THE OFFENCE OF "POSSESSION" UNDER THE NARCOTICS ACT 1965

It is an offence under the Narcotics Act 1965 (ss. 5 (1) (e), 6 (1), 7 (1) (c))[1] to have in one's possession any narcotic or the seed of any prohibited plant.[2] Nowhere in the Act, however, is there any definition of the term "possession." Recent New Zealand cases relating to the offence of possession of a substance prohibited under the Act have revealed the need for a clear definition of the constituent elements of the offence.

It is submitted that with an analysis of

(1) the legal concept of "possession" and

(2) the nature of the offences of possession under the Narcotics Act

it is possible to state precisely all the ingredients that make up the offences.

1. *The legal concept of "Possession"*

The word "possession" must be given a sensible and reasonable meaning in its context in the Act. It is a word common to many aspects of our law but it does not always have the same meaning. The discussion of "possession" here will be restricted to the field of drugs and it is intended to show that the word has a clear and unambiguous meaning when used in the Narcotics Act.

"Possession" involves two elements:

(a) the physical fact of possession and

(b) the mental fact of defendant's knowing that the article is physically possessed by him.

It is in relation to (b) that difficulties have arisen in the field of drug possession. Lord Reid in *Warner* v. *Metropolitan Police Commissioner*[3] observed that:

> As a legal term 'possession' is ambiguous at least to this extent: there is no clear rule as to the nature of the mental element required. All are agreed that there must be some mental element in 'possession' but there is no agreement as to what precisely it must be.

It is submitted that the ambiguity has arisen because of the failure to recognise that the requisite mental element must be treated as part of the *actus reus* of the offence of 'possession' of a prohibited article.

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1. In this paper discussion will be confined to s. 6 and s. 7 "possession" offences, for offences under these sections are of a less severe nature than an offence under s. 5. *R.* v. *Strawbridge* [1970] N.Z.L.R.909 is directly in point for all offences under s. 5.
2. See definition in s. 2, Narcotics Act.
3. [1969] 2 A.C. 256, 281.

The mental element in the concept of possession relates to the defendant's exercise of control over the article or substance; namely the knowledge that he has some article in his control that turns out to be prohibited. Any additional mental element involved in the offence must be related to either a *mens rea,* or as will be shown later, to a presumed mental state which can be rebutted by the defendant.

An offence of strict liability[4] is defined as one in which the prosecution need prove only *actus reus.* "The definition . . . removes from the definition of the offence all elements of mental blameworthiness and leaves only the notions of conduct, causation and harm, for which the defendant is responsible. This is a perfectly acceptable way of describing the typical offence of strict liability, where, for example, the defendant without any fault on his part is convicted for having adulterated tobacco in his possession.[5] Even if such offences do not involve *mens rea* they at least involve some conduct on the part of the defendant and it is possible to describe the conduct as 'causing' the 'harm' in question."[6] Thus, it is not inconsistent with the definition of an offence of strict liability to require the prosecution to show the defendant had the requisite mental element; namely that he was knowingly in control of an article that turned out to be prohbited even though his knowledge was completely innocent.

Reference was made above to the early case of *R.* v. *Woodrow.* The defendant in that case had no cause to suspect that the tobacco he had in his warehouse was adulterated. His lack of knowledge was held to be no defence. Pollock C.B.[7] made it clear that it was only the lack of knowledge of the characteristics of the tobacco known by him to be in his premises that provided no defence. As the offence was held to be one of strict liability, if he had no knowledge or cause to suspect that there was tobacco in his warehouse then he would not have been convicted:

> A man can hardly be said to be in possession of a thing without knowing it.

Consequently, even if the particular offence of possession is one of strict liability, the prosecution must still prove that the defendant knowingly had control over the thing prohibited.

