6

Strict liability

OVERVIEW

This chapter deals principally with:

- the meaning of strict liability;
- strict liability and the presumption of innocence under the ECHR, Article 6(2);
- offences of strict liability at common law;
- statutory offences of strict liability, and how it is determined whether a statutory offence is one of strict liability;
- the justification for strict liability; and
- the reduction of the operation of strict liability in the criminal law.

The meaning of strict liability

Key points 6.1

An offence is one of strict liability if *mens rea* is not required in respect of one or more elements of the *actus reus* of that offence.

6.1 It was stated in para 2.3 that, although the argument has been made that the state of mind with which a person acts should be irrelevant to his criminal liability (as opposed to whether and how he should be dealt with on conviction), this does not represent the law.

In many[1] offences, particularly regulatory ones, however, the defendant (D) may be convicted even though his conduct was not intentional, knowing, reckless or negligent with reference to a requisite element of the offence charged. In such cases, a person is liable to punishment in the absence of any fault on his part in respect of the element(s) in question and is said to be under strict liability[2] (of which there are many critics).

[1] See Ashworth and Blake 'The Presumption of Innocence in English Criminal Law' [1997] Crim LR 306.

[2] *Lemon* [1979] AC 617 at 656, per Lord Edmund-Davies (contrast at 639–640, 657, and 662, per Viscount Dilhorne, Lord Russell and Lord Scarman); *K* [2002] 1 AC 462 at [18], per Lord Bingham.

6.2 Most cases of strict liability are ones in which it has been held that ignorance or mistake, however reasonable, in relation to a particular element of the *actus reus* of an offence is no excuse, since no *mens rea* is required as to that element, although it is required in relation to one or more other elements. This can be shown by reference to *Prince*[3] and *Hibbert*.[4] In *Prince*, the charge was one of taking an unmarried girl under the age of 16 out of the possession of her father against his will, contrary to the Offences Against the Person Act 1861, s 55 (an offence which no longer exists). D knew that the girl was in the custody of her father, but he believed, on reasonable grounds, that she was 18. Had this been so, the offence would not have been committed; but D was held by the Court for Crown Cases Reserved to have been rightly convicted since knowledge that the girl was under 16 was not required. The Court clearly took the view that knowledge that the girl was in the possession of her father was required to be proved, proof of which knowledge was not disputed. *Prince* is distinguishable on this ground from *Hibbert*, where D's conviction for an offence under the same section was quashed, because D did not know that the girl he abducted was in anybody's possession. The jury appear to have found that D did not know that she was in anybody's guardianship.

6.3 There have, however, also been isolated instances in which the courts have held that an offence does not require any *mens rea* at all. An example relates to the offence of driving with excess alcohol, contrary to the Road Traffic Act 1988, s 5, which was stated in *DPP v H*[5] not to require proof of any *mens rea*. Another example is provided by *Bezzina*,[6] dealt with in para 6.41.

6.4 Quite inexplicably, the Court of Appeal in *Sandhu*[7] held that strict liability as to an element or elements of an *actus reus* does not simply mean that proof of *mens rea* in that respect is not required but that the prosecution must not prove it or seek to prove it. It quashed D's conviction for the strict liability offence of causing unauthorised alterations to a listed building on grounds that the evidence in respect of *mens rea* was inadmissible and prejudicial to D's interests. The result is that, where the prosecution has evidence of *mens rea* as to a strict liability element of the *actus reus*, it should not adduce it. This seems an artificial and unnecessary limitation, especially as evidence of fault will be relevant at the sentencing stage.

Strict liability and absolute liability distinguished

Key points 6.2

'Strict liability' refers to liability despite the absence of any *mens rea* in relation to one or more elements of the *actus reus* of an offence. 'Absolute liability' refers to liability despite the absence of any *mens rea* in relation to the elements of the *actus reus* and without the availability of any defence other than that the defendant is under 10 (the age of criminal responsibility).

[3] (1875) LR 2 CCR 154, CCR.
[4] (1869) LR 1 CCR 184, CCR. For another example, see *Gammon (Hong Kong) Ltd v A-G of Hong Kong*; para 6.14.
[5] [1997] 1 WLR 1406, DC. See also *Harrison and Francis* [1996] 1 Cr App R 138, CA.
[6] [1994] 3 All ER 964, CA.
[7] [1997] Crim LR 288, CA.

6.5 Strict liability is sometimes spoken of as 'absolute liability' and the corresponding expressions of 'absolute prohibition' and 'absolute offence' are occasionally used.[8] Such statements involve a confusion between strict liability and absolute liability, a concept which generally has no part in the criminal law. 'Absolute liability' refers to liability despite the absence of any *mens rea* in relation to the *actus reus* and without the availability of any defence such as duress by threats or circumstances, compulsion, automatism or insanity, other than the fact that D is under 10 (in which case D is irrebuttably presumed incapable of crime). Absolute liability is a concept which offends any idea of justice. In an Australian case it has been criticised as a 'throwback to a highly primitive form of concept'.[9]

6.6 The nature of the judicial process means that it is difficult to be certain which offences, if any, are ones of absolute liability in the proper sense of the term. However, the wording of a small number of offences would seem to indicate that they are ones of absolute liability. Certainly, the wording of some so-called 'status offences' or 'situational offences', such as those in issue in *Larsonneur*[10] and *Winzar v Chief Constable of Kent*,[11] may lead to such a conclusion.

In *Larsonneur*, D, an alien who had not got leave to land in the United Kingdom was deported from Ireland. She was brought to Holyhead in the custody of the Irish police, was handed over to the police there, and was 'found', still in custody, in a cell at Holyhead. She was convicted of an offence under orders made under the Aliens Restriction Acts, according to which it was an offence for an alien, to whom leave to land in the United Kingdom had been refused, to be found in any place within the United Kingdom.[12] D appealed unsuccessfully against conviction. Normally, someone is not guilty of an offence if the event is involuntary on his part, but the Court of Criminal Appeal took the view that D came precisely within the wording of the relevant order and that the circumstances of her entry and confinement were 'perfectly immaterial'. This decision has rightly been criticised as the 'acme of strict injustice'.[13] It is a matter of speculation whether Larsonneur might not equally have been held guilty if she had been brought to Holyhead unconscious and been 'found' in that state, or had been parachuted from an aeroplane against her will.

In *Winzar v Chief Constable of Kent*, the Divisional Court adopted the same attitude as in *Larsonneur*. D was taken to hospital on a stretcher. The doctor discovered that D was drunk and D was told to leave. Later, D was seen slumped on a seat in a corridor. The police were called and they removed him to their car on the highway. D's conviction of the offence, under the Licensing Act 1872, s 12, of being found drunk in a highway was

[8] For modern examples of such use, see *Loukes* [1996] 1 Cr App R 444, CA; *Roberts and George* [1997] RTR 462, CA; *M and B* [2009] EWCA Crim 2615. Also see Lord Reid's statement in *Sweet v Parsley*, para 6.13.

[9] *Mayer v Marchant* (1973) 5 SASR 567 at 585, per Zelling J.

[10] (1933) 149 LT 542, CCA. For a defence of this decision on the basis that the case involved the prior fault of the defendant, since she was the author of her own misfortune, see Lanham '*Larsonneur* Revisited' [1976] Crim LR 276. Prior fault was not relied on by the Court of Criminal Appeal as a ground of its decision. For another defence of *Larsonneur* see Doegar 'Strict Liability in Criminal Law and *Larsonneur* Reassessed' [1998] Crim LR 791, but see the persuasive response at [1999] Crim LR 100 by JC Smith. See also the response by Lanham at [1999] Crim LR 683.

[11] (1983) *Times*, 28 March, DC.

[12] This offence has since been repealed.

[13] Hall *General Principles of Criminal Law* (2nd edn, 1960) 329, n 14.

affirmed by the Divisional Court on the ground that, as the purpose of the offence was to deal with the nuisance of drunkenness in public, it was enough to establish guilt simply to prove that D was found drunk in a public place; the fact that the police had procured the offence was immaterial.

6.7 Apart from rare offences of the type just referred to in para 6.6, the general defences of the criminal law[14] are normally available to a person accused of an offence of strict liability.[15] It is very doubtful, to say the least, whether there are any offences, except those whose wording is similar to that of the offences in *Larsonneur* and in *Winzar v Chief Constable of Kent*, to which the general defences such as duress by threat or of circumstances, compulsion and non-insane automatism[16] would not apply.

It had been doubted whether, apart from rare offences of the type just referred to, there were any offences to which the defence of insanity did not apply. However, in *DPP v H*[17] the Divisional Court held that the defence of insanity could only apply in a case where *mens rea* was in issue and therefore that it could not apply to a strict liability offence for which no *mens rea* was required. Thus, it held, the defence of insanity was not available on a charge of driving with excess alcohol, contrary to the Road Traffic Act 1988, s 5. For criticism of this decision, see para 15.39.

Strict liability and the presumption of innocence

Key points 6.3

Strict liability does not infringe the presumption of innocence under the ECHR, Article 6(2).

6.8 As explained in Chapter 4,[18] the presumption of innocence contained in the ECHR, Article 6(2) may be contravened where the persuasive burden is imposed on the defendant to prove the absence of *mens rea*. On the other hand, Article 6(2) is not contravened where no *mens rea* is required as to all or some of the elements of an offence (ie strict liability).

The starting point is *Salabiaku v France*,[19] where the European Court of Human Rights stated that:

> '[I]n principle the Contracting States remain free to apply the criminal law to an act where it is not carried out in the normal exercise of one of the rights protected under the Convention and, accordingly, to define the constituent elements of the resulting offence.

[14] See Chs 15 and 16.

[15] Eg, the general defences of involuntary conduct and of duress are available on a charge of committing a strict liability offence: *Leicester v Pearson* [1952] 2 QB 668, DC (para 15.58 (involuntary conduct)); *Eden District Council v Braid* [1999] RTR 329, DC (duress by threats); *Martin (Colin)* [1989] 1 All ER 652, CA; *Gregory* [2011] EWCA Crim 1712 (duress of circumstances).

