Absence of an Exculpatory Belief as a Basis for Criminal Responsibility

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I. Absence of Mind as Guilty Mind

Introduction

It is the "beginning of wisdom", as Lord Hailsham said in *R v Morgan,* to see "that 'mens rea' means a number of quite different things in relation to different crimes".[1] There is nothing new in this observation; Lord Hailsham himself notes that it was made as early as 1889 by Stephen J in *R v Tolson.*[2] Nevertheless, when criminal activity was defined primarily by the common law rather than by statute, mens rea was a less complex concept; it simply referred to the moral blameworthiness of the defendant. Mens rea was invariably a state of mind amounting to guilty knowledge, and a claim of honest and reasonable mistake of fact would always be a defence to a criminal charge. Under statute law, however, whilst mens rea remains an essential element of criminal culpability, it has long been divorced from the notion of moral blameworthiness.[3] Indeed, "a mere absence of mind" may, in some circumstances, amount to "'mens rea' or guilty mind".[4]

Despite the decision in *Tolson,* which is still good law for the offence of bigamy in England, the concept of absence of mind as mens rea has always

1 [1976] AC 182, 213.
2 (1889) 23 QBD 168.
3 See Moodie, "Refulgent Mens Rea Eclipsed" (1985) 6 NZULR 230, 242.
4 Supra at note 2, at 185.

been on the periphery of the criminal law. It was developed further by the Privy Council in *Bank of New South Wales v Pipers*:[5]

> [T]he questions whether a particular intent is made an element of the statutory crime, and when that is not the case, whether there was an absence of mens rea in the accused, are questions entirely different, and depend upon different considerations. In cases when the statute requires a motive to be proved as an essential element of the crime, the prosecution must fail if it is not proved. 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 distinction is accepted by Dixon J in *Proudman v Dayman*:[6]

> 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.

The distinction which emerges from these cases is simply between a requirement of actual knowledge of the circumstances which give conduct its criminal nature (*Category 1* mens rea), and a presumption of knowledge where there is no exculpatory belief (*Category 2* mens rea). The latter forms the focus of this article. *Category 1* establishes liability for acts or omissions committed concurrently *with* a particular state of mind: knowledge. *Category 2*, on the other hand, establishes liability for acts or omissions committed *without* a concurrent definable state of mind: exculpatory belief. The obvious example of *Category 2* mens rea in New Zealand law is the decision in *R v Strawbridge*[7], where it was decided that a defendant charged with cultivating cannabis would be guilty of the offence once the external elements were established unless, "the accused honestly believed on reasonable grounds that her act was innocent".[8]

He Kaw Teh v R

The judgment of Brennan J in the landmark Australian case of *He Kaw Teh v R*[9] is perhaps the clearest judicial acknowledgement of these two separate and distinct categories of mens rea. Brennan J provides a useful basis for his discussion by identifying the external elements present in the full definition of a crime and by analysing the form of the mental element applicable to each external element. His conceptual framework can be summarised diagrammatically:

5 [1897] AC 383, 389. It may, however, have been more accurate for Sir Richard Couch to speak not of "absence of mens rea" but of a belief negativing the presumption of mens rea.
6 (1941) 67 CLR 536, 540.
7 [1970] NZLR 909.
8 Ibid, 916.
9 (1985) 59 ALJR 620.

EXTERNAL ELEMENTS OF A CRIME

MENTAL ELEMENTS APPLICABLE TO THE EXTERNAL ELEMENTS OF A CRIME		Conduct	Circumstances	Results
	Category 1 mens rea as some form of actual knowledge	Involves questions of a) voluntariness b) intention i) specific, or ii) oblique	Either: a) actual knowledge	Either: a) foresight of the possibility of their occurrence, or b) knowledge of the probability of their occurrence, or c) no intention to cause harm
	Category 2 mens rea as a state of mind less then knowledge		or b) absence of an exculpatory belief	

As indicated by the diagram *Category 2* mens rea only occurs as one of two possibilities in relation to the external element described as *circumstances*; *conduct* or *results* will always require some form of actual knowledge as mens rea.

Conduct is usually an act or an omission, but occasionally a state of affairs as with drug possession charges. *Circumstances* means the facts which give an act or omission its criminal nature. Few crimes require a specific *result*, but one that does, wounding with intent (s 188 of the Crimes Act 1961), serves to illustrate the relationship between external and mental elements of a crime. If A strikes B causing harm, the relevant *conduct* is A's rapid forward fist movement; the *circumstance* which gives this act its criminal nature is the fact that B happened to be in the path of the moving fist; the *result* depends on an objective assessment of whether B has suffered harm. The complexity of the mental element for such a crime is readily apparent: up to three questions are involved. Was the movement voluntary or intentional or both? Did A know B was in the path of his fist? Was there at least an awareness of the likelihood of grievous bodily harm? As questions of intent are inevitably a matter of inference based on what the actor knew at the time of acting, the distinction between *conduct* and *circumstances* is often of little or no practical significance: the mental element attributable to both will usually turn on what the actor knew.

The distinction between *conduct* and *circumstances* can, however, be of immense significance when a mental element requiring a state of mind less than actual knowledge is applicable to the *circumstances* which give the conduct its criminal nature. Following *Strawbridge*, such is the case for the

offence of cultivation of cannabis. The *conduct* involved is physically cultivating a cannabis plant, and here, as with the previous example, any such acts have to be voluntary and intentional. The *circumstance* which gives this act its criminal nature is the fact that the plant is an illegal one. Significantly, however, the courts have held that knowledge is presumed unless there is evidence that an accused person had an honest belief on reasonable grounds that her acts were innocent. Where there is evidence of such a belief it is important to realise that there is still no onus on the prosecution to prove that actual knowledge.[10] If the prosecution is able to prove that the belief is not honest or not reasonable the presumption will still hold. The legal fiction inherent in such a presumption ought not to disguise the fundamental reality that *Category 2* mens rea requires a state of mind less than actual knowledge of the facts which give the relevant conduct its criminal nature.