Further confirmation of the correctness of this approach can be seen in *Lockyer* v. *Gibb.*[8] A woman was charged with being in possession of a scheduled drug prohibited by a regulation made under the Dangerous Drugs Act 1965 (U.K.). The magistrate held that there was a possibility that she did not know that the tablets she had in her

4. "Strict" rather than "absolute" liability is discussed, for it is only on very rare occasions that liability is absolutely imposed.
5. *R.* v. *Woodrow* (1846) 15 M. & W. 404; 153 E.R. 907.
6. R. S. Clark, 1966, "Defences to Offences of Strict Liability", p.p. 10-11.
7. Supra, note 5 at p. 415; 912.
8. [1966] 2 All E.R. 653.

handbag contained any scheduled drug. On appeal Lord Parker C.J. held the offence to be one of strict liability. He had this to say with regard to possession:[9]

> In my judgment, it is quite clear that a person cannot be said to be in possession of some article which he or she does not realise is, or may be, in her handbag, in her room, or in some other place over which she had control. That, I should have thought, is elementary; if something were slipped into one's basket and one had not the vaguest notion it was there at all, one could not possibly be said to be in possession of it.

It is clearly recognised that knowledge is involved in the concept of possession. The question now, is to decide to what degree knowledge is relevant. Lord Parker went on to say:

> . . . in my judgment, under this provision, while it is necessary to show that the appellant knew she had the articles which turned out to be a drug, it is not necessary that she should know that in fact it was a drug and a drug of a particular character.[10]

If Lord Parker's observations are still good law, it is only the knowledge of the existence of some article over which one can exercise control that is relevant in "possession."

An offence of being in possession of a prohibited article may be held by the courts to be one in which a *mens rea* is an essential element. It is only in this situation that the knowledge of the character of the article or substance is relevant. The guilty knowledge is not an ingredient in the concept of "possession" in such an offence, but an ingredient in the offence of being in possession of a prohibited article. In offences of this type the word "knowingly" or a word of like kind is usually inserted in the section creating the offence.

Any ambiguity is removed if the mental element in the concept of "possession" is related solely to the defendant's conduct. This conduct involves the responsibility for the physical existence of the article on the person of the defendant and in no way relates to knowledge of the nature of the article.

The question of possession of a prohibited drug came before the House of Lords in *Warner's* case. The decision itself is very hard to analyse because of the different approaches of their Lordships. Lord Morris and Lord Guest clearly are in favour of the view expressed by Lord Parker C.J. in *Lockyer* v. *Gibb*. But Lord Pearce, whose approach appears to be endorsed by Lord Wilberforce would extend the mental ingredient in "possession."

Lord Pearce said that the defendant need not know the name and nature of the drug. He said:

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9. Ibid., p. 655F.
10. Ibid.

> I think that the term 'possession' is satisfied by a knowledge only of the thing itself and not its qualities, and that ignorance or mistake as to its qualities is not an excuse. This would comply with the general understanding of the word 'possess.' Though I reasonably believe the tablets which I possess to be aspirin, yet if they turn out to be heroin I am in possession of heroin tablets. This would be so I think even if I believed them to be sweets. It would be otherwise if I believed them to be something of a wholly different nature. At this point a question of degree arises as to when a difference in qualities amounts to a difference in kind . . . [11]

It is sufficient under Lord Parker's test to show that the defendant merely knew she had an article that turned out to be a drug. Lord Pearce goes further and says that what must be shown is that the defendant knew he had an article which turned out to be a drug and he must know that the article is something that differs from a prohibited drug only in quality. If the defendant could show he believed the article to be something of a wholly different nature than drugs then he would not be in possession of them.

It is submitted with respect that his Lordship has introduced a rather difficult distinction between kind and quality which he states is purely a question of degree.

Lord Pearce tried to introduce into "possession" a more exact knowledge of the article than had been recognised previously. Although this would have advantages it would appear to go further than the knowledge involved in the term "possession" as it is usually understood.

It is suggested that the term "possession" as used in the Narcotics Act must still be interpreted in accordance with the observations of Lord Parker in *Lockyer* v. *Gibb*.

Any further knowledge other than mere knowledge of the article in one's custody in offences under s. 6 (i) and s. 7 (i) (c) is not part of the *actus reus* of the offence. Whether it is relevant in these offences to show any further knowledge other than that involved in the term "possession" will now be considered.

2. *The Nature of the Offence of Possession under the Narcotics Act*

Where the existence or degree of the mental element involved is not clearly defined in the statute creating the offence the courts must seek Parliament's intention as to the nature of the offence. In seeking this intention the courts will always presume that *mens rea* is an essential element in every offence. This presumption, however is rebuttable, for Parliament, being a sovereign body can create offences of strict liability if so minded.

