

“Mens Rea” or a Duty of Care?
The Development of Strict Liability

by

R. J. ASHER, B.A.

“Strict liability” is a concept which developed during the nineteenth century with the advent of legislation prohibiting a variety of activities which, although usually not involving criminal behaviour in the traditional sense, were nevertheless detrimental to the public welfare.

I will attempt to indicate what promoted this new legislation, as this will give an insight into what influenced the judges when they dealt with strict liability.

By 1840 the industrial revolution was in progress. Millions of people were moving to Midland cities to live in tightly packed slums. This resulted in a host of sanitary and traffic problems with which the traditional parish organisations could not cope. The controllers of the new industries were in a position of great economic power, and in a position to exploit the labour force. Meanwhile the breakdown of the parish organisation contributed to the collapse of the traditional checks on drinking and social behaviour. Also as the Government increased its responsibilities, the economic structure increased in complexity and this structure in turn had to be protected.

A *laissez faire* policy was totally inadequate to deal with these new developments. Benthamite philosophers were demanding that the law should direct society along “correct” lines rather than follow developments. Practical reformers like Shaftesbury began to agitate for extensive government interference. In this context Parliament began, for the first time, to legislate extensively for the public welfare rather than let things sort themselves out.

The legislature normally set out the new laws in absolute terms, e.g. “It shall be an offence to sell rotten meat”. The public had to be protected from the new economic social and sanitary evils. An

application of the notion of "wilfulness" in the statutes would not have achieved the desired result. Few people "wilfully" sell rotten meat; the new provisions were aimed at those who sold without making any effort to ascertain the true nature of the product. Even a demand that the offence be committed "knowingly" would mean that the negligent could escape. So instead the prohibitions were set out in an absolute form.

Until the early nineteenth century there had been little social legislation. The Courts for the first time were faced with a multitude of sections imposing penalties for the careless performance of every day activities.

Moreover the offences contained in these statutes although in form criminal were basically different from the established common law crimes. We have already seen that "willfulness", the traditional "criminal" frame of mind was not mentioned in the new sections. Moreover it may be said that in the case of normal common law crimes the individual's interests were regarded as superior to the interests of the community in regard to the burden of proof. A heavy burden rested on the prosecution to establish that the accused was guilty, and a reasonable doubt could ruin the case. Now the Courts were faced with cases where the importance of the end achieved and the lightness of the penalty demanded a lighter burden on the prosecution. The issues at stake were much greater than the mere culpability of the offender. The interests of the individual in regard to the burden of proof, were secondary to the interests of the community.

However, the individual could not be forgotten. The stigma that results from conviction could not be ignored and too harsh a liability could cripple some occupations, and bring the law into disrepute for being unjust.

The Courts, then, in embarking upon statutory interpretation were faced with new concepts and the problem of balancing complex interests. The writer will attempt to ascertain how the Courts reacted to the challenge. An exhaustive study of the case law on strict liability will not be attempted. Rather a number of cases which were influential at the time and became leading precedents will be examined.

In *R. v. Woodrow*,¹ often regarded as the first "strict liability" case, the Court dealt with the new legislation in a novel and decisive manner. In this case an information was laid against a tobacco dealer who was alleged to have possession of adulterated tobacco.

¹ (1846) 15 M. & W. 404; 153 E.R. 907.

The Court found as a fact that Woodrow had believed that the tobacco was genuine and had no reason to suspect otherwise.

The Court in approaching the section did not mention the terms "strict liability" and "*mens rea*" which were to be used in later cases. It looked briefly at the words of the statute and wasted little time trying to construe their exact meaning. Instead the judges frankly discussed the balance of interests which is the essence of strict liability.²

It is true that in particular instances it may produce mischief, because an innocent man may suffer from his want of care in not examining the tobacco he has received . . . but the public inconvenience would be much greater, if in every case the officers were obliged to prove knowledge.

They decided that the public interest was more important than the private one—that the accused had to be convicted. But they did not do so on a blind reading of the statute and an assumption of strict liability. Even though the public interest was paramount, the mental element was relevant.³

In reality, a prudent man who conducts his business, will take guard against the injury he complains of . . . and he will not be exposed to it.