Take the case of A who tends B's garden while the latter is on vacation. By doing so he inadvertently cultivates some cannabis plants. Although he is aware of the existence of the plants he has no knowledge of what they are, and indeed gives no thought at all as to what they might be. When arrested A claims to have thought the plants were tomato plants. As he is a tomato gardener of some repute the claim is found to be dishonest in court and A is convicted on the basis that he had no honest and reasonable exculpatory belief.

In *He Kaw Teh* Brennan J concludes his discussion by identifying general principles which in his view are applicable to all statutory offences:[11]

1. There is a presumption that in every statutory offence, it is implied as an element of the offence that the person who commits the actus reus does the physical act defined in the offence voluntarily and with the intention of doing an act of the defined kind.
2. There is a further presumption in relation to the external elements of a statutory offence that are circumstances attendant on the doing of the physical act involved. It is implied as an element of the offence that, at the time when the person who commits the actus reus does the physical act involved, he either –
   a) knows the circumstances which make the doing of that act an offence; or
   b) does not believe honestly and on reasonable grounds that the circumstances which are attendant on the doing of that act are such as to make the doing of that act innocent.
3. The state of mind to be implied under (2) is the state of mind which is more consonant with the fulfilment of the purpose of the statute. Prima facie, knowledge is that state of mind.
4. The prosecution bears the onus of proving the elements referred to in (1) and (2) beyond reasonable doubt except in the case of insanity and except where statute otherwise provides.

There are obvious dangers in accepting sweeping categorisations such as

10 For a slightly different perspective and related discussion see Campbell, "Crime by Omission" in Clark (ed) *Essays on Criminal Law in New Zealand* (1971) 1, but note that the ratio in *Strawbridge* only requires a jury to be satisfied beyond reasonable doubt that there is no honest belief on reasonable grounds.

11 Supra at note 9, at 645.

this. For example, one might quibble with the narrowness of category 2(b); ultimately the definition of any offence is a matter of statutory interpretation and it is not unusual for a statute to define an exculpatory belief (the absence of which will lead to liability) in terms other than those given here.[12] Nevertheless the general principles established painstakingly in *He Kaw Teh v R* are at least a clear acknowledgement that "[m]ens rea is sometimes defined in terms which require a state of mind less than knowledge of the facts which make the act criminal".[13]

Categories 1 and 2 – Separate and Distinct

Actual knowledge and absence of an exculpatory belief must be regarded as distinct mental states and as such cannot relate to the same external element in the definition of an offence (although in complex offences with a number of external elements to be proved the two forms of mens rea may be present side-by-side in the definition of the offence, but relating to different external elements). Two reasons can be suggested for regarding these forms of mens rea as distinct:

(i) As noted already, the absence of an exculpatory belief will often be a state of mind short of actual knowledge. An example is the charge of drug possession which has always been held to be a *Strawbridge*-type offence in New Zealand. If A clears B's post office box without knowing the contents of a parcel collected there, and without giving any thought at all as to what its contents might be, an arrest of A as the parcel is being taken to B could well result in a successful conviction if in fact it contains illegal drugs.[14] This would only be the case if absence of mens rea does not amount to the same thing as an exculpatory belief. In other words, if our tomato gardener were to have said in the example already given, "I had no idea what the plants were", would that claim in itself amount to an honest and reasonable belief that his act of cultivation was innocent? On this point Casey J's comments in *Millar v Ministry of Transport* are clear:[15]

> "Honest belief" (or its converse 'honest ignorance') in this context means more than mere belief or ignorance. Wilfully closing ones eyes to the obvious is not acceptable; nor is a "couldn't care less" attitude. The word "honest" is intended to add a quality which I would sum up in the proposition that it describes the state of mind of a law-abiding citizen intending to do his or her best to comply with the obligations or duties imposed.

This suggests that the gardener in our example cannot rely on mere ignorance. Under a *Strawbridge* formulation a positive belief that the plants are something other than what they actually are seems necessary.

It is not unusual for the criminal law to require an accused to raise an

12 See text, infra, page 358.
13 Supra at note 9, at 641.
14 See *Police v Rowles* [1974] 2 NZLR 757; *Police v Emirali* [1976] 1 NZLR 286.
15 [1986] 1 NZLR 660, 678.

evidential doubt as to the existence of mens rea before the prosecution has to prove guilty knowledge.[16] Nonetheless, the requirement under a *Category 2* mens rea offence is more onerous: the accused has to point to a positive belief that the act in question is innocent and even then the prosecution has only to attack the validity of that belief rather than prove guilty knowledge. The distinctions here are subtle but important. The difference between actual knowledge and the absence of an exculpatory belief is straightforward: it is the difference between presence of mind and absence of mind. Not so simple is that the absence of actual knowledge is not the same as the existence of an exculpatory belief.

(ii) A second reason for regarding actual knowledge and absence of an exculpatory belief as distinct relates to the traditional requirement that the exculpatory belief be reasonable. This necessitates an objective assessment of the relevant state of mind. No such requirement applies if the mens rea element is actual knowledge. This is further proof that absence of actual knowledge resulting from simple ignorance or inadvertence is not synonymous with an exculpatory belief. Where there is no thought at all an assessment of reasonableness of belief has no relevance. Whether or not reasonableness continues to be an integral part of a *Strawbridge*-type test will be discussed in Part III.

A logical consequence of the above reasoning is that the absence of an exculpatory belief can only be the requisite mental element for a statutory offence if the prima facie requirement of actual knowledge is excluded. *Strawbridge*-type presumptions of knowledge ought not to obscure the fact that once the defence of an exculpatory belief is defeated for a given offence something less than knowledge is established. If the offence requires actual knowledge the prosecution may not have done enough.

