

PART IX – STRICT AND ABSOLUTE LIABILITY

I Introduction

A Historical Context

Criminal liability attaches to the commission of a prohibited consequence with a particular mental state. In addition to laws creating offences themselves, laws of criminal liability specify how and in what circumstances responsibility attaches to the commission of an offence. Laws of criminal liability are not offences in themselves, but underlie the interpretation and application of specific offences in criminal trials.

The development of legislation as the dominant criminal and regulatory framework has seen issues of criminal liability arise out of the ambiguous or inconsistent language used to construct statutory offences. Statutes pose problems because they do not always structure criminal liability in terms of prohibited consequences and mental states, and depart from the recognised structure of criminal liability at common law.

The issue underlying these problems of interpretation is whether the legislature has defined an offence that does not require the prosecution to prove the existence of a prohibited mens rea, or whether the requirement lingers implicitly.

By the mid 19th century, offences were increasingly defined by statute. For the past century, Australian criminal law has become decreasingly reliant on the common law. Many offences have been created without a component of mens rea (eg, exceeding a speed limitation). However, delimiting offences that do not require mens rea from those that do can be problematic.

Three main structures of criminal liability are presently recognised by the Australian criminal legal tradition. The High Court in *He Kaw Teh* created a tripartite division of crimes:

- Crimes of mens rea
 - Defined by reference to consequences *and* subjective mental standards
 - The accused cannot be convicted unless they possess the required mental state (eg, intention or recklessness for murder) or some substitute for it (eg, constructive murder)

- Crimes of strict liability
 - Defined by reference to the doing of the prohibited conduct or the causing of the prohibited consequences
 - Prima facie, criminal liability attaches proof that the actus reus has been committed (ie, voluntarily)
 - The prosecution need not prove fault
 - Only the physical elements of the crime are necessary to prove
 - Defined by Parliament in legislation
 - A general defence exists (*Proudman v Dayman*):
 - Honest and reasonable mistake of fact is legally available to the accused
 - Where the accused is labouring under an honest and reasonable mistake of fact as to circumstances which, if they existed, would have meant no offence was committed, the accused will not be guilty of the offence
 - The onus is on the defence to raise sufficient evidence to be considered relevant; having done so, the onus shifts to the prosecution to disprove the defence beyond reasonable doubt

- Where the accused satisfies their burden of proof (to adduce evidence of a mistake), if the prosecution does not disprove the defence, then the accused will be fully exonerated
- Crimes of absolute liability
 - Defined by reference to the doing of the prohibited conduct or the causing of the prohibited consequences
 - The conduct or consequences in and of themselves create criminal liability
 - Of course, the accused can still raise arguments to defeat the actus reus
 - Eg, involuntariness, duress, etc
 - No defence of honest and reasonable mistake of fact applies
 - Because of the relative ease with which criminal liability attaches to conduct, these offences are rare

B *Theoretical Analysis*

Several policy arguments exist in favour of the creation of offences of strict and absolute liability:

- The penalties imposed by such offences are not that severe, so it is an acceptable way to regulate social conduct
- The conduct constituting the actus reus must obviously be voluntary; however, dispensing with mens rea means minimum standards of behaviour can be easily imposed and enforced on thoughtless (or resourceful) individuals
- Justifiable to presume fault: regulatory offences need to set minimum standards for the common good
- Prosecutions under strict liability offences are simplified and more efficient, particularly where they are relatively minor
- It can often be difficult to prove a mental state of knowledge of intention; without strict liability crimes, many offenders would go unpunished

Counter-arguments are also able to be formulated:

- The common law is supposed to punish moral blameworthiness, so punishing conduct alone will corrupt the moral authority of the criminal law
 - Criminal liability should be based on culpable conduct (not conduct per se)
 - Rebuttal: someone can still be culpable in being careless of thoughtless (ie, not possessing recognised mens rea) – less culpable, perhaps, but still meriting punishment
- It is better that evil should go unpunished than the morally innocent should suffer
 - Balancing competing considerations of justice can be a difficult normative (and regulatory/legal) exercise

It is rare for statutes to expressly state the kind of liability being imposed. This is partly because legislators don't categorise offences in the same way as judges and lawyers, and partly because it is presumed that interpretation should ultimately be left to the courts. Arguably, courts are unsuited to this task:

- Courts are reactive (depend on parties to bring a matter before them)
- Decision-making is ad hoc (any interpretation would occur in the context of a given case and not universally)
- The kind of interpretation being urged by legislators is activist (courts should apply law, not unnecessarily create it)

- Courts necessarily produce incoherent bodies of law (interpretations vary, cases are distinguished or applied depending on implicit judicial normative evaluations)

Nevertheless, courts remain the principle arbiters of the classification of statutory offences into the categories of mens rea, strict and absolute liability.

C Current Position

Any classification of a criminal offence should begin with the statutory section that provides its definition (*Sweet v Parsley*). In particular, the section should be examined with a view to identifying references to mental states inherent in:

- Elements of the crime;
- The defences that are available, if any; and
- The words in which the section is phrased.

If the statutory section explicitly requires or excludes a specific mental element or defence, then the interpretation of the statutory section ends here, and it is to be presumed that the crime created is one of mens rea.

If the statutory section is ambiguous (or, as is more usually the case, silent) concerning any requirement of mens rea, then the common law imposes a presumption of mens rea (*He Kaw Teh*). This presumption is strong and will not lightly be displaced:

There is a presumption that mens rea, an evil intention, or a knowledge of the wrongfulness of the act, is an essential ingredient of 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.

(*Sherras v de Rutzen* (1895) UK per Wright J)

Some 90 years later, this statement was endorsed by the High Court of Australia in *He Kaw Teh*.

He Kaw Teh (1985) HCA:

Facts:

- A is caught trying to enter Melbourne from a flight from Kuala Lumpur with a false bottom bag containing 2.8 kg of heroin
- A is charged with two closely linked and overlapping drug offences under s 233B(1) of the Commonwealth *Customs Act 1901* (Cth), which is as follows:
 - **s 233B – Special provisions with respect to narcotic goods**
 - (1) Any person who:-
 - (b) imports, or attempts to import, into Australia any prohibited imports to which this section applies...
 - (c) without reasonable excuse has in his possession... any prohibited imports to which this section applies which have been imported into Australia in contravention of this Act; or
 - (d) aids, abets, counsels, or procures, or is in any way knowingly concerned in, the importation, or bringing, into Australia of any prohibited imports to which this section applies...
 - shall be guilty of an offence.

- A is convicted at trial; the Jury are directed that the offences impose strict liability and do not require mens rea
- An appeal to the Victorian Court of Criminal Appeal is dismissed

Issues:

- The accused appeals to the High Court on two primary issues:
 - Is s 233B(1)(b) an offence of strict liability or mens rea?
 - Does s 233B(1)(c) require proof that A was *knowingly* in possession of the prohibited imports (ie, is it an offence of strict liability or mens rea?)

Reasoning:

- How is the liability imposed by an offence to be classified?
 - Prima facie, there is a presumption that mens rea is required (*Sherras v De Rutzen*)
 - The presumption of mens rea that all serious criminal offences carry is not lightly displaced, even if the statute suggests a linguistic requirement of mens rea
 - In considering whether this presumption is rebutted, several interpretative criteria are to be examined
 - Gibbs CJ and Wilson J utilise the same interpretative criteria to reach different conclusions, showing that some variation in interpretation is unavoidable
 - If the presumption of mens rea is rebutted then a further common law presumption is raised that the defence of honest and reasonable mistake of fact is available (*Proudman v Dayman*)
 - In determining whether this further presumption is sound, the same interpretive criteria are considered
 - If the further presumption is not rebutted, the offence imposes strict liability
 - The evidentiary burden falls upon the defendant to adduce evidence of a mistake on the balance of probabilities
 - The legal burden then falls on the prosecution to disprove the defence beyond reasonable doubt
 - If the further presumption is rebutted, the offence is one of absolute liability
 - The defence of honest and reasonable mistake of fact is not available
- Majority (per Gibbs CJ):
 - s 233B(1)(b): critical question is whether knowledge of the nature and possible quality of the act is necessary to establish liability
 - Express words/language of statute
 - To 'import' is a purely physical act; it does not connote a requirement of intention
 - However, the provisions must be read in light of the general principles of criminal responsibility
 - 'Knowingly' is mentioned in (d)
 - A presumption of mens rea exists (*Sherras*) and this is not easily overturned by lack of references to mental states by the language of the statute
 - The statute is ambiguous as to the required mental elements
 - Applying the interpretative criteria, the presumption is not displaced
 - Whether subject matter 'truly criminal'? (*Sherras*)
 - Whether absolute liability would assist enforcement? (*Lim Chin Aik*)

