JOSHUA WILLIAMS MEMORIAL ESSAYS 1987

Sir Joshua Strange Williams was resident Judge of the Supreme Court in Dunedin from 1875 until 1913, and he left a portion of his estate upon trust for the advancement of legal education. The trustees of his estate, the Council of the Otago District Law Society, have provided from that trust an annual prize for the essay written by a student enrolled in law at the University of Otago which in the opinion of the Council makes the most significant contribution to legal knowledge and meets the requirements of sound legal scholarship. In 1987 the prize was awarded jointly to Kimberly Fraser and Paul Roth. Their winning entries are published in the following pages.

Joshua Williams Memorial Essay

STRICT LIABILITY REVISITED:

Millar v Ministry of Transport

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I INTRODUCTION

Judicial categorisation of offences is a fragile exercise. It seems inevitable that when appellate courts categorise, trial judges struggle to differentiate between the categories. The offence of disqualified driving illustrates the difficulties of neat categorisation.

Pior to *Auckland City Council* v *King,*[1] disqualified driving was generally regarded as an offence of absolute liability.[2] But in *King,* Mahon J concluded that the offence fell within the principle recognised by the Court of Appeal in *R* v *Strawbridge.*[3] Accordingly, if there was some evidence that the defendant honestly believed on reasonable grounds that he was not disqualified, he was entitled to an acquittal unless the trier of fact was satisfied beyond reasonable doubt that this was not so. However in *Peka* v *Police,*[4] Quilliam J took a different view. He classified the offence as one of a public welfare nature within the strict liability category of *Civil Aviation Department* v *MacKenzie.*[5] On this approach, proof that the defendant drove while disqualified prima facie imported the offence, leaving it open to the defendant to avoid liability by proving that he was totally

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1 [1977] 1 NZLR 429.

2 *Dryden* v *Johnson* [1954] NZLR 455; *Lange* v *MacDonald* [1968] NZLR 371.

3 [1970] NZLR 909. Casey J in *Hansen* v *Police,* unreported, High Court, Auckland, 25 November 1985, M 1076/85 applied the same approach to a case of driving otherwise than in accordance with the terms of an order authorising the issue of a limited licence. Despite being decided after *Civil Aviation Department* v *MacKenzie* [1983] NZLR 78, *MacKenzie* was not argued in this case.

4 Unreported, High Court, Napier, 7 March 1986, M 145/85. See also *Waihape* v *Police,* unreported, High Court, Napier, 7 March 1986, M 63/85, Quilliam J. McMullin J in *Millar* v *Ministry of Transport* (1986) 2 CRNZ 216, at 227 is mistaken to cite these cases as examples of absolute liability.

5 Supra n3.

free from fault. Similar judicial divergence as to the categorisation of the offence of disqualified driving is also to be found in other jurisdictions.[6]

In *Millar* v *Ministry of Transport,*[7] the Court of Appeal has settled this division of authority. The court held that means rea, in the sense of guilty knowledge, is an ingredient of the offence of disqualified driving. But, on proof that a disqualification order still in force was duly made against the defendant, his knowledge of the disqualification is to be assumed in the absence of evidence raising a reasonable doubt to the contrary. The court also considered various judicial categorisations of offences, both in New Zealand and overseas, and attempted to clarify its earlier categorisation of offences in *MacKenzie.*[8] However, while the court was at one in its reaffirmation of the principle that there is normally no criminal offence without a guilty mind, there is little unanimity beyond that point. Moreover, although the cumulative effect of the judgments is to broaden the range of application of the presumption in favour of mens rea, "[t]he law as to mens rea in statutory offences has become, if anything more uncertain".[9]

In this paper I intend to examine *Millar* against the background of prior judicial attempts to categorise offences, notably *MacKenzie.* To that end I will consider the elaboration of the categories in *MacKenzie,* the accommodation of *Strawbridge* within that categorisation, and finally the scope of the individual categories and the problems arising therefrom.

II Phases Of Decision

The appellant had a history of District Court convictions for excess breath and blood alcohol offences and driving while disqualified. On 29 April 1982 he was disqualified for twelve months and six months respectively. The periods of disqualification were intended to be concurrent. 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, the appellant drove while thus disqualified contrary to section 35(1)(a) of the Transport Act 1962. The appellant advanced the defence that he misunderstood the two orders made in open

6 In England, the offence was held to be absolute: *Taylor* v *Kenyon* [1952] 2 All ER 726; *R* v *Millar* [1975] 2 All ER 974. There is also Australian authority supporting absolute liability in this context: *Smith* v *Manno* [1961] SASR 17. However, in *R* v *Vlahos* [1975] 2 NSWLR 580, Street J expressly refrained from assenting to the proposition that a defence of honest belief on reasonable grounds was available to the offence and so left the question open. In *R* v *Prue* (1979) 96 DLR (3D) 577, the majority of the Supreme Court of Canada held that the offence of disqualified driving required proof of mens rea by reason of its inclusion in the Criminal Code. By contrast, in a later decision of the same court in *R* v *MacDougall* (1982) 14 DLR (3d) 216, it was held that the offence, as created under a provincial enactment, was a public welfare one of strict liability within Class 2 of *R* v *City of Sault Ste Marie* (1978) 85 DLR (3d) 161.

7 Supra n4.

8 In *MacKenzie,* supra n3, the information alleged the dangerous operation of an aircraft, contrary to s24(1) of the Civil Aviation Act 1964. The defendant pilot had flown low over a riverbed and the plane's tail fin caught telephone wires, causing two men on the ground to fear for their safety.

9 Supra n4 at 219.

court on 18 August 1982. In the absence of any written notice from the court, the appellant believed that the total disqualification period ran retrospectively from the previous disqualification order commencing on 29 April 1982 and thus, at the time of his apprehension, he thought it had expired. In fact it expired on 29 April 1986.