Mistake of Fact Distinguished

Absence of an exculpatory belief has some obvious links with the general defence of mistake of fact, but some clarification of the two concepts is required. It is submitted that the relevance of mistake of fact as a general defence is negligible under a statutory criminal regime. As already noted, where crimes were defined by the common law and mens rea still referred to a morally blameworthy mind, mistake of fact was always a defence to a criminal charge.[17] Under statute, however, the requisite mental element is always a matter of statutory interpretation. For the vast majority of criminal offences *Category 1* actual knowledge will apply, bearing in mind that knowledge in this sense is divorced from any concept of *moral* guilt:[18]

16 *R v Strawbridge* itself is often cited as authority for this proposition.
17 This point was made by Cave J in *Tolson*, supra at note 2.
18 *Labour Department v Green* [1973] 1 NZLR 412, 414 per McMullin J.

> It is not necessary in demonstrating whether an accused person has mens rea to show that he knew that what he was doing was immoral or contrary to the law, nor is it any defence for him to show that his motives in doing a particular act may have been entirely laudable.

Where mens rea is defined as actual knowledge it is for the prosecution to prove. A defendant can raise evidential doubt as to whether or not knowledge existed in any number of ways. But mistake of fact, with its historical requirement for an honest and reasonable belief, has no real relevance. As Lord Hailsham stressed in *R v Morgan,* where actual knowledge is the mental element there is no room for a defence such as mistake of fact:[19]

> Once one has accepted, what to me is abundantly clear, that the prohibited act in rape is non-consensual sexual intercourse, and that the guilty state of mind is an intention to commit it, it seems to me to follow as a matter of inexorable logic that there is no room either for a "defence" of honest belief or mistake, or of a defence of honest and reasonable belief or mistake. Either the prosecution proves that the accused had the requisite intent, or it does not. In the former case it succeeds, and in the latter it fails.

Obviously any claim by the accused that she has made a mistake of fact will cause uncertainty as to whether actual knowledge existed which the prosecution will have to rebut beyond reasonable doubt. But in this context a mistake is simply a denial of the existence of some essential element in the definition of the crime. For example, in the case of a rape charge prior to 1985 the defendant could negate the knowledge requirement not only by a mistake as to consent but also by a complete failure to address the question of consent.

In the *Tolson, Proudman v Dayman* and *Strawbridge* line of cases mistake of fact is pleaded to offences created by statute but the critical distinction to be made here is that the offences were held not to require *Category 1* actual knowledge. The *only* mens rea defence to such offences is the existence of an exculpatory belief in the form of a mistake of fact, and that belief, in all three cases, had to be both honest and reasonable. Where absence of an exculpatory belief is created expressly by statute the statute itself will define a state of thought the absence of which will result in a successful prosecution (as in s 128 of the Crimes Act). Where the exculpatory belief is judicially defined the courts have usually used the traditional mistake of fact formula, but there are variations on this, such as the *Strawbridge* mistaken belief that an act is innocent.

Given this analysis it is difficult to see the relevance of cl 25 of the new Crimes Bill 1989:

> **Mistake of fact** – . . . a person is not criminally responsible for an offence involving intention, knowledge, recklessness, heedlessness, or negligence in respect of any act done or omitted to be done if, at the time of the act or omission, the person mistakenly believes in the existence of any fact or circumstance that, if it existed, would negate that intention, knowledge, recklessness, heedlessness, or negligence.

The use of the term "mistake of fact" is troublesome here. As we have seen

19 Supra at note 1, at 214. In this case the actual knowledge was the intention to commit the act of non-consensual sexual intercourse.

the traditional mistake of fact defence suggested in cases such as *Tolson* has little relevance to offences requiring "actual knowledge", yet here we have a draft statute reserving the defence (without the need for the mistake to be honest and reasonable) to offences requiring intent, knowledge or recklessness: all variants of "actual knowledge" under New Zealand law.[20]

While the clause does accurately state the law, it is arguably confusing and superfluous. The mistake referred to in cl 25 is not that traditionally associated with the common law defence, but is simply a mistake that will act to deny some essential element of a crime (usually actual knowledge of the circumstances attendant on the conduct which give the conduct its criminal character). It will be argued in Part IV that where knowledge of an illegality forms one of the essential elements of a crime, mistake of the cl 25 variety ought to include mistake of law as well as mistake of fact. Furthermore, where actual knowledge is the requisite mental element, mistake is just one of several ways it can be denied. Simple ignorance or inadvertence will suffice. One wonders why mistake has been singled out for special mention in cl 25. For a crime requiring actual knowledge it matters little how the defendant attempts to deny knowledge; in the final analysis it is for the prosecution to prove that the accused had the requisite knowledge. This is surely the central point of Lord Hailsham's speech in *R v Morgan*. What cl 25 tends to obscure is that if mistake of fact is pleaded but defeated, the prosecution may still not have discharged its onus. Defeating a claim of "I thought she consented" is not necessarily the same as proving actual knowledge of lack of consent if that is what the crime of rape requires; there is still the possibility that the defendant neglected to give any thought at all to the issue. It is precisely for this reason that s 128 of the Crimes Act was amended. But cl 25, if passed in its proposed form, will obscure the onus on the prosecution of establishing actual knowledge where it is an essential mental element of a crime.

