

Criminal Law Summary Notes

Strict Liability and Absolute Liability Offences

Strict Liability Offences

Strict Liability crimes are those that, by way of express statutory statement or judicial interpretation, do not require proof of fault.

Therefore a crime of strict liability is one, which by definition does not require the prosecution to prove that the accused acted with ordinary negligence or any of the recognised mens reas.

Nearly all strict liability offences exist in statutory form

The issue of whether a statutory offence is one of strict liability arises where an offence does not expressly include negligence or a mens rea as one of its constituent elements.

At common law there is a rebuttable presumption that all statutory offences require proof of a mens rea (*He Kaw Teh v The Queen* (1985) 157 CLR 523).

Factors relevant to determining if an offence is one of strict liability

Factors the court takes into account:

- The words of the statute
- The severity of the penalty
- The utility in making the offence strict liability
- The harm sought to be prevented
- Moral culpability

Words of the statute

In determining whether an offence is one of strict liability, the words of the statute are obviously paramount.

-It could be argued that the failure of the legislature to expressly incorporate a fault element leads inexorably to the conclusion that it intended the offence to be one of strict liability (*Mayer v Marchant* (1973) 5 SASR 567 at 585).

-It can also be argued that had the legislature intended to include a fault element, it would have done so expressly. Given that the legislature would be aware of the common law presumption that all offences require a mens rea element (*Sweet v Parsley* [1970] AC 132).

Maximum penalty

The higher the penalty, the less likely it is that the offence does not require a mens rea element (*He Kaw Teh v The Queen* (1985) 157 CLR 523).

Thus, where an offence is punishable by a term of imprisonment, this is a factor that militates strongly in the favour of the presumption that proof of a mens rea is required.

The utility in making the offence strict liability

As a major objective of criminalizing conduct is to deter people from engaging in that conduct, the common law presumption that all offences require mens rea will only be displaced if people are able to take measures to prevent the actus reus occurring.

It was held in *He Kaw Teh*, that such a legislative intent will only be found in instances where an accused can take reasonable measures to prevent the actus reus from coming into existence (*He Kaw Teh v The Queen* (1985) 157 CLR 523).

Accordingly offences, which make one liable for the conduct of others, are unlikely to be construed as ones of strict liability.

The harm sought to be prevented

In *R v Kennedy* the Court took the view that the greater the social harm to which the offence is directed, the less likely it is that the offence requires mens rea (*R v Kennedy* [1981] VR 565).

In *He Kaw Teh*, the High Court took the opposite approach. The greater the social harm that the offence seeks to prevent, the greater the penalty that is normally attached to the offence and, hence, the less likely it is that the offence will be found to be one of strict liability (*He Kaw Teh v The Queen* (1985) 157 CLR 523).

Moral Culpability

Acts that directly infringe upon the important interests of others (such as physical or mental integrity or property right) are morally offensive. Thus, matters of broad public safety, health, and welfare are less likely to require a mens rea (*Proudman v Dayman* (1941) 67 CLR 536).

The Proudman defence: Honest and reasonable mistake

Where an offence is one of strict liability, an accused who commits the actus reus of the offence will avoid liability where s/he had an honest and reasonable belief in the existence of facts, if true, would have made his or her conduct entirely lawful.

There must be a mistake of fact involved; the Proudman defence doesn't involve a mistake of law or ignorance of law (*Ostrowski v Palmer* (2004) 78 ALJR 957).

The Proudman defence requires a positive belief to have been formed by the accused, as opposed to mere ignorance. The mistaken belief relating to facts must have been causally linked to the accused conduct, such that if the mistaken belief were true the accused conduct would have been lawful (*State Rail Authority of NSW v Hunter District Water Board* (1992) 65 A Crim R 101).

As with other defences, in the case of the Proudman defence the accused bears the evidential burden of raising the defence and the legal burden falls on the prosecution to then negate the defence.

Instances where the accused is able to discharge the evidential burden the prosecution must prove beyond reasonable doubt that the accused's mistaken belief was not an objectively reasonable one.

The Proudman defence consists of four essential elements:

1. The mistaken belief must be genuinely and reasonably held
2. There must be an actual mistake and not mere ignorance
3. The mistake must be of fact and not law
4. The mistaken belief must relate to the existence of facts which, if true, would have made the accused's conduct lawful