They seem to find, in fact, that the statute had imposed a *duty of care* on the accused which Woodrow owed to the public, and which he had not discharged. In other words he was negligent; his mistake was not reasonable by the new standard imposed by the statute. From the tenor of the judgments one gathers that if Woodrow had had the tobacco inspected by experts he would not have been convicted.⁴ On balancing the interests of public and individual the scales are not tipped completely towards the public. There is certainly no slavish adherence to statute. From this case it appears that if there was no evidence of a reasonable mistake i.e. a mistake which did not involve a breach of the duty of care, the prosecution would have failed to prove its case.

This new concept of statutes imposing a duty of care is discernible in some of the judgments of *R. v. Prince*.⁵ However in this case the judges discussed knowledge in terms of the doctrine of *mens rea*, which, I will try to show, has led the English Courts astray in their attempts to interpret absolute statutory prohibitions.

² *Ibid.*, p. 418.

³ *Ibid.*, p. 415.

⁴ *Ibid.*, p. 415.

⁵ (1875) L.R. 2 C.C.R. 154.

As mentioned above, the majority of criminal prosecutions the Courts had to deal with before the nineteenth century were those traditional common law crimes involving tangible harm to persons or property. The mental elements of these crimes had been distinguished by the Courts from the physical element; there was no crime without a deliberate intent to cause the consequence of the prohibited act, or a reckless disregard of what could happen. The traditional view of the mental element involved in "crimes" at this stage was summed up in 4 *Blackstone's Commentaries*.⁶

So that, to constitute a crime against human laws, there must first be a vicious will, and secondly an unlawful act consequent upon such vicious will.

This element of the offence, the "vicious will", became known as *mens rea*. A negligent frame of mind was not included in this definition.

Now this idea of deliberate wilfulness was not suitable for application to the new public welfare offences. We have seen that these new offences demanded an approach entirely different from the old common law crimes. The Court balanced the public welfare against the individual's rights rather than examined the accused's culpability on the statutory definition. The old idea of "malicious will" was not usually a relevant issue. The statutes were not aimed at the vicious; they were aimed at improving certain aspects of the subject's behaviour which were detrimentally affecting the public at large. This is why there was no mention of "wilfulness" in the new prohibitions.

Just as *mens rea* was a concept which could not be applied to the new offences, so was the alternative concept of "absolute liability". Any attempt to treat the physical act as the only relevant issue, meant that insanity, automatism and infancy could not be defences, a development which would not have furthered the enforcement of the regulations in the slightest. Moreover, there would be little point in punishing a small businessman who had done everything financially possible to abide by the regulations (assuming the business was not one to be discouraged).

In fact, though *mens rea*, i.e. "malicious will", was not a central issue, the mental state of the accused was still of importance. A new test of mental culpability had to be designed by the Courts in interpreting the statutes. In *R. v. Woodrow*⁷ the Court seemed to meet this challenge. The absolute prohibition was regarded as having imposed a duty of care upon tobacconists to insure that the tobacco was unadulterated, and the accused's failure to fulfil this duty could

⁶ 1848, 98.

⁷ *Supra* n. 1.

be regarded as "negligence", a mental state hitherto not punished by the criminal law. This "duty of care" approach came to terms directly with the conflicting demands of public welfare, and protection of the honest individual; the Courts could hold the duty of care satisfied when nothing the accused could have done would have fulfilled it.

Such an approach, of course, gives to the Courts the burden of deciding on the exact extent of the duty of care. The matter is certainly too delicate to be expressed in legislated formulas.

The concept of *mens rea*, then, when applied to an absolute prohibition could only confuse the issue with connotations of viciousness and absolute liability. One can see the confusion that results in the decision of Bramwell B. in *R. v. Prince*.⁸ Here there was an absolute prohibition against unlawfully taking an unmarried girl under the age of sixteen years out of the possession of the father without his consent. Bramwell B. states that *mens rea* is made irrelevant by the absolute wording of the statutory prohibition and that it is not of importance whether the accused believed the girl was over sixteen or not.⁹ Then, however, he concedes that if the accused believed that he had the father's consent, *mens rea* would be relevant and the accused would not be convicted.

Now there is no ground for the distinction in the statute. There is no reference to the mental element at all. Bramwell B. admits that he makes the distinction because he believes that the accused should have an absolute duty to ascertain the girl's age if he takes her against her parent's will, because that is morally heinous where if he believes he has the father's consent his act is not morally wrong, and a mistake will be a defence.¹⁰ He twists the doctrine of *mens rea* to suit this view. His approach would have been more logical if he had ignored the doctrine of *mens rea* and simply followed the approach adopted in *R. v. Woodrow*, and found that the legislature had imposed a stronger duty on the defendant to find out the child's age, than to check on the father's consent.