Category 2 – Absence of an Exculpatory Belief in New Zealand Criminal Law

Absence of exculpatory belief as a basis for criminal responsibility has been created both judicially and expressly by statute in New Zealand. For an example of the latter one need look no further than the crime of sexual violation under s 128 of the Crimes Act. The conduct in sexual violation is non-consensual sexual connection, but there need be no actual knowledge of the lack of consent as a circumstance which attends its occurrence. Exculpation will only be through a belief on reasonable grounds that the complainant consented to the sexual connection. This category of mens rea is more common in statutes which might be described as quasi-criminal, or in

[20] Since the "thoughtless" recklessness established in *R v Caldwell* [1982] AC 341 is not generally part of New Zealand law.

offences which appear absolute on the face of the statute except for the provision of a special defence establishing a narrow mens rea element into the definition of the offence. For example, under s 52 of the Arms Act 1983, it is unlawful to present a firearm at another person unless the presenting is for some lawful or sufficient purpose. Thus the mens rea requirement for this offence is the absence of a belief that the presenting is done for some lawful or sufficient purpose.[21]

In a sense the legislature in both these examples is establishing liability for lack of diligence, but this category of offence ought not to be thought of as establishing criminal liability for negligence. Negligent conduct is failure to take the care a reasonable person would take. Where the absence of an exculpatory belief is the requisite mental element in a crime it is thoughtless conduct in circumstances where thought ought to be given that is the public mischief to be restrained. It is liability for *acting* without thinking rather than liability for *failure* to take reasonable care.

It will be argued in Part II that the statutory offence considered in *Civil Aviation Department v MacKenzie*[22] also established liability for thoughtless conduct in circumstances where thought ought to have been given. The public policy behind such liability is readily apparent. Engaging in sexual conduct, presenting a firearm, and flying an aircraft are all situations where the legislature has good reason to encourage careful thought before acting.

The same rationale is difficult to apply to the decision in *R v Strawbridge* where liability for absence of mind was the result of judicial creativity rather than statutory expression. As has already been noted, *Strawbridge* has been applied to drug possession, an offence where the relevant conduct is a state of affairs rather than a physical act. Where the possessor has no knowledge that the substance in her possession is illegal, the public policy reason for requiring an exculpatory belief that the conduct is innocent is not readily apparent. The legacy of the *Strawbridge* decision will be discussed in parts III and IV.

II Civil Aviation Department v MacKenzie

MacKenzie established a new category of offence in New Zealand for regulatory provisions dealing with public safety (following the Canadian precedent of *R v City of Sault Ste Marie*[23]). The category itself has little direct relevance to our discussions for as Casey J observed the enquiry into absence of fault which is at the heart of the category "will not be called for unless it has first been decided that the normal presumption of mens rea was not intended to apply to the particular offence."[24] The difficulty with *MacKenzie* is

21 See *Stanbury v Police* (1988) 3 CRNZ 253.
22 [1983] NZLR 78 (CA); [1982] 2 NZLR 238 (HC).
23 (1978) 85 DLR (3d) 161.
24 Supra at note 15, at 679.

that three of the five judges who considered the case (including Casey J himself) found that s 24 of the Civil Aviation Act 1964 is an offence where a mens rea element must be proved by the prosecution.[25] All three, however, attempted to couch the requisite mens rea in terms encompassing actual knowledge. McMullin J in the Court of Appeal put it this way:[26]

> The mental element of the offence created by s 24(1) is fault on the part of the pilot causing unnecessary danger to persons or property.

Presumably fault in this context refers to some sort of actual knowledge on the pilot's part that he was causing unnecessary danger to persons or property, although McMullin J included the proviso that:[27]

> Fault does not necessarily involve deliberate misconduct or recklessness or an intention to fly dangerously.

The wording of s 24(1) is worth considering:

> Where an aircraft is operated in such a manner as to be the cause of unnecessary danger to any person or property, the pilot or the person in charge of the aircraft, and also the owner thereof unless he proves to the satisfaction of the Court that the aircraft was so operated without his actual fault or privity, shall be liable.

It is submitted that "unnecessary" is the critical word in this section. On one view, this "merely adds another ingredient to the facts the prosecutor must initially prove to sustain the conviction".[28] While this is undoubtedly one effect, surely (at least for those judges who decided that the offence included a mens rea element) "unnecessary" is also the critical word in relation to the mental element. The danger will only be unnecessary if the manoeuvre itself was unnecessary, and a determination of this will depend largely on what was going through the pilot's mind at the time. If the pilot thought that the manoeuvre in question was necessary in the circumstances, the statute seems to indicate that this is an adequate defence to the charge. In these terms the offence requires no *actual knowledge* of the unnecessary danger caused to persons or property, but, in the absence of an exculpatory belief that the manoeuvre was *necessary*, the pilot will be liable.

This discussion is now largely academic as the majority of the Court of Appeal held that the offence deals with public safety, and hence has no mens rea element. Nevertheless, it is submitted that the Court may have been less likely to make such a decision if counsel had argued that the mens rea element was the absence of an exculpatory belief rather than actual knowledge. Such a formulation also has obvious advantages of clarity and precision for the tribunal of fact. Instead of being asked to decide whether or not the defendant had the ill-defined mental element of "fault", it would be

25 Pain DCJ, Casey J, and McMullin J (CA).
26 Supra at note 22, at 94.
27 Ibid.
28 Ibid, 241 per Casey J.

instructed that the absence of a belief that the manoeuvre was necessary constituted the requisite mens rea.

III The Legacy of R v Strawbridge

On a charge of cultivating cannabis it was decided in *R v Strawbridge* that:[29]

> In order to present a *prima facie* case it is not necessary for the Crown to establish knowledge on the part of the accused. In the absence of evidence to the contrary knowledge on her part will be presumed, but if there is some evidence that the accused honestly believed on reasonable grounds that her act was innocent, then she is entitled to be acquitted unless the jury is satisfied beyond reasonable doubt that this was not so.