- Won't impede efficiency to require MR – without knowledge, it is difficult to prevent importation where inadvertent
 - Is compliance impossible?
 - Prioritises protection of the individual accused over protection of the community
 - Too serious consequences for individual to be strict liability
 - Exceedingly severe punishment suggests it could not be committed negligently
 - Presumption of mens rea not to be displaced under s 233B(1)(b), which is therefore an offence of mens rea
 - The mens rea that is required is as follows:
 - 'Import' requires knowledge that suitcase contained heroin
- s 233B(1)(c): cannot be an offence of absolute liability, because it would be 'absurdly draconian'
 - Applies interpretative criteria:
 - Presence of statutory defence
 - Life imprisonment is a serious penalty – that alone means that liability cannot be imposed without guilty intent
 - Subject matter of the statute: a 'grave social evil' that undeniably needs to be suppressed
 - However, if Parliament really wanted to impose severe penalties for trafficker, why would liability be strict? Usually strict and absolute liability offences attract lesser penalties than mens rea crimes
 - These are extremely severe penalties, and Parliament may not want to penalise careless importation
 - Concludes: the offence is a full mens rea offence – 'possession' requires knowledge that the defendant knew heroin was in his suitcase
 - Cf environmental pollution by companies, where a strict liability penalty is necessary to prevent laziness or wilful blindness by the offender (typically a company)
- Brennan J:
 - Elaborates further on the principles of statutory interpretation
- Wilson J (dissenting):
 - Emphasises the 'monstrous evils that are intrinsically nefarious', from which the statute's purpose is to protect the public
 - s 233B(1)(b) imposes strict liability:
 - Lacking 'without reasonable excuse' doesn't suggest mens rea
 - If anything, the offence is one of absolute liability
 - In light of the serious penalty, it is strict liability
 - Parliament intended to protect the community from a 'serious social evil'
 - The provision would be difficult to enforce without strict liability
 - It would be an enormous evidentiary burden if the Crown had to dismiss beyond reasonable doubt any innocent explanation

Decision:

- Majority (Gibbs CJ, Brennan, Mason, Dawson JJ):
 - s 233B(1)(b) 'importation': presumption of mens rea is not rebutted
 - Burden remains on prosecution to prove that the defendant knew he was bringing narcotic goods into Australia beyond reasonable doubt
 - s 233B(1)(c) 'possession': this is a mens rea offence

- The burden is on the prosecution to prove that the defendant knew that narcotic goods were in his or her possession
- Brennan J: knowledge that such possession was 'likely' is sufficient
- Dawson J: the mens rea only requires knowledge that they possess 'something'
- Minority (Wilson J):
 - s 233B(1)(b) is a strict liability offence because its subject-matter is so 'nefarious'
 - s 233B(1)(c): a strict liability offence subject to relevant statutory defences; the evidentiary and legal burden to establish the defence rests on the defendant to establish on the balance of probabilities

In *He Kaw Teh*, Gibbs CJ discussed the effect of wilful blindness on crimes of mens rea. In relevant circumstances, it was said, mens rea could be established merely where the suspicions of the accused are aroused and he deliberately refrains from inquiry for fear of learning the truth.

Pereira v DPP affirms this approach, holding that actual knowledge (ie, the requisite mental element) may be established as a matter of inference from the surrounding circumstances where it is the only possible inference.

Pereira v DPP (1985) HCA:

Facts:

- P is convicted of being knowingly concerned with importing and possessing cannabis resin, in breach of the *Customs Act 1901* (Cth)
- The resin was sent to P from Bombay concealed in jewellery and cricket balls
- A is convicted at trial and appeals to the HCA

Issues:

- What is the meaning of 'knowledge' and 'wilful blindness' in the context of strict liability offences?
 - What is the extent to which the accused needs to have knowledge of the circumstances? Can it be inferred by the jury?

Reasoning:

- A *reasonable* inference as to the accused's subjective state of mind can be made:
 - 'What did the accused actually know?'
- However, suspicious circumstances coupled with a failure to make enquiries may amount to wilful blindness
- Actual knowledge may be established as a matter of inference from surrounding circumstances
- However, it must be the only rational inference

Decision:

- [???

II Interpretative Criteria

A Overview

A court will have regard to several criteria in determining whether a crime defined by statute is one of mens rea, strict or absolute liability (*He Kaw Teh*):

- The language of the section creating the offence (and relatedly, the context and history of the statute)
- The subject-matter of the statute
- The seriousness of the consequences for the community of the commission of such crimes
- The seriousness of the consequences for the individual of potential conviction

Whether or not the strong presumption in favour of a requirement of mens rea is displaced is determined by reference to these interpretive criteria, which are said to help in identifying the purpose for which the legislature enacted the prohibition.

Several arguments are commonly put forward in relation to the criteria:

- The capacity of the individual to do anything to observe the law (if they were unable to act differently, the offence is less likely to be one of strict or absolute liability)
- The 'truly criminal' nature of the crime created (if a stigma attaches to conviction, the offence is more likely to require mens rea)
- The ease or difficulty with which the section can be enforced (if adducing evidence of the accused's mental state would be difficult, the offence is less likely to require mens rea)
- The seriousness of the penalty (the more severe the penalty, the more likely it is that mens rea is required)
- The seriousness of the conduct in society (the greater the social problem posed by the conduct of individuals like the accused, the more likely it is that the offence imposes strict or absolute liability – presumably, in the hope of preventing or stemming the social problem)

If the strong presumption of mens rea is displaced, then the statutory section does not create a mens rea crime. A further question which arises – whether the crime created is one of strict or absolute liability – is resolved by reference to the same criteria. This is a 'weak presumption'.

If the weak presumption of strict liability is not displaced, then the offence is one of strict liability (to which, as a matter of law, the defence of mistake applies). The prosecution must prove that:

- The accused did the prohibited act or caused the prohibited consequence; and
- The defence of honest and reasonable mistake of fact is not available, because either –
 - (a) the defence is excluded by the terms of the statute;
 - (b) the defence is not so excluded but, on the facts, the accused did not honestly hold the belief; or
 - (c) the defence is not so excluded and the belief was honestly held but, on the facts, the belief was not reasonable; and
- The accused did the prohibited act or caused the prohibited consequence with the required mental element if any is required by the statutory language
 - Eg, if the section requires knowledge of a fact or circumstance (drug importation cases)

However, if the presumption is displaced, then the crime imposes absolute liability. The prosecution must only prove that:

- The accused committed the prohibited act or caused the prohibited consequence; and
- No defences created by the terms of the statute are available

The extent to which the prosecution will be able to prove these matters depends on the availability and admissibility of relevant evidence and its treatment by the jury.

B *The Language of the Statute*

1 *Words connoting mentality*

Where specific mental requirements like 'knowledge' or 'intentionality' are laid down by the statute, the offence is one of mens rea. However, the absence of such words does not prima facie indicate that the offence is one of strict liability (*Sweet v Parsley*).

Sweet v Parsley (1970) HL:

Facts:

- A is a sub-tenant at a farm house, and she sub-leases rooms to other tenants
- A leaves the farm, but collects rent from her sub-tenants
- Cannabis is subsequently found at the premises
- A is fined £25 for an offence against the *Dangerous Drugs Act 1965* (UK), which makes it an offence for a person to be concerned with the management of any premises used for smoking of cannabis:
 - s 5: 'If a person –
 - (a) being the occupier of any premises, permits those premises to be used for the purpose of smoking cannabis or cannabis resin or of dealing in cannabis or cannabis resin (whether by sale or otherwise); or
 - (b) is concerned in the management of any premises used for such purpose as aforesaid;
 - he shall be guilty of an offence against this Act'
- A appeals to the House of Lords

Issue:

- [Though UK courts do not distinguish between crimes of strict and absolute liability, they can be a valuable source of comparative analysis]
- Can A be found guilty of contravening the offence despite having no knowledge of the presence of illicit substances on her premises?