Brett J.'s judgment¹² is more satisfactory, although he discusses the section in terms of *mens rea*. He holds that *mens rea* is an ingredient of all offences and that the absence of the word "knowingly" in a statute just shifts the burden of proof.¹³ He seems to regard *mens rea* as the mental element generally, not just wilfulness,

⁸ *Supra* n. 5.

⁹ *Supra* n. 5, pp. 174, 175.

¹⁰ *Supra* n. 5, p. 175.

¹¹ (1846) 15 M. & W. 404; 153 E.R. 907.

¹² *Supra* n. 5, p. 155.

¹³ *Supra* n. 5, p. 162.

and regards honest and reasonable mistakes as a defence. Since the accused had established a reasonable mistake he could be discharged.

By putting the burden on the accused to show reasonable mistake Brett J. is really just saying that the accused must show he has fulfilled the duty of care, for how else can reasonableness be measured except against a duty of care? Presumably it is for the judge to lay down the extent of the duty. Thus Brett J. is really approaching the case in the same way as the judges in *R. v. Woodrow*.¹⁴ He does however innovate, when he puts the burden on establishing the reasonable mistake on the accused. This is a new development, and one which was adopted by later Courts.

His approach was closely followed by Day J. in *Sherras v. De Rutzen*,¹⁵ who held that the absence of the word "knowingly" in a statute served only to shift the burden of proof on to the accused, who had to show that he had a reasonable and *bona fide* belief in facts that would prove him innocent if they were true. The accused here had been charged with the statutory offence of supplying liquor to a constable while on duty. It was accepted that the accused had a reasonable belief in the fact that the constable was not on duty.

Day J. did not mention *mens rea*. However, Wright J. maintained in a classic statement that:¹⁶

There is a presumption that *mens rea*, an evil intention, or a knowledge of the wrongfulness of the act, is an essential ingredient of every offence.

He proceeds to give three exceptions to the general rule, the main one being acts not criminal in the real sense but which are prohibited in the public interest. He finds that the case before him is not one of the exceptions.

His invocation of *mens rea* is confusing. He defines *mens rea* as "evil intention" or "knowledge of wrongfulness" and says it does not apply. But it is difficult to see how these concepts are important in "public welfare" offences. A person may serve bad tobacco or serve a constable on duty without malice or knowledge of his offence, but still be so grossly negligent that the public interest demands that he be punished. It is seldom in these offences that there exists the "vicious will" known as *mens rea*.

Indeed Wright J. proceeds to discuss the case in terms of negligence.¹⁷ This seems to be the issue which concerns him. He finds that no care taken by the publican would have revealed to him whether or not the constable was on duty. He seems to conclude

¹⁴ *Supra* n. 11.

¹⁵ [1895] 1 Q.B. 918, 920.

¹⁶ *Ibid.*, p. 921.

¹⁷ *Ibid.*, p. 923.

then that on balancing the public's interest with the publican's, the duty on the publican is not a heavy one; for actually, it was possible for the publican to have exercised more care—he could have checked with the chief constable that the man was not on duty. Wright J. did not choose to impose such a duty, while deciding the case outwardly on the absence of *mens rea*.

The case is often compared with that of *Cundy v. Le Coque*¹⁸ where Stephen J. found the accused liable for selling intoxicating liquor to a drunken person, despite the fact that the person served appeared quite sober. Here, as in *Sherras v. De Rutzen*,¹⁹ the prohibition was set out in absolute terms. There is no way of justifying the finding of *mens rea* in one provision and not in the other. The only way of distinguishing the two cases is to discuss the cases in terms of the duty of care. Stephen J., on balancing the respective interests, felt in *Cundy's* case the publican had not fulfilled his duty to ascertain the true state of his customer while in *Sherras'* case it was found that he had fulfilled it. Perhaps the reason for this was that it is harder to tell whether a constable is on duty, than to tell if a person is drunk.

In *Cundy v. Le Coque* Stephen J. points out the difficulty of applying the maxim of *mens rea*.²⁰

It is impossible now to apply the maxim generally to all statutes, and the substance of all the reported cases is that it is necessary to look at the object of each act that is under consideration to see whether and how far knowledge is the essence of the offence created.

He develops this argument in the bigamy case of *R. v. Tolson*.²¹

The full definition of every crime contains expressly or by implication a proposition as to a state of mind . . . it is the general practice of the Legislature to leave unexpressed some of the mental elements of crime. In all cases whatever, competent age, sanity, and some degree of freedom from some kinds of coercion are assumed to be essential to criminality, but I do not believe they are even introduced into any statute by which a particular crime is defined.

