

BETWEEN KELVIN BRUCE MILLAR

Appellant

AND MINISTRY OF TRANSPORT

Respondent

Coram: Cooke P.
 Richardson J.
 McMullin J.
 Somers J.
 Casey J.

Hearing: 17 July and 4 August 1986

Counsel: R.R. Mahoney for Appellant
 C.P. Browne for Crown

Judgment: 23 October 1986

JUDGMENT OF COOKE P. AND RICHARDSON J., DELIVERED BY COOKE P.

The appellant has a history of District Court convictions for excess breath and blood alcohol offences and driving while disqualified. On 29 April 1982 on different charges he was disqualified for twelve months and six respectively; apparently these disqualifications were concurrent. On 18 August 1982 on another disqualified driving conviction he was disqualified for twelve months from 29 April 1983; but on the same day on a breath alcohol conviction he was disqualified for two years from 29 April 1984. Those two orders were made by Judge Murray. On 3 June 1985 the appellant drove while thus disqualified. At

a hearing in the Dunedin District Court before Judge Willy he defended a charge of disqualified driving on that date by giving evidence that he had misunderstood what the District Court Judge said on 18 August 1982 and thought that the total disqualification of three years ran retrospectively from 29 April 1982. He said that he had received no written notice from the Court of the order made.

In a reserved judgment Judge Willy, after reviewing some of the authorities, found as a fact that the defendant did have an honest belief that he was not disqualified, but that, not having made any enquiries of the Court office or the Ministry of Transport, he could not satisfy the further element of reasonable grounds for that belief. It is not entirely clear what view the Judge took about where the onus lay as regards that element. Another difficulty is that, in the context of a discussion of reasonable grounds, he said 'To fit the facts of the case to the rubric of previous decisions absence of enquiries such as this is, in my view, a species of wilfully closing one's eyes to facts which are readily ascertainable'. The previous decisions cited by him included Auckland City Council v. King [1977] 1 N.Z.L.R. 429, where it had been pointed out by Mahon J. with some emphasis that wilful blindness is equivalent to guilty knowledge. Therefore, with respect, there are ambiguities in the District Court judgment convicting the defendant.

The defendant appealed from his conviction by way of general appeal to the High Court, where the case was heard by Williamson J. In his judgment the High Court Judge in turn reviewed authorities but in the end he disposed of the appeal by dismissing it on the ground that he was satisfied that the appellant had failed to establish an honestly held belief that his disqualification had ceased. This was contrary to the District Court Judge's finding unless one treats that finding as being one of wilful blindness tantamount to knowledge. Mr Mahoney, who has argued the case for the appellant in all three Courts, says that he had not appreciated that the High Court Judge, who had not seen the witnesses, might be contemplating taking what Mr Mahoney categorises as a different view of the facts from that of the District Court Judge. In any event, he says, the High Court Judge should not have done so.

Subsequently under s.144 of the Summary Proceedings Act 1957 Williamson J. gave leave to appeal to this Court on questions of law as to the mental element in the offence of driving while disqualified. He declined leave on questions relating to his alleged reversal of the District Court Judge on findings of fact, although he mentioned that there may have been some confusion on that point at the High Court hearing. In this Court Mr Mahoney asked if necessary for special leave to raise these further questions.

We heard careful arguments from Mr Mahoney and (especially after an adjournment granted to enable fuller consideration and instructions) Mr Browne. The latter on the resumed hearing began his written submissions by quoting 'The longer one looks at the reported cases and academic writings bearing on the present problem the more confused the picture becomes'. Police v. Creedon [1976] 1 N.Z.L.R. 571. 584. It is a familiar experience for a Judge on being confronted with a dictum of his own to wish that it had been left unspoken or spoken differently, but regrettably this is not one of those occasions. In the decade since that remark the law as to mens rea in statutory offences has become, if anything, more uncertain.

Section 35 of the Transport Act 1962 reads:

35. Driving while disqualified or contrary to the terms of a limited licence - (1) Every person commits an offence who -

- (a) Drives a motor vehicle on any road while he is disqualified from holding or obtaining a driver's licence authorising him to drive that vehicle; or
- (b) Being the holder of a limited licence issued to him pursuant to an order made under section 38 of this Act (or the corresponding provisions of any former enactment), drives on any road any motor vehicle otherwise than in accordance with the terms of the order authorising the issue of the limited licence.

(2) Every person who commits an offence against this section is liable -

- (a) For a first offence, to imprisonment for a term not exceeding 3 months or to a fine not exceeding \$1,000 or to both, and the Court shall make an

order under section 31 of this Act as if the offence for which the person is convicted is an offence that renders him liable to be disqualified for holding or obtaining a driver's licence.

- (b) For a second or subsequent offence, to the penalties specified in subsection (1) of section 30 of this Act.

Section 30(1) provides for a second or subsequent offence under s.35(1) liability on conviction on indictment to imprisonment for a term not exceeding five years or to a fine not exceeding \$4000 or to both; with a minimum period of disqualification of one year (without prejudice to the Court's power to order a longer period) unless the Court for special reasons relating to the offence thinks fit to order otherwise.

Notwithstanding the serious view taken by the legislature of second and subsequent offences of disqualified driving, the appellant appears to have been discharged after the instant conviction on payment of \$35 costs. That does not derogate, however, from the argument that the potential penalties under one or both sections tell in favour of some form of mens rea being an ingredient. This is an argument which carries some weight but is far from decisive. In Gammon Ltd v. Attorney-General of Hong Kong [1985] A.C. 1, 17, where the maximum penalties were a fine of \$250,000 and imprisonment for three years, the Privy Council were not persuaded that the severe penalties argument outweighed the importance of trying to ensure, for

public safety, that a buildings ordinance was complied with. Delivering the judgment of their Lordships Lord Scarman said that the legislature could reasonably have intended the severity of the penalties to be a significant deterrent. It was therefore held that knowledge of the materiality of a deviation from plans and knowledge of a likelihood of a risk of injury or damage were not ingredients of the relevant offences under the ordinance.

As to the offence of driving while disqualified, the reported cases offer a wide choice of interpretations of indistinguishable provisions. In England for a third of a century the prevailing view has been that it is an absolute offence: '... if a sentence of disqualification is pronounced in open court, there is an end of it': Taylor v. Kenyon [1952] 2 All E.R. 726, 727, per Lord Goddard C.J. with the agreement of Finmore J., McNair J. finding it enough to treat the case as one of deliberately refraining from making enquiries; R. v. Miller [1975] 2 All E.R. 974, 976-7, per James L.J. delivering the judgment of a Court of Appeal including also Lord Widgery C.J. and Ashworth J. Another Court of Appeal decision to the same effect, reported briefly and with a critical commentary, is R. v. Bowsher [1973] Cr.L.R. 373.

In New Zealand Archer J. thought that the law was the same in Dryden v. Johnson [1954] and Wilson J. definitely so held in Lang v. McDonald [1968] N.Z.L.R. 371. But in a case

already mentioned, Auckland City Council v. King, which concerned a disqualification order made in chambers under the new minor offence procedure (since amended to ensure that orders are made in open court), Mahon J. disagreed. He thought that the offence was of the R. v. Strawbridge [1970] N.Z.L.R. 919 type. That is to say, if there was some evidence that the defendant honestly believed on reasonable grounds that he was not disqualified, he was entitled to be acquitted unless the court or jury was satisfied beyond reasonable doubt that this was not so.

In South Australia in Smith v. Manno [1961] S.A.S.R. 17, 23, the Full Court 'as at present advised' held that the offence was absolute. In New South Wales in R. v. Vlahos [1975] 2 N.S.W.L.R. 580 the Crown conceded that the defence of honest belief on reasonable grounds was available, but the Court of Criminal Appeal, Street C.J. delivering the leading judgment, expressly refrained from assenting to that proposition. Reference was made to Taylor v. Kenyon.

