

THE JUDICIAL CATEGORISATION OF OFFENCES

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Notoriously, offences are often created by legislation which neither specifies any mental element or fault nor expressly excludes such a requirement. This practice has constantly caused difficulty and has led to a vast number of decisions, many of which are in substantial conflict. In searching for the elusive (or illusory) legislative intent in relation to particular offences the courts have had to repeatedly confront quite fundamental issues. Is there a requirement of mens rea? If there is, what in the context of the offence in question is this requirement? Who has the burden of proof on such an issue?

The courts have recognised the injustice of convicting a person who was not at fault, and have generally held that there is a common law presumption that an element of mens rea is an essential ingredient of an offence even though the legislation is silent on this. It has been accepted, however, that the mens rea which may be required may vary according to the nature of the offence and the demands of the social purpose of the legislation. Moreover, there have been many cases where the presumption of an ingredient of mens rea has been ignored or held to be rebutted, often because of a concern that to require mens rea or fault would defeat the object of the legislation because proof of it would be too difficult and acquittals too easy to obtain.

To assist the resolution of these difficulties the New Zealand Court of Appeal has, since the beginning of this century, recognised different categories of offence. These were the subject of important judicial modifications in 1970 and 1983 and the purpose of this paper is to analyse the scheme which now emerges from the cases. Space precludes an examination of the somewhat uncertain content of such mental elements as intention, knowledge and recklessness, and, unless the context indicates otherwise, the ambiguous but convenient term "mens rea" is used to include any required mental element or fault.

THE STRAWBRIDGE CLASSIFICATION

In the context of serious crime, the cornerstone of modern doctrine in New Zealand is the decision in *Strawbridge*.¹ This case is important for two reasons. First, the Court of Appeal restated the correct approach to the question whether mens rea is required when the terms of the legislation has left the position unclear. The Court adopted the views of Lord Reid in *Sweet v Parsley*,² pursuant to which there is a vital distinction between mere quasi-criminal offences (which "are not criminal in any real sense, but are

¹ [1970] NZLR 909; see A. T. H. Smith, Half way to the Half way House? [1971] NZLJ 304; I. D. Campbell, Crime by Omission, in *Essays on Criminal Law in New Zealand* (R. S. Clark ed. 1971), 1.

² [1970] AC 132, 149.

acts which in the public interest are prohibited under a penalty"³) and "truly criminal" or "serious" offences. When prohibited conduct is merely "quasi-criminal" the court may readily conclude that legislative silence as to mens rea means that the well-established practice of imposing strict liability should apply. But in the case of "acts of a truly criminal character" (or "serious offences") mere legislative silence is not enough to displace the presumption that mens rea is required, and a person will be liable in the absence of mens rea only if this was "clearly" intended. In *Strawbridge* the charge was one of cultivating prohibited plants (cannabis), the statute being silent as to mens rea. The maximum penalty was then fourteen years' imprisonment,⁴ and in view of the severity of the possible penalty and the stigma which such a conviction would attract the Court concluded that it was unthinkable that Parliament intended liability in the absence of mens rea — in particular, knowledge that the plant was a prohibited plant.

The second reason for the importance of *Strawbridge* is the Court of Appeal's recognition of three classes of offence. In summary these were: offences where the prosecution must prove mens rea, offences of strict liability, and offences where the prosecution need not prove mens rea but the defendant is entitled to be acquitted if there is evidence which creates a reasonable doubt that he did not have a guilty mind. This tripartite classification, which is a modified version of that enunciated by Edwards J in *Ewart*,⁵ will now be examined in detail. It is assumed throughout this discussion that there is no express statutory provision concerning the burden of proof.

Class One

This class includes all offences where the terms of the legislation expressly or impliedly require mens rea. In any such case the prosecution has the burden of proving beyond reasonable doubt that the defendant in fact acted⁶ with that mens rea, there being no case to answer until there is evidence from which that can reasonably be inferred.

In *Strawbridge*⁷ North P. indicated that this class consisted of offences which the statute required to be "knowingly" committed, in contrast with offences where the word "knowingly" has been omitted, adding that in the former case "the Crown must prove knowledge on the part of the accused before it can be said that a *prima facie* case has been made out". This is elliptical in that the same principle applies when other words are used which expressly require some state of mind, common examples being "wilfully", "intentionally", and "fraudulently". Similarly, should the statute impose liability for negligence by expressly making it an ingredient of the

³ *Sherras v De Rutzen* [1895] 1 QB 918, 922 per Wright J.

⁴ Section 5(1) of the Narcotics Act 1965; the maximum penalty is now 7 years: s.9 of the Misuse of Drugs Act 1975.

⁵ (1905) 25 NZLR 709, 731.

⁶ The courts usually refer only to acts, but all these categories include offences of omission: cp. *Tustin* (1908) 27 NZLR 506; *Linssen v Hitchcock* (1915) 34 NZLR 545.

⁷ [1970] NZLR 909, 915.

offence that the defendant acted without reasonable care, or acted “carelessly”, or “without reasonable consideration” for others, the prosecution will be required to prove such negligence and there will be no case to answer unless there is evidence from which a reasonable tribunal can infer it beyond reasonable doubt.⁸ In addition, the statutory definition may employ terms which implicitly require some particular mental element, in which case the same principle should apply in relation to that element. For example, older statutes sometimes required that the offender act “feloniously”, which seems to have imported the need for mens rea,⁹ and modern examples include prohibitions on “aiding and abetting” specified conduct,¹⁰ offences of “possession”,¹¹ and “permitting”.^{11a} It might be argued that the prohibition of any act imports a mental element to the extent that “voluntary” or “conscious” conduct is always essential; but it now seems that any such universal requirement is subject to the absence of antecedent “fault”, and in any event the apparent presumption that conduct is “voluntary” or “conscious”¹² will mean that this minimal mental element will not by itself bring an offence within class one.

In addition to cases where the statute uses words requiring mens rea, Edwards J would have included in class one any offence consisting of an act which “necessarily” showed a guilty mind, “so as to dispense with proof of knowledge”.¹³ He excluded the offence of selling obscene material because the statute did not include a word such as “knowingly” and because it was quite possible for a seller to be ignorant of the content of the material. Should the nature of the defendant’s conduct in fact reveal a guilty mind, the classification of the offence ceases to be significant, but in any event in subsequent cases the courts assumed that even serious offences could not be within class one if there were no words in the statute introducing a requirement of mens rea,¹⁴ and the same assumption is made in *Strawbridge*.

⁸ *Police v Simmons* [1978] 1 NZLR 435; *Boyes v Transport Department* [1966] NZLR 171; *Mackenzie v Civil Aviation Department*, unreported 28 June 1983, CA 29/83 majority judgment, p. 16.

⁹ *Ewart* (1905) 25 NZLR 709, 733, per Edwards J. quoting Brett J. in *Prince* (1875) LR 2 CCR 154, 163; Brett J. also mentioned cases where the statutory definition included another offence, such as murder or burglary, which itself requires proof of mens rea; cp. *Morgan* [1976] AC 182 (rape).

¹⁰ *Hazlewood & Co Ltd v Richardson* [1949] NZLR 1204.

¹¹ Which will at least require knowledge of the presence of the thing, if not knowledge of its nature, although that will usually be inferred from the fact of custody: see *Warner* [1969] 2 AC 256; *Police v Emirali* [1976] 1 NZLR 286, 288; cp. *Police v Hart* [1974] 2 NZLR 751; *Police v Rowles* [1974] 2 NZLR 756; *Collector of Customs v J.* [1976] 1 NZLR 763.

^{11a} Although varying views have been expressed as to the degree of mens rea this will require: e.g. compare *Sweet v Parsley* [1970] AC 132, 162; *Glennie v McGlynn* [1958] NZLR 344; and *R v City of Sault Ste. Marie* (1978) 85 DLR (3d) 161, 183.

¹² E.g. *Bratty v A.G. for Northern Ireland* [1963] AC 386.

¹³ (1905) 25 NZLR 709, 736.

¹⁴ *Carswell* [1926] NZLR 321 (bigamy); *Hirst* [1932] NZLR 300 (intercourse with inmate of institution); cp. *O. F. Nelson & Co Ltd v Police* [1932] NZLR 337, 368 per Smith J; and see *Williams J.* in *Ewart* (1905) 25 NZLR 709, 725-726.

