

2

Strict liability

This chapter explains:

- that strict liability offences do not require *mens rea*;
- how the courts decide which crimes are ones of strict liability; and
- why the existence of strict liability offences is controversial.

Introduction

Some offences do not require *mens rea* or do not require *mens rea* to attach to an element of the *actus reus*. These are generally known as strict liability offences which is the term used in this chapter, though some lawyers refer to those offences requiring no *mens rea* at all as imposing absolute liability and those requiring no *mens rea* as to an element of the *actus reus* as imposing strict liability. Most of these offences have been created by statute.

Which crimes are crimes of strict liability?

Unfortunately, statutes are not always so obliging as to state 'this is a strict liability offence'. Occasionally the wording of an Act does make this clear, but otherwise the courts are left to decide for themselves. The principles on which this decision is made were considered in **Gammon (Hong Kong) Ltd v Attorney-General** (1985). The defendants were involved in building works in Hong Kong. Part of a building they were constructing fell down, and it was found that the collapse had occurred because the builders had failed to follow the original plans exactly. The Hong Kong building regulations prohibited deviating in any substantial way from such plans, and the defendants were charged with breaching the regulations, an offence punishable with a fine of up to \$250,000 or three years' imprisonment. On appeal they argued that they were not liable because they had not known that the changes they made were substantial ones. However, the Privy Council held that the relevant regulations created offences of strict liability, and the convictions were upheld.

Explaining the principles on which they had based the decision, Lord Scarman confirmed that there is always a presumption of law that *mens rea* is required before a person can be held guilty of a criminal offence. The existence of this presumption was reaffirmed in very strong terms by the House of Lords in **B (a minor) v DPP (2000)**.

KEY CASE

In **B (a minor) v DPP (2000)** a 15-year-old boy had sat next to a 13-year-old girl and asked her to give him a 'shiner'. The trial judge observed that '[t]his, in the language of today's gilded youth, apparently means, not a black eye, but an act of oral sex'. The boy was charged with inciting a child under the age of 14 to commit an act of gross indecency. Both the trial judge and the Court of Appeal ruled that this was a strict liability offence and that there was therefore no defence available that the boy believed the girl to be over 14. The House of Lords confirmed that there was a presumption that *mens rea* was required, and ruled that the relevant offence was not actually one of strict liability. The House stated that in order to rebut the presumption that an offence required *mens rea*, there needed to be a 'compellingly clear implication' that Parliament intended the offence to be one of strict liability:

When interpreting a statute there is always a presumption of law that *mens rea* is required for an offence.

... [T]he test is not whether it is a reasonable implication that the statute rules out *mens rea* as a constituent part of the crime – the test is whether it is a *necessary* implication.

As the offence had a very broad *actus reus*, carried a serious social stigma and a heavy sentence it decided Parliament did not have this intention. Soon afterwards the House of Lords confirmed its reluctance to find strict liability offences in **R v K** (2001).

These cases have thrown doubt on the old case of **Prince** (1874) which had also been concerned with an offence against the person that could only be committed on a girl under a certain age. That offence had been treated as one of strict liability and the reasonable but mistaken belief of the defendant as to her age was therefore found to be irrelevant. The House of Lords described that case as ‘unsound’ and a ‘relic from an age dead and gone’. In **R v K** the House of Lords described **Prince** as a ‘spent force’.

KEY CASE

While there is a clear presumption that *mens rea* is required, if the courts find that Parliament had a clear intention to create a strict liability offence then strict liability will be imposed and the presumption will be rebutted. Thus in **R v G** (2008) the House of Lords held that an offence known as ‘statutory rape’ created by Parliament in s. 5 of the Sexual Offences Act 2003 was a strict liability offence. The offence is committed when a man has sexual intercourse with a child under the age of 13. The defendant in the case had only been 15 at the time of the alleged incident and the victim admitted that she had lied to him on an earlier occasion about her age. Despite this, the House of Lords still found the defendant liable because his mistake about her age was irrelevant since this was a strict liability offence.

The presumption that *mens rea* is required will be rebutted if Parliament intended to create a strict liability offence.

There are certain factors which can, on their own or combined, displace the presumption that *mens rea* is required. These can be grouped into four categories which will be considered in turn.

