Indexed as:

R. v. Sault Ste. Marie (City)

Her Majesty The Queen on the information of Mark Caswell,
appellant;
and
The Corporation of The City of Sault Ste. Marie, respondent.

[1978] 2 S.C.R. 1299

Supreme Court of Canada

1977: October 13, 14 / 1978: May 1.

Present: Laskin C.J. and Martland, Ritchie, Spence, Pigeon, Dickson, Beetz, Estey and Pratte JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Criminal law — Public welfare offences — Mens rea — Reasonable mistake as a defence — Scope of defence of due diligence — Offences not requiring proof of mens rea but not strict liability offences.

Criminal law — Duplicity — Water pollution — Provision prohibiting discharging or depositing or causing or permitting discharge that may impair water quality — Test for duplicity — The Ontario Water Resources Commission Act, R.S.O. 1970, c. 332, s. 32(1) — Criminal Code, ss. 724, 731.

The respondent City entered into an agreement with a company for the disposal of all refuse originating in the City. The company was to furnish a site and adequate labour, material and equipment. The site selected bordered Cannon Creek which runs into Root River. The method of disposal adopted was the "area" or "continuous slope" method of sanitary land fill, whereby garbage is compacted in layers which are covered each day by natural sand or gravel. The side had previously been covered with a number of fresh water springs that flowed into the creek. Material was dumped to submerge these springs and the garbage and wastes dumped over this material, ultimately to within twenty feet of the creek. Pollution resulted and the company was convicted of a breach of s. 32(1) of The Ontario Water Resources Commission Act. The City also charged under that section, which provides that every municipality or person that discharges, or deposits, or causes, or permits the discharge or deposit of any material of any kind into any water course, or on any shore or bank thereof is guilty of an offence. In dismissing the charge against the City the trial judge found that the City had nothing to do with the actual operations, that the company was an independent contractor and that its employees were not employees of the City. On appeal by trial de novo the judge found that the offence was one of strict liability and he convicted. The Divisional Court set aside the charge as duplicitous and also held that it required mens rea with respect to causing or permitting the discharge. The Court of Appeal, while rejecting the ground of duplicity as a basis to quash, as there had been no challenge to the information at trial, agreed that mens rea was required and ordered a new trial.

Held: The appeal and cross-appeal should be dismissed.

The primary test for duplicity should be the practical one based on the only valid justification for the rule against duplicity, the requirement that the accused know the case he has to meet and be not prejudiced in the preparation of his defence by ambiguity in the charge. In this case there was nothing ambiguous or uncertain in the charge. Section 32(1)

is concerned with only one matter, pollution, and only one generic offence was charged, the essence of which was "polluting". As the charge was not duplicitous it was not necessary to consider whether a duplicity objection can be raised for the first time on appeal.

Regarding mens rea the distinction between the true criminal offence and the public welfare offence is of prime importance. Where the offence is criminal mens rea must be established and mere negligence is excluded from the concept of the mental element required for conviction. In sharp contrast "absolute liability" entails conviction on mere proof of the prohibited act without any relevant mental element. The correct approach in public welfare offences is to relieve the Crown of the burden of proving mens rea, having regard to Pierce Fisheries, [1971] S.C.R. 5, and to the virtual impossibility in most regulatory cases of proving wrongful intention, and also, in rejecting absolute liability, admitting the defence of reasonable care. This leaves it open to the defendant to prove that all due care has been taken. Thus while the prosecution must prove beyond reasonable doubt that the defendant committed the prohibited act, the defendant need only establish on the balance of probabilities his defence of reasonable care. Three categories of offences are therefore now recognised (first) offences in which mens rea must be established, (second) offences of "strict liability" in which mens rea need not be established but where the defence of reasonable belief in a mistaken set of facts or the defence of reasonable care is available, and (third) offences of "absolute liability" where it is not open to the accused to exculpate himself by showing that he was free of fault. Offences which are criminal are in the first category. Public welfare offences are prima facie in the second category. Absolute liability offences would arise where the legislature has made it clear that guilt would follow on mere proof of the proscribed act.

Section 32(1) being a provincial enactment does not create an offence which is criminal in the true sense; and further the words "cause" and "permit" which are frequently found in public welfare statutes do not denote clearly either full mens rea or absolute liability and therefore fit much better into an offence of the strict liability class. As the City did not lead evidence directed to a defence of due diligence and the trial judge did not address himself to the availability of such a defence there should be a new trial to determine whether the City was without fault.

Cases Cited

Sherras v. De Rutzen, [1895] 1 Q.B. 918; R. v. Prince (1875), L.R. 2 C.C.R. 154; R. v. Tolson (1889), 23 Q.B.D. 168; R. v. Rees, [1956] S.C.R. 640; Beaver v. The Queen, [1957] S.C.R. 531; R. v. King, [1962] S.C.R. 746; Kipp v. A.G. (Ont.), [1965] S.C.R. 57; R. v. Surrey Justices, ex parte Witherick, [1932] 1 K.B. 450; R. v. Madill (No. 1) (1943), 79 C.C.C. 206; R. v. International Nickel Co. of Canada (1972), 10 C.C.C. (2d) 44; Kienapple v. The Queen, [1975] 1 S.C.R. 729; R. v. Matspeck Construction Co. Ltd., [1965] 2 O.R. 730; Ross Hillman Limited v. Bond, [1974] 2 All E.R. 287; R. v. Woodrow (1846), 15 M. & W. 404; R. v. Stephens (1866), L.R. 1 Q.B. 702; Proudman v. Dayman (1941), 67 C.L.R. 536; R. v. Strawbridge, [1970] N.Z.L.R. 909; R. v. Ewart, [1906] N.Z.L.R. 709; Sweet v. Parsley, [1970] A.C. 132; Woolmington v. Director of Public Prosecutions, [1935] A.C. 462; R. v. McIver, [1965] 2 O.R. 475; Maher v. Musson (1934), 52 C.L.R. 100; R. v. Patterson, [1962] 1 All E.R. 340; R. v. Custeau, [1972] 2 O.R. 250; R. v. Larocque (1958), 120 C.C.C. 246; R. v. Regina Cold Storage & Forwarding Co. (1923), 41 C.C.C. 21; R. v. A.O. Pope, Ltd. (1972), 20 C.R.N.S. 159, aff'd 10 C.C.C. (2d) 430; R. v. Hickey (1976), 29 C.C.C. (2d) 23 rev'd 30 C.C.C. (2d) 416; R. v. Servico Limited (1977), 2 Alta. L.R. (2d) 388; R. v. Industrial Tankers Ltd., [1968] 4 C.C.C. 81; R. v. Hawinda Taverns Ltd. (1955), 112 C.C.C. 361; R. v. Bruin Hotel Co. Ltd. (1954), 109 C.C.C. 174; R. v. Sheridan (1972), 10 C.C.C. (2d) 545; R. v. Cherokee Disposals & Construction Limited, [1973] 3 O.R. 599; R. v. Liquid Cargo Lines Ltd. (1974), 18 C.C.C. (2d) 428; R. v. North Canadian Enterprises Ltd. (1974), 20 C.C.C. (2d) 242; Lim Chin Aik v. The Queen, [1963] A.C. 160; Reynolds v. Austin & Sons Limited, [1951] 2 K.B. 135; R. v. Pee-Kay Smallwares, Ltd. (1947), 90 C.C.C. 129; Hill v. The Queen, [1975] 2 S.C.R. 402; R. v. Gillis (1974), 18 C.C.C. (2d) 190; Groat v. City of Edmonton, [1928] S.C.R. 522; Chasemore v. Richards (1859), 7 H.L.C. 349; Millar v. The Queen, [1954] 1 D.L.R. 148; R. v. Royal Canadian Legion, [1971] 3 O.R. 552; R. v. Teperman and Sons, [1968] 4 C.C.C. 67; R. v. Jack Crewe Ltd. (1975), 23 C.C.C. (2d) 237 referred to.