[16] Paras 15.54–15.66, 16.40–16.62 and 16.70–16.85.

[17] [1997] 1 WLR 1406, DC.

[18] Para 4.8.

[19] (1988) 13 EHRR 379, ECtHR.

> In particular, and again *in principle*, 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.'[20]

The Court did not specify what those conditions are.

Salabiaku v France has been referred to on a number of occasions by English appellate courts. They have held that Article 6(2) is restricted to the fairness of the trial in procedural terms and not with the fairness of the substantive law, with the result that strict liability does not infringe Article 6(2).

In *Barnfather v Islington Education Authority*,[21] for example, the Divisional Court held that the fact that an offence was one of strict liability was not incompatible with Article 6(2) because Article 6(2) provided a criterion against which only procedural (including evidential) matters could be tested and not the substantive requirements of an offence.[22]

More recently, *Salabiaku* was referred to in *G*,[23] where the House of Lords unanimously held that construing the Sexual Offences Act 2003, s 5 (rape of a child under 13)[24] as an offence of strict liability did not infringe the right to a fair trial under Article 6(1) or the presumption of innocence under Article 6(2) because Article 6 was not concerned with the substantive law but with the fairness of the procedure, and strict liability did not affect procedural fairness. Lord Hope explained the passage from *Salabiaku* quoted above as follows:

> 'It contains a clear affirmation of the principle that the contracting States are free to apply the criminal law to any act, so long as it is not one which is carried out in the exercise of one of the rights protected under the [ECHR]. Accordingly they are free to define the constituent elements of the offence that results from that act. So when the court said in the next sentence that the contracting States may "under certain conditions" penalise a simple or objective fact as such, irrespective of whether it results from criminal intent or negligence, it was reaffirming the same principle. As in the previous sentence, the certain conditions that are referred to indicate that objection could be taken if the offence was incompatible with other articles of the [ECHR]. But they have no wider significance… The substantive content of the criminal law does not raise issues of the kind to which [Article 6] is directed.'[25]

The European Court of Human Rights rejected in *G v UK*[26] a complaint that construing an offence under s 5 of the 2003 Act as one of strict liability was incompatible with the presumption of innocence under Article 6(2). It stated that it was not the Court's role under Article 6(1) or (2) to dictate the content of domestic criminal law, including whether *mens rea* should be required or whether there should be any particular defence available to D.

[20] Ibid at [27].
[21] [2003] EWHC 418 (Admin).
[22] In *Muhamad* [2002] EWCA Crim 1856, the Court of Appeal, having referred to *Salabiaku*, held that offences of strict liability were not in themselves objectionable under the ECHR.
[23] [2008] UKHL 37. See also *Deyemi and Edwards* [2007] EWCA Crim 2060, CA.
[24] Para 9.35.
[25] [2008] UKHL 37 at [28] and [29].
[26] (2011) 53 EHRR SE25, ECtHR. See also para 9.38.

Offences of strict liability

Key points 6.4

There are very few common law offences of strict liability. For the most part it is in statutory offences that strict liability in criminal cases is imposed, normally as the result of the courts' interpretation of the particular statute.

Strict liability at common law

6.9 The list of these offences only includes the following.

- *Public nuisance* Although liability for committing the ancient offence of public nuisance depends on proof of negligence,[27] a person may be vicariously liable for such an offence committed on his property or on the highway by his employee, even if the latter was disobeying orders.[28] In such a case the employer is said to be strictly liable because he can be convicted even if he was reasonably unaware of the employee's conduct.

  A public nuisance is an act not warranted by law, or an omission to discharge a legal duty, whose effect is to endanger the life, health, property or comfort of the public, or to obstruct a substantial section of the public in the exercise or enjoyment of rights common to all members of the public.[29] Typical examples are the obstruction of the highway or the emission of noise or smells from a factory in such a way as to cause serious inconvenience to the neighbourhood. Many instances of public nuisance now also constitute statutory offences with limited maximum sentences, and often with time limitations on prosecutions and defences unavailable on a charge of public nuisance. In 2005, the House of Lords held that, ordinarily, conduct falling within a statutory offence and under public nuisance should no longer be prosecuted as the common law offence of public nuisance.[30]

- *Outraging public decency* This offence requires proof of conduct of such a lewd, obscene or disgusting nature as to result in an outrage to public decency.[31] It does not have to be proved that D intended his conduct to have the effect of outraging public decency or was reckless as to the risk of this effect (or, indeed, that D had any type of *mens rea* as to this).[32]
- *Criminal contempt of court* Subject to various limitations, liability for contempt in relation to publications which interfere with the course of justice in particular proceedings is strict.[33]

[27] *Shorrock* [1994] QB 279, CA; approved in *Rimmington; Goldstein* [2005] UKHL 63.
[28] *Stephens* (1866) LR 1 QB 702, CCR.
[29] This definition was approved in *Rimmington; Goldstein* [2005] UKHL 63.
[30] Ibid.
[31] See further para 14.98.
[32] *Gibson and Sylveire* [1990] 2 QB 619, CA.
[33] Contempt of Court Act 1981, s 1.

In its consultation paper *Simplification of Criminal Law: Public Nuisance and Outraging Public Decency*,[34] the Law Commission:

- has made provisional proposals about public nuisance (see para 3.53) which, if implemented, would abolish vicarious liability for public nuisance; and
- has provisionally proposed that the offence of outraging public decency should cease to be an offence of strict liability and should require proof that D intended that his conduct would outrage public decency or was reckless as to the risk of this.[35]

Strict liability in statutory offences

Key points 6.5

Strict liability in statutory offences normally results from the courts' refusal to read into a provision which does not contain a *mens rea* term in respect of an element of the *actus reus* a requirement that *mens rea* in relation to it is required.

6.10 Most of the statutory offences of strict liability are 'regulatory offences' which arise under the regulatory legislation controlling such matters as the sale of food and other types of trading activity, health and safety at work and other public welfare matters, which are usually investigated and prosecuted by a regulatory authority rather than the police and the Crown Prosecution Service.[36] Similarly, many of the offences in statutes regulating road traffic have also been held to be of strict liability. Offences of the above types do not normally involve any inherently immoral conduct. The conduct subject to them is criminal simply because it is prohibited, and the offences are known as *mala prohibita*. People who are convicted of them are not normally regarded as criminals. It must be emphasised, however, that strict liability can arise even in respect of offences described as 'real crimes', ie crimes dealing with things which are inherently immoral (*mala in se*).

6.11 When enacting statutory offences, Parliament often stipulates a requirement of *mens rea* as to the elements of the *actus reus*. However, although it is almost unknown for a statutory provision expressly to state that *mens rea* is not required as to such an

[34] (2010) Law Com Consultation Paper No 193.

[35] The Law Commission has provisionally proposed that, with these amendments, the two offences should be restated as statutory offences.

[36] Research has shown that prosecution for a regulatory offence is usually a weapon of last resort against persistent offenders against a regulatory offence because the preference of regulatory authorities is to seek compliance by advice and persuasion: Richardson 'Strict Liability for Regulatory Offences' [1987] Crim LR 295. See also para 6.44.

element,[37] it has been common for Parliament simply to define the prohibited conduct without any reference to the *mens rea* in relation to an element. Strict liability in statutory offences normally results from the courts' refusal to read into a statutory provision which does not use a word like 'intentionally', 'recklessly' or 'knowingly' in relation to an element of the *actus reus* of a particular offence a requirement of *mens rea* in relation to it.

6.12 Some statutory offences are made subject by their parent statute to a defence whereby D is not guilty if he proves that he neither believed, nor suspected, nor had reason to suspect that one or more of the specified elements of the offence existed, or whereby he proves some other defence of a 'no fault' type.[38] Where such a defence is provided in relation to a particular offence, its effect is to make it clear that D can be convicted even though no *mens rea* as to the specified element or elements to which the defence applies is proved by the prosecution.

Presumption that *mens rea* is required

Key points 6.6

The absence of an express requirement of *mens rea* does not automatically mean that a statutory offence is one of strict liability, since it is rebuttably presumed that *mens rea* is required.

6.13 In modern times, judicial opinion has grown less favourable to the recognition of strict liability offences. In particular, the decision of the House of Lords in 1969 in *Sweet v Parsley,*[39] indicated a significant shift in the judicial approach to statutory offences which do not clearly require *mens rea* by categorically reaffirming a principle which had increasingly appeared to be of little importance. This is the principle that, in interpreting a statutory provision which is silent on the point, there is a presumption that *mens rea* is required, unless this is rebutted by clear evidence that Parliament intended the contrary. In *Sweet v Parsley* the House of Lords held that a person could not be convicted of the offence of 'being concerned in the management of premises used for the purpose of smoking cannabis' in the absence of knowledge of such use, the presumption that *mens rea* was required not having been rebutted. (Parliament subsequently made the requirement of knowledge doubly sure by inserting the word 'knowingly' in the definition of the corresponding offence in the Misuse of Drugs Act 1971, which replaced the previous provision.)

In a passage regarded as an authoritative and accurate statement of the law, Lord Reid said this about the interpretation of a statutory provision and whether it required *mens rea*:

[37] A modern example of where this has been done is the Sexual Offences Act 2003, s 53A (added by the Policing and Crime Act 2009, s 14) which provides, in relation to the offence of paying for the sexual services of a prostitute who has been subjected by a third party to exploitative conduct likely to induce the prostitute to provide the sexual services, that it is irrelevant whether D is, or ought to be aware, that the third party has engaged in exploitative conduct.

[38] See paras 6.45–6.47.

[39] [1970] AC 132, HL.