Finally, something must be said about the discharge of the prosecution's burden of proof in this class of case. In *Strawbridge* it was said that "the Crown must prove knowledge. . . before it can be said that a *prima facie* case has been made out", and subsequently in *McCone v Police*¹⁵ the Court described this as "the conventional burden of affirmatively establishing a guilty mind on the part of the accused". Plainly the prosecution must prove beyond reasonable doubt that the defendant in fact had the required mens rea, but it must be emphasised that this will not necessarily require an admission or confession and that in many cases the guilty mind may be reasonably inferred from the conduct of the defendant.

"When a statute provides that knowledge, intention, wilfulness, or some other specific state of mind is required as an ingredient of an offence, the prosecution must of course establish its existence as part of its case. But the very doing of the act in question may be, and commonly is, sufficient *prima facie* evidence of any intention or other state of mind that would normally accompany such an act."¹⁶

Moreover, the references in *Strawbridge* to the need to "prove" knowledge for a "*prima facie* case" must, it seems, be read as requiring no more than evidence from which mens rea can reasonably be inferred, for there to be a case to answer.

These are perhaps elementary points, but they are relevant to the practical distinction between class one and three offences, which will be considered after the latter have been described.

Class Two

These are offences of strict or absolute liability or, as Edwards J described them, "those in which either from the language or the scope and object of the enactment to be construed, it is made plain that the Legislature intended to prohibit the act absolutely, and the question of the existence of a guilty mind is only relevant for the purpose of determining the quantum of punishment. . .".

The Court of Appeal has now imposed a significant qualification on this proposition, which will be considered below,¹⁷ but it remains difficult to provide an adequate description of the kind of offence which is likely to be interpreted as falling within this class. Apart from the language of the legislation, the primary question since *Strawbridge* has been whether the prohibited conduct is "truly criminal" (in which case mens rea is probably essential) or merely "quasi-criminal" (in which case strict liability is readily imposed when the legislation is silent as to mens rea). Typically, quasi-criminal offences will be "public welfare" or "regulatory" offences consisting of conduct in the course of some trade, industry, business or other "particular activity", the specified conduct having been prohibited with the object of protecting public health or safety, or some other important

¹⁵ [1971] NZLR 105.

¹⁶ Adams, *Criminal Law and Practice in New Zealand* (2nd ed.), para 369; in *Ewart* (1905) 25 NZLR 709, 731, Edwards J spoke of a guilty mind being "necessarily inferred from the nature of the act done", but it should suffice that it can be reasonably inferred.

¹⁷ "The Mackenzie Classification".

public interest.¹⁸ The inference of strict liability will be strengthened if the nature of the offence is such that fault would often be difficult to establish,¹⁹ if the risk of offending can be minimised by the taking of obvious precautions, and if the possible penalty is moderate and little stigma attaches to conviction.²⁰ Conversely, mens rea is likely to be required if the offence may attract significant stigma, even if the maximum penalty is a relatively short term of imprisonment,²¹ and strict liability should not normally be imposed if it could result in the conviction of a class of persons who are unable to do anything which will promote the observance of the law.²²

Class Three

This consists of offences which are not within class one because the legislation contains no words which expressly or impliedly require mens rea, but which are nevertheless not offences of strict liability. In *Strawbridge*²³ it was held that, in this class of case, upon proof of the prohibited conduct, mens rea (or a “guilty mind”, or “knowledge of the wrongful nature of the act”) will be presumed in the absence of any evidence to the contrary. Nevertheless the accused will be entitled to acquittal if he can adduce evidence, or point to evidence in the prosecution case,²⁴ which leaves the tribunal of fact in reasonable doubt as to whether he acted with mens rea.

In *Ewart*²⁵ it had been held that in this class of case, upon proof that the defendant was responsible for the prohibited act, the defendant had the burden of proving absence of mens rea to the satisfaction of the court (or jury). This rule applied to the offence in *Ewart* (selling obscene material) and it was subsequently held to apply in numerous New Zealand cases,²⁶ including some where the courts were concerned with “truly criminal” offences.²⁷ But after *Woolmington*²⁸ there were a number of cases, involving

¹⁸ Such as fishery resources: *Fisheries Inspector v Wareham* [1974] 2 NZLR 639; or the value of the national currency; *R v St. Margaret's Trust Ltd* [1958] 2 All ER 289; some statements include public morals, but compare *Fraser v Beckett and Sterling Ltd* [1963] NZLR 480 with *Ewart* (1905) 25 NZLR 709.

¹⁹ Cp. *Alphacell v Woodward* [1972] AC 824.

²⁰ *Fisheries Inspector v Wareham* [1974] 2 NZLR 639.

²¹ *Police v Rowles* [1974] 2 NZLR 756 (possession of drugs); *Auckland C.C. v King* [1977] 1 NZLR 429 (driving while disqualified).

²² *Lim Chin Aik* [1963] AC 160; cp. *Dunn v Monson* (1911) 30 NZLR 399; *C. L. Innes & Co Ltd v Carroll* [1943] NZLR 80; *Auckland C.C. v King* [1977] 1 NZLR 429; contrast *Weiss v Green* (1907) 26 NZLR 942.

²³ [1970] NZLR 909. In describing this class the Court referred only to the absence of “knowingly”, and in *Ewart* (1905) 25 NZLR 709, 731, Edwards J referred only to the absence of “knowingly” or “wilfully”; but any term which expressly or impliedly requires mens rea places the offence in class one.

²⁴ *Mackenzie v Hawkins* [1975] 1 NZLR 165; *Police v Creedon* [1976] 1 NZLR 571, 584 per Richmond J.

²⁵ (1905) 25 NZLR 709, 731 per Edwards J; 725 per Williams J; 745 per Chapman J.

²⁶ E.g. *Peacock v Cameron* (1905) 25 NZLR 527; *Brittain v Henderson* (1908) 28 NZLR 262; *Dunn v Monson* (1911) 30 NZLR 399; *Linssen v Hitchcock* (1915) 34 NZLR 545; *Eccles v Richardson* [1916] NZLR 1090.

²⁷ *Hawthorne* (1914) 17 GLR 303; *Carswell* [1926] NZLR 321, 335-336; *Hirst* [1932] NZLR 300, 305-306; *O. F. Nelson & Co Ltd v Police* [1932] NZLR 337, 368.

²⁸ [1935] AC 462.

regulatory as well as serious offences, in which it was accepted that this must be qualified so that the defendant was required to do no more than point to evidence which raised a reasonable doubt on the mens rea issue.²⁹ In *Strawbridge* the Court of Appeal accepted that this conclusion followed from *Woolmington*. The Court cited a number of passages from the speeches in *Sweet v Parsley*,³⁰ and at one point described the modified third category of offence as being what Lord Pearce there referred to as a "sensible half-way house". That was plainly in error as Lord Pearce had in mind placing the persuasive burden of proof on the defendant, which he thought could not be done without inroads into the scope of *Woolmington*.³¹

In *Strawbridge* cultivating prohibited plants was held to be within this class of offence, so that upon proof that the defendant cultivated such plants it was to be presumed that she knew their nature, but she was entitled to acquittal if there was evidence which raised a reasonable doubt as to whether she in fact had such guilty knowledge. Subsequently the same conclusion was reached in a variety of cases where the statute contained no words importing or excluding mens rea. For example, on a charge of possession of controlled drugs it was held that proof of possession sufficed to establish guilt, but the defendant should nevertheless be acquitted if there was also evidence creating a reasonable doubt whether he in fact knew that what he possessed were drugs.³² On an overstaying charge under section 14(5) of the Immigration Act 1965, before the Act was amended, it was held that the defendant should be acquitted if there was evidence creating a reasonable doubt as to whether he was aware that his permit had expired and that no application for an extension had been made.³³ On a charge of omitting to provide animals with proper shelter, evidence of lack of awareness and foresight of the inadequacy of available shelter was held to be a defence if it created a reasonable doubt on that issue.³⁴ In the context of driving offences, it has been held that driving while disqualified may be defended on the same basis with evidence that the driver was ignorant of the disqualification, at least if it was not imposed in open court,³⁵ and driving

²⁹ *Innes v McKinlay* [1954] NZLR 1054, 1057-1958; *Burney* [1958] NZLR 745, 752; *Transport Department v McCutcheon* [1962] NZLR 675, 676-677; *Fraser v Beckett and Sterling Ltd* [1963] NZLR 480, 497; *Wellington Acclimatisation Society v Nireaha Co-Op Dairy Co* [1963] NZLR 599, 602; *Boyes v Transport Department* [1966] NZLR 171, 172; cp. *Lim Chin Aik* [1963] AC 160, 173; and in England compare *Harding v Price* [1948] 1 KB 695, 700, and *Reynolds v G. H. Austin and Sons Ltd* [1951] 2 KB 135, 145, with *Roper v Taylors Central Garages* [1951] 2 TLR 284, 288 and *Warner v MPC* [1969] 2 AC 256, 303.

