public” rather than an individual victim as is common with true crimes); the tendency of regulatory offences to address both potential as well as actual harm (e.g., many regulatory obligations are technical in nature, but if not complied with could lead to significant harm); the fact that restricted regulatory misconduct is typically the by-product of otherwise lawful and indeed even encouraged activity; and the likelihood that a regulated actor will have ongoing “intrusive” contact with governmental authorities than that associated with true crimes, through use of such techniques as licensing, inspections, and self-reporting requirements; and perhaps a different stigma associated with conviction of offences which may not have been intentionally committed.

While the focus of this thesis has been an examination of the actual regulatory offences in use, and the judicial pronouncements concerning them, a more theoretical “philosophy of law” approach to understanding regulatory offences was also undertaken, in an attempt to find the theoretical justifications for use of such offences. This analysis revealed that, whereas the absolute liability offence is problematic since it penalizes persons even though they may be without fault, the strict liability offence can be justified as a more fair and appropriate method of imposing penal liability, where that offence is part of a regulatory regime which holds regulated actors to a societally acceptable standard of care. With respect to the question of the value of punishing persons for failing to exercise due diligence, there is no empirical evidence that

conclusively supports or refutes this assertion, but Canadian, American, and English commentators reviewed in the thesis have all suggested that people can and do teach themselves to be more careful when they know that they will be penalized if they do not. On the other hand, if persons are penalized no matter how careful they might be, this may create an incentive for law-abiding, productive individuals to avoid engaging in regulatory activity at all. Adopting the approach of philosopher H.L.A. Hart, the strict liability offence can be viewed as a component of a choosing system-which maximizes the liberty of individuals (since persons have the choice of exercising reasonable care and thus avoiding liability), and sacrifices much in the way of prosecutorial efficiency in the process (when compared with absolute liability offences).

Although different from true crimes in terms of the fault element, both strict liability offences and true crimes offer accused persons fault-based “excusing conditions” to escape liability. In contrast, there are no fault-based excusing conditions when absolute liability offences are employed. With respect to the question of burden of proof, the suggestion made here is that requiring persons to establish due diligence recognizes the difficulty which prosecutors have establishing negligence without the benefit of many of the procedural techniques available to civil trial lawyers, and creates an incentive for accused persons to put in place proactive, preventative self-management systems which simultaneously reduce the likelihood of regulatory non-compliance taking place and provide the basis for successful due diligence defences. In Canada, the Supreme Court of Canada has ruled that a reverse onus due diligence defence violates the *Charter*'s presumption of innocence, but is justifiable as a reasonable limit on *Charter* rights under section 1.

A form of “social contract” exists, where, in exchange for the privileges associated with

access to the “elevated playing field” of particular regulated activities (which are entered into voluntarily by regulated persons) -- regulated activities which can be particularly beneficial to the regulated actor, but are also potentially harmful to segments of the public who rely on care being exercised -- regulated actors are required to meet rigorous standards and abide by a penal liability approach which imposes liability on them where they cannot demonstrate that reasonable care was exercised or a reasonable mistake of fact had occurred.

Discussion in Part Three of the thesis also suggested that the strict liability offence may be a particularly good fit for the conditions of modern governance, in that it encourages non-State intermediaries such as industry associations, standards organizations, and auditors, as well as individual regulators, to develop standards and implement preventative systems, since demonstration to the satisfaction of the court that an appropriate preventative system is in place may be considered to be proof that all reasonable care has been exercised. The trend toward private sector use of formal, self-initiated preventative systems has a number of ramifications for government, the courts, and the public. For government, private sector use of self-regulatory due diligence systems may extend the “reach” of limited enforcement resources, but it will be important for regulatory agencies to monitor and perhaps participate in the development of standards-based systems to ensure their adequacy. Regulated actors which comply with recognized management systems and regularly submit to third party audits may be less likely to be in violation of regulations, and in this regard some of the inspection, investigation and enforcement burden on government may be lessened. Nevertheless, the question of prosecutorial access to auditing information will need to be resolved in a manner sensitive to the needs of industry and government.

For courts, when due diligence defences are attempted by accused persons, it will be important for judges to carefully examine both the standards development and implementation processes to ensure that the preventative systems are indeed meeting or exceeding due diligence requirements. Where preventative systems are found by courts to be sound and appropriate approaches to due diligence, judges will be in a position to impose compliance with such systems on those convicted of regulatory offences as part of sentencing, and in so doing the ability of the court to prevent offences from occurring will be enhanced. For the public, use of such due diligence systems may decrease risks of harm occurring to the particular communities affected by a regulated actor's activities. In light of the fact that both the development and implementation of preventative systems may involve community and non-government organizations, it can be seen that the due diligence defence can facilitate the achievement of a broader notion of governance, encompassing not only government and the private sector, but also elements of the greater "civil society."

As the twenty-first century approaches, there is mounting evidence of the development of an increasingly sophisticated legal approach to addressing the myriad industrial, commercial and other regulatory activities associated with modern living -- an approach which respects fundamental principles of justice and the autonomy of individuals, yet at the same time is practical, effective and efficient for society as a whole. An integral component of this approach is a hierarchy of offences which is tailored to address the diversity of regulated actors and activities taking place in modern society. For minor contraventions deserving of small penalties, where an expeditious adjudication process and administrative convenience are predominant concerns, the absolute liability offence will continue to play an important role. Separate civil penalty regimes

with specialized tribunals and procedures are likely to be common feature on the regulatory landscape, in light of their ability to address particular, complex regulatory activities. Specialized offences for corporations may also become more common, in recognition of the central role played by corporations and the distinctive characteristics of such regulated actors.