'Our first duty is to consider the words of the Act; if they show a clear intention to create an absolute offence,[40] that is the end of the matter. But such cases are very rare. Sometimes the words of the section which creates a particular offence make it clear that *mens rea* is required in one form or another. Such cases are quite frequent. But in a very large number of cases there is no clear indication either way. In such cases there has for centuries been a presumption that Parliament did not intend to make criminals of persons who were in no way blameworthy in what they did. That means that, whenever a section is silent as to *mens rea*, there is a presumption that, in order to give effect to the will of Parliament, we must read in words appropriate to require *mens rea*...

[I]t is firmly established by a host of authorities that *mens rea* is an essential ingredient of every offence unless some reason can be found for holding that that is not necessary.... In the absence of a clear indication in the Act that an offence is intended to be an absolute offence, it is necessary to go outside the Act and examine all relevant circumstances in order to establish that this must have been the intention of Parliament.' [41]

6.14 The presumption that *mens rea* is required was again affirmed in 1984 by the Privy Council in *Gammon (Hong Kong) Ltd v A-G of Hong Kong*,[42] although on that occasion it was found to be rebutted. The defendants were charged with diverging in a material way from approved building plans, contrary to the Hong Kong Building Ordinance. They claimed that they were not guilty because they did not know that the divergence from the plans was a material one. Applying the approach set out in para 6.22 and subsequent paragraphs, the Privy Council held that, although *mens rea* was required as to other elements of the offence, the presumption that *mens rea* was required was rebutted in relation to the alleged need to prove knowledge of the materiality of the divergence.

In 2000, in *B v DPP*,[43] the House of Lords, reversing the Divisional Court, expressed the presumption in terms which gave further strength to it. It held that a person could not be convicted of an offence under the subsequently repealed Indecency with Children Act 1960, s 1(1) (gross indecency with or towards a child under 14, or incitement of a child under 14 to such an act) unless the prosecution proved the absence of a genuine belief on his part that the child was 14 or over. Section 1(1) did not expressly rule out *mens rea* as a constituent element of the offence; it simply made no reference one way or the other to any mental element in respect of the victim's age. The House of Lords could not find, in the statutory context or otherwise, any necessary implication to rebut the presumption that *mens rea* was required as to the fact that the victim was under 14.

The strength of the presumption was reaffirmed in 2001 by the House of Lords in *K*[44] in respect of the subsequently repealed offence of indecent assault on a female, contrary to the Sexual Offences Act 1956, s 14. This section provided that a girl under 16 or a mentally defective woman could not consent to the indecency so as to prevent there being an indecent assault but that D would not be guilty (in the case of a girl under 16) if he reasonably believed that he was married to the girl or (if a woman was a defective) he did not know or have reason to suspect that she was a defective. Section 14 made no provision for the case where D was ignorant that a girl was under 16. The House of Lords held that

[40] In this context this means a strict liability offence; see para 6.5.
[41] [1970] AC 132 at 148–149.
[42] [1985] AC 1, PC.
[43] [2000] 2 AC 428, HL.
[44] [2001] UKHL 41.

the words of the section did not exclude by necessary implication the presumption that *mens rea* was required as to the girl's age. Lord Steyn stated that the applicability of the presumption was not dependent on finding an ambiguity in the text; the presumption operated to supplement the text.[45]

6.15 The first paragraph of the quotation from Lord Reid's speech in *Sweet v Parsley*, set out in para 6.13, was considered by Lord Bingham in *DPP v Collins*.[46] In that case, the House of Lords was concerned with the offence under the Communications Act 2003, s 127(1)(a), which provides that a person is guilty of any offence if he 'sends by means of a public electronic communications network a message or other matter that is grossly offensive or of an indecent, obscene or menacing character'. Lord Bingham, with whom the other Law Lords agreed, held that the above first paragraph was relevant to the offence before the House, because Parliament could not have intended to criminalise the conduct of a person using language which was, for reasons unknown to him, grossly offensive to those to whom it related or which was thought by that person, however unreasonably, to represent a polite or acceptable usage. Lord Bingham therefore concluded, as part of his reasons for determining the appeal, that, in addition to an intention to send the message in question, D must intend his words to be grossly offensive to those to whom they relate, or be aware that they may be taken to be so.

What is the mens rea *that is presumed to be required?*

6.16 Where a *mens rea* requirement is read in under the presumption that *mens rea* is required, it will be a subjective mental element of some kind, eg intention or recklessness as to a consequence-element or knowledge or recklessness as to a circumstance-element.[47] It should not be read in that negligence is sufficient.[48]

Does Parliament really have an intention in respect of mens rea?

6.17 The presumption that *mens rea* is required is one of the rules of statutory interpretation, rules whose purpose is rather inaccurately said to be to discover Parliament's intention. In *K*, Lord Millett, in holding that the presumption that *mens rea* is required was not rebutted, stated that he did so 'without reluctance but with some misgiving, for I have little doubt that we shall be failing to give effect to the intention of Parliament'.[49] In truth, the presumption that Parliament intended *mens rea* to be required is a somewhat artificial rule. Devlin J (as he then was) wrote in respect of strict liability:

> 'The fact is that Parliament has no intention whatever of troubling itself about *mens rea*. If it had, the thing would have been settled long ago. All that Parliament would have to do would be to use express words that left no room for implication. One is driven to the conclusion that the reason why Parliament has never done that is that it prefers to leave the point to the judges and does not want to legislate about it.'[50]

[45] [2001] UKHL 41 at [32]. [46] [2006] UKHL 40. [47] Ch 3.
[48] *Gray's Haulage Co Ltd v Arnold Ltd* [1966] 1 All ER 896, DC (para 3.58); *B v DPP* [2000] 2 AC 428, HL (see para 5.13). [49] [2001] UKHL 41 at [41].
[50] *Samples of Lawmaking* (1962) 71.

Attention paid to the presumption by the courts

6.18 Despite what was said by the House of Lords in *Sweet v Parsley*, by the Privy Council in *Gammon* and by the House of Lords in *B v DPP* and in *K*, it would be wrong to leave the reader with the impression that there has been a massive reduction in recent years in the number of occasions on which the courts have held that an offence is one of strict liability. *Sweet v Parsley* was concerned with a drugs offence, and, as *B v DPP* and *K* indicate, the shift of approach has clearly been maintained in relation to the more serious types of offence. In *Phekoo*,[51] for instance, the Court of Appeal held that the offence of harassment of a residential occupier (contrary to the Protection from Eviction Act 1977, s 1(3)) was not one of strict liability as to the fact that the person harassed was a residential occupier, and in *Sheppard*[52] the House of Lords, overruling well-established decisions to the opposite effect, held that the offence of wilful neglect of a child in a manner likely to cause him unnecessary suffering or injury to health was not one of strict liability as to the risk of suffering or injury to health.

However, as far as regulatory offences are concerned, the change of attitude towards strict liability revealed in *Sweet v Parsley* has had less effect. On a considerable number of subsequent occasions in the 40 years after *Sweet v Parsley*, appellate courts, including the House of Lords in *Alphacell Ltd v Woodward*[53] and *Wings Ltd v Ellis*,[54] have paid little or no regard to the weight of the presumption that *mens rea* is required in holding that, on the true interpretation of a statutory offence, Parliament intended to rule out the need for *mens rea* in relation to an element of its *actus reus*.

6.19 Despite the fact that the suggestion in the decision in *Sweet v Parsley* that any further expansion of strict liability would be closely scrutinised and confined within narrow limits has not wholly borne fruit, it nevertheless remains true that the general approach reaffirmed in *Sweet v Parsley*, and equally emphatically in *Gammon (Hong Kong) Ltd v A-G of Hong Kong,* and given even greater force in *B v DPP* and *K*, remains the correct approach to the interpretation of whether a statutory provision imposes strict liability.

6.20 *B v DPP* and *K* raised hopes that the courts would review decisions imposing strict liability and would also give greater weight to the presumption.

The Court of Appeal's decision in *Muhamad*[55] one year after *K* does not excite optimism in the latter respect in relation to offences which might be regarded as regulatory. D, charged with materially contributing to his insolvency by gambling, contrary to the Insolvency Act 1986, s 362(1) (since repealed), argued that the offence required *mens rea*, viz that he knew or was reckless as to whether his act of gambling would materially contribute to his insolvency. The Court of Appeal rejected this argument; the offence was one of strict liability in this respect. The Court doubted that the offence was truly criminal (despite the maximum sentence of two years' imprisonment), and it held that

[51] [1981] 3 All ER 84, CA. The terms of the offence were amended by the Housing Act 1988, s 29.

[52] [1981] AC 394, HL.

[53] [1972] AC 824, HL; para 6.36.

[54] [1985] AC 272, HL. The House of Lords held that the offence under the Trade Descriptions Act 1968, s 14(1)(a) (since repealed), whereby a person committed an offence if he made a statement 'which he knows to be false', was an offence of strict liability as to the making of the statement (but not as to its falsity).

[55] [2002] EWCA Crim 1856.

the language of the statute (other offences in the statute specifically requiring *mens rea* generally carried a maximum of 10 years' imprisonment), the maximum sentence and social concern provided support for the rebuttal of the presumption. In addition, making the offence one of strict liability would promote the objects of the statute by encouraging greater vigilance to prevent gambling which would or might contribute to insolvency.

The Court of Appeal's decision in *Matudi*[56] soon afterwards is to like effect. On a charge of importing animal products without border inspection, contrary to the Products of Animal Origin (Import and Export) Regulations 1996, reg 21 (since revoked), D's defence was that he had no idea that the items contained meat (ie animal products) because they were only supposed to contain vegetables. The Court of Appeal held that it was compellingly clear that Parliament had not intended *mens rea* to be a requirement of an offence under reg 21. The wording of reg 21 itself gave no indication of whether it required *mens rea* or created a strict liability offence, whereas the wording of other offences in the Regulations expressly made a requirement of knowledge. Moreover, the unmonitored importation of animal products was of public concern as it created significant dangers to public and animal health, which could also have serious economic consequences. The greater the social risk, the more likely that the court would infer an intention to create a strict liability offence. The imposition of strict liability, the Court of Appeal added, was effective in promoting the objects of the legislation as it deterred importers from bypassing the provisions of the Regulations and encouraged the use of reputable suppliers.