In Canada, to confine attention to Supreme Court decisions, in R. v. Prue (1979) 96 D.L.R. (3d) 577 the charge had been laid under the federal Criminal Code. A majority of four Judges, whose judgment was delivered by Laskin C.J.C., held that the mere inclusion of such an offence in the Criminal Code must be taken to import a requirement of mens rea, in the sense of guilty knowledge, unless there were some clear indication to the contrary; and

that a question of constitutional validity might have arisen, having regard to the existence also of provincial legislation on the same subject, if that was not the true interpretation. Ritchie J. delivered the opinion of a minority of two to the effect that mistake of fact, if proved by the accused, would be a defence. He relied on the leading Canadian case concerning public welfare offences, R. v. City of Sault St Marie (1978) 85 D.L.R. (3d) 161. By contrast, in R. v. MacDougall (1982) 142 D.L.R. (3d) 216, where the charge was under a provincial Motor Vehicle Act, a court of seven Judges, including Laskin C.J.C. and two others who had been in the Prue majority, held that the offence was a public welfare one of strict liability within Sault St Marie. Accordingly a defence was available to the accused if he could prove that he reasonably believed in a mistaken set of facts which, if true, would render his act innocent. Dickson J., the author of the Sault St Marie judgment, was one of the seven unanimous Judges in MacDougall and one of the majority of four who thought Sault St Marie inapplicable in Prue.

Thus the cases on driving while disqualified themselves already present a striking range of alternative mens rea solutions, but it is not quite the full gamut. In listing other possibilities it is desirable first to put on one side statutes in which the legislature has considered the question and made its intention reasonably plain, at least up to a point. For instance, on the one hand it may be

expressly provided that to be an offence the act has to be done wilfully, knowingly or recklessly (a term itself productive of current controversy, into which it is unnecessary to enter here).

On the other hand, although draftsmen usually seem to shrink from saying crudely that criminal liability shall be absolute or irrespective of fault, there may be a sufficiently clear indication that this is intended, subject not uncommonly to some avenue of escape, as by way of shifting responsibility to the person whose act or default led to the occurrence. Wings Ltd v. Ellis [1985] 1 A.C. 272 illustrates the latter type of case. Fraser v. Beckett & Stirling Ltd [1963] N.Z.L.R. 480, 495-6, 497-8, is a case where the majority of the Court (North and McCarthy JJ.) discerned in the text and scheme of the Act an intention to exclude any requirement of mens rea. A more recent instance is Pharmaceutical Society of Great Britain v. Storkwain Ltd [1986] 2 All E.R. 635 in the House of Lords. The context of that case is a convenient one in which to mention that in England 'strict liability' is used in a different sense from that adopted in Canada in Sault St Marie and other cases, the English usage being tantamount to, or at least very close to, absolute liability. There has been no indication that the English courts are aware of the Canadian development or of the influence which it has had in New Zealand. To avoid ambiguity we will refer in the present judgment to liability independent of fault as absolute liability.

Turning to cases where the text and scheme of the statute provide no real help, it is possible as the authorities at present stand to identify at least the following choices open to a court in a case such as the present. The list may not be exhaustive.

1. Simple mens rea. If this case is in this class the offence is in substance driving while disqualified, knowing of the disqualification.
2. A suggested variant of 1 - whether it should be treated as a true variant will be considered shortly - whereunder in the absence of any evidence to the contrary it may be assumed that mens rea, in the sense of guilty knowledge, existed; but if there is any evidence to the contrary the onus falls on the prosecution to prove such knowledge affirmatively. See R. v. Wood [1982] 2 N.Z.L.R. 233, 237; R. v. Metuariki (C.A.167/85; judgment 30 May 1986). Those decisions and observations in this Court were influenced by the House of Lords rape case, R. v. Morgan [1976] A.C. 182, but there is some uncertainty about how widely the ratio of that decision is applicable: compare R. v. Phekoo [1981] 3 All E.R. 84, 93; R. v. Kimber [1983] 3 All E.R. 316; Westminster City Council v. Croyalgrange Ltd [1986] 2 All E.R. 353, 358-9. It may be as well to note that in its own particular sphere R. v. Morgan no longer represents the law of New Zealand. By new provisions inserted into the Crimes Act by the Crimes Amendment Act (No.3) 1985 rape consists of

sexual connection without consent and without believing on reasonable grounds that the woman has consented. So that particular crime is now either within or at least closely similar to the third class about to be mentioned.

3. The Strawbridge approach, which is somewhat similar to class 2 but requires, in addition to some evidence that the accused had an honest belief in facts which would make his act lawful, some evidence or basis for thinking that it was on reasonable grounds; in which event the onus falls on the prosecution to disprove honest belief on reasonable grounds. This approach has the support of Lord Diplock, as a general principle for the construction of enactments creating offences, in Sweet v. Parsley [1970] A.C. 132, 163-5. More recently it has been endorsed by the High Court of Australia for cases in which guilty knowledge is not an element of an offence: He Kaw Teh v. R. (1985) 60 A.L.R. 449.

4. Honest and reasonable mistake a defence, with the burden of proof on the balance of probabilities on the defendant. That was the approach of Dixon J. in Maher v. Musson (1934) 52 C.L.R. 100, 104-6, founded on English authorities before Woolmington v. Director of Public Prosecutions [1935] A.C. 462. The famous 'golden thread' speech of Viscount Sankey L.C. in Woolmington, although general in its language, was delivered in a case focussed on the common law crime of murder. It resolved in the favour of the accused a long-standing obscurity regarding the burden of proof of

matters going to a complete defence or to reduction of the crime to manslaughter, such as absence of intention to kill or cause grievous bodily harm and provocation. The historical survey in the speech did not touch on the considerations arising in the interpretation of modern statutes creating and defining new offences, save only that the proposition that it is the duty of the prosecution to prove the prisoner's guilt was said to be subject to the defence of insanity and 'any statutory exception'. Nevertheless it has had an impact in this area, as sufficiently demonstrated by the High Court of Australia's recent judgments in He Kaw Teh, where the conflict of Australian authority on the burden of proof in cases arguably within either the third class or the fourth appears to have been resolved by eliminating the fourth altogether for the future in Australia. But Lord Pearce pointed out in Sweet v. Parsley [1970] A.C. 132, 158, that there are many cases in which the width of the Woolmington opinion has caused awkward problems. Lord Pearce's speech brings out the merit of some half-way house solution.

5. A solution somewhat similar to 4 but bringing in broader considerations in that the defendant has the burden of showing on the balance of probabilities that he and all those for whom he is responsible acted honestly and with all due diligence. We have referred to this in New Zealand as the defence of total absence of fault. It is not confined to mistakes. See generally Police v. Creedon, already

cited, Ministry of Transport v. Burnetts Motors Ltd [1980] 1 N.Z.L.R. 51, 54, 57-8, and the pivotal New Zealand decision Civil Aviation Department v. MacKenzie [1983] N.Z.L.R. 78. This approach and the use of the expression public welfare regulatory offence owe much to the Canadian jurisprudence embodied chiefly in Sault St Marie. The expression is a convenient label rather than an exact definition, if only because all offences may be said to be against the public welfare. Earlier instances, at any rate in substance, of the same approach in New Zealand are in the judgments delivered in this Court by Chapman J. in R. v. Ewart (1905) 25 N.Z.L.R. 709, 743-5, and Gresson P. dissenting in Fraser v. Beckett & Stirling Ltd [1963] N.Z.L.R. 480, 489.