He then approaches the statute without looking closely at the words of the section.

In *Cundy's* case he had found that the legislature had fulfilled their duty to the public by:

. . . throwing on the publican the responsibility of determining whether the person supplied comes within the category,

¹⁸ (1884) 13 Q.B.D. 207.

¹⁹ *Supra* n. 15.

²⁰ *Supra*, n. 18, p. 210.

²¹ (1889) 23 Q.B.D. 168, 187.

a responsibility the publican had not fulfilled. In *Tolson's* case, however, he held that the woman's "reasonable" mistake as to whether her husband was alive exonerated her. Although there was a "duty of care" imposed by the legislature to ascertain whether the spouse was alive, Stephen J. seemed to feel that the woman has fulfilled it and that her mistake was "reasonable". It was found as a fact that she had made all possible inquiries. Stephen J., from his comments on automatism, can obviously see no point in punishing a person who is incapable of avoiding the offence. If Mrs Tolson had been careless in her inquiries he would probably have found her guilty as he had found the gullible Mr Cundy guilty.

We see then in these two cases, Stephen J. boldly approaching the new statutory prohibitions, without reference to outdated common law doctrines, and deciding, himself, on what duty of care the legislature was intending to impose on the public.

In the years that followed this decision, academics began to draw attention to what they regarded as a conflict between the approaches to modern statutes. On the one hand there was the case of *Sherras v. De Rutzen*²³ which stood for the principle that there was a presumption of *mens rea* in all statutory offences. On the other hand there were dicta like that of Kennedy J. in *Hobbs v. Winchester Corporation* stating that:²⁴

. . . in construing a modern statute a presumption as to *mens rea* does not exist.

The dichotomy is usually taken as being whether the mental state of the accused is or is not relevant.

However, it can be argued that there is no distinction in the basic approaches. Wright J. defines *mens rea* as "evil intention or a knowledge of the wrongfulness of the act"²⁵ but, as I have tried to show above, discusses the case in terms of negligence.²⁶ In *Hobb's* case the Court had to deal with a prosecution for selling unsound meat. Kennedy L.J.'s approach is similar to that of Stephen J. to absolute prohibitions. He says that *mens rea* is not relevant in the statute. He then goes on to discuss frankly the policy behind his decision.²⁷ A butcher was accused of selling unsound meat. He balances the public's interest against the butcher's, and decides that the butcher, who makes a profit from selling the goods, should take on the responsibility for protecting his customers. He seems to think that the

²² *Supra* n. 18, p. 210.

²³ *Supra* n. 15.

²⁴ [1910] 2 Q.B. 471, 483.

²⁵ *Sherras v. De Rutzen* [1895] 1 Q.B. 918, 921.

²⁶ *Supra* p. 104.

²⁷ *Supra* n. 24 p. 485.

act imposes a duty on butchers to have their meat examined by an analyst.²⁸ Presumably if Hobbs had had his meat examined by experts he would not have been convicted, since he would have fulfilled his duty.

Thus the different attitudes to the presumption of *mens rea* do not result in a fundamentally different approach by the Courts, because *mens rea* is not a concept which is really appropriate to the mental element in public welfare offences.

Where difficulties do arise, however, is when a Court does approach a section on the traditional lines of whether *mens rea* is present or not, and on the words of the statute, decides the case on this single issue without looking to policy factors.

This is what was done in *R. v. Larsonneur*.²⁹ In this case an alien girl received an official order to leave Britain. She went to the Irish Free State, but there a deportation order was made against her and she was escorted by the Irish police back into British territory. She was thus contravening the order to leave. She was charged under the Aliens Order Act, Article 1, which stated, without reference to *mens rea*, that any alien who was found on British territory after the expiration of the period allowed would be contravening the section.

Hewart C.J. in a brief judgment found that since she had done what the Act prohibited she was guilty.

He appears to have taken the previous statements by Courts that *mens rea* could be excluded by the words of statutes as meaning that all discussion of the mental culpability of the accused was to be excluded. Whereas we have seen that the Courts, when they say *mens rea* is irrelevant, still discuss mental culpability in terms of the duty of care. If Hewart C.J. had followed this approach he would have reached a more satisfactory conclusion. It was in the interests of the public that a heavy duty be placed on aliens to force them to take every precaution against breaching the requirements. But this was not furthered by imposing an impossible burden. Miss Larsonneur was physically impelled to breach the regulations. There was little point in punishing her when she could do nothing else. It could only taint the law with apparent injustice.

