

## **TOPIC 4: STRICT AND ABSOLUTE LIABILITY**

### Presumption and Application:

- Introduction: where a provision is silent in relation to whether there is a fault element, there is a rebuttable law presumption that the offence requires proof of a fault element (*HKT*)
- How to apply the *HKT* test:
  - o Go through each element of the given legislative provision (i.e. section by section)
  - o Identify whether provision rebuts the presumption (i.e. may be 'strict' or 'absolute' liability)
  - o Apply the test again to determine if the provision is 'strict' or 'absolute' (i.e. whether the defence of HRMF applies)
- *HKT*:
  - o Facts: D entered Australia with heroin in the false bottom of a suitcase. He claimed he had no knowledge of the drugs.
  - o Held: Prosecution had to prove D knew he was importing drugs

### Three factor test:

- Principle: the common law has noted that the following elements help in considering if the presumption has been rebutted (see *HKT*)
  - o Language of the provision
  - o Subject matter of the offence
  - o Policy implications (social utility)

#### 1. Language of the Provision:

- Consider whether the language is 'mandatory, absolute objective and based on general prohibition' (*Allens*) → points towards presumption being rebutted
  - o Cf 'subjective', 'discretionary' etc. (points towards presumption being maintained)
  - o 'Shall not' – strongest language could be used (objective based prohibition) (*Allens*)
    - Can be analogised with the term 'must'
  - o 'Without reasonable excuse' → unclear, can go either way (*HKT*)
  - o 'Allow or permit'
    - Implicitly connote some type of fault?
    - A person should not allow X to occur – allowing something to occur, entails you know it's going on and permit it to happen
  - o Consider whether other sections of the Act expressly requires a fault element but note: this is not in itself sufficient to justify exclusion of fault (*Sweet*)
    - Important for criminal law acts – normally require fault elements
  - o Consider whether any words reference knowledge (e.g. possession: *HKT*), dishonesty or recklessness (Note: this in and of itself is not sufficient)
  - o Note: court may adduce external materials to determine Parliament's intention

#### 2. Subject matter of offence

- Seriousness of conduct
  - o More serious offence = less likely that Parliament intended it to be SL
    - Consider punishment for offence → imprisonment suggests greater need for fault element to be established
    - Consider whether provision regulates non-criminal conduct for general community benefit (i.e. is the provision purely regulatory)
    - Consider the harm sought to be addressed → great need for effective enforcement (*Kearon*)
  - o Severity of punishment
    - More serious consequences → stronger presumption of fault element (*Kearon*)

#### 3. Policy implications (social utility)

- Consequences for the community
  - o Consider whether enforcement would be significantly undermined if proof of fault element was required
    - i.e. consider if requirement of fault would cause delays with effective enforcement
  - o Consider what effects/harm offence would cause to the community
  - o Consider if any inherent difficulties with proving fault
- Consequences to the accused

- Consider if there is any moral culpability
- What are the consequences to the accused (e.g. imprisonment, fine etc.)

Conclusion:

- Presumption of SL: if presumption of MR is rebutted, there is a rebuttable presumption that the provision is a SL offence (i.e. defence of HRMF) is available (*Proudman*)
  - Rebutting presumption: above presumption may be rebutted by apply *HKT* factors (*Allens*)
  - Note: may need to separate elements within individual provision to determine if SL or AL (e.g. age → HRMF not deemed defence: *Azadai*)
- Conclusion:
  - If SL: consider whether defence of HRMF arises on the facts
  - If AL: D is guilty of offence if AR elements are proven. HRMF is not available for AL offences

Strict or absolute liability offence

- Presumption of SL: if presumption of MR is rebutted, there is a rebuttable presumption that it is a SL offence (*Proudman*)
- Rebutting presumption: above presumption may be rebutted by applying HKT factors (see above) (*Allens*)