● Regulatory offence

A regulatory offence is one in which no real moral issue is involved, and usually (though not always) one for which the maximum penalty is small – the mass of rules surrounding the sale of food are examples. In **Gammon** it was stated that the presumption that *mens rea* is required was less strong for regulatory offences than for truly criminal offences.

KEY CASE

This distinction between true crimes and regulatory offences was drawn in the case of **Sweet v Parsley** (1970). Ms Sweet, a teacher, took a sublease of a farmhouse outside Oxford. She rented the house to tenants, and rarely spent any time there. Unknown to her, the tenants were smoking cannabis on the premises. When they were caught, she was found guilty of being concerned in the management of premises which were being used for the purpose of smoking cannabis, contrary to the Dangerous Drugs Act 1965 (now replaced by the Misuse of Drugs Act 1971).

The presumption in favour of *mens rea* is less strong for regulatory offences.

Ms Sweet appealed, on the ground that she knew nothing about what the tenants were doing, and could not reasonably have been expected to have known. Lord Reid acknowledged that strict liability was appropriate for regulatory offences, or 'quasicrimes' – offences which are not criminal 'in any real sense', and are merely acts prohibited in the public interest. But, he said, the kind of crime to which a real social stigma is attached should usually require proof of *mens rea*; in the case of such offences it was not in the public interest that an innocent person should be prevented from proving their innocence in order to make it easier for guilty people to be convicted.

Since their Lordships regarded the offence under consideration as being a 'true crime' – the stigma had, for example, caused Ms Sweet to lose her job – they held that it was not a strict liability offence, and since Ms Sweet did not have the necessary *mens rea*, her conviction was overturned.

Unfortunately the courts have never laid down a list of those offences which they will consider to be regulatory offences rather than 'true crimes'. Those generally considered to be regulatory offences are the kind created by the rules on hygiene and measurement standards within the food and drink industry, and regulations designed to stop industry polluting the environment, but there are clearly some types of offences which will be more difficult to categorise.

● Issue of social concern

According to **Gammon**, where a statute is concerned with an issue of social concern (such as public safety), and the creation of strict liability will promote the purpose of the statute by encouraging potential offenders to take extra precautions against committing the prohibited act, the presumption in favour of *mens rea* can be rebutted. This category is obviously subject to the distinctions drawn by Lord Reid in **Sweet v Parsley** – the laws against murder and rape are to protect the public, but this type of true crime would not attract strict liability.

The types of offences that do fall into this category cover behaviour which could involve danger to the public, but which would not usually carry the same kind of stigma as a crime such as murder or even theft. The breach of the building regulations committed in **Gammon** is an example, as are offences relating to serious pollution of the environment. In **R v Blake** (1996) the defendant was accused of making broadcasts on a pirate radio station and was convicted of using wireless telegraphy equipment without

a licence, contrary to s. 1(1) of the Wireless Telegraphy Act 1949. His conviction was upheld by the Court of Appeal which stated that this offence was one of strict liability. This conclusion was reached as the offence had been created in the interest of public safety, given the interference with the operation of the emergency services that could result from unauthorised broadcasting.

In **Harrow London Borough Council v Shah** (1999) the offence of selling National Lottery tickets to a person under the age of 16 was found to be an offence of strict liability. The Divisional Court justified this by stating that the legislation dealt with an issue of social concern.

These crimes overlap with regulatory offences in subject area but, unlike regulatory offences, may carry severe maximum penalties. Despite such higher penalties, strict liability is seen to be a necessary provision given the need to promote very high standards of care in areas of possible danger.

● The wording of the Act

Gammon states that the presumption that *mens rea* is required for a criminal offence can be rebutted if the words of a statute suggest that strict liability is intended. The House of Lords said in **Sweet v Parsley**: ‘the fact that other sections of the Act expressly required *mens rea*, for example, because they contain the word “knowingly”, is not in itself sufficient to justify a decision that a section which is silent as to *mens rea* creates a [strict liability] offence.’ At present it is not always clear whether a particular form of words will be interpreted as creating an offence of strict liability. However, some words have been interpreted fairly consistently, including the following.