Reasoning:

- Words like 'knowledge' or 'intentionally' will normally indicate that the offence requires mens rea
 - However, the lack of such words does not mean the reverse
 - It is possible to imply a requirement of intention even where it is not mentioned explicitly by the language in which the statutory provision is worded
- Lord Reid:
 - A was convicted on the basis that the offence was one of strict liability

- This is an obviously unjust result
- In considering the nature of liability imposed by the offence, it is necessary to start with the wording of the statute
 - Where the mental element is uncertain, the Court must interpret the provision by reference to the common law presumption that criminal offences import a requirement of mens rea
- Parliament would not intend to make a provision like this one of strict liability – it is too broad in scope, and would expose many thousands of landlords to potential criminal liability
- Instead, a commonsense approach to interpretation should be adopted:
 - Clearly, had Parliament thought about the scope of liability created, it would not have imposed strict liability
 - Therefore, the offence must require mens rea

Decision:

- Appeal allowed; the offence requires mens rea, which A did not possess

2 *Legislative context*

He Kaw Teh also makes it clear that, in considering the language of the statute and the type of liability to which it impliedly gives rise, regard should be had for the presence or absence of words with mental connotations (eg, 'knowingly'). In addition, the majority notes that the statutory context can be important. In particular, where another section of the legislation refers to mental state, but the section under which the accused is being prosecuted does not, a stronger case for imposing strict liability may be built.

2 *Drafting history*

The following are also relevant factors (*Welsh v Donnelly* [1983] 2 VR 173):

- The purpose of the statute
- Its legislative history
 - Look at Hansard, previous drafts, submissions by affected parties, senate reviews, etc

C *The Consequences for the Community*

1 *Impossibility of compliance*

An offence is more likely to impose strict liability if such a mode of attaching criminal responsibility would 'assist in the enforcement of the regulations' (*Lim chin Aik v R*). To elevate the offence above a mens rea crime, there must have been something that the accused could have done to observe the regulation and further the goals of Parliament. If not, then making the offence one of strict or absolute liability would confer no benefit upon the community.

The rationale behind this distinction (between situations where compliance is possible and those where it is not) seems to be that a strict liability crime is only an effective deterrent to potential offenders if it is actually possible for an individual to modify their behaviour so as to avoid committing the offence. If it is impossible to take steps to comply with the offence, there is arguably little benefit to be derived from prosecuting offenders for its commission.

Lim chin Aik v R (1963) Privy Council:Facts:

- A stayed in Singapore after orders were made by the government requiring persons of his status to leave
- However, no provision existed requiring the government to notify affected persons of those orders, or to publish or otherwise publicise those orders
- A was convicted of the offence although he was ignorant of the order made with respect to him

Issue:

- Can A be convicted notwithstanding the fact that, not knowing of the decree, he was unable to comply with it?

Reasoning:

- Generally, courts are far more likely to assume that regulatory offences are crimes of strict liability
 - They impose a lesser penalty
 - They are the subject of routine prosecution
 - Eg, *Welsh* (overloading a trailer)
- However, the consequences of interpreting the offence as one of strict liability must be considered
 - Would such a mode of criminal responsibility enable the statute to achieve its goals on the facts of the case?
 - Could the accused have acted so as to comply with the regulation, if it was a strict requirement?
- 'But it is not enough... merely to label the statute as one dealing with a grave social evil and from that to infer that strict liability was intended. It is pertinent also to inquire whether putting the defendant under strict liability will assist in the enforcement of the regulations. That means that there must be something that 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.'
 - Ie, if strict liability isn't going to prevent the crime, why impose it?
 - No social utility would be served

Decision:

- As there was nothing A could have done to change his conduct and so observe the regulation, there would be no benefit to the community were this an offence of strict liability; there is no reason for it to be so
- Conviction quashed

Creas' case (1 QB 998) makes for an interesting point of contrast. There, the accused served alcohol to a police officer who was on duty, and was convicted of an offence despite not knowing that he was an officer on duty. Arguably, no practical purpose was served by not requiring mens rea to be proved (if the accused did not know of the police officer's identity, how can a law prohibiting the serving of alcohol to an active law enforcement officer be complied with?), yet the conviction stood.

At any rate, in *Lim Chin Aik*, the fact that the accused could not have modified their behaviour so as to have complied with the section was a strong indication that a prohibited mental state was required, mitigating against it being a crime of strict liability. A similar consideration is approached from the perspective of 'luckless victims' in *Welsh v Donnelly* and *He Kaw Teh*.

2 Seriousness of consequences

Where the consequences for the community are particularly serious – as in the case of pollution, which may poison the environment and global ecosystem – an offence is more likely to impose a harsher form of liability. However, this is only one of several interpretative criteria to be weighed in deciding what kind of liability attaches to a statutory offence (*Allen v United Carpet Mills*).

Allen v United Carpet Mills Pty Ltd (1989) Vic SC:

Facts:

- Three persons were charged with offences against the EPA for discharged latex rubber into a creek, severely polluting it
- The relevant provisions read:
 - s 39(1): 'A person shall not cause or permit any waters to be polluted so that the physical, chemical or biological condition of the water is to be changed as to make or be reasonably expected to make those waters...
 - (c) harmful or potentially harmful to... fish or other aquatic life...
 - (e) detrimental to any beneficial use made of those waters.'
- A1 was a truck driver delivering the latex to A2, a carpet manufacturing company that used latex in its business
- A1 incorrectly hooked his delivery truck to A2's tanks, causing latex to spill over. A1 hosed this spill over down a storm water drain
- A1 pleaded guilty
- A2, which did not authorise or expect A1 to do as he did pleaded no case to answer
- A3, which owned the truck but gave inadequate instruction to A1 on its use, also pleaded no case to answer

Issue:

- Is the offence a crime of strict or absolute liability?

Reasoning:

- In deciding what form of offence s 39 creates, Nathan J applies the 4 interpretative criteria discussed in *He Kaw Teh*:
 - The language of the statute
 - Wording does not make any reference to mental state
 - The general style of the section seems to imply at least strict liability – 'shall not cause or permit' seems to suggest an objective, consequence-based prohibition – expressed in absolute terms
 - Absolute liability will only be implied if strict liability cannot be inferred due to the specific language of the section
 - Here, there is nothing to suggest only strict liability, so absolute liability is a possibility
 - The subject matter of the statute
 - Polluting public land
 - There is already an incentive against polluting private land (tortious liability), and a similar disincentive is needed in respect of public lands
 - 'Design, neglect, or sheer inadvertence' – not just negligent pollution

- The consequence for the community
 - Pollution may poison the ecosystem and harm the community
- The consequences for the individual
 - Not particularly morally culpable here
 - The potential penalties capable of imposition must be assessed
 - However, the penalty is not overly serious (not incarceration; just a fine)

Decision:

- The offence imposes absolute liability

D *The Consequences for the Individual*

1 *Extent of penalty*

In *He Kaw Teh*, it was significant that the penalty was life imprisonment. As the most serious punishment in the criminal calendar, more needs to be shown than mere inadvertence as to importation in order to invoke it upon an accused. Where a section provides for incarceration, it is more likely that the offence will require mens rea, since it is generally agreed that only morally culpable criminals should be imprisoned.

Conversely, if a section purports only to impose a fine or other monetary penalty (eg, demerit points, or even community service), the offence is more likely to be one of strict liability. The lesser the penalty (and the greater the frequency of prosecution), the more likely it is to impose absolute liability.

2 *Efficiency of Prosecution*

If strict liability is imposed solely to make an offender easier to prosecute, then perhaps it is necessary to protect the individual accused from wrongful conviction (note, eg, the comments of Gibbs J in *He Kaw Teh*). If, however, requiring a mens rea element does not substantially increase the difficulty of obtaining a conviction, it is desirable to do so (cf Wilson J in *He Kaw Teh*, who reasons that traffickers are experienced criminals and know what to say in order to escape conviction). Ultimately, however, this is just another example of the competing interests of society (community protection) and the individual (justice for the accused).

E *Further Examples*

The word 'import', in relation to goods or narcotic substances, is held in *He Kaw Teh* to import a requirement of mens rea. However, this does not mean that 'import', used in other statutes, will necessarily indicate that the offence of mens rea. That conclusion is only to be arrived at after a consideration of the relevant interpretative criteria (Selectrix per Hedigan J).