APPEAL and CROSS APPEAL from a judgment of the court of Appeal for Ontario [(1976), 13 O.R. (2d) 113.] allowing an appeal by the Crown and ordering a new trial after a judgment of the Divisional Court [13 O.R. (2d) 116.]

allowing an appeal by the accused and quashing, after trial de novo, a conviction on a charge under s. 32(1) of The Ontario Water Resources Commission Act.

R.M. McLeod and J.N. Mulvaney, Q.C., for the appellant.
R.J. Rolls, Q.C., and R.S. Harrison, for the respondent.

Solicitor for the appellant: Minister of the Attorney General for Ontario, Toronto.
Solicitors for the respondent: Fasken & Calvin, Toronto.

The judgment of the Court was delivered by

DICKSON J.:— In the present appeal the Court is concerned with offences variously referred to as "statutory," "public welfare," "regulatory," "absolute liability," or "strict responsibility," which are not criminal in any real sense, but are prohibited in the public interest. (Sherras v. De Rutzen [[1805] 1 Q.B. 918.]) Although enforced as penal laws through the utilization of the machinery of the criminal law, the offences are in substance of a civil nature and might well be regarded as a branch of administrative law to which traditional principles of criminal law have but limited application. They relate to such everyday matters as traffic infractions, sales of impure food, violations of liquor laws, and the like. In this appeal we are concerned with pollution.

The doctrine of the guilty mind expressed in terms of intention or recklessness, but not negligence, is at the foundation of the law of crimes. In the case of true crimes there is a presumption that a person should not be held liable for the wrongfulness of his act if that act is without mens rea: (R. v. Prince [(1987), L.R. 2 C.C.R. 154.]; R. v. Tolson [(1889), 23 Q.B.D. 168.]; R. v. Rees [[1956] S.C.R. 640.]; Beaver v. The Queen [[1957] S.C.R. 531.]; R. v. King [[1962 S.C.R. 746.]). Blackstone made the point over two hundred years ago in words still apt: "... to constitute a crime against human law, there must be first a vicious will, and secondly, an unlawful act consequent upon such vicious will ...," 4 Comm. 21. I would emphasise at the outset that nothing in the discussion which follows is intended to dilute or erode that basic principle.

The appeal raises a preliminary issue as to whether the charge, as laid, is duplicitous, and if so, whether ss. 732(1) and 755(4) of the Criminal Code preclude the accused City of Sault Ste. Marie from raising the duplicity claim for the first time on appeal. It will be convenient to deal first with this preliminary point and then consider the concept of liability in relation to public welfare offences.

The City of Sault Ste. Marie was charged that it did discharge, or cause to be discharged, or permitted to be discharged, or deposited materials into Cannon Creek and Root River, or on the shore or bank thereof, or in such place along the side that might impair the quality of the water in Cannon Creek and Root River, between March 13, 1972 and September 11, 1972. The charge was laid under s. 32(1) [See Note below] of The Ontario Water Resources Commission Act, R.S.O. 1970, c. 332, which provides so far as relevant, that every municipality or person that discharges, or deposits, or causes, or permits the discharge or deposit of any material of any kind into any water course, or on any shore or bank thereof, or in any place that may impair the quality of water, is guilty of an offence and, on summary conviction, is liable on first conviction to a fine of not more than $5,000 and on each subsequent conviction to a fine of not more than $10,000, or to imprisonment for a term of not more than one year, or to both fine and imprisonment.

Note: Section 32(1) reads as follows:

32. (1) Every municipality or person that discharges or deposits or causes or permits the discharge or deposit of any material of any kind into or in any well, lake, river, pond, spring, stream, reservoir or other water or watercourse or on any shore or bank thereof or into or in any place that may impair the quality of the water of any well, lake, river, pond,

spring, stream, reservoir or other water or watercourse is guilty of an offence and on summary conviction is liable on forest conviction of a fine of not more than $5,000 and on each subsequent conviction to a fine of nor more than $10,000 or to imprisonment for a term of not more than one year, or to both such fine and imprisonment.

Although the facts do nor rise above the routine, the proceedings have to date had the anxious consideration of five courts. The City was acquitted in Provincial Court (Criminal Division), but convicted following a trial de novo on a Crown appeal. A further appeal, by the City, to the Divisional Court was allowed and the conviction quashed. The Court of Appeal for Ontario on yet another appeal directed a new trial. Because of the importance of the legal issues, this Court granted leave to the Crown to appeal and leave to the City to Cross-appeal.

To relate briefly the facts, the City on November 18, 1970 entered into an agreement with Cherokee Disposal and Construction Co. Ltd., for the disposal of all refuse originating in the City. Under the terms of the agreement, Cherokee became obligated to furnish a site and adequate labour, material and equipment. The site selected bordered Cannon Creek which, it would appear, runs into the Root River. The method of disposal adopted is known as the "area", or "continuous slope" method of sanitary land fill, whereby garbage is compacted in layers which are covered each day by natural sand or gravel.

Prior to 1970, the site had been covered with a number of fresh-water springs that flowed into Cannon Creek. Cherokee dumped material to cover and submerge these springs and then placed garbage and wastes over such material. The garbage and wastes in due course formed a high mound sloping steeply toward, and within twenty feet of, the creek. Pollution resulted. Cherokee was convicted of a breach of s. 32(1) of The Ontario Water Resources Commission Act, the section under which the City has been charged. The question now before the Court is whether the City is also guilty of an offence under that section.

In dismissing the charge at first instance, the judge found that the City had had nothing to do with the actual disposal operations, that Cherokee was an independent contractor and its employees were not employees of the City. On the appeal de novo Judge Vannini found the offence to be one of strict liability and he convicted. The Divisional Court in setting aside the judgment found that the charge was duplicitous. As a secondary point, the Divisional Court also held that the charge required mens rea with respect to causing or permitting a discharge. When the case reached the Court of Appeal that Court held that the conviction could not be quashed on the ground of duplicity, because there had been no challenge to the information at trial. The Court of Appeal agreed, however, that the charge was one requiring proof of mens rea. A majority of the Court (Brooke and Howland JJ.A.) held there was not sufficient evidence to establish mens rea and ordered a new trial. In the view of Mr. Justice Lacourcière, dissenting, the inescapable inference to be drawn from the findings of fact of Judge Vannini was that the City had known of the potential impairment of waters of Cannon Creek and Root River and had failed to exercise its clear powers of control.

The divers, and diverse, judicial opinions to date on the points under consideration reflect the dubiety in these branches of the law.