At first instance, the District Court Judge rejected the application of *MacKenzie.*[10] Taking the view that disqualified driving was not a public welfare offence he elected to apply the *Strawbridge* test of honest and reasonable belief. While noting that the purpose of imposing disqualification was partly to protect the public from drivers who demonstrated lack of respect for a court order, he also saw its purpose as being to deter such drivers from indulging in the sort of conduct that made disqualification necessary.[11] He accepted that the appellant did have an honest belief that the disqualification period had expired but concluded that the appellant's belief was not based on reasonable grounds. In the absence of enquiries to the Court Office or the Ministry of Transport, he held that the appellant had been guilty of closing his eyes to facts which were readily ascertainable.

On appeal to the High Court, Williamson J relied on *Peka* v *Police*[12] and found that the offence of driving while disqualified was a public welfare offence within the second category of *MacKenzie.* Yet contrary to *MacKenzie,* where the test adopted in the second category is an exclusively objective one of total absence of fault, he applied a subjective test.[13] The reasonableness of the appellant's belief was viewed as a point of reference against which the honesty of that belief could be measured. Accordingly, on the findings of the District Court Judge, Williamson J held that the appellant had failed to establish an honestly held belief. Subsequently, leave was given to appeal on a question of law as to the mental element in the offence of disqualified driving. The appeal was upheld unanimously by a full Court of Appeal.[14]

All five members of the court held that the offence of driving while disqualified is *not* a "public welfare" offence within the second category of *MacKenzie.* Notwithstanding the fact that the original cause of the disqualification will often have been in some way related to public safety, the

10 Supra n3.

11 *Millar* v *Ministry of Transport* (1986) 2 CRNZ 108 at 109.

12 Supra n3.

13 Supra n11, at 114-115.

14 All five members agreed to resolve the ambiguity in the District Court Judge's finding of wilful blindness would involve excessive delay. In the District Court, the concept of wilful blindness was equated with a deliberate abstention to make enquiries. This acceptance of a doctrine of constructive knowledge contradicts what was said by Mahon J in *R* v *Crooks* [1981] 2 NZLR 53. There the Court of Appeal, on a receiving case, held that guilty knowledge may not be proved merely by establishing that the defendant, suspecting the property to have been dishonestly obtained, elected to make no enquiry as to its origin. Rather, wilful blindness is a species of knowledge per se and consists of a deliberate abstention from knowledge such that a person deliberately refrains from making enquiries because he or she prefers not to have the result. Clearly as McMullin J points out in *Millar,* supra n4 at 231, upon the conclusion that a defendant has acted honestly but mistakenly, it is irrelevant to import the apposite notion of wilful blindness.

court agreed the dominant purpose behind the offence of disqualified driving is to ensure the enforcement of court orders,[15] and further, that mens rea is an essential ingredient of the offence.

In practical terms, the recognition that the presumption of mens rea applies to the offence of disqualified driving provides a defence of honest belief or mistake.[16] On proof that a disqualification order was still in force at the relevant time, the defendant's knowledge of the order will be presumed. To avoid conviction the defendant must then satisfy an evidential burden of raising the issue of honest but mistaken belief as to the expiry date of the disqualification.[17] Once in issue, the onus of proof, consistent with *R* v *Woolmington,*[18] rests with the prosecution to prove guilty knowledge beyond reasonable doubt.

The Court of Appeal did not confine its discussion to the offence of disqualified driving, but rather took the opportunity to review generally the categorisation of statutory offences which are silent as to any mental element.

In their joint judgment, Cooke P and Richardson J advanced a seven-fold categorisation of statutory offences partly derived from the Court of Appeal's earlier adoption of a Canadian-based, three-fold categorisation in *MacKenzie:*

(1) Simple mens rea offences (category 1 of *MacKenzie*): mens rea/ persuasive burden on prosecution.

(2) Offences where on proof of the actus reus, mens rea is presumed, but that presumption can be displayed by evidence that the accused had an honest belief in facts which would make his act lawful: honest belief/ evidential burden on defendant.

(3) The *Strawbridge* approach where, in addition to some evidence of an honest belief, there must also be a reasonable basis for such belief: honest and reasonable belief/evidential burden on defendant.

(4) Offences where honest and reasonable mistake is a defence, but where the burden of proof on the balance of probabilities lies with the defendant: honest and reasonable belief/persuasive burden on defendant.

(5) Public welfare regulatory offences where the defendant has the burden of showing on the balance of probabilities a total absence of fault (category 2 of *MacKenzie*): total absence of fault/persuasive burden on defendant.

(6) Offences where the defendant has a lesser burden of showing on the balance of probabilities that he did not do the act knowing of its

15 Supra n4. Cooke P and Richardson J at 226; McMullin J at 229.

16 Throughout their joint judgment, Cooke P and Richardson J did not refer to a defence of honest mistake as such, except to say that it operated like a defence: ibid at 224. They recognised a range of offences where, as a result of the presumption in favour of mens rea, an honest but mistaken belief on the part of the defendant becomes relevant when viewed in the trial context. It is the recognition of this range of offences which provides a defence.

17 Discussed by Cooke P and Richardson J, supra n4 at 226; McMullin J at 230.

18 [1935] AC 462.

wrongfulness: honest belief/persuasive burden on defendant.

(7) Offences of absolute liability, where criminal responsibility attaches without fault (category 3 of *MacKenzie*): absolute liability.

Upon the elimination of categories 4 and 6 for New Zealand purposes,[19] this seven-fold categorisation can be further reduced to a three-fold categorisation by the amalgamation of categories 1 and 2, and the possible elimination of category 3. In the result the *MacKenzie* category 1 is expanded and three broad categories are recognised:

Category 1: an amalgam of categories 1 and 2 of the seven-fold categorisation which is broadened to include those offences where mens rea is presumed as well as those where it is express or implied.

Category 2: offences where the accused may exculpate himself by establishing a total absence of fault.[20]

Category 3: offences of absolute liability.

Cooke P and Richardson J went on to state that in the absence of clear indication of legislative intent as to mens rea, there must be a weighty reason to displace the ordinary rule that a guilty mind is an essential element of criminal liability. If there is, it should then be asked if the statutory purposes and the interests of justice are best served by allowing a defence of total absence of fault with the onus on the defendant.[21]

Millar therefore has a wider significance beyond its immediate context of traffic offences. The implications of the decision can only be assessed by reference to previous attempts at judicial categorisation.