³⁰ [1970] AC 132.

³¹ Cp. Adams, Onus of Proof in Criminal Cases, in *Essays on Criminal Law in New Zealand* (R. S. Clark ed. 1971), 82.

³² *Police v Rowles* [1974] 2 NZLR 756; *Police v Emirali* [1976] 1 NZLR 286.

³³ *Labour Dept v Aloua* [1975] 1 NZLR 507; the Immigration Amendment Act 1976, s.4(2), provides that the overstayer commits the offence "whether or not he knows" his permit has expired; *quaere* whether reasonable mistake may still excuse; cp. *Kumar v Immigration Dept.* [1978] 2 NZLR 553.

³⁴ *Mackenzie v Hawkins* [1975] 1 NZLR 165.

³⁵ *Auckland City Council v King* [1977] 1 NZLR 429.

with an excess blood alcohol content might sometimes be excused by evidence which creates a reasonable doubt as to the driver's knowledge of his consumption of alcohol.³⁶ In *Police v Creedon*³⁷ the same principle was applied when independently of the words used in the statute it was held that there was a defence of lack of "fault" or negligence: on a charge of failing to yield the right of way when proceeding from a give-way sign the driver had a defence if there was evidence leaving a reasonable doubt as to whether he had been guilty of any fault or negligence.

Finally, in principle it is possible for an offence to fall into more than one of the above classes of offence. An offence could be in class one in respect of one mental element which is required by the statute, but it could be an offence of strict liability in other respects, or there may be other mental elements which will be presumed in the absence of evidence to the contrary. For example, on a charge of possession of a controlled drug it may be that the prosecution must prove knowledge of the presence of the thing, although it is normally proper to infer that from the fact of custody, but a defence of lack of knowledge of the nature of the thing may be considered if there is evidence supporting it.^{37a}

Class One and Class Three Compared

An assessment of the practical significance of the *Strawbridge* classification requires a closer examination of the distinction between class one and class three offences. In class one the prosecution has the burden of proving that the defendant in fact acted with the mens rea or fault required by the words of the statute, and there will be no *prima facie* case unless there is evidence from which a reasonable tribunal could find beyond reasonable doubt that the mens rea or fault *in fact* existed. In class three, however, all the prosecution is initially required to do is establish that the defendant did the prohibited act or was responsible for the prohibited omission or state of affairs. Once there is evidence from which a reasonable tribunal could find this external element beyond reasonable doubt, there is a case to answer. In addition, the required mens rea or fault will be presumed unless there is evidence to the contrary, although the defendant should be acquitted if there is such evidence which leaves the tribunal of fact in reasonable doubt on the issue. In other words, upon proof that the defendant was responsible for the external elements of the offence, the conclusion that he acted with the requisite mens rea or fault is one which *must* be drawn — it is a "rebuttable presumption of law" — but the presumption imposes only an "evidential" and not a "persuasive" burden on the defendant, who remains entitled to acquittal if there is evidence creating a reasonable doubt as to whether he *in fact* acted with such mens

³⁶ *Flyger v Auckland C.C.* [1979] 1 NZLR 161; *Rooke v Auckland C.C.* [1980] 1 NZLR 680.

³⁷ [1976] 1 NZLR 571, 575-576, 584, 586.

^{37a} It may be that the defendant has an evidential burden in relation to both these mental elements, although in principle this need not be the case; see *Police v Hart* [1974] 2 NZLR 751; *Police v Rowles* [1974] 2 NZLR 756; *Police v Emirati* [1976] 1 NZLR 286; Cp Adams, *Criminal Law and Practice in New Zealand* (2nd ed.), paras 358-360.

rea or fault.³⁸ In principle, this evidential burden will be discharged, so that the issue must be determined as a matter of fact rather than presumption, if there is evidence from the defendant, a co-defendant, or the prosecution,³⁹ which is capable of leaving a reasonable tribunal in reasonable doubt.⁴⁰

The availability of a presumption of mens rea in class three cases marks the difference between them and class one cases, but the practical importance of the distinction will not always be great. Whether the offence be in class one or class three, the evidence of the prohibited conduct will often be evidence from which mens rea can be inferred as a matter of fact. In class one cases this will be a conclusion which may, not must, be drawn, but the defendant will usually be in the best position to know the truth of the matter and in the absence of evidence suggesting lack of mens rea an acquittal on this ground will be unlikely.

When the mens rea in question consists of intention or foresight as to consequences, that state of mind will usually be readily inferred from conduct which brought about those consequences. There is an absence of authority for the inclusion in class three of offences requiring specified consequences when the statute is silent as to mens rea,⁴¹ and it is unlikely that a *Strawbridge* presumption of intent would do much that is not already achieved by way of inference.

For the most part the relevant cases are concerned with possible ignorance or mistake as to circumstances forming part of the offence. Knowledge of circumstances may be more difficult to infer than intent to cause results, but much will depend on the nature of the offence and the facts of the case. In the case of some offences the nature of the prohibited conduct will usually make it easy to infer mens rea, so that the prosecution's hand is not greatly strengthened if the available inference is replaced by a presumption. For example, section 128 of the Crimes Act 1961 defines the crime of rape but makes no mention of mens rea, so that this truly criminal act appears to be a class three offence. It should follow that upon proof that the defendant had intercourse with a female who did not in fact consent it will be presumed that the defendant knew this, or was reckless, although he remains entitled to an acquittal if there is evidence raising a reasonable doubt about it. If rape was a class one offence the prosecution would be required to "affirmatively" prove such knowledge or recklessness, but the nature of the act is such that it is difficult to imagine cases where the inference of mens rea would not be practically inevitable in the absence of evidence suggesting it was absent.⁴² Again, the *Strawbridge* presumption

³⁸ For this terminology, see e.g. Cross, *Evidence* (3rd N.Z. ed.), pp. 88-89, 91, 124-127.

³⁹ In *Sweet v Parsley* [1970] AC 132, 164, Lord Diplock suggested that evidence of mistaken belief can only originate from the defendant; this is not necessarily the case: Adams, *Criminal Law and Practice in New Zealand* (2nd ed.) para 366/1; Campbell, Crime by Omission, in *Essays on Criminal Law in New Zealand* (R. S. Clark ed. 1971), p. 12-13; cp *Mackenzie v Hawkins* [1975] 1 NZLR 165.

⁴⁰ Cp Cross, *op.cit.*, 88; *Lee Chun Chuen* [1963] AC 220, 229; *Anderson* [1965] NZLR 29, 35; *Kahu* [1947] NZLR 368, 377.

⁴¹ But see *Mackenzie v Hawkins* [1975] 1 NZLR 165.

