

MENS REA/STRICT LIABILITY/ABSOLUTE LIABILITY

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1. General Presumption

There is a presumption that in creating a criminal offence, the legislature intends a guilty intent appropriate to the nature of the offence to be an ingredient of the offence. This presumption can only be displaced if the language of the statute read along with its subject matter requires the conclusion that the legislature intended that such guilty intent should not form part of the prescription of the offence.

The rationale of the presumption is that it is repugnant to basic and long-accepted notions of criminal responsibility to hold a person to be guilty of a crime without some element of mental fault, such as intention or knowledge.

In *CTM v The Queen* [2008] HCA 25; (2008) 236 CLR 440; (2008) 247 ALR 1; (2008) 82 ALJR 978; (2008) 185 A Crim R 188, Gleeson CJ, Gummow, Crennan and Kiefel JJ said the presumption involved 'a basic legal principle of criminal responsibility which informs our understanding, and interpretation, of the criminal law'.

(a) Mens rea

The starting point when considering statutory offences, is that it is to be inferred that *mens rea* is an essential element in the criminal offences which the statute creates. That is, a person cannot be convicted unless he/she has a guilty mind. A court requires good grounds for moving away from such a presumption.

The expression "*mens rea*" is ambiguous, imprecise, difficult to define but can mean voluntariness, knowledge of all the facts constituting the necessary ingredients of the relevant defence, knowledge of the wrongfulness of the act, intent to cause the wrongfulness and even recklessness in some cases. *Mens rea* has two elements: (1) mind; (2) which is guilty, and the first is always essential.

The manner in which the mental element is to be ascertained from the statute was expounded by Wright J in *Sherras v de Rutzen* (1895) 1 QB 918 in a famous *dictum* at 921; (1895-9) All ER Rep 1167 at 1169; 11 TLR 369:

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

(b) Tripartite categorization of statutory offences

In *He Kaw Teh v R* [1985] HCA 43; (1985) 157 CLR 523; (1985) 60 ALR 449; (1985) 59 ALJR 620; (1985) 15 A Crim R 203; [1986] LRC (Crim) 553, the High Court recognized a tripartite categorization of statutory offences namely, "*mens rea*", "strict liability (or 'halfway house'" and "absolute liability". If *mens rea* is not an element of the offence, the common law defence of honest and reasonable mistake is nevertheless available unless the offence is one of absolute liability. The terms 'strict liability' and 'absolute liability' are not always used precisely and sometimes interchangeably.

Gibbs J in *Teh's Case* considered five matters in assessing whether the presumption of *mens rea* was displaced namely:

1. The language of the section creating the offence;
2. The subject matter of the statute;
3. The consequences for the community of an offence;
4. Potential consequences for an accused, if convicted;
5. Whether strict liability would assist in the enforcement of the regulations..

In *He Kaw Teh v R*, Brennan J said that:

" ... It is now firmly established that *mens rea* is an essential element in every statutory offence unless, having regard to the language of the statute and to its subject-matter it is excluded expressly or by necessary implication ... Earlier doubts as to the existence of the presumption or as to its strength ... have now been removed."

(c) Construction of Statutes

A statute must be construed against the whole background of the law which includes the principles by which the question whether the presumption that honest and reasonable mistake provides a defence has been excluded is to be determined.

(d) Defence of honest and reasonable mistake

The rule is that honest and reasonable belief in a state of facts which, if true, would take the defendant outside the defence charged, is a good answer to a statutory offence, unless the language used clearly excludes that defence, or unless, although the language leaves the matter in doubt, the object and scope of the enactment, the nature of the duty imposed, or other considerations arising from the subject matter of the legislation, make it probable that the legislative authority intended to impose a duty of absolute responsibility.

(e) Classification of Offences

Offences can be classified into three categories as follows:

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/she took all reasonable care. This involves consideration of what a reasonable person 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/she 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/herself by showing that he/she was free of fault.

Professor Sayre, in a celebrated article entitled *Public Welfare Offences* (1933) 33 Columbia Law Review 51 at p73 classified regulatory offences into the following categories:

- (1) illegal sales of intoxicating liquor;
- (2) sales of impure or adulterated food or drugs;
- (3) sales of misbranded articles;
- (4) violations of anti-narcotic acts;
- (5) criminal nuisances:
 - (a) annoyances or injuries to the public health, safety, repose or comfort;
 - (b) obstructions of highways;
- (6) violations of traffic regulations;
- (7) violations of motor vehicle laws;
- (8) violations of general police regulations passed for the safety, health or well-being of the community.

It must however be recognised that the categories of offences said by Professor Sayre to attract the principle of strict liability cover a broad spectrum and must be considered by the courts, not only in the light of the purported purposes of individual statutes, but also having regard to the specific scope of individual sections within such statutes.

It is generally accepted that statutes which create offences for the purpose of regulating social or industrial conditions or to protect the revenue, particularly if the penalty is monetary and not too large, may more easily be regarded as imposing absolute liability. This approach may be displaced if to regard an offence as one of absolute liability could not promote the object of the legislation by making people govern their conduct accordingly.

Although it is convenient to be able to classify an offence in its entirety as one of 'strict' or 'absolute' liability, the task is one of construction and it is by no means inevitable that the application of the same principles of construction should produce the same result with respect to each ingredient in an offence.

2. Examples of the *Mens rea*/Strict Liability/Absolute Liability Categories

(a) *Mens rea* in statutory offences – defence of mistake of fact – burden of proof – mental element where "false" and "misleading" used in statute

HELD: Allowing the appeal against conviction on the "*mens rea* ground" only.

(1) Per King CJ (Mitchell J agreeing): There is a presumption that *mens rea* is an essential ingredient of every offence. Per Legoe J: The fundamental rule is that a person cannot be convicted unless he has a guilty mind.

(2) Per King CJ (Mitchell J agreeing): The above presumption can be displaced by statute; the elements of a statutory offence must be determined by reference to the statute which creates it.

Statement in *Sweet v Parsley* [1969] UKHL 1; (1970) AC 132 at p162; (1969) 1 All ER 347 at p361; 53 Cr App R 221; [1969] 2 WLR 470; per Lord Diplock, applied.

(3) *Per curiam*: On the proper interpretation of s138(1)(d) in its context, *mens rea* is an element of the offence in question, and even if the defendant has acted unreasonably it must be shown that he acted "dishonestly" (per King CJ and Mitchell J) or with "guilty mind" (per Legoe J).

R v Erson [1914] VicLawRp 20; (1914) VLR 144; 20 ALR 46; 35 ALT 117, considered.

(4) Per King CJ (Mitchell J agreeing; Legoe J to similar effect): When the words "false" and "misleading" are found together in a penal statute, they carry a distinct flavour of dishonesty.

Per King CJ (Mitchell J agreeing): The *mens rea*, which is an element of the offence is knowledge of the falsity of the statement or at least reckless indifference as to its truth or falsehood.

(5) *Per curiam*: On the facts, the special magistrate was justified in finding that the appellant had no belief in the truth of his answer.

[Upon appeal see: *Cameron v Holt* [1980] HCA 5; (1980) 142 CLR 342; 28 ALR 490; 54 ALJR 202 at p166; MC 39/1980. Appeal dismissed.]

Per King CJ:

"The crime with which this appeal is concerned is a creature of the statute. Its elements must be determined by reference to the statute which creates it. The manner in which the mental element is to be ascertained from the statute was expounded by Wright J in *Sherras v de Rutzen* (1895) 1 QB 918 in a famous *dictum* at 921; (1895-9) All ER Rep 1167 at 1169; 11 TLR 369:

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

It is beyond question that if *mens rea* is not an element of the offence, the common law defence of honest and reasonable mistake is nevertheless available: *Proudman v Dayman* [1941] HCA 28; (1941) 67 CLR 536. There could be no question of strict liability. The section does not, of course, indicate expressly whether *mens rea* is an element in the offence or whether, on the other hand, the protection of those who infringe its provisions innocently is left to the common law defence of mistake.

The intention of the legislature must be gathered by implication from the words and subject matter of the statute. The first step in attempting to ascertain what Parliament must have intended, is to determine the difference in the legal effect of the competing views in relation to the offence under consideration.

... It seems to me that in practical terms, putting aside refinements and distinctions, the difference between the effect of the competing views as to the section is that if *mens rea* is an element of the offence, there must be dishonesty; if it is not, and the defence of honest and reasonable mistake of fact must be relied on, unreasonableness is sufficient.

The real question to be considered is whether an intention can be gathered from the statute that dishonesty is not necessary and that unreasonableness is sufficient for guilt to attach."

Per King CJ in *Holt v Cameron* (1979) 22 SASR 321; 38 FLR 226; 27 ALR 311; 1 A Crim R 402; MC 21/1980, 19 September 1979.

(b) Companies – aid and abet commission of an offence – mens rea

Per Marks J:

"... The general rule prevails that ignorance of the law provides no excuse. The exceptions, as the above authorities indicate, are where the statute under consideration requires interpretation to the contrary of the general rule. The authorities on this subject are too numerous to discuss. I summarise as best I can my understanding of the law. There is a rebuttable presumption that *mens rea* or evil intention or knowledge of the wrongfulness of the act is an essential ingredient in every offence (per Wright J in *Sherras v DeRutzen* (1895) 1 QB 918 at 921; 11 TLR 369 approved by the House of Lords in *Lim Chin Aik v R* [1963] AC 160; [1963] 1 All ER 223; [1963] 2 WLR 42) and the High Court in *Cameron v Holt* [1980] HCA 5; (1980) 142 CLR 342; 28 ALR 490; 54 ALJR 202).

In determining whether the presumption is rebutted regard should be had to the wording of the statute and the mischief with which it purports to deal. In *Lim Chin Aik* (above cited) their Lordships said (at p174) that

"it is pertinent also to enquire whether putting the defendant under strict liability will assist in the enforcement of the regulation. That means that there must be something he can do, directly or indirectly by supervision or inspection, by improvement of his business methods or by exhorting those whom he may be expected to influence or control, which will promote the observance of the regulation."

Again at p175 they said:

"Where it can be shown that the imposition of strict liability would result in the prosecution and conviction of a class of persons whose conduct could not in any way affect the observance of the law, their Lordships consider that, even where the statute is dealing with a grave social evil, strict liability is not likely to be intended."

(See also *Cameron v Holt* [1980] HCA 5; (1980) 142 CLR 342 at 346; 28 ALR 490; 54 ALJR 202; *Sweet v Parsley* [1969] UKHL 1; [1970] AC 132 at p162; [1969] 1 All ER 347; 53 Cr App R 221; [1969] 2 WLR 470; *Warner v Metropolitan Police Commissioner* (1969) 2 AC 256; [1968] 2 All ER 356; (1968) 52 Cr App R 373; [1968] 2 WLR 1303.)

The general rule is that where *mens rea* must be established it is knowledge of the facts which constitute the offence and not of the law which must be proved: *Bank of New South Wales v Piper* (1897) AC 383 at pp389-390; *R v Warner* (1969) 2 AC 265 at p276. It was accepted on behalf of the Commissioner that she was obliged to prove that Mid-East and therefore Nicholas "became aware" of the relevant interest at a particular time. This concession was necessary because the 14 days within which the notice had to be given only commenced to run after "awareness" of the relevant interest.

Accordingly that mental element was an ingredient of the offence which the prosecution was obliged to prove. Save as to that, I consider that the obligation to give notice was absolute. It could hardly be otherwise. Mr Gillard's contentions that the prosecution had to prove knowledge of the statute, of the legal obligation and a wilful intention to disobey it, cannot be supported by any reasonable construction of the Act. The construction for which he contended would make the relevant provisions, in my view, virtually nugatory. It is unnecessary to analyse those provisions in detail. I observe merely that they reflect a clear intention on the part of the legislature to prevent company take-overs by stealth and to cast the legislative net as widely as possible to catch all manner of schemes of contrary purpose. ..."

Per Marks J in *Nicholas v Wade (Commissioner of Corporate Affairs)* [1983] VicRp 66; [1983] 1 VR 703; 7 ACLR 45; MC 71/1982, 10 September 1982.

(c) Offensive language in a public place – mens rea – offender intoxicated – whether prosecution required to prove voluntary conduct

HELD: The words "shall not conduct himself or herself" require at least that there should be a voluntary act by the person charged. Accordingly, in a charge of offensive conduct, the prosecution is required to prove beyond reasonable doubt that the person charged had voluntarily engaged in the conduct complained of. Such voluntariness may be negated by the effects of intoxication.

Per Yeldham J:

"... It should be said at the outset that no question concerning the onus of proof arises, nor is it relevant to consider the principle which has developed that an honest and reasonable mistake of fact would be a ground of exculpation in cases in which actual knowledge is not required as an element

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of an offence: see *He Kaw Teh v R* [1985] HCA 43; (1985) 157 CLR 523; (1985) 60 ALR 449; (1985) 59 ALJR 620; (1985) 15 A Crim R 203; [1986] LRC (Crim) 553 and the cases therein referred to. The argument before me and, I apprehend, before the magistrate, turned upon the well-known passage in the judgment of Wright J in *Sherras v De Rutzen* (1895) 1 QB 918 at 921; 11 TLR 369, namely:

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

In *He Kaw Teh's case*, Brennan J (at 566) said that such statement has not been doubted. His Honour expressed agreement with what Lord Goddard CJ said in *Brend v Wood* (1946) 62 TLR 462 at 463; (1946) 176 LT 306, that:

" ... It is of the utmost importance for the protection of the liberty of the subject that a Court should always bear in mind that, unless a statute, either clearly or by necessary implication, rules out *mens rea* as a constituent part of a crime, the Court should not find a man guilty of an offence against the criminal law unless he has a guilty mind."

Brennan J said that:

" ... It is now firmly established that *mens rea* is an essential element in every statutory offence unless, having regard to the language of the statute and to its subject-matter it is excluded expressly or by necessary implication ... Earlier doubts as to the existence of the presumption or as to its strength ... have now been removed."

Sherras v De Rutzen has been considered and applied on many occasions by courts of high authority. The principle is not in doubt, but its application in any particular case frequently raises questions of considerable difficulty. In *R v Turnbull* [1943] NSWStRp 56; (1943) 44 SR (NSW) 108; 61 WN (NSW) 70, Jordan CJ emphasised that the rule of the common law that an act is not criminal unless it is the product of a guilty mind is just as applicable to acts which are criminal because prohibited by statute as to those which are offences at common law, and it can only be excluded expressly or by necessary implication. His Honour emphasised that *mens rea* has two elements: (1) mind; (2) which is guilty, and the first is always essential. He said (at 109):

" ... A person is never regarded as criminally liable for an act which, although physically the act of his body, was done while his mind was in so abnormal a state that it cannot be regarded as his act at all, eg he was sleep-walking or so young, or so insane, as to be incapable of knowing that he was acting or the nature or quality of his act."