Gresson P. did not distinguish between this approach and the defence of honest and reasonable mistake. As often, it was unnecessary to do so on the facts of that case.

6. A lesser burden falling on the defendant of showing on the balance of probabilities simply that he did not do the act knowing of its wrongfulness. In other words a defence of honest ignorance. That seems to have been Day J.'s solution in Sherras v. De Rutzen [1895] 1 Q.B. 915, 921, and it was the solution adopted by Williams and Edwards JJ. in this Court in R. v. Ewart, where other English authorities supporting it are marshalled. Ewart is often thought of as something of a classic New Zealand case, but one of its striking features is that as to the position under the section there creating the offence three different solutions are to be found in the Court of Appeal judgments.

7. Absolute liability, alternatively called in England and elsewhere strict liability. It still flourishes in England despite the opinion of Lord Diplock in Sweet v. Parsley [1970] A.C. 132, 163, that the inference that a case was in that class had often been wrongly drawn by English courts. Lord Reid expressed a rather similar regret at 150. Lord Diplock spoke in terms of a higher than normal duty of care, but the whole passage shows that he meant an obligation as stringent as to take whatever measures might be necessary to prevent the prohibited act - virtual insurance - such being the way in which he analysed cases of absolute or strict liability. A recent illustration is R. v. Wells Street Magistrate ex parte Westminster City Council [1986] 3 All E.R. 4.

It is ironic that in the home of Woolmington a greater readiness seems to persist than is found elsewhere to construe ambiguous statutes so as to produce results the very antithesis of that case. In his book on Criminal Law, 4th ed. (1982) 377, Professor Colin Howard dismisses the present status and influence of the absolute (he terms it 'strict') liability doctrine in Australia as small, confined for the most part to minor statutory offences of a regulatory kind, such as offences against statutes regulating the sale of food, drugs and alcoholic drinks. In his opinion the better view appears to be that such responsibility serves no purpose not served equally well by the doctrine of negligence. In New Zealand there has been a

school of judicial thought favouring absolute responsibility in the field of indecent publications: the minority opinions of Stout C.J. and Cooper J. in R. v. Ewart and the majority opinions of North and McCarthy JJ. in Fraser v. Beckett & Stirling Ltd. Nevertheless the present New Zealand inclination is to restrict rather than expand its scope. The compromise solution in Civil Aviation Department v. MacKenzie was seen as a way of softening the rigours of this doctrine, in the interests of fairness to defendants, without unduly handicapping prosecutions brought to protect the interest of the public.

It is no exaggeration to say that respectable, even high, judicial authority can be invoked for placing driving while disqualified in every one of the seven classes. This state of affairs is no credit to either legislatures or courts. Legislatures and their draftsmen have either not considered the problem at all or, if they have had it in mind, refrained from expressing any intention, leaving it to the courts to work out an answer. No criticism could be made of this practice if it were consistent. Evolving coherent theories of the basis of criminal liability, capable of reasonably straightforward practical application, can naturally be seen as a judicial function. But quite often Parliament is specific to some extent about the kind of mens rea or fault that has to be proved, as in ss.56(1) and 56(1A) of the Transport Act (causing bodily injury or death by 'carelessly' using a motor vehicle or by

'carelessly' using a motor vehicle in certain circumstances regarded as particularly culpable, such as excess of a speed limit). So too in s.57(a) the word 'recklessly' is used. These provisions themselves are capable of giving rise to problems of interpretation. Indeed the field of mens rea is one where a draftsman once venturing soon finds ahead an extensive prospect of thorny problems opening up one after another; and the contrast between express provisions and legislative silence is an added source of difficulty for Judges.

Equally the courts can hardly claim to have been consistent: see the passage in Lord Diplock's speech in Sweet v. Parsley previously cited. Nor have they been able to provide easily-applied guidance. For example, the crucial test for absolute liability in the formulation adopted by the Privy Council in Gammon v. Attorney-General of Hong Kong [1985] A.C. 1, 14, is whether its creation will be effective to promote the objects of the statute by encouraging greater vigilance to prevent the commission of the prohibited act. While that test may perhaps leave room for a requirement of mens rea if there is a class of persons who could not possibly do anything to ensure that they comply with the statute (as in Lim Chin Aik v. The Queen [1963] A.C. 160), such cases are not common. Generally speaking, greater vigilance can have some effect. It would seem therefore that the test adopted in Gammon could give such rein to absolute (or 'strict') liability that the so-called presumption that mens rea is required for statutory offences would be displaced more often than not.

In the present case, faced with some such range of choices as already outlined counsel for the Ministry contended, and confirmed the contention after taking further instructions, primarily for class 5 (total absence of fault a defence, Civil Aviation Department v. MacKenzie) but as an alternative for class 7 (absolute liability in accordance with Taylor v. Kenyon and Lang v. McDonald). Counsel for the appellant contended for class 2, which would on his interpretation of the District Court Judge's findings result in the acquittal of the defendant. He indicated that he would like to assign the case to class 1 but lacked confidence in arguing for it.

The range of choices in this and other instances and the general complexity of the subject can be simplified for New Zealand law in the following ways. In the first place, if there is any distinction between classes 1 and 2 in the foregoing list, it seems so narrow as not to be worth preserving. Class 2 may be called Strawbridge without reasonable grounds. But once that complication is dropped the offence can be described simply as one where guilty knowledge is an ingredient of the offence. That indeed is exactly how the House of Lords resolved the common law about rape in Morgan. The crime was redefined as having sexual intercourse with a woman without consent, knowing that she was not consenting or with indifference as to whether or not she consented. The approach of the House of Lords in Woolmington to the so-called 'defence' of provocation is

parallel. If a reasonable doubt remained as to whether the killing was provoked the prosecution had not proved the malicious intention, or in other words the mens rea, required as an ingredient of murder: see [1935] A.C. at 481.

Seen in this way absence of guilty knowledge is like the defences of provocation, automatism, self-defence and compulsion. There must be some evidence or material, either from the prosecution case or called by the defence, to raise the issue. In the absence of a foundation for a contrary view the offence will be inferred to have been committed unprovoked, knowingly, not in self-defence, free from compulsion. A trial Judge should not put a possibility for which there is no foundation in the evidence to the jury. A Judge sitting alone should not take it into account. But if there is a real foundation the Judge's duty is to direct the jury accordingly or to consider it himself when he is the tribunal of fact; and the prosecution will fail if a reasonable doubt remains.

Next it is legitimate and in our view important to pay more than lip service to Lord Reid's proposition in Sweet v. Parsley at 149 that it is a universal principle that if a penal provision is reasonably capable of two interpretations, that interpretation which is most favourable to the accused must be adopted. The qualification reasonably is also important and prevents an overweighting in favour of the accused.

Last, provided that Lord Reid's universal principle is never lost sight of, the fairly refined distinctions between classes 3, 4, 5 and 6 become harder to justify. Class 3 (Strawbridge) can be seen as a troublesome anomaly, probably best done away with or severely confined, as confirmed by the elaborate discussion forced upon the High Court of Australia in He Kaw Teh. In practical effect it amounts to reading into a statute a mixed subjective and objective mens rea formula for which there is little if any warrant. If the legislature really wishes to produce this result, it can do so expressly, as in the current New Zealand rape legislation. The object of justice aimed at by the other three classes can often be best achieved by class 5, the recognition of total absence of fault as a defence. And there is a good deal less room for class 7, absolute liability, once it is accepted that class 5 is an available alternative under which the onus is on the defendant of proving total absence of fault.