Further, the following factors militate towards an offence being one of absolute liability:

- The purpose of the statute is the protection of public health and the environment
 - The purpose of the statute is the surest guide to the mental element required (Brennan J in *He Kaw Teh*)
- There is a linguistic contrast between the section being interpreted (no mental connotations) and other sections in the statute (mentally laden words)

- The penalty is solely monetary
- The prohibited conduct may be rendered lawful by licensing

Selectrix Pty Ltd v Andrew Humphrys (2001) Vic SC:

Facts:

- Selectrix imports from the USA 118 cylinders of a gas called FR12, manufactured for use as a refrigerant in car air conditioners
- Selectrix advertises the imported FR12 for sale in Australia in local trade journals
- Selectrix are charged with offences under s 13(1) of the *Ozone Protection Act 1989*, which provides that a person (including a corporation):
 - ‘...must not manufacture, import or export a hydrochlorofluorocarbon... unless the person holds a controlled substances license that allows the person to do so’
- Selectrix does not have a controlled substances license
- At first instance, the Magistrate considers whether s 13 is an offence of mens rea, strict liability or absolute liability, and concludes that it is an offence of strict liability ([7]-[8])
- Stuckey, the Chief Executive Officer of Selectrix, testifies that he thought the gas was ‘ozone friendly’, and that he based this belief on the fact that a competitor (BOC) had advertised the gas as environmentally friendly
- Stuckey says that BOC’s advertisement depicted a frog, and that this indicated the gas was environmentally friendly and contained no HCFCs
- Stuckey reasons that he could rely on BOC’s statement to import and resell FR12 himself
- The Magistrate holds that although the defence of honest and reasonable mistake of fact is available to Selectrix, the company’s mistake (through Stuckey, as CEO) was as to the law, rather than fact (he didn’t think he *needed a license*)
- However, giving Selectrix the benefit of the doubt in this regard and assuming a mistake of *fact* had been made, the Magistrate proceeds to consider the availability of the defence
- The Magistrate accepts that Stuckey honestly believed the gas was ‘ozone friendly’, but finds that it is *not reasonable* to base this belief on the advertisement of a competitor
- This honest but *nevertheless negligent* or careless mistake means that the company cannot rely on the defence of honest and reasonable mistake of fact
- Selectrix is convicted, fined \$4 000 and ordered to pay \$4 500 in costs
- Selectrix appeals the conviction

Issues:

- Is s 13 an offence of mens rea, strict liability or absolute liability?
- Given the Magistrate treated this as a strict liability offence, should A have been able to rely on the defence of honest and reasonable mistake of fact?
 - Is Stuckey’s belief that FR12 is not a prohibited import reasonable?

Reasoning:

- Hedigan J: at [13]:
 - ‘One of the problems in the area is that appellate courts have not all spoken with a single voice and the principles are, of course, capable of application to different contexts and, where applicable, must be applied. Both appellant’s and respondent’s counsel cited and counter-cited various parts of the judgments of Gibbs CJ, Brennan and Dawson JJ in *He Kaw Teh*’
- Was the offence one of mens rea because it involved an act of ‘importing’?
 - Dawson J in *He Kaw Teh*: ‘it was virtually impossible to conclude that there was no intention to import at the least the container in which the goods were being

- brought in' – the same could be said here
- Gibbs CJ: the offence created in *Teh* was an extremely serious one; however, importation does not necessarily connote knowledge or intention
 - 'Whilst it is true that s 50 of the *Customs Act 1901* draws no distinction between the meaning of "import" in relation to goods or narcotic substances, other considerations relating to (i) the subject matter, (ii) purpose of the enactment, (iii) the penalties provided, and (iv) the language of the statute itself, are relevant matters to consider.'
 - Thus, perhaps if the offence here was more serious, and the penalty greater, it too would require mens rea
 - However, on the facts it is purely regulatory and the consequence – though important to prevent – is relatively minor on its own
 - 'It is true to say that it may be a matter of serious and significant debate whether or not it is more dangerous to import ozone depleting substances than importing personally affecting substances such as narcotics. Nothing in the evidence was directed to resolving this debate.'
- What is the nature of the interpretative process?
 - Tension exists between meeting statutory goals and protecting liberty of the accused:
 - '...[T]here is a tension between the legislative objective of dealing with a grave social evil and the principle that the protection of the liberty of the subject commonly involves resistance to the finding of guilt of a breach of the criminal law in the absence of a guilty mind.'
 - Current formulations of mens rea balance these competing interests:
 - 'The requirement of mens rea is at once a reflection of the purpose of the statute and humane protection for persons who unwittingly engage in prohibited conduct ...'
 - Was the mistake one of fact or law?
 - 'In my view, the mistake in this case was in respect of a mixed fact and law issue. The respondent argued that Mr Stuckey's evidence carried the matter no further than a belief that the goods were "ozone friendly". It was put that this was not a mistake as to an exculpatory fact because it was not a mistake as to whether the substance was an HCFC being only a mistake as to the qualities of the substance, eg as to a mistake as to whether heroin was harmful'
 - No conclusion is drawn on the matter
 - Was the offence actually one of absolute liability?
 - Subject matter
 - 'This statute could not be regarded as being other than concerned with the protection of public health and the environment' (as suggested by s 3 [aims] and the second reading speech)
 - 'The view of Brennan J [in *He Kaw Teh*] was that the purpose of the statute is the surest guide to the mental element required. I conclude that this legislation 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.'
 - Language
 - Other sections of the Act employed words which might reasonably be regarded as importing mens rea – 'knowingly', 'intentionally' or 'without reasonable excuse'
 - There was a distinct linguistic contrast between s 13 other parts of the Act

- Consequences for the individual
 - ‘The relevant penalty is solely monetary. Even with the multiplication in the case of corporate responsibility it is moderate.’
 - ‘[T]he activity in question in this case (importation) may be rendered lawful by licensing. That one may apply and obtain a licence for the importation of the relevant products supports the conclusion that this is a regulatory offence. These matters point in the direction of absolute liability.’
 - The offence is not truly criminal – a moderate fine is imposed, and the offence only applies in the absence of a license

Decision:

- Despite using the word ‘import’, the interpretative criteria indicate that the offence does not require mens rea, and, further, is purely regulatory
- Because the offence is one of absolute liability, no defence of honest and reasonable mistake of fact is available to Selectrix
- Even if the offence did only impose strict liability, Stuckey’s belief, though honest, was unreasonable according to the findings of fact made by the trial judge
 - He did not seek advice from his friend
 - He did not read the customs warnings
- Appeal dismissed

The use of absolute liability in respect of social regulatory legislation is extremely common. Offences relating to matters of public health, environmental or public safety have all been characterised as absolute liability offences. See, for example:

- *Allen v United Carpet Mills Pty Ltd* (water pollution);
- *Welsh v Donnelly* (exceeding maximum weight in a trailer);
- *Franklin v Stacey* (driving an unregistered and uninsured motor vehicle);
- *Kearon v Grant* (exceeding a speed limit); and
- *Ambrose v Edmonds-Wilson* (failure to furnish a tax return).

Kearon v Grant (1991) Vic CCA:Facts:

- Grant, the accused, is driving west along Princess Hwy
- Grant reaches a 60 kmh⁻¹ sign at the intersection of Princess Hwy and Fogarty Rd
- Road-works are in progress, and Grant slows down to 60 kmh⁻¹ until the next intersection at Snell Rd, as directed by the sign
- There is another 60 kmh⁻¹ sign at Snell Road, but there is no more roadwork
- Grant is traveling behind an unmarked police car (Kearon, the prosecutor), and after Snell Rd he overtakes Kearon and two trucks
- Kearon alleges Grant is traveling at 110 kmh⁻¹ for a substantial part of the highway between Snell Rd and Bessie Creek Rd, where a 110 kmh⁻¹ sign has been erected
- Grant is charged with exceeding the speed limit in a 60 kmh⁻¹ zone under s 1001(1)(c) of the *Road Safety (Traffic) Regulations Act 1988 (Vic)*
- Grant claims, in his defence, that he thought the sign at Snell Rd related to Snell Rd traffic, not Princess Hwy traffic
 - His belief is supported by the fact that there were no more road-works after Snell Rd

- His belief is also supported by the fact that the other cars also accelerated after Snell Rd
- He only overtook after he had covered some distance after Snell Rd because of his uncertainty about the speed limit
- On this basis, Grant claims that he made an honest and reasonable mistake of fact

Issue:

- Is the offence one of strict or absolute liability?

Reasoning:

- Magistrate: acquittal
 - If the offence is one of strict liability, the defence is potentially available
 - However, if the section creates absolute liability, no defence is available
 - The Magistrate characterises s 1001 as an offence of strict liability
 - The accused introduced sufficient evidence to prima facie raise the defence
 - Kearon, the prosecutor, failed to prove beyond reasonable doubt that the accused was not labouring under an honest and reasonable mistake of fact
- Brooking J: absolute liability
 - The learned Magistrate was incorrect
 - Here, there are two kinds of mistake operating:
 - A belief as to the applicable speed limit (G thought it was 110kmh⁻¹)
 - A belief as to the speed he was travelling (an error in the speedometer)
 - The subject matter and character of the offence makes it seem that Parliament intended absolute liability
 - 'I think 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'
 - The consequences for the community are serious
 - Road safety has an important effect on public welfare
 - It better serves the enforcement of the Act to be an offence of absolute liability
 - Speeding motor vehicles have become 'machines of destruction'
 - Given the routine nature of prosecution, courts cannot be clogged with claims of mistake
 - The consequences for the individual are minor
 - The severity of the penalty is low
 - There is no stigma attached to conviction
 - It is a summary offence
 - It is therefore highly unlikely to be a strict liability offence

Decision:

- Section 1001 creates an offence of absolute liability

III Defences

A Honest and Reasonable Mistake of Fact

1 Definition

Prima face, the defence of honest and reasonable mistake of fact is available in respect of all crimes of strict liability (*Proudman v Dayman*).