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11. [1969] 2 A.C. 256, 305.

Their Lordships in *Warner's* case considered the nature of the offence of possession under s. 1 (1) of the Drugs (Prevention of Misuse) Act 1964. Once again because of the differing approaches of the Law Lords it is difficult to ascertain the majority finding. Both Lord Guest and Lord Morris were of the opinion that the offence was one of strict liability. Their reasons were primarily based on the evils which the Act was expressly designed to suppress. Lord Guest stated:

> If . . . this is not an absolute offence the prosecution will, in my view, require to establish knowledge by the accused not only of possession of the actual substance but also knowledge of the nature of the substance namely, that it is a prohibited drug under the Act . . . to require mens rea would very largely defeat the purpose and object of the Act.[12]

Lord Pearce, whose views were endorsed (although, with respect, somewhat vaguely) by Lord Wilberforce, saw three possible methods by which Parliament may have intended to penalise the unauthorised possession of certain drugs. These methods were:

(i) *mens rea* in the full sense as an element of the offence;
(ii) the offence to be one of strict liability;
(iii) Parliament may have intended what was described as a "half-way house." Proof of possession of the drugs here would be enough to throw on the defendant the onus of establishing his innocence.

Lord Pearce felt this third approach could not be adopted for "ultimately the burden of proof is always on the prosecution unless it has been shifted by any statutory provision."[13] Consequently he felt compelled to hold the offence to be one of strict liability.[14] To hold otherwise would be to stultify the practical efficacy of the Act.

It is submitted that any New Zealand court would adopt the same approaches as those stated above in *Warner's* case when considering the nature of an offence under s. 6 (I) or s. 7 (I) (c) of the Narcotics Act. In fact the same approach has been taken in this country, for Wild C.J. in *Brundhorst* v. *Police*[15] rejected the argument that *mens rea* is an essential ingredient in an offence under s. 6 (1) of the Narcotics Act and held the offence to be one of strict liability.

Consequently the observations of Lord Reid in holding the offence in *Warner* to be one involving *mens rea* would be of little significance to a later court deciding the same issue if one is to decide the question on the basis of the decision in *Warner*. But it is submitted that as a result of the decision of the House of Lords in *Sweet* v. *Parsley*[16] the

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12. Ibid., 301C.
13. Ibid., 303C.
14. Ibid., 306C.
15. This unreported decision was referred to by Luxford S.M. in *Police* v. *Young* (1967) 12 M.C.D. 108, 109.
16. [1969] 2 W.L.R. 470.

offence of possession of a narcotic should not be held to be one of strict liability.

Although the offence in *Sweet* v. *Parsley* was not an offence of possession but one of being concerned in the management of premises used for the smoking of cannabis, their Lordships were offering some statement of principles applicable to drug offences in general. In view of their observations any subsequent court must take into account their findings.

Lord Reid in *Warner* was reluctant to hold the offence to be one of strict liability for strict liability in the past had been limited to quasi-criminal offences that were not of a serious nature:

> . . . there is a long line of cases in which it has been held with regard to less serious offences that absence of *mens rea* is no defence . . . These are only quasi-criminal offences and it does not really offend the ordinary man's sense of justice that moral guilt is not of the essence of the offence.[17]

In relation to drug offences, Lord Reid was of the opinion that because of the serious and criminal nature of the offence Parliament clearly would not have intended strict liability.

The position then in *Warner* is that Lord Reid is reluctant to find the offence to be one of strict liability because it did not come within the type of offence that had previously been held to be offences of strict liability. The other Law Lords, in differing degrees, on the other hand, were reluctant to find the offence was anything but one imposing strict liability, for to decide otherwise would reduce the effect of the statute.

It is with this discussion in mind that *Sweet* v. *Parsley* is now analysed. It is strongly suggested that this case provides a guideline that will enable courts to sidestep the dilemma that faced their Lordships in *Warner*.

Brief reference has been made to the "half-way house" approach which was discarded by Lord Pearce in *Warner*. He, along with the other Law Lords would not entertain the possibility of the section there in issue creating an offence of this nature without the clear intention of Parliament.