‘Cause’

In **Alphacell v Woodward** (1972) the defendants were a company accused of causing polluted matter to enter a river. They were using equipment designed to prevent any overflow into the river, but when the mechanism became clogged by leaves the pollution was able to escape. There was no evidence that the defendants had been negligent, or even knew that the pollution was leaking out. The House of Lords stated that where statutes create an offence of causing something to happen, the courts should adopt a common-sense approach – if reasonable people would say that the defendant has caused something to happen, regardless of whether he or she knew he or she was doing so, then no *mens rea* is required. Their Lordships held that in the normal meaning of the word, the company had ‘caused’ the pollution to enter the water, and their conviction was upheld.

‘Possession’

There are many offences which are defined as ‘being in possession of a prohibited item’, the obvious example being drugs. They are frequently treated as strict liability offences. For example, s. 5 of the Firearms Act 1968 provides:

A person commits an offence if, without the authority of the Defence Council . . . he has in his possession . . . (b) any weapon of whatever description designed or adapted for the discharge of any noxious liquid, gas or other thing.

In **R v Deyemi** (2007) the defendants had been found in possession of an electrical stun-gun which they claimed to have mistaken for a torch. The offence was interpreted as a

Which crimes are crimes of strict liability?

strict liability offence and so it was irrelevant if they had made a mistake. The harshness of this approach is highlighted by a statement by the trial judge:

. . . [A]lthough it does offend one's sense of justice to exclude *mens rea* from an offence so a defendant can be guilty of being in possession of something when he knows he is in possession, if it is a prohibited article, albeit he thinks it is something different, and that view is not unreasonable, having regard to its appearance and usage, I am satisfied that that is the state of affairs Parliament intended to create in making the offence one of strict liability.

The conviction was therefore upheld by the Court of Appeal.

'Knowingly'

Clearly use of this word tells the courts that *mens rea* is required, and tends to be used where Parliament wants to underline the fact that the presumption should be applied.

● The smallness of the penalty

Strict liability is most often imposed for offences which carry a relatively small maximum penalty, and it appears that the higher the maximum penalty, the less likely it is that the courts will impose strict liability. However, the existence of severe penalties for an offence does not guarantee that strict liability will not be imposed. In **Gammon** Lord Scarman held that where regulations were put in place to protect public safety, it was quite appropriate to impose strict liability, despite potentially severe penalties.

● Relevance of the four factors

Obviously these four factors overlap to a certain extent – regulatory offences usually do have small penalties, for example. And in **Alphacell v Woodward**, the House of Lords gave their decision the dual justification of applying the common-sense meaning of the term 'cause', and recognising that pollution was an issue of social concern.

It is important to note that all these categories are guidelines rather than clear rules. The courts are not always consistent in their application of strict liability, and social policy plays an important part in the decisions. During the 1960s, there was intense social concern about what appeared to be a widespread drug problem, and the courts imposed strict liability for many drugs offences. Ten years later, pollution of the environment had become one of the main topics of concern, hence the justification of the decision in **Alphacell v Woodward**. Today, there appears to be a general move away from strict liability, and some newer statutes imposing apparent strict liability contain a limited form of defence, by which an accused can escape conviction by proving that he or she took all reasonable precautions to prevent the offence being committed. However, the courts could begin to move back towards strict liability if it seemed that an area of social concern might require it.

● Crimes of negligence

Following the decision of **Attorney-General's Reference (No. 2 of 1999)** – discussed on p. 30 – it is arguable that crimes of negligence, such as gross negligence manslaughter, are actually crimes of strict liability. This is because in that case the Court of Appeal stated