⁴² Cp *Morgan* [1976] AC 186, 200.

should add little that is not supplied by common sense if the relevant circumstance is one of which the defendant had notice. For example, when it is shown that a person had overstayed his permit to be in New Zealand, it may naturally be inferred that he was aware of the expiry date, unless there is evidence to the contrary.⁴³

Even in cases where the circumstances forming part of the offence are such that knowledge of them cannot obviously be inferred from mere proof of the prohibited conduct, the presumption supplied by *Strawbridge* is not always needed. In many cases the prosecution will be able to adduce additional evidence pointing to guilty knowledge,⁴⁴ and sometimes the law provides a special rule that certain evidence suffices — for example, the rule that unexplained possession of recently stolen property allows, but does not require, the inference that the defendant was guilty of theft or receiving.⁴⁵ But in the absence of extra evidence or a special rule, the presumption in *Strawbridge* will sometimes be needed if proof of the prohibited conduct is to support a finding of guilt. For example, evidence that on one occasion the defendant watered a prohibited plant might not support an inference that he in fact knew the nature of the plant, and proof that the defendant supplied clothing to a person who had recently escaped from lawful custody might involve no evidence that he knew of the escape.⁴⁶

In such cases (which may be unusual) the *Strawbridge* presumption will be of real utility, and the defendant will be required to point to evidence suggesting lack of mens rea before that question will be investigated. But it is wrong to suppose that if the offence is in class one the defendant can have no evidential burden in relation to mens rea. In *Strawbridge*⁴⁷ the Court thought that recognition of class three offences was supported by the reasoning of Lord Diplock in *Sweet v Parsley*,⁴⁸ but this may be doubted. Lord Diplock did not distinguish offences according to whether the statutory definition required mens rea or not. Rather, he provided an interpretation of *Woolmington* of general application, explaining that it did not lay down how the onus of proving guilt can be discharged as to “any particular elements of the offence”, which, he said, “is left to the common sense of the jury”. This is hardly consistent with a presumption of law based on proof of prohibited conduct. Lord Diplock further explained that *Woolmington* did not require the prosecution to call evidence to prove the absence of an excusing mistake, or the absence of a claim of right on a charge of larceny (which in New Zealand would be a class one offence). “The jury,” he said, “is entitled to presume that the accused acted with

⁴³ *Cp Labour Dept. v Aloua* [1975] 1 NZLR 507.

⁴⁴ A. T. H. Smith [1971] NZLJ 304, 308.

⁴⁵ E.g. *Schama and Abramovitch* (1914) 112 LT 480; and for the inference or presumption of possession from custody, see *Warner* [1969] 2 AC 256; and for “knowingly harbouring” see *Cohen* [1951] 1 KB 505 (although this judgment does not clearly distinguish the persuasive and evidential burdens, nor presumptions and permissible inferences); and see Glanville Williams (1977) 127 New LJ 156, 157-158.

⁴⁶ *Keane* [1921] NZLR 581, 584.

⁴⁷ [1970] NZLR 909, 914-916.

⁴⁸ [1970] AC 132, 164.

knowledge of the facts", unless there is evidence of a mistake which creates a reasonable doubt on the question. This does not seem to be the same as the presumption which must be applied in class three cases under *Strawbridge*, but even if Lord Diplock was merely describing a permissible and usual inference of fact it may also be that he meant that the possibility of an excusing mistake should not be investigated unless there is some evidence positively supporting it, whether or not the statutory definition requires knowledge. Pursuant to *Strawbridge*, where the words of the statute require mens rea the prosecution will fail unless there is evidence from which the required mens rea may be inferred as a fact, and the Judge will not be entitled to remove or dispose of the issue by applying a presumption of law. But although the general issue whether mens rea is proved must be decided as a question of fact, it does not follow that the judge or jury should have to consider any particular reasons for supposing that it was absent unless there is some evidence supporting such an hypothesis.⁴⁹ Defences such as self-defence and compulsion, which do not negate an element of the offence, should not be considered unless there is some evidence supporting them, and the same is true of at least some particular reasons for the absence of mens rea. A well-established example is automatism,⁵⁰ and the same is true of intoxication.⁵¹ There seems to be no reason why the same principle should not apply to mistake.⁵² The process of "inferring" the fact of mens rea from conduct will often be barely distinguishable from applying a presumption which is rebuttable by evidence raising a reasonable doubt on the issue.^{52a}

These various evidential considerations diminish the significance of the difference between class one and class three offences, but there is one other possible distinction which must be briefly considered. In *Strawbridge* the Court of Appeal twice indicated that it was a defence if the accused "did not know" that the plant was a prohibited plant, but in finally answering the question submitted to the Court it described the defence as being "that the accused honestly believed on reasonable grounds that her act was innocent".⁵³ The objections to the apparent requirement of "reasonable grounds" for the belief are well known. In the first place, it is inconsistent with the proposition that the defendant was innocent if she "did not know" the nature of the plants. A mistaken belief may exclude knowledge of, or advertence to, the actual circumstances which constitute the offence even though the belief may not be based on "reasonable" grounds, or facts which would deceive a "reasonable" person. This was the basis of the decision in *Morgan*⁵⁴ that an accused should not be convicted of rape if

⁴⁹ Cross, *Evidence* (5th UK ed.), 96.

⁵⁰ *Bratty v A.G. for Northern Ireland* [1963] AC 386; *Burr* [1969] NZLR 736, 748; *Hill v Baxter* [1958] 1 QB 277, 284.

⁵¹ *Kamipeli* [1975] 2 NZLR 610, 619.

⁵² *Pappajohn* (1980) 111 DLR (3d) 1; this question was not decided in *Morgan* [1976] AC 182; if on the evidence there is not "room for more than one view" as to mens rea, a direction on the question may not always be necessary: *Steane* [1947] KB 997, 1004; *Howe* [1982] 1 NZLR 618.

^{52a} Cp *O'Connor* (1980) 29 ALR 449, 485-587, per Murphy J.

⁵³ [1970] NZLR 909, 916.

⁵⁴ [1976] AC 182.

he believed, albeit without reasonable grounds, that the woman consented. The presence or absence of reasonable grounds is something which should be considered when deciding whether a claim of mistake might be true, but some people will in fact form beliefs on grounds which are later assessed as being less than reasonable, and there is no warrant for a rule of law to the effect that evidence of such a belief is incapable of discharging the evidential burden imposed in class three cases.⁵⁵ Secondly, if the sentence where the court requires reasonable grounds is regarded as authoritative, in preference to the passages where lack of knowledge was said to excuse, liability is imposed for what may be no more than mere negligence as to a vital element, whereas it has long been thought to be a basic principle that mere negligence, as opposed to intention or recklessness, is insufficient fault in the context of serious crime.⁵⁶

If the offence is a class one offence where the statute expressly requires advertence to certain facts, or some particular intent, a mistake which may exclude such a state of mind need not be based on reasonable grounds.⁵⁷ In the case of class three offences, however, there are statements in some New Zealand cases suggesting that an excusing mistake must be reasonable,⁵⁸ That is clearly appropriate if the Court concludes that negligence is sufficient fault,⁵⁹ but where the offence is truly criminal this will be exceptional and in other cases it is submitted that a mistake excluding awareness of an essential circumstances need not be based on reasonable grounds. This is supported by cases where "honest ignorance" has been said to be a defence,⁶⁰ or where "actual awareness" or "conscious knowledge" has been said to be necessary for guilt,⁶¹ and the Court of Appeal has now accepted it in relation to cultivating prohibited plants.⁶² At present, this appears to be the general rule in New Zealand in the case of truly criminal acts, whether they be class one or class three offences.

⁵⁵ Cp Glanville Williams (1975) 125 New LJ 968, 969, criticising the views of the CA in *Morgan* [1976] AC 182, 191; and see [1975] NZLJ 78.

⁵⁶ E.g. *Walker* [1958] NZLR 810, 816.

⁵⁷ E.g. *Conrad* [1974] 2 NZLR 626; cp *Simpson* [1978] 2 NZLR 221, 226; it is submitted that dicta to the contrary in *Pheko* [1981] 3 All ER 84, 92-93 are insupportable.

⁵⁸ E.g. *Carswell* [1926] NZLR 321; *Kumar v Immigration Dept.* [1978] 2 NZLR 553, 557.

⁵⁹ E.g. *Police v Creedon* [1976] 1 NZLR 571; cp *Brittain v Henderson* (1908) 28 NZLR 262; *Technical Books v Collector of Customs* [1957] NZLR 490, 494; *Auckland City Council v King* [1977] 1 NZLR 429.

⁶⁰ *Ewart* (1905) 25 NZLR 709, 726 per Williams J, who added that suspicion would suffice if the defendant abstained from checking: 729; Edwards J said that "honest ignorance" excused, but that a guilty mind could be inferred from failure to check a publication of dubious reputation: 737-738; but Chapman J favoured liability for negligence: 744-745; in *Linszen v Hitchcock* (1915) 34 NZLR 545, 546, a "not altogether unreasonable" belief excused.