The Duplicity Point

Turning then to the question of duplicity, and whether the information charged the City with several offences, or merely one offence which might be committed in different modes. The argument is that s. 32(1) of The Ontario Water Resources Commission Act charges three offences: (i) discharging; (ii) causing to be discharged; (iii) permitting to be discharged, deleterious material. The applicable principle is well-established: if the information in one count charges more than on offence, it is bad for duplicity: Kipp v. Attorney General for Ontario [[1965] S.C.R. 57.].

The rule against multiplicity of charges in an information is contained in s. 724(1) of the Code which reads as follows:

724. (1) In proceedings to which this Part applies, the information ...

(b) may charge more than one offence or relate to more than one matter of complaint, but where more than one offence is charged or the information relates to more than one matter of complaint, each offence or matter of complaint, as the case may be, shall be set out in a separate count.

Section 731(a) provides, however, that no information shall be deemed to charge two offences by reason only that it states that the alleged offence was committed in different modes.

Several tests have been suggested for determining whether an indictment or information is multiplicitous. Probably the best known test is that enunciated by Avory J. in R. v. Surrey Justices, ex parte Witherick [[1932] 1 K.B. 450.], at p. 452. The charge was that of driving without due care and attention and without reasonable consideration for other persons. Avory J. said that, if a person may do one without the other, it followed as a matter of law that an information which charged him in the alternative would be bad. In R. v. Madill [(1943), 79 C.C.C. 206.] (No. 1), at p. 210, Ford J.A. applied the test of "... whether evidence can be given of distinct acts, committed by the person charged, constituting two or more offences," and in R. v. International Nickel Co. of Canada [(1972), 10 C.C.C. (2d) 44.], at p. 48, Arnup J.A. expressed the view that if a section containing two or more elements is to be construed as containing only one offence, one must be able to state with precision the essence of the single offence.

Each of these tests is helpful as far as it goes, but each is too general to provide a clear demarcation in concrete instances. This is shown by the variety of cases and the diversity of opinion in this case itself. To resolve the matter one must recall, I think, the policy basis of the rule against multiplicity and duplicity. The rule developed during a period of extreme formality and technicality in the preferring of indictments and laying of informations. It grew from the humane desire of judges to alleviate the severity of the law in an age when many crimes were still classified as felonies, for which the punishment was death by the gallows. The slightest defect made an indictment a nullity. That age passed. Parliament has made it abundantly clear in those sections of the Criminal Code having to do with the form of indictments and informations that the punctilio of an earlier age is no longer to bind us. We must look for substance and not petty formalities.

The duplicity rule has been justified on two grounds: to be fair to the accused in the preparation of his defence, and to enable him to plead autrefois convict in the future. As Avory J. said in R. v. Surrey Justices, ex parte Witherick, supra, at p. 452:

> It is an elementary principle that an information must not charge offences in the alternative, since the defendant cannot then know with precision with what he is charged and of what he is convicted and may be prevented on a future occasion form pleading autrefois convict.

The problem of raising a defence of autrefois convict is illusory even when there is duplicity. It is difficult to see as a practical matter why the Crown would begin new proceedings after having just concluded as successful prosecution. Even if there were a prosecution, it could not succeed. Assume conviction of the City on a charge of (i) discharging; (ii) causing discharge of; (iii) permitting discharge of pollutant at a stated time and place. If another charge were laid at a later date in respect of (i) or (ii) or (iii), as related to the same pollutant and the same time and place, the new charge would be based on the same cause or matter which had already formed the basis of a conviction, and a further conviction would be barred: Kienapple v. The Queen [[1975] 1 S.C.R. 729.]. It is equally clear that no problem of autrefois acquit arises, even where there is duplicity, because an acquittal means acquittal on all the offences charged, and thus there is no difficulty in raising the defence of autrefois acquit to a later charge of one of the same offences alone.

In my opinion, the primary test should be a practical one, based on the only valid justification for the rule against

duplicity: does the accused know the case he has to meet, or is he prejudiced in the preparation of his defence by ambiguity in the charge? Viewed in that light, as well as by the other tests mentioned above, I think we must conclude that the charge in the present case was not duplicitous. There is nothing ambiguous or uncertain in the charge. The City knew the case it had to meet. Section 32(1) of The Ontario Water Resources Commission Act is concerned with only one matter, pollution. That is the gist of the charge and the evil against which the offence is aimed. One cognate act is the subject of the prohibition. Only one generic offence was charged, the essence of which was "polluting," and that offence could be committed in one or more of several modes. There is nothing wrong in specifying alternative methods of committing an offence, or in embellishing the periphery, provided only one offence is to be found at the focal point of the charge. Furthermore, although not determinative, it is not irrelevant that the information has been laid in the precise words of the section.

I am satisfied that the Legislature did not intend to create different offences for polluting, dependent upon whether one deposited, or caused to be deposited, or permitted to be deposited. The legislation is aimed at one class of offender only, those who pollute.

In R. v. Matspeck Construction Co. Ltd. [[1965] 2 O.R. 730.], Hughes J. considered the very section now under study and, adopting the approach I favour, concluded that the charge was not duplicitous. The judge said, at p. 732:

> There can be no doubt in the mind of accused that he is charged with having in one mode or another, discharged or deposited material into water and that this material may have impaired its quality.

On the other hand, in the English case of Ross Hillman Limited v. Bond [[1974] 2 All E.R. 287.], where very similar language was used, May J. said, p. 291, that the Act (in that case s. 40 (5)(b) of the Road Traffic Act, 1972) created three distinct types of offence. I think that the authority of the English cases in this area of the law must be carefully considered and their aid discounted to the extent that the statutory provisions applicable differ from those contained in our Code.

I conclude that the charge in this case is not duplicitous. It is unnecessary, therefore, to consider whether a defendant can raise a duplicity objection for the first time on appeal.

The Mens Rea Point

The distinction between the true criminal offence and the public welfare offence is one of the prime importance. Where the offence is criminal, the Crown must establish a mental element, namely, that the accused who committed the prohibited act did so intentionally or recklessly, with knowledge of the facts constituting the offence, or with wilful blindness toward them. Mere negligence is excluded from the concept of the mental element required for conviction. Within the context of a criminal prosecution a person who fails to make such enquiries as a reasonable and prudent person would make, or who fails to know facts he should have known, is innocent in the eyes of the law.

In sharp contrast, "absolute liability" entails conviction on proof merely that the defendant committed the prohibited act constituting the actus reus of the offence. There is no relevant mental element. It is no defence that the accused was entirely without fault. He may be morally innocent in every sense, yet be branded as a male factor and punished as such.

Public welfare offences obviously lie in a field of conflicting values. It is essential for society to maintain, through effective enforcement, high standards of public health and safety. Potential victims of those who carry on latently pernicious activities have a strong claim to consideration. On the other hand, there is a generally held revulsion against punishment of the morally innocent.

Public welfare offences evolved in mid-nineteenth century Britain: (R. v. Woodrow [(1846), 15 M. & W. 404.] and R. v. Stephens [(1866), L.R. 1 Q.B. 702.]) as a means of doing away with the requirement of mens rea for petty police offences. The concept was a judicial creation, founded on expediency. That concept is now firmly imbedded in the concrete of Anglo-American and Canadian jurisprudence, its importance heightened by the every-increasing complexities of modern society.