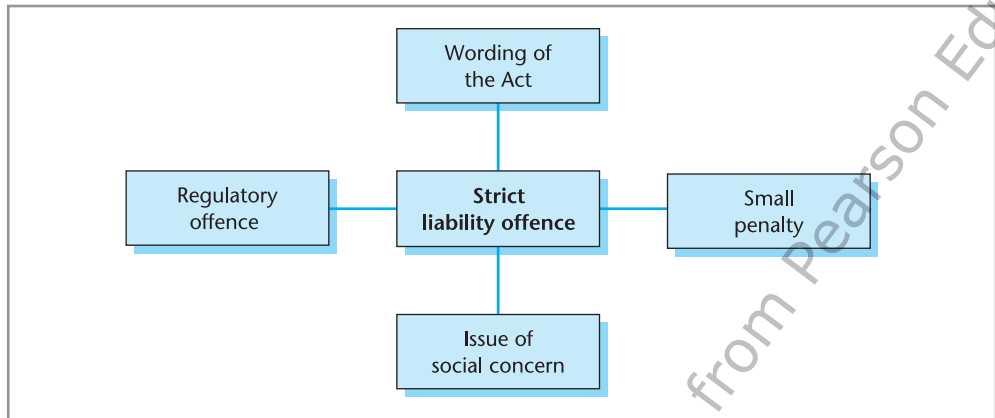


Figure 2.1 Strict liability

that gross negligence was not a form of *mens rea* and that a person could be found to have been grossly negligent without looking at their state of mind but simply by looking at the gross carelessness of their conduct.

The effect of mistake

Where strict liability applies, an accused cannot use the defence of mistake, even if the mistake was reasonable. The House of Lords judgment of **B (a minor) v DPP** is slightly misleading on this issue as it seems to blur the distinction between mistakes made in relation to strict liability offences and mistakes made in relation to offences requiring *mens rea*. This distinction is, however, fundamental. As the case was concerned with an offence that required *mens rea*, anything it stated in relation to strict liability offences was merely *obiter dicta* and therefore not binding on future courts.

The European Convention on Human Rights

TOPICAL ISSUE

The European Convention on Human Rights

Article 6(2) of the European Convention on Human Rights states:

Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.

The decision of the European Court of Human Rights in **Hansen v Denmark** (1995) suggests that strict liability offences may breach Art. 6(2) because once the prohibited act is proven, the defendant is 'presumed' to be liable. But the European Court stated in **Salabiaku v France** (1988):

the Contracting States may, under certain conditions, penalise a simple or objective fact as such, irrespective of whether it results from criminal intent or from negligence.

This has been interpreted by the English courts as allowing strict liability offences, most recently by the House of Lords in the case of **R v G** (2008).

Arguments in favour of strict liability

Promotion of care

By promoting high standards of care, strict liability, it is argued, protects the public from dangerous practices. Social scientist Barbara Wootton has defended strict liability on this basis, suggesting that if the objective of criminal law is to prevent socially damaging activities, it would be absurd to turn a blind eye to those who cause the harm due to carelessness, negligence or even an accident.

Deterrent value

Strict liability is said to provide a strong deterrent, which is considered especially important given the way in which regulatory offences tend to be dealt with. Many of them are handled not by the police and the Crown Prosecution Service (CPS), but by special government bodies, such as the Health and Safety Inspectorate which checks that safety rules are observed in workplaces. These bodies tend to work by placing pressure on offenders to put right any breaches, with prosecution, or even threats of it, very much a last resort. It is suggested that strict liability allows enforcement agencies to strengthen their bargaining position, since potential offenders know that if a prosecution is brought, there is a very good chance of conviction.

Easier enforcement

Strict liability makes enforcing offences easier; in **Gammon** the Privy Council suggested that if the prosecution had to prove *mens rea* in even the smallest regulatory offence, the administration of justice might very quickly come to a complete standstill.

Difficulty of proving *mens rea*

In many strict liability offences, *mens rea* would be very difficult to prove, and without strict liability, guilty people might escape conviction. Obvious examples are those involving large corporations, where it may be difficult to prove that someone knew what was happening.

No threat to liberty

In many strict liability cases, the defendant is a business and the penalty is a fine, so individual liberty is not generally under threat. Even the fines are often small.

Profit from risk

Where an offence is concerned with business, those who commit it may well be saving themselves money, and thereby making extra profit by doing so – by, for example, saving the time that would be spent on observing safety regulations. If a person creates a

risk and makes a profit by doing so, he or she ought to be liable if that risk causes or could cause harm, even if that was not the intention.

Arguments against strict liability

Injustice

Strict liability is criticised as unjust on a variety of different grounds. First, that it is not in the interests of justice that someone who has taken reasonable care, and could not possibly have avoided committing an offence, should be punished by the criminal law. This goes against the principle that the criminal law punishes fault.