⁶¹ *Labour Dept. v Aloua* [1975] 1 NZLR 507; *Police v Rowles* [1974] 2 NZLR 756, 758-759; cp *Mackenzie v Hawkins* [1975] 1 NZLR 165.

⁶² *Wood*, unreported, 22 September 1982, CA 82/82; and see *Walker*, unreported, 3 March 1980, CA 133/79 (rape).

THE MACKENZIE CLASSIFICATION

In *Civil Aviation Department v Mackenzie*⁶³ the Court of Appeal recognised an additional class of offence. Following the decision of the Supreme Court of Canada in *R v City of Sault Ste. Marie*,⁶⁴ the Court held that a distinction must be drawn between “truly criminal offences” and “public welfare regulatory offences”, and in respect of the latter class, if the legislation in question has left the position unclear, there will be a defence of “total absence of fault”, but the defendant has the burden of proving this defence on the balance of probabilities. It was made clear that this does not apply to truly criminal offences, in which context the *Strawbridge* principles will continue to apply. In addition, it applies only to public welfare offences where the terms of the legislation neither exclude nor require an element of mens rea or fault: it was recognised that if the legislation expressly makes negligence an ingredient of the offence the prosecution will have to prove it, unless there is a statutory provision to the contrary, and the same should be true whenever the terms of the legislation expressly or impliedly require an element of mens rea or fault.^{64a}

In *Mackenzie* the information alleged the dangerous operation of an aircraft, contrary to section 24(1) of the Civil Aviation Act 1964. The defendant pilot had flown low over a country riverbed and the plane’s tail fin caught two telephone wires, with the result that the trailing wires threatened the safety of two men on the ground. The pilot, however, was not aware of the wires or the collision with them, the wires being difficult to see after poles indicating their presence had been removed. At first instance it was held to have been established on balance that the defendant had not been at “fault” and the charge was dismissed. In the Court of Appeal it was held that the offence was a public welfare regulatory offence, but that proof of lack of fault provided a defence. There was some doubt as to whether the correct objective test had been applied on this issue, but in view of the time that had elapsed the Court of Appeal held that the acquittal should stand.

This decision is significant in two respects, which will now be considered in more detail.

The defence of absence of fault

The first important aspect of *Mackenzie* is the adoption of the principle that although the legislation may create a public welfare regulatory offence, with no indication of any requirement of mens rea or fault, a defendant apparently responsible for the external elements of the offence may nevertheless be excused if he was not guilty of any “fault”. In *Police v Creedon*⁶⁵

⁶³ Unreported, 28 June 1983, CA 29/83; the majority judgment of Davison CJ, Cooke and Richardson JJ was delivered by Richardson J; McMullin J dissented.

⁶⁴ (1978) 85 DLR (3d) 161.

^{64a} But see *Strasser v Roberge* (1979) 103 DLR (3d) 193, below note 12; and in public welfare offences the courts may be slow to find an implied requirement of mens rea: see the treatment of “permit” in *R v City of Sault Ste. Marie* (1978) 85 DLR (3d) 161, 183.

⁶⁵ [1976] 1 NZLR 571.

the Court of Appeal had recognised this defence, but there were indications that it might be available only when the offence consisted of a failure to do something in certain circumstances.⁶⁶ The supposed distinction between statutes prohibiting an act and those imposing a duty to act on the happening of a certain event was dismissed by Lord Reid as “very unsatisfactory” and “insubstantial”,⁶⁷ and there is no attempt to maintain it in either *Sault Ste. Marie* (where causing or permitting pollution was alleged) or *Mackenzie*. The distinction is merely formal in so far as breach of a duty to do something (for example, failing to stop when a vehicle approaches) can often be as well described as positive action which is prohibited in the circumstances existing at the time (for example, proceeding across an intersection when a vehicle approaches). In any event, it now seems that absence of fault will be a defence to a charge of any public welfare regulatory offence unless it is “clearly excluded in terms of the legislation”.⁶⁸ This is a major advance and provided the courts give full weight to the requirement that the defence will be excluded only if this was “clearly” intended offences of which a person can be guilty without fault should become rare. It is to be hoped the majority in *Mackenzie* understates the position when it suggests that recognition of the defence “may well diminish the number of statutory offences which the courts feel compelled to hold to be absolute”.

In *Mackenzie* it was emphasised that the defence of absence of fault was not the same as the mere absence of “mens rea in the strict sense”, which was equated with some “particular state of mind”, such as intention, knowledge, or recklessness. Rather, the *Mackenzie* defence of “total absence of fault” requires that the defendant “did what a reasonable man would have done”, and exercised “all reasonable care” to avoid the offence.⁶⁹ These descriptions highlight the generality of the defence. In some cases there will be absence of fault because of a reasonable mistake, or reasonable ignorance, on the part of the defendant, and there is no need to strain the concept of impossibility to excuse him.⁷⁰ In other cases the defendant might know all the essential facts but may be entitled to acquittal because he had taken all reasonable steps to prevent the offence.⁷¹ On the other hand, at the time of the offence the defendant may be understandably ignorant of the true circumstances or may lack the ability to prevent the offence, but the defence will fail if his ignorance or incapacity can be attributed to antecedent “fault” on his part.⁷²

Although lack of fault may arise in a variety of circumstances, the Court of Appeal rejected a suggestion that there should be “a variable standard

⁶⁶ *Ibid.*, 573-574, per McCarthy P, 579, per Richmond J.

⁶⁷ *Warner v MPC* [1969] 2 AC 256, 276.

⁶⁸ *Mackenzie*, *supra*, majority judgment at p. 14; and see Neil Cameron [1981] 5 Crim LJ 299, 300, commenting on the general description of the defence in *Tifaga v Dept. of Labour* [1980] 2 NZLR 235.

⁶⁹ *Ibid.*, pp. 15-16.

⁷⁰ Cp the judgment of Richmond J in *Creedon* [1976] 1 NZLR 571.

⁷¹ *Sault Ste. Marie* (1978) 85 DLR (3d) 161, 174, 181-182.

⁷² E.g. *Creedon* [1976] 1 NZLR 571, 582, per Richmond J: *Tifaga v Dept. of Labour* [1980] 2 NZLR 235.

of negligence depending on subjective considerations affecting the individual concerned".⁷³ Such a quasi-objective approach, which allows physical or mental characteristics of an accused to be taken into account in any assessment of what it was reasonable for him to do, may be appropriate in some areas of the criminal law.⁷⁴ When, however, the issue concerns responsibility for a regulatory offence designed to protect the public health or safety an objective test is insisted upon, and nothing less than the vigilance, skill and care of a reasonable person will suffice to excuse. That is a high standard and moral blame will not necessarily be involved when there is a breach of it.⁷⁵

The burden of proof

The second major innovation in *Mackenzie* is the decision that on a charge of a public welfare regulatory offence the defendant has the burden of proving the defence of absence of fault on the balance of probabilities. The Court of Appeal had foreshadowed this conclusion in earlier cases,⁷⁶ and the majority found sufficient support for it in *Sault Ste. Marie*.⁷⁷

McMullin J delivered a separate judgment in which he accepted that the nature of the offence meant that the issue was whether the pilot had been at fault, and that mere absence of an intention to fly dangerously and an absence of recklessness was no defence.⁷⁸ But he expressed his "emphatic dissent" from the conclusion that the defendant has the persuasive burden of proof on this issue. It is submitted that the dissent is distinctly more convincing than the majority judgment.

First, the weight of authority is against the rule adopted by the majority. They accepted the view of the Supreme Court of Canada that *Woolmington* is concerned only with crimes "in the true sense" and not with "public welfare" offences. This imposes a substantial qualification on the terms of the judgment in *Woolmington* where Viscount Sankey LC had said that, apart from insanity and statutory exceptions, the prosecution is required to prove guilt "no matter what the charge or where the trial".⁷⁹ In New

⁷³ *Mackenzie*, supra, majority judgment, p. 15.

⁷⁴ E.g. provocation: s.169(2) (a) of the Crimes Act 1961; *Camplin* [1978] AC 705; duress: *Graham* [1982] 1 All ER 801; cp Smith and Hogan, *Criminal Law* (4th ed.), 76-78; and for more controversial developments of the concept: Pickard (1980) 30 U Toronto LJ 75; Temkin [1983] Crim LR 5, 15-16; cp *Labour Dept. v Aloua* [1975] 1 NZLR 507, 509.