The statute in this case was silent as to mens rea, and while the judgment of North P demonstrates an intention to follow the principle established in *Proudman v Dayman*, the actual ratio requires the exculpatory belief to be a belief in innocence rather than a belief in mistaken facts. While the New Zealand test may seem to involve a lower standard of culpability, on closer inspection the reverse is true. Typically a belief in innocence will be based on mistaken facts and where this happens there is no real difference between the two tests. Where the mistake is a mistake of law the defence will probably be disallowed under both tests. More problematic is where there is a belief in mistaken facts, but no belief in innocence. Take the facts of *R v Taaffe*[30] where the accused thought he was importing illicit currency but was in fact importing prohibited drugs. On the *Proudman v Dayman* test Taaffe would not be guilty of the offence of importing prohibited drugs, whereas under the *Strawbridge* test he would have no belief in innocence, and no defence.

New Zealand decisions have tended to overlook the precise wording in *Strawbridge* and to apply the *Proudman v Dayman* test while using *Strawbridge* as authority for so doing.[31] The concept of innocence is an integral part of both tests and so there remains the question of what constitutes innocence. It has been noted elsewhere that innocence in a mistake of fact defence may take one of four forms:[32]

1. moral innocence,
2. innocence of any civil wrong,
3. innocence of any crime, or
4. innocence of the crime with which the defendant is charged.

Finding a person guilty of a criminal offence simply through lack of moral innocence or because a civil wrong has been committed would clearly not be an acceptable form of criminal liability, although a cynical reading of *Police v*

29 Supra at note 7, at 916.
30 [1983] 1 WLR 627.
31 See *Kumar v Immigration Department* [1978] 2 NZLR 553.
32 Fairall & O'Connor, *Criminal Defences* (1988) 55.

Taggart[33] could suggest that a combination of the two was the reason for the conviction in that case. Australian courts are tending to the view that for mistake of fact to succeed there has to be innocence of any criminal offence whatsoever.[34] The Canadians are opting for the narrower view:[35]

> The requirement that where the actus reus of an offence is proved there must be proof of the mens rea of the *same* crime is now basic in our criminal law.

Obviously innocence of the crime with which the defendant is charged is the baseline for a successful defence of mistake of fact; it is not entirely clear from the reported decisions whether New Zealand courts will add additional requirements.[36] *Strawbridge* itself suggests a rather wide definition. Nevertheless the requirement that innocence be assessed in relation to the specific offence means the court will still have to state precisely the requisite mens rea element, even though the defence is generally utilised in circumstances where the legislature has not specified the mental element (as in *Strawbridge*). How else can it be determined whether or not the accused is innocent of the offence?

One of the reasons for defining mens rea as absence of thought or belief rather than some form of actual knowledge is to create what was described by Lord Pearce in *Sweet v Parsley* as a "sensible half-way house"[37] between crimes requiring actual knowledge and those where there is absolute liability once the external elements of the crime have been established regardless of the state of mind. To introduce a mens rea element requiring absence of exculpatory belief is simply to set a lower standard of culpability: prosecutors are given an easier task as the grounds for exculpation will be narrow. Often this is done for public policy reasons as was the case in 1985 when s 128 of the Crimes Act was amended to its current form.

A further reason for establishing absence of an exculpatory belief as the requisite mens rea has emerged in New Zealand case law (this has led, in part, to the complications discussed in Part IV). Where it appears that the legislature has intended actual knowledge of the illegality of certain conduct to be essential for culpability the courts have been reluctant to give judicial effect to such an interpretation by adhering strictly to s 25 of the Crimes Act. Typically this has occurred in drug offences such as cultivating a prohibited plant (the offence in *Strawbridge*) or selling a poison contrary to the Poisons Act 1960 (the offence in *Police v Taggart*). In the latter case Woodhouse J was dismissive of the defendant's claim that he was unaware he was dealing with a statutory poison:[38]

33 [1973] 1 NZLR 732.
34 Supra at note 32.
35 *Kundeus* (1975) 32 CRNS 129 per Laskin CJ.
36 But see Mathias, *Misuse of Drugs* (1988) para 128.
37 [1970] AC 132, 157.
38 Supra at note 33, at 733.

> the finding is simply that the appellant was unaware of the law concerning the substance that he knew he was handling. And, of course, ignorance of the law cannot be put forward in answer to a matter such as this.

For a court to hold that actual knowledge of the illegality is an essential element of the offence would be to misrepresent the true nature of the mental element in these drug offences if s 25 prevents a defendant from denying knowledge of the illegality. A formulation of mens rea as the absence of an exculpatory belief at least states the mental element more accurately if s 25 applies. The discussion of *R v Metuariki*[39] in Part IV will examine further the viability of such an approach. Suffice it to say that the requirement for an exculpatory belief that the plants are something other than what they are (that is, mistake of fact in the traditional sense) is likely to remain the *only* mens rea defence to a drug cultivation charge, despite a body of opinion that *Strawbridge* is no longer good law.[40] It is unlikely that the prosecution will be required to prove actual knowledge that the plants are illegal, as the rigid application of s 25 precludes a defendant from denying this knowledge.

IS REASONABLENESS STILL PART OF THE STRAWBRIDGE TEST?

In the speech already quoted from *R v Morgan*[41] Lord Hailsham warned against drawing inferences from decisions where mens rea means one thing and applying them to cases where it means another. To do so is "logically impermissible".[42] Ironically the pitfalls of such an approach are perhaps best illustrated by the inferences the New Zealand Court of Appeal has drawn from the decision in *R v Morgan* itself. On at least three occasions the Court of Appeal has asserted confidently that the decision in *R v Morgan* effectively removes the *Strawbridge* requirement for a mistaken belief to be reasonable.[43] This is asserted despite the fact that the offence in *R v Morgan* requires actual knowledge as mens rea whereas in *Strawbridge* mens rea is the absence of an exculpatory belief. With respect, the Court of Appeal appears to have missed the point of *R v Morgan* and to have attempted the logically impermissible. In *R v Morgan* Lord Hailsham stated expressly that the case did not require him to decide whether the need for reasonableness is appropriate in an offence requiring a mistaken belief as a means of avoiding liability (as in *Tolson*). Lord Cross on the other hand was prepared to express a view:[44]

> I can see no objection to the inclusion of the element of reasonableness in what I may call a "*Tolson*" case . . . if the definition of the offence is on the face of it "absolute" and the defendant is seeking to escape his prima facie liability by a defence of mistaken belief, I can see no

39 (1986) 2 CRNZ 116.