The strict liability offence with due diligence and reasonable mistake defences is likely to remain the backbone of regulatory regimes, since it offers regulators a penal approach by which large penalties including imprisonment can be fairly imposed, encourages regulated actors to engage in preventative activity, yet at the same time allows persons who can demonstrate that they have done everything reasonable to escape liability. Criminal negligence offences for particularly egregious deviations from acceptable standards, and intentional offences to address deliberate incidents of misconduct round out the hierarchy of offences. Where appropriately implemented, a legal system which employs such a varied and tailored approach to addressing regulatory activity will not only be fair and effective, but may also stimulate the private sector to assume considerable responsibilities for self-management. Some jurisdictions, such as Canada and New Zealand are closer to full implementation of this model approach than are others examined here, but all seem to be moving in this direction.

A legal commentator has said that the power of law is rooted not so much in its ability to command obedience through fear of legal sanctions, but rather in its ability to persuade people that the world described in its images and categories is the only attainable world in which a sane person would want to live.<sup>1090</sup> In many respects, this description of law accurately captures the development of the modern regulatory offence. The discussion in this thesis of the historical

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<sup>1090</sup>R. Gordon, "Critical Legal Histories" (1984) *Stanford Law Rev.* 36.

origins, function, evolution, and theoretical justifications for the strict liability offence -- the key offence within the hierarchy of regulatory offences available -- is the story of an alternative description of reality to that inherent in the conventional "true crime" model.

It is becoming increasingly difficult for courts and commentators to maintain that the world must conform to the precepts and assumptions of the true crime model, in the face of mounting evidence that regulatory actors and activities are distinctly different from this model, are deserving of a different approach, and in light of the successful implementation of key components of that different approach (most notably, the widespread usage in some jurisdictions of the strict liability offence). Recognition and approval by the superior courts of Canada and New Zealand of the strict liability offence represents confirmation of this alternative description of reality, alongside the older true crime "story."

It is hoped that the practical benefits which flow from recognition of the strict liability offence -- benefits which include increased fairness for the accused who can escape liability if he or she can demonstrate due diligence, and increased protection for the public, since regulated actors are stimulated to engage in preventative action which should decrease the likelihood of offences taking place -- will lead courts in other jurisdictions to follow the Canadian and New Zealand lead. If they do not, governments, the private sector, and the general public in those jurisdictions may be left to cope with the regulatory reality of the twenty-first century while continuing to struggle with concepts and approaches developed for a nineteenth-century criminal story of decreasing relevance.

## Bibliography

- Aquinas, Saint Thomas, *The "Summa Theologica" of St. Thomas Aquinas* (London: Thomas Baker, 1918).
- Attenborough, F.L., ed., *The Laws of the Earliest English Kings* (New York: Russell and Russell, 1963).
- Baumgarth, W. and R. Regan, eds., *On Law, Morality, and Politics: Saint Thomas Aquinas* (Indianapolis/Cambridge: Hackett Publishing Company, 1988)
- Bellamy, J., *Criminal Law and Society in Late Medieval and Tudor England* (New York: St. Martin's Press, 1984).
- Black, V., "A Brief Word About Advertising," [1988] 20 *Ottawa L. Rev.* 509.
- Blackstone, *Commentaries on the Laws of England* (Boston: Beacon Press, 1962), book IV.
- Brackett, J., *Criminal Justice and Crime in Late Renaissance Florence, 1537-1609* (Cambridge: Cambridge University Press, 1992)
- Bregha, F., and J. Moffet, "The Canadian Chemical Producers Association's Responsible Care Program," in D. Cohen and K. Webb, eds., *Voluntary Codes in the Marketplace* (Ottawa: Government of Canada, forthcoming).
- Brinkworth, K., and W. Whisson, "Trade Descriptions Act, Due Diligence and Reasonable Precautions," (1992) *Business Law Review* 143 - 145.
- Burnett-Hall, R., "The Environmental Protection Act 1990" (1991) *Business Law Review* 123 - 128.
- Carson, W., "Some Sociological Aspects of Strict Liability and the Enforcement of Factory Legislation," (1970) 33 *Mod. L. Rev.* 396 - 412.
- Cascio, J., "Implications of ISO 14001 for Regulatory Compliance," paper presented to the *Fourth International Conference on Environmental Compliance and Enforcement*, Thailand, 1996. Available on Internet at: <http://www.inece.org/4thvol1/4toc.html>
- Coffee Jr., J. "Does 'Unlawful' Mean 'Criminal'? Reflections on the Disappearing Tort/Crime Distinction in American Law," [1991] 71 *Boston University Law Review* 193 - 246.
- Cornish, W., and G. Clark, *Law and Society in England 1750 - 1950* (London: Sweet & Maxwell, 1989).