⁷⁵ *Creedon* [1976] 1 NZLR 571, 575, 582, 586-587; *Gosney* [1971] 2 QB 674; *Transport Ministry v McLeod* [1974] 1 NZLR 142.

⁷⁶ Cato [1981] NZLJ 294; the question had been left open in *Ministry of Transport v Burnetts Motors Ltd* [1980] 1 NZLR 51, and was recognised as "perhaps a moot question" in *Tifaga v Dept. of Labour* [1980] 2 NZLR 235, 244; and see *Creedon* [1976] 1 NZLR 571, 586.

⁷⁷ (1978) 85 DLR (3d) 161.

⁷⁸ *Mackenzie*, supra, judgment of McMullin J at pp. 12-13, 22-23; at pp. 17-18 he seems to imply that an honest but unreasonable mistake might excuse, but this should not be so when mere negligence or fault is sufficient mens rea.

⁷⁹ [1935] AC 462, 481; and in *Mancini v DPP* [1942] AC 1, 11, Viscount Simon LC said the rule is "of general application in all charges under the criminal law".

Zealand McMullin J noted that in *Police v Creedon*⁸⁰ the Court of Appeal accepted that the defendant had no more than an evidential burden on the fault issue, and in earlier cases *Woolmington* had been applied when similar defences were recognised in the context of public welfare offences.⁸¹ McMullin J also cited English decisions which establish that on a charge of dangerous driving, which bears an obvious resemblance to the dangerous flying alleged in *Mackenzie*, the prosecution has the burden of disproving absence of fault when there is evidence supporting such a defence.⁸² His Honour might have added a reference to *Transport Ministry v McLeod*⁸³ where Cooke J applied the same rule. On the other side, for post-*Woolmington* authority the majority pointed to earlier reservations on the question, the decision in *Sault Ste. Marie*, and some Australian decisions on the defence of reasonable mistake, although it was conceded that the true position “has not been resolved authoritatively in that country”.⁸⁴

Second, McMullin J objected that the majority judgment involved unwarranted judicial legislation on a matter which should be left to Parliament. In developing the law the courts will effectively legislate, and in many cases this is proper and desirable, but there are a number of reasons which support the view that this is not true of the reversal of the burden of proof in *Mackenzie*.

McMullin J. cites a number of statutes to illustrate the point that in modern times Parliament has been careful to expressly impose the burden of proof on the defendant in various particular contexts.⁸⁵ If on a public welfare charge the defendant must prove a judge-made defence, presumably the same will generally be true of a statutory defence, in which case many of these statutory reversals of onus are redundant. In any event, the existence of numerous particular statutory provisions of this kind suggests that judicial creation of a like rule of general application is inappropriate unless there are strong grounds for supposing it is necessary. But the reasons given by the majority are less than overwhelming.

The majority first cited an earlier dictum of Cooke J for the conceptual point that “there seems to be some logical objection to requiring the prosecution to prove something which, ex hypothesi, is not an ingredient of the offence”.⁸⁶ This assumes that the common law provides a defence

⁸⁰ [1976] 1 NZLR 571.

⁸¹ McMullin J, at p. 31, cited *Innes v McKinlay* [1954] NZLR 1054, and *Transport Dept. v McCutcheon* [1962] NZLR 675; see also *Fraser v Beckett and Stirling Ltd* [1963] NZLR 480, 498, and *Wellington Acclimatisation Society v Nireaha Co-op. Dairy Co* [1963] NZLR 599, 602; in *Mackenzie*, *supra*, the majority at p. 8 imply that pursuant to *Ewart* the defendant carried the burden of proof in class three cases until *Strawbridge*, but this view was generally abandoned before that.

⁸² McMullin J, at pp. 21-22 cited *Spurge* [1961] 2 QB 205, *Gosney* [1971] 2 QB 674, and *Burns v Bidder* [1966] 2 All ER 29 (failing to give way to a pedestrian, a distinct public welfare offence where the same rule applied).

⁸³ [1974] 1 NZLR 142.

⁸⁴ *Mackenzie*, *supra*, majority at p. 14; and see the authorities cited by McMullin J at pp. 18-21; for competing Australian views, see Howard (1960) 79 LQR 547, and Brett (1974) 37 MLR 317; and see Howard, *Criminal Law* (4th ed.), 376-377.

⁸⁵ *Mackenzie*, per McMullin J at p. 30.

⁸⁶ *Police v Creedon* [1976] 1 NZLR 571, 586.

or excuse of lack of fault rather than a presumption that fault is an ingredient of the offence, a view not shared by McMullin J and which is at variance with a host of authority which assumes that possible exculpation in these cases depends on whether the presumption that an element of mens rea is an ingredient of the offence has been rebutted.⁸⁷ More substantially, in the context of "true crime" the courts have not felt constrained by any supposed objections of logic in holding that the requirement that the prosecution prove guilt means that it must negate any defence which is supported by some evidence, including defences such as self defence, compulsion and provocation, which do not negate an element of the offence.⁸⁸

On a more practical level, the majority placed reliance on the fact that "the defendant will ordinarily know far better than the prosecution how the breach occurred and what he had done to avoid it".⁸⁹ This again supports the view that the defendant should have an evidential burden but in the context of "true crime" the courts have rejected any rule that the persuasive burden rests with the defendant merely because relevant facts are peculiarly within his knowledge. Thus, once there is evidence suggesting self-defence, compulsion, provocation, automatism, or lack of mens rea as a result of mistake or intoxication, the prosecution must negate the defence beyond reasonable doubt. There is surely force in the protest of McMullin J that it is difficult to see why a defendant on a lesser "public welfare" charge should be subject to a greater burden.⁹⁰ It has to be said that the majority's justification for drawing such a distinction is vague in the extreme. Apart from an unhelpful reference to "public policy considerations" it is said that when the emphasis is on "protection of the interests of society as a whole" it is "not unreasonable" to require the defendant to prove lack of fault.⁹¹ This may be part of a coherent explanation for the imposition of liability for negligence but the object of the offence seems to have no bearing on the appropriate distribution of the burden of proof. Probably the real reason was a concern that because the prosecution will often be unable to adduce direct evidence of how the offence came to be committed a mere evidential burden may make it too easy to succeed with possibly bogus no-fault defenses, with the result that the deterrent value of the legislation would be diminished. This may be what Cooke J had in mind in *Ministry of Transport v Burnetts Motors Ltd*⁹² when he referred to "practical difficulties" which might arise from a no-fault defence, although this may be contrasted with the view of McCarthy P in *Police v Creedon*⁹³ that with the evidential burden on the defendant the defence should not pose "any difficulties of proof" for the prosecution, and the absence of

⁸⁷ For classical statements see, e.g. *Sherras v De Rutzen* [1895] 1 QB 918, 921, *Tolson* (1889) 23 QBD 168, 187.

⁸⁸ Cp Glanville Williams, *The Theory of Excuses* [1982] Crim LR 732, 734.

⁸⁹ *Mackenzie*, *supra*, majority p. 15.

⁹⁰ *Mackenzie*, *supra*, per McMullin J. at p. 29; in the majority's citation from the judgment of Cooke J in *Creedon*, *supra* n. 86 it is no accident that the sentence referring to other defences, and the "advantage of consistency", is omitted.

⁹¹ *Mackenzie*, *supra*, majority p. 15.

⁹² [1980] 1 NZLR 51, 58.

⁹³ [1976] 1 NZLR 571, 575.

any suggestion of special difficulty arising in the many traffic cases which must have been decided on the *Creedon* principles. It may be that in the case of some offences a mere evidential burden might facilitate specious defences, and McMullin J mentioned the areas of conservation and pollution as possible examples. The stigma and penalties attaching to “true crime” are such that there this is not regarded as justifying reversal of the burden of proof, but reversal may be more readily acceptable for public welfare offences. But it does not seem possible to generalise as to the ease with which some credible evidence of absence of fault might be adduced, particularly in view of the high standard of care normally required. Any danger of false defences is more appropriately met by particular legislation, rather than a sweeping rule.