We are not attempting or proposing any drastic judicial surgery. Where the law is settled in New Zealand, as by decisions of the Privy Council in New Zealand cases or by this Court on particular sections or their forerunners, it should remain undisturbed. Civil Aviation Department v. MacKenzie was not meant to disrupt firmly-settled patterns of statutory interpretation in particular fields. Nor would it be right to exclude in advance the possibility that particular statutes creating offences, when silent as to

fault or mens rea, may import absolute liability or some variant of liability outside the main stream. But as a general approach to statutory offences when the words give no clear indication of legislative intent and there is no overriding judicial history, it will be right to begin by asking whether there is really anything weighty enough to displace the ordinary rule that a guilty mind is an essential ingredient of criminal liability. If there is, the next enquiry should be whether the statutory purpose and the interests of justice are on balance best served by allowing a defence of total absence of fault, with the onus on the defendant.

Perhaps it is as well to underline that what we have just said does not apply where there is a clear indication of legislative intent. For an example of a clear indication of an intention to impose absolute liability, see the Machinery Act 1950, ss.17 and 27, applied by Heron J. in an unreported judgment drawn to attention in argument in the present case, AHI Operations Ltd v. Department of Labour (Auckland High Court M.1736/84; judgment 31 May 1985).

By contrast with express provisions as just illustrated, there are a significant group of statutory provisions, aimed at regulating the carrying on of various trades or activities, where in defining offences Parliament or the regulation-maker has not gone as far as to impose absolute liability in clear terms or by necessary implication, yet it may be unreasonable to read in the ordinary implication of

mens rea. For instance, as Richardson J. put it delivering the majority judgment in MacKenzie at 81, if personal injury or property damage ensues, truly criminal charges may be brought under the Crimes Act. Or it may be unreasonable to suppose that the prosecutor will be able to acquire any accurate knowledge of the workings of the defendant's business organisation. The object of this type of provision is best served by imposing liability prima facie if the defendant or his or its servants or agents are shown to have committed the unlawful act, while allowing exculpation if the defence can prove total absence of fault.

Typical instances of this, the MacKenzie class of case, arise when the provision creating the offence is directed at conduct having a tendency to endanger the public or sections of the public. Examples are the offence of operating an aircraft in such a manner as to be a cause of unnecessary danger to any person or property (MacKenzie itself) or of discharging waste into natural water (Hastings City v. Simons [1984] 2 N.Z.L.R. 502, 504) or of operating a motor vehicle in such a condition as to be liable to cause annoyance to any person (Ministry of Transport v. Burnetts Motors Ltd [1980] 1 N.Z.L.R. 51). Unreported High Court decisions were drawn to attention in argument in which the principle has been applied to driving with excess breath or blood alcohol, and to operating a vehicle overweight or without a warrant of fitness. The correctness of those decisions does not now arise for determination, but there appears to be no reason to doubt that they were correct.

The discussion up to this point has necessarily been quite long, but once it has been undertaken the decision of the present case does not perhaps present much difficulty. The reasons why Taylor v. Kenyon and cases following it have imposed absolute liability for driving while disqualified have never been fully articulated. Insofar as they may reflect a sense that the defendant has flouted an order of the court they are out of harmony with the ordinary rule that a person is not punished for contempt of court, as by disobeying an injunction, unless he has proper notice of its terms. See 9 Halsbury's Laws of England, 4th ed. paragraphs 66, 67 and 75. The wilful blindness rule, carefully applied, should be a major safeguard against spurious claims of lack of knowledge.

A tendency to imperil the public safety is not the main reason for penalising disqualified driving. The driving itself may be perfectly safe. Often, though not invariably, the original cause of disqualification will have been in some way related directly or indirectly to public safety, but the offence of disqualified driving is not created for that reason: the dominating purpose is to ensure enforcement of court orders. There is insufficient reason for declining to apply to this offence what Lord Reid called a universal principle. In other words mens rea, in the sense of guilty knowledge, should be understood to be an ingredient of the offence. But, on proof that a disqualification order still in force was duly made against

the defendant, his knowledge of the disqualification is naturally to be assumed in the absence of evidence suggesting otherwise. If there is such evidence, the prosecution must affirmatively prove knowledge beyond reasonable doubt.

In this case, because of the ambiguity in the District Court Judge's finding about wilful blindness, the High Court Judge would have been justified in remitting the matter to the District Court Judge for clarification. That not having been done, while it is easy to share with the High Court Judge some degree of scepticism, it would savour of oppression to prolong the proceedings at this stage. On that view the appeal should be allowed and an acquittal entered.

The Court has unanimously come to that conclusion and the case will be disposed of accordingly. So the decision is a plain reaffirmation in New Zealand of the principle that normally there is no criminal offence without a guilty mind. In view of the unclear state of the authorities to which we have referred it will cause no surprise that, as will be seen from the judgments of the other members of the Court, there is not complete unanimity beyond that point. Nevertheless it will be seen that there is a clear majority for the following view. If the case is not covered by the principle just stated it is likely to be because the essentially regulatory nature of the legislation justifies the interpretation that proof or an inference of mens rea is

not required as part of the prosecution's case. Then there are two primary alternatives. First, acceptance that the defendant can escape liability by proving total absence of fault; second, if even that quite narrow escape route is inconsistent with the object of the legislation, absolute liability. Settled lines of interpretation of particular statutes are not to be disturbed, but we hope that Judges and practitioners called on to consider new questions will find some help in the principles just summarised.

R. J. L. v. R.

Solicitors:

Crown Law Office, Wellington, for Respondent

KELVIN BRUCE MILLAR

V

MINISTRY OF TRANSPORT

<u>Coram</u>	Cooke P Richardson J McMullin J Somers J Casey J
<u>Hearing</u>	17 July 1986; 4 August 1986
<u>Counsel</u>	R.R. Mahoney for appellant C.P. Browne for Crown
<u>Judgment</u>	23 October 1986

JUDGMENT OF McMULLIN J

This appeal raises a question of the classification of offences within the criminal law. In particular, is the offence of driving while disqualified from holding a driver's licence (Transport Act 1962 s.35(1)(a)) a mens rea offence, an offence of absolute liability or an offence of strict liability? In a sense, the appeal is a sequel to the decision of this Court in Civil Aviation Department v. McKenzie [1983] NZLR 78.

In Peka v. Police M.145/85 and Waihape v. Police M.63/85, both judgments 7 March 1986, Quilliam J held the offence to be one of absolute liability. So did Judge Wily when convicting the present appellant in the District Court. But on the appellant's appeal to the High Court Williamson J held that the offence was one of strict liability or, as it was described in Civil Aviation v. McKenzie, a public welfare offence. A third view on the analogous offence of driving otherwise than in accordance with the terms of a limited licence (Transport Act s.35(1)(b)) was expressed by Casey J in Hansen v. Police M.1076/85 judgment 25 November 1985. He held it to be within the third class of R v. Ewart [1905] 25 NZLR 709 as modified by R v. Strawbridge [1970] NZLR 909, that is one where upon proof that the defendant is responsible for the external elements of the offence the appropriate mens rea will be presumed; nevertheless the defendant becomes entitled to acquittal if there is evidence which raises a reasonable doubt as to whether he in fact acted with mens rea.

A classification of criminal offences which included one covering what is called "public welfare offences" was adopted in R v. City of Sault Ste Marie (1978) 85 DLR (3d) 161. In that case the Supreme Court of Canada added to the two categories then existing in that country, namely mens rea and absolute liability, a third and new category of "public welfare offences". It held that in such offences the doing of the act prohibited prima facie imported the

offence leaving it open to the accused to avoid liability by proving on a balance of probabilities that he had taken all reasonable care. In Civil Aviation v. McKenzie the majority of this Court adopted that classification, adding it as a fourth class to the three classes set out in R v. Strawbridge.