The presumption in favour of the defence is weak, and can be rebutted by the language of the statute (*He Kaw Teh*). If the presumption is rebutted, the defence will not be available to the accused (as in *Kearon v Grant*).

***Proudman v Dayman* (1941) HCA:**

Facts:

- A is charged with an offence under s 30 of the *Road Traffic Act* (SA) which makes it an offence for a person to permit an unlicensed driver to drive a motor vehicle on any road
- A claims that she believed on reasonable grounds that the person she permitted to drive her car was licensed
- A is convicted at trial (in the Magistrates' Court)
- A appeals to the Supreme Court of South Australia, the Full Court of the Supreme Court of South Australia, and finally to the High Court of Australia

Issue:

- Can the accused be guilty of 'permitting an unlicensed driver to drive a motor vehicle on any road', despite not being aware that the driver was unlicensed?

Reasoning:

- Dixon J: lays out the general doctrine
 - 'As a general rule an honest and reasonable belief in a state of facts which, if they existed, would make the defendant's act innocent affords an excuse for doing what would otherwise be an offence'
 - 'It is one thing to deny that a necessary ingredient of the offence is a positive knowledge of the fact that the driver holds no subsisting license. It is another thing to say that an honest belief founded on reasonable grounds that he is licensed cannot exculpate a person who permits him to drive.'
- The strength of the presumption that the defence is available varies
- There must be a mistake made (mere inadvertence will not suffice)
 - Ignorance of the fact (rather than a mistaken belief in a fact) may not be sufficient to establish the defence of HRMF. This proposition has inconclusive authority: see *Proudman*
- The mistake must pertain to facts, not law
 - The accused must believe in facts which, if true rather than mistaken, would make the accused legally innocent

Just because an offence does not require mens rea, that does not mean that the defence of honest and reasonable mistake of fact cannot operate. It affords a defence to a strict liability crime unless specifically denied by the legislation or by necessary implication. For example, where the subject matter of the offence dictates that the defence cannot arise, it is logically inapplicable (sexual offences with a child under 10, for example).

Similarly, if it is necessary to deny the applicability of the defence in order to give effect to the object of the legislation, or where an expressed statutory defence is inconsistent with the existence of a defence based on honest and reasonable mistake, the defence will not arise.

2 *Onus of proof*

Since *Woolmington*, defences must be raised by the accused so as to satisfy a basic evidential threshold (not difficult to prove), at which point the onus shifts to the prosecution to disprove the existence of the defence beyond reasonable doubt. The defence of honest and reasonable mistake of fact is no different.

An evidential burden to adduce evidence of an operative mistake rests upon the accused (Gibbs CJ in *He Kaw Teh*); if such evidence can be raised, the prosecution bears the ultimate legal burden of disproving the existence of the defence beyond reasonable doubt.

3 *Type of mistake*

The defence *only* applies to mistakes of fact. Mistakes of law are not covered by the defence. Ignorance of the law is no excuse (or so the saying goes).

The mistake must be such as to render – were the circumstances as believed – the accused's conduct innocent (*Proudman v Dayman*).

4 *Inadvertence*

Mere ignorance or inadvertence will not suffice. There must be a positive belief in a particular state of affairs. As Dixon J in *Proudman* noted, if one does not consider whether the driver of a car is licensed, mistake cannot be raised as a defence – even if one's failure to advert to the facts was reasonable. There needs to be an actual mistaken belief (eg, that the driver was licensed).

5 *Mistake at common law*

A common law mistake of fact need not be reasonable – just honest. The effect at common law is to negate the mental element of the offence.

In the context of a strict liability offence, the belief must also be reasonable. Establishing that this belief was honestly and reasonably held is what makes strict liability more difficult to overcome for an accused; the defendant will usually need to give evidence and be subject to cross-examination.

[Gibbs CJ in *He Kaw Teh* discusses the defence as set out in *Proudman v Dayman* – in particular, whether absence of an honest and reasonable mistake of fact is itself a form of mens rea, or whether the defence is only available when the offence whose contravention is alleged does not require mens rea.]

6 *Wilful blindness*

'Wilful blindness' in respect of the true state of facts may exclude the accused from relying on their honest belief in another, incorrect state of facts. However, wilful blindness does not necessarily preclude reliance on the defence; if it was reasonable to hold the mistaken belief, then, if honest, it will still afford a defence.

- *Caralis v Smith* (where the accused persons were prevented from pleading mistake because they deliberately failed to make enquiries so as to maintain their mistaken beliefs, even after their suspicions had been aroused).

7 Application: Sexual Offences

Consider the operation of the defence of honest and reasonable mistake of fact in the context of sexual offences:

- *R v Kennedy* [1981] VR 565 [noted in WW 14.50]
 - Here, the accused was charged with taking a person under 18 years of age out of the possession and against the will of the person having lawful charge of her with intent that she be carnally known (this offence has since been replaced by s 56); the maximum penalty is 5 years imprisonment
 - Result: absolute liability offence
- Would the outcome have been different if *Kennedy* was decided after *He Kaw Teh*?
 - Probably: severe sanction suggests mens rea is required
 - Similarly, reference to a specific 'intent' seems to indicate that 'intent that she be carnally known' is an element of the mens rea of the offence
 - However, on the facts the outcome may have been the same
- The House of Lords has recently rejected the proposition that special rules of construction apply to age-based sexual offences:
 - *B (a minor) v DPP* [2000] 1 All ER 833 (HL) [WW14.42C]

B Reasonable Care and Due Diligence

A defence of 'taking all reasonable care and diligence is within the scope of the concept of honest and reasonable mistake of fact' (*Allen v UCM*). Thus, criminal liability will not arise where the accused takes all reasonable care (or exercises due diligence) yet still makes a mistake of fact leading to the commission of an offence of strict liability.

C Reasonable Cause or Excuse

The relevant section may define specific defences applicable to the offence in question. Most commonly, a consequence will be prohibited subject to the qualification 'without reasonable excuse' or 'without reasonable cause'. Such a qualification suggests that, where the accused has a reasonable cause of excuse for acting in the way they did, they will be acquitted of the relevant offence.

This is a specific statutory defence that must be explicitly stated to be available: it is *not* a general defence to strict liability offences available at common law.

If the defence is available, then the question arises, 'what amounts to a reasonable cause or excuse?'

- The scope of 'reasonable excuse' or 'cause' is unclear and undefined
- Whether a person has such a reasonable cause or excuse is a question of fact for the jury
- A reasonable cause may be based on a *mistaken* belief; however, that mistake and the cause arising from it must still be objectively '*reasonable*'
- A reasonable mistake of law amounts to a 'reasonable cause' (*Bacon* – although on the facts the mistake was unreasonable and hence the defence was not made out)
- 'Reasonable excuse' also entails the inclusion of common law defences (eg, infancy, insanity, duress: *He Kaw Teh* and *Brown*) [???]

***R v Bacon* (1977) NSW CCA:**

Facts:

- The five accused parties want to protect a group of buildings in Kings Cross from development (and demolition) and support residents resisting eviction against allegedly unscrupulous tactics the developer is using to evict them
- Each accused therefore conclude that they should squat in one of the buildings scheduled for demolition
- They are each charged with a summary offence under s 50 of the *Summary Offences Act* 1970 (NSW), which states that:
 - 'A person who enters or remains in or upon any part of a building or structure, or any land occupied or used in connection therewith, and has no reasonable cause for so doing is guilty of an offence.'
- All are convicted at trial and fined \$40 each
- Each of the five Accused genuinely believe in the validity and propriety of their actions
- One of the Accused, Teresa Brennan, had installed her own furnishings in the building
- She was given no opportunity to remove her personal property when the police officer demanded that they leave or face arrest

Issue:

- Given these findings of fact, did the prosecution prove beyond reasonable doubt that the accused remained on the premises with 'no reasonable cause'?
 - Did the accused have reasonable cause for remaining on the premises such as to negative criminal liability under the Act?