McMullin J also objected to the uncertainty involved in the majority’s rule. The nature and object of an offence may have an important bearing on the nature of the mens rea which may be held to be necessary for guilt, but *Mackenzie* makes this *and* the burden of proof depend on whether an offence is classified as a “public welfare regulatory offence”. This concept is nothing if not imprecise. Many such offences will be part of a statutory scheme designed to control an identifiable trade, industry or business, but some are concerned with other “particular activities” (such as driving or flying), and while the descriptions in *Mackenzie* stress the objects of protecting public health and safety the object will sometimes be to protect other public interests.⁹⁴ It may once have been reasonable to assume that “serious” offences would be excluded, at least when there is a possibility of a substantial term of imprisonment.⁹⁵ *Mackenzie*, however, gives the lie to this. The dangerous flying offence was punishable by up to twelve months imprisonment and/or a fine of \$2,000, plus mandatory disqualification of a convicted pilot for twelve months, in the absence of special reasons. From this it was naturally inferred that this was a “serious rather than a minor offence” but, largely because of the nature and object of the offence (the object being the protection of the public rather than individuals), it was nevertheless held to be a public welfare offence to which absence of intention or recklessness was no defence, although lack of negligence was. This confirms the continued existence of public welfare offences which are “serious” but not “truly criminal”. McMullin J noted the uncertainty of all this, and asked whether certain offences in the Crimes Act 1961, and cultivating cannabis, could be so classified.⁹⁶ It may be that a “serious offence” will be “truly criminal” if it is thought to involve significant social stigma, but that seems to be a prescription for a series of ad hoc “gut” decisions rather than a coherent principle. The conceptual base of *Mackenzie* is so vague that there is a serious danger that offences which have hitherto been classified as requiring mens rea will now be held to be “fault” offences, with the burden of proof on the defendant. The majority’s

⁹⁴ Above, note 18.

⁹⁵ Cp *Strawbridge* [1970] NZLR 909, 911-912.

⁹⁶ *Mackenzie*, *supra*, per McMullin J at p. 26-27, citing the offences of wrecking and interfering with signals, contrary to ss.301 and 303 of the Crimes Act 1961; and for the object of drug legislation as “protection to public health”, see *Beaver* [1957] SCR 531, 547, per Fauteux J dissenting; cp *Molis* (1980) 55 CCC (2d) 558, 564.

extremely cautious view of the effect of the decision on the future scope of "absolute" liability does not increase confidence in this respect, and there must be doubt as to how certain offences which have previously been placed in the third class in *Strawbridge* will now be classified; examples are failing to provide animals with adequate food or shelter, driving while disqualified, and driving with an excess blood alcohol concentration.⁹⁷

It is unfortunate that the Court of Appeal has felt obliged to hold that there is a general rule that people can be convicted of regulatory offences although there may be evidence creating a reasonable doubt as to whether they had been guilty of any lack of due diligence. When, however, it becomes apparent that the rule applies to an uncertain range of serious offences, when liberty and livelihood may be lost, the majority's claim⁹⁸ that the decision does not derogate at all from the fundamental principle that the burden of proof rests on the prosecution has a hollow ring.

McMullin J also pointed to potential anomalies. For example, driving a motor vehicle in a dangerous manner, contrary to section 57(c) of the Transport Act 1962, seems to be a public welfare offence, it being very similar in nature to the offence in *Mackenzie*, with similar, though lesser, penalties. But what is the position if the dangerous driver happens to kill someone, and is charged with dangerous driving causing death (Section 55(1) of the Transport Act 1962), or manslaughter? Although McMullin J has doubts it is submitted that both the latter offences would have to be labelled "truly criminal", given the stigma and the probability of imprisonment. In the driving context, however, *Mackenzie* may have very peculiar consequences even when no death or injury is involved. Although it seems that driving in a dangerous manner is a public welfare offence with the defendant having the burden of proving the no-fault defence supplied by the judges, yet if the driver is charged with driving recklessly, contrary to section 57(a) of the Transport Act 1962, which is subject to the same penalties, it seems that the legislative ingredient of recklessness must mean that the prosecution must prove fault.⁹⁹ Even more strangely, for the same reason the prosecution will have the burden of proving fault on a charge of the less serious offence of careless use, contrary to section 60 of the Transport Act 1962.¹ Perhaps the statutory scheme of the Transport Act 1962 is such that *Mackenzie* will not apply to the offence of driving in a dangerous manner, notwithstanding its obvious similarity to the operation of an aircraft in a dangerous manner.² Uncertainty is increased by the possibility that some legislative provisions may be inconsistent with the rational application of the newly created rule in *Mackenzie*.

⁹⁷ Above, notes 34-36; cp *MacDougall* (1982) 142 DLR (3d) 216 (disqualified driving: public welfare offence); *Howells* [1977] QB 614 (strict liability for unlawful possession of a firearm); and see *O. F. Nelson & Co Ltd v Police* [1932] NZLR 337, 347-351, 354-355, 368.

⁹⁸ *Mackenzie*, *supra*, majority at p. 16.

⁹⁹ Cp *Lawrence* [1982] AC 510.

¹ Cp *Boyes v Transport Dept.* [1966] NZLR 171.

² In *Mackenzie*, *supra*, the majority at pp.7-8 noted that this offence is defined in terms of how an aircraft is operated, rather than how a pilot operates it. Such inconsequential matters of drafting style should have no bearing on questions of substance, such as the fault required or the burden of proof.

In *Mackenzie* the majority seized the opportunity to adopt the rule reversing the burden of proof, although it appears that neither party argued for such a principle. The vigorous dissent of McMullin J prevents any suggestion that the majority overlooked difficulties which may arise from its rather general judgment. Nevertheless it is submitted that on the burden of proof it represents a wrong turning in the development of the criminal law. It may be too optimistic to hope that the Court will be persuaded to reconsider, but there is one perhaps technical basis on which the authority of the decision might be attacked. This requires a closer consideration of the offence with which the Court was concerned.

The disappearing comma

The offence charged in *Mackenzie* is defined in section 24(1) of the Civil Aviation Act 1964, which, omitting the penalties, provides:

“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 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 on summary conviction. . .”.

Here the important point is that the section expressly provides a defence of absence of “actual fault or privity”, the persuasive burden being on he who relies on it. In *Mackenzie*, at first instance Judge Pain dismissed the charge on the ground that the statutory defence was available to the pilot, who had established absence of fault. The prosecutor appealed and in the High Court Casey J held that the statutory defence was available only to an owner, not the pilot, but that pursuant to *Creedon* the pilot had a defence if there was evidence raising a reasonable doubt whether he had been guilty of fault or negligence.^{2a} The ruling that the statutory defence was available only to the owner was accepted by both parties in the Court of Appeal, where all the Judges appear to have assumed that it was correct. In passing, it may be mentioned that the fact that “fault” on the part of the owner was sufficient for liability was one reason why the majority rejected the idea that “mens rea in the strict sense” was necessary on the part of the pilot — in the interests of “consistency and harmony of approach” fault should suffice for the pilot’s liability as well. The majority did not pursue the question whether the express exculpation of the blameless owner in the very body of the offence should be taken to imply that diligence could not excuse the pilot or, if it could, that his burden of proof should not be identical to that which the statute imposed on the owner; and McMullin J was content to assert that there was “no reason to suppose” that the provision of the defence for the owner was meant to impose a more absolute liability on the pilot. As in some, though not all, earlier cases the Court claims that the language of the legislation is important in considering whether there may be a defence of lack of mens rea or fault, yet no weight is given to one of the more obvious textual factors — the express provision of such a defence in one case, but not in the case before the court.³

^{2a} *Civil Aviation Dept. v Mackenzie* [1982] 2 NZLR 238.

³ *Cp Sherras v De Rutzen* [1895] 1 QB 918.