6.21 *Muhamad* and *Matudi* were both cases where the statutory provisions in question had not been the subject of an authoritative interpretation. In *Deyemi and Edwards*,[57] decided in 2007, the Court of Appeal regarded itself as unable to review, in the light of the emphatic statements in *B v DPP* and *K*, the interpretation of a provision which had already been interpreted in a decision binding on the court. In *Deyemi and Edwards,* D1 and D2 had pleaded guilty to the possession of a prohibited weapon (a stun gun), contrary to the Firearms Act 1968, s 5, after the judge had ruled that the offence was one of strict liability. They did not know that the article was a stun gun and were each given a conditional discharge. Their appeals against conviction were rejected by the Court of Appeal. The Court recognised the importance of *B v DPP* and *K* but held that it was bound by its decision in 1990 in *Bradish*[58] that the offence under s 5 was one of strict liability as to the nature of the thing possessed. It stated that its conclusion as to the binding effect of *Bradish* meant, at least for the Court of Appeal, that the decisions in *B v DPP* and *K* did not assist. The Court went on to say: 'Each of [those decisions] is concerned with the proper meaning to be attributed to the statutory provisions in question; the statutory provisions with which we are concerned have been construed by decisions binding on us.'[59] Thus, unless an existing interpretation of an offence is not binding on the court under the rules of precedent, the effect of *B v DPP* and *K* is limited to provisions which have not yet been interpreted by an appellate court. Hopes that *B v DPP* and *K* would lead to a review by the courts of decisions imposing strict liability have therefore been dashed.

56 [2003] EWCA Crim 697.
57 [2007] EWCA Crim 2060.
58 [1990] 1 QB 981, CA. Also applied in *Zahid* [2010] EWCA Crim 2158.
59 [2007] EWCA Crim 2060 at [25].

Rebutting the presumption

Key points 6.7

The presumption that *mens rea* is required can be rebutted by clear words in the statute or by necessary implication.

6.22 In *Sweet v Parsley* the House of Lords held that clear evidence to the contrary was required before the presumption that *mens rea* was required could be rebutted. Further guidance was given in *Gammon (Hong Kong) Ltd v A-G of Hong Kong* where Lord Scarman, giving the opinion of the Privy Council, said:

> 'In their Lordships' opinion, the law relevant to this appeal may be stated in the following propositions… (1) there is a presumption of law that *mens rea* is required before a person can be held guilty of a criminal offence; (2) the presumption is particularly strong where the offence is "truly criminal" in character; (3) the presumption applies to statutory offences, and can be displaced only if this is clearly or by necessary implication the effect of the statute; (4) the only situation in which the presumption can be displaced is where the statute is concerned with an issue of social concern: public safety is such an issue; (5) even where a statute is concerned with such an issue, the presumption of *mens rea* stands unless it can also be shown that the creation of strict liability will be effective to promote the objects of the statute by encouraging greater vigilance to prevent the commission of the prohibited act.' [60]

6.23 The requirement that the presumption can only be rebutted by clear words (ie express provision) or 'necessary implication' was emphasised and strengthened by the House of Lords in *B v DPP*.[61] As Lord Hutton (with whom Lords Mackay and Steyn agreed) stated, 'the 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'.[62] Lord Nicholls (with whom Lords Irvine and Mackay agreed) took an equally tough approach in giving the leading speech: ' "Necessary implication" connotes an implication which is compellingly clear.' [63] Lord Steyn regarded the presumption that *mens rea* is required, unless Parliament has expressly or by necessary implication indicated the contrary, as a constitutional principle. He quoted with approval Lord Hoffmann's statement in *Secretary of State for the Home Department, ex p Simms*:

> 'But the principle of legality means that Parliament must squarely confront what it is doing and accept the political cost. Fundamental rights cannot be overridden by general or ambiguous words. This is because there is too great a risk that the full implications of their unqualified meaning may have passed unnoticed in the democratic process. In the absence of express language or necessary implication to the contrary, the courts therefore

[60] [1985] AC 1 at 14. This was applied, eg, in *Wings Ltd v Ellis* [1985] AC 272, HL; *Wells Street Metropolitan Stipendiary Magistrate, ex p Westminster City Council* [1986] 3 All ER 4, DC; *Blake* [1997] 1 All ER 963, CA.
[61] [2000] 2 AC 428, HL. [62] Ibid at 481. [63] Ibid at 464.

> presume that even the most general words were intended to be subject to the basic rights of the individual.'[64]

Lord Steyn then said: 'In other words, in the absence of express words or a truly necessary implication, Parliament must be presumed to legislate on the assumption that the principle of legality will supplement the text.'[65] If the presumption of *mens rea* is regarded as a constitutional principle its rebuttal will be made even more difficult.

Lord Steyn's statement about 'a constitutional principle' were echoed by the Court of Appeal in 2009 in *M and B*. The Court stated:

> 'The default position is that, despite the absence of any express language, there is a presumption, founded in constitutional principle, that *mens rea* is an essential ingredient of the offence. Only a compelling case for implying the exclusion of such an ingredient as a matter of necessity will suffice.'[66]

6.24 From *B v DPP* and *K*[67] the Court of Appeal in *Kumar* concluded:

> '[F]irstly that in all statutory offences whenever a section is silent as to *mens rea* there is a presumption that the mental element is an essential ingredient of the offence. Secondly, in the absence of express statutory provision the presumption of the mental element can only be excluded if the necessary implication is "compellingly clear", "truly necessary" and free from ambiguity. Further, the presumption must not involve an internal inconsistency.'[68]

6.25 In deciding whether the effect of the statutory provision is 'by necessary implication' to rebut the presumption that *mens rea* is required in respect of the elements of the offence, the court can look at the words of the statute and various extrinsic factors (such as the nature of the offence and the mischief sought to be prevented) and must consider whether strict liability would promote the object of the provision.[69]

6.26 Lord Scarman's fourth proposition in *Gammon*, that the presumption can only be displaced where the statute is concerned with an issue of social concern (public safety in that case), is of little significance. It is hard to think of many statutes containing criminal offences which are not concerned with such an issue. Subsequent cases indicate that the courts have not spent much time considering the matter, and have held, for instance, that Acts relating to town and country planning,[70] broadcasting[71] and the National Lottery[72]

64 [2000] 2 AC 115 at 131.
65 [2000] 2 AC 428 at 470.
66 [2009] EWCA Crim 2615 at [23].
67 Para 6.14.
68 [2004] EWCA Crim 3207 at [25].
69 *Sweet v Parsley* [1970] AC 132 at 163, per Lord Diplock; *Gammon (Hong Kong) Ltd v A-G of Hong Kong* [1985] AC 1, PC; *Wings Ltd v Ellis* [1985] AC 272, HL.
70 *Wells Street Metropolitan Stipendiary Magistrate, ex p Westminster City Council* [1986] 3 All ER 4, DC.
71 *Blake* [1997] 1 All ER 963, CA.
72 *Harrow London Borough Council v Shah* [1999] 3 All ER 302, DC.

dealt with issues of social concern. There are, of course, many offences in statutes dealing with matters of social concern which are not strict liability: rape and theft are obvious examples.

Lord Scarman's last proposition in *Gammon* (presumption that *mens rea* required not rebutted unless strict liability would aid enforcement of the law) is also, generally, easily satisfied, as shown in para 6.41.

It is unfortunate that courts, having found Lord Scarman's fourth and last propositions satisfied, have often given too much weight to them in finding the presumption of *mens rea* rebutted;[73] satisfaction of these requirements only means that an offence *may* be one of strict liability, not that it must be.

Words of the statute

6.27 Certain words which commonly appear in statutory offences have been considered by appellate courts on a sufficient number of occasions as to indicate whether they are likely to be held to support or rebut the presumption that *mens rea* is required in a particular offence. Examples of such words are as follows:

'Permitting' or 'suffering'

6.28 There is a substantial number of statutory offences of 'permitting' or 'suffering' (which terms have been held to be synonymous).[74]

'Permit' has been held by the House of Lords in *Vehicle Inspectorate v Nuttall*[75] to be capable of having at least two types of meaning, a narrow meaning, 'allow', 'agree to' or 'authorise', and a wider one, 'fail to take reasonable steps to prevent', its meaning in any particular offence depending on its context. No guidance was given as to how a court is to approach the question of context.

It has been stated by a Divisional Court that 'It is of the very essence of the offence of permitting someone to do something that there should be knowledge.'[76] Consistent with this, it has been held, for example, on a charge of committing the statutory offence of permitting a motor vehicle to be used in breach of the Construction and Use Regulations or of permitting an employee to drive in excess of lawful hours, that liability depended on proof that the defendant knew about the contravention in question.[77]

The courts have not always taken the same approach. It has been held that the statutory offences of permitting another to use a motor vehicle on a road without insurance, or permitting another to drive on a road without a driving licence, are strict liability

[73] See, eg, *Blake* [1997] 1 All ER 963, CA.

[74] *Somerset v Wade* [1894] 1 QB 574, DC; *Ferguson v Weaving* [1951] 1 KB 814, DC.

[75] [1999] 3 All ER 833, HL.

[76] *Gray's Haulage Co Ltd v Arnold Ltd* [1966] 1 All ER 896 at 898, per Lord Parker CJ with whom the other judge, Winn LJ, entirely agreed. As in other contexts, knowledge in this context includes wilful blindness: *Gray's Haulage Co Ltd v Arnold Ltd* [1966] 1 All ER 896 at 898, per Lord Parker CJ. Also see *James & Son Ltd v Smee* [1955] 1 QB 78, DC; *Vehicle Inspectorate v Nuttall* [1999] 3 All ER 833 at 840, per Lord Steyn.