- Dickson, R., "Legal Aspects of the Factory Act of 1856," [1981] *Journal of Legal History* 276 - 284.
- Dickson, R., "Industrial Safety: The Political Challenge: [1982] *Journal of Legal History* 188 - 195.
- Diver, C., *The Assessment and Mitigation of Civil Money Penalties by Federal Administrative Agencies*, Final Report to the Administrative Conference of the United States (May, 1979).
- Drapkin, I., *Crime and Punishment in the Ancient World* (Lexington, Mass.: Lexington Books, 1989).
- Drayton, W., "Economic Law Enforcement" (1980) 4 *Harvard Environmental Law Enforcement* 1.
- Envis, G., "'Thou Shall Not Market Dangerous Goods' -- Can Consumer Safety be a Reality?" (1992) *Business Law Review* 6 - 8.
- Field, S., and N. Jorg, "Corporate Liability and Manslaughter: should we be going Dutch?" [1991] *Crim. L.R.* 156 - 171
- Filippi, D., "Unleashing the Rule of Lenity: Environmental Enforcers Beware!" [1996] 26 *Environmental Law* 923.
- Filby, F., *A History of Food Adulteration and Analysis* (London: George Allen and Unwin Ltd., 1934).
- Fisse, B., and J. Braithwaite, *Corporations, Crime and Accountability* (Cambridge: Cambridge University Press, 1993).
- Fisse, B., ed., *Howard's Criminal Law* (5th ed.) (Sydney, Australia: The Law Book Company, 1990).
- Franke, M., "A Study of German Alternatives to Traditional Criminal Prosecution," Masters Thesis, Universite de Montreal, 1985.
- Gerkens, M. and R., *Food Law in Australia* (Sydney, Australia: Law Book Company Ltd., 1985).
- Gordon, R., "Critical Legal Histories" (1984) *Stanford Law Rev.* 36.
- Gross, C., ed., *Select Cases Concerning the Law Merchant*, Vol. I, (London: Selden Society, 1908).

- Hall, J., "Interrelations of Criminal Law and Torts: P" (1943) *Columbia L. R.* 753 - 779
- Hart, H.L.A., *Punishment and Responsibility: Essays in the Philosophy of Law* (Oxford: Clarendon Press, 1970).
- Harvey, B., *The Law of Consumer Protection and Fair Trading* (London: Butterworths, 1978)
- Holgate, G., "Workplace Health and Safety: Absolute Liability Absolutely?" (1995) *Business Law Review* 132 - 134.
- Holmes, O., *The Common Law*, Boston, 1949.
- Hopkins, A. and N. Parnell, "Why Coal Mine Safety Regulations in Australia are not Enforced," (1984) 12 *International Journal of the Sociology of Law* 179 - 194.
- Howard, C. *Strict Responsibility* (London: Sweet & Maxwell, 1963).
- Hug, W., "The History of Comparative Law," (1933) *Harv. L. Rev.* 1027 - 1070
- Hutchins, B.L., and A. Harrison, *A History of Factory Legislation*, 3rd Ed. (NY: August Kelley, Publishers, 1971).
- Hutchinson, A., "*Sault Ste. Marie, Mens Rea* and The Halfway House: Public Welfare Offences Get a Home of Their Own," [1979] 17 *Osgoode H.L.J.* 415 - 444.
- Hutchison, S., D. Rose, and P. Downes, *The Law of Traffic Offences* (Scarborough: Carwell, 1998).
- International Organisation for Standardisation, *Environmental Management Systems: Specifications with Guidance for Use* (Geneva, ISO/DIS 14001, June 1995).
- Ireland, R. "The Presumption of Guilt in the History of English Criminal Procedure," [1985] *Journal of Legal History*, 243 - 255.
- Jeffery, M., "Environmental Enforcement and Regulation in the 1980's" *R. v. Sault Ste. Marie Revisted* (1984) 10 *Queen's L.J.* 43.
- Johnson, P. "Strict Liability: The Prevalent View," in Kadish, ed., *Encyclopedia of Crime and Justice*, 1518, at pp. 1520-21.
- Jobson, "Far from clear" (1976) 18 *Crim. L.Q.* 294- 308.
- Jones, A., "Regulation, Crime and Pollution From Abandoned Coal Mines," [1996] 8 *J. of*

***Environmental Law* 43 - 69**

Kadish, S. and S. Schulhofer, ***Criminal Law and its Processes: Cases and Materials*** (Fifth Edition) (U.S.: Little, Brown and Company, 1989)

Kellett, J., "The Breakdown of Guild and Corporation Control over the Handicraft and Retail Trade in London," (1957-1958) 10 ***Economic History Review*** 381 - 394.

Kiedrowski, J., and K. Webb, "Second Guessing the Law-Makers: Social Science Research in Charter Litigation," (1993) 19 ***J. of Cdn. Public Policy*** 379 - 397.

Kiralfy, A., ***Potter's Outlines of English Legal History*** (fifth edition) (London: Sweet and Maxwell, 1958).

Knoff, R., and F. Morton, ***Charter Politics*** (Scarborough, Ont.: Nelson Canada, 1992)

Kocurek and Wigmore, ***Sources of Ancient and Primitive Law***, Vol. I, (Boston: Little, Brown, and Co., 1915).

Lafave, W., and A. Scott, Jr., ***Substantive Criminal Law*** (St. Paul, Minn.: West Publishing Co., 1986).

Lambert, R., ***Sir John Simon, 1816 - 1904 and English Social Administration*** (London: MacGibbon & Kee, 1963).

Langbein, J., ***Prosecuting Crime in the Renaissance: England, Germany, France*** (Cambridge, Mass.: Harvard Univ. Press).