III The Law Preceding *Millar*

> Notoriously, offences are often created by legislation which neither specifies any mental element or fault, nor expressly excludes such a requirement.[22]

In the face of such legislative practice, the courts have attempted to balance the need to conserve a general requirement of mens rea in order to ensure fairness to blameless transgressors against the legislative policies underlying regulatory offences. Thus, since the beginning of this century, the New Zealand Court of Appeal has acknowledged various categories of offences.

A tripatite categorisation was first elaborated in *R* v *Ewart*.[23] There, Edwards J suggested that there were three categories of offences known

19 Category 4 is an Australian variant developed by Dixon J in *Maher* v *Musson* (1934) 52 CLR 100, which in New Zealand is swallowed by category 2 of *MacKenzie*. According to Cooke P in *Millar*, supra n4 at 223, this category has also been eliminated for the future in Australia after the recent case of *He Kan Teh* v *R* (1985) 60 ALR 449. Category 6 is a variant of category 3 of *R* v *Ewart* (1905) 25 NZLR 709 which has been reconstituted by *MacKenzie*, supra n3.

20 In *Millar*, supra n4 at 222, Cooke P describes the defence as one where the defendant must show that he or she acted honestly and with due diligence. Somers J speaks of a defence of acting, without intent or fault (235). While Casey J refers to a defence of "absence of fault" (236). These descriptions highlight the generality of the defence.

21 Supra n4 at 225.

22 G Orchard, "Judicial Categorisation of Offences" (1983) 2 Canta LR 81.

23 *Ewart* supra n19.

to criminal law:[24] those requiring mens rea; those of absolute liability, in the sense that no element of mens rea or fault need be established beyond proof of the actus reus; and a third class in which the commission of the act in itself prima facie imported an offence, yet the person charged could still avoid liability by proving to the satisfaction of the court that in fact he did not have a guilty mind.

The so-called 'half-way house' solution denoted by the third category of *Ewart* is illustrative of a dawning judicial recognition that the concept of absolute liability must be moderated or qualified in some way.[25] More recently, this realisation has been expressed in the reaffirmation of the general principle that a defendant should not be found guilty of an offence unless he has a guilty mind.[26]

More than sixty years later a variant of the half-way house category was adopted by the Court of Appeal in the landmark case of *R* v *Strawbridge.*[27]

As a case involving a truly criminal offence of cultivating cannabis which did not require mens rea, *Strawbridge* did not fit into the pre-existing categories. The third category of *R* v *Ewart* was not available as a result of the decision in *Woolmington* v *Director of Public Prosecutions.*[28] To accommodate this exception, the Court of Appeal recognised an intermediate category of offences derived from a reconstituted third category of *Ewart.* On proof that the defendant did cultivate prohibited plants, the requisite mens rea was presumed, but it was open to her to displace this inference by adducing evidence raising a reasonable doubt that she did not know that the plant being cultivated was a prohibited plant.

However, in *Police* v *Creedon,*[29] the Court of Appeal expressed a preference for a different standard as the suitable qualification on liability for quasi-criminal offences. While each of the judgments in that case was formulated in different terms, all converged on the objective concept of "fault" as the appropriate standard.[30] Cooke J went even further and was prepared to accept a shift in the onus of proof to the defendant in respect of regulatory offences. But in order to maintain consistency with

24 Ibid at 731.

25 The concept of absolute liability evolved as a judicial preference in the nineteenth century in the context of increasing state regulation. The courts came to read quasi-criminal, or regulatory, legislation very strictly to maintain effective protection of important social interests: *R* v *Woodrow* [1846] 153 All ER 907; *R* v *Stephens* [1866] LR QB 702.

26 *Lim Chin Aik* v *The Queen* [1963] AC 160; *Sweet* v *Parsley* [1970] AC 132; *Gammon Ltd* v *Attorney-General of Hong Kong* [1985] AC 1.

27 Supra n3.

28 In *Woolmington* v *DPP,* supra n18, it was affirmed that the onus lies on the prosecution to prove all elements of the offence unless Parliament otherwise provides. On this precedent, North P concluded in *Strawbridge,* ibid, that *Ewart,* supra n19, went too far in holding that the burden of proof in category 3 passed to the accused. Nevertheless, consistent with Lord Diplock's analysis in *Sweet* v *Parsley,* supra n26, he found that *Woolmington* did not go so far as to say that the prosecution must call evidence to prove the absence of any mistaken belief by the accused in the existence of facts which, if true, would make the act innocent. Hence it was still possible to subject the accused to a lesser evidentiary burden of creating a reasonable doubt that he did not have a guilty mind.

29 [1976] 1 NZLR 571. See also *McCone* v *Police* [1973] NZLR 105.

30 Ibid, McCarthy P at 575; Richmond J at 582, 584; Cooke J at 587.

Strawbridge, he concurred with the other members of the court in leaving the ultimate burden of negativing the defence on the prosecution.[31]

Onus of proof considerations were again referred to in *Ministry of Transport* v *Burnetts Motors.*[32] While the case did not turn on onus, Cooke J indicated that the approach of the Supreme Court of Canada in *R* v *City of Sault Ste Marie,*[33] where a persuasive onus was put on the defendant of establishing the no-fault defence "[w]ould do much to eliminate any practical difficulties which may result from recognising a defence of total absence of fault".[34] The Court thus made it clear that *Strawbridge* and *Creedon* were not to be seen as the last word on the question and might now occasion modification in view of the Canadian developments.[35]

This matter was pursued in *Civil Aviation Department* v *MacKenzie.*[36] Accepting the Canadian Supreme Court's interpretation of *Woolmington* in *Sault Ste Marie*[37] the Court of Appeal held that where a public welfare offence does not expressly include any standard of liability beyond the external elements of the offence, proof of those elements will prima facie import the offence, leaving it open to the defendant to avoid liability by proving that he was totally free from fault. In the result, the Court of Appeal recognised three categories of offences:

Category 1: offences in which mens rea such as intent, knowledge or recklessness must be proved by the prosecution.