Although the threefold classification into offences of mens rea, strict liability and absolute liability, was adopted in Canada to provide some middle ground, not previously available there, between mens rea and absolute liability, Sault Ste Marie has created problems of classification even in Canada and may have worked in a reverse way to what Dickson J., the architect of the judgment, intended. In Strasser v. Roberge (1979) 103 DLR (3d) 193, less than 18 months after deciding Sault Ste Marie, the Supreme Court of Canada was divided on whether an offence involving strike activity was a mens rea offence or a public welfare offence. Dickson J, who dissented, referring to Sault Ste Marie, said:

It would, indeed, be ironic if that decision, which embodies a principle for the benefit of the accused on a public welfare offence, by the introduction of a defence of reasonable care to avoid the strictures of absolute liability, were to be used to justify the rejection of any need for proof of mens rea by the prosecution and the shifting of the burden of proof to the accused for an offence which would seem to require mens rea. In Sault Ste Marie it was held not to be unfair to place upon the defendant the burden, or one might perhaps better say the "right and opportunity", of proving that his conduct did not fall below the objective standard of a reasonable man in the circumstances. It did not seem unfair to impose such a burden when the offence would

otherwise be characterized as one of absolute liability and the accused would have no defence whatever. On the other hand, it certainly does seem unfair to reverse the burden of proof where there are strong indications that the offence would otherwise fall within the first category of mens rea offences. (203)

The difficulties of classification are referred to by Stuart, Canadian Criminal Law, pages 161-163 (published in 1982 but only recently available in this country), leading the author to say that a major weakness of Sault Ste Marie is that any definition of public welfare offences is avoided. The difficulty in defining what are public welfare offences was one of the reasons why, in Civil Aviation v. McKenzie, I was unable to accept the Canadian approach. I took the view, which Sault Ste Marie did not, that, statutory exceptions apart, R v. Woolmington [1935] AC 462 was of general application in all criminal cases. "No matter what the charge or where the trial" the principle applies - Woolmington per Viscount Sankey LC, 481. "The rule is of general application in all charges under the criminal law" Mancini v. D.P.P. [1942] AC 1 per Viscount Simon LC, 11. Lord Pearce's "half-way house", placing the persuasive burden of proof on the defendant, could not have been brought about without cutting into Woolmington. Woolmington has always been applied in New Zealand in respect of class 3 Ewart offences. Innes v. McKinlay [1954] NZLR 1054; Transport Department v. McCutcheon [1962] NZLR 675; Boyes v. Transport Dept [1966] NZLR 171; Transport Dept. v. McIntosh [1974] 1 NZLR 142. And see Sir Francis Adams,

Criminal Onus and Exculpations (Sweet & Maxwell 1978), p.11.

The classification of disqualified driving has been the subject of a number of reported cases. There is authority for the proposition that the offence is one of absolute liability. In England, Taylor v. Kenyon [1952] 2 All ER 726; R v. Miller [1975] 2 All ER 974; in New Zealand, the judgments in Dryden v. Johnson [1954] NZLR 455 and Lang v. McDonald [1968] NZLR 371, following Taylor v. Kenyon. But in Auckland City Council v. King [1977] 1 NZLR 429 Mahon J held that driving while disqualified was not an offence of absolute liability; that it was either an offence requiring proof of mens rea or falling within the third class in R v. Ewart as modified in R v. Strawbridge.

Two Canadian cases of driving while disqualified in which Sault Ste Marie was considered are interesting for their differing reasoning. In R v. Prue (1979) 96 DLR (3d) 577, charges of driving while disqualified were laid under the Federal Criminal Code. The accuseds' licences had been suspended automatically on conviction although they were unaware of this. The four judges in the majority said that the charge required proof of mens rea unless there were some clear indication to the contrary because it was an offence under the Criminal Code; moreover, even if the statute did not require proof of mens rea, there might be a question as to its constitutional validity since it was not open to Parliament to add a sanction, without more, to a violation

of a provincial statute. Two of the minority were of the view that the statute created a strict liability offence for which it was unnecessary to prove mens rea but for which a mistake of fact, if proved by the accused, would be a defence. The third judge in the minority thought it was unnecessary to determine whether the statute required proof of mens rea since, even if it did, mens rea could be inferred and the accused's ignorance of the consequences of a conviction was an ignorance of law. On the other hand in R v. MacDougall (1982) 142 DLR (3d) 216, where the charge had been laid under a Provincial Statute, the seven Judges held that the offence was a public welfare offence of strict liability within Sault Ste Marie. In that situation a defence was available to the accused if he could prove that he reasonably believed in a set of facts which, if true, would have rendered his act innocent.

Mr Mahoney argued strongly that driving while disqualified was neither an offence of absolute liability nor one of strict liability, but one involving proof of mens rea. He favoured the adoption of Sault Ste Marie to the extent that it took driving while disqualified out of the category of absolute liability, but disavowed it in that it created an amorphous and undefined kind of offence.

For the reasons Mr Mahoney advanced I think that disqualified driving is an offence involving mens rea. Contrary to what may be a first impression, the offence is

not primarily directed at the protection of the public. Therefore it is not a public welfare offence within the fourth class in McKenzie. The public safety factor was a relevant factor when the disqualification was initially imposed for the act of driving with excess blood alcohol. The welfare of the public may then have been an important reason to keep the appellant off the roads. But public safety is not foremost in imposing a sentence for driving in breach of a disqualification. The sentence then imposed is primarily intended as a punishment of the offender for the breach of a Court order. The theme of punishment underlies the sentence. Thus a first offence of driving while disqualified carries with it a penalty of imprisonment for a term not exceeding 3 months or a fine not exceeding \$1,000 or both with a period of further disqualification. A second offence carries with it a penalty of imprisonment of up to 5 years or a fine up to \$5,000 or both with a period of further disqualification.

However, there may be no logical connection between a disqualification from driving and public safety on the highways. Disqualification may be imposed in certain cases for the non-payment of fines (s.96, Summary Proceedings Act 1957) or in respect of an offence punishable by imprisonment, not being an offence against the Transport Act 1962 (s.83(1)(b) Criminal Justice Act 1985).

This leaves the real enquiry whether the offence is a

mens rea offence or one of absolute liability. It is true that there are no words such as "knowingly" to describe the act of driving while disqualified. The absence of such may lend some weight to absolute liability. But the words of Lord Diplock in Sweet v. Parsley [1970] AC 132 are in point:

But only too frequently the actual words used by Parliament to define the prohibited conduct are in themselves descriptive only of a physical act and bear no connection to any particular state of mind on the part of the person who does the act. Nevertheless, the mere fact that Parliament has made the conduct a criminal offence gives rise to some implication about the mental element of the conduct described. (162)

And,

This implication stems from the principle that it is contrary to a rational and civilised code, such as Parliament must be presumed to have intended, to penalise one who has performed his duty as a citizen to ascertain what acts are prohibited by law (ignorantia iuris non excusat) and has taken all proper care to inform himself of any facts which would make his conduct lawful. (163)

It is of the utmost importance for the protection of the liberty of the subject that a Court should always bear in mind that unless a statute either clearly or by necessary implication rules out mens rea as an element of a crime, the defendant should not be found guilty of an offence against the criminal law unless he has got a guilty mind - Lord Goddard CJ in Brend v. Wood [1946] 62 TLR 462 cited by Lord Evershed in delivering the opinion of the Judicial Committee in Lim Chin Aik v. The Queen [1963] AC 160, 173. That view is reflected in New Zealand in R v. Howe [1982] 1

NZLR 618, where Cooke J, delivering the judgment of the Court, said:

