

# A Comparative Approach to the Burden of Proof in Criminal Trials

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## Introduction

The burden of proof in criminal cases – Professor Gerald Orchard<sup>1</sup> has captured the essence of this problem succinctly in an article<sup>2</sup> written in the wake of the New Zealand Court of Appeal decision, *Civil Aviation Department v MacKenzie*,<sup>3</sup>

Notoriously, offences are often created by legislation which neither specifies any mental element or fault nor expressly excludes such a requirement. This practice has constantly caused difficulty and has led to a vast number of decisions, many of which are in substantial conflict. In searching for the elusive (or illusory) legislative intent in relation to particular offences the courts have had to repeatedly confront quite fundamental issues. Is there a requirement of mens rea? If there is, what in the context of the offence in question is this requirement? Who has the burden of proof on such an issue?<sup>4</sup>

The purpose of this article is to examine the law in New Zealand with regard to the last question raised by Professor Orchard, namely who has the burden of proof on such an issue. Reference will be made to the most recent New Zealand Court of Appeal decision on this matter, *Millar v Ministry of Transport*.<sup>5</sup>

Necessarily, a discussion of the New Zealand approach will involve a consideration of Canadian case-law for, as Sir Robin Cooke has stated,<sup>6</sup> "as a re-

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<sup>2</sup> "The Judicial Categorisation of Offences", (1983) 2 Canterbury Law Review, 81.

<sup>3</sup> [1983] NZLR 78.

<sup>4</sup> *Supra* at note 2, at 81.

<sup>5</sup> (1986) 2 CRNZ 216.

<sup>6</sup> [1983] NZLJ 297, 303.

alistic compromise between competing dogmas we have gratefully thrown in our lot with the Canadians".

By way of contrast, an examination of English and Australian case law will be undertaken. As will be seen, England provides a dramatic contrast and Australia straddles the two camps.

### New Zealand and Canada

The judgment of the New Zealand Court of Appeal in *Civil Aviation Department v MacKenzie* has been described as "... the most important decision of the New Zealand courts on any area of the criminal law for over a decade".<sup>7</sup> That case heralded the introduction of the public welfare regulatory offence and concomitant reverse onus. With such offences the prosecution need prove only the existence of the prohibited act. The defendant to escape liability has the onus of proof thrust upon him/her to prove that s/he was not at fault, and must do so on the balance of probabilities.

The facts of *MacKenzie* are as follows. The appellant MacKenzie, at the end of a sight-seeing flight, flew his aircraft at a height of approximately twenty feet preparatory to landing. In so doing, the tail fin of his aircraft caught two telephone wires and dragged them along the ground. Two people who were on the ground feared for their safety on account of the trailing wires and took cover. Some distance off, the wires fell off the tail. Among other charges, MacKenzie was charged under Section 24(1) of the Civil Aviation Act 1964, which provides:

(1) Where an aircraft is operated in such a manner as to be the cause of unnecessary danger to any person or property, the pilot or the person in charge of the aircraft, and also the owner thereof unless he proves to the satisfaction of the Court that the aircraft was so operated without his actual fault or privity, shall be liable on summary conviction to a fine not exceeding \$2,000 or to imprisonment for a term not exceeding twelve months, or to both and, if the pilot of an aircraft is so convicted, the Court shall order him to be disqualified from holding or obtaining a pilot licence for such period, being not less than 12 months, as the Court thinks fit, unless the Court for special reasons relating to the offence thinks fit to order otherwise.

The question of law which came before the Court of Appeal was: "[w]hat was the mental element (or mens rea) of the offence created by Section 24(1) of the Civil Aviation Act 1964?"<sup>8</sup>

In arriving at its decision in *MacKenzie* the majority of the Court drew heavily from Canadian criminal jurisprudence, to wit the Supreme Court of Canada's judgment in *R v City of Saulte Ste Marie*.<sup>9</sup> There the Court was dealing with "... offences variously referred to as 'statutory', 'public welfare', 'regulatory', 'absolute liability', or 'strict responsibility', which are not criminal

<sup>7</sup> Finn (1984) 8 Criminal LJ 54,55.

<sup>8</sup> *Supra* at note 3, at 80.