It is submitted that the "half-way house" approach should be adopted by the courts because it would provide a sensible approach to the possession offences in the Narcotics Act.

In *Sweet* v. *Parsley* Lord Reid made observations on a "half-way house" type of offence between an offence involving *mens rea* and one of strict liability.

> The choice (as to the nature of the offence) would be more

17. [1969] 2 A.C., 271-2.

> difficult if there were no other way open than either *mens rea* in the full sense or an absolute offence; . . . But there are at least two other possibilities. Parliament has not infrequently transferred the onus as regards *mens rea* to the accused so that once the necessary facts are proved, he must convince the jury on the balance of probabilities he is innocent of any intention. I find it a little surprising that more use has not been made of this method; but one of the bad effects of the decision of the House in *Woolmington* v. *Director of Public Prosecutions* [1935] A.C. 462 may have been to discourage its use.[18]

Lord Reid felt that although this method may not be wholly satisfactory the public scandal of convicting on a serious charge persons who are in no way blameworthy would be avoided.

Lord Pearce, too, considered the advantages of the half-way house approach but he felt there were difficulties involved in adopting it:

> Admittedly, if the prosecution have to prove a defendant's knowledge beyond reasonable doubt, it may be easy for the guilty to escape. But it would be very much harder for the guilty to escape if the burden of disproving *mens rea* or knowledge is thrown on the defendant. And if that were done, innocent people could satisfy a jury of their innocence on the balance of probabilities . . .
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> If it were possible in some so called absolute offences to take this sensible half-way house; I think the courts should do so. This has been referred to in *Warner's* case. I see no difficulty in it apart from the opinion of Viscount Sankey L.C. in *Woolmington* v. *Director of Public Prosecutions* [1935] A.C. 462. But so long as the full width of that opinion is maintained, I see difficulty.[19]

It is submitted that the difficulty envisaged by his Lordship is not a difficulty at all. So long as the defendant does not have to bear the burden of a persuasive onus of proof there is no conflict with *Woolmington*. The burden on the defendant here is an evidential burden. So long as the defendant does not have to prove beyond reasonable doubt the existence of mistaken belief but merely to throw a reasonable doubt as to its non-existence there is no problem.

The difficulty which Lord Pearce talks of involves the persuasive burden; the half-way house approach involves only the evidential burden. This is shown by Lord Diplock:

> *Woolmington's* case affirmed the principle that the onus lies on the prosecution in a criminal trial to prove all the elements of the offence with which the accused is charged . . . *Woolming-*

18. [1969] 2 W.L.R. 470, 474H.
19. Ibid., 481F-482B.

> *ton's* case did not decide anything so irrational as 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 . . . What *Woolmington's* case did decide is that where there is any such evidence the jury after considering it and also any relevant evidence called by the prosecution on the issue of the existence of the alleged mistaken belief should acquit the accused unless they feel sure that he did not hold the belief or that there were no reasonable grounds upon which he could have done so.[20]

There is, therefore, no reason why the courts cannot now adopt this sensible half-way house approach. It is not as if a new type of offence was being created for Stephen J. in *R.* v. *Tolson*[21] found that a necessary element in an offence is the absence of a belief, held honestly and on reasonable grounds in the existence of facts which, if true, would make the act an innocent one.

In light of the views of their Lordships in *Sweet* v. *Parsley* the existence of the half-way house approach can freely be recognised.

The possibilities that this approach open up are strong reasons why the views of the law lords in *Warner's* case should, with respect, no longer stand. If there is an alternative approach to strict liability that will still ensure enforcement of the provisions of the Act then how can one impute to Parliament an intention to create an offence of strict liability? For Parliament has always intended to prevent innocent persons from being convicted.

It is submitted that the courts would not be carrying out the will of Parliament if the offence of possession of a prohibited drug was now held to be one of strict liability. The widespread evasion of the Act talked of by Lord Guest would not take place if the offence were of the "half-way house" type.

POSSESSION UNDER SECTIONS 6 AND 7 OF THE NARCOTICS ACT

The position under the New Zealand Act will now be discussed.