[77] *James & Son Ltd v Smee* above; *Gray's Haulage Co Ltd v Arnold Ltd* above.

offences in respect of the uninsured use or lack of a licence.[78] Likewise, it has been held that the statutory offence of permitting an animal to be carried so as to be likely to cause unnecessary suffering is one of strict liability as to this risk.[79] These cases are, however, isolated exceptions to a general rule that 'permit' or 'suffer' are to be interpreted as requiring *mens rea*. In *Vehicle Inspectorate v Nuttall*[80] the House of Lords (or at least a majority of it) held that, on a charge of the statutory offence of permitting a driver to contravene rules restricting driving hours, 'knowledge' is required, so that at the very least recklessness in the sense of not caring whether a contravention occurred is necessary.[81]

'Wilfully'

6.29 The appearance of the adverb 'wilfully' in a statutory offence might be thought clearly to indicate a requirement of *mens rea* as to all the elements of its *actus reus*, but the courts have not always been willing to accept such an indication.[82] Some cases have appeared to hold that 'wilfully' requires no more than proof of a voluntary act, in which case it added nothing to the general principle that such an act is required. In *Cotterill v Penn*,[83] for example, the Divisional Court held that the offence of unlawfully and wilfully killing a house pigeon, contrary to the Larceny Act 1861, s 23 (since repealed), merely required that D should intend to do the act forbidden, which was that of shooting at the bird in that case, and did not also require that D should realise that what he was shooting at was a house pigeon, so that a belief that it was a wild pigeon was immaterial.[84] In other cases the approach has been to interpret 'wilfully' so as to require *mens rea* as to all the elements of the *actus reus*.[85]

A particularly important decision is that of the House of Lords in 1980 in *Sheppard* [86] which was concerned with the Children and Young Persons Act 1933, s 1. This makes it an offence where someone having the responsibility for a child or young person under 16 'wilfully assaults, ill-treats, neglects, abandons or exposes him . . . in a manner likely to cause unnecessary suffering or injury to health'. By a majority of three to two, the House of Lords, overruling previous decisions to the contrary, held that in the offence of wilfully neglecting under s 1 there was an element of *mens rea* as to the risk of causing unnecessary suffering or injury to health. Dealing with the case, where the charge involved failure to provide adequate medical aid, it held that the requirement of wilfulness could be satisfied (a) where D was aware the child's health might be at risk if it was

[78] *Lyons v May* [1948] 2 All ER 1062, DC.

[79] *Cheshire County Council v Alan Helliwell & Sons (Bolton) Ltd* (1991) 155 JP 425, DC; *Greener v DPP* (1996) 160 JP 265, DC.

[80] [1999] 3 All ER 833, HL. 'Permit' was held to bear the wider meaning referred to above.

[81] The speeches in *Vehicle Inspectorate v Nuttall* are not noteworthy for their clarity but the Divisional Court in *Yorkshire Traction Co Ltd v Vehicle Inspectorate* [2001] RTR 518, DC subsequently confirmed that the offence in question in *Nuttall* was not one of strict liability and required 'knowledge'.

[82] Andrews 'Wilfulness: A Lesson in Ambiguity' (1981) 1 LS 303.

[83] [1936] 1 KB 53, DC.

[84] For further examples see *Arrowsmith v Jenkins* [1963] 2 QB 561, DC; *Maidstone Borough Council v Mortimer* [1980] 3 All ER 552, DC; *Millward* [1985] QB 519, CA.

[85] See, eg, *Eaton v Cobb* [1950] 1 All ER 1016, DC; *Bullock v Turnbull* [1952] 2 Lloyd's Rep 303, DC; *Gittins* [1982] RTR 363, CA; *Hills and Ellis* [1983] QB 680, DC (para 7.71).

[86] [1981] AC 394, HL.

not provided with medical aid, or (b) where D was unaware of this risk because he did not care whether the child's health was at risk or not. Part (b) seemed to suggest that it referred to objective (ie *Caldwell*)[87] recklessness, but in *A-G's Reference (No 3 of 2003)*[88] the Court of Appeal held that the approach to recklessness in *G*[89] could be incorporated into a direction on wilfulness under the test in *Sheppard*. The Court held that there was no material difference between the two cases; the alternative test in *Sheppard* (unawareness due to not caring) was, like the first, one of subjective recklessness as in *G*. In the light of *Sheppard* and *A-G's Reference (No 3 of 2003)*, cases which have apparently held that 'wilfully' simply requires a voluntary act in the context of particular statutory offences are unlikely to be followed.

'Cause'

6.30 Some statutory offences are framed in terms of causing some *event to happen* or of causing someone *to do something*.

Where a statutory offence is defined simply in terms of causing some event to happen, the courts have traditionally been very likely to interpret it as an offence of strict liability as to the occurrence of that thing. An example is provided by *Alphacell Ltd v Woodward*,[90] whose facts are set out in para 6.36. On the other hand, where the offence is defined in terms of causing someone else to do something, 'cause'[91] has been interpreted as requiring *mens rea* as to the thing being done.[92]

Wording of other offences in statute

6.31 Another way in which the wording of the statute can be important is that the appearance in the definition of other offences in the statute (or, indeed, in another statute to which it may be regarded as an appendix),[93] but not in the definition of the offence in question, of words such as 'knowingly' has the potential to lead or contribute to a finding that *mens rea* is not required in relation to an element or elements of the offence in question. This is a significant point because it is common for different provisions, or even different offences in the same provision, to be expressed in a way which expressly requires full *mens rea* for one but not for another.

[87] Para 3.35. [88] [2004] EWCA Crim 868. [89] [2003] UKHL 50 (para 3.33).

[90] [1972] AC 824, HL. See also *Price v Cromack* [1975] 2 All ER 113, DC and *Loukes* [1996] 1 Cr App R 444, CA (para 8.159).

[91] D 'causes' someone else to do something if it is done on the actual authority, express or implied, of D or in consequence of D exerting some influence on the acts of the other person: *A-G of Hong Kong v Tse Hung-Lit* [1986] AC 876, PC.

[92] *Lovelace v DPP* [1954] 3 All ER 481, DC; *Ross Hillman Ltd v Bond* [1974] QB 435, DC; *A-G of Hong Kong v Tse Hung-Lit* [1986] AC 876, PC. Contrast *Sopp v Long* [1970] 1 QB 518, DC.

[93] In *B v DPP* [2000] 2 AC 428, the House of Lords, in considering whether the offence of inciting a child to commit an act of gross indecency, contrary to the Indecency with Children Act 1960 (since repealed by the Sexual Offences Act 2003 (SOA 2003)), which did not contain a word such as 'knowingly', was an offence of strict liability, considered the wording of other sexual offences under the Sexual Offences Act 1956 (repealed by SOA 2003). However, it concluded that a comparison of the wording of the offences did not give rise to a necessary implication that the presumption of *mens rea* was rebutted in respect of the 1960 Act.

6.32 A famous case in the present context is *Cundy v Le Cocq*,[94] which concerned the offence under the Licensing Act 1872, s 13 (since repealed) of sale by a publican of liquor to a drunken person. It was held that the defendant licensee's belief, even if founded on reasonable grounds, in the sobriety of his customer was no defence. This conclusion was reached in the light of the general scope of the Act, which was for the repression of drunkenness, and of a comparison of the various sections in the relevant part of the Act, some of which, unlike the section in question, contained the word 'knowingly'.

The same conclusion as in *Cundy v Le Cocq* was reached by the House of Lords in *Pharmaceutical Society of Great Britain v Storkwain Ltd*,[95] which was concerned with the offence of supplying specified medicinal products except in accordance with a prescription by an appropriate practitioner, contrary to the Medicines Act 1968, s 58(2)(a). The House of Lords relied principally on the fact that other offence-creating provisions in the Act expressly required *mens rea* in holding that the presumption that *mens rea* was required was rebutted in relation to s 58(2)(a), which did not make such express provision. Consequently, it upheld convictions under s 58(2)(a) of retail pharmacists who had supplied drugs after being given forged prescriptions which they believed to be genuine.

The above cases were decided before *B v DPP* and *K*.[96] More recently, the presumption that a criminal statute requires *mens rea* was held by the Court of Appeal in 2006 in *G*[97] to be rebutted by necessary implication in respect of the Sexual Offences Act 2003, s 5 (rape of a child under 13)[98] in relation to the child's age. The Court of Appeal held that:

> 'Such an implication arises in respect of s 5 . . . from the contrast between the express references to reasonable belief that a child is 16 or over in, for instance, s 9, and the absence of any such reference in relation to children under 13. Thus, on its actual meaning, s 5 creates an offence even if the defendant reasonably believes that the child was 13 or over.'[99]

This issue was not argued when the case was unsuccessfully appealed to the House of Lords but the speeches in the House confirmed that the offence was one of strict liability as to the age of the child.[100]

6.33 By way of comparison, reference may be made to *Sherras v De Rutzen*,[101] where D, a licensee, had supplied liquor to a police officer who was on duty, contrary to the Licensing Act 1872, s 16(2) (since repealed). D reasonably believed that the officer was off duty because he had removed his armlet which at that time, to D's knowledge, was worn by police officers in the locality when on duty. D was convicted by the magistrates but his conviction was quashed on appeal, the Divisional Court holding that D could not be convicted if he did not know that the police officer was on duty, even though the definition in s 16(1) of another offence contained the word 'knowingly' and s 16(2) did not. One of the two judges, Day J, thought that the only effect of the presence of 'knowingly' in s

[94] (1884) 13 QBD 207, DC.
[95] [1986] 2 All ER 635, HL; see Jackson '*Storkwain*: A Case Study in Strict Liability and Self-regulation' [1991] Crim LR 892.
[96] Paras 6.14 and 6.23.
[97] [2006] EWCA Crim 821. See also *Unah* [2011] EWCA Crim 1837.
[98] Para 9.35.
[99] [2006] EWCA Crim 821 at [17].
[100] [2008] UKHL 37.
[101] [1895] 1 QB 918, DC.