Secondly, the argument that strict liability should be enforced because *mens rea* would be too difficult to prove is morally doubtful. The prosecution often find it difficult to prove *mens rea* on a rape charge, for example, but is that a reason for making rape a crime of strict liability? Although many strict liability offences are clearly far lesser crimes than these, some do impose severe penalties, as **Gammon** illustrates, and it may not be in the interests of justice if strict liability is imposed in these areas just because *mens rea* would make things too difficult for the prosecution. It is inconsistent with justice to convict someone who is not guilty, in the normal sense of the word, just because the penalty imposed will be small.

Even where penalties are small, in many cases conviction is a punishment in itself. Sentencing may be tailored to take account of mitigating factors, but that is little comfort to the reputable butcher who unknowingly sells bad meat, when the case is reported in local papers and customers go elsewhere. However slight the punishment, in practice there is some stigma attached to a criminal conviction (even though it may be less than that for a 'true crime') which should not be attached to a person who has taken all reasonable care.

In addition, as Smith and Hogan (2005) point out, in the case of a jury trial, strict liability takes crucial questions of fact away from juries, and allows them to be considered solely by the judge for the purposes of sentencing. In a magistrates' court, it removes those questions from the requirement of proof beyond reasonable doubt, and allows them to be decided according to the less strict principles which guide decisions on sentencing.

Strict liability also delegates a good deal of power to the discretion of the enforcement agency. Where strict liability makes it almost certain that a prosecution will lead to a conviction, the decision on whether or not to prosecute becomes critical, and there are few controls over those who make this decision.

Ineffective

It is debatable whether strict liability actually works. For a start, the deterrent value of strict liability may be overestimated. For the kinds of offences to which strict liability is usually applied, the important deterrent factor may not be the chances of being convicted, but the chances of being caught and charged. In the food and drinks business

particularly, just being charged with an offence brings unwelcome publicity, and even if the company is not convicted, they are likely to see a fall in sales as customers apply the 'no smoke without fire' principle. The problem is that in many cases the chances of being caught and prosecuted are not high. In the first place, enforcement agencies frequently lack the resources to monitor the huge number of potential offenders. Even where offenders are caught, it appears that the usual response of enforcement agencies is a warning letter. The most serious or persistent offenders may be threatened with prosecution if they do not put matters right, but only a minority are actually prosecuted. Providing more resources for the enforcement agencies and bringing more prosecutions might have a stronger deterrent effect than imposing strict liability on the minority who are prosecuted.

In other areas too, it is the chance of getting caught which may be the strongest deterrent – if people think they are unlikely to get caught speeding, for example, the fact that strict liability will be imposed if they do is not much of a deterrent.

In fact in some areas, rather than ensuring a higher standard of care, strict liability may have quite the opposite effect: knowing that it is possible to be convicted of an offence regardless of having taken every reasonable precaution may reduce the incentive to take such precautions, rather than increase it.

As Professor Hall (1963) points out, the fact that strict liability is usually imposed only where the possible penalty is small means that unscrupulous companies can simply regard the criminal law as 'a nominal tax on illegal enterprise'. In areas of industry where the need to maintain a good reputation is not so strong as it is in food or drugs, for example, it may be cheaper to keep paying the fines than to change bad working practices, and therefore very little deterrent value can be seen. In these areas it might be more efficient, as Professor Hall says, 'to put real teeth in the law' by developing offences with more severe penalties, even if that means losing the expediency of strict liability.

Justifying strict liability in the interests of protecting the public can be seen as taking a sledgehammer to crack a nut. It is certainly true, for example, that bad meat causes food poisoning just the same whether or not the butcher knew it was bad, and that the public needs protection from butchers who sell bad meat. But while we might want to make sure of punishment for butchers who knowingly sell bad meat, and probably those who take no, or not enough, care to check the condition of their meat, how is the public protected by punishing a butcher who took all possible care (by using a normally reputable supplier for example) and could not possibly have avoided committing the offence?

The fact that it is not always possible to recognise crimes of strict liability before the courts have made a decision clearly further weakens any deterrent effect.

• Little administrative advantage

It is also open to debate whether strict liability really does contribute much to administrative expediency. Cases still have to be detected and brought to court, and in some cases selected elements of the *mens rea* still have to be proved. And although strict liability may make conviction easier, it leaves the problem of sentencing. This cannot be done fairly without taking the degree of negligence into account, so evidence of the

accused's state of mind must be available. Given all this it is difficult to see how much time and manpower is actually saved.