<sup>9</sup> (1978) 85 DLR (3d) 161.

in any real sense, but are prohibited in the public interest . . ."<sup>10</sup> In dealing with these offences Dickson J promulgated a threefold classification of criminal offences and an attendant scheme dealing with the burden of proof:<sup>11</sup>

I conclude . . . that there are compelling grounds for the recognition of three categories of offences rather than the traditional two:

1. Offences in which mens rea, consisting of some positive state of mind such as intent, knowledge, or recklessness, must be proved by the prosecution either as an inference from the nature of the act committed, or by additional evidence.
2. Offences in which there is no necessity for the prosecution to prove the existence of mens rea; the doing of the prohibited act prima facie imports the offence, leaving it open to the accused to avoid liability by proving that he took reasonable care. This involves consideration of what a reasonable man would have done in the circumstances. The defence will be available if the accused reasonably believed in a mistaken set of facts which, if true, would render the act or omission innocent, or if he took all reasonable steps to avoid the particular event. These offences may properly be called offences of strict liability . . .
3. Offences of absolute liability where it is not open to the accused to exculpate himself by showing that he was free of fault.

Prior to Dickson J detailing this list of three he said, with reference to the second category, ". . . [W]hile the prosecution must prove beyond reasonable doubt that the defendant committed the prohibited act, the defendant must only establish on the balance of probabilities that he has a defence of reasonable care".<sup>12</sup>

His Honour Mr Justice Richardson (delivering the judgment of the majority (Davison C J and Cooke J)), said in *MacKenzie* that there are two reasons ". . . why in our judgment the Court should now follow the path taken by the Canadian decision (*Sault Ste Marie*) . . ."<sup>13</sup>

His Honour determined that it was artificial to speak in terms of mens rea when considering liability under legislation which was (and still is) essentially regulatory. The Courts must be able to ensure that standards of public health and safety are maintained ". . . without at the same time snaring the diligent and socially responsible".<sup>14</sup> Richardson J, in an indirect reference to *Woolmington v D.P.P.*,<sup>15</sup> expressed the opinion that allowing a no fault defence with a persuasive burden upon the defendant did not abrogate the general principle of criminal law, that the burden of proof of a requisite mental state rests on the prosecution, because ". . . it is recognised that the price of absolute liability is too high".<sup>16</sup> His Honour contended that this is especially so in an increasingly complex society where offences of public welfare regulation are involved.<sup>17</sup>

<sup>10</sup> *Ibid*, at 165 per Dickson J.

<sup>11</sup> *Ibid*, at 181-182.

<sup>12</sup> *Ibid*, at 181.

<sup>13</sup> *Supra* at note 3, at 85.

<sup>14</sup> *Ibid*.

<sup>15</sup> [1935] AC 462.

<sup>16</sup> *Supra* at note 3, at 85.

<sup>17</sup> *Ibid*.

Drawing heavily from *Saulte Ste Marie* Richardson J advanced a further argument in favour of adopting Dickson J's second category with its reverse onus provision. The defendant will be in a stronger position to adduce evidence as to how the proscribed act occurred and likewise what was done to avoid it. Also, Richardson J felt that as the emphasis of the public welfare regulatory offences was upon "... the protection of the interests of society as a whole ...",<sup>18</sup> placing a persuasive onus upon a defendant to provide that s/he was without fault was not "unreasonable". His Honour concluded that the defence was to be objectively assessed and that "variable standard[s] of negligence depending on subjective considerations affecting the individual concerned"<sup>19</sup> would not be appropriate.

McMullin J, the lone dissident in *MacKenzie* was not persuaded by *Saulte Ste Marie*. Classifying an offence as one which appropriately fits within the rubric of the Dickson J's second category would be difficult.<sup>20</sup> "The niceties of classification are not so important if the *Strawbridge* test is preserved ... [b]ut they will be of real importance if the Canadian classification is adopted".

In *Strawbridge*<sup>21</sup> the question on appeal before North P, Turner and Haslam JJ, was whether knowledge on the part of the accused that the plant she cultivated was a prohibited plant was an essential element of the offence created by section 5(1)(c) of the Narcotics Act 1965.

Section 5(1)(c) was silent as to any requisite mental element. North P, who delivered the judgment of the Court of Appeal, held that section 5(1)(c) did not create absolute liability and was not one which required the prosecution to prove every element of the offence. The Court adopted what North P termed a "sensible halfway house".<sup>22</sup>

The Court characterised the offence as one where, prima facie, it was not necessary for the Crown to establish knowledge on the part of the accused:<sup>23</sup>

in the absence of evidence to the contrary knowledge on her part will be presumed, but if there is some evidence that the accused honestly believed on reasonable grounds that her act was innocent, then she is entitled to be acquitted unless the jury is satisfied beyond reasonable doubt that this was not so.