Category 2: public welfare regulatory offences where the defendant has the burden of proving the defence of total absence of fault on the balance of probabilities.

Category 3: offences of absolute liability.

In addition to the three categories derived from *Sault Ste Marie,* the majority in *MacKenzie* clearly contemplated the survival of the *Strawbridge* principle:[38]

> Where as in *Strawbridge,* the presumption of mens rea operates, the defendant is only required to point to some evidence which raises the issue and the ultimate burden of proof then rests on the prosecution.

31 Ibid at 586.
32 [1980] NZLR 51.
33 Supra n6. Here the Supreme Court of Canada (at 181-182) outlined three categories of statutory offences:
1. Offences in which mens rea, consisting of some positive state of mind 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 all reasonable care . . .
3. Offences of absolute liability where it is not open to the accused to exculpate himself by showing that he was free from fault.

34 Supra n32 at 58. See also *Rooke* v *Auckland City Council* [1980] NZLR 680.
35 Ibid, Richmond P and Richardson J at 54.
36 Supra n3.
37 The majority in *MacKenzie,* ibid at 84-85, held that *Woolmington,* supra n18, applied to serious offences only, and should not be read in such a way as to preclude putting the persuasive burden of proof on the defendant in this category of case.
38 Ibid at 85.

The majority was less than expansive about where *Strawbridge* was accommodated within the categorisation. McMullin J, who vigorously dissented in the adoption of the *Sault Ste Marie* categorisation,[39] was of the opinion that the acceptance of the second category of *Sault Ste Marie* would result in either the substitution of a new category for category 3 of *Ewart,* as modified by *Strawbridge* (that is, the *Strawbridge* category), or the continued recognition of the *Strawbridge* category with the creation of a new fourth category of strict liability public welfare offences (category 2 as adopted by the majority).[40]

The latter view was preferred in *Browne* v *Auckland City Council*[41] where Chilwell J concluded that, as a consequence of *MacKenzie,* there were now four categories of statutory offences in New Zealand:

(i) Truly criminal offences requiring mens rea (category 1 of *MacKenzie*).

(ii) Strict liability offences which are truly criminal and where the defendant can avoid liability by adducing evidence which raises reasonable doubt that he lacked mens rea (the *Strawbridge* category).

(iii) Strict liability offences of a public welfare regulatory nature where the defendant can avoid liability by proving total absence of fault on the balance of probabilities (category 2 of *MacKenzie*).

(iv) Offences of absolute liability (category 3 of *MacKenzie*).

In addition, the criteria for precise definition of public welfare offences were not entirely clear from either *Sault Ste Marie* or *MacKenzie.* Thus in *O'Neill* v *Ministry of Transport,*[42] Gallen J "with some hesitation and reservation" placed the offence of driving with an excessive blood alcohol concentration in the second category, though the severity of the penalty tended to suggest that category 1 was more appropriate.[43]

As a serious offence not clearly within the public welfare typology, *Millar* revealed the inherent fragility of a categorisation with uncertain criteria of definition. To resolve this and other potential anomalies, the Court of Appeal was forced to reassess and to a certain degree reconstitute, the *MacKenzie* categories.

39 Ibid at 95-96. In his opinion, *Woomington* applied across the spectrum of crimes and to transfer the onus of proof entailed too much judicial uncertainty and ought to be a matter for Parliament. Moreover, he felt the classification of offences as "public welfare" offences to be too imprecise: "It may cover both serious crimes and breaches of regulations."

40 In *Millar,* supra n4, McMullin J adopts the second alternative: "In *Civil Aviation Department* v *MacKenzie* the majority of this Court adopted that classification [class 2 of *Sault Ste Marie*], adding it as a fourth class to the three classes set out in *MacKenzie*" (227).

41 Unreported, High Court, Auckland, 20 June 1985, M1172/85. Jamieson J at the District Court level in *Collector of Customs* v *Van Den Beld,* unreported, District Court, Dunedin, 20 February 1984, also recognised the survival of the *Strawbridge* principle within the *MacKenzie* classification, and expressly applied it to the offence of importing indecent films. This decision was overruled in the High Court which found the offence to be one of absolute liability. *Barrow* v *Van Den Beld,* unreported, High Court, Dunedin, 14 November 1984, Holland J M183/84.

42 [1985] 2 NZLR 513.

43 Ibid at 517-518. See also Heron J in *AHI Operations Ltd* v *Department of Labour,* unreported, High Court, Auckland, 31 May 1985, M1736/84.

IV CATEGORY 1 AND *STRAWBRIDGE*

In reducing the number of categories and thereby the difficulties of categorisation, Cooke P and Richardson J suggested that the distinction between categories 1 and 2 of the seven-fold categorisation is so narrow that it is hardly worth preserving.[44] Instead they preferred to recognise a broad category 1 comprising offences where mens rea is express, implied or presumed.

From an evidential perspective, there is little practical distinction between the two categories. Irrespective of whether an offence is category 1 or category 2, proof of the actus reus will often be evidence from which mens rea can be inferred as a matter of fact. That is to say, the process of "inferring" the presence of mens rea from conduct under category 1 is seldom distinguishable from applying a presumption which can be displaced by evidence raising reasonable doubt on the issue.[45]

The position of *Strawbridge* in relation to this broad amalgam remains uncertain. Cooke P and Richardson J describe the *Strawbridge* principle as a "troublesome anomaly" to be restricted to its facts.[46] In their joint judgment "reasonableness" was perceived as a separate substantive qualification to "honest belief" resulting in an "unacceptable mix of objective and subjective formulae".[47] Taking the seven-fold categorisation they put *Strawbridge* in category 3, outside the amalgam and distinct from cases adopting a purely subjective formula such as *R* v *Morgan, Wood* and *Meturariki,* which they cite in relation to category 2.[48]

This approach clearly differs from that adopted by McMullin, Casey and Somers JJ, who, on the authority of *Morgan, Wood* and *Meturariki,* view *Strawbridge* in purely subjective terms. "Reasonableness," rather than being a separate substantive qualification, goes only towards testing the credibility of such belief. Under the seven-fold categorisation they would include *Strawbridge* in category 2, alongside *Morgan, Wood* and *Meturariki,* where it becomes an explicit part of the broad amalgam.[49]

The minority stance of Cooke P and Richardson J probably reflects a desire to restrict *Strawbridge* to its facts and thus avoid the complications of a distinction between "public welfare" and *Strawbridge* categories in the area of strict liability. But it is still difficult to reconcile their vision of *Strawbridge* with earlier decisions of the Court of Appeal.