● Inconsistent application

The fact that whether or not strict liability will be imposed rests on the imprecise science of statutory interpretation means that there are discrepancies in both the offences to which it is applied, and what it actually means. The changes in the types of cases to which strict liability is applied over the years reflect social policy – the courts come down harder on areas which are causing social concern at a particular time. While this may be justified in the interests of society, it does little for certainty and the principle that like cases should be treated alike.

The courts are also inconsistent in their justifications for imposing or not imposing strict liability. In **Lim Chin Aik v R** (1963), the defendant was charged with remaining in Singapore despite a prohibition order against him. Lord Evershed stated that the subject matter of a statute was not sufficient grounds for inferring that strict liability was intended; it was also important to consider whether imposing strict liability would help to enforce the regulations, and it could only do this if there were some precautions the potential offender could take to prevent committing the offence. '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.'

In the case of **Lim Chin Aik**, the precaution to be taken would have been finding out whether there was a prohibition order against him, but Lord Evershed further explained that people could only be expected to take 'sensible' and 'practicable' precautions: Lim Chin Aik was not expected to 'make continuous enquiry to see whether an order had been made against him'.

Presumably then, our hypothetical butcher should only be expected to take reasonable and practicable precautions against selling bad meat, and not, for example, have to employ scientific analysts to test every pork chop. Yet just such extreme precautions appear to have been expected in **Smedleys v Breed** (1974). The defendants were convicted under the Food and Drugs Act 1955, after a very small caterpillar was found in one of three million tins of peas. Despite the fact that even individual inspection of each pea would probably not have prevented the offence being committed, Lord Hailsham defended the imposition of strict liability on the grounds that: 'To construe the Food and Drugs Act 1955 in a sense less strict than that which I have adopted would make a serious inroad on the legislation for consumer protection.' Clearly the subject areas of these cases are very different, but the contrast between them does give some indication of the shaky ground on which strict liability can rest – if the House of Lords had followed the reasoning of **Lim Chin Aik**, Smedleys would not have been liable, since they had taken all reasonable and practical precautions.

● Better alternatives are available

There are alternatives to strict liability which would be less unjust and more effective in preventing harm, such as better inspection of business premises and the imposition of liability for negligence (see below).

Reform

● Restrict the use of strict liability

The Law Commission has published a consultation paper entitled *Criminal Liability in Regulatory Contexts* (2010). It has suggested that the criminal law should only be employed to deal with wrongdoers who deserve the stigma associated with criminal conviction because they have engaged in seriously reprehensible conduct. Strict liability could perhaps be more easily justified if the tighter liability were balanced by real danger to the public in the offence – the case of **Gammon** can be justified on this ground.

The Law Commission's draft Criminal Code Bill required that Parliament should specifically state if it was creating an offence of strict liability. Where this was not done the courts should assume *mens rea* was required. The practice of allowing the courts to decide when strict liability should be applied, under cover of the fiction that they are interpreting Parliamentary intention, is not helpful, leading to a mass of litigation, with many of the cases irreconcilable with each other – as with **Lim Chin Aik** and **Smedleys v Breed**, above. If legislators knew that the court would always assume *mens rea* unless specifically told not to, they would be more likely to adopt the habit of stating whether the offence was strict or not.

● Defence of all due diligence

In its 2010 consultation paper, the Law Commission recommended that for offences of strict liability, the courts should have the power to apply a due diligence defence. In Australia a defence of all due care is available, where a crime would otherwise impose strict liability, the defendant can avoid conviction by proving that he or she took all due care to avoid committing the offence. This is effectively creating an offence of negligence but where negligence is presumed and the burden of proof is placed on defendants to show they were not negligent to avoid liability.

● Extending strict liability

Baroness Wootton (1981) advocated imposing strict liability for all crimes, so that *mens rea* would only be relevant for sentencing purposes.

? Answering questions

Strict liability tends to arise in essay rather than problem questions, because the offences to which it applies tend not to be included in course syllabuses. Given the large amount of theoretical discussion for and against strict liability, it should not be difficult to discuss critically, and is therefore a good choice for essay questions.