Larmour, R., "A Merchant Guild of Sixteenth-Century France: The Grocers of Paris," (1967) 20 ***Economic History Review*** 467 - 481.

Law Reform Commission of Canada, ***Policy Implementation, Compliance and Administrative Law***, Working Paper 51 (Ottawa: LRCC, 1986).

Law Reform Commission of Canada, ***Studies in Strict Liability*** (Ottawa: LRCC, 1974).

Lawson, F., ***Negligence in the Civil Law: Introduction and Select Texts*** (Oxford: Oxford University Press, 1962).

Leigh, L., ***Strict and Vicarious Liability: A Study in Administrative Criminal Law*** (London: Sweet & Maxwell, 1982).

Levi, M., "Business Regulatory Offences and the Criminal Law," ***The Company Lawyer*** Vol. 5, No. 6,

251 - 258.

MacDonagh, O., *A Pattern of Government: The Passenger Acts and Their Enforcement, 1800 - 1860* (London: MacGibbon and Kee, 1961).

Mahoney, R., "The Presumption of Innocence: A New Era," (1988) 67 *Can. Bar R.* 1 - 56.

McDonald, E., "Absolute liability and the search for clear legislative intent" [1992] *NZLJ* 266 - 268.

McDonald, E., "Hunt: the burden of proof and the New Zealand Bill of Rights Act 1990" [1992] *NZLJ* 432 - 435.

McKeon, R., ed., *Artistotle: The Basic Works of Aristotle* (New York: Random House, 1941).

Melnitzer, J., "Fix environmental snags before seeking ISO 14000 certification," *Law Times*, June 16 - 22, 1997, pp. 14 - 15.

Mueller, G., ed., *Essays in Criminal Science* (New Jersey: Rothman, 1961)

Mueller, G., "Tort, Crime and the Primitive," [1955] 46 *J. of Criminal Law, Criminology and Police Science*, pp. 303 - 332.

Newland, S., "The Rule of Scalia: Statutory Construction and the Rule of Lenity," [1994] 29 *Harvard Civil Rights-Civil Liberties Law Review* pp. 197 - 229;

November, J., "Public welfare/Regulatory offences: Judicial criteria for definition and classification," in 1990 *NZLR* 236 - 239 and 365 - 370.

Ontario Law Reform Commission, *The Basis of Liability for Provincial Offences* (Ontario: Law Reform Commission, 1990).

O'Keefe, J., *Bell and O'Keefe's Sale of Food and Drugs* (14th ed.) (London: Butterworth & Co., 1968).

Paciocco, D., "Subjective and Objective Standards of Fault for Offences and Defences," (1995) 59 *Sask. L. Rev.* 271.

Packer, H., "Mens Rea and the Supreme Court," (1968) *Sup. Ct. Rev.* 107 - 152.

Paeffgen, H.-U., "Overlapping Tensions Between Criminal and Administrative Law: The Experience of West German Environmental Law," [1991] 3 *J. of Env'tal Law* 247 - 264.

- Page, T. E., et al., eds. *Plato*, Chapter IX, "Laws" (Cambridge: Harvard Univ. Press, 1926, reprinted 1961), Vol. II.
- Painter, P., *A History of the Middle Ages: 284 - 1500* (New York: Alfred A. Knopf)
- Parpworth, N., "The Offence of Causing Water Pollution: A New South Wales Perspective," [1997] 9 *J. of Env'tal Law* 59 - 77.
- Parto, S., "Aiming Low," in R. Gibson, ed., *Beyond Compulsion: The Potential and Limitations of "Voluntary" Initiatives for Corporate Greening* (Peterborough: Broadview Press, 1999).
- Paulus, I., "Strict Liability: Its Place in Public Welfare Offences," (1977-78) 20 *Criminal Law Quarterly*, 445 - 467.
- Paulus, I., *The Search for Pure Food: A Sociology of Legislation in Britain* (London: Martin Robertson & Co. Ltd., 1974).
- Peiris, G., "Strict liability in Commonwealth criminal law," (1983) 3 *Legal Studies*, 117 - 145.
- Perkins, "Criminal Liability Without Fault: A Disquieting Trend" (1983) 68 *Iowa L. Rev.* 1067.-
- Plucknett, T.F.T., *Edward I and Criminal Law* (Cambridge: University Press, 1960).
- Polanyi, K., *The Great Transformation* (Boston: Beacon Press, Sixth Printing, 1965).
- Pollock, E., and F. Maitland, *The History of English Law Before the Time of Edward I* (Cambridge: University Press, Re-issued 2nd ed., 1968 (First Edition, 1895), Volume II.
- Radzinowicz, L., and J. Turner, eds., Editorial Note in *Mental Abnormality and Crime* (1944) Nendeln, Liechtenstein: Kraus Reprint (1968).
- Reynolds, S., *Kingdoms and Communities in Western Europe, 900 - 1300* (2nd ed) (Oxford: Clarendon Press, 1997).
- Richard, P., Commissioner, *The Westray Story: A Predictable Path to Disaster* (Report of the Westray Mine Public Inquiry) (Nova Scotia: Government of Nova Scotia, 1997).  
[Http://www.gov.ns.ca/legi/inquiry/westray/execsumm.htm](http://www.gov.ns.ca/legi/inquiry/westray/execsumm.htm)
- Richardson, "Strict Liability for Regulatory Crime: the Empirical Research," [1987] *Crim. L.R.* 295.
- Riley, *Memorials of London and London Life in the 13th, 14th and 15th Centuries* (London; Longman's, Green and Co. ,1868).