44 Supra n4 at 224. This conclusion was also recognised by McMullin J at 232, Casey J at 235-236, and inferentially by Somers J at 235.

45 Orchard, supra n22 at 90.

46 Supra n4 at 225.

47 Idem.

48 In the English case of *R* v *Morgan* [1976] AC 182, it was established that the test of honest belief is a subjective one. It is the defendant's state of mind that is relevant. It is not incumbent upon the defendant to establish reasonable grounds for that belief, although such may be relevant in testing the honesty of the belief in the first place. In *R* v *Wood* [1982] 2 NZLR 233, a cannabis cultivation case, McMullin J drew attention to *Morgan* and its possible qualification on *Strawbridge* supra n3. This qualification was reaffirmed in *R* v *Meturariki* (1986) 2 CRNZ 116.

49 Supra n4, McMullin J at 231, Somers 234, Casey 236.

In *Meturariki,*[50] Richardson J noted that, following *Morgan* and *Wood, Strawbridge* had been reduced to a purely subjective test of honest belief. Yet in *Millar* he sees *Strawbridge* as being somehow distinct from *Meturariki* and *Wood,* and goes so far as to put them in different categories in the seven-fold categorisation.

Clearly, the majority viewpoint of the other three judges is more consistent with preceding authority. However, in view of the breadth of category 1 in *Millar,* this fundamental cleavage on the nature of *Strawbridge* fades into insignificance. All five judges acknowledge the existence of an overarching principle effectively affording a defence of mistake.[51]

Therefore, it remains possible to predict the scope of category 1 with some degree of confidence. The amalgam will obviously include those cases where mens rea is either express,[52] or necessarily implied,[53] and it will also encompass serious offences where mens rea arises presumptively and is not displaced by the "public welfare" nature of the offence or a clear legislative intention that the offence is absolute. In short, category 1 covers all "mens rea" offences.[54]

Category 1 is broad enough to allow a defence of honest mistake and in that sense covers the ground previously within the domain of the *Strawbridge* principle. If an offence is truly criminal and neither specifies nor necessarily implies mens rea, one would expect a court to apply the presumption in favour of mens rea. Arguably such a presumption is also particularly apposite to serious offences where an argument of mistake is possible. But beyond that, it is impossible to define the perimeters of category 1 — or the other two categories for that matter.

V CATEGORY 2: PUBLIC WELFARE OFFENCES

Until *Millar,* the identification of "public welfare" primarily with the protection of public health and safety seemed to work reasonably well in New Zealand. Thus, the rubric has been applied to driving and traffic

50 Supra n48 at 117-118.

51 Although by majority rather than unanimity. Cooke P, Richardson, Somers and Casey JJ place the offence of disqualified driving in a reconsidered and somewhat expanded category 1 of *MacKenzie* which includes offences were mens rea is relevant by the defence of honest but mistaken belief. McMullin J reluctantly concedes the existence of a three-fold *MacKenzie* categorisation, but he persists with the *Strawbridge* approach which he describes as the fourth category of *MacKenzie* (229). He agrees with Mahon J in *ACC* v *King,* supra n1, that *Strawbridge* can be applied to the defence of disqualified driving. Thus, McMullin J utilised the same terminology as the majority, and recognised the defence of an honest but mistaken belief as being included in the mens rea category. However, it is framed not within a reconstituted category 1 of *MacKenzie* but upon a *Strawbridge* analysis.

52 *Police* v *Barcham,* unreported, High Court, Palmerston North, 6 December 1985, M132/84. Grieg J concluded that the inclusion of the words "wilful obstruction" in the statutory provision meant the offence of intentionally obstructing a police officer was within the first category of *MacKenzie.*

53 *Paul* v *Housing Corporation of New Zealand,* unreported, High Court, Blenheim, 25 September 1984, M31/83. Jeffries J was of the opinion that the words "stipulates for or demands [excessive rent]" under the Rent Freeze Regulations 1983 were strong terms which necessarily import mens rea. As such, the relevant offence came within the first category of *MacKenzie.*

54 Supra n4 at 236 per Casey J.

offences[55] and to cases involving various other offences of a regulatory nature, including water and soil conservation,[56] animal control,[57] and rent regulation and protection.[58] However in their joint judgment in *Millar,* Cooke P and Richardson J acknowledged the uncertainty inherent in the concept of public welfare.[59]

> The expression is a convenient label rather than an exact definition, if only because all offences are said to be against the public welfare.

Casey J also noted the difficulty of deciding "what is an issue of social concern".[60] Somers and McMullin JJ preferred to avoid the designation altogether.[61]

But even so, Cooke P, Richardson and Casey JJ remained content to utilise the label, albeit restrictively. Public welfare regulatory offences are defined as those "directed at conduct having a tendency to endanger the public".[62] "Typical" instances of this category of case were seen to include discharging waste into natural water and operating an aircraft in such a manner as to be a cause of unnecessary danger to any person or property.[63] In this context, reference was also made to the offence of driving with excess breath and blood alcohol, and operating a vehicle in such a condition as to be liable to cause annoyance.[64] Yet the offence of disqualified driving was found not to imperil the public safety.

If "public welfare" is defined so narrowly, then the difficulties encountered in cases such as *Millar* will persist. It may be advantageous

55 *O'Neill* v *MOT,* supra n42. A case involving the offence of driving a motor vehicle with excess blood alcohol; *Peka* v *Police,* supra n4, where the accused was charged with disqualified driving; *Browne* v *ACC,* supra n41. Here the appellant was convicted under the Traffic Regulations 1976 of operating a vehicle without a warrant of fitness.