It is the above quotation which encapsulates what His Honour Mr Justice McMullin characterised as the "*Strawbridge* test".

In reply to the argument that the defendant will be in a stronger position to adduce evidence as to how the proscribed act occurred and what was done to avoid it His Honour states:<sup>24</sup> "... defences of intoxication, automatism, self-defence and provocation which are also matters peculiarly within the knowl-

<sup>18</sup> Ibid.

<sup>19</sup> Ibid.

<sup>20</sup> Ibid, at 95.

<sup>21</sup> [1970] NZLR 909.

<sup>22</sup> Ibid, at 916.

<sup>23</sup> Ibid.

<sup>24</sup> Supra at note 3, at 96.

edge of the accused must be eliminated by the prosecution beyond reasonable doubt . . . (and) . . . [i]t is difficult to see why a defendant who faces a lesser 'public welfare' charge should labour under a greater burden . . . it can now be confidently said that there is not and never has been, a general rule of law that the mere fact that a matter lies peculiarly within the knowledge of the defendant is sufficient to cast the onus upon him."

McMullin J contends that *Woolmington* is of general application in all criminal trials<sup>25</sup> and that exceptions to it should not be permitted. The reverse onus provision of the second category of offence is regarded by His Honour as an unjustifiable exception. Such an exception is tantamount to judicial legislation and would be best left to Parliament. In answer to this argument reference should be made to the following:<sup>26</sup>

Nothing we have said is to be taken as derogating in any way from the fundamental principle of our criminal law that the burden of proof of guilt rests on the prosecution. The distinction we draw is between truly criminal charges and public welfare regulatory offences. And the public policy considerations which in the case of public welfare offences justify requiring the defendant to bear the burden of proof where a defence of absence of fault is available do not apply where the mental state of the defendant is the issue. The prosecution bears the burden of proving the mental element in the offence: a no fault defence allows the defendant the opportunity of exonerating himself by proving that he exercised all reasonable care.

In *Millar v Ministry of Transport*<sup>27</sup> the Court of Appeal clarified and summarised the principles stated in *MacKenzie*. The varied judgments which came from *Millar* are indicative of the problematic nature of the issue of the burden of proof in criminal trials.

The facts of *Millar* are relatively straightforward. On 29 April 1982, on different charges, Millar was disqualified from driving for twelve months and six months; these disqualifications were to run concurrently. On 18 August 1982 on another disqualified driving conviction he was disqualified for twelve months from 29 April 1983. However, on the same day on a breath alcohol conviction he was disqualified for two years from 29 April 1984. On 3 June 1985 Millar drove while disqualified.

Millar was charged under Section 35 of the Transport Act 1962.

35. Driving while disqualified or contrary to the term 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) . . . .
- (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 . . .
  - (b) For a second or subsequent offence, penalties specified in subsection (1) of Section

<sup>25</sup> The essence of *Woolmington* is that the prosecution always has the persuasive burden in criminal trials with two exceptions - where the accused has raised the defence of insanity and where statute provides.

<sup>26</sup> Supra at note 3, at 85 per Richardson J.

<sup>27</sup> Supra at note 5.

30 of this Act.

Section 30(1) provides for a second or subsequent offence under Section 35(1), liability upon conviction to imprisonment for a term not exceeding five years or to a fine not exceeding \$4,000 or both, and a minimum period of disqualification of one year unless the court for special reasons relating to the offence thinks fit to order otherwise.

At the hearing in the District Court before Judge Willy, Millar defended the charge and adduced evidence to the effect that he had misunderstood what the District Court Judge had said on 18 August 1982, and that he believed the disqualification (three years in all) ran retrospectively from 29 April 1982. Millar had not received written notice from the Court of the orders made on 18 August 1982.