This narrower approach can also be seen in the judgment of McTiernan J. in *Proudman v. Dayman*.³⁰ Mrs Proudman was charged with the statutory offence of permitting an unlicensed driver to drive a motor car. McTiernan J. looked closely at the words of the statute,

²⁸ *Supra* n. 24, p. 485.

²⁹ (1933) 24 Cr. App. R. 74.

³⁰ 67 C.L.R. 536.

found that they made no mention of *mens rea* and held that therefore honest mistake was no defence.³¹

Dixon J. approaches the case in a different way. He says:³²

there may be no longer any presumption that "mens rea" in the sense of a specific state of mind, whether of motive, intention, knowledge or advertance, is an ingredient in an offence created by a modern statute.

He continues that though there is no presumption as to the relevance of *mens rea* honest and reasonable mistake will always be a defence. Which really means that the mental element is relevant in that the accused must have behaved like a reasonable man, i.e. fulfilled the duty of care. He puts the burden of showing fulfillment of the duty on the defence,³³ presumably following the lead of Brett J. in *R. v. Prince*³⁵ and Day J. in *Sherras v. De Rutzen*.³⁶

His general approach of considering reasonable mistake is the same as that of Stephen J. in *Cundy v. Le Coque*.³⁶ But in the fact that he expresses it simply in terms of "reasonable mistake" rather than the duty of care, it is more limited. For there must be still a defence where there is no mistake by the accused, but intervention of a third party as in the case of *Norcock v. Bowey*³⁷ or automatism, or any event which despite the accused fulfilling the duty of care causes the prohibited act. Dixon J. probably had this wider approach in mind. To regard his judgment as only setting up the defence of reasonable mistake is to give it too limited a scope; rather it sets up the rule that there will only be responsibility for negligence.

In *Lim Chin Aik v. The Queen*,³⁸ the Court adopted an outwardly more old-fashioned approach. It invoked the dichotomy between *mens rea* and absolute liability and decided that there was a presumption as to *mens rea* in all modern statutes. However the reasoning seems to be in line with the duty of care approach. The Court declines to impose an absolute duty on the accused to find out whether an immigration order had been made against him, since there was no earthly way he could have found out except by continuous enquiry—and even then, if the immigration order had come out a second before he started to leave he would be committing an offence! The Court refuses to impose such a ridiculous duty of care.

³¹ *Ibid.*, p. 542.

³² *Ibid.*, p. 540.

³³ *Ibid.*, p. 541.

³⁴ *Supra* n. 5.

³⁵ *Supra* n. 15.

³⁶ *Supra* n. 18.

³⁷ [1966] S.A.S.R. 250.

³⁸ [1963] A.C. 160.

Despite the fact that the Court holds that the common law doctrine of *mens rea* which does not include liability for negligence, is relevant, one feels sure that if Lim had been negligent, e.g. not bothered to read published orders when he knew he was under suspicion, then the Court would have found him guilty. To do this, on their reasoning, they would have to find the presumption as to *mens rea* overruled! The theoretical approach is unsatisfactory.

In *Sweet v. Parsley*³⁹ the House of Lords again balanced up the interests of public and individual, but the majority explicitly chose to do so on the terms of *mens rea* and absolute liability rather than the duty of care.

In this case a woman had rented out her house to a group of people. The police had raided the house and found *cannabis* on the premises. The appellant had been convicted under s. 5 of the Dangerous Drugs Act 1965 for being:

... concerned in the management of premises for (the smoking of cannabis).

Although the majority approach the statute in the way Wright J. did in *Sherras v. De Rutzen*,⁴⁰ Diplock L.J. adopts the approach of Stephens J. and Dixon J. He points out that Wright J.'s statement on *mens rea* is of little help in regarding modern statutes, since thoughtlessness is more at issue than wilfulness.⁴¹ He prefers Stephen J.'s approach, and states that reasonable mistake and automatism will always be defences. Then he proceeds to concisely rationalise the way a modern court should approach the mental element in statutory offences.⁴²

Where penal provisions are of general application to the conduct of ordinary citizens in the course of their everyday life, the presumption is that the standard of care required of them is that of the familiar common law duty of care. But where the subject matter of a statute is the regulation of a particular statute involving potential danger to public health, safety or morals, in which citizens have a choice whether they participate or not, the Court may feel driven to infer an intention of Parliament to impose, by penal sanctions, a higher duty of care on those who participate and to place on them an obligation to take whatever measures may be necessary to prevent the prohibited act. . . .