Reasoning:

- Prima facie, the accused were trespassing
- Can their beliefs amount to reasonable cause such as to exculpate their conduct?
 - They can't plead necessity – 'if homelessness were a defence to trespass, no door would remain shut'
 - There is no reasonable cause, despite their principled objections to the development
 - Even if they believed in a right to live in the building in protest, policy reasons militate against its recognition as a reasonable cause
 - The accused should not be able to take the law into their own hands
 - However, it would have been a valid excuse if they believed that they had good title (and hence were allowed to stay on the property)
 - As this was clearly not the case, the four of the accused without possessions on the premises had no reasonable cause for there remaining

- The fifth accused, Teresa, may have had reasonable cause, if it is found that she remained on the premises to protect her property
 - This is a question of fact
 - The issue is remitted for termination by a jury

Decision:

- The appeal of the four primary accused fails
- The fifth accused's case is remitted to a jury for determination

R v Bacon appears to allow a reasonable mistake of law to amount to 'reasonable cause'. Though *obiter dicta*, this may be applicable where the defence is created by the legislation.

D *Act of a Third Party*

Where the prohibited act or consequence was the result of a third party over whom the accused had no control and against which the accused could not reasonably have been expected to guard, this will afford a defence to an offence of strict liability (*Mayer v Marchant*).

Mayer v Marchant (1973) SA Full SC:

Facts:

- The accused is driving a truck carrying an load of distillate in excess of the statutory limit of 32 tonnes
- The accused often knowingly drives slightly in excess of the statutory weight limit, but in this instance, the supplier had, unbeknownst to the accused, loaded his truck with distillate of a greater than usual density, causing a much greater weight excess than usual

Issue:

- Can the accused be excused on the basis that the offence was the result of the acts of a third party?

Reasoning:

- Statement of the defence (Bray CJ):
 - '...it is a defence to a criminal charge, whether under the provisions of the common law or of any statute, to show that the forbidden act occurred as the result of a stranger, or as the result of non-human activity over which the defendant had no control and against which he could not reasonably have been expected to guard.'
- Onus and burden of proof:
 - 'The onus of proof of this defence is, in my view, exactly the same as in the case of mistake or any other general defence. The onus is on the defendant to point to some evidence capable of raising it. Once that has happened the ultimate onus is on the prosecution to exclude it so that a reasonable doubt as to its existence will result in an acquittal.'
- Rationale for the defence:
 - 'To penalise a man in such circumstances seems to bear more resemblance to

the selection of a ritual scapegoat than to the administration of any rational system of justice and I would not be prepared to believe that Parliament had intended this unless I was constrained by the most specific language or the most compelling authority.'

- The rationale is thus similar to that for an honest and reasonable mistake of fact
- The defence is not based *solely* on the accused taking reasonable care
 - It is concerned with whether the prohibited conduct took place due to the acts of third parties, and whether the accused could have reasonably guarded against the conduct
 - Here, there was nothing that the accused could have done to prevent the supplier loading different distillate
- The accused cannot rely on a defence of mistake because he knew he was over the statutory limit anyway
 - Thus, the belief – even if true – would not have rendered his conduct innocent as required by *Proudman*
- In *Snell*, a cow owned by the accused wandered onto the road through a gate left open as a result of the act of a trespasser; the farmer was charged with an offence of strict liability
 - If the gate was left open by a trespasser, the farmer is absolved of liability because there is nothing the farmer could have done to prevent the commission of the offence
 - However, if the gate was left open by, for example, a guest of the farmer, this will not exonerate him, since the guest is under the farmer's control
- Can the accused here rely on an act of a third party as exculpatory?
 - To supply without warning a different product could exculpate an accused, but only if it was the *cause* of the commission of the prohibited act
 - Here, the accused was driving in excess of the statutory limit anyway, so the act of the third party was not the *cause* of the offence occurring
 - The fact that the accused would not have been as seriously in breach of the limit is irrelevant; the offence requirements would have been made out either way
 - The accused is not an 'innocent scapegoat', so the rationale is inapplicable here

Decision:

- The accused cannot rely on the act of the third party supplier to exculpate him from criminal responsibility for exceeding the statutory limit, because he would have committed the offence even if the third party had not intervened
- The third party cannot thus be said to have been the cause of the commission of the offence

D Other Defences

1 Physical compulsion

Where the accused is physically compelled to commit a crime of strict liability, this defence may sometimes be available (*O'Sullivan v Fisher*).

2 Automatism

This quasi-defence operates to negate the actus reus of the offence, but is rarely if ever available to an accused charged with a crime of strict liability (see, eg, *Barker v Burke*).

3 Common law defences

According to Brown, even if the statutory section is interpreted as imposing strict liability, general common law defences are still available to an accused charged with a contravention of the section. Hence, duress, necessity, and the like are available.

IV The Doctrine of Mistake

A Types of Mistake

It becomes necessary to distinguish between two kinds of mistake:

- Mistake of fact (such as to negate mens rea in a relevant crime); and
- Honest and reasonable mistake of fact (in the context of a strict liability offence).

Mistake in the context of a mens rea crime is not a defence; it may only be relevant to negative the mental elements of the offence itself. For example, in *Morgan* a mistake as to the presence of consent negatives the mens rea requirement of knowledge that the victim was not or might not have been consenting. Similarly, in the context of theft (or even murder – 'I thought the gun was unloaded'), a mistaken belief in a legal right may be such as to negate the element of dishonesty.

A mistake will only be able to negate mens rea where the relevant mental state is subjective; that is, knowledge, intention, or recklessness are all subject to be displaced by an operative mistake, but negligence is restricted by the further requirement that the mistake be reasonable according to an objective standard. For mistake to be successfully raised by an accused in any mens rea crime, its existence needs to be logically inconsistent with the presence of mens rea. At a practical level, this means it will be argued by the defence as a response to the charge.

Where a mistake is sought to be relied upon as the basis for a defence of honest and reasonable mistake of fact, the following questions need be asked and answered in the affirmative for it to be available:

- As a matter of law, is the defence available in respect of the offence charged?
 - Is the relevant offence an offence of strict liability for which the defence of honest and reasonable mistake of fact is available?
- If the defence is available as a matter of law, did the accused make a mistake of fact (and not a mistake of law)?
 - Ignorance of the law is no excuse, and such a mistake cannot negative liability
- Given that the defence is available and the mistake is as to facts, would the facts being such as the accused mistakenly believed them to be render the accused innocent?
- If they would, did the accused honestly and reasonably believe that the facts existed, albeit that the accused was mistaken?

If the defence is available as a matter of law, and if the answer to the remaining questions is 'yes', then the accused is not guilty of the offence charged.

If a mistake is raised in the form of a *defence* to a charge carrying strict liability, the procedural effect differs substantially from its operation when attempting to negate the mental element of a crime of mens rea:

- If honest and reasonable mistake of fact is raised as a defence to a crime of strict liability, the onus rests on the accused to satisfy an evidentiary burden
 - Where an offence requires mens rea, the onus is on the prosecution to prove intention, knowledge, recklessness, or even negligence
 - The evidentiary onus is there on the prosecution to prove every element of an offence
- Where raised as a defence to a crime of strict liability, a mistake must be both honest and reasonable
 - A mistake raised to negate the mens rea element of an offence need only be honest; it need not also be reasonable
 - However, if the relevant mental standard is criminal negligence, the reasonableness of a mistake may influence whether it is operative
- A mistake used as the basis for a defence of honest and reasonable mistake of fact can only be operative if the mistake pertains to fact
 - Where mistake is used to negate mens rea, the mistake can be of any kind
 - That is, it can be in respect of both fact and law.

B Mistakes of Law

1 Mistake of law is insufficient

The defence of honest and reasonable mistake of fact applies to mistakes about the factual elements of the offence, but not mistakes about the existence of the law creating the offence (*Ostrowski v Palmer* per Gleeson CJ and Kirby J).

It is no defence to a criminal charge that the defendant believed that his or her actions were not regulated by law or that his or her actions satisfied the provisions of a law. Such beliefs are mistakes of law, not mistakes of fact (*Ostrowski v Palmer* per McHugh J).

***Iannella v French* (1968) HCA:**

Facts:

- A rents out a house; the maximum rent for the property was stipulated under several pieces of legislation:
 - *Housing Improvement Act 1940* (SA) (which gazetted the house as substandard and therefore set a maximum rent); and
 - *Landlord and Tenant Act 1942* (SA) (a general rent control act)
- A notice is published in all papers saying that the rent controls under the *Landlord and Tenant Act* had expired
- Reading this, A incorrectly (but honestly) believes that the property was no longer subject to any legislative rent-control
- He charges above the maximum rent allowable under the *Housing Improvement Act*,

which still applies, and is subsequently charged with and convicted of contravening the provisions of that Act

Issue:

- Was the accused's mistaken belief that his property was no longer subject to any rent controls one of fact or law?