40 For a further example see *Customs v Lawrence Publishing Co Ltd* [1986] 1 NZLR 404, 417 per McMullin J.

41 See text, supra at page 346.

42 Supra at note 1, at 214.

43 *R v Wood* [1982] NZLR 233, 237; *R v Metuariki*, supra at note 39, at 118; *Millar v Ministry of Transport*, supra at note 15, at 665.

44 Supra at note 1, at 202.

> hardship to him in requiring the mistake – if it is to afford him a defence – to be based on reasonable grounds.

If *R v Morgan* leaves *Tolson* untouched, then, by the same reasoning, *Strawbridge* should be similarly unaffected. Interestingly, in *Stanbury v Police*, a 1988 decision dealing with s 52 of the Arms Act 1983, Jeffries J applied *Strawbridge* and stated:[45]

> The person is not guilty of a crime if he commits an act under an honest and reasonable belief in the existence of certain facts and circumstances which, if true, would make such an act lawful.

Despite the recent obiter of the Court of Appeal, he went on to apply the objective test of reasonableness to assess whether or not the circumstances justified the belief.

Bearing in mind that an absence of an exculpatory belief offence is always a half-way house between an offence requiring actual knowledge and one of absolute liability, and that by its very nature such an offence creates liability for thoughtlessness, it is difficult to argue that the exculpatory belief need not be reasonable. As there is no case directly on point, presumably *R v Strawbridge* is still good law (unaffected by *R v Morgan*), but doubtless the persuasive force of the Court of Appeal's obiter will be difficult for subsequent courts to resist.

A further example of the Court of Appeal's failure to appreciate that in a *Strawbridge*-type case mens rea is the absence of belief rather than actual knowledge is provided by Cooke P and Richardson J in *Millar v MOT*[46] where they identify seven separate classes of offence. Class 1 is simple mens rea (and the example given makes it clear actual knowledge is involved here).[47] Class 2 is where:[48]

> in the absence of any evidence to the contrary it may be assumed that mens rea, in the sense of guilty knowledge, existed; but if there is any evidence to the contrary the onus falls on the prosecution to prove such knowledge affirmatively. Class 2 may be called *Strawbridge* without reasonable grounds. But once that complication is dropped the offence can be described simply as one where guilty knowledge is an ingredient of the offence.

As authority for this category the Court of Appeal cite *R v Wood* and *R v Metuariki*.[49] Both cases simply approve *Strawbridge* as modified by *R v Morgan*. Again this seems to miss the point that *Strawbridge* will only ever apply to offences where guilty knowledge, in the sense of actual knowledge, is not an ingredient of the offence. Rather, the *Strawbridge*-type offence *presumes* guilty knowledge unless there is an exculpatory belief.

Part of the confusion is attributable to the fact that *Strawbridge* is at varying

45 Supra at note 21, at 255.
46 Supra at note 15.
47 Ibid, 221.
48 Ibid, 221-224
49 Supra at note 39.

times held to be authority for two separate propositions:

WIDE PROPOSITION: Strawbridge represents a category of offence where the legislature has neither defined the mental element nor indicated that the offence is to be one of absolute liability. Once the actus reus is established mens rea (as guilty knowledge) may be assumed, but if there is evidence to the contrary the prosecution must prove that knowledge affirmatively.[50]

NARROW PROPOSITION: Strawbridge is also authority for a category of offence where mens rea is presumed unless the accused can point to an honest belief on reasonable grounds that the act in question was innocent.

Assuming it is the latter proposition which more accurately states the ratio of *Strawbridge* (with or without the requirement for an objective assessment of reasonableness), the case remains good authority for a category of mens rea (absence of an exculpatory belief) quite separate and distinct from what might be described as simple mens rea. *Strawbridge* may well be "a troublesome anomaly"[51] but neither *Morgan* nor *MacKenzie* has done away with it.

IV R v Metuariki

If there were any doubts about the continuing relevance of *Strawbridge* subsequent to *Morgan* and *MacKenzie* the decision of the Court of Appeal in *R v Metuariki* effectively dispels them. Unusually for a criminal case all three judges delivered separate judgments. Metuariki was charged with a drug dealing offence under s 6 of the Misuse of Drugs Act. But, as possession is necessarily a component of any drug dealing charge, the Court was asked to consider whether a person who dealt with magic mushrooms in the belief that they were not illegal had the necessary mens rea for prosecution. All three judges treat the offence under s 6(1)(c) as one governed by the principle in *R v Strawbridge* (suitably modified in their view by the House of Lords decision in *R v Morgan*), and it is the narrower proposition from *Strawbridge* which is applied; in other words, an honest belief that the conduct was innocent is required to defeat the charge. Despite this, all three define the mens rea element in terms of actual knowledge, but without reaching any consensus. For Richardson and McMullin JJ guilty knowledge is knowledge that the substance in possession is a controlled drug. Casey J takes a different view and holds that the mens rea element is satisfied where there is knowledge as to the nature and characteristics of the substance in possession; there need be no knowledge, in his view, that the substance is proscribed by law.