56 *Waikato Carbonisation Ltd* v *Waikato Valley Authority,* unreported, High Court, Hamilton, 4 September 1984, M220/84; *Hastings City Council* v *Simons* [1984] 2 NZLR 502. Both cases concerned the industrial pollution of a natural waterway. *Blackstock* v *Puller (Waitaki Catchment Commission),* unreported, High Court, Dunedin, 30 July 1986 Quilliam J, M222/85, the plaintiff obstructed a river by the construction of a groyne.

57 *Campbell* v *Police,* unreported, High Court, Christchurch, 5 September 1984, M414/84.

58 *Paul* v *Housing Corporation of New Zealand,* supra n53. In the alternative Jeffries J suggested the offence may be one of strict liability. Public welfare has also been found to include maintaining community standards of morality and decency. *Barrow* v *Van den Beld,* supra n41.

59 Supra n4 at 222.

60 Ibid at 236.

61 Somers J, supra n4 at 234, would prefer to speak in terms of a category that included all offences which exclude the requirement of proof of mens rea by the prosecution but in which the aims of Parliament can be met by acquitting those who can show they are without intent or fault. McMullin J also wished to do away with the "niceties of classification" that the use of the term public welfare entails, ibid.

62 Ibid at 225. This definition is narrower than that of category 2 of *MacKenzie* where the majority referred more generally to the protection of public and social interests, supra n3 at 81-82.

63 In so describing "typical" cases of the *MacKenzie* category 3, by implication Cooke P and Richardson J were also contemplating modern atypical cases potentially falling outside this category 2 designation. They envisaged such anomalies as being accommodated under the broader category 1 of *MacKenzie.*

64 Supra n4 at 225-226.

to extend the term "public welfare" to include all offences against legislation regulating conduct which threatens public health or safety, as well as ancillary or adjectival offences, such as noncompliance with court orders, which promote the public interest in a wider sense. Such a broad view of "public welfare" applies in Canada. According to *R* v *City of Sault Ste Marie,*[65] the expression "public welfare offence" primarily describes those offences protecting broad social interests – not merely those which prevent conduct endangering others. Subsequent cases have continued to apply the concept in this manner.[66]

As McMullin J has critically observed,[67] it may well be that in the New Zealand context public welfare has become a term fraught with ambiguity. From a referential perspective, "public welfare" is used in contradistinction to "truly criminal". Viewed in this way, the expression is little more than an aid to initial categorisation. It should not in itself be determinative of categorisation. If less emphasis is placed on the term "public welfare" and more on the *regulatory nature* of offences, then offences involving breach of court orders, including disqualified driving, could be accommodated in category 2 of *MacKenzie.* Alternatively, it may be the intermediate category itself which is problematic. The approach taken by Somers and McMullin JJ[68] comprehends a more fundamental categorisation comprising firstly, offences where mens rea is relevant, and secondly, offences where mens rea is not required though an objective defence of total absence of fault is available.

In failing to consider these alternatives the majority in *Millar* increases the rigidity of an already brittle category 2 of *MacKenzie.*[69] Rather than widening the scope of category 2, Cooke P, Richardson and Casey JJ have elected to broaden category 1 to accommodate those anomalous regulatory offences which do not attract absolute liability and do not imperil the public safety.

VI Testing The Distinction Between Categories 1 And 2

Leaving category 3 aside for the moment, the key to the success of the *MacKenzie/Millar* categorisation lies in judicial ability to distinguish between categories 1 and 2. The distinction between these latter categories can be tested by reference to a range of driving offences.

Most driving cases, where the complaint arises out of the manner of driving, fall into one of the offences of careless, dangerous, reckless, or drunken driving. The least serious offence is careless driving. There a "fault" element is specified by the legislature. Structurally therefore, the offence is similar to category 1 offences which specify mens rea, though of course

65 Supra n6 at 171.

66 *R* v *Chapin* (1979) 10 CR (3d) 371, 95 CLR (3d) 13; *R* v *Dilorenzo* (1984) 45 OR (2d) 385.

67 In his dissenting judgment in *MacKenzie,* supra n39, McMullin J forcefully suggests there are difficulties in determining the limits of such a categorisation. This dissent is reiterated in *Millar,* supra n4 at 228. See also Orchard, supra n22.

68 Supra n61.

69 This development can be viewed as an inevitable consequence of their efforts to eliminate the distinction between the *Strawbridge* principle and public welfare in the strict liability category.

the vital difference lies in the prescription of an objective standard of liability – an element that moves the offence closer to the second public welfare category. However, precisely because the legislature has prescribed a "fault" element, the Court of Appeal in *MacKenzie* cautioned that careless driving does not fall within category 2; and this view has been recently applied in *O'Neill* v *Ministry of Transport.*[70] So the result is that careless driving falls outside the *MacKenzie* categorisation. To escape liability for this offence the defendant need only raise a reasonable doubt on the issue of carelessness.

Dangerous driving is also outside the catchment of the *MacKenzie* categorisation. In *R* v *Jones,*[71] the Court of Appeal, without referring at all to *MacKenzie* has recently held that liability for this offence requires proof of objective dangerousness caused by the defendant's carelessness or fault. Effectively, therefore, dangerous driving is carelessness plus objective dangerousness. Yet dangerous driving would seem analogous to dangerous flying[72] which in *MacKenzie* itself was placed in category 2. The former is surely no less or more against public safety than the latter. But the legislative stipulation of a fault element in dangerous driving dictates that it be treated differently.[73] Turning to reckless driving, both reckless and dangerous driving are equally culpable.[74] However, whether or not recklessness in this context is interpreted subjectively or objectively,[75] it is incontrovertibly a form of mens rea. So reckless driving goes into category 1 of *MacKenzie.*

From one perspective, all this may seem quite consistent. In each of the three offences considered above the prosecution must prove a legislatively-stipulated requirement of fault or mens rea. And for his part, the defendant can avoid liability by raising a reasonable doubt as to the relevant element. But, viewed in the light of the *MacKenzie* categorisation, only one offence fits neatly into the judicially-created scheme.

70 (1986) 2 CRNZ 59.

71 [1986] 1 NZLR 1.