<i>Allen v United Carpet Mills</i>	
<b>Facts:</b>	<ul style="list-style-type: none"> <li>- D1 incorrectly hooked up hoses from his tanker to storage tanks, causing rubber latex to pollute the Darebin creek</li> <li>- D2 owned the storage tanks, and had no idea what D1 was doing, and had taken steps to prevent this kind of thing from happening.</li> <li>- D1 and D2 were charged under Environment Protection Act s.39:</li> <li>- A person shall not cause or permit any waters to be polluted so that the physical, chemical or biological condition of the water is so changed as to make or be reasonably expected to make those waters —               <ul style="list-style-type: none"> <li>- harmful or potentially harmful to ... fish or other aquatic life;</li> <li>- detrimental to any beneficial use made of those waters.</li> </ul> </li> <li>- Penalty: \$10,000 plus \$400/day after conviction (if it continues)</li> </ul>
<b>Issue:</b>	Was the offence a crime of strict liability or absolute liability?
<b>Held:</b>	<p>Absolutely liable, applying the <i>HKT</i> test</p> <ol style="list-style-type: none"> <li>1. <b>Wording</b> - 'Shall not cause or permit' was stated in absolute terms. Avoided 'knowingly cause' or 'negligently cause'.</li> <li>2. The <b>subject matter</b> of the statute was environmental pollution – creates a heavy burden and cost on the community – here the offence was on public land</li> <li>3. <b>The utility / public policy?</b> \$10,000 fine '<i>whether intentionally or by neglect or sheer inadvertence causing escape of damaging pollutants.</i>' The financial consequences for the company are not high compared to incarcerated individuals. Consequences to ecosystem would be severe.</li> </ol>

<i>Kearon v Grant</i>	
<b>Facts:</b>	<p>D was charged with speeding in the following circumstances:</p> <ul style="list-style-type: none"> <li>- He was travelling on a highway with a 100kph speed limit</li> <li>- He approached road works with an associated sign reducing the limit to 60kph</li> <li>- There was no sign at the end of the road works, but he assumed he could return to 110kph (as did the other cars around him)</li> </ul>
<b>Issue:</b>	Is speeding a strict or absolute liability offence?
<b>Held:</b>	<ul style="list-style-type: none"> <li>- Balanced importance of safe driving, potentially harmful consequences to the community of speeding (being death, injury and economic loss), inconvenience to Prosecutors to prove fault in every case and clog up the courts, versus little stigma (attached to conviction) and low penalty (for the offence)</li> <li>- Unlikely that Parliament intended it to be a strict liability offence</li> <li>- D is <b>Absolutely Liable</b> for speeding</li> </ul>

<b>Azadzo v CCV</b>	
<b>Facts:</b>	D was convicted of three charges committing an indecent act in the presence of a child aged under 16 years under s 47 of the CA
<b>Issue</b>	Was this an absolute liability offence, or would D have a defence if he honestly and reasonably believed V was 16?
<b>Held:</b>	The purposes of the section are to protect children under the age of 16 years from exposure to indecent acts and to deter potential offenders from engaging in such acts <ul style="list-style-type: none"> <li>- AL promotes these purposes by imposing on potential offenders a duty of greater vigilance to avoid liability</li> <li>- The terms, subject matter and purpose of the legislation all indicate that the parliament intended the crime to be one of AL in respect to the age of the victim (the independent act still needed AL)</li> </ul>

Honest and Reasonable Mistake of Fact (HRMF):

- Only available for SL offences (not AL offences)
- Onus: accused has the evidentiary burden of raising the defence and prosecution must then disprove it BRD
- Actus reus: prosecution must first provide that D has committed the act in question (i.e. that the AR elements are met)
- Test for mistake: D must have had an honest and reasonable belief regarding a state of facts which, if true, would render D's conduct innocent (*Proudman*)
- Two ways to approach this:
  - o Just one big long analysis based on this general test
  - o Split this up into small components – Sally takes this approach

Requirements:

- D must have made a mistake
  - o D must have positively held an erroneous belief (*Proudman*)
  - o Ignorance and indifference are insufficient (*Proudman*) → must have considered the issue and formed a wrong conclusion
- Mistake must have been one of fact (not law) (*CTM*)
  - o It is insufficient that D believed their actions were not regulated by law/satisfied the law (*Ianella*)
    - Includes D who is mistaken as to legal significance of fact, the legal conclusions to draw from a fact or ignorant of law (*Otrowski; Esop*)
  - o Erroneous advice about the state of law will not exonerate individuals (*Otrowski; Proudman*) even where supplied by government authority
  - o If compound event (i.e. mistake is one of fact and law) → usually treated as mistake of fact (*Thomas*)
- Mistake must have been honest
  - o **Subjective test:** determine whether D genuinely believes erroneous fact (*CTM*)
- The mistake must have been reasonable
  - o **Objective test:** consider whether a reasonable person would have formed the same mistaken belief
- If the mistaken fact were true, it must have rendered the accused's conduct innocent
  - o Must be the case that if the mistaken fact were true, it would have rendered the conduct of D innocent (*CTM; Mayer v Marchant*)
    - Consider situation where even if mistaken fact was true, it would still breach legislative provision
    - *Mayer v Marchant*: truck driver thought the weight was different, however even if he did have that weight, he still would have been in breach of the legislative provision, was irrelevant
  - o Third party involvement: consider whether D could have reasonably been expected to protect themselves/whether the conduct of other party was outside their control