Judge Willy found as a fact that Millar did have an honest belief that he was not disqualified. However, as he had not made any enquiries of the Court or the Ministry of Transport, Millar could not satisfy the Court to the further element of reasonable grounds for his honest belief. Judge Willy rejected the application of *MacKenzie* as he took the view that driving while disqualified was not a public welfare regulatory offence. Millar was convicted and he appealed to the High Court where the matter was heard by Williamson J.<sup>28</sup>

His Honour Mr. Justice Williamson applied *MacKenzie*, despite his personal reservations, and concurred in the finding of Quilliam J in *Peka v Police*<sup>29</sup> that driving while disqualified was a public welfare regulatory offence. There was therefore a persuasive onus upon Millar to prove that he was without fault. On the facts, Williamson J was satisfied that Millar failed to establish an honestly held belief that his disqualification had ceased when he drove on 3 June 1985. This was so as he had made no enquiries of either the Ministry of Transport or the Court as to the terms of the orders made on 18 August 1982. Millar then sought, and was granted, leave to appeal to the Court of Appeal on questions of law as to the mental element in the offence.

A full bench of the Court heard submissions and was unanimous in holding that *mens rea* was an ingredient of the offence. If there was evidence suggesting that Millar did not know of the disqualification, the prosecution must affirmatively prove knowledge beyond a reasonable doubt. Millar's appeal was allowed as the prosecution had failed to discharge its onus.

In arriving at its decision the Court took two discernible paths. The majority of Cooke P, Richardson, Somers and Casey JJ one, McMullin J another.

In a joint judgment (Cooke P and Richardson J) delivered by the President, an examination of Commonwealth decisions dealing with what were termed "indistinguishable provisions"<sup>30</sup> was undertaken. Cases from New Zealand, New South Wales, South Australia, Canada and England were as-

<sup>28</sup> (1986) 2 CRNZ 108.

<sup>29</sup> High Court, Napier (M145/85).

<sup>30</sup> *Supra* at note 5, at 216.

sembled. From these Cooke P outlined a non-exhaustive list of seven approaches to the classification of statutory offences which are silent as to mens rea.<sup>31</sup>

1. Mens rea offences where the prosecution must prove every element of the offence.
2. Where mens rea (in the sense of guilty knowledge) is assumed. If evidence is adduced by the defendant contrary to the assumption, the prosecution must prove guilty knowledge affirmatively.
3. The "Strawbridge approach". In addition to adducing evidence which points to the defendant having an honest belief in facts which if true would make the defendant's act lawful, the defendant must provide evidence which indicates that the belief was on reasonable grounds. Once this is done, the onus is upon the prosecution to disprove the defendant's honest belief on reasonable grounds.
4. Dixon J in *Maheer v Musson*,<sup>32</sup> with reference to English authorities pre-dating *Woolmington v D.P.P.*,<sup>33</sup> held that an honest and reasonable mistake was a defence. A defendant availing himself/herself of this defence would have a persuasive burden (to the standard of the balance of probabilities) to establish an absence of fault.
5. The MacKenzie "public welfare regulatory offence" approach. Once the prosecution has proved the existence of the proscribed act the defendant has a persuasive burden (balance of probabilities) to establish an absence of fault.
6. The solution of Day J in *Sherraz v De Rutzen*<sup>34</sup> was that a defendant had a persuasive onus (balance of probabilities) that s/he did not do the act knowing of its wrongfulness.
7. Absolute liability – strict liability in England. The prosecution proves the existence of the prohibited act and conviction is incurred thereon, independent of fault.

Cooke P then proceeded to collapse seven into three.

The distinction between classes 1 and 2 "seems so narrow as not to be worth preserving."<sup>35</sup> "Class 3 can be seen as a troublesome anomaly, probably best done away with or severely confined . . . [as] it amounts to reading into a statute a mixed subjective and objective mens rea formula for which there is little if any warrant."<sup>36</sup> If the legislature wishes to produce such a test, Cooke P argues that it can do so expressly as has been done with the rape legislation.

Cooke P asserts that the objectives of justice aimed at in classes 4, 5 and 6 "can often be best achieved by class 5."<sup>37</sup> Once it is accepted that class 5 is available "there is a good deal less room for class 7."<sup>38</sup> However, Cooke P concedes that where there is clear legislative intent the Courts should rightly impose the rigours of absolute liability.<sup>39</sup>

Examples of offences which are suitably classified as public welfare regulatory offences under class 5 are cited viz, operating an aircraft in such a manner as to be a cause of unnecessary danger to persons or property (*MacKenzie*), discharging waste into natural water (*Hastings City v Simons*<sup>40</sup>),

<sup>31</sup> *Ibid*, at 221-223.

<sup>32</sup> (1934) 52 CLR 100.

<sup>33</sup> *Supra* at note 15.

<sup>34</sup> (1895) QB 918.