Decision:

- Owen and Taylor JJ:
 - The mistake was as to law
 - The accused failed to realise the currency of the statute
- However, this is the opposite conclusion to that reached by the other judges

Compare, for example, the result in *Tolsen v R*. In that case, the accused believed her husband was dead. This was held to be an honest and reasonable mistake of fact that, if true, would have rendered her subsequent remarriage innocent. However, the belief was actually related to legal status (ie, the legal existence of the husband), yet still found to be one relating to a state of facts. This suggests that the approach to separating mistakes of fact from those of law will not always be literal.

Thomas v R (1937) HCA:

Facts:

- Bigamy is an offence of strict liability
- The accused, a police officer, marries Miss Deed, and is charged and convicted of bigamy when it is subsequently discovered that he is still legally married to his former wife
- The accused believes that he was not married to his former wife
 - She had explained many times that they were *not* married because she had not divorced *her* previous husband
 - The basis of the belief of the accused is that his marriage to his former wife was not valid because her decree of divorce 'had not been made absolute, so that she was still a married woman when he married her'
- Miss Deed leaves the accused in favour of another man, but the accused is prosecuted

Issue:

- Is the belief of the accused one of fact or law?

Reasoning:

- Latham CJ:
 - 'The belief was that a decree absolute had not been made by the Supreme Court of Victoria. *Whether or not such a decree had been made was a question of fact.* If no decree absolute had been made, the marriage of the accused's former wife would not have been dissolved and therefore, she would still have been a married woman when she married the accused. Thus, her marriage to the accused would have been invalid, and he would not have been a married person when he went through the ceremony of marriage with Miss Deed. Thus, if his belief as to the matter of fact mentioned had been true, he would not have been guilty of the offence charged.' (emphasis added)
- Dixon J:
 - The mistake was one of fact

- The accused's only belief relating to law was that a divorce is not absolute until entered into a court of law
 - He was not mistaken in this respect
 - The only mistake was that, in fact, this event had not occurred
 - There was thus no mistake as to law but only a mistake as to the actual circumstances
 - Policy arguments are also relevant to the conclusion
 - It would be inconsistent with the liberal view of law were any other conclusion to be reached
- The belief was honest, reasonable, and pertained to a matter of fact (the granting of a decree absolute); further, it was a defence to the offence charged
 - If the belief was true, the accused would not have been guilty

Decision:

- The defence of honest and reasonable mistake of fact has been made out by the accused
- An acquittal is entered

2 *Mixed mistakes of fact and law*

Where an accused makes a compound mistake that comprises both a mistaken factual and legal belief, it will be treated as a mistake of fact (*Thomas v R*; affirmed *Ostrowski v Palmer*).

However, if the mistakes can be separated out, then a mistake of law will prevent the defence being relied upon by the accused (if the mistake of fact is not in itself enough to sustain the defence: *Power v Huffa*).

Power v Huffa (1976) SA:Facts:

- A is involved in an aboriginal rights demonstration
- The police attempt to move her along, but she refuses to move, instead calling the Minister for Aboriginal Affairs, whom she believes to be authorising the protest
- A, however, is charged with loitering
- A claims that she is not guilty by virtue of an honest and reasonable mistake of fact

Issue:

- Is the belief of the accused one of fact or law?

Reasoning:

- The accused actually possesses two beliefs:
 - First, that she was acting under the senator's authority
 - This is a factually correct belief
 - However, it is not in itself adequate to make her act innocent (ie, obtaining the permission of an MP is insufficient justification for loitering)
 - Second, that the senator had the authority to give her authorisation to remain where she was
 - This is a legally incorrect belief
 - This is a matter of law – the senator did not have any such authority

Decision:

- The mistake was one of law and a conviction should be entered

3 *Legal advice from an official*

What if the accused's mistake of law was predicated upon incorrect legal advice? The traditional (and currently accepted) view is that the origin of the advice on which the belief is predicated is irrelevant to the question of whether a mistake pertains to fact or law. For example, in *Triton v Victorian Dairies* (1965 Vic SC), the accused was charged with failing to appoint an auditor despite obtaining legal advice that he did not need to do so.

It is entirely irrelevant whether the mistake of law relied on by an accused is induced by incorrect information obtained from a government official (or any other third party) or is induced by any other mistaken factual understanding (*Ostrowski v Palmer*).

Ostrowski v Palmer (2004) HCA:

Facts:

- Palmer is a licensed commercial fisherman
 - His license extends to fishing for western rock lobster in the relevant fisheries using up to 87 lobster pots
 - He spends considerable money setting up his boat in order to do this
- He is aware that there are some areas in which it is not legal to fish, and so he attends a major office of Fisheries WA to request the current regulations on where fishing is permitted
 - The office does not have the relevant material, so they tell him to come back two days later to get it; this he does
 - Palmer is given by the Fisheries Officer a copy of the current regulations, and is told that it will suffice for his needs
- The document includes various manually inserted amendments
 - However, these documents are deficient; they do not include Regulation 34, which provides that an area near Point Quobba is closed to rock lobster fishing
 - Palmer is also directed to a pamphlet in the office, which states that the area at Point Quobba reef near Carnarvon is a total exclusion zone, with all marine life protected
 - Palmer subsequently stays well clear of this zone
- Palmer fishes with 54 pots in the zone prohibited by Regulation 34, in the genuine belief that he is allowed to do so, basing this belief on the documentation he had been given
- Palmer is charged (by Ostrowski of WA Fisheries) with the strict liability offence of having fished for rock lobster in a prohibited zone, in breach of Regulation 34 of the *Fish Management Regulations 1995 (WA)* and s 222 of the *Fish Resources Management Act 1994 (WA)*
- Palmer pleads not guilty before the Magistrate on the basis of the *WA Criminal Code* equivalent of the defence of honest and reasonable mistake of fact (s 24 of the *Code*)
- Relevant *Code* provisions:
 - s 22: 'Ignorance of the law does not afford any excuse for an act or omission which would otherwise constitute an offence, unless knowledge of the law by an offender is expressly declared to be an element of the offence...'
 - s 24: 'A person who does or omits to do an act under an honest and reasonable, but mistaken, belief in the existence of any state of things is not criminally responsible for the act or omission to any greater extent than if the real state of

things had been such as he believed to exist'

- Regulation 34:
 - **'Fishing for rock lobster in the waters surrounding Quobba Point**
A person who is the holder of a commercial fishing licence must not fish for rock lobsters at any time in the area described in the Table to this regulation.
 - Penalty: \$5000 and the penalty provided in s 222 of the Act.'
 - 'All that portion of the Indian Ocean bounded by a line starting from a point on the high water mark situated at the southwestern-most extremity of Quobba Point and extending south to south latitude 24°34'; thence east to a point on the high water mark; and thence generally northwesterly along the high water mark aforesaid to the starting point'

Issue:

- Can Palmer rely on an honest and reasonable mistake of fact as a defence to the strict liability offence created by Regulation 34?
 - Can the false information provided to him by WA Fisheries form the basis of this belief, or is it only a mistake as to law?

Reasoning:

- Magistrate:
 - Although A is clearly honest, his mistake is one of law, not fact
 - This finding is reinforced by Palmer's diligent adherence to the legally defined exclusion zone he was aware of around Point Quobba
 - Therefore Palmer cannot rely on (the codified) defence of honest and reasonable mistake of *fact* under s 24
 - Palmer is convicted; he is fined \$500 plus \$2 000 in costs and an additional *mandatory* penalty of \$27 600
 - The Magistrate declined to give a discretionary order for forfeiture of A's pots
- WA Court of Appeal:
 - Olsson J and Malcolm CJ:
 - Palmer made a compound mistake of fact and law
 - Therefore, the mistake can be relied on
 - Convictions quashed
 - Steytler J (dissenting):
 - The mistake was one of law only
 - Convictions upheld
- Gleeson CJ and Kirby J:
 - Cite Jordan CJ in *R v Turnbull*, as cited by Brennan J in *He Kaw Teh*:
 - '[I]t is also necessary at common law for the prosecution to prove that [the accused] knew that he was doing the criminal act which is charged against him, that is, that he knew that *all the facts constituting the ingredients necessary to make the act criminal* were involved in what he was doing. If this be established, it is no defence that he did not know that the act which he was consciously doing was forbidden by law. Ignorance of the law is no excuse. But it is a good defence if he displaces the evidence relied upon as establishing his *knowledge of the presence of some essential factual ingredient of the crime charged*.'
 - Thus the defence of honest and reasonable mistake of fact under s 24 of the *Code* (WA) applies to mistakes about the factual elements of the offence, but not mistakes about the existence of the law creating the offence
 - Can Palmer claim that this was a mistake of fact?