At the present day the Courts generally lean towards interpreting ambiguous statutes that create offences, especially serious offences, as requiring a guilty state of mind extending to all the ingredients. The climate of judicial opinion regarding mens rea is illustrated by statements in speeches in the House of Lords by Lord Reid in Sweet v. Parsley [1970] AC 132, 148; [1969] 1 All ER 347, 349, Lord Diplock in R v. Sheppard [1981] AC 394, 407-408; [1980] 3 All ER 899, 906, and Lord Hailsham of St Marylebone LC in R v. Lawrence [1982] AC 510, 520; [1981] 1 All ER 974, 978. The New Zealand Courts, we think, subscribe strongly to the conservation of mens rea as a cardinal requirement of the criminal law. In other words, there must normally be true moral blameworthiness before people can be convicted of crime. The degree of blameworthiness that is caught varies with the subject-matter and the wording by which the legislature elects to define the crime, but the two main heads are intention and recklessness. (623)

Viewed against these statements of principle the offence of driving while disqualified should not be regarded as an offence of absolute liability. It would be unreasonable to regard a disqualified driver as having no defence to the charge when he had an honest belief that the disqualification period had expired or that none had ever been imposed. To illustrate: A, charged with an offence which does not carry imprisonment but a fine and the possibility of a period of disqualification, instructs his solicitor to appear for him and plead guilty. After the hearing, which he does not attend, he receives a letter from his solicitor reporting that he was convicted and fined and disqualified from driving for 6 months. In fact, contrary to the solicitor's advice, A was disqualified for 12 months but the solicitor

misheard the Judge. A faithfully observes what he believes to be the period of disqualification of 6 months, but is apprehended while driving in the 8th month and charged with disqualified driving. If the offence were one of absolute liability A would require to be convicted although manifestly "contrary to a rational civilised code" (Lord Diplock's phrase). This would not accord with the concept that the law should punish the truly guilty and acquit the innocent. For these reasons I think that Mahon J in Auckland City Council v. King and Casey J in Police v. Hansen were right in holding the respective offences considered in those cases to be within the third class of Strawbridge.

But if there were any doubt as to the category into which disqualified driving fell, the interpretation most favourable to the accused should be adopted. Sweet v. Parsley [1970] AC 132, 149 per Lord Reid. For these reasons I would regard disqualified driving as being an offence for which the absence of mens rea is a defence. Mens rea in this context is the absence of an honest belief in the existence of facts (the expiry of the disqualification period) which, if true, would make the act innocent.

In the District Court Judge Willy said that, having seen and heard the appellant, he was satisfied that he did have an honest belief that he was not disqualified at the time that he drove; he accepted that the appellant had misheard or misunderstood what the Judge had said when disqualifying

him and that there was room for such a misunderstanding. And he accepted that the appellant's subsequent behaviour was consistent with his honest belief that his disqualification had expired before he drove. He went on, however, to find that the appellant's honest belief was not founded on reasonable grounds; that the appellant was not entitled to rest his belief on what he thought he heard the Judge say in open Court; that the appellant had been guilty of wilfully closing his eyes to facts which were readily ascertainable. Williamson J, regarding the offence as one of strict liability rather than absolute liability, thought that on the findings of the District Court Judge the appellant had failed to establish an honestly held belief.

In R v. Wood [1982] 2 NZLR 233 (a case involving the cultivation of cannabis) this Court held that as a consequence of R v. Morgan [1976] AC 182, an accused did not have to prove that she had reasonable grounds for an honest belief that the plant she was cultivating was not cannabis; that the reasonableness or otherwise of that belief might nonetheless be important as an index of whether or not it was honestly held. We reiterated that same view in R v. Metuariki CA.165/85 judgment 30 May 1986 (a cannabis cultivation case). See also R v. Taaffe [1983] 1 WLR 627 (a drug case) and R v. Gladstone Williams [1974] 78 Crim App R 276 (an assault case). These cases establish that an honest belief in a state of affairs or as to the existence of a fact, which if true would make the act innocent, will

provide a defence itself. It is not then incumbent on an accused to establish reasonable grounds for such belief although such may be relevant in testing the honesty of the belief in the first place. On this approach there was no need for the appellant to satisfy the Judge that he had reasonable grounds for his belief. The honesty of the same had already been accepted.

For over a century there have been cases in which it has been held that wilful blindness can be regarded as the equivalent of intent. R v. Sleep (1861) 30 LJMC 170 is an early instance of an accused's guilt being put on the basis either of an actual intent or the wilful shutting of his eyes. R v. Crooks [1981] 2 NZLR 53 is a recent case in which the "blind eye" direction was discussed in a receiving case. Many of the decided cases concern the position of an aider and abettor said to have connived at an offence by wilfully shutting his eyes to an obvious means of knowledge. When a person deliberately refrains from making enquiries because he prefers not to have the result; when he wilfully shuts his eyes for fear that he may learn the truth; he may for some purposes be treated as having the knowledge which he deliberately abstained from acquiring. R v. Crabbe (1985) 59 ALJR 417. But where a defendant has been found to have acted honestly but mistakenly, there is no room for importing the notion of wilful blindness to take away from him something which he has already been held to have, namely an honest belief. Had the appellant in the present case

expressed doubts as to what he had heard in Court, any claim that he honestly believed that he was disqualified from driving for only a lesser period could hardly have been accepted. But that is not the case here. The District Court Judge believed him and thought that his mistake was understandable. Therefore there was no room for the finding of wilful blindness. I would therefore allow the appeal and vacate the conviction.

That is enough to dispose of this appeal but it is opportune to make some more general observations on the classification of offences. I agree with Cooke P that the authorities are not consistent in their approach to this subject, particularly with regard to the division between mens rea and absolute liability offences. For example, in Gammon (Hong Kong) Ltd v. V.A.B. of Hong Kong [1985] 1 AC 1 a maximum penalty as great as a fine of \$250,000 and imprisonment for three years did not dissuade the Privy Council from holding that the offence was one of absolute liability. There will always be some offences for which a citizen will be held liable without fault on his part. The legislative policy may require this. A number of such offences are referred to in the judgment of Heron J in AHI Operations Ltd v. Department of Labour (M.1736/84, Auckland Registry, judgment 31 May 1985). The modern approach is to keep these to a minimum. Gammon is an exception to it. But the result of that case may have been influenced by the weight which the Judicial Committee appeared to give to the

judgment of the local court, the Court of Appeal of Hong Kong, as reflected in a passage from that Court's judgment cited at p.15. It is well known that the building and construction works carried out in the Colony are extensive and labour intensive, making it essential that a firm grip be exercised by the contractor over the whole enterprise. Absolute liability might have been thought to best ensure that. And who better to say so than the superior Court of the Colony.

It would be better if the Legislature in creating offences, particularly those involving public safety and the environment, could prescribe what defences are permitted. Some modern statutes do this. For instance, s.30(1) of the Food Act 1981 provides for strict liability, and s.30(2) and s.31 set out the defences that are available; s.7A(1) of the Clean Air Act 1972 provides for a form of strict liability and s.7A(2) provides a defence; s.242(1)(a) of the Harbours Act 1950 restricts the defences available to a charge under s.242(1) of depositing material in a harbour and s.6 of the Marine Pollution Act 1974 provides special defences to charges of discharging oil or pollutant in a harbour. These may be added to the other cases mentioned in my judgment in McKenzie p.96. But the list is not exhaustive.

If, however, there is to be discerned in a statute an intention, for reasons of policy or public safety, to make the doing of an act an absolute offence, that intention

should not be defeated by allowing a defendant a way of escape by reversal of the onus of proof. If the argument for absolute liability is that statutory standards can only be maintained by displacing the ordinary presumption of mens rea with one of absolute liability it is not for the Courts to defeat the underlying concern of the Legislature by allowing a defendant a way of escape at the cost of the reversal of the persuasive onus.