Various arguments are advanced in justification of absolute liability in public welfare offences. Two predominate. Firstly, it is argued that the protection of social interests requires a high standard of care and attention on the part of those who follow certain pursuits and such persons are more likely to be stimulated to maintain those standards if they know that ignorance or mistake will not excuse them. The removal of any possible loophole acts, it is said, as an incentive to take precautionary measures beyond what would otherwise be taken, in order that mistakes and mishaps be avoided. The second main argument is one based on administrative efficiency. Having regard to both the difficulty of proving mental culpability and the number of petty case which daily come before the Court, proof of fault is just too great a burden in time and money to place upon the prosecution. To require proof of each person's individual intent would allow almost every violator to escape. This, together with the glut of work entailed in proving mens rea in every case would clutter the docket and impede adequate enforcement as virtually to nullify the regulatory statutes. In short, absolute liability, it is contended, is the most efficient and effective way of ensuring compliance with minor regulatory legislation and the social ends to be achieved are of such importance as to override the unfortunate by-product of punishing those who may be free of moral turpitude. In further justification, it is urged that slight penalties are usually imposed and that conviction for breach of a public welfare offence does not carry the stigma associated with conviction for a criminal offence.

Arguments of greater force are advanced against absolute liability. The most telling is that it violates fundamental principles of penal liability. It also rests upon assumptions which have not been, and cannot be, empirically established. There is no evidence that a higher standard of care results from absolute liability. If a person is already taking every reasonable precautionary measure, is he likely to take additional measures, knowing that however much care he takes, it will not serve as a defence in the event of breach? If he has exercised care and skill, will conviction have a deterrent effect upon him or others? Will the injustice of conviction lead to cynicism and disrespect for the law, on his part and on the part of others? These are among the questions asked. The argument that no stigma attaches does not withstand analysis, for the accused will have suffered loss of time, legal costs, exposure to the processes of the criminal law at trial and, however one may down-play it, the opprobrium of conviction. It is not sufficient to say that the public interest is engaged and, therefore, liability may be imposed without fault. In serious crimes, the public interest is involved and mens rea must be proven. The administrative argument has little force. In sentencing, evidence of due diligence is admissible and therefore the evidence might just as well be heard when considering guilt. Additionally, it may be noted that s. 198 of The Highway Traffic Act of Alberta, R.S.A. 1970, c. 169, provides that upon a person being charged with an offence under this Act, if the judge trying the case is of the opinion that the offence (a) was committed wholly by accident or misadventure and without negligence, and (b) could not by the exercise of reasonable care or precaution have been avoided, the judge may dismiss the case. See also s. 230(2) of the Manitoba Highway Traffic Act, R.S.M. 1970, c. H60, which has a similar effect. In these instances at least, the Legislature has indicated that administrative efficiency does not foreclose inquiry as to fault. It is also worthy of note that historically the penalty for breach of statutes enacted for the regulation of individual conduct in the interest of health and safety was minor, $20 or $25; today, it may amount to thousands of dollars and entail the possibility of imprisonment for a second conviction. The present case is an example.

Public welfare offences involve a shift of emphasis from the protection of individual interests to the protection of public and social interests. See Sayre, Public Welfare Offences (1933), 33 Colum. L. Rev. 55; Hall, Principles of Criminal Law, (1947), ch. 13; Perkins, The Civil Offence (1952), 100 U. of Pa. L. Rev. 832; Jobson, Far From Clear, 18 Crim. L. Q. 294. The unfortunate tendency in may past cases has been to see the choice as between two stark alternatives; (i) full mens rea; or (ii) absolute liability. In respect of public welfare offences (within which category pollution offences fall) where full mens rea is not required, absolute liability has often been imposed. English jurisprudence has consistently maintained this dichotomy: see Hals. (4th ed.), Vol. II, Criminal Law, Evidence and

Procedure, para. 18. There has, however, been an attempt in Australia, in many Canadian courts, and indeed in England, to seek a middle position, fulfilling the goals of public welfare offences while still not punishing the entirely blameless. There is an increasing and impressive stream of authority which holds that where an offence does not require full mens rea, it is nevertheless a good defence for the defendant to prove that he was not negligent.

Dr. Glanville Williams has written: "There is a half-way house between mens rea and strict responsibility which has not yet been properly utilized, and that is responsibility for negligence," (Criminal Law (2d ed.): The General Part, p. 262). Morris and Howard, in Studies in Criminal Law, (1964), p. 200, suggest that strict responsibility might with advantage be replaced by a doctrine of responsibility for negligence strengthened by a shift in the burden of proof. The defendant would be allowed to exculpate himself by proving affirmatively that he was not negligent. Professor Howard (Strict Responsibility in the High Court of Australia, 76 L.Q.R. 547) offers the comment that English law of strict responsibility in minor statutory offences is distinguished only by its irrationality, and then has this to say in support of the position taken by the Australian High Court, at p. 548:

> Over a period of nearly sixty years since its inception the High Court has adhered with consistency to the principle that there should be no criminal responsibility without fault, however minor the offence. It has done so by utilizing the very half-way house to which Dr. Williams refers, responsibility for negligence.

In his work, Public Welfare Offences, at p. 78, Professor Sayre suggests that if the penalty is really slight involving, for instance, a maximum fine of twenty-five dollars, particularly if adequate enforcement depends upon wholesale prosecution, or if the social danger arising from violation is serious, the doctrine of basing liability upon mere activity rather than fault, is sound. He continues, however, at p. 79:

> On the other hand, some public welfare offences involve a possible penalty of imprisonment of heavy fine. In such cases it would seem sounder policy to maintain the orthodox requirement of a guilty mind but to shift the burden of proof to the shoulders of the defendant to establish his lack of a guilty intent if he can. For public welfare offences defendants may be convicted by proof of the mere act of violation; but, if the offence involves a possible prison penalty, the defendant should not be denied the right of bringing forward affirmative evidence to prove that the violation was the result of no fault on his part.

and at p. 82:

> It is fundamentally unsound to convict a defendant for a crime involving a substantial term of imprisonment without giving him the opportunity to prove that his action was due to an honest and reasonable mistake of fact or that he acted without guilty intent. If the public dander is widespread and serious, the practical situation can be met by shifting to the shoulders of the defendant the burden of proving a lack of guilty intent.

The doctrine proceeds on the assumption that the defendant could have avoided the prima facie offence through the exercise of reasonable care and he is given the opportunity of establishing, if he can, that he did in fact exercise such care.

The case which gave the lead in this branch of the law is the Australian case of Proudman v. Dayman [(1941), 67 C.L.R. 536.] where Dixon J. said, at pp. 540-41:

> It is one thing to deny that a necessary ingredient of the offence is positive knowledge of the fact that the driver holds no subsisting licence. It is another to say that an honest belief founded on reasonable grounds that he is licensed cannot exculpate a person who permits him to drive. As a

> general rule an honest and reasonable belief in a state of facts which, if they existed, would make the defendant's act innocent affords an excuse for doing what would otherwise be an offence.

...