72 The analogy between dangerous driving and dangerous flying was drawn by McMullin J in *MacKenzie,* supra n3 at 94. He noted "each is a public welfare measure of the same genus". See also Gallen J in *O'Neill* v *MOT,* supra n42 at 517.

73 The *MacKenzie* categorisation is not only fragile but it is almost certainly non-exhaustive. It would seem cases such as *O'Neill,* supra n70, and *Jones,* supra n71, where Parliament has specified the fault required, exist in their own category beyond *MacKenzie* and beyond *Millar.* In *Millar,* supra n4, this category of offence remains nameless. For although Cooke P refers to the offences of careless and reckless driving in passing, he does not say which category they come under (223). Perhaps, as S France contends, this is of no great moment: "Absolute Liability Since MacKenzie" [1987] NZLJ 50, 54. As Cooke P stressed, he was putting aside statutes in which the legislature has made its intention reasonably plain, supra n4, 220-221, 223, thus demarcating the limits of his categorisation.

74 S 30(3)(c) Transport Act 1962. Every person who commits an offence against s57 of the Act, which relates to reckless or dangerous driving, is liable to imprisonment for a term not exceeding 3 months or to a fine not exceeding $1,500 or both and subject to the court's discretion, a period of 6 months disqualification from driving.

75 *D'Almeida* v *Auckland City Council* (1984) CRNZ 281; *R* v *Jones* [1986] 1 NZLR 1; *McBreen* v *Ministry of Transport,* unreported, High Court, Dunedin, 27 September, 1982, M102/82, Hardie Boys J.

Where no fault element is prescribed, the permutations become even more evident. Disqualified driving fits into category 1 as a result of *Millar.* Drunken driving is placed in category 2,[76] though the cognate offence of refusing to give a blood sample is apparently in category 1.[77] Then, descending the scale of motoring criminality, offences like operating a motor vehicle without a warrant of fitness[78] reside in category 2.

Arguably, all these offences are intended, directly or indirectly, to protect the public welfare, yet they are spread throughout categories 1 and 2 and even beyond. However, the real objection is not so much derived from designation or description; but rather from the different evidential/ persuasive burdens cast on the defendant to answer the allegation against him.[79]

VII CATEGORY 3: ABSOLUTE LIABILITY

In *Millar* it is made clear that the category of absolute liability is to be narrowly confined to offences which disclose a clear legislative intention that accountability be unqualified.[80]

Significantly however, courts of first instance appear to have remained amenable to the concept of absolute liability. Thus, in many of the pre-*Millar* cases applying *MacKenzie,* absolute liability has been found at the District Court level. But in each case the High Court has taken a different view, preferring to place the offences in category 2.[81] While it is perhaps too early to predict the extent to which *Millar* will curb this tendency in the District Court, where the High Court overrules such decisions the doctrine of *stare decisis* will provide a systemic constraint on the inclination of lower courts to find liability without fault.

But even so, the High Court itself has had resort to category 3. In *AHI Operations Ltd* v *Department of Labour,*[82] Heron J held that the offence against section 17(1) of the Machinery Act 1950, of being the owner of machinery and failing to ensure that a dangerous part thereof was securely fenced, came within the category of absolute liability. Among the factors inclining Heron J to this view were the relatively severe penalties, the subject

76 For example, *O'Neill* v *MOT,* supra n42.

77 *Payne* v *Goodgame* (1986) 2 CRNZ 100.

78 *Browne* v *ACC,* supra n41. Other driving offences which would probably come under category 2 include the *Creedon* situation of failing to give way at an intersection, supra n29.

79 Factors which reflect the legislature's view of the seriousness of a offence include the severity of penalty. A comparative study of penalties alone demonstrates that the offence of dangerous driving is more serious than operating a vehicle without a warrant of fitness, but somewhat incongruously, more is required of the defendant to excuse him for the less serious offence. McMullin J is of the opinion that such disparity could be overcome by the retention of a constant onus of proof as enunciated in the *Strawbridge* principle, *MacKenzie,* supra n3, at 95-96. This suggestion was not adopted by the other four judges in *Millar,* supra n4.

80 *Millar,* supra n4 at 223, 232. Dicta reflecting this New Zealand inclination to restrict rather than expand the scope of absolute liability can be found in *R* v *Howe* [1982] 1 NZLR 618 per Cooke J at 623, and also in *MacKenzie,* supra n3 at 84, where Richardson J inferentially adopts dicta of Dickson J in *Sault Ste Marie,* supra n6.

81 *Browne* v *ACC,* supra n41; *Campbell* v *Police,* supra n57; *Paul* v *Housing Corporation of New Zealand,* supra n53; *Peka* v *Police,* supra n4; *Waikato Carbonisation,* supra n56.

82 Supra n43.

matter and nature of the offence, the terms of the statute, both in immediate and general context and an established line of judicial authority imposing absolute liability under the statute and cognate English legislation.[83]

Heron J also concluded that the imposition of absolute liability would facilitate the promotion of the objects of the legislation by encouraging greater industrial vigilance in the use of machinery.[84] This proposition, which derives from judicial intuition rather than any demonstrated relationship, has also been recently adopted by the Privy Council as the central rationale of absolute liability in *Gammon Ltd* v *Attorney-General of Hong Kong.*[85] In *Millar,* however, the majority was singularly unimpressed by *Gammon's* recitation of this suspect apology for unqualified liability. Thus Cooke P and Richardson J considered that if such a "test" were widely applied, the potential scope of absolute liability would, more often than not, displace the presumption in favour of mens rea.[86] Somers J sought to distinguish *Gammon* on the ground that it arose under a jurisdiction that does not recognise an intermediate category of strict liability between mens rea offences and those imposing absolute liability.[87] Similarly, McMullin J treated *Gammon* as an exception limited to its facts.[88]

There may well be other cases where the legislative intention is best implemented by the imposition of absolute liability. These could extend from the relatively inconsequential "ticket" cases at the lower end of the minor offence scale to offences which, though they do not pertain to public safety, involve some such vital national interest as preservation of the natural heritage.[89] Furthermore, as *Barrow* v *Van den Beld*[90] illustrates, the doctrine of precedent may well preserve pre-*MacKenzie* decisions on absolute liability.