The many cases decided on mens rea and absolute liability in various Commonwealth jurisdictions indicate differences of approach to the classification of offences. But in the interests of certainty in the criminal law it is desirable that the categories be diminished rather than increased. In this country three categories were recognised from the time of Ewart and, until McKenzie, the only variation within those categories was the replacement of the persuasive onus by an evidential onus as reflected in Strawbridge. The law as laid down in these cases worked well enough although from time to time there were difficulties, as there will continue to be, occasioned by the Legislature's failure to indicate whether an offence was one of absolute liability. By and large, within that framework, the guilty were convicted and the innocent escaped. While any move to reduce the number of categories, and thereby the difficulties of classification, by treating classes 1 and 3 of Ewart as modified by Strawbridge as not very different, is commendable, in my view the creation of the fourth class in McKenzie following Sault Ste Marie has

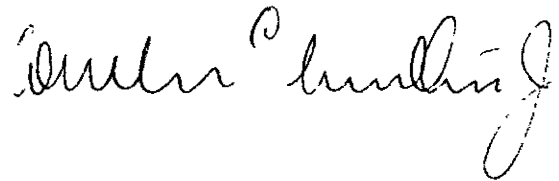
tended to create difficulties, particularly for District Court Judges who deal with the great majority of these cases, where none had previously existed. And as well, the decision in McKenzie which was aimed at softening the rigours of absolute liability for defendants, has in many cases placed on them a burden of proof which they formerly did not have - a point against which Dickson J registered strong reaction in his dissenting judgment in Strasser v. Roberge.

Mr Mahoney did not seek to reopen McKenzie. He did not need to do so. But if the matter were now res integra I would favour, as I think he did, the retention of the classification laid down in Strawbridge. It did not create any difficulties over the definition of some offences as serious crimes (for which under McKenzie the conventional onus of proof is maintained) and others as public welfare offences (for which it is reversed). Such a distinction seems neither fair nor logical. To illustrate, dangerous or reckless driving causing death is a serious crime carrying the conventional onus of proof, but dangerous or reckless driving simpliciter is only a public safety or welfare offence with the defendant carrying the persuasive onus. Yet, in both cases the dangerous or reckless driving may be equally grave and the occurrence or avoidance of death a matter of pure chance. A Strawbridge approach made for a constant onus of proof and avoided legislative changes occasioned by the social grading of offences. As to the last point, what is a serious crime in one generation may not be regarded as such in another.

Its inclusion as such in the Crimes Act 1961 is not the last word. "Crime" is defined in s.2(1) of that Act as "an offence for which the offender may be proceeded against by indictment". It extends to offences which, under any other Act, may be prosecuted on indictment. Changes in social outlook often bring about changes in the law. For instance, at common law suicide was a felony leading in earlier times not only to the forfeiture of property but also to the infliction of indignities upon the body of the deceased. When the criminal law was codified in New Zealand in 1893 suicide was not made a crime; but attempted suicide was declared to be a criminal offence and it remained a crime until 1961 when the change in community outlook removed it from the Crimes Act. Pallister v. Waikato Hospital Board [1975] 2 NZLR 725, per Woodhouse J, 746. Again, until the passing of the Homosexual Law Reform Act 1986 all consensual acts of sodomy or attempted sodomy were crimes. They are no longer so. At the other end of the scale, acts which at one time would have been regarded as no more than anti-social have become offences attracting criminal sanctions. Beside the orthodox criminal law environmental offences are a new development. Some environmental offences may be seen in time by many, as they are already seen by some, to be serious crimes. The pollution of a river or other water source may in time be regarded as worse than the conventional crime of shop-lifting. There is another reason why the Courts should not reverse the onus of proof. If the Legislature has itself reversed the onus, as it has in some

statutes but not in others, it can hardly have intended that the Courts should undertake by judicial legislation in those other enactments what it has itself declined to do.

For these reasons, which generally are those I expressed more fully in my judgment in McKenzie's case, I am of the view that offences of absolute liability apart (and I treat as such, offences of strict liability where the Legislature itself provides for limited defences) all crimes and offences should have a common onus of proof and that should rest on the prosecution.

A handwritten signature in dark ink, appearing to read "Sir John Peel", written in a cursive style.

KELVIN BRUCE MILLAR

v.

MINISTRY OF TRANSPORT

Coram: Cooke P.
Richardson J.
McMullin J.
Somers J.
Casey J.

Hearing: 17 July 1986; 4 August 1986

Counsel: R.R. Mahoney for Appellant
C.P. Browne for Crown

Judgment: 23 October 1986

JUDGMENT OF SOMERS J.

The jurisprudence of the common law world in relation to mens rea in statutory offences is confused and unsatisfactory. The best service this court can render the community and those who administer the law is to try to simplify it in a way that is consistent with the intention of Parliament and the fair and just disposal of prosecutions for such offences.

In many cases the legislature has made its intention clear by the use of such words as knowingly,

wilfully, deliberately or recklessly, or by expressly providing that an accused person may exonerate himself by discharging some particular onus. No real difficulty arises in those cases. But in others, regrettably numerous, the statute or regulation constituting the offence is silent as to the mental state, if any, which must accompany the act.

In this situation I think the starting point is that expressed by Lord Reid in Sweet v. Parsley [1970] A.C. 132, 149 - 'mens rea is an essential ingredient of every offence unless some reason can be found for holding that that is not necessary...if a penal provision is reasonably capable of two interpretations, that interpretation which is most favourable to the accused must be adopted.' I shall say something more about this class of case presently.

If upon examination of the statute or regulation and any other relevant material the offence is found to be one which does not require proof of mens rea by the prosecution a further enquiry is necessary. In cases of this class, where apparently proof of certain acts is sufficient to constitute the offence, Parliament has obviously intended to penalise those who do the acts with intent and those who do them carelessly. But it is quite a different matter to suppose that Parliament intended that those who had no intent and who have exercised complete care in what they have done should be convicted on mere proof of fact or circumstance. In many, perhaps most, of such cases

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proof. Examples are the defences of self-defence and provocation and cases involving the 'defence' of colour of right. In R. v. Strawbridge it was indicated that the presumption of knowledge could be met by evidence of an honest belief held on reasonable grounds. As a result of the decision in R. v. Morgan [1976] A.C. 182 I do not think it is now necessary for honest belief to be founded on reasonable grounds: see R. v. Wood [1982] N.Z.L.R. 233, 237; R. v. Metuariki (C.A. 167/85; judgment 30 May 1986). (As a consequence of the Crimes Amendment Act (No.3) 1985 Morgan is no longer the law as to rape in New Zealand: that offence is now one of negligence).

Cases of the second class mentioned above were described in Civil Aviation Department v. McKenzie [1983] N.Z.L.R. 78 and were comprehended under the label public welfare regulatory offences. That description has I think caused some difficulty. I would prefer to say that the class includes all offences which exclude the requirement of proof of mens rea by the prosecution but in which the aim of Parliament can be met by acquitting those who can show they are without intent or fault.

From the foregoing it will be apparent that I am of the opinion that statutory offences may be conveniently characterised in three ways; first those in which the prosecution has the onus of establishing mens rea, secondly those in which an accused may exculpate himself by

wilfully, deliberately or recklessly, or by expressly providing that an accused person may exonerate himself by discharging some particular onus. No real difficulty arises in those cases. But in others, regrettably numerous, the statute or regulation constituting the offence is silent as to the mental state, if any, which must accompany the act.

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it will be found that the object and purpose of the statute or regulation can be achieved by exonerating those who are able to demonstrate that they are without intent and are without fault. On this class of case too I shall add something shortly.

That would leave some cases, they ought to be few in number, in which mere proof of the prohibited act will lead to conviction. They are cases of absolute liability.