This case, and several others like it, speak of the defence as being that of reasonable mistake of fact. The reason is that the offences in question have generally turned on the possession by a person or place of an unlawful status, and the accused's defence was that he reasonably did not know of this status: e.g. permitting an unlicensed person to drive, or lacking a valid licence oneself, or being the owner of property in a dangerous condition. In such cases, negligence consists of an unreasonable failure to know the facts which constitute the offence. It is clear, however, that in the principle the defence is that all reasonable care was taken. In other circumstances, the issue will be whether the accused's behaviour was negligent in bringing about the forbidden event when he knew the relevant facts. Once the defence of reasonable mistake of fact is accepted, there is no barrier to acceptance of the other constituent part of a defence of due diligence.

The principle which has found acceptance in Australia since Proudman v. Dayman has a place also in the jurisprudence of New Zealand: see The Queen v. Strawbridge [[1970] N.Z.L.R. 909.]; The King v. Ewart [[1906] N.Z.L.R. 709.].

In the House of Lords case of Sweet v. Parsley [[1970] A.C. 132.], Lord Reid noted the difficulty presented by the simplistic choice between mens rea in the full sense and an absolute offence. He looked approvingly at attempts to find a middle ground. Lord Pearce, in the same case, referred to the "sensible half-way house" which he thought the Courts should take in some so-called absolute offences. The difficulty, as Lord Pearce sat it, lay in the opinion of Viscount Sankey L.C. in Woolmington v. Director of Public Prosecutions [[1935] A.C. 462.] if the full width of the opinion were maintained. Lord Diplock, however, took a different and, in my opinion, a preferable view, at p. 164:

> ...Woolmington'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, any more than it decided that the prosecution must call evidence to prove the absence of any claim of right in a charge of larceny. The jury is entitled to presume that the accused acted with knowledge of the facts, unless there is some evidence to the contrary originating from the accused who alone can know on what belief he acted and on what ground the belief, if mistaken, was held.

In Woolmington's case the question was whether the trial judge was correct in directing the jury that the accused was required to prove his innocence. Viscount Sankey L.C. referred to the strength of the presumption of innocence in a criminal case and then made the statement, universally accepted in this country, that there is no burden of the prisoner to prove his innocence; it is sufficient for him to raise a doubt as to his guilt, I do not understand the case as standing for anything more, than that. It is to be noted that the case is concerned with criminal offences in the true sense; it is not concerned with public welfare offences. It is somewhat ironic that Woolmington's case, which embodies a principle for the benefit of the accused, should be used to justify the rejection of a defence of reasonable care for public welfare offences and the retention of absolute liability, which affords the accused no defence at all. There is nothing in Woolmington's case, as I comprehend it, which stands in the way of adoption, in respect of regulatory offences, of a defence of due care, with burden of proof resting on the accused to establish the defence on the balance of probabilities.

There have been several cases in Ontario which open the way to acceptance of a defence of due diligence. In R. v. McIver [[1965] 2 O.R. 475.], the Court of Appeal held that the offence charged, namely, careless driving, was one of strick liability, but that it was open to an accused to show that he had a reasonable belief in facts which, if true, would have rendered the act innocent. MacKay J.A., who wrote for the Court, relied upon Sherras v. De Rutzen, Proudman v. Dayman, Maher v. Musson [(1934), 52 C.L.R. 100.], and R. v. Patterson [[1962] 1 All E.R. 340.], in availing an

accused the opportunity of explanation in the case of statutory offences that do not by their terms require proof of intent. The following two short passages from the judgment might be quoted (at p. 481):

> On a charge laid under s. 60 of the Highway Traffic Act, it is open to the accused as a defence, to show an absence of negligence on his part. For example, that his conduct was caused by the negligence of some other person, or by showing that the cause was a mechanical failure, or other circumstance, that he could not reasonably have foreseen.
>
> ...
>
> In the present case it was open to the accused to show, if he could, that the collision of his car with the car parked on the shoulder of the read, occurred without fault or negligence on his part. He having failed to do so was properly convicted.

An appeal to this Court was dismissed [1966] S.C.R. 254 on other grounds.

Later, in R. v. Custeau [[1972] 2 O.R. 250.], MacKay J.A., again speaking for the Court, returned to the same point, at p. 251:

> In the case of an offence of strict liability (sometimes referred to as absolute liability) it has been held to be a defence if it is found that the defendant honestly believed on reasonable grounds in a state of facts which, if true, would render his act an innocent one.

In the British Columbia Court of Appeal the concept of reasonable care was discussed in R. v. Larocque [(1958), 120 C.C.C. 246.] (selling liquor to an interdicted person contrary to a provincial statue) by Mr. Justice Sheppard, speaking for the Court, at p. 247:

> ... That test has been defined in Bank of New South Wales v. Piper, [1897] A.C. 383 at pp. 289-90 as follows: 'On the other hand, the absence of mens rea really consists in an honest and reasonable belief entertained by the accused of the existence of facts which, if true, would make the act charged against him innocent.'
>
> The onus would therefore be upon the accused to show not merely that he did not know that Pierre was an interdicted person but also that he, the accused, had used honest and reasonable efforts to become acquainted with the information supplied by the Department to comply therewith and that notwithstanding such efforts he had an honest and reasonable belief that Pierre was not an interdicted person.

In an early Saskatchewan Court of Appeal decision in R. v. Regina Cold Storage & Forwarding Co. [(1923), 41 C.C.C. 21.] (unlawful possession of liquor) it was held that mens rea was an essential element for conviction and that element was absent. Chief Justice Haultain appears to have conceptualized absence of mens rea, not as lack of knowledge or intent but rather in terms of reasonable care in an offence of strict liability. He said, at p. 23: "Absence of mens rea means an honest and reasonable belief by the accused in the existence of facts which, if true, would make the charge against him innocent."

In the New Brunswick case of R. v. A.O. Pope, Ltd. [(1972), 20 C.R.N.S. 159 aff'd 10 C.C.C. (2d) 430.] (failing to provide properly fitted goggles contrary to the Industrial Safety Act, 1964 (N.B.), c. 5) Kierstead Co. Ct. J. held that the offence was one of strict but not absolute liability, and a defence of reasonable care was open to the accused to prove that the act was done without negligence or fault on his part. An appeal to the New Brunswick Supreme Court, Appeal Division, was dismissed without, however, any discussion of this issue.

Two more recent cases, one being from the Province of Ontario and the other from the Province of Alberta, deserve attention. In R. v. Hickey [(1976), 29 C.C.C. (2d) 23 rev'd 30 C.C.C. (2d) 416.] (speeding) the Divisional Court held that the offence was one of strict liability, but that the accused would have a valid defence if he proved on the balance of probabilities that he honestly believed on reasonable grounds in a mistaken set of facts which, if true, would have made his conduct innocent. The accused had testified that he honestly believed because of the speedometer reading that he was not exceeding the speed limit. A test conducted by a police officer at the scene showed that the speedometer was, in fact, not working properly. The majority of the Court, therefore, set aside the conviction. Mr. Justice Galligan made the following comment, at p. 36:

> Submissions were made to this Court about the difficulties involved in the prosecution of speeding cases and other strict liability offences if this defence is a valid one in law. in my opinion, the availability of the defence as a matter of law should make no unreasonable burden upon the prosecution or the Courts. It is clear from the Australian authorities that not only is the burden of proving such a defence upon the accused, he must prove in upon a balance of probabilities. It is not sufficient merely to raise a reasonable doubt. In this respect, the defence of mistake when raised as a defence to an offence of strict liability is very different than is the defence of mistake of fact when it is raised in a case involving men rea as an essential ingredient of the offence. In the former case, the mistake of fact must not only be an honest one, but it must be based on reasonable grounds and it must be proved by the accused on the balance of probabilities. In the latter case the defence need only be an honest one and need not necessarily be based upon reasonable grounds and it need only cause the Court to have a reasonable doubt: see R. v. Morgan et al., [1975] 2 W.L.R. 913 (H.L.) and Beaver v. The Queen (1957), 118 C.C.C. 129, [1957] S.C.R. 531, 26 C.R. 193.