16(1) and its absence in s 16(2) was to shift the burden of proof (in s16(2)) on the issue of knowledge to D (ie D had to prove that he did not know). Day J's approach has, however, not been generally adopted.

The approach taken by the Divisional Court in *Sherras v De Rutzen* was taken in modern times by the Court of Appeal in *Berry (No 3)*[102] which was concerned with the Explosive Substances Act 1883, s 4(1). Section 4(1) provides that any person who 'makes or knowingly has in his possession or under his control' any explosive substance (including any apparatus or part of an apparatus for causing an explosion) commits an offence punishable with up to 14 years' imprisonment. The Court held that, although 'knowingly' only qualified the second and third categories of offence (possessing or controlling), the first category (making) must be interpreted as requiring proof by the prosecution that an alleged 'maker' acted with knowledge that the substance was an explosive substance.

The recent decision of the Court of Appeal in *M and B*[103] indicates that it will now be exceptional for the appearance of a word like 'knowingly' in other offences in the statute, but not in the definition of the offence in question, alone to influence a court to find that the presumption that *mens rea* is required is rebutted. In that case, the issue arose as to whether the offence of bringing a prohibited article into a prison, contrary to the Prison Act 1952, s 40C(1)(a), was one of strict liability or required proof of *mens rea*. The Court held that s 40C(1)(a) required *mens rea*, despite the fact that some other offences in the Act, including other parts of s 40C(1), expressly required *mens rea* but s 40C(1)(a) did not. The Court stated:

> '[T]he absence of express language, even in the presence of express language elsewhere in the statute, is not enough to rebut the presumption unless the circumstances as a whole compel such a conclusion.'[104]

Lord Reid took an even stricter approach in *Sweet v Parsley*:

> 'It is also firmly established that the fact that other sections of the Act expressly require *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 an absolute offence.'[105]

As *G*, in particular, indicates, this would seem to go further than the present case law allows.

6.34 There is a further qualification to the approach taken in cases like *Cundy v Le Cocq*, *Storkwain* and *G*. According to Lord Steyn in *B v DPP*,[106] the argument that comparisons or contrasts can be drawn between different provisions in a statute (or between a parent

[102] [1994] 2 All ER 913, CA. [103] [2009] EWCA Crim 2615. [104] Ibid at [23].

[105] [1970] AC 132 at 149. More recently the point was made by the Court of Appeal in *Muhamad* [2002] EWCA Crim 1856 at [18].

[106] [2000] 2 AC 428 at 473. Also see Lords Nicholls and Hutton [2000] 2 AC 428 at 465 and 481 for a similar approach. Lord Bingham echoed this approach in *K* [2001] UKHL 41 at [4].

statute and a statute to which it is an appendix) is considerably weakened where the statute contains a motley of offences of diverse origins, gathered together by the statute with little or no change in their phraseology and with no clear or coherent pattern or consistent theme.

Extrinsic factors

6.35 Where no clear indication as to the need for *mens rea* or otherwise is given by the words of the statute, the courts can go outside the Act and examine all the relevant circumstances to determine whether, by necessary implication, Parliament intended to displace the need for *mens rea*. In *K*, Lord Steyn stated that the presumption 'can only be displaced by *specific language*, ie an express provision or a necessary implication [from that language]'.[107] However, his fellow Law Lords did not comment on this and, as reference to *Muhamad* and to *Matudi* in para 6.20 shows, extrinsic factors are not yet excluded from being taken into account. Some of these factors are discussed in the following paragraphs.

The subject matter of the enactment

6.36 An offence is more likely to be construed as one of strict liability if it falls within the three classes enumerated by Wright J in *Sherras v De Rutzen*:[108]

> 'Apart from isolated and extreme cases [such as *Prince*], the principal classes of exceptions [to the general rule that *mens rea* is required] may perhaps be reduced to three. One is a class of acts which … are not criminal in any real sense, but are acts which in the public interest are prohibited under a penalty. Several such instances are to be found in the decisions on the Revenue Statutes, eg *A-G v Lockwood*,[109] where the innocent possession of liquorice by a beer retailer was held to be an offence. So under the Adulteration Acts, *Woodrow*[110] as to innocent possession of adulterated tobacco; *Fitzpatrick v Kelly*[111] and *Roberts v Egerton*[112] as to the sale of adulterated food … To the same head may be referred *Bishop*[113] where a person was held rightly convicted of receiving lunatics in an unlicensed house, although the jury found that he honestly and on reasonable grounds believed that they were not lunatics. Another class comprehends some, and perhaps all, public nuisances[114] … Lastly, there may be cases in which, although the proceeding is criminal in form, it is really only a summary mode of enforcing a civil right: see per Williams and Willes JJ in *Morden v Porter*,[115] as to unintentional trespass in pursuit of game … But except in such cases as these, there must in general be guilty knowledge on the part of the defendant … '

This dictum was referred to by the House of Lords in *Alphacell Ltd v Woodward*,[116] where the defendant company, whose settling tanks overflowed into a river, was held to have

[107] [2001] UKHL 41 at [32]. Italics supplied.
[108] [1895] 1 QB 918 at 921.
[109] (1842) 9 M & W 378.
[110] (1846) 15 M & W 404.
[111] (1873) LR 8 QB 337.
[112] (1874) LR 9 QB 494.
[113] (1880) 5 QBD 259.
[114] This refers to statutory offences in the nature of a public nuisance.
[115] (1860) 7 CBNS 641.
[116] [1972] AC 824, HL.

been rightly convicted of causing polluted matter to enter a river contrary to the Rivers (Prevention of Pollution) Act 1951, s 2 (since repealed), despite the fact that there was no evidence that it knew that pollution was taking place from its settling tanks or had been in any way negligent. In construing the offence as one of strict liability, Viscount Dilhorne and Lord Salmon regarded the statute as dealing with acts falling within the first class, ie acts which 'are not criminal in any real sense, but are acts which in the public interest are prohibited under a penalty', while Lord Pearson thought that the offence fell within the second class enumerated, saying '*mens rea* is generally not a necessary ingredient in an offence of this kind, which is in the nature of a public nuisance'.[117]

6.37 The first of Wright J's three classes is particularly important since it covers many statutes regulating particular activities involving potential danger to public health or safety which a person may choose to undertake, such as those relating to the sale of food, pollution, dangerous substances and the condition and use of vehicles. The fact that an offence is not truly criminal (ie falls within the category of *mala prohibita*, and not *mala in se*) has often been given by a court as a reason (or one of the reasons) for concluding that it is one of strict liability.[118] In contrast, as Lord Scarman said in *Gammon*,[119] the presumption of *mens rea* is particularly strong where the offence is 'truly criminal' in character.

This prompts one to ask what the criteria of 'true criminality' are. The courts have yet to supply an answer. Indeed, they do not appear to share a consistent approach. In modern cases, in which the offences in question were punishable with a maximum of two years' imprisonment, the Court of Appeal said in one case that because the offence was imprisonable it was 'truly criminal' in character,[120] while in another the Divisional Court said that the offence was 'not truly criminal' despite the severity of the maximum punishment.[121] In a third case, the Court of Appeal doubted that an offence punishable with two years' imprisonment was 'truly criminal'.[122] More recently, however, the Court of Appeal in *M and B*,[123] holding that the offences of bringing a prohibited article (List A and List B articles respectively) into a prison, under the Prison Act 1952, ss 40B(1)(a) and 40C(1)(a), which carry maximum punishments of 10 and two years respectively were not ones of strict liability, stated that:

> '[T]he offences with which ss 40A [an interpretation section], B and C are concerned have nothing in common with the typical health and safety provisions which may be matters of absolute liability[124] in the context of the regulation of business activities. It therefore matters not that it could be argued that absolute liability might be an extra spur to vigilance on the part of prison visitors. It seems to us to be impossible to argue that the bringing or throwing into prison of a List A article (controlled drugs, explosives, firearms etc) with the statute's potential ten year penalty is not truly criminal. If that is so in relation to s 40B(1)(a), the same must be so also in relation to the identical language in s 40C(1)(a).'[125]

117 [1972] AC 824 at 842.
118 See, eg, *Chilvers v Rayner* [1984] 1 All ER 843 at 847, per Robert Goff LJ.
119 Para 6.22.
120 *Blake* [1997] 1 All ER 963 at 968; para 6.41.
121 *Harrow London Borough Council v Shah* [1999] 3 All ER 302 at 306.
122 *Muhamad* [2002] EWCA Crim 1856; para 6.20.
123 [2009] EWCA Crim 2615.
124 Ie strict liability, and not absolute liability in its true sense.
125 [2009] EWCA Crim 2615 at [31].

The seriousness of the offence

6.38 Quite apart from the relevance of offence-seriousness to the issue of 'true criminality', the seriousness of an offence can operate as a separate factor. Offence-seriousness is of particular importance where an offence is not regarded as truly criminal.

In *B v DPP*,[126] Lord Nicholls stated:

> 'The more serious the offence, the greater is the weight to be attached to the presumption [that *mens rea* is required], because the more severe is the punishment and the graver the stigma which accompany a conviction.'

The offence in *B v DPP* was punishable with 10 years' imprisonment, and a conviction for it carried an undoubted stigma. These factors reinforced, rather than negatived, the application of the presumption in that case.