Cases in the first class arise in several ways. In some the prosecution must from the outset assume the burden of intent, knowledge, wilfulness, or recklessness. Sometimes this is not at once apparent. In R. v. Strawbridge [1970] N.Z.L.R. 909 it was held that on a charge of cultivating cannabis knowledge by the accused of the nature of the plant will be presumed unless there is evidence that the accused honestly believed on reasonable grounds that the act was innocent in which case the Crown must affirmatively establish such knowledge. This is not to deny that the prosecution has the onus of proving such knowledge; it is simply that evidence of the fact of cultivation by the accused gives rise to the inference that he did know the nature of the plant. It is only when there is evidence of honest belief that the prosecution is obliged to address the topic in a more affirmative way. There are other examples in the criminal law where the course which a case takes will require the prosecution to assume a particular burden of

proof. Examples are the defences of self-defence and provocation and cases involving the 'defence' of colour of right. In R. v. Strawbridge it was indicated that the presumption of knowledge could be met by evidence of an honest belief held on reasonable grounds. As a result of the decision in R. v. Morgan [1976] A.C. 182 I do not think it is now necessary for honest belief to be founded on reasonable grounds: see R. v. Wood [1982] N.Z.L.R. 233, 237; R. v. Metuariki (C.A. 167/85; judgment 30 May 1986). (As a consequence of the Crimes Amendment Act (No.3) 1985 Morgan is no longer the law as to rape in New Zealand: that offence is now one of negligence).

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establishing want of intent and fault, and thirdly, absolute offences. The variety of cases explored in the judgment of Cooke P. will I consider conveniently fall into one or other of these three groups.

I would not wish to part from this topic without mentioning Gammon Ltd. v. Attorney-General of Hong Kong [1985] A.C.1. This was an appeal to the Privy Council from the Court of Appeal of Hong Kong and is not therefore authoritative in New Zealand. Nor with respect do I consider it is of much persuasive value here. The alternatives considered in the case were that the offence required proof of mens rea or was absolute. No reference was made to R. v. City of Sault Ste Marie (1978) 85 D.L.R. (3d.) 161, or to Civil Aviation Department v. McKenzie [1983] N.Z.L.R. 78. The existence of a class of offence between those requiring proof of mens rea and those that are absolute is evidently not a part of the law of Hong Kong, nor, it may be supposed, of England.

As to the offence of driving while disqualified with which this case is concerned there is nothing I can usefully add to what has been written by Cooke P. I am in entire agreement with his conclusions on that and as to the disposition of the case.

James J.

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Casey J

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Counsel: R R Mahoney for Appellant
C P Browne for Crown

Judgment: 23 October 1986

JUDGMENT OF CASEY J

There is little I can usefully add to the review made by the President and Richardson J. There are manifest difficulties in the Courts' efforts to resolve the tensions between the need to regulate lawful activities for the overall benefit of society, and the injustice of penalising blameless transgressors. When controls were fewer and directed at a limited range of high risk conduct, absolute liability could be more rationally justified. However, the increasing management of society has subjected a vastly higher proportion of citizens to the risk of penalties as they go about their daily business.

Along with this is a mounting reluctance to accept, as consistent with a civilized system of justice, the proposition that regulatory offences are not criminal and imply no moral condemnation. It is difficult to understand how this

attitude ever gained ground as a justification for absolute liability, considering that some of the earliest prohibitions were aimed at such disgraceful conduct as the sale of poisoned food and drink. Nor is it any longer true to say that the penalties for such offences are generally minor. The Privy Council in Gammon Ltd. v Attorney-General of Hong Kong [1985] AC 1 paid little regard to the view that a severe penalty is a material factor in deciding that absolute liability was not intended. In that case a breach of the Hong Kong building regulations exposed the offender to a fine of \$250,000 and imprisonment for 3 years. The crucial test adopted by the Judicial Committee was whether absolute liability would be effective to promote the objects of the statute by encouraging greater vigilance.

Legislators, both past and present, have generally failed to come to grips with this conflict between social needs and the individual's expectation of a fair deal in the Courts. They have usually left the Judiciary to work out a system which will protect the innocent without letting too many guilty people escape. Their trust that this can be done in the absence of any clear guidelines or declarations of policy has put the Courts into an impossible position - if this is not too strong a term to describe the state of the authorities both here and in other Commonwealth jurisdictions.

Referring to the classification adopted by Cooke P and Richardson J, I accept the conclusion that there is no practical difference between Classes 1 and 2, involving offences in which mens rea is an ingredient. The majority in R v Morgan [1976] AC 182 spelt out in clear terms the view that the existence of an honest belief was inconsistent with the guilty mind essential to such charges. As Lord Hailsham pointed out at p.214, it is the presence of that belief which is material, so that an enquiry into its reasonableness is relevant only in determining whether it existed. The logical relevance of this approach to all offences involving a guilty mind is compelling, and I see no reason to confine it to rape.

In such cases both the evidentiary and persuasive onus remain on the Crown. The requisite intention or state of mind will usually be inferred from proof of the facts constituting the offence and the surrounding circumstances. However, if there is evidence which might give rise to a doubt about those matters, the prosecutor (carrying the overall burden of proving the charge beyond reasonable doubt) must dispose of it.

In R v Strawbridge [1970] NZLR 919, this Court said it was not necessary for the Crown to establish guilty knowledge by the accused in order to present a prima facie case: in the absence of evidence to the contrary it will be presumed.

This was not a statement that mens rea was not an ingredient of the charge under the (then) Narcotics Act 1965; or that the ultimate onus of proving it did not rest on the Crown. In practical terms it was an acknowledgment of the inference to be legitimately drawn from proof of the facts constituting the offence. That case can properly be included in a single class covering every situation in which a guilty mind is an essential element, with the burden of proof remaining on the prosecution throughout. The only exception will be when that onus is explicitly placed on the accused.

"Honest belief" (or its converse "honest ignorance") in this context means more than mere belief or ignorance. Wilfully closing ones eyes to the obvious is not acceptable; nor is a "couldn't care less" attitude. The word "honest" is intended to add a quality which I would sum up in the proposition that it describes the state of mind of a law-abiding citizen intending to do his or her best to comply with the obligations or duties imposed.

In Gammon (p.14) the Judicial Committee discussed the approach to be adopted in determining whether proof of a guilty mind is required in any particular class of offences :

"(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, and public safety is such an issue; (5) even where a statute is concerned with such an issue, the presumption of mens rea stands unless it can also be shown that the creation of strict liability will be effective to promote the objects of the statute by encouraging greater vigilance to prevent the commission of the prohibited act."

(In New Zealand we tend to call it "absolute" rather than "strict" liability, and of course all our offences are statutory.)

If it is determined that the exclusion of mens rea is intended (and I acknowledge the problems inherent in deciding what is "an issue of social concern"), the next enquiry is whether any recognition of blameless conduct is precluded altogether; or whether it is open to the accused to show an absence of fault to relieve him of liability, as accepted in Civil Aviation Department v MacKenzie [1983] NZLR 78. I accept as a pragmatic solution the adoption by the President and Richardson J of two remaining classes. However, it must always be remembered that such an enquiry will not be called for unless it has first been decided that the normal presumption of mens rea was not intended to apply to the particular offence.

Many regulatory offences have already been fitted into one of the foregoing three classes by the Courts, and in any future legislation of the same kind Parliament can be assumed

to intend a corresponding approach to mens rea. For example, absolute liability will presumably continue to be the rule in legislation involving the safety of machinery.

I agree that the offence of driving while disqualified requires proof of mens rea. The finding of the District Court Judge in regard to the Appellant's honest belief is ambiguous, but I accept that after this length of time the proper course is to allow the appeal and enter an acquittal.

Mr. Casey J.