He criticises the English Courts for not having adopted this approach.

The other judges had expressed reservations about the doctrine of honest mistake since the burden of proving the mistake was said to be on the defence, thus contravening *Woolmington's* case.⁴³ Lord

³⁹ [1970] A.C. 132.

⁴⁰ *Supra* n. 15.

⁴¹ [1970] A.C. 132, 162.

⁴² *Ibid.*, p. 163.

⁴³ *Ibid.*, p. 150, 158.

Diplock states that the burden is not on the defence; the prosecution counsel must establish that the duty of care has been breached if he is to prove the offence; he maintains that there is only an evidentiary burden on the accused to show that there is a possibility that the duty of care has been fulfilled as there is an evidentiary burden on the accused to establish automatism.⁴⁴

This judgment may be an indication that the English Courts may be at last disregarding the doctrines of *mens rea* and absolute liability which had confused their approach to these public welfare offences. Instead, when the Court is confronted with a duty imposed by a statute it will apply the Common Law approach outlined in *Donaghue v. Stevenson*⁴⁵ to see whether the duty is fulfilled, and a reasonable mistake or intervention of a third party will be a defence. Sometimes the public interest demands an extremely high duty of care, but even then, presumably, if there was nothing more the person could have done to fulfil the duty as in *Lim's*⁴⁶ case, the accused will not be convicted.

Lord Diplock's approach was at least partially adopted by the New Zealand Court of Appeal in *R. v. Strawbridge*.⁴⁷ The appellant there was indicted under s. 5(1) of the Narcotics Act 1965 which prohibited the cultivation of cannabis without any reference to knowledge on the part of the offender. The appellant pleaded that she did not know that she was cultivating cannabis and that knowledge was an essential element of the offence.

North P., who delivered the judgment, adopted what he termed the "half-way house" approach. He said that Parliament must express itself very clearly if it desires convictions without any consideration of *mens rea*.⁴⁸ When a provision was set out in absolute form, he preferred to adopt the approach of Dixon J. in *Proudman v. Dayman*,⁴⁹ reasonable mistake was a defence.⁵⁰

We have seen above that this comes very close to the "duty of care" approach. However, North P. was faced with difficulties when it came to the burden of proof. Brett J. in *Cundy v. Le Coque*, Day J. in *Sherras v. De Rutzen*, and Dixon C.J. in *Proudman v. Dayman* chose to put the burden of establishing reasonable mistake on the

⁴⁴ *Ibid.*, p. 164.

⁴⁵ [1932] A.C. 562.

⁴⁶ *Supra* n. 38.

⁴⁷ [1970] N.Z.L.R. 909.

⁴⁸ *Ibid.*, p. 911.

⁴⁹ *Supra* n. 30.

⁵⁰ *Supra* n. 47, p. 914.

accused. This conflicted with the rule in *Woolmington v. D.P.P.*⁵¹ that the burden of proof in criminal cases always lies on the prosecution.

North P. chose to adopt the reasoning of Diplock L.J. discussed above.⁵² There is only an evidentiary burden on the accused to show reasonable mistake. Once a reasonable doubt has been raised it is up to the prosecution to dispell it.

Thus the prosecution is more or less obliged to show that the accused has acted unreasonably. Presumably the reasonableness of the actions will be measured against a duty of care, the extent of which is decided by the Court. References to *mens rea*, absolute liability and the half-way house tend to confuse the issue. *Mens rea* and absolute liability refer to the traditional criminal state of mind, which is not relevant in the modern public welfare statutes. The half-way house suggests a compromise between the two. This is certainly not what has happened. Instead a new concept of mental culpability is being developed. This is the concept of negligence; a failure to fulfil a prescribed duty of care. This approach originally developed in *R. v. Woodrow*,⁵³ and continued by Stephen J. in *R. v. Tolson*⁵⁴ and in a slightly altered form in *Proudman v. Dayman*,⁵⁵ is again being used by English and New Zealand Courts. Common Law judges are beginning to approach public welfare provisions as duties to be fulfilled rather than crimes with or without malice.

⁵¹ [1935] A.C. 462.

⁵² *Supra* p. 109.

⁵³ *Supra* n. 11.

⁵⁴ *Supra* n. 21.

⁵⁵ *Supra* n. 30.