By defining mens rea as requiring actual knowledge, but still applying the

50 Hence *Strawbridge* effectively reintroduced *R v Ewart* (1906) 25 NZLR 709 Class 3, as modified by *R v Woolmington* [1935] AC 462. Both *Police v Rowles*, supra at note 14, and *Police v Emirali*, supra at note 14, are examples of *Strawbridge* being applied in this limited sense.

51 Described as such by Cooke P and Richardson J in *Millar v MOT*, supra at note 15.

narrow proposition from *Strawbridge*, the judges are confusing two distinct and different forms of mens rea without any clear indication as to whether it is actual knowledge or the absence of an exculpatory belief that constitutes the requisite mens rea. Indeed, the judgments can support six different definitions as to what constitutes guilty knowledge in ss 6 and 7 of the Misuse of Drugs Act. These are:

A (i) absence of an honest belief that the substance is not a controlled drug,
(ii) absence of an honest belief that the substance is not a drug,
(iii) absence of an honest belief that the substance is something completely different in nature and characteristics from what in fact it turns out to be;

B (i) knowledge that the substance is a controlled drug,
(ii) knowledge that the substance is a drug,
(iii) accurate knowledge of the nature and characteristics of the substance (but falling short of knowledge that it is a controlled drug).

Richardson and McMullin JJ tend to support B(i). It is unclear whether Casey J is supporting B(ii) or B(iii). But given their express approval of the decision in *Police v Taggart*[52] all three judges can, in fact, be taken as committed to one or other of the definitions in A. *Police v Taggart* held that failure to know that a tablet (in Taggart's possession) was an illegal drug was a mistake of law and therefore no defence.

The inconsistencies of logic in the judicial arguments are worth spelling out in detail in view of the importance of *R v Metuariki*; currently the leading case on the mental element required for a drug possession charge under New Zealand law. Richardson and McMullin JJ both define the required mens rea as knowledge that the substance in possession is a controlled drug. But they also acknowledge that if the accused has no such knowledge, or is mistaken, then she is ignorant of the law and therefore has no defence. That approach suggests they have misstated the necessary mens rea element. An exculpatory belief is required rather than simple lack of knowledge. Casey J at least indicates an awareness of the problem and says it is not necessary for the accused to have knowledge that the substance is a controlled drug as this would result in "an accused being able to avail himself of ignorance of the law in support of an innocent intention".[53] Hence, in his view knowledge of the physical qualities of the substance is sufficient to sustain a conviction. In the instant case Casey J acknowledges that Metuariki knew the mushrooms were both mushrooms and hallucinatory, but states "it is open to Metuariki to rely on his ignorance of the nature of the substance as evidence indicating inno-

52 Supra at note 33.
53 Supra at note 39, at 126.

cence".[54] But his Honour then indicates that such evidence is provided by the fact Metuariki "was unaware of its identity as a *controlled drug*".[55] And that is tantamount to saying that actual knowledge of the illegal nature of the drug is required.

Leaving these ironies aside the one thing all three judges agreed on is that s 25 of the Crimes Act applies: ignorance or mistake of law is no excuse. Given this, the only possible mens rea defence once the actus reus is established is an exculpatory belief that the substance is something other than what it actually is.[56] Possession of a controlled drug does appear to be an offence within the narrow proposition from *Strawbridge*.

Two additional points can be made in relation to *R v Metuariki*. First, the decision itself is difficult to reconcile with *Police v Taggart*, although all three judges do attempt to distinguish the cases by saying that Taggart's mistake was of law, while Metuariki's was of fact. Taggart dropped tablets into the drinks of two female companions in the knowledge that the tablets were designed to stimulate sexual activity. The women concerned had to be hospitalised and Taggart was convicted, for although he did not know that the tablets contained a statutory poison, "[h]e understood the nature and characteristics of the substance he was handling".[57] It could also be argued that Metuariki understood the nature and characteristics of the substance he was handling; he was, after all, selling the magic mushrooms specifically for their hallucinatory effect which he had himself experienced. Like Taggart, he did not know the substance contained a controlled drug, and, furthermore, he had been told the mushrooms were not illegal (arguably a mistake of law). The Court of Appeal held on these facts that the mental element was not satisfied and the evidence was insufficient to sustain a conviction.

The second point is whether the mens rea requirement for drug possession offences *should* be the absence of an exculpatory belief. One of the dangers in trying to fit offences into mens rea categories is that principles of statutory interpretation are easily overlooked, and in this case there is strong evidence in the statute to suggest that the legislature intended knowledge of the illegality of the substance possessed to be an essential element of the crime. First, the words of s 7(1)(a) of the Misuse of Drugs Act are clear and unequivocal:

> no person shall . . . [p]rocure or have in his possession, or consume, smoke, or otherwise use, any controlled drug.

As such they can be distinguished from the relevant statute in the leading English case *R v Warner*[58] which created an offence where a person had "in his

54 Ibid.

55 Ibid, emphasis added.

56 But note the actus reus of a drug possession charge includes the mental element of "knowledge of the presence of the thing", see Mathias, supra at note 36, at para 121.

57 Supra at note 33, at 733.

58 [1969] 2 AC 256.

possession a substance . . . specified in the Schedule to this Act". It has been argued that the English construction restricts the mental element of knowledge to the existence of a thing possessed.[59] The New Zealand formulation does not admit the possibility of separating the knowledge into, on the one hand, knowledge of the substance, and on the other hand, knowledge of its precise nature. The term "possession" implies a state of mind (knowledge) with respect to the thing possessed, and on the face of the statute, the thing possessed can only be defined one way: "any controlled drug".