His Honour observed that it was also necessary, assuming his mind to be sufficiently normal to be capable of criminal responsibility, that the person charged should be shown to have knowledge that he was doing the criminal act charged against him. Amongst the more important cases of recent years dealing with the question of statutory offences and the requirement of *mens rea* are *Lim Chin Aik v R* [1962] UKPC 34; (1963) AC 160; [1963] 1 All ER 223; (1963) 2 WLR 42; *Iannella v French* [1968] HCA 14; (1968) 119 CLR 84; [1968] ALR 385; 41 ALJR 389 where at CLR 93-94, Barwick CJ, speaking of the presumption mentioned by Wright J said: " ... it is not a presumption lightly to be displaced"; *R v Warner* (1969) 2 AC 256; [1968] 2 All ER 356; (1968) 52 Cr App R 373; [1968] 2 WLR 1303; *Sweet v Parsley* [1969] UKHL 1; (1970) AC 132; [1969] 1 All ER 347; 53 Cr App R 221; [1969] 2 WLR 470; *R v Vlahos* (1975) 2 NSWLR 580; *Holt v Cameron* (1979) 22 SASR 321; (1980) 27 ALR 311; (1979) 38 FLR 226; (1979) 1 A Crim R 402 (and on appeal *sub nom Cameron v Holt* [1980] HCA 5; (1980) 142 CLR 342; 28 ALR 490; 54 ALJR 202); *Gammon (Hong Kong) Ltd v Yee Chin Tao* (1985) AC 1 at 12-13; [1984] 2 All ER 503; [1984] 3 WLR 437; [1984] Crim LR 479; (1984) 80 Cr App R 194; [1985] LRC (Crim) 439; and *Phipps v State Rail Authority of New South Wales* (1986) 4 NSWLR 444 at 449-451.

Much has been written as to what is meant by the elusive concept of *mens rea*. In *He Kaw Teh's case*, Gibbs CJ described it as "ambiguous and imprecise". The discussion (at 530-531 and 569-570) is instructive: see also *Phipps v State Rail Authority of New South Wales* (at 449-450) and Gillies, *Criminal Law* (1985) Ch 3 at 39 *et seq*. Both counsel in the present appeal sought to place reliance upon the appearance of the word "wilfully" in other sections of the *Offences in Public Places Act* – eg s7, "wilfully prevent", s8 and s9, "wilfully damage", s10, "wilfully mark". But I do not regard the use of that expression in other sections as being any reliable indicator: see *R v Turnbull* (at 112; 73); *Lim Chin Aik's case* (at 173, 176); *Iannella v French* (at 93); *Sweet v Parsley* (at 149). Nor do I take the terms of subs (2) as being an indicator that no mental element is necessary in the offence for which subs (1) provides. I do not regard the provision of a defence of "reasonable excuse" as being an indication that the Crown need not prove the appropriate mental element, whatever it might be.

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An onus is placed upon the person charged to prove on a balance of probabilities that he had a reasonable excuse for acting in the manner complained of. Reasonable excuse plainly has a broader scope than a mere absence of intent; see per Dawson J in *He Kaw Teh's case* (at 595).

In my opinion the words "shall not conduct himself or herself" in s5(1) require at least that there should be a voluntary act by the person charged. In the present case the magistrate's attention was directed only to the question of whether the appellant was capable of forming an intention to behave offensively, an issue which he resolved in her favour although holding that it was irrelevant. Such a finding necessarily involves that at the relevant time the appellant did not voluntarily engage in the conduct which was held to constitute the offence. In my opinion the *Offences in Public Places Act*, s5, does at least require the Crown to prove beyond reasonable doubt that the person charged had voluntarily engaged in the conduct complained of.

The offence created is truly criminal in nature; and clearly causes a stigma to attach to any person convicted of it. The penalty, whilst not heavy, is not insubstantial, at least to many of the people who would be caught by the section's provisions; and I do not regard the subject matter of the offence as being really within the matter said, in cases such as *Sweet v Parsley* (at 163), to be one involving "potential danger to public health, safety or morals, in which citizens have a choice whether they participate or not". The fact that the intoxication in the present case was self-induced is not relevant: *R v O'Connor* [1980] HCA 17; (1980) 146 CLR 64; (1980) 29 ALR 449; (1980) 54 ALJR 349; (1980) 4 A Crim R 348. In that case (at 80) Barwick CJ said:

"In *Ryan's case* ([1967] HCA 2; (1967) 121 CLR 205; [1967] ALR 577; (1967) 40 ALJR 488) I attempted a summary statement of the principle that in all crime, including statutory offences, the act charged must have been done voluntarily, ie accompanied by the will to do it. I find no need to qualify what I then wrote. I stated the principle as without qualification."

See also Brennan J in *He Kaw Teh's case* (at 569-571) and *R v Martin* (at 218; 89). Gillies, *Criminal Law* (at 36), says that "the only mental element in an offence of strict liability is that associated with the voluntary performance of the conduct comprising its *actus reus*". It follows that, because in s5 the expression "shall not conduct himself or herself", involves at least proof that the actions complained of were voluntary, the appellant was entitled to be acquitted upon this charge as she was on the charge of common assault. Thus her appeal must succeed. I answer the question asked in the stated case in the affirmative. Pursuant to the *Justices Act 1902*, s106, I quash the conviction and dismiss the charge of offensive conduct. I order the respondent to pay the costs of the appellant. Question answered in affirmative. Conviction quashed."

Per Yeldham J in *Jeffs v Graham* (1987) 8 NSWLR 292; 28 A Crim R 211; MC 50/1987, 3 April 1987.

(d) Overloading motor vehicle – whether honest and reasonable belief is a defence

HELD: Order nisi absolute.

Failure to comply with s35(5) of the *Motor Car Act 1958* imposes a strict liability upon a driver. The defence of honest and reasonable mistake is not open.

Proudman v Dayman [1941] HCA 28; (1941) 67 CLR 536, discussed.

Per Young CJ:

"... How then is it to be decided whether the defence of honest and reasonable mistake is to be available in a case such as the present? The answer is to be found in the terms of the statute: see the discussion by Wills J in *R v Tolson* [1886-90] All ER 26; 9 WR 709; (1889) 23 QBD 168 at pp172-176. The nature of the matters with which the *Motor Car Act* is concerned is peculiarly public safety. The notorious dangers of travel on modern highways and the necessity for strict control of the handling of motor vehicles on those highways suggest that if ever the intention to be imputed to Parliament is to impose strict responsibility, it is likely to be in statutes dealing with the control and handling of motor vehicles.

I have endeavoured to show that the purposes of the part of the *Motor Car Act* in which s35(5) is found are public safety and protection of the use of the roads. In matters of public safety it is not difficult to impute an intention to the legislature to impose strict responsibility: *Provincial Motor Cab Co Ltd v Dunning* (1909) 2 KB 599; *Green v Burnett*; *James & Son Ltd v Smee* [1955] 1 KB 78; [1955] 1 QB 78 at pp93-4; [1954] 3 All ER 273; (1954) 3 WLR 631. And I think that in view of the notorious problems faced by authorities concerned today with the maintenance of highways used by heavy transport it is also not difficult to impute an intention to the legislature to impose strict responsibility for adherence to limitations of the weight to be carried. Some of those problems can be discerned from a study of the transport cases in the High Court culminating in *Armstrong v Victoria (No.2)* [1957] HCA 55; (1957) 99 CLR 28. I also think that the history of the legislation which has

been set out by McInerney J in his reasons which I have had the advantage of reading supports the conclusion that the legislature intended to impose strict responsibility.

The conclusion that I would reach from a consideration of the general provisions of the statute is reinforced by a consideration of the language of s35(5) although of course it stops short of expressly negating the defence of mistake. The fact that the maximum penalty is not particularly heavy also assists in this conclusion. The provision for the additional penalty and the proviso expressly conferring upon the Court a discretion not to impose the additional penalty in certain circumstances strongly suggests that the legislature intended to exclude the defence of honest and reasonable mistake as a ground of exculpation from the offence.

Notwithstanding these conclusions I have been troubled by the fact that the defendant's vehicle was carrying a container and that it might be thought that there was little that the defendant could have done to bring himself within the law. Is this a case of the kind referred to by the Privy Council in *Lim Chin Aik v R* (1963) AC 160 at p174; [1963] 1 All ER 223; (1963) 2 WLR 42 where Lord Evershed for the Board said that it was not enough merely to show that the statute was one dealing with a grave social evil? Is it a case where it would be absurd to suppose that the legislature intended to expose an innocent carrier who could not be aware of the true facts to a penalty: see *Maher v Musson* [1934] HCA 64; (1934) 52 CLR 100; [1935] ALR 80; 89 P 7 per Evatt and McTiernan JJ at p109?

I have ultimately come to the conclusion that the putting of the defendant under strict liability is necessary for the enforcement of the statute. In such a case the exclusion of the defence of honest and reasonable mistake inevitably means that individuals are called upon so to conduct their affairs that the general welfare is not prejudiced and to that extent the rights of the individual are subjected to the common good. I think that the class of person included in s35(5) shows that the legislature regards the legislation as being of that character and therefore intends that the defence of honest and reasonable mistake should be excluded. It may be that the owner, for instance, will have to improve his business methods or take some other action to ensure that the provisions of a permit are obeyed, but I see no reason why this should not be done. It may be more difficult for the driver. But it is not a case like *Maher v Musson* where the breach arose from antecedent breaches of the law generally by other persons: see 52 CLR at p106 per Dixon J.

We were pressed with some decisions of the Full Court of South Australia. These have been examined in the reasons prepared by Southwell J which I have had the advantage of reading. I wish only to refer to the judgment of Bray CJ in *Kain & Shelton Pty Ltd v McDonald* (1971) 1 SASR 39 and to the passage quoted by McInerney J in his reasons. The passage has considerable force but, if I may say so with respect, a statute must be construed against the whole background of the law which includes the principles by which the question whether the presumption that honest and reasonable mistake provides a defence has been excluded is to be determined. For very many years now the Courts have had to grapple with this problem but I detect no ready assumption that Parliament intends to exclude the defence. It is only after prolonged consideration that I have reached the conclusion that it is to be excluded in the present case.

It follows that the order nisi should be made absolute. Having regard to the fact that the Magistrate was of the opinion that the defendant believed on reasonable grounds that the vehicle and load were not overweight, I agree in the suggestion made by McInerney J that instead of sending the information back to the Magistrate we should ourselves convict the respondent and impose a nominal penalty."

Per Young CJ in *Welsh v Donnelly* [1983] VicRp 79; [1983] 2 VR 173; MC 11/1983, 13 December 1982.

Per McInerney J:

"... Mr Uren submitted that in the first instance the matter was one of interpretation of the statute. In developing this submission Mr Uren contended that the courts have looked first, at the category of the offence itself and secondly at other circumstances which the courts have considered to be such as to support the conclusion that the offence was one of strict liability. Basically, the cases in which this construction has been adopted have been (Mr Uren submitted) cases of "regulatory offence" to adopt the term used by Professor Howard in his book *Strict Liability* (1963) at p1. Professor Howard adopts this term because, as he submits, the type of offence referred to is usually part of a legislative scheme for the administration or regulation of society. Sayre, in a celebrated article entitled *Public Welfare Offences* (1933) 33 Columbia Law Review 51 at p73 classified regulatory offences into the following categories:

- (1) illegal sales of intoxicating liquor;
- (2) sales of impure or adulterated food or drugs;
- (3) sales of misbranded articles;
- (4) violations of anti-narcotic acts;

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- (5) criminal nuisances:
 - (a) annoyances or injuries to the public health, safety, repose or comfort;
 - (b) obstructions of highways;
- (6) violations of traffic regulations;
- (7) violations of motor vehicle laws;
- (8) violations of general police regulations passed for the safety, health or well-being of the community.

In my opinion the true rule governing this matter is that stated by O'Bryan J in *McCrae v Downey* [1947] VicLawRp 25; (1947) VLR 194 at pp202-3; [1947] ALR 157, as follows:

"From these authorities I take the rule to be that honest and reasonable belief in a state of facts which, if true, would take the defendant outside the defence charged, is a good answer to a statutory offence, unless the language used clearly excludes that defence, or unless, although the language leaves the matter in doubt, the object and scope of the enactment, the nature of the duty imposed, or other considerations arising from the subject matter of the legislation, make it probable that the legislative authority intended to impose a duty of absolute responsibility..."

... In *Lim Aik's Case* (1963) AC 160 at p174; [1963] 1 All ER 223; (1963) 2 WLR 42 Lord Evershed, delivering the judgment of the Board of the Privy Council said:

"But it is not enough in their Lordships' opinion merely to label a statute as one dealing with a grave social evil and from that to infer that strict liability was intended. It is pertinent also to enquire whether putting the defendant under strict liability will assist in the enforcement of the regulations. That means there must be something he can do directly or indirectly, by supervision or inspection, by improvement of his business methods or by exalting those whom he may be expected to influence or control, which will promote the observations of the regulations. Unless this is so, there is no reason in penalising him, and it cannot be inferred that the legislature imposed strict liability merely in order to find a luckless victim."

Per McNerney J in *Welsh v Donnelly* [1983] VicRp 79; [1983] 2 VR 173; MC 11/1983, 13 December 1982.

(e) Mens rea – statutory offence – evasion of taxi-cab fare – exculpatory provisions available – whether mens rea a necessary ingredient of offence

Per Finlay J:

"... The general principles of the common law governing criminal responsibility were referred to in *He Kaw Teh v R* [1985] HCA 43; (1985) 157 CLR 523; (1985) 60 ALR 449; (1985) 59 ALJR 620; (1985) 15 A Crim R 203; [1986] LRC (Crim) 553 by Gibbs CJ at CLR p621 as follows:

"The relevant principle is stated in *Sherras v De Rutzen* [1895] 1 QB 918 at 921; 11 TLR 369 as follows:

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

The Chief Justice observed at CLR p622:

"The rule is not always easy to apply. Its application presents two difficulties – first, in deciding whether the Parliament intended that the forbidden conduct should be punishable even in the absence of some blameworthy state of mind and secondly, if it is held that *mens rea* is an element of the offence, in deciding exactly what mental state is imported by that vague expression."

Mason J agreed with the reasons in the judgment of the Chief Justice. Wilson J also used the same starting point from what he called "The much quoted statement of Wright J" referred to above. Brennan J referred to the same passage stating, "That statement has not been doubted" and went on to say:

"Recently in *Gammon Ltd v AG of Hong Kong* [1985] AC 1; [1984] 2 All ER 503; [1984] 3 WLR 437; [1984] Crim LR 479; (1984) 80 Cr App R 194; [1985] LRC (Crim) 439, Lord Scarman delivering the judgment of the Judicial Committee stated five propositions (at p14):

'(1) There is a presumption of law that *mens rea* is required before a person can be held guilty of a criminal offence;

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- (2) the presumption is particularly strong where the offence is "truly criminal" in character;
- (3) the presumption applies to statutory offences, and can be displaced only if this is clearly or by necessary implication the effect of the statute; (my emphasis);
- (4) the only situation in which the presumption can be displaced is where the statute is concerned with an issue of social concern, and public safety is such an issue;
- (5) even where a statute is concerned with such an issue, the presumption of *mens rea* stands unless it can also be shown that the creation of strict liability will be effective to promote the objects of the statute by encouraging greater vigilance to prevent the commission of the prohibited act'."

Dawson J at p650 said:

"Rules of construction must give way to actual expressions of legislative intent but almost invariably in the context such indications as there are require guilty intent as an ingredient of an offence rather than the contrary. Where some word such as 'knowingly' or 'wilfully' is used in the description of an offence there is no difficulty in concluding that guilty intent is required. However the absence of words such as these even if the words appear in the description of offences created elsewhere in the enactment does not mean that an offence is intended to be absolute."

... Having regard to the words of the regulations and the nature of the offence in my view the informant in the subject case was not required to prove that the plaintiff had an evil intention. In other words the presumption of *mens rea* as an essential ingredient of the offence charged was in this case displaced. I do not see the learned magistrate as doing any more than acknowledging this when he said "that this is an absolute offence, there is no *mens rea* appropriate to the case".

Per Finlay J (NSW Supreme Court) in *Walsh v Schuberg* MC 55/1986, 6 September 1985.