Ryan, D., and R. Schell, "Criminal Sanctions under the Federal Mine Safety and Health Act" (1983) 85 *West Virginia L. Rev.* 757 - 775.

Saltzman, A., "Strict Criminal Liability and the United States Constitution: Substantive Criminal Law Due Process," [1978] 24 *Wayne Law Review* 1571 - 1640.

Sandmel, S., et al., eds., *The New English Bible with the Pocrypha*, Oxford Study Edition (New York: Oxford University Press, 1976).

Saxe, D., "Due Diligence: Reasonable Doubt Test Reaffirmed," (1991) 2 *Environmental Law Alert* (No. 3) pp. 1 - 3.

Saxe, D., *Environmental Offences: Corporate Responsibility and Executive Liability* (Aurora, Ont.: Canada Law Book Inc., 1990).

Saxe, D., "The Impact of Prosecution of Corporations and Their Officers and Directors upon Regulatory Compliance by Corporations," (1991) 1 *JELP* 91 - 109.

Sayre, F., "Mens Rea," (1932) 45 *Harvard L. Rev.* 974 - 1026.

Sayre, F., "Public Welfare Offenses," (1933) *Columbia L. R.* 55 - 88

Seago, P., *Criminal Law* (Second Edition) (London: Sweet & Maxwell, 1985).

Shapiro, B., "*Beyond Reasonable Doubt*" and "*Probable Cause*": *Historical Perspectives on the Anglo-American Law of Evidence* (Berkeley: University of California Press, 1991)

Shoemaker, R. *Prosecution and Punishment: Petty Crime and the Law in London and Rural Middlesex, c. 1660 - 1725* (Cambridge: Cambridge Univ. Press, 1991).

Singer, R., "The Resurgence of Mens Rea: III -- The Rise and Fall of Strict Criminal Liability" [1989] 30 *Boston College L. R.* 337 - 408.

Smith, J.C., and B. Hogan. *Criminal Law* (Fifth edition) (London: Butterworths, 1983)

Standards New Zealand, "Reducing legal liability with an ISO 14001 EMS," *Standards New Zealand Environmental Newsletter* 1:1 (February 1996), p. 1.

Starrs, J., "The Regulatory Offense in Historical Perspective," in G. Mueller, ed., *Essays in Criminal Science* (New Jersey: Rothman, 1961), pp. 233 - 267.

Stein, A. "From Blackstone to Woolmington: On the Development of a Legal Doctrine" (1993) 14 *J. of Legal History* 14 - 27.

Stuart, D., *Canadian Criminal Law* (3rd Ed.) (Scarborough, Ont: Carswell, 1995).

Strachan-Davidson, J. , *Problems of the Roman Criminal Law* (Amsterdam: Editions RODOPI, 1969).

Strantz, N., "Beyond R. v. Sault Ste. Marie: The Creation and Expansion of Strict Liability and the "Due Diligence" Defence," (1992) 30 *Alta. L. Rev.* 1233 - 1257.

Swaigen, J., "Negligence, Reverse Onuses and Environmental Offences: Some Practical Considerations," (1992) 2 *JELP* 149 - 188.

Swaigen, J. "Procedure in Environmental Regulation," in P. Finkle and A. Lucas, *Environmental Law in the 1980s: A New Beginning* (Calgary: Canadian Institute of Resources Law, 1982) 85 - 95.

Swaigen, J., *Regulatory Offences in Canada: Liability and Defences* (Scarborough, Ont.: Carswell, 1992).

Swaigen, J. and G. Bunt, *Sentencing in Environmental Cases*, (Ottawa: Law Reform Commission of Canada, 1985).

Thrupp, S., "Medieval Gilds Reconsidered" (1942) 2 *J. of Economic History* pp. 164 - 173

Tollefson, C., "Ideologies Clashing: Corporations, Criminal Law, and the Regulatory Offence," (1991) 29 *Osgoode Hall L.J.* 705.

Tucker, E., "The Determination of Occupational Health and Safety Standards in Ontario, 1860 - 1982: From the Market to Politics to...?" [1984] 29 *McGill L. J.* 260 - 311.

Unattributed, "Competition Act's Regulatory System is Valid to Proscribe Misleading Ads," (1991) 61 *BNA Antitrust and Trade Regulation Reporter* (11-7-1991), pp. 589 - 590.

Unattributed, "Courts Complicate Due Diligence Defence," *Law Times*, Dec. 9 - 15, 1991.

Van Zeben, D.J., and M. Mulkey, "Choosing Among Criminal, Civil Judicial, and Administrative Enforcement Options: A Comparative Discussion of United States and Netherlands Experience," in *International Conference on Environmental Enforcement* (U.S.: EPA et al., Conference Proceedings, Sept. 22 - 25, 1992, Budapest, Hungary, Vol. I), pp. 397 - 415.

Warmington, E., and P. Rouse, eds., *Great Dialogues of Plato*, (New York: New American Library Mentor Book).

Webb, K., "Between the Rocks and Hard Places: Bureaucrats, Law and Pollution Control," in R.