<sup>35</sup> *Supra* at note 5, at 224.

<sup>36</sup> *Ibid*, at 225.

<sup>37</sup> *Ibid*, at 225.

<sup>38</sup> *Ibid*, at 225.

<sup>39</sup> Cooke P refers to the unreported judgment *AHI Operations Ltd v Dept of Labour*, High Court, Auckland. 31 May 1985 (M 1736/84). Heron J.

<sup>40</sup> [1984] 2 NZLR 502.

operating a motor vehicle in such a condition as to be liable to cause annoyance to any person (*Ministry of Transport v Burnett Motors Ltd*<sup>41</sup>).

Cooke P held that the offence of driving while disqualified was one which required guilty knowledge as an ingredient of the offence, to be proved by the prosecution affirmatively. The application of class 5 was rejected because the offence was not created to regulate public safety but rather to ensure enforcement of the orders of the Court. Section 35 of the Transport Act is punitive and not regulatory. Absolute liability was also rejected. "The reasons why *Taylor v Kenyon*<sup>42</sup> and cases following it have imposed absolute liability . . . have never been fully articulated. In so far as they may reflect a sense that the defendant has flouted an order of the Court, they are out of harmony with the ordinary [approach to] contempt of Court".<sup>43</sup> Therefore, with reference to Lord Reid's universal principal in *Sweet v Parsley*<sup>44</sup> it was held that driving while disqualified was a mens rea offence.

Of great significance is a restatement of principle which appears in the last paragraph of Cooke P's judgment.<sup>45</sup> Three classes of statutory offences which are silent as to mens rea are identified. First, offences which require guilty knowledge. Secondly, public welfare regulatory offences which require the prosecution to prove the existence of the proscribed act, the defendant then has an onus (persuasive) upon him/her to prove absence of fault to the standard of the balance of probabilities. Thirdly, dealing with offences which are essentially regulatory in nature, if the narrow escape route provided in the second class is inconsistent with the object of the legislation, absolute liability should be imposed.

His Honour Mr. Justice Somers in a short judgment indicates his complete agreement with the three classes identified and the appropriate classification of the offence of driving while disqualified. The same can be said of Casey J. With reference to the second and third classes identified by the President, Casey J does sound a cautionary note though; "it must always be remembered that such an enquiry will not be called for unless it has been decided that the normal presumption of mens rea was not intended to apply to the particular offence."<sup>46</sup>

McMullin J concurred with the majority holding that driving while disqualified was an offence which involved mens rea. He took the opportunity afforded him by the appeal to repeat the opinion he expressed in *MacKenzie* that *Woolmington* is of general application in criminal trials and that further exceptions to it should not be created. His Honour opined that the threefold classification of the majority is uncertain, due to the definitional problems as-

<sup>41</sup> [1980] 1 NZLR 51.

<sup>42</sup> [1952] 2 All ER 726.

<sup>43</sup> *Supra* at note 5, at 226.

<sup>44</sup> [1970] AC 132.

<sup>45</sup> *Supra* at note 5, at 226-227.

<sup>46</sup> *Ibid*, at 236-237.

sociated with the term public welfare regulatory offence, and is tantamount to judicial legislation. McMullin J is strongly of the view that the onus of proof in criminal trials should never be reversed. With the exception of offences of absolute liability, all criminal offences should have a common onus and that should be on the prosecution.

In his judgment Cooke P makes reference<sup>47</sup> to two Supreme Court of Canada decisions namely *R v Prue*<sup>48</sup> and *R v MacDougall*,<sup>49</sup> which deal with the offence of driving while disqualified. In *Prue* the offence was one proscribed under the Federal Criminal Code. A majority of four<sup>50</sup> held that the mere inclusion of such an offence in the Criminal Code resulted in the offence being one which required the prosecution to prove mens rea. The Criminal Code consists of prohibitions and not regulatory offences. Laskin CJC, who delivered the majority judgment, expressed the opinion that a question of constitutional validity may have arisen if mens rea was not an ingredient of the offence as there was provincial legislation on the same matter. Ritchie J delivered the opinion of the minority<sup>51</sup> and held that the offence was one of strict liability (Dickson J's second category in *Saulte Ste Marie*) and that the defendants could escape liability by proving to the standard of balance of probabilities a mistake of fact. His Honour Mr Justice Beetz held that it was unnecessary to determine whether or not the offence involved mens rea for even if the offence was one where mens rea could be inferred from the nature of the act committed it could not be negated by the defendant's ignorance of the law.