(f) Prohibited import – producing customs statement with untrue particular – import placed in luggage by unknown person – whether defence of "wrongful act of a stranger" available – whether offence absolute or strict liability

C. was charged with importing prohibited imports namely, 2 spring-bladed knives and producing to a Customs officer a statement which was untrue in a particular namely, that his baggage did not contain spring-bladed knives. C. pleaded not guilty. He gave evidence to the effect that one of his friends had placed the knives in his luggage as a practical joke. The Magistrate accepted this evidence and dismissed both charges. In respect of the charge concerning the untrue statement, the Magistrate took the view that the defence of the "wrongful act of a stranger" was available to C. On appeal—

HELD: Appeal allowed. Dismissal in respect of the untrue statement charge set aside and conviction recorded.

Having regard to the fact that the *Customs Act* 1901 (Cth) is a revenue Act in that s234 deals, in part, with evasion of the payment of duty and the need for the traveller and importer to make a true disclosure at all times to Customs officials, the offence provided for under s234(1)(e) is not an offence of strict liability but an absolute offence and accordingly, the defence of "act of a stranger" is not available.

Per O'Loughlin J:

"... I return, therefore, to the first argument advanced by Mr Fairbank which, as it transpired, was the argument upon which he most strongly relied. He commenced by saying that there are three categories of offences to be considered and momentarily I will abbreviate them by describing them as "*mens rea*", "strict liability" and "absolute liability". In support of this classification he referred to the judgments of Gibbs CJ and Dawson J in *He Kaw Teh v R* [1985] HCA 43; (1985) 157 CLR 523; (1985) 60 ALR 449; (1985) 59 ALJR 620; (1985) 15 A Crim R 203; [1986] LRC (Crim) 553. Referring to the reasons of Dickson J, who delivered the judgment of the Supreme Court of Canada in *Reg v Sault Ste. Marie* [1978] 2 SCR 1299; 3 CR (3d) 30, Gibbs CJ said, at p210, that Dickson J held that offences could be classified into three categories as follows:-

"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

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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."

Dawson J, at p252, recognized these three categories when he said:-

"In relation to the offence of importing narcotic goods into Australia, the question which arises is whether the prosecution has to prove any mental state accompanying the importation. In other words, the question is whether *mens rea* is an ingredient of the offence to be proved by the prosecution. If it is not, the further question arises whether the offence is one of strict liability which, whilst not requiring the prosecution to prove *mens rea* in order to make out a case, allows the accused to raise honest and reasonable mistake by way of exculpation. To that extent a mental element is imported into an offence of strict liability short of requiring proof of *mens rea* by the prosecution. The mistake must involve a belief in a state of affairs which, if true, would make the act of the accused innocent. If the statute in neither of these ways requires any mental state to accompany the importation, then the offence is an absolute one and is complete once the prohibited act of importation is proved. Offences of strict or absolute liability are creatures of statute. The terms 'strict liability' and 'absolute liability' are not always used precisely and sometimes interchangeably, but used as I have used them, they are a convenient way of drawing the distinction to which I have referred."

... Applying the terminology used in *He Kaw Teh's case*, the passage should read:

"S111 should be construed as creating an offence of absolute liability which does not, in law, accommodate a *Proudman v Dayman* type defence."

... [I]t would seem to me that one must have regard to the fact that the *Customs Act* is a revenue act in that s234, in part, deals with evasion of the payments of duty and elsewhere deals with the need for the traveller or the importer to make, and fill out, a true disclosure at all time to customs officials – to assume, thereby, the responsibility of making certain that facts (of which customs officials have no knowledge or have no means of obtaining knowledge) are properly presented to the authorities.

Viewed in this manner, and notwithstanding that from time to time hardship may be created, I have come to the conclusion that the offence for which provision is made in s234(1)(e) of the Act is an absolute offence and that the learned stipendiary magistrate was therefore incorrect in holding that the defence of "act of a stranger" was available to the respondent. In my opinion, therefore, the appeal must be allowed.

I accordingly set aside the order of dismissal with respect to count 1 in the complaint and in lieu thereof I record a conviction. It follows that I must also allow the appeal for the purposes of setting aside the learned stipendiary magistrate's order as to costs."

Per O'Loughlin J in *Lanham v Coles* [1986] 40 SASR 390; 82 FLR 216; 21 A Crim R 340; MC 21/1986, 27 March 1986.

(g) Income tax – fail to furnish return – accountant engaged by taxpayer – notice sent to accountant – return not furnished by accountant – taxpayer unaware of notice – charge laid against taxpayer – whether *mens rea* or honest mistake of fact apply

1. Having regard to the subject-matter of the *Taxation Administration Act* 1953 ('Act'), the object of s8C and its language, both *mens rea* and honest and reasonable mistake of fact are excluded by necessary implication.

2. Where a taxpayer's address for service was care of an accountant, and the accountant failed to comply with a requirement to furnish the return, the taxpayer was deemed to have received the notice, and the questions of his intention, knowledge and *mens rea* were all irrelevant to whether the taxpayer had committed an offence under s8C of the Act.

Per Bollen J:

"... Mr Kavanagh for the appellant said that the offence was absolute, more than strict, but absolute. That is to say he was submitting that intention, knowledge and *mens rea* were irrelevant. I have thought about all the authorities to which I was referred. Much has been written about *mens rea* in

statutory offences. Much has been written about the "defence" of honest and reasonable mistake. I think that, in this day and age, the less said by a single judge about the topic in general the better. I attempt to confine myself to saying no more than I believe to be necessary to decide this case. In *He Kaw Teh v R* [1985] HCA 43; (1985) 157 CLR 523; (1985) 60 ALR 449; (1985) 59 ALJR 620; (1985) 15 A Crim R 203; [1986] LRC (Crim) 553 Brennan J said at CLR 566:

"It is now firmly established that *mens rea* is an essential element in every statutory offence unless, having regard to the language of the statute and to its subject-matter, it is excluded expressly or by necessary implication."

I respectfully think that this is completely correct and well-supported by authority. I take it as my text. I add a reference to *Gammon (Hong Kong) Ltd v Attorney General of Hong Kong* [1985] AC 1; [1984] 2 All ER 503; [1984] 3 WLR 437; [1984] Crim LR 479; (1984) 80 Cr App R 194; [1985] LRC (Crim) 439. The Judicial Committee to the Privy Council in effect said that the presumption that *mens rea* was an essential ingredient of a statutory offence could be displaced by clear words and by necessary implication where the statute creating the offence dealt with an issue of social concern provided that strict liability would be effective to promote the objects of the statute.

We can easily understand the object of the *Taxation Administration Act*. More pointedly the object of s8C is to compel compliance with things lawfully required of taxpayers pursuant to a taxation law. It is a section intended to promote and facilitate the assessment and collection of the right amount of income tax from taxpayers. The Commissioner must have quite extensive powers to enable him and his officers so to assess and collect. It is, of course, a very unattractive idea that any person can be convicted without his or her having any intention to break the relevant law or even to take a chance about breaking it. But sometimes it must happen.

Road traffic offences and offences under the legislation to provide for the sale of unadulterated food are examples. The interest of the community demands that in some class of statutory offence absolute liability should attach to people who are subjectively innocent. That is necessary for the operation of the legislation which in turn is seen by the legislature to be for the good of the general populace. The robust mind initially fights against penalties without guilty intention. But in the end it must be resigned to some areas, perhaps correctly called social issues, in which such penalties must regretfully obtain.

Section 8C does not expressly say that *mens rea* and honest and reasonable mistake are excluded but I think that consideration of the subject-matter of the Act, or the object of s8C and of its language shows that both *mens rea* and honest and reasonable mistake are excluded by necessary implication. I think the subject-matter of the legislation and the object of s8C cry out that he who has received a notice at his address for service must comply with it to the extent that he is capable of doing so. Intention, knowledge and *mens rea* are all irrelevant."

Per Bollen J (Supreme Court of South Australia) in *Ambrose v Edmonds-Wilson* (1988) 48 SASR 514; 92 FLR 429; 9 ATR 1217; (1988) 88 ATC 4, 173; MC 53/1989, 12 February 1988.

(h) Environment Protection offence – whether absolute offence – whether defence of reasonable precautions available

1. Having regard to the purpose and intent of the *Environment Protection Act* 1970 ('Act'), the language used in s39 of the Act and notwithstanding the severe penalty provided for a breach of it, s39 imposes absolute liability upon an offender, and a defence of reasonable precautions is not available.

Chiou Yaou Fa v Morris [1987] NTSC 20; (1987) 46 NTR 1; (1987) 87 FLR 36; (1987) 27 A Crim R 342;

He Kaw Teh v R [1985] HCA 43; (1985) 157 CLR 523; (1985) 60 ALR 449; (1985) 59 ALJR 620; (1985) 15 A Crim R 203; [1986] LRC (Crim) 553; and

Welsh v Donnelly [1983] VicRp 79; (1983) 2 VR 173, referred to.

2. An employer is responsible for a breach of the provisions of s39 of the Act, notwithstanding that the doing of the act leading to the pollution was delegated to a person who was an independent contractor.

Goodes v General Motors Holdens' Pty Ltd [1970] VicSC 330; [1972] VicRp 42; (1972) VR 386; 27 LGRA 287, applied.

3. In view of the deeming provisions in s63(2) of the Act, once the elements of the offence are established, the occupier bears the onus of establishing that the cause of the pollution was

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unrelated to any commercial or industrial undertaking.

Window v The Phosphate Co-operative Co of Australia Ltd [1983] VicRp 88; (1983) 2 VR 287, distinguished.

Per Nathan J:

"... In order to consider this question, it is necessary to analyse the character of s39. Does it create an offence of which *mens rea* is an element, or is it one of absolute liability, or, is it in that "halfway house" of strict liability, as described by Asche J in *Chiou Yaou Fa v Morris* [1987] NTSC 20; (1987) 46 NTR 1; (1987) 87 FLR 36; (1987) 27 A Crim R 342, where the defence may be applicable.

The High Court was called upon to consider these various categories of offences in *He Kaw Teh v R* [1985] HCA 43; (1985) 157 CLR 523; (1985) 60 ALR 449; (1985) 59 ALJR 620; (1985) 15 A Crim R 203; [1986] LRC (Crim) 553.

... The High Court recognized a tripartite categorization of statutory offences, so far as the mental ingredient necessary for conviction was concerned. They are conveniently summarized by Asche J in *Chiou Yaou Fa's Case* as follows (p19):

"(i) that *mens rea* applies in full;

(ii) that the offence is one of strict liability so that the prosecution does not have to rebut *mens rea* in proving the *actus reus*; but if the evidence raises a likelihood of honest and reasonable mistake the prosecution must rebut that beyond reasonable doubt;

(iii) that the offence creates absolute liability."

I consider that a defence of taking all reasonable care and diligence is within the scope of the concept of honest and reasonable mistake and should be available to offences carrying strict liability. This being so, if s39 is an offence of strict liability, the Magistrate would have been entitled, (subject to satisfactory evidence being available), to dismiss the charge against R.L. I should add here, that although the term "defence" has been used by me and in other authorities when discussing honest and reasonable mistake, the accused has an evidentiary onus only to discharge, so as to raise a defence of honest and reasonable mistake or reasonable and proper care and diligence. Once the evidentiary onus is discharged by the accused, it is then required to be displaced by the prosecution beyond reasonable doubt.

A further difficulty with the English authorities in this area is that they have not developed, to the same extent and clarity, the tripartite categorization of criminal offences as was adopted in *Teh's Case* and accordingly, the terms "strict liability" and "absolute liability" have tended to be used by the English authorities interchangeably.

Returning to *Teh's Case* and *Chiou Yaou Fa's Case*, both pointed out the *prima facie* presumption that *mens rea* is an element of any criminal offence, and that the onus rests on the prosecution at all times to establish that element beyond reasonable doubt. A court requires good grounds for moving away from such a presumption. Further to this proposition, as stated by Asche J in *Chiou Yaou Fa's Case* (p22):

"If, however, *mens rea* can be shown to have been displaced, it does not follow that the court should leap to the opposite extreme of absolute liability. Rather the presumption, if *mens rea* is displaced, should be of strict liability unless the words of a statute are so clear and unambiguous as to admit of no other construction."

Gibbs J in *Teh's Case* considered four matters in assessing whether the presumption of *mens rea* was displaced (pp528-530), namely:

1. The language of the section creating the offence;
2. The subject matter of the statute;
3. The consequences for the community of an offence;
4. Potential consequences for an accused, if convicted.

Similarly, Brennan J approached the issue of *mens rea* thus (at p576):

"Principally, by reference to the language of the statute and its subject matter. From those sources, the mischief at which the statute is aimed is derived, and the purpose of the statute is perceived. The purpose of the statute is the surest guide of the legislature's intention as to the mental state to be implied." (my emphasis)

Further assistance, and also from a Court which binds me, is the Full Court decision of *Welsh v Donnelly* [1983] VicRp 79; [1983] 2 VR 173. A provision of the *Motor Car Act 1958* (s35(5)) made it an offence to overload a trailer above axle weights of stated levels. The Court unanimously held that the provision imposed strict liability although that term was used synonymously with absolute liability which is to be understood in view of the fact it was decided prior to *Teh's Case*.

This Act recites "any person shall not cause" pollution. It would be difficult to frame language in more absolute and embracive terms. The phrase echoes commandments given elsewhere and is just as explicit. I find the terms of the Act impose absolute liability.

... In s39 of the Act, the severity of the penalty is one indice which can be used to assess whether the offence is one of strict or absolute liability. Section 39(5) of the Act provides for a maximum penalty of not more than 100 penalty units (\$10,000), and in the case of a continuing offence, a daily penalty of not more than 40 penalty units each day the offence continues after conviction. At first blush, this may be viewed as quite a severe financial penalty and thus suggest a categorization of strict liability is appropriate. But as Gibbs J indicated, the potential penalty needs to be assessed in the context of the consequence for the community of the offence. That observation, which I find compelling, brings me to reflect upon the potential damage that may be incurred by the release of pollutants into waters, the potential hazard to health that may result, and the social costs which may be incurred by failing to dispose of pollutants in a safe manner. Viewed from that perspective the penalties are not oppressive.

... Examining the Act as a whole and the purpose it is designed to serve, I conclude it is directed at penalizing all those persons in control of potential pollutants who allow, whether by design, neglect or sheer inadvertence, the escape of those pollutants into the environment which then cause damage. The legislature has deliberately used the word "cause" and has avoided using language such as "knowingly cause" or "negligently cause" (pollution) which would have been expected, if the intention had been to create an offence of merely strict and not absolute liability. This is a strong indication that absolute liability was intended.

I am further drawn to this conclusion after considering the subject matter of the Act. It is primarily concerned with pollution of the air or water, both are in the nature of common property, as distinct from property held in private hands. The usual constraints which prevent persons from intruding upon the property rights of others (e.g. actions in trespass or nuisance) are not effective in creating a regime which protects the general environment. The Act is social regulatory legislation designed to protect the environment. Pollution of the environment usually results in a burden and cost to the community. The Act penalises those who have "caused" pollution and, thereby brought a detriment to the community as a whole. Based on these conclusions, the Magistrate erred in law in finding that R.L. had a defence under the Act, in that it took reasonable precautions to prevent the pollution. Section 39 creates offences of absolute liability. I should add, if it is found R.L. took reasonable precautions to prevent pollution, it may be a relevant consideration as to penalty."

Per Nathan J in *Allen v United Carpet Mills Pty Ltd & Anor* [1989] VicRp 27; [1989] VR 323; [1988] VicSC 354; MC 03/1989, 12 July 1988.

(i) Weights and measures – certain goods found to be under weight stated on package – defences available to employer – whether inconsistency between defence – whether mens rea ingredient of offence

Mens rea is not an essential ingredient of an offence against s82L of the *Weights and Measures Act 1958*.