Paehlke and D. Torgerson, *Managing Leviathan: Environmental Politics and the Administrative State* (Peterborough, Ont.: Broadview Press, 1990), pp. 201 - 228.

Webb, K., and A. Morrison, "Legal Aspects of Voluntary Codes: In the Shadow of the Law," in D. Cohen and K. Webb, eds., *Exploring Voluntary Codes in the Marketplace* (Ottawa: publication forthcoming).

Webb, K., *Pollution Control in Canada: The Regulatory Approach in the 1980s* (Ottawa: Law Reform Commission of Canada, 1988).

Webb, K., "Regulatory Offences, The Mental Element, and the Charter," [1989] 21 *Ottawa Law Review* 419 - 478.

Webb, K., "Taking Matters Into Their Own Hands: The Increasing Role of Citizens in Regulatory Enforcement," (1991) 36 *McGill L.J.* 770.

Webb, K., "The Legal Framework for Voluntary Arrangements: Present and Future," (paper prepared for and presented at the 1997 Learneds Law and Society Meeting, May, 1997).

Webb, K., "On the Periphery: The Limited Role for Criminal Offences in Environmental Protection," in D. Tingley, ed., *Into the Future: Environmental Law and Policy for the 1990's* (Edmonton: Environmental Law Centre, 1990), pp. 58 - 69.

Webb, K., and A. Morrison, "Voluntary Approaches, the Environment and the Law: A Canadian Perspective," in C. Carraro and F. Leveque, eds., *Voluntary Approaches in Environmental Policy* (Netherlands: Kluwer Publications, 1999) , pp. 229 - 259.

Webb, K., "Voluntary Initiatives and the Law," in R. Gibson, ed., *Beyond Compulsion: The Potential and Limitations of "Voluntary" Initiatives for Corporate Greening* (Peterborough: Broadview Press, 1999), pp. 32 - 50

Weber, J., "The King's Peace: A Comparative Study," (1989) 10 *J. of Legal History*, pp. 135 - 160.

Weidel, R.A., et al., "The Erosion of Mens Rea in Environmental Criminal Prosecutions," (1991) 21 *Seton Hall L. J.* 1100 - 1124.

Weisser, M., *Crime and Punishment in Early Modern Europe* (Sussex: Harvester Press, 1979).

Wigmore, J., "Responsibility for Tortious Acts: Its History" (1894) 7 *Harv. L. Rev.*, 315 - 337.

Williams, G., *Textbook on Criminal Law* (Second Edition) London: Stevens and Sons, 1983.

Wright, C.A., and A. M. Linden, *Canadian Tort Law: Cases, Notes and Materials* (7th ed.) (Toronto: Butterworths, 1980)

Zuckerman, A., "No Third Exception to the Woolmington Rule" (1987) 103 *Law Quarterly Rev.* 170.

### Court Decisions

*Adler v. State* (1876) 55 Ala. 16.

*Allen v. United Carpet Mills Pty Ltd.* [1989] VR 323.

*Alphacell v. Woodward* [1972] AC 824.

*American Car and Foundry Co. v. Armentraut*, (1905) 214 Ill. 509, 73 N.E. 766.

*Attorney-General v. Lockwood* (1842) 9 M. & W. 376.

*Australian Iron and Steel Pty Ltd. v. EP Authority* (1992) 29 NSWLR 497

*Bain v. State* (1878) 61 Ala. 75.

*Beaver v. The Queen* [1957] SCR 531.

*Betts v. Armstead* (1878) 20 L.R. 771.

*Blaker v. Tillstone* (1894) 1 Q.B. 345.

*Bosley v. Davies*, (1875) 1 QB 84.

*Canadian Dredge and Dock et al. v. The Queen* [1985] 19 CCC (3d) 1.

*Canadianoxy Chemicals Ltd. v. Canada (Attorney General)* [1997] BCJ No. 724.

*Civil Aviation Department v. MacKenzie* [1983] NZLR 78.

*Commonwealth v. Boynton* (1861) 2 Allen 160 (Mass. 1861)-

*Commonwealth v. Farren* (1864) 9 Allen 489 (Mass. 1864).

*Commonwealth v. Mixer* (1910) 207 Mass. 141, 93 N.E. 249 (1910).

*Commonwealth v. Raymond* (1867) 97 Mass.567 (1867) .

*Core v. James* (1871) LR 7 QB 135.

*Department of Labour v. Waste Management NZ Ltd.* [1995] Court Registry Number 40040511262 (District Court, Auckland).

*Duncan v. Ellis* (1916) 21 CLR 379.

*Erson* [1914] VLR 144.

*Faulks v. People*, (1878) 39 Mich. 200.

*Fitzpatrick v. Kelly*, (1873) LR 8 QB 337.

*Gammon (Hong Kong) Ltd. v. Attorney-General of Hong Kong* [1985] AC 1.

*Gleeson v. Hobson* [1907] VLR 148.

*He Kaw Teh v. The Queen* [1985] 157 CLR 523.

*Hobbs v. Winchester Corporation* [1910] 2 K.B. 471.

*Hunter v. Southam Inc. Inc.* [1984] 2 SCR 145.

*Lambert v. California* (1957) 355 US 225.

*Leary v. United States* (1969), 395 U.S. 6.

*Leland v. Oregon* (1952) 343 U.S. 790.

*Lim Chin Aik v. The Queen* [1963] AC 160.

