# STRICT LIABILITY 2

Notes from Smith and Hogan, *Criminal Law*, Eighth edition 1996, p117-125.

## ARGUMENTS FOR STRICT LIABILITY

1. The primary function of the courts is the prevention of forbidden acts. What acts should be regarded as forbidden? Surely only such acts as we can assert ought not to have been done. Some of the judges who upheld the conviction of *Prince* did so on the ground that men should be deterred from taking girls out of the possession of their parents, whatever the girl's age.

   This reasoning can hardly be applied to many modern offences of strict liability. We do not wish to deter people from driving cars, being concerned in the management of premises, financing hire purchase transactions or canning peas. These acts, if done with all proper care, are not such acts as the law should seek to prevent.

2. Another argument that is frequently advanced in favour of strict liability is that, without it, many guilty people would escape – that there is neither time nor personnel available to litigate the culpability of each particular infraction.

   This argument assumes that it is possible to deal with these cases without deciding whether D had *mens rea* or not, whether he was negligent or not. Certainly D may be convicted without deciding these questions, but how can he be sentenced? Suppose that a butcher sells some meat which is unfit for human consumption. Clearly the court will deal differently with (i) the butcher who knew that the meat was tainted; (ii) the butcher who did not know, but ought to have known; and (iii) the butcher who did not know and had no means of finding out. Sentence can hardly be imposed without deciding into which category the convicted person falls.

3. The argument which is probably most frequently advanced by the courts for imposing strict liability is that it is necessary to do so in the interests of the public. Now it may be conceded that in many of the instances where strict liability has been imposed, the public does need protection against negligence and, assuming that the threat of punishment can make the potential harmdoer more careful, there may be a valid ground for imposing liability for negligence as well as where there is *mens rea*.

   This is a plausible argument in favour of strict liability if there were no middle way between *mens rea* and strict liability – that is liability for negligence – and the judges have generally proceeded on the basis that there is no such middle way. Liability for negligence has rarely been spelled out of a statute except where, as in driving without due care, it is explicitly required. Lord Devlin has said: "It is not easy to find a way of construing a statute apparently expressed in terms of absolute liability so as to produce the requirement of negligence." (*Samples of Lawmaking*, p76).

## ARGUMENTS AGAINST STRICT LIABILITY

1. The case against strict liability, then, is, first, that it is unnecessary. It results in the conviction of persons who have behaved impeccably and who should not be required to alter their conduct in any way.

2. Secondly, that it is unjust. Even if an absolute discharge can be given D may feel rightly aggrieved at having been formally convicted of an offence for which he bore no responsibility. Moreover, a conviction may have far-reaching consequences outside the courts, so that it is no answer to say that only a nominal penalty is imposed.

3. The imposition of liability for negligence would in fact meet the arguments of most of those who favour strict liability. Thus Roscoe Pound, in a passage which has been frequently and uncritically accepted as a justification for such offences, wrote:

   "The good sense of the courts has introduced a doctrine of acting at one's peril with respect to statutory crimes which expresses the needs of society. Such statutes are not meant to punish the vicious will but to put pressure upon the thoughtless and inefficient to do their whole duty in the interest of public health or safety or morals." (*The Spirit of the Common Law*, p52)

   The "thoughtless and inefficient" are, of course, the negligent. The objection to offences of strict liability is not that these persons are penalised, but that others who are completely innocent are also liable to conviction. Though Lord Devlin was sceptical about the possibility of introducing the criterion of negligence (above), in *Reynolds v Austin* (1951) he stated that strict liability should only apply when there is something that the defendant can do to promote the observance of the law – which comes close to requiring negligence.

   If there were something which D could do to prevent the commission of the crime and which he failed to do, he might generally be said to have failed to comply with a duty – perhaps a high duty – of care; and so have been negligent.

4. In *Alphacell v Woodward* (1972) Lord Salmon thought the relevant statutory section, "encourages riparian factory owners not only to take reasonable steps to prevent pollution but to do everything possible to ensure that they do not cause it." This suggests that, however vast the expenditure involved, and however unreasonable it may be in relation to the risk, D is under a duty to take all *possible* steps.

   Yet it may be doubted whether factory owners will in fact do more than is reasonable; and it is questionable whether they ought to be required to do so, at the risk – even though it be unlikely – of imprisonment. The contrary argument is that the existence of strict liability does induce organisations to aim at higher and higher standards.

## POSSIBLE DEVELOPMENTS: A "HALFWAY HOUSE?"

There are several possible compromises between *mens rea* and strict liability in regulatory offences. A "halfway house" has developed in Australia. The effect of Australian cases is:

> D might be convicted without proof of any *mens rea* by the Crown; but acquitted if he proved on a balance of

probabilities that he lacked *mens rea and* was not negligent; ie, that he had an honest *and reasonable* belief in a state of facts which, had it existed, would have made his act innocent.

The onus of proving reasonable mistake is on D.

## STATUTORY DEFENCES

It is common for the drastic effect of a statute imposing strict liability to be mitigated by the provision of a statutory defence. It is instructive to consider one example. Various offences relating to the treatment and sale of food are enacted by the first twenty sections of the Food Safety Act 1990. Many, if not all, of these are strict liability offences. Section 21(1), however, provides that it shall be a defence for the person charged with any of the offences to prove that he took all reasonable precautions and exercised all due diligence to avoid the commission of the offence by himself or by a person under his control.

Statutory defences usually impose on the defendant a burden of proving that he had no *mens rea* and that he took all reasonable precautions and exercised all due diligence to avoid the commission of an offence. The effect of such provisions is that the prosecution need do no more than prove that the accused did the prohibited act and it is then for him to establish, if he can, that he did it innocently. Such provisions are a distinct advance on unmitigated strict liability.

## PROPOSALS FOR REFORM

The Law Commission (1978) proposed a Criminal Liability (Mental Element) Bill, now incorporated in the draft Criminal Code, which would provide a definition of intention, knowledge and recklessness and establish a presumption for offences created after the passing of the Bill that intention, knowledge or recklessness should be required as to all the elements of the offence.

The onus would then be on Parliament, if it wished to create an offence requiring a lesser degree of *mens rea* or an offence of negligence or strict liability, to make this clear in the enactment. It is Parliament's responsibility to decide the nature of criminal liability. It is better that Parliament should have an actual intention in the matter, rather than a purely mythical one, attributed to it, perhaps many years later, in a haphazard manner by the courts.