He Kaw Teh v R [1985] HCA 43; (1985) 157 CLR 523; (1985) 60 ALR 449; (1985) 59 ALJR 620; (1985) 15 A Crim R 203; [1986] LRC (Crim) 553, indicia of Gibbs CJ, applied.

Per Vincent J:

"... English and Australian Courts have generally propounded the doctrine that save in exceptional cases, statutory offences require proof of a guilty mind or *mens rea*, the precise nature of which may vary from statute to statute. Not only must the intention of Parliament as to whether *mens rea* is an element of a statutory offence be gleaned from the language, subject matter, and purpose of the particular enactment concerned, but, if *mens rea* is such an element, the specific nature of that which is required to justify a conviction must be obtained from the same source.

In *He Kaw Teh v R* [1985] HCA 43; (1985) 157 CLR 523; (1985) 60 ALR 449; (1985) 59 ALJR 620; (1985) 15 A Crim R 203; [1986] LRC (Crim) 553 where the High Court was called upon to consider whether this presumption had been displaced by s233B(1) of the *Commonwealth Customs Act*. Gibbs CJ at pp528-530 referred to several indicia which were relevant to this question of statutory interpretation, namely:

- (i) the language of the section creating the offence;
- (ii) the subject matter of the statute;
- (iii) the consequences for the community of an offence;
- (iv) potential consequences for an accused if convicted;
- (v) whether strict liability would assist in the enforcement of the regulations.

He concluded that although these indicators did not all point in the same direction, the view that Parliament did not intend that the offence defined in par.(b) should be an absolute one was clearly open and thus the presumption of *mens rea* remained. Unlike the legislation which arose for consideration in that case, there are in my view no conflicting indicia or factors which could tend to make the interpretation of the relevant sections of the *Weights and Measures Act* complicated or difficult insofar as an intention to displace the presumption is concerned.

Each of the matters to which the learned Chief Justice referred points directly against the necessity for establishment of *mens rea* before liability under s82L is proved. This proposition in my opinion is almost self evident and I do not therefore propose to deal with them *seriatim*. In any event with the exception of the potential consequences for an accused if convicted, which in this case involves the imposition of a small monetary penalty, I have already dealt with each of the other matters in different contexts. ..."

Per Vincent J in *Vaux v SE Dickins Pty Ltd* [1989] VicSC 101; MC 11/1989, 16 March 1989.

(j) Motor traffic – speeding – mens rea – whether strict liability imposed

Having regard to the subject matter and character of Reg 1001 of the *Road Safety (Traffic) Regulations* 1988 concerning the offence of driving a motor vehicle at an excessive speed, it is clear that strict responsibility is imposed for a speeding infringement and accordingly, the defence of honest and reasonable mistake as a ground of exculpation is precluded.

Per Brooking J:

"... These speed limits are imposed by the regulations in the interests of road safety. This must be apparent to all without having regard to the title of the regulations, the *Road Safety (Traffic) Regulations* 1988, or the title of the Act under which they are made, the *Road Safety Act* 1986, or to the objects of the Act and regulations as stated in s1 of the Act and clause 102 of the regulations. If ever one might expect an intention to impose strict responsibility, it would be in relation to this offence of driving a motor vehicle at an excessive speed. (Compare what was said by the Chief Justice in *Welsh v Donnelly* [1983] VicRp 79; (1983) 2 VR 173 at p177, and what was said in the same case by Southwell J at pp199-200, where His Honour cited a passage from *Franklin v Stacey* (1981) 27 SASR 490 concerning the subordination of interests of individuals to the interest of the public in view of the purpose and policy of the statute, the *Motor Vehicles Act*, as securing the public welfare and promoting safety of the public).

Speeding motor cars have become dreadful engines of destruction. The cost to the community in terms of death and injury and economic loss has been enormous. I would expect a provision of this kind to require drivers to keep within the applicable speed limit at their peril. If the defence of honest and reasonable belief were applicable, then mistakes could be of two kinds. There could be a mistake of fact, the fact bearing on whether one was in a speed zone, and there could be a mistake of law as to the speed at which the vehicle was travelling. I think that the intention here is that motorists shall at their peril be aware of the applicable speed limit, and shall then at their peril so govern their speed as to keep within it. I do not think that they can be heard to say, except in mitigation, that a badly parked pantechnicon obscured a speed restriction sign from their view, or that a power failure at night led them to believe that there was no provision for street lighting along the road, or that they believed their faulty speedometer to be working properly, as in *Hearn v McCann* (1982) 29 SASR 448; (1982) 5 A Crim R 368, or that for any other reason they believed they were not breaking the speed limit. Human ingenuity and human nature being what they are, I should not expect the law to recognize mistake as a defence to a charge of this kind. That defence was rejected by Zelling J in the speeding case to which Mr Monteith very properly referred us, *Hearn v McCann* (*supra*).

A conviction for speeding carries no stigma; perhaps it should, but it does not. This summary offence carries a maximum penalty of only \$500. Licence cancellation and suspension are dealt with by s28 of the *Road Safety Act* 1986. A licence cancellation or suspension may bear heavily on the defendant, but in the overall scheme of things, a licence cancellation or suspension, irksome though it may be, may be regarded as towards the bottom end of the scale of criminal punishment. In my view, the ground of the order nisi has been made out and the order nisi should be made absolute with costs, including costs reserved, and the order below should be set aside. ..."

Per Brooking J (Kaye and Murphy JJ agreeing) in *Kearon v Grant* [1991] VicRp 25; [1991] 1 VR 321; (1990) 11 MVR 377; MC 25/1990, 21 June 1990.

(k) Exceeding speed limit – defence of honest and reasonable mistake**Per Macaulay J:****"... Honest and reasonable mistake**

68. Mr Agar's third fundamental complaint was that the defence of honest and reasonable mistake should be available for the offence with which he was charged, at least in circumstances where the alleged speed is within the "grey" area of the vehicle's speedometer error tolerance.

69. In this case the alleged speed of 75kph was within plus or minus 10 per cent of 70kph – although I note that the actual speed indicated by the Gatsometer was 78 kph, just outside the 10 per cent range. Be that as it may, Mr Agar sought to distinguish the decision of the appeal division of this Court in *Kearon v Grant* [1991] VicRp 25; [1991] 1 VR 321; (1990) 11 MVR 377 because that case concerned an allegation of grossly excessive speed whereas his case does not.

70. In *Kearon* Brooking J, with whom Kaye and Murphy JJ agreed, said at VR 323 –

... I think it clear that the defence, as I shall call it, of honest and reasonable belief is not open on a charge under this regulation of exceeding the speed limit. In my view, the subject matter and character of this regulation are such as to make it likely that the exclusion of this defence was intended.

These speed limits are imposed by the regulations in the interests of road safety. This must be apparent to all without having regard to the title of the regulations, the *Road Safety (Traffic) Regulations* 1988, or the title of the Act under which they are made, the *Road Safety Act* 1986, or to the objects of the Act and regulations as stated in s1 of the Act and cl 102 of the regulations. If ever one might expect an intention to impose strict responsibility, it would be in relation to this offence of driving a motor vehicle at an excessive speed.

Speeding motor cars have become dreadful engines of destruction. The cost to the community in terms of death and injury and economic loss has been enormous. I would expect a provision of this kind to require drivers to keep within the applicable speed limit at their peril. If the defence of honest and reasonable belief were applicable, then mistakes could be of two kinds. There could be a mistake of fact, the fact bearing on whether one was in a speed zone, and there could be a mistake of fact as to the speed at which the vehicle was travelling. I think that the intention here is that motorists shall at their peril be aware of the applicable speed limit, and shall then at their peril so govern their speed as to keep within it. I do not think that they can be heard to say, except in mitigation, that a badly parked pantechnicon obscured a speed restriction sign from their view, or that a power failure at night led them to believe that there was no provision for street lighting along the road, or that they believed their faulty speedometer to be working properly, as in *Hearn v McCann* (1982) 29 SASR 448; (1982) 5 A Crim R 368, or that for any other reason they believed they were not breaking the speed limit. Human ingenuity and human nature being what they are, I should not expect the law to recognise mistake as a defence to a charge of this kind.

71. There have been no other iterations of the purposes and objects of the *Road Safety Act* to suggest that any purpose different from that considered by Brooking J should be inferred. The force of his Honour's reasoning still applies – so does the authority of the decision.

72. Mr Agar incorrectly assumed that the offence with which the driver in *Kearon* was charged was, by definition, an offence involving speed of at least 25 kph in excess of the speed limit. He misapplies the defined term "excessive speed infringement" in s3 of the *Road Safety Act* to the circumstances of that case. It only has relevance to mandatory suspension under s28(1)(a). In *Kearon* the driver was charged under reg. 100(1)(c) of the *Road Safety (Traffic) Regulations* 1988 with exceeding the speed indicated on a speed restriction sign in a speed zone. The degree by which the driver exceeded the speed limit played no part in the reasoning of the Court.

73. Indeed, in my view, it would make no sense at all, having regard to the reasoning behind the conclusion that the offence was one of strict liability, to pay any attention to whether the alleged speed exceeded the speed limit by a few or by many kilometres per hour. Much public attention has been drawn to the self-evident fact that exceeding a speed limit by just a few notches can cause injury as readily as driving at speeds well above a limit.

74. In the County Court Mr Agar appears to have argued that *Kearon* was wrong because it did not take into account the reasoning of the High Court in *He Kaw Teh v R* [1985] HCA 43; (1985) 157 CLR 523; (1985) 60 ALR 449; (1985) 59 ALJR 620; (1985) 15 A Crim R 203; [1986] LRC (Crim) 553. That argument featured less in the submissions before me, the focus being upon the asserted ground for distinguishing *Kearon* from the present as already discussed. To the extent Mr Agar still relies upon an error in failing to apply *He Kaw Teh* instead of *Kearon*, I have been unable to discern any basis for finding an error.

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75. In conclusion, his Honour was not in error in declining to afford to Mr Agar the defence of honest and reasonable mistake of fact (assuming for present purposes that such a defence might have been made out on the facts of the case)."

Per Macaulay J in *Agar v Dolheguy & Anor* [2010] VSC 506; (2010) 246 FLR 179; MC 50/2010, 11 November 2010.

(1) Failing to stop/render assistance/report to police – categorisation of offences – whether involving strict liability

1. For the purpose of considering criminal intent, statutory offences fall into three categories.

- (1) Prosecution must prove *mens rea* as an essential ingredient of the offence
- (2) Prosecution must negative evidence of the defendant's honest and reasonable belief
- (3) Absolute offences or ones of strict liability.

2. The provisions of s61(1) of the *Road Safety Act* 1986 ('Act') do not create absolute offences nor impose strict liability. That is, s61(1) does not create Category 3 offences.

3. Having regard to the relative seriousness of the offences and other matters, s61 offences do not fall within Category 2 offences involving the defence of honest and reasonable belief. Section 61 requires that the appropriate mental element be proved by the prosecution as an essential ingredient of the offence.

4. To establish an offence under s61(b) or (e) of the Act it must be proved that there was actual knowledge on the part of the driver that an accident had occurred and that a person was injured. Where a driver knew he had been in a collision but did not know he had hit a person, a magistrate was in error in finding proved charges laid pursuant to s61(1)(b) and (e) of the Act.

5. In relation to a charge under s61(1)(a) of the Act, the prosecution must show there was appreciable damage to property other than the defendant's motor vehicle.

Per Teague J:

"... I turn to the first question posed in the order of the Master, as to whether the learned magistrate erred in deciding that s61(1) of the *Road Safety Act* created an absolute offence. *He Kaw Teh v R* [1985] HCA 43; (1985) 157 CLR 523; (1985) 60 ALR 449; (1985) 59 ALJR 620; (1985) 15 A Crim R 203; [1986] LRC (Crim) 553 is the leading case dealing with the categorisation of statutory offences for the purpose of considering criminal intent. As a very general proposition, it is possible to say that such offences fall into three categories. To none of those categories it is easy to give a satisfactory label. The first category covers offences in which there is an original obligation on the prosecution to prove *mens rea* as an essential ingredient of the offence.

The second category has commonly been referred to as covering the middle ground. It relates to offences where *mens rea* will be presumed to be present unless and until some evidence is advanced by the defendant that he had an honest belief in facts which would make his act lawful, and some evidence or basis for thinking that it was on reasonable grounds, in which circumstances the onus is on the prosecution to disprove honest belief on reasonable grounds beyond reasonable doubt. The third category is also not easy to give a label to, as it apparent from two relatively recent decisions of the Victorian Full Court in *Welsh v Donnelly* [1983] VicRp 79; [1983] 2 VR 173, and *Kearon v Grant* [1991] VicRp 25; [1991] 1 VR 321; (1990) 11 MVR 377. In each case the court held that a statutory provision creating an offence was intended to create an offence in the third category and not an offence in the middle ground.

... In the light of what was said in those cases, I am not disposed myself to adopt "absolute offence" as a label to identify an offence in the third category. However, I am satisfied that it was in that sense that the label was used by the learned magistrate. All six of the cases to which I am about to refer involved prosecutions based on legislative provisions in terms comparable to but not the same as s61. All six were cited to the learned magistrate. There is not in any of those cases, or in any case to which I was referred in argument, support for the proposition that such a provision should be taken to create an "absolute offence", or, to use a different expression, to impose strict liability.

... In *Harding v Price* [1948] 1 KB 695; [1948] 1 All ER 283, the accused was acquitted on appeal of a charge of failing to report an accident, he being a driver who was found to have been unaware that an accident had occurred. Lord Goddard CJ referred to the general rule that a man should not be found guilty of an offence against the criminal law unless he has a guilty mind, and to the

exception to that rule where a statute, either clearly or by necessary implication, rules out *mens rea* as a constituent part of a crime by making an absolute prohibition against the doing of some act, and to the qualification to the exception that, even where the statute imposes what is apparently an absolute prohibition, an absence of guilty knowledge may in some cases be a defence.

... Although those six cases were cited to the learned magistrate, he decided, without elaborating other than to say that he rejected the defence arguments, that s61(1) created an absolute offence. I am satisfied that he erred.

... From what was said in *He Kaw Teh*, I am satisfied that, when addressing the issue of the appropriate classification of an offence created by a statutory provision, I should have regard to, at least, the proper construction of the section, the mischief which the section is designed to remedy, the context in which the section stands in the statute, the subject matter of the statute itself, and whether putting the defendant under absolute liability would assist in the enforcement of the statute.

There can only be a limited benefit to be gained by examining the different circumstances in which courts have gone about this exercise with other statutory provisions. That limited benefit lies in becoming better acquainted with the process. The process resulted in a full *mens rea* classification in *He Kaw Teh* as to an offence under the *Customs Act* of importing heroin. In *Welsh* and *Kearon*, the two Victorian cases I earlier referred to, the analysis resulted in the classification of the offence being considered as one of strict liability. *Welsh* was decided before *He Kaw Teh*. *Kearon* was decided after, but without reference to *He Kaw Teh*.

... Not without reservation, I have concluded that offences under s61 are to be given a full *mens rea* classification, that is that they are to be treated as requiring the appropriate mental element to be proved as an essential ingredient of the offence. ..."

Per Teague J in *Robinson v Fisher* [1993] VicSC 455; MC 13/1994, 31 August 1993.

(m) Drink/driving – whether offence under s49(1)(f) of Road Safety Act 1986 is one of strict liability

The legislature has established an increasingly strict regime with respect to drink/driving offences designed to protect the community. There would seem to be little doubt that the offence established by s49(1)(f) of the *Road Safety Act 1986* ('Act') is to be regarded as one of strict liability. Accordingly, the defence of honest and reasonable mistake is not available with respect to the offence established by s49(1)(f) of the Act.