*Liparota v. United States* (1985) 471 U.S. 419.

*Maher v. Musson* (1934) 52 CLR 100.

*Marjury v. Sunbeam Corporation Ltd.* [1974] 1 NSWLR 659.

*Marshall v. State* (1873) 49 Ala. 21.

*Martin v. Ohio* (1987) 480 U.S. 228

*McCrae v. Downey* [1947] VLR 194.

- Meah v. Roberts* [1977] 1 WLR 1187.
- Millar v. Ministry of Transport* [1986] 1 NZLR 660.
- Miller v. State*, (1854) 3 Ohio St. 476.
- Ministry of Commerce v. Woolworths (NZ) Ltd.* [1991] DCR 539.
- Ministry of Transport v. Burnetts Motors Ltd.* [1980] 1 NZLR 51.
- Morissette v. United States* 342 U.S. 246 (1952).
- Myerson v. Collard* (1918) 25 CLR 154.-
- Overland Cotton Mill Co. v. People*, (1904) 32 Colo. 263 Pac. 924.
- Pain v. Boughtwood* (1890) 24 L.R. 353.
- Parker v. Alder* (1898) 1 Q.B. 20.
- Patterson v. New York* 97 S. Ct. 2319 (1977).
- Police v. Creedon* [1976] 1 NZLR 571.
- Proudman v. Dayman* (1941) 67 CLR 536.
- Provincial Motor Cab Co. v. Dunning* [1909] 2 K.B. 599.-
- The Queen v. Pierce Fisheries Ltd.* [1971] SCR 5.
- Reference re: s. 94(2) of the Motor Vehicles Act* (1985) 24 DLR (4th) 536.
- Reynolds v. G.H. Austin & Sons Ltd.* [1951] 2 KB 135.
- Re Winship* (1970) 25 L. Ed. 368.
- Rivera v. Delaware*, (1976) 50 L. Ed. (2d) 160.-
- Roberts v. Egerton* (1874) LR 9 QB 494.
- R. v. Anderson* (1990) 75 CR (3d) 50 (SCC).
- R. v. Appleby* (1971) 3 CCC (2d) 354.

- R. v. Banks* (1794) 1 Esp. 143.
- R. v. Bata* (1992) 9 OR (3d) 329.
- R. v. Beauchamp* (1953) OR 422.
- R. v. Bonnor* [1957] VR 227.
- R. v. British Columbia Hydro and Power Authority* (1997) BCSC, BCJ No. 1744 (July 10, 1997).
- R. v. Brydon* (1974) 21 CCC (2d) 513.
- R. v. Canadian International Paper Co.* (1983) 12 CELR 121.
- R. v. Cancoil Thermal Corporation* (1986) 52 CR (3d) 188 (Ont. CA).
- R. v. Cappozzi Enterprises* (1981), 60 CCC (2d) 385.
- R. v. Chapin* [1979] 2 SCR 121.
- R. v. Chaulk* 1990] 3 SCR 1303.
- R. v. City of Barrie* (1970-71) 13 *Crim. L.Q.* 371.
- R. v. City of Sault Ste. Marie* [1978] 40 CCC (2d) 353.
- R. v. Commander Business Furniture Inc.* (1992) 9 CELR (NS) 185.
- R. v. Crawley* (1862) 3 Fost. & F. 109.
- R. v. Creighton* [1993] 3 SCR 3 (SCC).
- R. v. Custeau* (1971) 2 OR 250.
- R. v. Dilorenzo* (1984) 26 MVR 259 (Ont. CA).
- R. v. Dixon* (1814) 3 M. & S. 12.
- R. v. Domtar* [1993] Ontario Judgments, No. 3415 (Ont. Ct. - General Division).
- R. v. Durham* [1992] 10 OR (3d) 596 (Ont. C.A.).

- R. v. Edwards Books and Art* [1986] 76 DLR (4th) 1.
- R. v. Ellis-Don Ltd.* [1992] 7 OR (3d) 320.
- R. v. Esso Resources Canada Ltd.* [1983] 46 A.R. 375.
- R. v. Ewart* (1905) 25 NZLR 709.
- R. v. Finlay* [1993] 3 SCR 103 (SCC).
- R. v. Fitzpatrick* [1995] 4 SCR 154.
- R. v. Geraghty* (1990) 22 MVR (2d) 57 (BCCA).
- R. v. Gillis* (1974) 18 CCC (2d) 190.
- R. v. Gonder* (1981) 62 CCC (2d) 326.
- R. v. Gosset* [1993] 3 SCR 76 (SCC).
- R. v. Grottoli* (1979), 43 CCC (2d) 158.
- R. v. Gulf of Georgia Towing Ltd.* [1979] 3 WWR 84.
- R. v. Hickey* (1977) 30 CCC (2d) 416.
- R. v. Holmes* [1988] 50 DLR (4th) 780.
- R. v. Howells* [1977] 2 WLR 716.
- R. v. Hufsky* [1988] 1 SCR 621.
- R. v. Hundal* [1993] 1 SCR 867.
- R. v. Hunt* (1987) A.C. 352; [1987] 1 All E.R. 1 (H.L.).
- R. v. Industrial Tankers Ltd.* [1968] 2 OR 142.
- R. v. Jarvis* (1862) 3 Fost. & F. 108 (NP).
- R. v. Keegstra* [1990] 3 SCR 697.