***Proudman v Dayman***

<b>Facts:</b>	D was charged with lending her car to an unlicensed driver to drive. She didn't know he was unlicensed.
<b>Held:</b>	<ul style="list-style-type: none"> <li>- HRMF was a defence to the relevant charge</li> <li>- It requires the mistaken belief to be positively held – ignorance, indifference or carelessness is not sufficient.</li> <li>- D had not turned her mind to the issue of whether her friend had a licence, so the defence could not succeed.</li> </ul>

### ***R v Esop (1836) 173 ER 203***

<b>Facts:</b>	<ul style="list-style-type: none"> <li>- D was charged with sodomy (at a time when it was a crime in England).</li> <li>- D came from a country where sodomy was not a crime. He did not realise it was a crime in England</li> </ul>
<b>Issue</b>	Mistake of fact or law?
<b>Held:</b>	<ul style="list-style-type: none"> <li>- Mistake of law</li> <li>- D will be guilty even though he did not know that the <i>actus reus</i> was forbidden by the criminal law.</li> <li>- Ignorance of the law is no defence.</li> </ul>

### ***Thomas v R (1937) 59 CLR 279***

<b>Facts:</b>	<ul style="list-style-type: none"> <li>- W was previously married to X, but the marriage was legally dissolved.</li> <li>- D married W.</li> <li>- W repeatedly told D (wrongly) that her prior marriage had never been legally ended and that she was therefore not his wife. She left with another man.</li> <li>- D wrongly believed he was not married to W, and married another woman. He was charged with bigamy.</li> </ul>
<b>Issue</b>	Mistake of fact or law?
<b>Held:</b>	Mistake of fact, but could be classified either way: <ul style="list-style-type: none"> <li>- The belief that he was not married (a mistake of fact) was based on the belief that W's previous marriage had never legally ended (a mistake of law)</li> <li>- A mistake about the existence of a compound event consisting of law a fact should usually be treated as a mistake of fact</li> <li>- So D was not guilty of bigamy</li> </ul>

### ***Iannella v French (1968) 119 CLR 84***

<b>Facts:</b>	<ul style="list-style-type: none"> <li>- D owned a house that was subject to rent controls under the <i>Housing Improvement Act 1940 (SA)</i></li> <li>- He read a newspaper article which said that rent controls under the <i>Landlord and Tenant (Control of Rents) Act 1942–1961 (SA)</i> had expired</li> <li>- He mistakenly thought this meant he was free of rent controls and increased the rent on his property.</li> <li>- He was charged with a breach of the <i>Housing Improvement Act</i>.</li> </ul>
<b>Issue</b>	Mistake of fact or law?
<b>Held:</b>	<ul style="list-style-type: none"> <li>- Taylor and Owen: mistake of law (currency of relevant statute)</li> <li>- Barwick CJ and Windeyer: mistake of fact (whether the house was rent controlled)</li> <li>- The decision of Barwick CJ as the Chief Justice prevailed</li> </ul>

### ***Ostrowski v Palmer (2004) 218 CLR 493***

<b>Facts:</b>	<ul style="list-style-type: none"> <li>- D was a commercial fisherman who wanted to fish for lobster</li> <li>- He asked the relevant government agency (Fisheries WA) where he was permitted to do so</li> <li>- He was given documents which he was told were comprehensive and sufficient</li> <li>- The documents were actually deficient, and did not identify a certain prohibited area.</li> <li>- D fished in that area and was charged</li> </ul>
<b>Issue</b>	Mistake of fact or law?

<b>Held:</b>	Mistake of law <ul style="list-style-type: none"> <li>- Didn't matter it was induced by fisheries WA, was convicted but didn't have to pay penalty or costs – SL offence</li> <li>- Unclear which way it could go but make best guess – note the uncertainty</li> </ul>
--------------	---

***CTM v The Queen***

<b>Facts:</b>	<ul style="list-style-type: none"> <li>- V was a 15 year-old girl. Was drinking and fell asleep at D's house</li> <li>- D was a 17 year-old boy. He allegedly sexually assaulted V.</li> <li>- D was charged with having sex with a person aged between 14 and 16.</li> <li>- D told the police that V had told him she was 16</li> </ul>
<b>Issue</b>	Was the HRMF available as a defence?
<b>Held:</b>	<ul style="list-style-type: none"> <li>- As a matter of statutory construction, an HRM that V was 16 years is a defence to the relevant charge</li> <li>- But there was no evidence to support D's claim that he believed V was 16.</li> <li>- As the evidential burden was not met, the prosecution did not need to disprove the defence.</li> </ul>