Welsh v Donnelly [1983] VicRp 79; [1983] 2 VR 173, applied.

Per Vincent J:

"... Counsel for the appellant relied upon statements of principle in a large number of cases, in support of this proposition. These included the following: *R v Jones* [1995] QB 235; [1995] 3 All ER 139; [1995] 2 WLR 64; *Butler v Loneragan* (1994) 19 MVR 361; (1994) 74 A Crim R 259, NSW Supreme Court, 16/6/94; *Hawthorne (Department of Health) v Morcam Pty Ltd* [1985] TASRp 10; (1992) 29 NSWLR 120; 65 A Crim R 227; *Edwards v Macrae* (1991) 14 MVR 193; *L v F* (1985) 21 A Crim R 55; [1985] Tas R 112; (1985) 3 MVR 120, Tas. Supreme Court, 24/9/85; *Harmer v Grace, ex parte Harmer* [1980] Qd R 395; *Boucher v GJ Coles & Co Ltd* (1974) 9 SASR 495; (1974) 32 LGRA 87; *Mayer v Marchant* (1973) 5 SASR 567; (1973) 30 LGRA 246.

Some reliance was also placed upon pronouncements of principle by the High Court in *He Kaw Teh v R* [1985] HCA 43; (1985) 157 CLR 523; (1985) 60 ALR 449; (1985) 59 ALJR 620; (1985) 15 A Crim R 203; [1986] LRC (Crim) 553, and *Jiminez v R* [1992] HCA 14; (1992) 173 CLR 572; 106 ALR 162; 66 ALJR 292; 15 MVR 289; 59 A Crim R 308.

Among the Victorian cases to which reference was made were: *Fitzgerald v Howey* [1995] VicSC 427; (1996) 24 MVR 369, Victorian Supreme Court, Eames J, 10/8/95; *Robinson v Fisher* [1993] VicSC 455; [1993] ACL Rep. 130 VIC 201; *Pilkington v Elliot & Anor* [1991] VicSC 510 (unreported, Victorian Supreme Court, Coldrey J, 27/9/91); *Kearon v Grant* [1991] VicRp 25; [1991] 1 VR 321; (1990) 11 MVR 377; *Meeking v Crisp & Anor* [1989] VicRp 65; [1989] VR 740; (1989) 9 MVR 1; *Kidd v Reeves* [1972] VicSC 61; [1972] VicRp 64; [1972] VR 563; *Barker v Burke* [1970] VicRp 111; [1970] VR 884.

These authorities, emanating from different jurisdictions and concerned with a variety of pieces of legislation, contain statements emphasising the fundamental importance in the attribution of criminal responsibility of the existence of what might be described as a sufficiently culpable state of mind. The undoubtedly correct view is repeatedly expressed that Courts should be very reluctant to adopt interpretations of statutory provisions which could have the effect of holding criminally responsible an individual who has acted in the honest and reasonable belief that his or her conduct was lawful.

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... On its proper construction, the argument proceeded, s49(1)(f) falls into the line of offences considered by *Welsh v Donnelly* (*supra*) (overloaded vehicles); *Kearon v Grant* (*supra*) (speeding); and *Pilkington v Elliot* (*supra*) (driving unregistered vehicle). Acknowledging the force of the arguments advanced on behalf of the appellant, I am of the opinion that the defence of honest and reasonable mistake is not available with respect to the offence established by s49(1)(f) of the *Road Safety Act 1986*.

I do not think that it is necessary to set out the history of this section or the structure within which it is contained. It is sufficient, I think, to state that over the years the legislature has established an increasingly strict regime with respect to drink driving offences designed to protect the community. There would seem to be little doubt that, at least since the decision in *Welsh v Donnelly*, and consistent with this approach, s49(1)(f) has been regarded as one of strict liability. Although the provision has been the subject of repeated examination in this Court over a number of years, there is nowhere to be found, as I understand the situation, any pronouncement or indication in any of many judgments handed down, that this is not the case. For good or ill, the position is, in my opinion, fairly clear. I do not consider that the Magistrate fell into error in deciding as he did. ..."

Per Vincent J in *Skase v Holmes & Anor* [1995] VicSC 555; MC 03/1996, 11 October 1995.

(n) Use of unregistered vehicle – whether offence of strict liability

The courts have considered a number of factors in determining whether an offence is one of strict liability. These include firstly, that the penalty imposed is monetary; secondly, that there is no stigma attaching to a conviction; and thirdly, that the defendant is able to comply with the provision with relative ease. All of these features adhere to s7 of the *Road Safety Act 1986* ('Act'). The words of s7 simply prohibit a person owning a motor vehicle or trailer which is used on a highway and is unregistered. On its face the clear and concise language in which the provision is couched, together with its objective form, clearly indicate a legislative intention to impose strict liability upon the owner of an unregistered vehicle used on a highway. Having regard to the purpose, wording and characteristics of s7, honest and reasonable mistake is not a defence to a charge under s7(1)(b) of the Act.

Per Coldrey J:

"... I should interpolate that the question of whether *mens rea* is a requisite ingredient of an offence (often designated by such terms as "knowingly" or "wilfully" in the description of an offence) should not be confused with the question as to whether the defence of honest and reasonable mistake (to use a compendious description) is a ground of exculpation. (See for example *Kain & Shelton Pty Ltd v McDonald* (1971) 1 SASR 39 at p40; *Welsh v Donnelly* [1983] VicRp 79; (1983) 2 VR 173 at 177; *Proudman v Dayman* [1941] HCA 28; (1941) 67 CLR 536 at p540.) The cases indicate that whilst positive knowledge or intent may not be a necessary ingredient of an offence an honest and reasonable mistake of fact may, nonetheless, be a ground for exculpation.

The imprecise ambit of the concept of *mens rea* is adverted to by Gibbs CJ in *He Kaw Teh v R* [1985] HCA 43; (1985) 157 CLR 523 at p533; (1985) 60 ALR 449; (1985) 59 ALJR 620; (1985) 15 A Crim R 203; [1986] LRC (Crim) 553. After an examination of such cases as *R v Tolson* [1886-90] All ER 26; (1889) 23 QBD 168; 9 WR 709; *Bank of New South Wales v Piper* (1897) AC 383; *Maher v Musson* [1934] HCA 64; 52 CLR 100; [1935] ALR 80; 89 P 7; *Thomas v R* [1937] HCA 83; (1937) 59 CLR 279; [1938] ALR 37 and *Proudman v Dayman* (*ibid*) he stated:

"These cases establish that if it is held that guilty knowledge is not an ingredient of an offence, it does not follow that the offence is an absolute one. A middle course, between imposing absolute liability and requiring proof of guilty knowledge or intention, is to hold that an accused person will not be guilty if he acted under an honest and reasonable mistake as to the existence of facts, which, if true, would have made his act innocent."

Having made that general statement the Chief Justice posed a number of questions one of which was whether

"the absence of an honest and reasonable belief in the existence of facts which would have made the act innocent is a form of *mens rea* or whether, on the other hand, an honest and reasonable mistake affords the accused a defence only when he is charged with an offence of which *mens rea* is not an element."

Ultimately the Chief Justice remarked: (at p534)

"It may be that little turns on the question whether honest and reasonable mistake should be regarded as a special defence available only in cases not requiring *mens rea*, or as something the

absence of which constitutes *mens rea*. The matter is largely one of words. On either view the words of the statute and the nature of the offence must be considered in deciding what mental state is required, and whether an objective test of reasonableness is to be applied together with the subjective test of whether there was a mistaken belief."

It is now beyond argument that where the defence relied upon is honest and reasonable mistake there is no burden cast upon the accused of establishing such a defence on the balance of probabilities. The proposition is put succinctly by Dawson J in *He Kaw Teh* at CLR p593 –

"The governing principle must be that which applies generally in the criminal law. There is no onus upon the accused to prove honest and reasonable mistake upon the balance of probabilities. The prosecution must prove his guilt and the accused is not bound to establish his innocence. It is sufficient for him to raise a doubt about his guilt and this may be done, if the offence is not one of absolute liability, by raising the question of honest and reasonable mistake. If the prosecution at the end of the case has failed to dispel the doubt then the accused must be acquitted."

(See also *Kidd v Reeves* [1972] VicRp 64; (1972) VR 563; *Mayer v Marchant* (1973) 5 SASR 567; (1973) 30 LGRA 246 and *R v Strawbridge* (1970) NZLR 909).

In this passage Dawson J refers to offences of absolute liability. This term is used interchangeably with that of strict liability. What then are the criteria to be applied in determining whether an offence is one of absolute or strict liability? In *He Kaw Teh* Dawson J remarked: (at p594)

"Attempts have been made to categorize those offences which have been regarded as absolute, but the result is only helpful in a broad sense and the recognized categories cannot be regarded as exhaustive. It is generally accepted that statutes which create offences for the purpose of regulating social or industrial conditions or to protect the revenue, particularly if the penalty is monetary and not too large, may more easily be regarded as imposing absolute liability. This approach may be displaced if to regard an offence as one of absolute liability could not promote the object of the legislation by making people govern their conduct accordingly: see *Lim Chin Aik v R* (1963) AC 160; [1963] 1 All ER 223; (1963) 2 WLR 42. Conduct prohibited by legislation which is of a regulatory nature is sometimes said not to be criminal in any real sense, the prohibition being imposed in the public interest rather than as a condemnation of individual behaviour. On the other hand, if a prohibition is directed at a grave social evil, the absolute nature of the offence may more readily be seen, particularly if proof of intent would be difficult and would represent a real impediment to the successful prosecution of offenders."

... The issue between the parties was whether this offence attracted absolute liability or whether the respondents could avail themselves of the defence of honest and reasonable mistake. In submitting that the instant offence was one of absolute liability, Mr Radford, who appeared on behalf of the appellant, referred me to the article of Professor Sayre entitled *Public Welfare Offence* (1933) 33 Columbia LR 55 which identifies a number of categories of offences attracting the doctrine of strict liability. These are, illegal sales of intoxicating liquor; sales of impure or adulterated food or drugs; sales of misbranded articles; violations of anti-narcotic Acts; criminal nuisances; violations of traffic regulations; violations of motor vehicle laws and violations of general police regulations passed for the safety, health or well-being of the community.

It must however be recognised that the categories of offences said by Professor Sayre to attract the principle of strict liability cover a broad spectrum and must be considered by the courts, not only in the light of the purported purposes of individual statutes, but also having regard to the specific scope of individual sections within such statutes. Mr Radford contended that the *Road Safety Act* 1986 had as its purpose public health and safety and consequently the legislature had either expressly or implicitly excluded a defence of honest and reasonable mistake in the public interest. He referred to *Welsh v Donnelly* [1983] VicRp 79; (1983) 2 VR 173 where at p177 Young CJ referred to the predecessor to the *Road Safety Act* in these terms:

"The nature of the matters with which the *Motor Car Act* is concerned is peculiarly public safety. The notorious dangers of travel on modern highways and the necessity for strict control of the handling of motor vehicles on those highways suggest that if ever the intention to be imputed to Parliament is to impose strict responsibility, it is likely to be in statutes dealing with the control and handling of motor vehicles."

... The words of s7 simply prohibit a person owning a motor vehicle or trailer which is used on a highway and is unregistered. On its face the clear and concise language in which the provision is couched, together with its objective form, clearly indicate, in my view, a legislative intention to impose strict liability upon the owner of an unregistered vehicle used on a highway. Are there, however, any other indicia which would support or, indeed erode, such a conclusion?

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... Accordingly having considered the purpose, wording and characteristics of the section I am of the view that honest and reasonable mistake is not a defence under s7(1)(b) of the *Road Safety Act*. It follows from this conclusion that it was not open to the Magistrate to hold that there was a reasonable doubt founded upon the discharge by the defendants of the evidentiary onus cast upon them of raising the issue of honest and reasonable mistake of fact. ..."

Per Coldrey J in *Pilkington v Elliott & Anor* [1991] VicSC 510; MC 20/1997, 27 September 1991.

(o) Agricultural and Veterinary Chemicals offence – whether offence one of absolute or strict liability – principles to be applied in classifying offence

There is a legal presumption that *mens rea* is an essential ingredient in every offence. However, this presumption can be displaced. In *He Kaw Teh v R* [1985] HCA 43; (1985) 157 CLR 523; (1985) 60 ALR 449; (1985) 59 ALJR 620; (1985) 15 A Crim R 203; [1986] LRC (Crim) 553, the High Court set out the criteria to be applied by a court in determining whether the presumption of *mens rea* has been displaced as follows:

1. The first criterion is consideration of the words of the statute. Having regard to s40 of the *Agricultural and Veterinary Chemicals (Control of Use) Act* ('Act') it was clearly intended to create an offence to which absolute liability attached on the basis that—

- (a) words such as "knowingly caused" are not used;
- (b) the prohibition is on an otherwise lawful activity;
- (c) the insertion of a specific defence in s40(2) of the Act does not contemplate strict liability.

2. The second criterion is consideration of the subject matter of the statute. The Act is concerned ultimately with the protection of public health and the environment. Whilst this subject matter is important it contrasts markedly with the legislation which was considered by the High Court in *He Kaw Teh*. Whilst a breach of the Act is socially important and serious it could not be regarded as an offence which is truly criminal.

(3) The third criterion is whether subjecting the defendant to absolute liability will assist in the observance of the statute. The measures taken by W. were not sufficient to demonstrate adequate observance of the requirements of s40(1)(a) of the Act. More could have been done by W. such as investigating the nature of the adjoining crop to ensure that damage did not occur.

(4) The fourth criterion is consideration of the purpose of the legislation and the penalties imposed. Section 40(1)(a) of the Act has been enacted to regulate potential risk to public health and the environment from aerial spraying. It is a statute which falls within the category of legislation introduced for the purpose of regulating social conditions and public safety. The relevant penalty is monetary and moderately sized.

(5) Having regard to these criteria, the magistrate was correct in finding that s40(1)(a) of the Act was a provision to which absolute liability applied.

Per Warren J:

"... 9. In *He Kaw Teh* the High Court referred to the fact that the courts have set down criteria to be applied in determining whether the presumption of *mens rea* has been displaced. The first criterion is consideration of the words of the statute creating the offence (see Gibbs CJ and Mason J 529; Brennan J 567; Dawson J 594). The second criterion is consideration of the subject matter of the statute (see Gibbs CJ and Mason J 529; Dawson J 594). The third criterion is whether subjecting the defendant to absolute liability will assist in the promotion of observance of the relevant statute (see Gibbs CJ and Mason J 530; Brennan J 567). The fourth criterion is that where a statute creates an offence for the purpose of regulating social conditions and public safety and where the penalty attached to a statutory offence is monetary and moderately sized, the statute is more easily regarded as imposing absolute liability (see Brennan J 567; Dawson J 595).

10. The High Court observed that the expression "*mens rea*" is ambiguous, imprecise, difficult to define but can mean voluntariness, knowledge of all the facts constituting the necessary ingredients of the relevant defence, knowledge of the wrongfulness of the act, intent to cause the wrongfulness and even recklessness in some cases (see Gibbs CJ and Mason J 530-531; Brennan, J 568-70). In *He Kaw Teh* the High Court observed, further, that an honest and reasonable mistake of fact will be a ground of exculpation in cases in which actual knowledge is not a necessary element of an offence (see Gibbs CJ and Mason J 532; Brennan J 574). Ultimately, the High Court in *He Kaw Teh* was concerned with the grave conduct of heroin importation. In applying the principles to be extracted from the case, the High Court held that *mens rea* was required.