Section 29 of the Misuse of Drugs Act provides a further clue:

> **Mistake as to nature of controlled drug** – Where, in any proceedings for an offence against any of the provisions of section 6 or section 7 of this Act, it is necessary, if the defendant is to be convicted of the offence charged, for the prosecution to prove that some substance, preparation, mixture, or article involved in the alleged offence was the controlled drug which the prosecution alleges it to have been, and it is proved that the substance, preparation, mixture, or article was that controlled drug, the defendant shall not be acquitted of the offence charged by reason only of the fact that he did not know or may not have known that the substance, preparation, mixture, or article in question was the particular controlled drug alleged.

Although there is a manifest ambiguity in the expression "the particular controlled drug", which enables Casey J to give the section a completely different construction to that adopted by Richardson or McMullin JJ in *Metuariki,* it is submitted that Richardson J's conclusion is the correct one:[60]

> therefore it is implicit in the closing words of s 29 that . . . the accused must be aware that the substance in question was indeed a controlled drug.

This is particularly so in view of the additional clue provided by the public duty defences in ss 7(3)(a) and 7(3)(b). These defences are only operative if the person in possession of the substance in question *knows or suspects it to be a controlled drug.* The clear inference is that there is *already* a defence to the charge if there is no knowledge or suspicion that the substance is a controlled drug. Finally, if it were held sufficient to have knowledge that the substance was a drug (Casey J hints that knowledge of the nature of the substance includes knowledge that the substance is a drug) there exists the problem noted by McMullin J[61] that many substances in daily use are drugs without being illegal. In any event the Misuse of Drugs Act only defines controlled drugs; how would the term "drug" be legally defined?

Given this analysis the mens rea element for drug possession is relatively simple, consisting of either actual knowledge or suspicion that the substance is a controlled drug. Suspicion is included to cover the possibility of wilful blindness.[62] In addition, as knowledge of the illegality is essential for culpability, the rule that ignorance of the law is no defence ought not to apply. This is

59 Brennan J in *He Kaw Teh*, supra at note 9, at 646.
60 Supra at note 39, at 118.
61 Ibid, 122.
62 See *R v Crooks* [1981] 2 NZLR 53.

not surprising given that there is a recognised but limited class of offences where "the knowledge that the relevant conduct is forbidden is an essential element of its immorality".[63] Hence, in *Maher v Musson*,[64] the defendant was acquitted on a charge of possessing illicit spirits as he did not know the spirits were illicit. On this view the defendant in *Taggart* has a right to feel aggrieved: he lacked the essential mental element and should have been acquitted of the crime charged.

Such a view does not inevitably conflict with s 25 of the Crimes Act. If, as has been suggested, the mental element for drug possession includes knowledge that the substance is a controlled drug, no crime has been committed unless this knowledge is established. The purpose of s 25 is to prevent defendants who have otherwise committed all the elements of an offence from arguing ignorance of the law to avoid conviction. In respect of drug possession s 25 currently operates to prevent the prosecution from having to establish knowledge of the illegality; instead a *Strawbridge*-type presumption of knowledge operates unless there is an exculpatory belief. A similar analysis was adopted by Holland J in *Booth v Ministry of Transport*[65] where it was held that a mistake of law as to the date of commencement of a driving disqualification would not preclude the defendant from raising a defence of absence of mens rea since the offence of driving while disqualified necessitates actual knowledge that the disqualification was in force at the time of driving.

V Conclusion

Under a statutory criminal law regime, determining the requisite mental element for any particular offence should first and foremost be a matter of statutory interpretation. Attempts to fit offences into pre-determined categories can overlook this. A case in point is *Millar v MOT* where the Court of Appeal attempted to reduce the various categories of offence to three:

(i) simple mens rea;
(ii) regulatory provisions dealing with public safety;
(iii) offences of absolute liability.

This categorisation fails to recognise that mens rea can exist not only as actual knowledge, but also as absence of an exculpatory belief.

Absence of exculpatory belief denotes a state of mind essential for liability, and as such it creates a half-way house between offences requiring actual knowledge and offences of absolute liability. Where it applies, the prosecution

63 Hall, *General Principles of Criminal Law* (2nd ed 1960) 403 (emphasis removed).
64 (1934) 52 CLR 100; for a New Zealand case where knowledge of the illegality of conduct is included in the mental element of a crime see *Donnelly v Commissioner of Inland Revenue* [1960] NZLR 469.
65 [1988] 2 NZLR 217.

has the advantage of a lower level of culpability. It is, therefore, surprising that under our criminal code absence of thought or belief is the required mental element for the serious offences of sexual violation and possession of a prohibited drug.

There is little difficulty with such a mens rea element for the crime of rape, as the statute is clear and represents a deliberate policy choice on the part of the legislature. More problematic is the case of drug possession and related offences such as cultivation of a prohibited plant.[66] Here the legislature has apparently intended to prescribe offences requiring actual knowledge, but a strict application of s 25 of the Crimes Act effectively means that the only mens rea defence is an exculpatory belief. For this reason persons in possession of a controlled drug who have neither given any thought at all to what it is they have in their possession, nor have actual knowledge or suspicion of the illegal nature of the substance in their possession, may be liable for drug possession. While liability for thoughtless conduct no doubt has its place in the criminal code, it has no place where Parliament clearly intends knowledge of the illegality to be an essential element of the offence. Equally problematic are instances where the courts have failed to acknowledge that a particular statutory offence creates liability for acting without a concurrent belief. It is respectfully submitted that *Civil Aviation v McKenzie* is such a case.

Millar v MOT identifies a bewildering array of mens rea alternatives where "the text and scheme of the statute provide no real help".[67] On the basis of this article's analysis of absence of mind as guilty mind one wonders how determined the search for help has been. The confusion owes as much to judicial creativity and neglect of statutory interpretation as it does to reticent drafting.

66 It can be argued that the offence in *Strawbridge*, as in *Metuariki*, ought to have been construed as requiring actual knowledge.

67 *Millar*, supra at note 15, at 664.