The decision in Hickey was subsequently appealed to the Court of Appeal (1976), 30 C.C.C. (2d) 416. The Court allowed the appeal and restored the conviction. Mr. Justice Jessup, in giving judgment for the Court, said:

> Assuming, without deciding, that statutory offences can be classified into one of three groups mentioned by Estey, C.J.H.C., in his judgment given in the Divisional Court, we are of the opinion that the offence here in question, of speeding, under the Highway Traffic Act, R.S.O. 1970, c. 202, is a statutory offence within the third group mentioned by Estey, C.J.H.C.; that is one of absolute liability in the sense that reasonable mistake of fact is not a defence.

No reasons were given for the identification of the offence as one of absolute liability once the three groups of statutory offences were assumed to exist.

In the Appellate Division of the Alberta Supreme Court, the defence of reasonable care for an offence of strict liability was accepted after full consideration of the issues involved, in the recent case of R. v. Servico Limited [(1977), 2 Alta. L.R. (2d) 388.]. The offence in question was that an employer "shall not permit a person under the full age of eighteen years to work during the period of time prohibited by this section." Mr. Justice Morrow, writing for the majority of the Court, said (at pp. 397-8):

> While the language of the particular regulation under review does in my view come within the category of absolute or strict liability offences. I am also of the opinion that the general language used--particularly with the inclusion of the word "permit," which has a connotation suggesting some intent is to be considered-- brings this section into what probably can be described as the exception to the rule of absoluteness as suggested by Estey C.J.H.C., in his dissenting judgment in Regina v. Hickey (1976), 12 O.R. (2d) 578, 29 C.C.C. (2d) 63, 68 D.L.R. (3d) 88, reversed 13 O.R. (2d) 228, 30 C.C.C. (2d) 416, 70 D.L.R. (3d) 689 (C.A.), where at p. 580 he describes statutes which prohibit a specified act or omission but which are interpreted to permit the defence of an honest belief held on reasonable grounds in a mistaken set of facts which if true would render the act or omission innocent.

The above exception or type of defence has long been recognized in Australia,...

It is interesting to note the recommendations made by the Law Reform Commission to the Minister of Justice (Our Criminal Law) in March, 1976. The Commission advises (p. 32) that (i) every offence outside the Criminal Code be recognized as admitting of a defence of due diligence; (ii) in the case of any such offence for which intent or recklessness is not specifically required the onus of proof should lie on the defendant to establish such defence; (iii) the defendant would have to prove this on the preponderance or balance of probabilities. The recommendation endorsed a working paper (The Meaning of Guilt--Strict Liability) in which it was stated that negligence should be the minimum standard of liability in regulatory offences, that such offences were (p. 32), "to promote higher standards of care in business, trade and industry, higher standards of honesty in commerce and advertising, higher standards of respect for the ... environment and [therefore] the ... offence is basically and typically an offence of negligence"; that an accused should never be convicted of a regulatory offence if he establishes that he acted with due diligence, that is, that he was not negligent. In the working paper, the Commission further stated (p. 33), "let us recognize the regulatory offence for what it is--an offence of negligence--and frame the law to ensure that guilt depends upon lack of reasonable care." The view is expressed that in regulatory law, to make the defendant disprove negligence--prove due diligence--would be both justifiable and desirable.

In an interesting article on the matter now under discussion, Far From Clear, supra, Professor Jobson refers to a series of recent cases, arising principally under s. 32(1) of The Ontario Water Resources Commission Act, the section at issue in the present proceedings, which "openly acknowledged a defence based on lack of fault or neglect; these cases require proof of the actus reus but then permit the accused to show that he was without fault or had no opportunity to prevent the harm." The paramount case in the series is R. v. Industrial Tankers Ltd. [[1968] 4 C.C.C. 81.] in which Judge Sprague, relying upon R. v. Hawinda Taverns Ltd. [(1955), 112 C.C.C. 361.] and R. v. Bruin Hotel Co. Ltd. [(1954), 109 C.C.C. 174.], held that the Crown did not prove that the accused had mens rea, but it did have to show that the accused had the power and authority to prevent the pollution, and could have prevented it, but did not do so. Liability rests upon control and the opportunity to prevent i.e. that the accused could have and should have prevented the pollution. In Industrial Tankers, the burden was placed on the Crown to prove lack of reasonable car. To that extent Industrial Tankers and s. 32(1) cases which followed it, such as R. v. Sheridan [(1972), 10 C.C.C. (2d) 545.], differ from other authorities on s. 32(1) which would place upon the accused the burden of showing as a defence that he did not have control or otherwise could not have prevented the impairment: see R. v. Cherokee Disposals & Construction Limited [[1973] 3 O.R. 599.]; R. v. Liquid Cargo Lines Ltd. [(1974), 18 C.C.C. (2d) 428.] and R. v. North Canadian Enterprises Ltd. [(1974), 20 C.C.C. (2d) 242.]

The element of control, particularly by those in charge of business activities which may endanger the public, is vital to promote the observance of regulations designed to avoid that danger. This control may be exercised by "supervision or inspection, by improvement of his business methods or by exhorting those whom he may be expected to influence or control" (Lord Evershed in Lim Chin Aik v. The Queen, [[1963] A.C. 160) at p. 174.]. The purpose, Dean Roscoe Pound has said (The Spirit of the Common Law (1906)), is to "put pressure upon the thoughtless and inefficient to do their whole duty in the interest of public health or safety or morale." As Devlin J. noted in Reynolds v. Austin & Sons Limited [[1951] 2 K.B. 135.], at p. 139: "...a man may be responsible for the acts of his servants, or even for defects in his business arrangements, because it can fairly be said that by such sanctions citizens are induced to keep themselves and their organizations up to the mark." Devlin J. added, however: "If a man is punished because of an act done by another, whom he cannot reasonably be expected to influence or control, the law is engaged, not in punishing thoughtlessness or inefficiency, and thereby promoting the welfare of the community, but in pouncing on the most convenient victim."

The decision of this Court in The Queen v. Pierce Fisheries Ltd. [[1971] S.C.R. 5.] is not inconsistent with the concept of a "half-way house" between mens rea and absolute liability. In Pierce Fisheries the charge was that of having possession of undersized lobsters contrary to the regulations under the Fisheries Act, R.S.C. 1952, c. 119. Two points arise in connection with the judgment of Ritchie J., who wrote for the majority of the Court. First, the adoption of what had been said by the Ontario Court of Appeal in R. v. Pee-Kay Smallwares, Ltd. [(1947), 90 C.C.C. 129.]:

> If on a prosecution for the offences created by the Act, the Crown had to prove the evil intent of the accused, or if the accused could escape by denying such evil intent, the statute, by which it was obviously intended that there should be complete control without the possibility of any leaks, would have so many holes in it that in truth it would be nothing more than a legislative sieve.