On occasions, however, the courts have construed offences carrying a lengthy maximum term of imprisonment as not requiring *mens rea*. In *Warner v Comr of Metropolitan Police*[127] a pre-*Sweet v Parsley* case, the offence of unauthorised possession of drugs was held not to require proof that D knew that what he was in possession of was a drug, despite the fact that the offence in question was punishable with a maximum of two years' imprisonment, and could, if the drug had been of a different type, have been punished with a maximum of 10 years. (The law on this subject has been changed since *Warner*.)[128] Similarly, in the post-*Sweet v Parsley* (but pre-*B v DPP*) cases involving the offences of possessing a firearm without a certificate (*Howells*),[129] of possessing a prohibited weapon (*Bradish*),[130] and of having a loaded firearm in a public place (*Harrison and Francis),*[131] the offences were held to be ones of strict liability as to their circumstances that the article possessed was respectively a firearm, a prohibited weapon, or a loaded shotgun (or, indeed, a firearm at all), although the maximum punishment on conviction on indictment for these offences was respectively three (or in some cases five)[132] years' imprisonment, five years[133] and seven years. In *Gammon v A-G of Hong Kong*,[134] the maximum imprisonment was three years, and in *Pharmaceutical Society of Great Britain v Storkwain Ltd*[135] it was two years. Both cases were decided after *Sweet v Parsley* but before *B v DPP*. Since the decisions in *B v DPP* and *K*, the Court of Appeal in *Muhamad*[136] has held that the offence of materially contributing to one's insolvency by gambling was 'not a particularly serious' offence, and was one of strict liability, despite the fact that it is punishable with two years' imprisonment.

[126] [2000] 2 AC 428 at 464. The seriousness of the offence is one way in which an offence can be said to be of 'truly criminal' character. Also see Lord Steyn ibid at 472, and *Sweet v Parsley* [1970] AC 132 at 149 and 156, per Lords Reid and Pearce. Contrast para 6.37, nn 120–122.

[127] [1969] 2 AC 256, HL.

[128] Para 6.46.

[129] [1977] QB 614, CA. See also *Hussain* [1981] 2 All ER 287, CA.

[130] [1990] 1 QB 981, CA.

[131] [1996] 1 Cr App R 138, CA.

[132] Now five years or – in some cases – seven.

[133] Now 10 years.

[134] Para 6.14.

[135] Para 6.32.

[136] Para 6.20.

The mischief of the crime

6.39 Where an offence is aimed at the prevention of some particularly serious social danger, such as to public health or the environment, this may be a factor which contributes to persuading the court that the need for *mens rea* is displaced.

A recent example of this factor being relied on by a court is *Matudi*, referred to in para 6.20.[137]

The presence of a grave social danger is not alone enough to rebut the presumption that *mens rea* is required.[138]

Whether strict liability would assist the enforcement of the law

6.40 In *Gammon (Hong Kong) Ltd v A-G of Hong Kong*,[139] Lord Scarman, giving the Privy Council's opinion, said that, even where a statute is concerned with an issue of social concern, the presumption of *mens rea* stands unless it can be shown that strict liability will be effective to promote the objects of the statute by encouraging greater vigilance to prevent the commission of the prohibited act.

This point was initially developed by Devlin J in *Reynolds v GH Austin & Sons Ltd*[140] and by the Privy Council in *Lim Chin Aik v R*.[141]

In *Reynolds v GH Austin & Sons Ltd*, D Ltd, a private hire coach company, contracted to take members of a women's guild on a trip to the seaside. Six seats on the coach remained unbooked and the organiser of the trip advertised tickets for them to the general public. The effect of doing so was that the use of the coach to carry the passengers on the trip would be as an 'express carriage', which would require a road service licence to be held by D Ltd. D Ltd did not have such a licence and, being unaware of the advertisement (and hence of the need for one), performed the contract. D Ltd was charged with using the coach as an express carriage without a road service licence, contrary to the Road Traffic Act 1930, s 72 (since repealed). The Divisional Court held that the offence was not one of strict liability. Devlin J stated:

> 'If a man is punished because of an act done by another, whom he cannot reasonably be expected to influence or control, the law is engaged, not in punishing thoughtlessness or inefficiency and thereby promoting the welfare of the community, but in pouncing on the most convenient victim. Without the authority of express words, I am not willing to conclude that Parliament can intend what would seem to the ordinary man to be the useless and unjust infliction of a penalty.... I think it a safe general principle to follow (I state it negatively, since that is sufficient for the purposes of this case), that where the punishment of an individual will not promote the observance of the law either by that individual or by others whose conduct he may reasonably be expected to influence, then, in the absence of clear and express words, such punishment is not intended.'[142]

[137] Also see *Howells* [1977] QB 614, CA.
[138] See *Lim Chin Aik v R* [1963] AC 160 at 174.
[139] Para 6.22.
[140] [1951] 2 KB 135, DC.
[141] [1963] AC 160, PC.
[142] [1951] 2 KB 135 at 149–150.

In *Lim Chin Aik v R*, a case concerned with Singapore immigration regulations, the Privy Council observed that, in considering whether the presumption that *mens rea* was required was rebutted, it is 'not enough merely to label the statute before the court as one dealing with a grave social evil, and from that to infer that strict liability was intended'.[143] It is also necessary to inquire whether putting D under strict liability will assist the enforcement of the law. There must be something he could 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 regulations … Where it can be shown that the imposition of strict liability would result in the prosecution and conviction of a class of persons whose conduct would not in any way affect the observance of the law, their Lordships consider that, even where the statute is dealing with a grave social evil, strict liability is not likely to be intended.'[144]

Lim Chin Aik had been convicted under a Singapore Immigration Ordinance which made it an offence for someone prohibited from entering Singapore to enter or remain there. He had been prohibited from entering Singapore, but the prohibition had not been published or made known to him. The Privy Council advised that his conviction should be quashed on account of the futility of imposing punishment in such a case.

6.41 These decisions can be contrasted with those in *Blake* and *Bezzina*.

In *Blake*[145] the Court of Appeal, holding that the offence of establishing or using any station, or using apparatus, for wireless telegraphy without a licence, contrary to the Wireless Telegraphy Act 1949, s 1(1) (since repealed),[146] was one of strict liability as to the lack of a licence, stated that the imposition of strict liability would encourage greater vigilance on the part of those establishing or using a station, or using equipment, to avoid committing the offence, eg in the case of users by carefully checking whether they were on the air.

Bezzina[147] was concerned with the offence under the Dangerous Dogs Act 1991, s 3(1), whereby, if a dog is dangerously out of control in a public place, its owner or handler is guilty of an offence. Dismissing appeals against conviction, the Court of Appeal held that the presumption that *mens rea* was required for this offence was rebutted and that no *mens rea* need be proved on the part of the owner or handler. It had no doubt that strict liability would be effective to promote the objects of the Dangerous Dogs Act 1991 by encouraging greater vigilance among dog owners or handlers to prevent the offence being committed.

These and other cases[148] indicate that with isolated exceptions the present requirement will normally be easily satisfied. It must be emphasised that its satisfaction does not automatically rebut the presumption that *mens rea* is required.

143 [1963] AC 160 at 174.
144 Ibid.
145 [1997] 1 All ER 963, CA.
146 A corresponding offence is now contained in the Wireless Telegraphy Act 2006, ss 8(1), 35(1).
147 [1994] 3 All ER 964, CA.
148 Eg *Brockley* (1993) 99 Cr App R 385, CA; *Muhamad* [2002] EWCA Crim 1856 and *Matudi* [2003] EWCA Crim 697; para 6.20.

The justification for strict liability

Key points 6.8

The arguments for and against strict liability commonly put forward centre on the effective enforcement of the law and the maintenance of standards.

6.42 One justification for strict liability is that the commission of many regulatory offences is very harmful to the public and, as it is very difficult to prove that the defendant had acted with *mens rea* as to all the elements of the *actus reus*, such offences would often go unpunished and the legislation rendered ineffective.[149] Again, it is sometimes said that too many bogus defences would succeed if excusable ignorance or mistake were always accepted as defences. It is also argued that the great pressure of work upon the minor criminal courts nowadays makes it impractical to inquire into *mens rea* in each prosecution for a regulatory offence.[150] Moreover, it is urged that the imposition of strict liability does something towards ensuring that the controllers of business organisations do everything possible to see that important regulatory legislation is carried out.[151] Repeated convictions may discourage or oblige the incompetent to refrain from certain undertakings and ensure that the competent stay competent.

6.43 There are many who remain unconvinced by these arguments[152] and who reply that the fact that the prosecution may find proof of *mens rea* as to a particular element or elements of the *actus reus* difficult is of itself no reason for depriving the defendant of his customary safeguards.[153] They argue, in any event, that it does not follow that, even if proof of *mens rea* is impossible in certain types of cases, the only solution is to go to the other extreme by denying that D's mental state is relevant to the question of responsibility, since there are other possibilities such as a defence of no negligence. They add that it is improper to jettison the requirement of *mens rea* simply to facilitate the flow of judicial business, that the courts' time is taken up anyway by considerations of *mens rea* in determining sentence, particularly because, if D's state of mind is a matter of dispute, there will have to be a post-conviction hearing to determine this, and that it is not a satisfactory answer to say that it is always possible to subject the offender to a small fine (or even to grant him an absolute discharge), since the 'mere' stigma of a conviction may have serious consequences for D. For example, it may lead to loss of a professional status. In addition, critics of strict liability point out that strict liability is particularly unjust where D has taken *all* reasonable precautions to avoid infringing regulatory legislation and therefore cannot reasonably be expected to take further steps to improve his systems. It serves no useful purpose, and may either discourage efficient operators from continuing to trade etc or may encourage them to take precautionary steps which go beyond the

149 *Alphacell Ltd v Woodward* [1972] AC 824 at 839 and 848, per Viscount Dilhorne and Lord Salmon.
150 Sayre 'Public Welfare Offences' (1933) 33 Columbia Law Review at 69.
151 *Alphacell Ltd v Woodward* [1972] AC 824 at 848, per Lord Salmon.
152 For instance, Howard *Strict Responsibility* (1963) 9–28.
153 See *Thomas v R* (1937) 59 CLR 279 at 309, per Sir Owen Dixon, for a statement to this effect by one of the great judges of the twentieth century.

reasonable (with consequent costs which will be passed on to the consumer). It is questionable, however, whether the imposition of strict liability results in higher standards of care. In a case before the Supreme Court of Canada, it was observed that:

> 'There is no evidence that a higher standard of care results from [strict] liability. If a person is already taking every reasonable precautionary measure, is he likely to take additional measures, knowing that however much care he takes, it will not serve as a defence in the event of breach? If he has exercised care and skill, will conviction have a deterrent effect upon him or others?'[154]

6.44 There is much to be said for removing regulatory offences from the scope of the criminal law and leaving them to be dealt with by civil sanctions. Such a system would leave our criminal courts free to deal with 'real' criminal offences, most of which do not involve strict liability. It would greatly reduce the criticisms made of strict liability in the criminal law.