- R. v. Kurtzman* (1991) 66 CCC (3d) 161.
- R. v. Lemieux* (1978) 41 /ccc (2d) 33 (Que. C.A.).
- R. v. Lenihan* [1997] NSJ No. 93, (NSCA).
- R. v. Maidment* (1984) 7 D.R.R. (4th) 171.
- R. v. Martin*, [1992] 1 SCR 838.
- R. v. McIver* (1965) 2 OR 475 .
- R. v. McKay* (1983) 4 FPR 304.
- R. v. McKinlay Tpt. Ltd.* [1990] 76 CR (3d) 283.
- R. v. Medley* (1866) LR1 QB 702.
- R. v. Murphy* (1988) 88 A.R. 279.
- R. v. Namink* (1979) 27 Chitty's L.J. 289 (Ont. Co. Ct.).
- R. v. North Canadian Enterprises Ltd.* [1974] 20 CCC (2d) 242.
- R. v. Northwood Pulp and Timber Co.* [1995] BJ No. 2380 Nov. 10, 1995.
- R. v. Oakes*, [1986] 26 DLR (4th) 200.
- R. v. Nova Scotia Pharmaceutical Society* [1992] 93 DLR (4th) 36.
- R. v. Ping Yuen* [1921] 3 WWR 505.-
- R. v. Placer Developments Ltd.* (1983) 13 CELR 42.
- R. v. Pontes* (1995) 13 MVR (3d) 145 (SCC).
- R. v. Prospec Chemicals Ltd.* [1996] Alberta Judgment, No. 174, Alberta Provincial Court, January 25, 1996.
- R. v. Regina Cold Storage and Forwarding Co. Ltd.* [1923] 3 WWR 1387.
- R. v. Rendall* (1975) 18 CCC (2d) 253.

- R. v. Richard* [1996] 3 SCR 525 (SCC).
- R. v. Richardson* (1981) 62 CCC (2d) 417 (Ont. Div. Ct.).
- R. v. Rio Algom* (1988) 66 OR (2d) 674.
- R. v. Robbins* [1996] O.J. No. 4220 .
- R. v. Safety-Kleen Canada Inc.* (1997) Ont. CA C22476 (Feb. 27, 1997).
- R. v. Shelley* (1981) 59 CCC (2d) 292.
- R. v. Sheridan* [1973] 2 OR 193.
- R. v. Skorput* (1992) 72 CCC (3d) 294.
- R. v. Smillie* [1998] BCJ No. 2082.
- R. v. Stone* (1996) 21 MVR (3d) 59 (NSCA).
- R. v. Stevenson* (1862) 3 Fost & F. 106 (NP).
- R. v. Strawbridge* [1970] NZLR 909.
- R. v. Trophic Can. Ltd.* (1981) 57 CCC (2d) 539.
- R. v. Tutton* (1989) 69 CR (3d) 289 (SCC).
- R. v. Vaillincourt* [1987] 47 DLR (4th) 399.
- R. v. Vantandillo* (1815) 4 M & S 73.
- R. v. V. K. Mason Construction Ltd.* [1968] 3 CCC 62.
- R. v. White* [1999] SCJ No. 28, June 10, 1999, SCC.
- R. v. Wholesale Travel Group Inc.* (1991) 84 DLR (4th) 161.
- R. v. Whyte* (1988) 51 DLR (4th) 481.
- R. v. Wigglesworth* [1987] 2 SCR 541.
- R. v. Woodrow* [1846] 14 M & W. 404.

*Sherras v. De Rutzen* [1895] 1 Q.B. 918.

*Staples v. United States* (1994) 114 S.Ct. 1793.

*State v. Presnell* (1851) 34 N.C. 103.

*Stern v. State* 53 Ga. 229.

*Stodeman v. The King* (1936) 55 CLR 192.

*Strasser v. Roberge* (1979) [103] DLR (3d) 193.

*Sweet v. Parsley* [1970] A.C. 133.

*Taylor v. Armour & Co. Pty Ltd.* [1962] VR 346.

*Taylor Woodrow Property Management Limited v. National Rivers Authority, National Rivers Authority v. Alfred McAlpine Homes (East) Limited, CPC (UK) Limited v. National Rivers Authority* [1995] 7 *J. of Env'tal Law* 55 -79.

*The Queen v. Stephens* (1866) 1 LR 702.

*The Queen v. Tolson* [1886-90] All E.R. Rep. 26, 23 QBD 168.

*Thomson Newspapers Ltd. v. Can. (Dir. of Investigation and Research)* [1990] 76 CR (3d) 129.

*United States v. Balint*, (1922) 258 U.S. 250, 42 Sup. Ct. 301.

*United States v. Behrman* (1922) 258 U.S. 280, 42 Sup. Ct. 303.

*United States v. Dotterweich* (1943) 320 U.S. 277.

*United States v. Freed* (1972) 401 US 601.

*United States v. Johnson* 221 U.S. 488, 497 - 98.

*United States v. Plaza Health Laboratories Inc.* (1993) 3 F.3d 643.

*United States v. Park* (1975) 421 US 658.

*U.S. v. Ragen* (1941) 314 US 513.

*United States v. Reilly*, (1993) 827 Federal Supplement 1076.

*Woolmington v. The Director of Public Prosecutions* [1935] AC 462.