- ‘There were three elements of the offence created by the regulation:
 - being the holder of a commercial fishing license;
 - fishing for rock lobsters; and
 - doing so in the waters surrounding Quobba Point.
 - The respondent's conduct satisfied all of those elements, and he made no mistake, and had no erroneous belief, about any of those elements, or about any matter relevant to them.
 - He knew he held a commercial fishing licence; he knew he was fishing for rock lobsters; and he knew where he was fishing.’ (at [6])
- McHugh J:
 - Is this a case of mixed mistake of law and fact?
 - No
 - ‘The earlier mistakes made by Mr Palmer - as to whether he had a complete set of regulations and whether a regulation existed which prohibited fishing in the area - explain how he came to form his mistaken view as to where he could fish. These earlier mistakes are nevertheless *preliminary to the commission of the offence*. They do not concern the elements of the offence; they cannot change what is a mistake of law, namely, a belief that Mr Palmer was entitled to fish for rock lobster in the area, into one of fact.’
 - Mistakes which don't concern the actual elements of the offence are irrelevant to the question of whether the accused can rely on a mistake
 - The bad legal advice received prior to the commission of the offence was unfortunate, but will not exonerate the accused
 - Fisheries WA made a mistake of law and passed that mistake on to Palmer; however, it is still a mistake of law:
 - ‘[I]t is *irrelevant* whether the mistake of law is induced by incorrect information obtained from an official government body or from any other third party or is induced by any other form of mistaken factual understanding. Thus, in any situation where a person's mistaken belief as to the legality of an activity is based on mistaken advice, that person would not have a defence under s 24. To find otherwise would expand the scope of the defence in s 24 to an *unacceptable extent*. It would also undermine the principle that ignorance of the law is no excuse, a principle expressly provided for in s 22 of the *Criminal Code*.’ (emphasis added)
 - ‘Thus, it is no defence to a criminal charge that the defendant believed that his or her actions were not regulated by law or that his or her actions satisfied the provisions of a law. Such beliefs are mistakes of law, not mistakes of fact...’
- Callinan and Heydon JJ:
 - The appellant (Ostrowski for WA Fisheries) appears to have accepted that this was really a case for the exercise of a prosecutorial discretion not to prosecute because he has given the following undertaking to the Court:
 - ‘Instructions have been sought and obtained from the Attorney General of Western Australia that in the event the Magistrate's decision is reinstated and the conviction entered, the Executive Council will advise the Governor to remit the general penalty, the mandatory penalty and the order for costs. This undertaking, together with the agreement reached between the Appellant and the Respondent that the Respondent's costs of the appeal and special leave application be paid, cure any perceived injustice to the Respondent.’

- 'It is impossible not to sympathise with the respondent. On any fair and objective view he was not culpable in any way. To the contrary he was most diligent. He went to the office of the administering authority twice in order to ascertain what his obligations were. Entirely openly and strictly in accordance with his licence he sought to comply with his understanding of what he could do based on official information personally provided by officials.'
 - 'That being said, he is still guilty'
 - The relevant mistake is one of law and cannot form the basis of a defence of honest and reasonable mistake of fact
 - Appeal allowed

Decision:

- All five HCA judges uphold the legally conservative position that a mistake as to law cannot form the basis of a defence of honest and reasonable mistake of fact
- All Judges agree that a defence based on the alleged doctrine of 'officially induced error of law' (ie, by the WA Fisheries officer) could not be raised here because such a defence – if it exists at all – was not raised at trial, and so cannot be raised on appeal

A similar approach has been adopted in the UK in *Surry Council v Battersby*, in which a council, when asked about the registration of a child, gave an incorrect answer, leading to the conviction of the accused irrespective of the mistake of the council. Though unfair, the mistake was one of law and not fact.

However, the decision in *R v Ranger* seems to indicate that some mistakes of law will be allowed to exonerate an accused. There, a law prohibited working on Sundays; on the basis of an earlier decision by a court that bakers were exempted from compliance with any such law, the accused baked on Sunday, and was subsequently charged with contravening the prohibition. The court held that he could rely on that pronouncement. Thus, a mistake of law relating to the bona fide interpretation of a statute on the basis of correctly interpreted court authority may be a valid basis on which to argue an honest and reasonable mistake of law. This is not the prevailing Australian approach.

A further example exists in *Texas Co v State of Texas*, an American case in which the accused is released from payment of a particular tax by the State's Governor. Following this concession, the company does not pay the tax; the tax veto is later held to be unconstitutional. When prosecuted for tax evasion, the company is found not to be liable for the unpaid tax because of a presumption that a governor's conduct is constitutional.

The assumption is underlying both these cases is that mistakes of law (that the tax was unpayable, that the legislation does not prevent bakers working on Sunday) are justifiable where they are induced by sources of particular authority (the Governor, a court). This may be contrasted with the Australian approach, which does not examine the identity of the inducer of a mistake and requires that the mistake pertain to a state of facts (*Ostrowski v Palmer*).

4 *Distinguishing mistakes of fact from mistakes of law*

Distinguishing these can often be very difficult:

- A mistake of fact may occur where the accused is mistaken as to a state of affairs
- A mistake of law will often occur where the accused is mistaken as to one or more of the following:

- The legal significance of a fact;
 - The legal conclusions to be drawn from a fact;
 - Ignorance of or a mistake about the law itself
- ‘Compound mistakes’ of fact and law are treated as mistakes of fact (*Ostrowski v Palmer*)

5 Reasonable cause of excuse

Although mistake of law is a clearly inadequate basis for a defence of honest and reasonable mistake of fact, a statutory defence of reasonable ‘cause’ or ‘excuse’ may possibly be satisfied.

For example, in *R v Bacon*, it was noted that, had the squatters possessed a mistaken but reasonable belief that they had legal title to the properties in which they were squatting, this might be sufficient to constitute a ‘reasonable cause’ for not vacating the premises (a defence under the section) – despite being a clear mistake as to law.

Mistaken belief in a legal right may allow a mistake of *law* to form the basis of a claim in defence to a strict liability offence, but *only* if the statute makes an absence of ‘reasonable cause’ a requirement for conviction. Such a defence is thus unrelated to the defence of honest and reasonable mistake of fact; it is available only where the statute expressly provides for that defence.

V Secondary Materials

A Senate Standing Committee Report on Strict and Absolute Liability Offences in Commonwealth Legislation (2002)

1 Ch 2: Merits of Strict and Absolute Liability

- Suited to regulation
 - More effective supervision of regulatory schemes
 - Suitable where there is a very high frequency of charges laid (eg, parking or speeding offences)
 - No protracted court process – fewer procedural barriers to enforcement
 - Purely regulatory offences are consequence based
 - Teleological approach to enforcement: consequences only
 - Regulations achieve social ends by preventing prohibited outcomes
 - Undermines authority of regulations if offenders can escape liability despite causing the prohibited outcome
- Less difficult to enforce
 - Inability to enforce mens rea based provisions
 - Evidentiary burden can prevent effective prosecution of crimes requiring mens rea (eg, difficult to prove intent or recklessness to speed – need knowledge of speed limit, etc)
- Efficiency
 - Optimum use of resources
 - The vast majority of individuals will pay the fine rather than dispute it

- Where necessary, allows rapid and low-cost prosecution
- Balance between social and individual justice
 - Strict liability is acceptable if tempered by the availability of appropriate defences and by checks and balances

2 *Ch 3: Concerns about Strict and Absolute Liability*

- Injustice
 - Lack of court scrutiny and therefore lack of transparency
 - Innocent people paying fines rather than paying cost in time and money of contesting a fine
 - 'Net widening' (where people are convicted of offences instead of warned as would otherwise have been done)
 - Might unduly affect small and medium size businesses due to costs of ensuring compliance
- Rigidity
 - Failure to consider circumstances of individual cases;
 - Dispensing with protection of mens rea;
 - Effectively reversing the onus of proof;
- Authority
 - Diminishing the moral content of strict liability offences
 - Accused can be guilty without being culpable (eg, *Ostrowski v Palmer*)
 - Can penalise attempts to comply
 - Perception of unfairness or harshness can undermine the capacity of the law to educate and deter
 - Overall erosion of basic principles of criminal responsibility

3 *Ch 4: The Use of Strict and Absolute Liability at a Commonwealth Level*

- Basic principles of criminal responsibility
- Merits of creating strict and absolute liability offences and the criteria for doing so
- Principles for protecting those affected by strict or absolute liability offences
- Principles for the sound administration of strict liability offences