Ritchie J. held that the offence was one in which the Crown, for the reason indicated in the Pee-Kay Smallwares case, did not have to prove mens rea in order to obtain a conviction. This, in my opinion, is the ratio decidendi of the case. Second, Ritchie J. did not, however, foreclose the possibility of a defence. The following passage from judgment (at p. 21) suggests that a defence of reasonable care might have been open to the accused, but that in that case care had not been taken to acquire the knowledge of the facts constituting the offence:

> As employees of the company working on the premises in the shed "where fish is weighted and packed" were taking lobsters from boxes "preparatory for packing" in crates, and as some of the undersized lobsters were found "in crates ready for shipment," it would not appear to have been a difficult matter for some "officer or responsible employee" to acquire knowledge of their presence on the premises.

In a later passage Ritchie J. added (at p. 22):

> In this case the respondent knew that it had upwards of 60,000 pounds of lobsters on its premises; it only lacked knowledge as to the small size of some of them, and I do not think that the failure of any of its responsible employees to acquire this knowledge affords any defence to a charge of violating the provisions of s. 3(1)(b) of the Lobster Fishery Regulations.

I do not read Pierce Fisheries as denying the accused all defences, in particular the defence that the company had done everything possible to acquire knowledge of the undersized lobsters. Ritchie J. concluded merely that the Crown did not have to prove knowledge.

The judgment of this Court in Hill v. The Queen [[1975] 2 S.C.R. 402.], has been interpreted (R. v. Gillis [(1974), 18 C.C.C. (2d) 190.]) as imposing absolute liability and denying the driver of a motor vehicle the right to plead in defence an honest and reasonable belief in a state of facts which, if true, would have made the act non-culpable. In Hill, the appellant was charged under the Highway Traffic Act with failing to remain at the scene of an accident. Her car had "touched" the rear of another vehicle. She did not stop, but drove off, believing no damage had been done. This Court affirmed the conviction, holding that the offence was not one requiring mens rea. In that case the essential fact was that an accident had occurred, to the knowledge of Mrs. Hill. Any belief that she might have held as to the extent of the damage could not obliterate that fact, or make it appear that she had reasonable grounds for believing in a state of facts which, if true, would have constituted a defence to the charge. The case does not stand in the way of a defence of reasonable care in a proper case.

We have the situation therefore in which many Courts of this country, at all levels, dealing with public welfare offences favour (i) not requiring the Crown to prove mens rea, (ii) rejecting the notion that liability inexorably follows upon mere proof of the actus reus, excluding any possible defence. The Courts are following the lead set in Australia many years ago and tentatively broached by several English courts in recent years.

It may be suggested that the introduction of a defence based on due diligence and the shifting of the burden of proof might better be implemented by legislative act. In answer, it should be recalled that the concept of absolute liability and the reaction of a jural category of public welfare offences are both the product of the judiciary and not of the Legislature. The development to date of this defence, in the numerous decisions I have referred to, of the courts in this country as well as in Australia and New Zealand, has also been the work of judges. The present case offers the opportunity of consolidating and clarifying the doctrine.

The correct approach, in my opinion, is to relieve the Crown of the burden of proving mens rea, having regard to Pierce Fisheries and to the virtual impossibility in most regulatory cases of proving wrongful intention. In a normal case, the accused alone will have knowledge of what he has done to avoid the breach and it is not improper to expect him to come forward with the evidence of due diligence. This is particularly so when it is alleged, for example, that pollution was caused by the activities of a large and complex corporation. Equally, there is nothing wrong with rejecting absolute liability and admitting the defence of reasonable care.

In this doctrine it is not up to the prosecution to prove negligence. Instead, it is open to the defendant to prove that all due care has been taken. This burden falls upon the defendant as he is the only one who will generally have the means of proof. This would not seem unfair as the alternative is absolute liability which denies an accused any defence whatsoever. While the prosecution must prove beyond a reasonable doubt that the defendant committed the prohibited act, the defendant must only establish on the balance of probabilities that he has a defence of reasonable care.

I conclude, for the reasons which I have sought to express, that there are compelling grounds for the recognition of three categories of offences rather than the traditional two:

1. Offences in which mens rea, consisting of some positive state of mind such as intent, knowledge, or recklessness, 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. This involves consideration of what a reasonable man would have done in the circumstances. The defence will be available if the accused reasonably believed in a mistaken set of facts which, if true, would render the act or omission innocent, or if he took all reasonable steps to avoid the particular event. These offences may properly be called offences of strict liability. Mr. Justice Estey so referred to them in Hickey's case.
3. Offences of absolute liability where it is not open to the accused to exculpate himself by showing that he was free of fault.

Offences which are criminal in the true sense fall in the first category. Public welfare offences would prima facie be in the second category. They are not subject to the presumption of full mens rea. An offence of this type would fall in the first category only if such words as "wilfully," "with intent," "knowingly," or "intentionally" are contained in the statutory provision creating the offence. On the other hand, the principle that punishment should in general not be inflicted on those without fault applies. Offences of absolute liability would be those in respect of which the Legislature had made it clear that guilt would follow proof merely of the proscribed act. The overall regulatory pattern adopted by the Legislature, the subject matter of the legislation, the importance of the penalty, and the precision of the language used will be primary considerations in determining whether the offence falls into the third category.

The Ontario Water Resources Commission Act, s. 32(1)

Turning to the subject matter of s. 32(1)--the prevention of pollution of lakes, rivers and streams--it is patent that this is of great public concern. Pollution has always been unlawful and, in itself, a nuisance: Groat v. City of Edmonton [[1928] S.C.R. 522.]. A riparian owner has an inherent right to have a stream of water "come to him in its natural state, in flow, quantity and quality": Chasemore v. Richards [(1859), 7 H.L.C. 349.], at p. 382. Natural streams which formerly afforded "pure and healthy" water for drinking or swimming purposes become little more than cesspools when riparian factory owners and municipal corporations discharge into them filth of all descriptions. Pollution offences are undoubtedly public welfare offences enacted in the interest of the public health. There is thus no presumption of a full mens rea.

There is another reason, however, why this offence is not subject to a presumption of mens rea. The presumption applies only to offences which are "criminal in the true sense," as Ritchie J. said in the Queen v. Pierce Fisheries (supra), at p. 13. The Ontario Water Resources Commission Act is a provincial statute. If it is valid provincial legislation (and no suggestion was made to the contrary), then it cannot possibly create an offence which is criminal in the true sense.