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... 35. Finally, whilst *Allen v United Carpet Mills Pty Ltd & Anor* [1988] VicSC 354; [1989] VicRp 27; [1989] VR 323 was concerned with different legislation to that before me it is an authority of some assistance. Nevertheless, an analysis of the authorities, in particular *He Kaw Teh* reveals that each statute must be construed in accordance with the criteria laid down by the High Court before the nature of the liability to be attached to the relevant statutory offence can be determined.

... 39. Turning to the application of the principles in *He Kaw Teh*, s40(1)(a) of the Act is a section that does not expressly require *mens rea*. The subject matter of the Act is the protection of public health and the environment. There were further steps that the appellant might have taken to ensure that no injurious effects were caused by aerial drift. Accordingly, the magistrate was correct in finding that s40(1)(a) of the *Agricultural and Veterinary Chemicals (Control of Use) Act* was a provision to which absolute liability applied. It follows that the appeal will be dismissed."

Per Warren J in *Wilson v Gahan* [1999] VSC 72; MC 12/1999, 18 March 1999.

(p) Importing an ozone depleting substance without a licence – whether such offence involves absolute or strict liability

Section 13(1) of the *Ozone Protection Act* 1989 (Cth) ('Act') provides that a person must not import an HCFC unless the person holds a controlled substances licence. Without being licensed, SP/L imported a number of cylinders of a gas which required the necessary licence. SP/L acted on the basis of advertising by a competitor. The magistrate found that the offence was one of strict liability but ruled that SP/L's belief was not reasonably grounded and found the charge proved. Upon appeal—

HELD: Appeal dismissed.

1. It was open to the magistrate to conclude that SP/L's belief was not reasonably grounded and find that the defence of honest and reasonable belief had been negated by the prosecution beyond reasonable doubt.

2. *Obiter*. The legal presumption that *mens rea* is an essential ingredient in every serious offence may be displaced by the words of the statute creating the offence or the subject matter with which it is concerned. The Act falls into the category of public safety legislation that is intended to protect all Australians. The potential risk to public health and the environment arising from uncontrolled importation of HCFCs is self-evident. Other relevant factors include the language of s13(1), the monetary penalty and the licensing procedure pointing to a regulatory offence. Having regard to all of these factors, the offence created by s13(1) of the Act is an absolute liability offence.

Per Hedigan J:

"... 4. Those issues included consideration of the question as to whether the offence created by s13(1) was one of absolute liability, or one in respect of which *mens rea* was an element and whether or not it was an offence in respect of strict liability (a lesser liability than absolute liability) as identified in *Chiou Yaou Fa v Morris* [1987] NTSC 20; (1987) 46 NTR 1; (1987) 87 FLR 36; (1987) 27 A Crim R 342 and, more critically, in *He Kaw Teh v R* [1985] HCA 43; (1985) 157 CLR 523; (1985) 60 ALR 449; (1985) 59 ALJR 620; (1985) 15 A Crim R 203; [1986] LRC (Crim) 553 (hereinafter called *Teh*). It will be necessary, in view of submissions made to me by counsel to refer later to *Teh* but it might be said without much dispute that in that case (a case of a charge of possession of a prohibited import, heroin) the High Court recognised a tripartite categorisation of statutory offences, based upon the mental ingredient necessary. These were analysed by Asche J in *Choi Yaou Fa* and summarised in this way, as cases in which

"(1) *Mens rea* applies in full;

(2) the offence might be one of strict liability so that the prosecution does not have to rebut *mens rea* in proving the *actus reus* but, if the evidence raises a likelihood of honest and reasonable mistake, the prosecution must rebut that beyond reasonable doubt; and

(3) that the offence creates absolute liability."

It is not in dispute the charges may be such that *mens rea* in the strict sense is not an element e.g. *Allen v United Carpet Mills Pty Ltd & Anor* [1988] VicSC 354; [1989] VicRp 27; (1989) VR 323 where charges were laid under s39(1) of the *Environment Protection Act* 1970 in effect forbidding pollution of waters under the Act. Nathan J in that case, concluded that s39(1) of the *Environment Protection Act* created the offence of absolute liability to which a defence of honest and reasonable mistake was not available.

... Both parties accepted that strict liability was there being used in the context of a liability which was not absolute liability, that is, liability regardless of absence of knowledge or *mens rea*.

... 24. There were a number of arguments advanced before me on the issue of whether or not the Magistrate was in error in concluding that the offence created by s13(1) of the Act was one of absolute liability, that is, not requiring proof of any intent or *mens rea*. The legal presumption that *mens rea* is an essential ingredient in every serious offence may be displaced by the words of the statute creating the offence or the subject matter with which it is concerned. In *Teh* the High Court considered the criteria that had to be applied in order to determine whether the presumption of *mens rea* had been displaced. These are (1) the words of the statute; (2) the subject matter of the statute; (3) whether the imposition of absolute liability would assist in the enforcement and observance of the relevant statute and its objects; and (4) that in the case where the offence is regulatory (that is for the purpose of regulating social conditions or to promote and maintain the public safety) and the penalty is monetary and moderately sized, the statute is more easily construed as imposing absolute liability.

... 32. There are many reported cases wherein social regulatory legislation prohibiting conduct in matters of public health, environmental or public safety have been characterized as absolute liability offences. I refer to *Allen v United Carpet Mills Pty Ltd (supra)* (water pollution), *Welsh v Donnelly* [1983] VicRp 79; [1983] 2 VR 173, Full Court of the Supreme Court of Victoria (exceeding maximum weight in a trailer); *Franklin v Stacey* (1981) 27 SASR 490 (driving an unregistered and uninsured motor vehicle); *Kearon v Grant* [1991] VicRp 25; [1991] 1 VR 321; (1990) 11 MVR 377 (exceeding a speed limit); and *Ambrose v Edmonds-Wilson* (1988) 48 SASR 514; (1988) 92 FLR 429; (1988) 19 ATR 1217 (failure to furnish a tax return).

33. All of these matters are powerful considerations pointing to the characterisation of this offence as an absolute liability offence. In my judgment, although it is not necessary for the decision on this appeal, I am of the opinion that the offence created by s13(1) is an absolute liability offence."

Per Hedigan J in *Selectrix Pty Ltd v Humphrys* [2001] VSC 45; 159 FLR 348; MC 38/2001, 1 March 2001.

(q) Failing to produce a valid ticket upon request – reason for failing to produce ticket

Per Nettle J:

"... 46. Ms Batrouney contended otherwise. She submitted that it should be enough to satisfy the requirements of s221(2)(a) of the *Transport Act* 1983 that a traveller has an intention to purchase a ticket on board. But in my view that cannot be right. It is tantamount to saying that *mens rea* is a necessary ingredient of the offence created by s221(4) or that, even if *mens rea* is to be presumed, the offence permits of a defence of honest and reasonable mistake. Neither view is acceptable.

47. Granted that there is a presumption that *mens rea* is an essential ingredient of every offence, the presumption is liable to be displaced either by the words of the statute that creates the offence or by the subject matter with which it deals, or both: *Sherras v DeRutzen* [1895] 1 QB 918 at p921; 11 TLR 369; *He Kaw Teh v R* [1985] HCA 43; (1985) 157 CLR 523 at 528; (1985) 60 ALR 449; (1985) 59 ALJR 620; (1985) 15 A Crim R 203; [1986] LRC (Crim) 553. Thus it is generally accepted that statutes which create offences for the purposes of regulating social or industrial conditions or to protect the revenue, particularly if the penalty is monetary and not too large, may more readily be regarded as imposing absolute liability.

48. Further, and although in the case of common law offences and some statutory offences, it may be a defence to show an honest and reasonable belief in the existence of circumstances which, if true, would make the act charged an innocent act, that will not apply if the purpose of the statute is to make an act an offence regardless of intent.

49. A great deal has been written upon the subject of strict liability and absolute liability offences and quite a lot of it is repetitive: See, as well as *He Kaw Teh*, *supra*, *Welsh v Donnelly* [1983] VicRp 79; [1983] 2 VR 173 at 178 and 186, and the authorities there cited; *Allen v United Carpet Mills Ltd* [1988] VicSC 354; [1989] VicRp 27; [1989] VR 323 at 327-329; *Griffin & Elliot v Marsh* 122 ALR 552; (1994) 34 NSWLR 104; (1994) 28 ATR 355; *Hawthorne (Department of Health) v Morcam Pty Ltd* (1992) 29 NSWLR 120; 65 A Crim R 227; *Leask v The Commonwealth* [1996] HCA 29; (1996) 187 CLR 579 at 598; (1996) 140 ALR 1; (1996) 70 ALJR 995; (1996) 18 Leg Rep 2; 35 ATR 91; *Llandilo Staircases Pty Ltd v WorkCover Authority of New South Wales* (2001) 104 IR 204; *R v Scott* (1996) 131 FLR 137; (1936) 137 ALR 347; *Selectrix Pty Ltd v Humphrys* [2001] VSC 45; (2001) 159 FLR 348; *Tomazin v Ward*, 6/97, SCWA, 1117/93. It is unnecessary and undesirable that I add to that repetition by further extensive observations of my own. Given the clarity with which the precepts have now been established by the cases, I confine myself to this: that whether the matter is approached via the language of the section, the subject matter of the statute, the consequences for society of an offence or the consequences of conviction for an accused, I see no room in s221(4) for a defence of honest or reasonable mistake. The purpose of the statute is evidently to motivate people to ensure that they buy a ticket. That objective is likely to be frustrated if mistake is allowed to excuse.

50. I add for the sake of completeness that the defence of honest and reasonable mistake has also been said in some of the authorities to embrace a defence of due diligence and, in turn, that due diligence for that purpose is constituted of taking all reasonable care to avoid the event the subject of charge: See *R v Sault Ste Marie* [1978] 2 SCR 1299 at 1325-1326; 3 CR (3d) 30; *He Kaw Teh, supra* at 533; *Allen v United Carpet Mills Pty Ltd, supra* at 327; cf *Australian Iron and Steel Pty Ltd v Environment Protection Authority* (1992) 29 NSWLR 497; (1992) 66 A Crim R 134; (1992) 79 LGERA 158 NSWCCA, 18 December 1992. But even allowing that such a defence is in some sense sometimes available, I think it clear that there is no room for it in the present context. Parliament has gone to considerable lengths in s221(2) in describing with precision the defences which will be allowed. It is not to be supposed that Parliament also intended to allow for something larger and less well defined.

51. The history of the legislation bears that out. Section 221 derives from s31 of the *Railways Act* 1958, as amended by s2 of the *Railways (Offences) Act* 1969 and, before that, s31 of the *Railways Offences Act* 1928 (which re-enacted without change s31 of the *Railways Act* 1915). In its original form, s31 of the *Railways Act* was directed to the intentional evasion of payment of a fare and thus intent to evade payment was an essential element of the offence which s31 created. The amendments made in 1969, however, removed the necessity for intent, and made the offence one of strict or absolute liability, subject only to a defence for a traveller who proved that he intended to obtain a ticket valid in respect of the journey in question and that he took all reasonable steps to obtain such a ticket. When the *Railways (Offences) Bill* was read a second time, the Minister explained that the changes were indeed intended to overcome the need to prove intent, and thus to aid conviction, and that the defence of taking all reasonable steps was being included to cover the position of those passengers – whom he described as a small percentage of total passengers – who board a train at a station where the booking office is not open.

52. As has been seen, s221 of the *Transport Act* 1983 eschewed the requirement for a passenger to prove that he or she had the intent of purchasing a ticket, but it maintains the essential structure of the strict liability offence created by the *Railways (Offences) Act* and it adds as essential elements of the statutory defence both that reasonable efforts to purchase a ticket be made *prior* to commencing the journey and that there be no reasonable opportunity to purchase a ticket on board. ..."

Per Nettle J in *Mounsey v Lafayette* [2002] VSC 342; (2002) 37 MVR 256; MC 26/2002, 6 September 2002.

(r) Poisoning of native trees in contravention of statutory planning controls – whether mens rea an element of the offence

DC was the owner of land on which 33 native trees were poisoned contrary to two sets of provisions contained in a Planning Scheme relating to protection of native vegetation generally and specifically. After a charge was laid against DC alleging a breach of s126 of the *Planning and Environment Act* 1987 ('Act'), the Magistrate rejected submissions that the prosecution was required to prove that DC committed a positive act in breach of the planning scheme or that the breach occurred with the knowledge of DC. The Magistrate convicted DC and imposed an aggregate penalty of \$40,000. Upon appeal—

HELD: Appeal dismissed. The Magistrate was correct to reject both submissions.

1. The Magistrate was correct to conclude that it was not necessary for the prosecution to establish either that the owner caused the poisoning to occur, or that it knew of the behaviour breaching the scheme.

2. The language and statutory context of the section supported this view; there was an absence of language in s126 suggesting the contrary; the subject matter of the statute was the regulation of land use in the public interest, including the conservation of native vegetation and the maintenance of ecological processes and genetic diversity; that subject matter was properly characterisable as regulatory and involving matters of public interest of a kind in which statutory offences have been recognised which did not require proof of *mens rea*; the imposition of liability without proof of *mens rea* would directly respond to difficulties of proof otherwise inherent in effective enforcement of the planning scheme, would impose a burden upon owners in circumstances where owners ordinarily have a capacity to manage what occurs on their land, and would have a general deterrent effect; and, lastly, neither the gravity of the offence, nor the penalty applicable, supported the view that Parliament intended *mens rea* be a necessary element of the offence.

He Kaw Teh v R [1985] HCA 43; (1985) 157 CLR 523; (1985) 60 ALR 449; (1985) 59 ALJR 620; (1985) 15 A Crim R 203; [1986] LRC (Crim) 553, discussed.

Per Osborn J:

"... **The subject matter of the statute**

21. The purpose of the empowering legislation and of the native vegetation controls is one of the public interest and social seriousness: Cf *Allen v United Carpet Mills Pty Ltd* [1989] VicRp 27; [1989] VR 323, per Nathan J; and *Wilson v Gahan* [1999] VSC 72 per Warren J, as she then was. In *Director General of Department of Land and Water Conservation v Greentree* [2003] NSWCCA 31; (2003) 131 LGERA 234; (2003) 140 A Crim R 25, the New South Wales Court of Appeal stated of broadly analogous provisions:

The focus of these objects is the protection, maintenance and enhancement of native vegetation. The Act is intended to prevent activities that destroy or harm native vegetation and to promote activities that enhance it. Such objects suggest that sections like section 21(2) which are included to achieve those objects should be read, in the absence of language to contrary effect, as imposing strict liability.

22. In that case, the Court of Appeal held that *mens rea* was not an element of the offence charged under s21(2) of the *Native Vegetation Conservation Act 1997* (NSW), which was expressed in the following terms:

A person must not clear native vegetation on any land except in accordance with:

- (a) a development consent that is in force; or
- (b) a native vegetation code of practice.

23. Section 126 itself raises broader issues of proper and orderly planning than provisions solely concerned with native vegetation. It relates to the enforcement of the P&E Act as a whole and of the planning scheme as a whole. Nevertheless, the native vegetation controls exemplify controls which are of value to the community as a whole and go beyond seeking to preserve and enhance the value of a particular site for its own sake.

24. Conversely, s126 is not concerned with offences of a gravely criminal kind, in respect of which it might be expected that Parliament intended *mens rea* to be an element: Cf *He Kaw Teh* [1985] HCA 43; (1985) 157 CLR 523 per Gibbs CJ, 535; (1985) 60 ALR 449; (1985) 59 ALJR 620; (1985) 15 A Crim R 203; [1986] LRC (Crim) 553.