Section 6 (1) of the Narcotics Act 1965 states that "Except pursuant to a licence under this Act . . . no person shall procure, receive, store, or have in his possession . . . any narcotic."

Under s. 7 (1) "Every person commits an offence against this Act who — (c) Except as may be provided by regulations made under this Act, has in his possession the seed of any prohibited plant which he is not authorised under this Act to cultivate . . . "

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20. Ibid., 488B.
21. (1889) 23 Q.B.D. 168.

In s. 15 the general penalty which relates to offences including those in ss. 6 and 7 is stated to be a term of imprisonment not exceeding three months or to a fine not exceeding £200 or both.

Offences under ss. 6 and 7 are offences of a criminal nature and although the penalty is only a maximum of three months as compared with a maximum of fourteen years in *Sweet* v. *Parsley*, it is submitted that there is sufficient stigma involved in a conviction under those sections to prevent a court from finding the offence to be one of strict liability. This is especially so now the courts have acknowledged the existence of the "half-way house" approach.

The question of the nature of an offence under s. 5 (1) (e) came before the New Zealand Court of Appeal in *R.* v. *Strawbridge*.[22] North P. stated:

> But we think it emerges from recent authorities that the Courts will insist on Parliament expressing if it intends to subject citizens to conviction for offences carrying heavy penalties even in absence of *mens rea* on their part.

The attitude the Court ought to adopt in the case of serious offences was well expressed by Lord Reid in *Sweet* v. *Parsley*[23] in a passage North P. adopted. Lord Reid's view was that *mens rea* is an essential ingredient unless otherwise shown. Where there is no clear intention that the offence is intended to be absolute then the court must go outside the Act and examine all relevant circumstances in order to establish that this must have been the intention of Parliament. If it is not proved conclusively that the offence was intended to be absolute, then because of the principle that if a penal provision is reasonably capable of two interpretations, the one most favourable to the accused must be adopted.

Offences under ss. 6 and 7 are offences of a serious nature and there can be imputed to Parliament no clear intention to create an offence of strict liability. The half-way house approach is clearly more favourable to the defendant and the sections should be regarded as creating an offence of this nature and not one of strict liability.

A clear statement on the New Zealand position was made by North P. in *Strawbridge* in relation to the exact nature of the mental element in offences of the half-way house type. His view[24] is that when the section creating the offence does not require one to knowingly do the prohibited act, "We are prepared then to accept the reasoning of Lord Diplock in *Sweet* v. *Parsley* and with him to hold that unless s. 5 (1) (c) is to be read as creating an absolute offence it is open to an accused person to point to evidence which tends to show that he or she did not know that the plant which was being cultivated was a

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22. [1970] N.Z.L.R. 909.
23. Ibid., 911, line 10.
24. Ibid., 915, 916.

prohibited plant . . . [T]here is nothing in *Woolmington's* case which stands in the way of our adopting what Lord Pearce referred to as a 'sensible half-way house'."

As a result of *Strawbridge,* the New Zealand interpretation of the half-way house approach is submitted to be as follows: knowledge of the wrongfulness of the act will be presumed in the absence of evidence to the contrary. The burden of proof (or disproof) lies on the accused to point to some evidence which creates a reasonable doubt that he did not have a guilty mind. North P. states that the defendant must point to evidence to show that she honestly believed on reasonable grounds that the act was innocent.[25] This introduces the notion of negligence into the half-way house type of offence. Lord Diplock in *Sweet* v. *Parsley* also is of the opinion that the jury should acquit unless they are sure that the defendant did not hold the belief or that there were no reasonable grounds on which he could have held the belief. It is to be noted that the basis for this view is to be found in Stephen J.'s judgment in *R.* v. *Tolson.*

It would appear that at least as far as New Zealand is concerned, and probably also in England, the defendant's mistaken belief or ignorance of the true nature of the article he possesses must be based on reasonable grounds if he is to be entitled to an acquittal.

This was the interpretation in *Strawbridge;* an interpretation that is binding on New Zealand courts when dealing with an offence under s. 5 of the Narcotics Act. It is strongly suggested that the same approach should be taken to offences under ss. 6 and 7 of the Narcotics Act 1965.