The present case concerns the interpretation of two troublesome words frequently found in public welfare statutes: "cause" and "permit." These two words are troublesome because neither denotes clearly either full mens rea nor absolute liability. It is said that a person could not be said to be permitting something unless he knew what he was permitting. This is an over-simplification. There is authority both ways, indicating that the courts are uneasy with the traditional dichotomy. Some authorities favour the position that "permit", does not authorities favour the position that "permit", does not import mens rea: see Millar v. The Queen [[1954] 1 D.L.R. 148.]; R. v. Royal Canadian Legion [[1971] 3 O.R. 552.]; R. v. Teperman and Sons [[1968] 4 C.C.C. 67.]; R. v. Jack Crewe Ltd. [(1975), 23 C.C.C. (2d) 237.]; Browning v. J.H. Watson Ltd. [[1953] 1 W.L.R. 1172.]; Lyons v. May [[1948] 2 All E.R. 1062.]; Korten v. West Sussex C.C. [(1903), 72 L.J.K.B. 514.]. For a mens rea construction see James & Son Ltd. v. Smee [[1955] 1 Q.B. 78.]; Sommerset v. Hart [(1884), 12 Q.B.C. 360.], Grays Haulage Co. Ltd. v. Arnold [[1966] 1 All E.R. 896.]; Smith & Hogan, Criminal Law (3rd ed.) at p. 87; Edwards, Mens Rea and Statutory Offences (1955), at pp. 98-119. The same is true of "cause." For a non-mens rea construction, see R. v. Peconi [(1907), 1 C.C.C. (2d) 213.]; Alphacell Limited v. Woodward [[1972] A.C. 824.]; Sopp v. Long [[1969] 1 All E.R. 855.]; Laird v. Dobell [[1906] 1 K.B. 131.]; Dorten v. West Sussex C.C., (supra); Shave v. Rosner [[1954] 2 W.L.R. 1057.]. Others say that "cause" imports a requirement for a mens rea: see Lovelace v. D.P.P. [[1954] 3 All E.R. 481.]; Ross Hillman Ltd. v. Bond, supra; Smith and Hogan, Criminal Law (3rd ed.) at pp. 89-90.

The Divisional Court of Ontario relied on these latter authorities in concluding that s. 32(1) created a mens rea offence.

The conflict in the above authorities, however, shows that in themselves the words "cause" and "permit", fit much better into an offence of strict liability than either full mens rea or absolute liability. Since s. 32(1) creates a public welfare offence, without a clear indication that liability is absolute, and without any words such as "knowingly" or "wilfully" expressly to import mens rea, application of the criteria which i have outlined above undoubtedly places the offence in the category of strict liability.

Proof of the prohibited act prima facie imports the offence, but the accused may avoid liability by proving that he took reasonable care. I am strengthened in this view by the recent case of R. v. Servico Limited, supra, in which the Appellate Division of the Alberta Supreme Court held that an offence of "permitting" a person under eighteen years to work during prohibited hours was an offence of strict liability in the sense which I have described. It also will be recalled that the decisions of many lower courts which have considered s. 32(1) have rejected absolute liability as the basis for the offence of causing or permitting pollution, and have equally rejected full mens rea as an ingredient of the offence.

The Present Case

As I am of the view that a new trial is necessary, it would be inappropriate to discuss at this time the facts of the present case. It may be helpful, however, to consider in a general way the principles to be applied in determining whether a person or municipality has committed the actus reus of discharging, causing, or permitting pollution within the terms of s. 32(1), in particular in connection with pollution from garbage disposal. The prohibited act would, in my opinion, be committed by those who undertake the collection and disposal of garbage, who are in a position to exercise continued control of this activity and prevent the pollution from occurring, but fail to do so. The "discharging" aspect of the offence centres on direct acts of pollution. The "causing" aspect centres on the defendant's active undertaking of something which it is in a position to control and which results in pollution. The "permitting" aspect of the offence centres on the defendant's passive lack of interference or, in other words, its failure to prevent an occurrence which it

ought to have foreseen. The close interweaving of the meanings of these terms emphasizes again that s. 32(1) deals with only one generic offence.

When the defendant is a municipality, it is of no avail to it in law that it had no duty to pick up the garbage, s. 354 (1)(76) of The Municipal Act, R.S.O. 1970, c. 284, merely providing that it "may" do so. The law is replete with instances where a person has no duty to act, but where he is subject to certain duties if he does act. The duty here is imposed by s. 32(1) of The Ontario Water Resources Commission Act. The position in this respect is no different from that of private persons, corporate or individual, who have no duty to dispose of garbage, but who will incur liability under s. 32(1) if they do so and thereby discharge, cause, or permit pollution.

Nor does liability rest solely on the terms of any agreement by which a defendant arranges for eventual disposal. The test is a factual one, based on an assessment of the defendant's position with respect to the activity which it undertakes and which causes pollution. If it can and should control the activity at the point where pollution occurs, then it is responsible for the pollution. Whether it "discharges," "causes," or "permits" the pollution will be a question of degree, depending on whether it is actively involved at the point where pollution occurs, or whether it merely passively fails to prevent the pollution. In some cases the contract may expressly provide the defendant with the power and authority to control the activity. In such a case the factual assessment will be straightforward. Prima facie, liability will be incurred where the defendant could have prevented the impairment by intervening pursuant to its right to do so under the contract, but failed to do so. Where there is no such express provision in the contract, other factors will come into greater prominence. In every instance the question will depend on an assessment of all the circumstances of the case. Whether an "independent contractor" rather than and "employee" is hired will not be decisive. A homeowner who pays a fee for the collection of his garbage by a business which services the area could probably not be said to have caused or permitted the pollution if the collector dumps the garbage in the river. His position would be analogous to a householder in Sault Ste. Marie, who could not be said to have caused or permitted the pollution here. A large corporation which arranges for the nearby disposal of industrial pollutants by a small local independent contractor with no experience in this matter would probably be in an entirely different position.

It must be recognized, however, that a municipality is in a somewhat different position by virtue of the legislative power which it possesses and which others lack. This is important in the assessment of whether the defendant was in a position to control the activity which it undertook and which caused the pollution. A municipality cannot slough off responsibility by contracting out the work. It is in a position to control those whom it hires to carry out garbage disposal operations, and to supervise the activity, either through the provisions of the contract or by municipal by-laws. It fails to do so at its peril.

One comment on the defence of reasonable care in this context should be added. Since the issue is whether the defendant is guilty of an offence, the doctrine of respondeat superior has no application. The due diligence which must be established is that of the accused alone. Where an employer is charged in respect of an act committed by an employee acting in the course of employment, the question will be whether the act took place without the accused's direction or approval, thus negating wilful involvement of the accused, and whether the accused exercised all reasonable care by establishing a proper system to prevent commission of the offence and by taking reasonable steps to ensure the effective operation of the system. The availability of the defence to a corporation will depend on whether such due diligence was taken by those who are the directing mind and will of the corporation, whose acts are therefore in law the acts of the corporation itself. For a useful discussion of this matter in the context of a statutory defence of due diligence see Tesco Supermarkets v. Nattras [[1972] A.C. 153.].

The majority of the Ontario Court of Appeal directed a new trial as, in the opinion of that court, the findings of the trial judge were not sufficient to establish actual knowledge on the part of the City. I share the view that there should be a new trial, but for a different reason. The City did not lead evidence directed to a defence of due diligence, nor did the trial judge address himself to the availability of such a defence. In these circumstances, it would not be fair for this Court to determine, upon findings of fact directed toward other ends, whether the City was without fault.

I would dismiss the appeal and direct a new trial. I would dismiss the cross-appeal. There should be no costs.

Appeal and cross-appeal dismissed, new trial directed.