25. Further, legislation of the type in issue is properly to be regarded as regulatory in nature. As the Magistrate observed, when offences are created to regulate social or industrial conditions, planning, the environment, or public safety, they are more easily regarded as imposing strict or absolute liability.

The utility of displacing the presumption of *mens rea*

26. First, land use legislation governing environmental protection and conservation of natural resources, in particular, has been held to impose situational liability in a number of other instances, including the New South Wales cases cited by the Magistrate: *Environment Protection Authority v Werris Creek Coal Pty Ltd*; *Environment Protection Authority v Holley* [2009] NSWLEC 124; *Barbara Filipowski v Vopak Terminals Sydney Pty Ltd* [2006] NSWLEC 104. The utility of this approach has been widely accepted.

27. Secondly, whereas the identity of those involved in the act of poisoning trees may be difficult to prove, its effects will not be. Many other potential breaches of the planning scheme, such as the demolition of protected buildings, removal of top soil and the carrying out of earthworks, may involve similar practical realities. There is a plain and obvious utility in making such provisions enforceable against the owner of land, who will normally have a degree of ongoing control over his or her land and the activity which occurs upon it. Conversely, if the section were to be read as regulating only acts in breach of the scheme which could be positively proven to have been undertaken by a particular individual or individuals, its utility would be materially impaired: Cf the observations of Viscount Dilhorne in *Alphacell v Woodward* [1972] UKHL 4; (1972) AC 824, 839; [1972] 2 All ER 475; [1972] 2 WLR 1320 (a case of industrial pollution of a river).

28. Her Honour did not err in holding as part of her reasons that owners of land are in a position to take steps to improve the control which they exercise over the activity that occurs on their land (when a statutory control such as that which is in issue is implemented). This is the ordinary corollary of ownership.

29. The current provisions of the P&E Act were preceded by s49(1) of the *Town and Country Planning Act 1961*, which provided:

Any person who contravenes or fails to comply with any provision of this Act or of any interim development order or planning scheme or any condition of a permit under such an order or scheme and the owner of any land in relation to which any such contravention or failure occurs shall, without prejudice to any other consequences which arise under this Act by reason of

such contravention or failure, be guilty of an offence against this Act and severally liable to a penalty of not more than One hundred pounds and, where the contravention or failure is of a continuing nature, to a further penalty of not more than Ten pounds for every day during which the contravention or failure continues after conviction.

This provision was the basis of the prosecution against the owner forming part of the subject matter of *Davey v Brightlite Nominees Pty Ltd* [1984] VicRp 76; [1984] VR 957; (1984) 56 LGRA 274. It has been a longstanding legislative policy to impose liability for compliance with planning legislation upon landowners.

30. In turn, the general deterrent effect of s126 will be materially enhanced if it is given the construction for which the council contends.

The nature of the penalty

31. The fact that the legislation provides for penalty by way of fine only, and not by imprisonment, also tends to support the conclusion that Parliament intended s126(2) to impose strict or absolute liability upon an owner by way of a status offence. Conversely, where an offence provides for imprisonment, that will tend to favour the contrary conclusion.

32. The submissions made on behalf of DC by reference to *He Kew Teh* are misconceived. The effect of the scheme of the section is not necessarily draconian. If the owner establishes by positive evidence on the balance of probabilities that he or she had no knowledge of the offending conduct, then that fact will go strongly to penalty. In other words, the fact that the prosecution need not prove knowledge on the part of the owner to establish the offence does not mean that positive proof of absence of knowledge will not bear on the outcome, including the question whether a conviction should be recorded.

Conclusion as to mens rea

33. For the above reasons, the Magistrate was correct to conclude that it was not necessary for the prosecution to establish either that the owner caused the poisoning to occur, or that it knew of the behaviour breaching the scheme.

34. In summary, the language and statutory context of the section support this view; there is an absence of language in s126 suggesting the contrary; the subject matter of the statute is the regulation of land use in the public interest, including the conservation of native vegetation and the maintenance of ecological processes and genetic diversity; that subject matter is properly characterisable as regulatory and involving matters of public interest of a kind in which statutory offences have been recognised which do not require proof of *mens rea*; the imposition of liability without proof of *mens rea* will directly respond to difficulties of proof otherwise inherent in effective enforcement of the planning scheme, will impose a burden upon owners in circumstances where owners ordinarily have a capacity to manage what occurs on their land, and will have a general deterrent effect; and, lastly, neither the gravity of the offence, nor the penalty applicable, support the view that Parliament intended *mens rea* be a necessary element of the offence. ..."

Per Osborn J in *DC Consolidated Investments Pty Ltd v Maroondah City Council* [2011] VSC 634; MC 47/2011, 8 December 2011.

(s) Whether voluntariness an element of the offence – application of principle of legality to interpretation of statutory offences, including driving offences

HELD: Appeal allowed. Orders of the judge quashed. Remitted to the judge for hearing and determination according to law.

1. On the authorities, it is a basic and fundamental principle of the common law that a person is criminally responsible only for their conscious and voluntary acts. The prosecution must therefore establish beyond reasonable doubt that the act constituting the alleged crime was done in the exercise of the accused's will to act. As there is an evidentiary presumption of voluntariness, it is not usually necessary for the prosecution to supply express proof of this element. But where the issue is legitimately raised, the prosecution must prove beyond reasonable doubt that the accused's acts were conscious and voluntary. These general principles apply equally to statutory offences, including driving offences, subject to contrary provision.

Ryan v R [1967] HCA 2; (1967) 121 CLR 205; [1967] ALR 577; 40 ALJR 488; and

R v O'Connor [1980] HCA 17; (1980) 146 CLR 64; (1980) 29 ALR 449; (1980) 4 A Crim R 348; (1980) 54 ALJR 349, applied.

2. The provisions of s56(2) of the *Road Safety Act* 1986 ('Act') do not expressly abrogate the principle

of voluntariness. Nor do the provisions implicitly abrogate that principle. There is nothing in the language of s56(2), the context of the section or the legislation as a whole or the legislative purpose to suggest unmistakably and unambiguously that the provisions should be interpreted so as to abrogate the principle. In s56(2), the word 'allow' is a verb meaning 'permit'. The person 'must allow' the sample to be taken, which compels them actively to permit the sample to be taken. The active step of allowing, in the sense of permitting, a sample to be taken can only be taken by someone acting consciously and voluntarily. Their intention is not relevant, but their acts must be conscious and voluntary.

Meertens v Falkenberg (1981) 92 LSJS 202, Supreme Court of South Australia – Full Court, King CJ, Sangster and Legoe JJ, 13 March 1981, followed.

3. It is an element of the offence specified in s56(2) of the Act that the accused consciously and voluntarily refused to allow the taking of the sample. Where the matter is not legitimately in issue, the prosecution may prove that element by relying on the evidentiary presumption of voluntariness. Where the matter is legitimately an issue, as it was in the present case, the prosecution was required to prove the element on the evidence beyond reasonable doubt. The trial judge erred in law on the face of the record in deciding otherwise.

R v Carter [1959] VicRp 19; [1959] VR 105; [1959] ALR 335, followed.

Per Bell J:

"... 40. On these authorities, it is a basic and fundamental principle of the common law that a person is criminally responsible only for their conscious and voluntary acts. The prosecution must therefore establish beyond reasonable doubt that the act constituting the alleged crime was done in the exercise of the accused's will to act. As there is an evidentiary presumption of voluntariness, it is not usually necessary for the prosecution to supply express proof of this element. But where the issue is legitimately raised, the prosecution must prove beyond reasonable doubt that the accused's acts were conscious and voluntary. These general principles apply equally to statutory offences, including driving offences, subject to contrary provision.

Per Bell J in *Dover v Doyle* [2012] VSC 117; (2012) 34 VR 295; MC 08/2012, 29 March 2012.

(t) Use of unregistered motor vehicle – referral to Magistrates' Court – during hearing certificate tendered to the court – certificate did not contain all prescribed particulars – whether absolute liability offence

1. *Obiter*. In relation to the criteria for determining whether the defence of honest and reasonable mistake of fact is available, the first criterion is consideration of the words of the statute creating the offence; the second criterion is consideration of the subject matter of the statute. The third criterion is whether subjecting the defendant to absolute liability will assist in the promotion of observance of the relevant statute. The fourth criterion is that where a statute creates an offence for the purpose of regulating social conditions and public safety and where the penalty attached to a statutory offence is monetary and moderately sized, the statute is more easily regarded as imposing absolute liability.

He Kaw Teh v R [1985] HCA 43; (1985) 157 CLR 523; (1985) 60 ALR 449; (1985) 59 ALJR 620; (1985) 15 A Crim R 203; [1986] LRC (Crim) 553, applied.

2. In relation to the first criterion, the language of s7 of the *Road Safety Act* 1986 ('Act') as a whole strongly indicated that an offence against s7(1)(a) was one of absolute liability.

3. In relation to the second criterion, the Act was concerned with road use, registration of vehicles and trailers and licensing. Issues of public safety will often arise which indicated that the subject matter of the offence was a matter of social seriousness but did not involve grave moral fault and was not criminal in any real sense.

4. The third criterion was whether absolute liability would assist in the observance of the statute. The fact that the legislature had chosen to penalise drivers who may not have owned the vehicle they were driving indicated a legislative intent to cast a wide and effective net. To penalise drivers as well as owners indicated that the purpose of s7(1) of the Act as a whole was to keep as many unregistered (and potentially unsafe) vehicles as possible off the roads. That purpose was furthered by an absolute liability offence for drivers as well as owners. The absence of an honest and reasonable mistake defence should have encouraged drivers who had doubts about the registration of a vehicle to refuse to drive the vehicle without some objective proof of

its registration. On the other hand, if the defence were available, the prosecution of the offence could have become very difficult.

5. In relation to the fourth criterion, there was no doubt that the object which the Act was designed to achieve was to secure the public welfare and to promote the safety of the public. The legislature must have been taken to have subordinated the interests of individuals to the interests of the public and to have intended that any hardship resulting to an individual by the application of the ordinary rule of interpreting a statutory provision in accordance with its natural and literal meaning, and by the imposition of strict liability for infringement of the particular section, was to give way to the public interest. If no current registration label was affixed, the prudent course was not to drive the vehicle. Further, the monetary penalty was a moderate one and no stigma attached to a conviction for this regulatory offence. Finally, no prison sentence was prescribed for the offence.

6. Having regard to these matters, an offence against s7(1)(a) of the Act was an offence of absolute liability for which the defence of honest and reasonable mistake was not available.

Pilkington v Elliott [1991] VicSC 510; MC 20/1997, followed.

Per Cavanough J:

"... 80. Mr Tsolacis relies on *Pilkington v Elliot* [1991] VicSC 510, unreported, Supreme Court of Victoria, Coldrey J, 27 September 1991, which concerned a charge under s7(1)(b) of the RSA of owning an unregistered vehicle used on a highway. Mr Tsolacis relies particularly on the following passage in the judgment of Coldrey J:

The words of s7 simply prohibit a person owning a motor vehicle or trailer which is used on a highway and is unregistered. On its face the clear and concise language in which the provision is couched, together with its objective form, clearly indicate, in my view, a legislative intention to impose strict liability upon the owner of an unregistered vehicle used on a highway.

81. Mr Tsolacis submits that Coldrey J found that an offence under s7(1)(b) is a "strict liability offence" and that, therefore, the defence of honest and reasonable mistake of fact is available. He submits that, by analogy, the defence is also available for an offence of using an unregistered vehicle contrary to s7(1)(a).

82. Mr Tsolacis' submission is plainly misconceived. As Coldrey J himself noted, the terms "strict liability" and "absolute liability" are often used interchangeably. In the passage quoted above, Coldrey J was saying, in effect, that the offence created by s7(1)(b) was one of absolute liability. This is obvious, because Coldrey J went on to say that 'honest and reasonable mistake is not a defence to a charge under s7(1)(b)'; and because it was common ground that there was no requirement to prove *mens rea* in the ordinary sense of intent or guilty knowledge.

... 85. In finding that the offence of owning an unregistered vehicle used on a highway was not subject to the defence of honest and reasonable mistake, Coldrey J referred to certain additional authorities and took into account several factors. His Honour observed that it was beyond argument that the RSA is concerned with public safety. This weakened the presumption that the defence was available. Coldrey J also found the offence in s7(1)(b) to be a 'regulatory offence', punishable by a monetary penalty. His Honour noted that no stigma attached to a conviction; that a defendant was able to comply with the subsection with relative ease; and that the owner of a vehicle is in a unique position to ensure that it is registered. His Honour also observed that absolute liability would assist enforcement of the subsection, as car owners would usually be in a position to ensure that their practices promoted the observance of the subsection.

86. Although Coldrey J acknowledged that the imposition of absolute liability could create hardship in some cases (for example, if an unregistered vehicle was stolen and driven on a highway), such injustices could be avoided by the sensible exercise of prosecutorial discretion and by the court's ability to dismiss any charge as trifling.

87. Mr Tsolacis has not submitted in terms that the judgment of Coldrey J in *Pilkington v Elliot* was wrong. However, having regard to Mr Tsolacis' unrepresented status, I have considered that question. I would only be justified in declining to treat *Pilkington v Elliot* as correctly decided if I was satisfied that it was "clearly wrong": *Tomasevic v Travaglini* [2007] VSC 337; [2007] 17 VR 100 (Bell J) at 105 [21]-[24] and cases there cited; *Engbretson v Bartlett* [2007] VSC 163 (Bell J) at [63]; (2007) 16 VR 417; (2007) 172 A Crim R 304. I am far from being so satisfied. Indeed, in my view, his Honour's conclusion was correct, for the reasons his Honour gave. I note that the judgment has stood unchallenged for some 20 years now.

MENS REA/STRICT LIABILITY/ABSOLUTE LIABILITY

... 91. In my view, the overwhelming weight of authority in this Court compels me to hold that the decision of Coldrey J in *Pilkington v Elliot* was and remains correct in law. I propose to follow it.

... 95. Although some of Mr Tsolacis' submissions have some force, in the end I am not satisfied that they lead to the conclusion that the defence of honest and reasonable mistake is available for an offence against s7(1)(a) of the RSA.

... 110. I recognise, as did Coldrey J in *Pilkington v Elliot* and Walters J in *Franklin v Stacey* (1981) 27 SASR 490, that any offence of absolute liability may give rise to an unjust situation in some cases. Nevertheless, I concur with the comments of Walters J that, in matters of public safety, and particularly road safety, it is not surprising that the legislature would choose to subordinate the interests of individuals to the public interest. I also echo the comment of Coldrey J that any injustice can be avoided by the sensible exercise of either prosecutorial or sentencing discretion. In the absence of the defect in the certificate, this very case would have presented an example.

111. For all of those reasons, it is my view that an offence against s7(1)(a) of the RSA is an offence of absolute liability for which the defence of honest and reasonable mistake is not available. ..."

Per Cavanough J in *Tsolacis v McKinnon* [2012] VSC 627; MC 01/2013, 21 December 2012.

(u) Whether intention of accused to commit an indecent act in presence of child known to be underage was an element of offence – whether honest and reasonable mistake as to age was a defence

1. Whether intention or knowledge apply to elements of a statutory offence turns on the interpretation of the provision in question. Whether honest and reasonable mistake of fact is a defence also raises a question of statutory interpretation. According to the applicable principles, there is an interpretative presumption that intention and knowledge must be proved in respect of all of the elements or, if not that, then honest and reasonable mistake is a defence, subject to Parliament's plain contrary intention. When considering whether that plain contrary intention is indicated, the court examines the subject matter and the purpose of the legislation, the terms of the legislation and whether criminal liability without intention or knowledge, or honest and reasonable mistake as a defence, would promote observance of the legislative scheme.