The Regulatory Enforcement and Sanctions Act 2008, Part 3 (ss 36–65)[155] goes some way to achieving this. It provides a range of civil administrative sanctions which can be imposed by the regulator of a regulated activity in respect of which the regulatory offence of a specified type was committed. Schedule 5 to the Act specifies the regulators who can use these sanctions if granted the relevant power to do so. The implementation of this scheme depends on subordinate legislation. At the time this book went to press, Part 3 of the Act had been implemented in respect of prescribed environmental offences by Orders and Regulations made by the relevant Ministers in 2010. These measures permit the Environment Agency and (in England) Natural England, as regulators, to impose civil administrative sanctions in relation to the environmental offences prescribed by them. Implementation in respect of other areas of the specified types of regulatory legislation is awaited.

Where they are available the civil administrative sanctions do not replace the criminal sanction of a prosecution and conviction in the courts, but a prosecution will only be instituted where the breach in question is a serious one. The civil administrative sanctions will be appropriate in cases where advice and persuasion to comply have failed or would otherwise be inadequate.

Under Part 3 of the Act, a regulator can impose the following civil administrative sanctions where the offence is specified by subordinate legislation in respect of the particular sanction:

- a fixed monetary penalty, ie a penalty of an amount prescribed by subordinate legislation;
- one or more of the following discretionary requirements, viz:
  (a) a variable monetary penalty, ie a penalty of an amount determined by the regulator;

[154] *City of Sault Ste Marie* (1978) 85 DLR (3d) 161 at 171, per Dickson J.

[155] The provisions of Part 3 of the Act are based on the Final Report of the *Macrory Review of Regulatory Penalties* (2006).

(b) a compliance notice, ie a requirement that steps specified by the regulator be taken to secure that the offence does not continue or recur;
(c) a restoration notice, ie a requirement by the regulator to restore the position as it would have been if the offence had not been committed;

- a stop notice, which requires the offender to cease the offending activity until he has taken the steps specified in the notice;
- an enforcement undertaking, ie an undertaking to take such action as may be specified in the undertaking within such period as may be specified in it.

Reducing operation of strict liability in the criminal law

Key points 6.9

The injustice involved in strict liability is increasingly being mitigated in statutory offences by the provision of various types of defences.

Statutory defences

6.45 In a limited number of offences, mostly concerned with financial or commercial matters, a defence of 'no intention' is provided. For example, in the offence of destruction by an officer of a company of company documents, contrary to the Companies Act 1985, s 450, D has a defence if he proves that he had no intention to conceal the company's state of affairs or to defeat the law. However, by far the most common statutory defences are 'no negligence' and 'due diligence' defences.

Although most statutory defences of these types expressly require D to prove them, a particular provision may be interpreted as merely imposing an evidential burden rather than a persuasive one. Exceptionally, the statute expressly states that D merely bears an evidential burden in respect of such a defence: an example is provided by the Tobacco Advertising and Promotion Act 2002, s 17, in respect of no-negligence defences (under s 5) to specified offences under that Act.

6.46 The Misuse of Drugs Act 1971, s 28, which applies to offences of possession of a controlled drug and certain other drugs-related offences, provides an example of a 'no negligence' defence. It provides that D shall be acquitted if he proves[156] that he neither believed, nor suspected, nor had reason to suspect (ie was not negligent), that the substance involved was a controlled drug.[157]

6.47 An example of a due diligence defence is in the Trade Descriptions Act 1968, s 24(1), which provides D with a defence if he proves that the commission of an offence under the Act was due to a mistake, or to reliance on information supplied to him or to the act or

[156] In *Lambert* [2001] UKHL 37, 'proves' in s 28 was interpreted, obiter, as simply requiring the defendant to adduce evidence (as opposed to prove on the balance of probabilities) so as to comply with the ECHR, Art 6(2).
[157] For another example, see para 18.37.

default of another person, an accident or some other cause beyond his control, and that he exercised due diligence to avoid committing the offence in question.[158]

An example of a second type of due diligence defence is provided by the Weights and Measures Act 1985, s 34,[159] which provides that it is a defence for a person charged with an offence under Part IV of the Act to prove that he took all reasonable precautions and exercised all due diligence to avoid the commission of the offence.

Another type of due diligence defence is provided by the Bribery Act 2010, s 7(2), referred to in para 18.20.[160]

6.48 It must be emphasised that there is no general 'no intention', 'no negligence' or 'due diligence' defence. Instead, a statutory offence is only subject to such a defence if the statute in question expressly creates it and applies it to that offence.

In comparison, the courts in Australia and Canada have developed a general no negligence defence to offences which do not require proof of *mens rea* as to one or more elements of the *actus reus*, the persuasive burden of proving which is borne by D.[161] Although such a defence found some favour with three Law Lords in *Sweet v Parsley*,[162] it has yet to be implied by our courts into a statutory offence. Likewise, our courts have not adopted another possibility referred to by Lord Reid in *Sweet v Parsley*: the substitution of a requirement for negligence to be proved instead of subjective *mens rea* when a statutory offence was silent as to the need for *mens rea*.[163] Indeed, a variation on this, preferred by Lord Diplock in *Sweet v Parsley*,[164] the implication of a defence of reasonable mistake under the so-called *Tolson* rule, has been expressly rejected by the House of Lords in *B v DPP*,[165] as explained in para 5.13.

Proposal for a judicial power to apply a due diligence defence

6.49 In its consultation paper *Criminal Liability in Regulatory Contexts*,[166] the Law Commission has made the following provisional proposal: when interpreting a statutory offence which does not expressly require proof that D was at fault (ie had *mens rea*), the courts should be able to apply to that offence a due diligence defence, in relation to which D would have the burden of proof. The Commission comments that:

> '[W]ere the courts to have power to apply a defence of due diligence in all the circumstances to an offence of strict liability, they would no longer be required to exercise their minds over the question of whether Parliament by necessary implication (if not expressly) requires proof of fault if the offence itself is to be established. Further, such a defence would not come into play by presumption irrespective of statutory context. It applies

[158] For a similar example, see the Video Recordings Act 1984, s 14A.

[159] Similar examples of this provision are provided by the Consumer Protection Act 1987, s 39; Criminal Justice Act 1988, s 141A; Food Safety Act 1990, s 21; and Property Misdescriptions Act 1991, s 2(1).

[160] Due diligence defences have been examined recently by V Smith 'Due Diligence and State of Mind' (2011) 175 JPN 89, 177.

[161] *Maher v Musson* (1934) 52 CLR 100, HC of Australia; *Proudman v Dayman* (1941) 67 CLR 536, HC of Australia; *City of Sault Ste Marie* (1978) 85 DLR (3d) 161, SC of Canada.

[162] [1970] AC 132 at 150, 158 and 164 per Lords Reid, Pearce and Diplock.

[163] Ibid at 150. [164] Ibid at 163–164. [165] [2000] 2 AC 428, HL.

[166] (2010) Law Com Consultation Paper No 195.

> when, in the court's view, considering the purpose and operation of the statute in context, the application of the defence would lead to use of the criminal law in that context that was fair to defendants without placing unnecessarily obstructive obstacles in the way of prosecuting authorities (this can be called the fairness objective).'[167]

The Commission also notes that:

> 'Clearly, the courts would not apply the defence of due diligence where to do so would defeat the purpose of the statute. A related point is that we would expect the courts not to apply it if, despite the absence of a requirement for proof of a positive fault requirement, there are specific defences applicable to the offence that mean that the fairness objective has been met.'[168]

The Commission has provisionally proposed that, if the above proposal is accepted, the defence of due diligence should take the form of showing that due diligence was exercised in all the circumstances to avoid the commission of the offence. The Commission recognises, however, that it may be preferable for the defence to have the same wording and to impose the same stricter standards as those under the Weights and Measures Act 1985, s 34 (and other provisions) referred to at n 159 above, which is the most commonly encountered statutory form of the due diligence defence.

The Commission recognises that there may be some contexts, eg the road traffic context, where a due diligence defence would be inappropriate and that it might be better right from the outset to state that the power to apply the due diligence defence has no application to offences in specified contexts.

FURTHER READING

Brett 'Strict Responsibility: Possible Solutions' (1974) 37 MLR 417

Horder 'Strict Liability, Statutory Construction and the Spirit of Liberty' (2002) 118 LQR 459

Leigh *Strict and Vicarious Liability* (1982)

Manchester 'Knowledge, Due Diligence and Strict Liability in Statutory Offences' [2006] Crim LR 213

Paulus 'Strict Liability for Public Welfare Offences' (1978) 20 Crim LQ 445

Richardson 'Strict Liability for Regulating Crime: the Empirical Research' [1987] Crim LR 295

Sayre 'Public Welfare Offences' (1933) 33 Columbia LR 55

Simester (ed) *Appraising Strict Liability* (2005)

JC Smith 'Responsibility in Criminal Law' in *Barbara Wootton, Essays in Her Honour* (1986) (Bean and Whynes (eds)) 141

Smith and Pearson 'The Value of Strict Liability' [1969] Crim LR 5

Stanton-Ife 'Strict Liability: Stigma and Regret' (2007) 27 OJLS 151

[167] At para 6.7.

[168] At para 6.93.