Three and a half years later the Supreme Court gave a unanimous judgment in *MacDougall* holding that the offence of driving while disqualified was an offence within the second category of *Saulte Ste Marie*.<sup>52</sup> The charge was laid under the provincial Motor Vehicle Act, R.N.N.S. 1967, which, it is submitted, was the only distinguishing feature from *Prue*.

The unanimous decision of the Supreme Court in *R v Chapin*,<sup>53</sup> delivered by Dickson J, is illustrative of the Canadian approach to regulatory offences. The defendant was charged under the Migratory Birds Regulations. Dickson J said of the offence that it "... is a classic example of an offence in the second category delineated in the *Saulte Ste Marie* case.<sup>54</sup> The fact that the offence could not be characterized as a true crime and was punishable upon summary conviction and not indictment indicated the offence was not one which required mens rea to be proved. Also, the purpose of the regulations

<sup>47</sup> Ibid, at 220.

<sup>48</sup> (1979) 96 DLR (3d) 577.

<sup>49</sup> (1982) 142 DLR (3d) 216.

<sup>50</sup> Laskin CJC, Spence, Dickson, Estey JJ.

<sup>51</sup> Ritchie J and Pigeon J.

<sup>52</sup> Laskin CJC, Ritchie, Dickson, Beetz, Estey, Chouinard, Lamer JJ.

<sup>53</sup> (1979) 95 DLR (3d) 13.

<sup>54</sup> Ibid, at 24.

was to ensure the "... general welfare of the Canadian public, not to mention the welfare of the ducks."<sup>55</sup> The offence was not one of absolute liability because of the serious nature of the penalties involved upon conviction.<sup>56</sup> In answer to the prosecution submission that absolute liability would assist enforcement of the regulations His Honour stated:<sup>57</sup>

I do not think that the public interest, as expressed in the convention (Migratory Birds Convention Act), requires that s 14 of the Regulations be interpreted so that an innocent person should be convicted and fined and also suffer the mandatory loss of his hunting permit and the possible forfeiture of his hunting equipment, merely in order to facilitate prosecution.

*Chapin*, it is submitted, illustrates the application of *Saulte Ste Marie* in a clear and unambiguous manner. *Millar v Ministry of Transport* also illustrates the clear and unambiguous application of *Saulte Ste Marie*. Therefore, it can be said that Canada and New Zealand are at one over the issue of the burden of proof in criminal trials. The categorisation of offences is in principle the same, however, the application of the principle may provide a wealth of disparate solutions.

Whilst Canada and New Zealand have adopted the same jurisprudence, the same cannot be said of Australia and England.

## England

The advice of the Privy Council in *Gammon Ltd v Attorney-General of Hong Kong*<sup>58</sup> is indicative of the approach adopted in England with regard to the burden of proof in criminal trials. Lord Scarman in the first paragraph of his advice, delivered on behalf of their Lordships,<sup>59</sup> succinctly summarises the English approach.<sup>60</sup>

The issue in the appeal is whether the offences charges are offences of strict liability [absolute in New Zealand] or require proof of mens rea as to their essential facts.

Lord Scarman considers that there are only two choices, and not the three His Honour Mr. Justice Cooke or His Honour Mr. Justice Dickson would articulate.

In *Pharmaceutical Society of Great Britain v Storkwain Ltd*<sup>61</sup> Lord Goff of Chievely stated:<sup>62</sup>

The question which has arisen for decision in the present case is whether, in accordance with the well-recognised presumption, there are to be read into s 58(2)(a) words appropriate to

<sup>55</sup> Ibid, at 20.

<sup>56</sup> Ibid, at 22.

<sup>57</sup> Ibid.

<sup>58</sup> [1985] 1 AC 1.

<sup>59</sup> Lord Fraser of Tullybelton, Lord Bridge of Harwick and Lord Brightman.

<sup>60</sup> Supra at note 58, at 10.

<sup>61</sup> [1986] 2 All ER 635.

<sup>62</sup> Lord Goff's speech was concurred with by Lord Bridge of Harwick, Lord Brandon of Oakbrook, Lord Templeman and Lord Ackner.

require mens rea . . .<sup>63</sup>

The clear implication of these words is that like Lord Scarman, Lord Goff considers that there are only two categories of offence – absolute liability or one where mens rea should be read into the offence. For a further example reference should be made to *R v Wells Street Metropolitan Stipendiary Magistrate, Ex parte Westminster City Council*.<sup>64</sup>

This two-fold classification results in there never being a situation, insanity and statutory exceptions aside, where a defendant bears a persuasive onus. In *Millar v Ministry of Transport Cooke P* stated:<sup>65</sup>

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.