1 Is it just to impose criminal liability where no *mens rea* has been proved?

Avoid the natural temptation of using this question simply as a trigger for writing everything you know on the subject without applying that material to the specific question asked. Obviously you will want to learn off a lot of material before the exam, and it will probably help to follow the structure of this book when you do this, so that for this chapter, for example, you might learn the lists of arguments for and against strict liability. That material will provide the basis for answering many differently worded questions on strict liability, but, in the exam, you must angle that material to the actual question being asked. In this question, the key words are 'imposition' and 'justifiable' and these and their synonyms should be used at several points in the essay to show that you are answering the particular question asked. You could start by stating where strict liability is currently imposed, before discussing whether such impositions are justified – in this part you can describe the kind of offences to which strict liability applies, giving examples from case law. You should, however, devote the bulk of your essay to discussing when the imposition of strict liability is justified, if ever in your opinion, and when not, using the arguments for and against it to back up your points.

2 How far does the imposition of criminal liability depend upon the existence of fault?

This is a slightly more difficult question, but one for which it should be possible to get good marks if you plan your answer carefully. As well as strict liability discussed in this chapter, the question also raises issues discussed in the previous chapter on 'Elements of a crime'. A good answer could include such issues as an explanation of *actus reus* (including causation and voluntariness), and *mens rea* and the absence of defences (such as insanity and duress) giving rise to evidence of fault.



Summary

There are a small number of crimes which can be committed without any *mens rea*. These offences are known as strict liability crimes.

Which crimes are crimes of strict liability?

It is generally a question of statutory interpretation to determine whether an offence is one of strict liability. A leading case on how the courts decide this issue is **Gammon (Hong Kong) Ltd v Attorney-General** (1985). The starting point for the courts is a presumption that *mens rea* is required. There are certain factors which can, on their own or combined, displace this presumption. These can be grouped into four categories:

- regulatory offences
- issues of social concern
- the wording of the Act
- the smallness of the penalty.

Crimes of negligence

Following the decision of **Attorney-General's Reference (No. 2 of 1999)**, it is arguable that crimes of negligence, such as gross negligence manslaughter, are actually crimes of strict liability.

The effect of mistake

Where strict liability applies, an accused cannot use the defence of mistake, even if the mistake was reasonable.

The European Convention on Human Rights

There has been some debate as to whether strict liability offences breach the European Convention on Human Rights.

Arguments in favour of strict liability

A range of arguments have been put forward in support of strict liability offences:

- promotion of care
- deterrent value
- easier enforcement
- difficulty of proving *mens rea*
- no threat to liberty
- prevent profit from risk.

Arguments against strict liability

A range of arguments have been put forward against strict liability offences:

- injustice
- ineffective
- little administrative advantage
- inconsistent application
- better alternatives are available.

Reform

A number of reform proposals have been put forward. These range from the Law Commission's draft Criminal Code which would require Parliament to specifically state if it is creating an offence of strict liability, to Baroness Wootton's suggestion that all crimes should be strict liability offences.



Reading list

Carson, D. (1970) 'Some sociological aspects of strict liability' [1970] *Modern Law Review* 225.

Hogan, B. (1978) 'The mental element in crime; strict liability' [1978] *Criminal Law Review* 74.

Jackson, B. (1982) 'Storkwain: a case study in strict liability and self-regulation' [1991] *Criminal Law Review* 892.

Simester, A. (ed.) (2005) *Appraising Strict Liability*, Oxford: OUP.

Wootton, B. (1981) *Crime and the Criminal Law: Reflections of a Magistrate and Social Scientist*, London: Stevens.

Reading on the internet

The Law Commission report *Criminal Liability in Regulatory Contexts* (2010) is available on the Law Commission's website at:

http://www.lawcom.gov.uk/current_consultations.htm

The website of the Health and Safety Executive, responsible for the enforcement of a range of strict liability offences, can be found at:

<http://www.hse.gov.uk>

Visit www.mylawchamber.co.uk/elliottcriminal to access tools to help you develop and test your knowledge of criminal law, including interactive multiple choice questions, practice exam questions with guidance, glossary, glossary flashcards, legal newsfeed, legal updates.