Nonetheless, absolute liability will be very much the exception. And despite suggestions that *MacKenzie* may leave open "residual" defences based upon involuntariness,[91] the better view is that on the few occasions

83 Ibid at 7-11. He noted that the relatively severe fines of $2000 and $100 per day for a continuing offence were to be seen in the context of the injuries which would occur if the legislation was breached (10).

84 Ibid at 12.

85 Supra n26.

86 Supra n4 at 224.

87 Ibid at 235.

88 Ibid at 232. Casey J referred to *Gammon* only in passing (235, 236).

89 For example, the protection of endangered species. Section 63 of the Wildlife Act 1953 speaks of "absolutely" protected animals.

90 In *Barrow* v *Van den Beld,* supra n41, Holland J found, on the authority of *Fraser* v *Beckett and Stirling Ltd* [1963] NZLR 181 (CA), the offence of importing indecent documents into New Zealand to be one of absolute liability. This conclusion was reached by a strict application of the doctrine of stare decisis. His Honour reasoned that until the Court of Appeal clearly overruled or "differed with" *Fraser,* that decision remained binding on the High Court. Such observance of precedent is questionable. It is difficult to conceive that whenever the Court of Appeal charts a new direction as in *MacKenzie,* supra n3, it must pronounce upon all its earlier decisions in the area.

91 *Kilbride* v *Lake* [1962] NZLR 590; *Tifaga* v *Department of Labour* [1980] 2 NZLR 235. See also *Murray* v *Ongoongo,* unreported, High Court, Auckland, 17 October 1985, Hillyer J, M409/185; *Finau* v *Department of Labour* [1984] 2 NZLR 396. These last two cases are discussed by France, supra n73 at 53.

the legislature insists upon the imposition of absolute liability the court should hear no excuse.[92] Thus absolute is absolute. That in itself is sufficient reason for judicial caution in placing offences in category 3.

Finally, if the draft Bill of Rights is enacted the scope of absolute liability may be confined even further. In *Reference Re Section 94 of the Motor Vehicles Act (BC),*[93] the Supreme Court of Canada held that a provision of the Motor Vehicle Act (BC), imposing absolute liability with a minimum period of imprisonment, was inconsistent with section 7 of the 1982 Canadian Charter of Rights and Freedoms which guarantees the right not to be deprived of life, liberty and security of the person. The Court found that a law enacting an absolute liability offence will offend section 7 if, and to the extent, it has the potential of depriving a person of life, liberty or security of the person.[94] In the *Motor Vehicles* case the combination of imprisonment and absolute liability in s94(2) meant persons could be deprived of their liberty in the entire absence of any wrongful intent.

Such an approach could be followed by New Zealand courts under article 14 of the draft Bill.[95] While article 14 does not apply expressly to liberty and security of the person, it is certainly arguable that such rights are inferentially protected under the general guarantee of the right to life.

VIII CONCLUSION

If one accepts a very narrow range of absolute liability, then the critical categories for most purposes will be 1 and 2. In the past the courts interpreted regulatory legislation as either requiring mens rea or imposing absolute liability. Now, with *MacKenzie* providing a *via media* of strict liability, subject to a defence of absence of fault, and *Millar* expanding the range of a defence of honest belief or mistake, the choice is one of mens rea or strict liability. But the price of progress has been ambiguity.

Perhaps *Millar's* most important contribution has been its reaffirmation of fundamental principles. In this respect *Millar* meets the criticism of Dickson J in his dissenting judgment in *Strasser* v *Roberge.*[96] By recognising the primacy of the general principle in favour of mens rea in the categorisation process, *Millar* should inhibit any judicial tendency to gravitate towards category 2 rather than category 1 and to dispose of categorisation by mere reference to a general label of public welfare.

92 If a quasi-absolute category is recognised, it is not clear what the standard of fault should be nor where the burden of proof should fall. Orchard, supra n22, suggests that on the basis of *MacKenzie,* the persuasive onus of proof will be on the defendant. But this is by no means definitive. In *MacKenzie* supra n3 at 81-82, the majority apparently regarded total absence of fault under category 2 as a broad defence encompassing such specific defences as impossibility and necessity. It is unlikely, therefore, that they would concede such defences to be available to category 3.

93 (1985) 24 DLR (4th) 536.

94 Thus absolute liability offences do not per se violate s 7: ibid at 559. Wilson J thought it would "trivialise" the Charter to sweep all absolute liability offences into s 7 (565).

95 Article 14 reads: "No one shall be deprived of life except on such grounds, and where applicable, in accordance with such procedures, as are established by law and are consistent with the principles of fundamental justice."

96 (1979) 103 DLR (3d) 193.

Nonetheless, a degree of ambiguity continues to enshroud the concept of a "public welfare" offence in category 2. Regrettably, *Millar* has not dispelled "the niceties of classification" of which McMullin J spoke in *MacKenzie.*[97] Indeed some of the problems of categorisation are frankly conceded in *Millar;* and Cooke P and Richardson J emphasised that *Millar* is not the "last word" on the subject.[98]

If categories are to mean anything, offences with similar penalty and similar subject matter ought to be within the same category, and indeed, within the same categorisation. But clearly, this is not the situation at present. Categorisation as a form of judicial processing of statutes,[99] is largely the result of indifferent, if not inadequate, drafting. If those who write our statutes cannot achieve consistency in prescribing the mens rea or fault element of offences, there is little realistic prospect that the courts will be at one in neatly assigning similar offences into the same categories. Judicial categorisation cannot be superimposed upon the statute book. In the final analysis, the problems of defining and applying such judicial constricts may only be minimised by resorting to fundamental principle.

97 Supra n3 at 95. It may be that subsequent courts, following the headnote of *Millar,* supra n4, which avoids the term, will view the term "public welfare" as one of reference rather than one of definition.

98 Supra n4 at 225.

99 The concept of judicial processing owes its origin to the work of Francis Bennion, formerly a Parliamentary Counsel in the United Kingdom and Chairman of the Statute Law Society from 1977-1979. See Bennion, *Statute Law* (1980).