2. After examining these matters, the trial judge was correct in deciding that, in respect of the age ingredient, intention and knowledge were not elements of the offence and honest and reasonable mistake was not a defence. The purposes of s47(1) of the *Crimes Act* 1958 are to protect children under the age of 16 years from exposure to indecent acts and to deter potential offenders from engaging in such acts in places where children might be. The purpose of the provision is as much to protect children from themselves as it is to protect them from others. Those purposes and promoting observance of the legislative scheme (among other things) plainly indicate that Parliament intended the offence to be one of absolute liability in relation to the age ingredient. Persons who commit indecent acts in places where children might be do so at their own peril.

3. In reaching this conclusion, the Court took into account that it is possible for potential offenders to take reasonable precautions to avoid criminal liability. On the interpretation which was plainly intended by Parliament, it was not possible to offend against s47(1) by accident. To be convicted, the accused must have intended to commit an indecent act. Potential offenders can avoid liability by not committing such acts in places where children might be. So interpreted, the provision imposes on persons an obligation to take greater than usual care to avoid criminal liability. Parliament has deliberately imposed that obligation to take greater than usual care in order to protect children from others and also to protect children from themselves. This interpretation accords not just with Parliament's plain intention but also with decisions of the Full Court of the Supreme Court in relation to similar statutory provisions.

Per Bell J:

"... **'Absolute' and 'strict' liability offences**

12. The question is whether s47(1) of the *Crimes Act* requires the prosecution to prove against an accused person that he or she had a guilty mind in respect of the age of the complainant, that is, that the accused intentionally committed the indecent act knowing that the complainant was under the age of 16 years. The second defendant contends that, as the trial judge held, the offence requires no such proof and is wholly established if the accused intentionally committed the act which was indecent, whether or not he or she knew that the complainant was under that age. In the catalogue of offences, that would make the offence in s47(1) an 'absolute liability' offence: *He Kaw Teh v The*

Queen [1985] HCA 43; (1985) 157 CLR 523, 590; (1985) 60 ALR 449; (1985) 59 ALJR 620; (1985) 15 A Crim R 203; [1986] LRC (Crim) 553 (Dawson J).

13. The plaintiff contends that proof of a guilty mind is required or, if not that, then honest and reasonable mistake as to age is a defence. Here we are using the term 'defence' not in the pure technical sense but in that loose sense which is conveniently used to describe an honest and reasonable belief by the accused in a state of affairs which, if true, would take the accused's act 'outside the operation of the enactment' and be 'a ground of exculpation'. That would make the offence in s47(1) a 'strict liability' offence: *CTM v The Queen* [2008] HCA 25; (2008) 236 CLR 440, 446 [6]; (2008) 247 ALR 1; (2008) 185 A Crim R 188; (2008) 82 ALJR 978 (Gleeson CJ, Gummow, Crennan and Kiefel JJ).

14. The answer to this question depends on the proper interpretation of the provisions of s47 as to which a general presumption applies in favour of intention and knowledge being an element of the offence or, if not, mistake being a defence. The question is whether the presumption has been displaced. The answer is not free from difficulty.

15. It is convenient to address the question under three headings. Now I will consider the principles governing the general presumption of interpretation, where there is much to find in support of the plaintiff's case. Next I will consider the Victorian legislation historically, and previous decisions of the Full Court of this court, where there is much to find against the plaintiff's case. Later I will apply the general principles to the interpretation of the provisions of s47, on which the determination of the question in issue depends.

General presumption of interpretation

16. The general presumption was stated in the High Court of Australia in the earliest days of federation by Griffith CJ in *Hardgrave v The King* [1906] HCA 47; (1906) 4 CLR 232; 13 ALR 206:

The general rule is that a person is not criminally responsible for an act which is done independently of the exercise of his will or by accident. It is also a general rule that a person who does an act under a reasonable misapprehension of fact is not criminally responsible for it even if the facts which he believed did not exist.

17. This statement of the presumption reflected the common law, which had been authoritatively stated in the United Kingdom several years earlier by Wright J in *Sherras v De Rutzen* [1895] 1 QB 918; 11 TLR 369.

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

18. Wright J went on to specify three classes of case in which the presumption might be displaced:

- (i) acts which 'are not criminal in any real sense, but are acts which in the public interest are prohibited under a penalty';
- (ii) acts which are 'public nuisances'; and
- (iii) 'cases in which, although the proceeding is criminal in form, it is really only a summary mode of enforcing a civil right'.

In the plaintiff's submission, the present case falls into none of these categories and we are here dealing with an example of a true statutory crime. I accept that submission. Indeed the crime is a serious one.

20. So it is understandable that in *Proudman v Dayman* [1941] HCA 28; (1941) 67 CLR 536, Dixon J described the presumption as 'but a weak one'. However, reflecting the ever increasing number of statutory offences, more stringent attention has recently been given to the presumption by the courts. For example, in *He Kaw Teh v The Queen* [1985] HCA 43; (1985) 157 CLR 523; (1985) 60 ALR 449; (1985) 59 ALJR 620; (1985) 15 A Crim R 203; [1986] LRC (Crim) 553, Gibbs CJ emphasised that interpretation of statutory offences in accordance with the presumption was required by 'the general principles of the common law which govern criminal responsibility'. Similarly, in the more recent case of *CTM v The Queen* [2008] HCA 25; (2008) 236 CLR 440; (2008) 247 ALR 1; (2008) 82 ALJR 978; (2008) 185 A Crim R 188, Gleeson CJ, Gummow, Crennan and Kiefel JJ said the presumption involved 'a basic legal principle of criminal responsibility which informs our understanding, and interpretation, of the criminal law'. The plaintiff presented his case in the context of this recent emphasis on the application of the presumption.

21. The rationale of the presumption is that it is repugnant to basic and long-accepted notions of

criminal responsibility to hold a person to be guilty of a crime without some element of mental fault, such as intention or knowledge.

22. In the emphatic words of Hayne J in *CTM* (*supra*):

To read a statute which creates a statutory offence that forms part of the general criminal law as subject to the general principles according to which the criminal law is administered does no more than reflect the fact that '[s]ociety and the law have moved away from the primitive response of punishment for the *actus reus* alone'. It avoids what has been called 'the public scandal of convicting on a serious charge persons who are in no way blameworthy'. And '[i]t is now firmly established that *mens rea* is an essential element in every statutory offence unless, having regard to the language of the statute and to its subject matter, it is excluded expressly or by necessary implication'.

... 96. In conclusion, the history of Victoria's sex offences legislation and the previous decisions of the Full Court of this court suggest that it was the plain intention of Parliament that intention or knowledge in respect of the complainant's age was not required to prove a charge of offending against s47(1) of 1958 Act, and mistake as to age was not to be a defence. However, the previous decisions of the Full Court preceded the decision of the High Court in the now leading authority of *He Kaw Teh*. The tests enunciated by the High Court in that case (and applied in *CTM*) require the court to examine the question by reference to the provisions which are in issue, taking into account particular considerations. To that task I now turn.

... 106. According the authorities which I have discussed, there is a presumption of interpretation that intention or knowledge is an ingredient of all of the elements of the offence in s47(1) or, if not that, then honest and reasonable mistake as to age is a defence, unless Parliament has plainly revealed a contrary intention expressly or by necessary implication. In determining whether that contrary intention is plainly revealed, it is necessary to examine the subject matter and purpose of the legislation creating the offence, the terms of the legislation and whether criminal liability without intention or knowledge, or honest and reasonable mistake of age as a defence, would promote the observance of the legislative scheme.

... 122. It is clear that s47(1) does not create an absolute liability offence in every respect. To offend against that provision, a person must 'wilfully' commit an indecent act with or in the presence of a child. The word 'wilfully' conveys the sense that the act must be committed intentionally and knowingly. This requirement for intention and knowledge clearly applies to the 'indecent' nature of the act. The accused must commit the act intentionally and knowingly in that respect. The accused cannot be convicted if the act was committed accidentally. The question is, does the word 'wilfully' also apply to the age of the child such that intention and knowledge in respect of that age is an ingredient of the offence or that mistake as to age is a defence.

123. The fact that s47 does not create an absolute liability offence in all respects assists the plaintiff's case to a certain extent in relation to the age ingredient. The act must be committed intentionally and knowingly in relation to the indecency ingredient. If Parliament's reasoning was consistent, as is natural to think, the intention would more likely be that the act must be committed with intention and knowledge in relation to the age ingredient as well.

124. However, it does not automatically follow from the presence of one element of an offence requiring intention and knowledge that the other elements of the offence have the same requirement. That principle was stated by Black CJ in *Chief of the General Staff v Stuart* [1995] FCA 1746; (1995) 58 FCR 299; (1995) 133 ALR 513; 84 A Crim R 529:

In determining whether in a provision such as s44 the presumption has been displaced, and to what extent it has been displaced, I see no reason why different elements of an offence should necessarily be treated in the same way: see *He Kaw Teh* [1985] HCA 43; (1985) 157 CLR 523, 568; (1985) 60 ALR 449; (1985) 59 ALJR 620; (1985) 15 A Crim R 203; [1986] LRC (Crim) 553 (Brennan J). ... Although it is convenient to be able to classify an offence in its entirety as one of 'strict' or 'absolute' liability, the task is one of construction and it is by no means inevitable that the application of the same principles of construction should produce the same result with respect to each ingredient in an offence: (1995) 58 FCR 299, 305; (1995) 133 ALR 513; 84 A Crim R 529.

... 148. The subject matter of s47(1) is the offence of committing an indecent act in the presence of a child under the age of 16 years. The cardinal purposes of the provision are protecting children from such acts, which includes protecting children from themselves, and deterring potential offenders. Imposing on potential offenders a duty of greater vigilance to avoid liability is consistent with the nature of the offence and the purpose of the provision: for the effective protection of children from indecent acts which children may in their immaturity seek out, the provision requires potential

offenders to do more than usually required to avoid exposing children to such acts. Absolute liability promotes the observance of the provision in this way. Strict liability would do so to a significantly lesser extent. The force of this consideration is not as great in the case of child offenders who themselves may lack decision-making maturity. But the main target of the provision is the adult offender from whom children need protection most.

Presumption displaced

149. The subject matter and purpose of the legislation, the terms of the legislation and promoting observance of the legislative scheme plainly indicate by necessary implication that the interpretative presumption has been displaced and that Parliament intended the crime in s47(1) to be one of absolute liability in respect of the age ingredient. In cases not involving consent as covered by s47(2), honest and reasonable mistake of age is not available as a defence and the judge was correct to so conclude. The plaintiff's application for judicial review of his convictions and sentences on the charges relating to the first and second complainants will be dismissed."

Per Bell J in *Azadzoï v County Court of Victoria & Kara Roden* [2013] VSC 161; MC 24/2013, 12 April 2013.

(v) Probationary driver failed to display P plate – whether honest and reasonable mistake as to presence of P plate relevant to proof of offence.

S., who was employed as a tow truck driver, was a holder of a probationary driver licence at the time and that his tow truck did not have a P plate displayed facing out from the front. S. was issued with an infringement notice which was contested by S. at the Magistrates' Court where he was convicted of the offence and fined \$152 plus statutory costs of \$73.30. Upon appeal to the County Court, the judge took the view that the *Proudman v Dayman* defence was available on the evidence as to whether S. had an honestly and reasonably held belief that a P plate was affixed to the front of his vehicle. As a result, the information was dismissed. Upon appeal—

HELD: County Court decision set aside and remitted to the County Court for hearing and determination according to law.

1. The issue as presented on the originating motion was whether the offence created by reg 55(1) of the RSDR should be classified as one of absolute liability, or strict liability where the defence of honest and reasonable mistake was available.

2. It is a principle at common law that an honest and reasonable, but mistaken belief in a set of facts which if they existed would have made the defendant innocent, provides a ground of exculpation. The evidentiary onus of raising the ground is on the defendant. Once that occurs, the legal onus lies on the prosecution to prove beyond reasonable doubt the absence of an honest and reasonable belief.

3. The contextual framework and content of the Road Safety Act and RSDR is multifactorial but has public safety and road safety at its core. The safety of the public is served by achieving the objective that probationary drivers be subject to a highly regulated scheme in which police and other road users are able to identify a probationary driver through the display of P plates.

4. Reg 55(1) has an important role to play as part of the wider scheme. Considered in that light, the offence under consideration was less readily distinguishable from offences involving excessive speed, drink driving and the like.

5. The mischief to which reg 55(1) is directed is risky driving behaviour by young and/or inexperienced drivers. Its purpose is regulatory and assists authorities in enforcing the restrictions placed on probationary drivers, viz pt 2 div 6, by providing police and other road users a means of easily identifying probationary drivers.

6. The public safety purpose of the regulation, when interpreted as part of the graduated licensing scheme as a whole, was relevant to concluding that reg 55(1) is intended to impose absolute liability.

7. Accepting the soundness of the reasoning in *Welsh v Donnelly*, the distinguishing features of reg 55(1) are relatively slight. They appear to turn on the absence of a specific statutory proviso or defence and the fact that the mischief at which the regulation is aimed may be seen as less directly connected to a road safety purpose. But in light of the analysis that the Road Safety Act and RSDR promulgate a scheme for probationary licensing in which public safety is enhanced through the interplay of interconnected provisions, reg 55(1) nevertheless plays an important role in achieving that purpose. The application of this criterion tends in favour of the imposition of absolute liability for breach of reg 55(1).

8. The practical realities of the requirement posed by reg 55(1) lead one to conclude that the commission of the offence is largely avoidable by a conscientious probationary driver, and that pragmatism dictates that the interests of the individual be subjugated to the welfare of the public as a whole if the graduated licensing scheme is to operate effectively.

9. It was concluded that an honest and reasonable, but mistaken, belief that a P plate was displayed facing out from the vehicle was not relevant to proof of the offence created by reg 55(1) of the RSDR. In other words, absolute liability applied to that element of the offence.

Per Jane Dixon J:

"111. Accepting the soundness of the reasoning in *Welsh v Donnelly*, the distinguishing features of reg 55(1) are relatively slight. They appear to turn on the absence of a specific statutory proviso or defence and the fact that the mischief at which the regulation is aimed may be seen as less directly connected to a road safety purpose. But in light of my analysis that the RSA and RSDR promulgate a scheme for probationary licensing in which public safety is enhanced through the interplay of interconnected provisions, reg 55(1) nevertheless plays an important role in achieving that purpose.

112. The application of this criterion tends in favour of the imposition of absolute liability for breach of reg 55(1)....

119. Nevertheless, the Full Court in *Welsh v Donnelly* had in mind that the common law presumption of *mens rea* was weaker for a regulatory offence under the *Motor Car Act 1958*, in contrast to an offence of a truly criminal character, and that the legislature must be taken to have subordinated the interests of individuals to the wider public in light of the subject matter and objects of the legislation. I can detect no basis in principle to form a different view about the regulation I am asked to construe. It is quite apparent, as submitted by the plaintiff, that the offence under consideration is regulatory in nature, and not truly criminal, carrying a modest penalty, no risk of gaol, and no significant stigma. These factors point in favour of absolute liability when considered in combination with the other matters already discussed.

Conclusion

120. For the above reasons, in answer to the issue in this proceeding identified at [19], I conclude that an honest and reasonable, but mistaken, belief that a P plate is displayed facing out from the vehicle is not relevant to proof of the offence created by reg 55(1) of the RSDR. In other words, absolute liability applies to that element of the offence. ...

Per Jane Dixon J in *DPP v Stanojlovic* [2017] VSC 540; MC 47/2017, 12 September 2017.

**Patrick Street LL B, Dip Crim
18 September 2017**