Lord Scarman in *Gammon* outlined the approach which should be adopted when the courts are called upon to determine the mental element involved in statutory offences which are silent as to mens rea:<sup>66</sup>

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.

The same quotation was cited and quoted with approval in the judgment of Watkins LJ in *R v Wells St. Magistrate*.<sup>67</sup> Watkins LJ accepted the approach and held that the offence was one of strict liability. Lord Scarman's approach would, it is submitted, not be accepted in New Zealand nor Canada as it fails to make reference to the second category of *Sault Ste Marie*. It is of interest to note that Lord Scarman's thesis has been the subject of judicial scrutiny in the High Court of Australia<sup>68</sup> yet seemingly not in the New Zealand Court of Appeal.

### Australia

The leading Australian case on the burden of proof in criminal trials is *He Kaw Teh v R*.<sup>69</sup> The applicant was charged with importing heroin into Australia and being in possession of heroin without lawful excuse. The trial judge

<sup>63</sup> Supra at note 61, at 636.

<sup>64</sup> [1986] 1 WLR 1046.

<sup>65</sup> Supra at note 5, at 221.

<sup>66</sup> Supra at note 58, at 14.

<sup>67</sup> Supra at note 64, at 1051.

<sup>68</sup> *He Kaw Teh v R* (1985) 60 ALR 449, 480-481 per Brennan J.

<sup>69</sup> *Ibid.*

directed the jury that the Crown did not need to prove any specific state of mind on the part of the accused for the offences to be made out. He also gave directions as to defences open to the accused stating that the onus of proof lay on the accused to satisfy the court on the balance of probabilities.

He Kaw Teh was convicted in the Supreme Court of Victoria and appealed to the Full Court of the Supreme Court of Victoria. The appeal was dismissed as the trial judge's direction to the jury followed two decisions which bound the Supreme Court.<sup>70</sup>

Gibbs CJ (with whom Mason J agreed) and Brennan J make specific reference to the fact that there is a strong presumption that mens rea is an essential element in every offence unless ". . . having regard to the language of the statute and its subject matter, it [the presumption] is excluded expressly or by necessary implication."<sup>71</sup> Gibbs CJ makes reference to *Sherraz v De Rutzen*<sup>72</sup> and the well known principle of common law for which that case stands, namely that there is a presumption that mens rea is an essential ingredient in every offence.<sup>73</sup> Gibbs CJ opined that when considering the application of the presumption to a particular statutory offence, regard should be had to the subject matter with which the statute deals, and the practicality of enforcing the statute with the presumption read into it, and also the words of the statute itself.<sup>74</sup> Brennan J reached much the same conclusion as his brother Gibbs CJ but in so doing considered Lord Scarman's fivefold procedure promulgated in *Gammon*.<sup>75</sup> His Honour Mr. Justice Brennan expressed the opinion that Lord Scarman's fourth proposition ". . . seems to be too categorical an approach to what is after all, a question of statutory interpretation."<sup>76</sup> His Honour concluded that reference should be made to the complete statutory context rather than be confined to issues of social concern. Brennan J also took umbrage at Lord Scarman's fifth proposition.

However grave the mischief at which a statute is aimed may be, the presumption is that the statute does not impose criminal liability without mens rea unless the purpose of the statute is not to deter a person from engaging in prohibited conduct (as Lord Scarman seems to suggest) but to compel him to take preventative measures to avoid the possibility that, *without deliberate conduct on his part*, the external elements of the offence may occur. (The emphasis is my own.)

Brennan J makes reference to the "luckless victim" passage from *Lim Chim Aik v The Queen*<sup>77</sup> and in so doing evokes an echo of *Millar* namely that the courts should not impose criminal liability upon persons whom are not morally blameworthy. It is this feature of the High Court decision in *He Kaw*

<sup>70</sup> *R v Parsons* (1983) 53 ALR 568; *R v Diroca and Tucci* [1981] VR 247.

<sup>71</sup> *Supra* at note 68, at 480 per Brennan J.

<sup>72</sup> *Supra* at note 34.