From the above discussion on the legal concept of "possession" and the nature of the offence under ss. 6 (1) and 7 (1) (c) it is therefore submitted that a clear and unambiguous interpretation can be given to these sections.

The approach of the courts could well be as follows:

(1) The prosecution must prove that the defendant is knowingly in control of some article or substance that turns out to be prohibited under the Narcotics Act. The defendant need not be shown to know of the nature of the article i.e. that it is a narcotic or seed of a prohibited plant.

(2) Proof of possession is proof of possession of the drug i.e. once the prosecution has proved the prohibited article or substance was in the defendant's possession, the defendant is presumed to have knowledge of the existence of the drug in his possession.

(3) It is then open to the defendant to point to evidence to raise a reasonable doubt as to the knowledge that has been imputed to him. If he can show that he honestly believed, on reasonable grounds, a state of facts which, if they existed, would make his act innocent, he is entitled to an acquittal.

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25. Ibid., 916, line 40.

In arriving at the conclusion that ss. 6 and 7 of the Narcotics Act should be read in this way, not only the interpretation of the section and the subject matter of the offence has been taken into account but also the severity of the penalty. These matters have been considered recently in several New Zealand cases that do not appear to be reconcilable. The cases show the need for clarification of the ingredients of the offence created by the sections.

The prosecution must show that the defendant possessed the prohibited article. If the defendant can persuade the court that he had no knowledge at all or any awareness of being physically in custody or control of an article prohibited under the Act, then the case must fail for no *actus reus* has been shown.[26]

In an unreported reserved decision delivered in the Invercargill Magistrate's Court on 15 September 1970[27] Mr Nicholson S.M. held the offences under s. 7 of the Narcotics Act to be of strict liability. His Worship adhered closely to the views of Lord Morris and Lord Guest in *Warner*. It has been attempted to show that so far as the nature of the offence of possession under the Narcotics Act is concerned, their views are no longer tenable. His Worship is of the opinion that the English courts were unwilling to commit themselves to the half-way house approach in the absence of statutory provision expressly shifting the onus of proof to the defendant. It is respectfully submitted that in view of Lord Diplock's observations in *Sweet* v. *Parsley* and North P.'s statement in *Strawbridge* the courts should no longer be unwilling to commit themselves to the half-way house approach. The onus on the defendant is purely an evidential burden and is in accordance with the finding of Stephen J. in *R.* v. *Tolson*. The defendant should be entitled to introduce evidence to show an honest belief based on reasonable grounds that his act was innocent.

Another point raised by Nicholson S.M. was that Strawbridge's offence was classed as a half-way one purely because of the heavy penalty of fourteen years; the Court of Appeal could not accept that Parliament intended a person with an innocent mind should be liable to such a penalty.

It is respectfully suggested that the deprivation of liberty is the important factor and therefore the maximum penalty of three months imprisonment under ss. 6 and 7 makes the offences created by these sections offences of the same type. This is especially the case when one considers that the innocent person need not be convicted at all if the sensible half-way house approach is adopted.

A Magistrate's Court decision was given on the question of possession under s. 6 (1) by Mr. Wicks S.M. in an oral decision on 11 June 1971.[28] His Worship felt bound by *Strawbridge* "so that

26. This approach was adopted by H. J. Evans S.M. in *Police* v. *Tatton*, unreported Christchurch Magistrate's Court decision delivered 22.2.71. See also judgment of Perry J. in *Fletcher* v. *Police* at Hamilton 17.5.71.
27. *Police* v. *Takashi Onishi*.
28. *Police* v. *Drysdale*.

if I am satisfied that the defendant honestly believed on reasonable grounds that his act was innocent then he is entitled to be acquitted." This is the approach that should be adopted by the courts when considering all the offences of possession under the Narcotics Act 1965. The difficulties envisaged by the English courts would be overcome and the position in New Zealand with respect to drug possession offences would be clear.

It is submitted that it is impossible to come to any conclusion other than finding these offences to be ones in which the sensible half-way house gives the most realistic approach. The acceptance by the courts of this third type of offence, unhindered by any difficulties in application, should overcome the problems expressed by the Law Lords of the House of Lords in *Warner's* case.

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