<sup>73</sup> *Supra* at note 68, at 452.

<sup>74</sup> *Ibid*, at 453-454.

<sup>75</sup> *Ibid*, at 480-481.

<sup>76</sup> *Ibid*, at 480.

<sup>77</sup> [1963] AC 160, 174 per Lord Evershed.

*Teh* which steers the High Court of Australia away from the English position of two available solutions – (mens rea or absolute liability), towards the position in New Zealand prior to *MacKenzie* as exemplified by *R v Strawbridge*.<sup>78</sup>

... if it is held that guilty knowledge is not an ingredient of an offence, it does not follow that the offence is an absolute one. A middle course ... is to hold that an accused will not be guilty if he acted under an honest and reasonable mistake as to the existence of the facts, which, if true, would have made his act innocent.

However, as regards the burden of proof, Gibbs CJ holds that such a defence does not require the accused to bear a persuasive onus – the accused has only an evidential burden upon him/her.<sup>80</sup> Brennan J, who incidentally avoids reference to *MacKenzie* and *Saulte Ste Marie*, concurs with Gibbs CJ concerning the "middle course" and where the persuasive burden should rest.

Wilson J, who dissented as to the classification of the offences charged but not on the issue of the identification of three classes, refers to *Strawbridge* on a number of occasions<sup>81</sup> and states:<sup>82</sup>

I have taken the substance of this formulation from the decision of the New Zealand Court of Appeal in *Strawbridge*.

Of great significance to the possible future development of the law in Australia is the fact that none of the judges of the High Court expressly rejects the substance of *Saulte Ste Marie* or *MacKenzie*. Impliedly the Court noted *Saulte Ste Marie* (but not *MacKenzie*) and did not adopt Dickson J's threefold classification but, the Court did not condemn or critically examine the Canadian position. Gibbs CJ makes reference to the point that the Supreme Court of Canada has given a confident answer to the question – "What is the standard of proof required to establish the defence of honest and reasonable mistake?",<sup>83</sup> and yet does not discuss the matter more fully. It is submitted that the matters raised by *Saulte Ste Marie*, *MacKenzie* and *Millar* are yet to be dealt with in a meaningful and conclusive way by the High Court of Australia.

It should be noted that the Supreme Court of Western Australia<sup>84</sup> and the Supreme Court of Victoria<sup>85</sup> have followed *He Kaw Teh* as regards the interpretation (by the High Court) of the specific charges involved.

In order to illustrate the differences Australia and New Zealand reference should be made to *Davis v Bates*.<sup>86</sup> A full Court of the Supreme Court of

<sup>78</sup> *Supra* at note 21.

<sup>79</sup> *Supra* at note 68, at 455 per Gibbs CJ.

<sup>80</sup> *Ibid*, at 457.

<sup>81</sup> *Ibid*, at 468, 471, 474, 475.

<sup>82</sup> *Ibid*, at 475.

<sup>83</sup> *Ibid*, at 456.

<sup>84</sup> *Jeppe v R* (1985) 61 ALR 383.

<sup>85</sup> *R v Kural* [1986] VR 673.

<sup>86</sup> (1986) 43 SASR 149.

South Australia held that the offence of driving while disqualified<sup>87</sup> was not one which has an element of guilty knowledge which the prosecution must prove in order to establish the offence. If the defendant adduced evidence to the effect that he had an honest or reasonable belief that he was qualified to drive he was entitled to be acquitted. This result would not be the same in New Zealand due to the Court of Appeal decision in *Millar*. Driving while disqualified has been categorised as an offence which requires mens rea to be proved by the prosecution.

### Conclusion

New Zealand and Canada are in substantial agreement as to the principles involved in the burden of proof in criminal trials. England provides a striking contrast. And Australia straddles the two camps with its adoption of a position closely proximating *Strawbridge*. The last words on this matter should be appropriately, it is submitted, those of His Honour Mr. Justice Cooke, President of the New Zealand Court of Appeal.<sup>88</sup>

The New Zealand Court of Appeal, established as a separate Court in 1958, has been faced . . . with a continual surfacing of policy cases: bringing home how many fundamental issues remain unsettled or reassessable in these years, creating a constantly strengthening awareness that our responsibility must be to aim at solutions best fitting the particular national way of life and ethos.

<sup>87</sup> s 91(5) Motor Vehicles Act 1959 (SA).

<sup>88</sup> *Supra* at note 6, at 297.