At first sight, the syntax and punctuation of section 24(1) supports the view that the statutory defence is available only to the owner. But this may be debatable. In *Mackenzie* the majority accept as a "first principle" the view that a penal provision reasonably capable of two interpretations should be given that interpretation which is most favourable to the accused.⁴ Construing section 24(1) as providing a defence to the pilot as well as the owner appears to require no more than a disregard of the niceties of punctuation, which might be thought a minor matter in comparison with the creativity involved in providing a non-statutory defence to the same effect. It would, moreover, provide "harmony and consistency" with the Civil Aviation Regulations 1953 which, because of different drafting, make the defence of absence of "actual fault or privity" available to the pilot as well as the owner in respect of offences under the Regulations, which are less serious than that in section 24(1).⁵ It may be added that although both limbs of the "actual fault or privity" provision can be sensibly applied to an earthbound owner,⁶ the phrase seems entirely appropriate if it was intended to refer to those in the cockpit as well as those elsewhere, "actual fault" including personal negligence but "privity" requiring knowledge, or at least suspicion or wilful blindness.⁷

In the High Court, however, Casey J thought that section 24(1) unambiguously provided a defence for an owner but not a pilot. Moreover, he concluded that it was understandable that the regulations should extend the defence to the pilot because some of the offences in the regulations may arise from matters "outside the knowledge or responsibility of the pilot", in contrast with section 24(1) which concerns the pilot's actual operation of the aircraft.^{7a} On this view it might be objected that the effect of the decision in *Mackenzie* is to provide a defence which the legislature seems to have deliberately withheld from the pilot, and further doubts arise when the legislative history of section 24(1) is considered. This does not seem to have been examined by Casey J or the majority of the Court of Appeal, and is mentioned only in summary form by McMullin J. Section 24(1) first appeared in New Zealand legislation as section 8(1) of the Air Navigation Act 1931, this being adapted from English legislation: section 10 of the Air Navigation Act 1920 (UK). In New Zealand, it was subsequently re-enacted as section 6(1) of the Civil Aviation Act 1948, and then as section 24(1) in the 1964 Act. McMullin J says that the 1931 provision was "in substantially the same form" as the present one, and this is correct but for one important change. Section 8(1) of the 1931 Act (and section 10 of the 1920 United Kingdom Act) had a comma which was dropped in the later statutes: it provided that when an aircraft is operated so as to cause danger "the pilot or the person in charge of the aircraft, and also the

⁴ *Mackenzie, supra*, Majority at p.5 citing *Sweet v Parsley* [1970] AC 132, 149 per Lord Reid.

⁵ Civil Aviation Regulations 1953, Regulation 18(9); the defence was successfully relied on by a pilot in *Barr v Civil Aviation Dept.* [1965] NZLR 503.

⁶ "Owner" in the phrase "and also the owner" will not include an owner who is also "the pilot or person in charge of the aircraft"; cp [1982] 2 NZLR 238, 240.

⁷ *Compania Maritima San Basilio SA v Oceanus Mutual Underwriting Ass. (Bermuda) Ltd* [1977] 1 QB 49, 68, per Lord Denning, 79, per Roskill LJ.

^{7a} [1982] 2 NZLR 238, 240.

owner thereof, unless he proves. . . [absence of] actual fault or privity, shall be liable. . .". The second of the commas was absent from the New Zealand legislation of 1948, and was not reintroduced in 1964 (and it was also dropped from the later English legislation: section 11 of the Civil Aviation Act 1949). When the comma was there, before the clause beginning "unless he proves", it seems clear that the section provided a defence to both owner and pilot; or if it was thought to be at all ambiguous, "first principles" would require the question to be resolved in favour of the pilot. But the disappearance of this punctuation seems to confine the defence to the owner.

If it is correct that the statutory defence was available to the pilot under the 1931 Act there seem to be only two possible inferences from the change in the legislation in 1948 (in New Zealand) and 1949 (in the United Kingdom). The first possibility is that there may have been no intention to change the effect of the section, the punctuation change being a drafting slip at some stage in what seems to have been an international review of the legislation. Although they probably do not provide a permissible aid to interpretation, the terms of the 1953 Regulations do not suggest any local intention to exclude pilots from the defence.⁸ On the drafting slip theory it is submitted that the appropriate course would be for the court to ignore the change and allow the pilot the statutory defence, which would leave no room for the common law defence of absence of fault. The second possibility is that the punctuation change was deliberate, the intention being that a defence which was or may have been previously available should no longer exist. If this was the case it is very difficult to see how the courts could be justified in resurrecting the defence.⁹ On either of these views it may be argued that in *Mackenzie* the Court of Appeal was mistaken in concluding that a non-statutory defence of absence of fault was available to the offence in section 24(1) of the Civil Aviation Act 1964.

CONCLUSION

In attempting to develop principles to assist in determining the degree to which mens rea or fault may be in issue when legislation creating an offence is silent on the question, the Court of Appeal has recognised four categories of offence. These have evolved and changed over the years and this process will no doubt continue. The present framework can now be summarised.

1. *Strawbridge class one*. These are offences where the wording of the legislation is such that an element of mens rea or fault is expressly or

⁸ Nor does the Minister's explanation of the 1948 Bill: Vol. 281 NZPD p. 1085; cp in Australia, section 23(2) of the Air Navigation Act 1920-1973, which does not exclude the pilot from the defence; in Halsbury's Statutes of England (2nd ed.), Vol. 28, p. 204, a note to s.11 of the Civil Aviation Act 1949 says it "reproduces" s.10 of the 1920 Act.

⁹ In *Harding v Price* [1948] 1 KB 605 a defence of ignorance was allowed by the court after Parliament had deleted the word "knowingly", but the court at least accepted that the change in wording had some effect — it said it altered the burden of proof.

impliedly an ingredient of the offence. The prosecution has the burden of proving this ingredient beyond reasonable doubt, and there will be no case to answer until there is evidence which can reasonably support the conclusion that it existed in fact.

An offence will be in this category only if the draftsman has used words which positively import an element of mens rea, although this may be either a subjective state of mind (such as intention, knowledge or recklessness) or objective fault (or negligence), and the offence may be either truly criminal (such as murder) or quasi-criminal (such as careless use of a motor vehicle). The classification of offences adopted by the Supreme Court of Canada is also headed by those where from the outset the prosecution has the burden of proving mens rea, but this class is not co-extensive with the first category recognised in New Zealand. Pursuant to *Sault Ste. Marie*¹⁰ class one offences in Canada include truly criminal offences where the statute is silent on mens rea, as well as those where the words of the statute require it, it being presumed that mens rea (usually in the sense of intention, knowledge or recklessness) is an essential ingredient which must be proved by the prosecution. In New Zealand, where the statute is silent as to the mens rea required for a truly criminal offence an absence of intention, knowledge or recklessness will generally excuse,¹¹ but at least where the relevant mens rea consists of knowledge of circumstances these crimes have been placed in a separate category (*Strawbridge* class three).

Finally, in Canada as in New Zealand a public welfare regulatory offence will be in class one if the legislation uses words such as "knowingly" or "intentionally", which explicitly require a mental element, and no doubt this will be so whenever any element of fault is expressly required. But it seems to be otherwise if the definition of a regulatory offence merely implies a requirement of mens rea. In *Strasser v Roberge*¹² the defendant was prosecuted for "participation" in an unlawful strike. Although this was held to be a "regulatory" or "public welfare" offence the Supreme Court of Canada also held that the terms of the statute and the nature of the offence implied that an "intention" to join the strike was an element of the offence. Nevertheless, a majority of the Court held that, as it was of a regulatory nature and intention would be difficult to prove, it was to be classified as a "strict liability offence", it being a defence for the defendant to prove on the balance of probabilities "that he did not have the required intent and took reasonable steps to avoid committing the offence". Dickson J, the architect of the *Sault Ste. Marie* classification, dissented from this curious and confusing decision. It is unlikely that it will be accepted as an authority in this country, but it shows there is a risk that the scope of the "half-way house" in *Mackenzie* could become excessive.¹³

2. *Strawbridge class three.* These are offences where the terms of the legislation do not expressly or impliedly require mens rea and upon proof

¹⁰ (1978) 85 DLR (3d) 161, 181-182.

¹¹ Cp. *Howe* [1982] 1 NZLR 618, 623; *Meek* [1981] 1 NZLR 499, 501-502.

¹² (1979) 103 DLR (3d) 193; cp. *Ihaia v Police* [1982] 2 NZLR 211, 214 ("forcibly hinders or prevents" requires "intention").

¹³ Stuart, *Canadian Criminal Law* (1982), 169-171.

that the defendant was responsible for the external elements of the offence the appropriate mens rea will be presumed; nevertheless the defendant becomes entitled to acquittal if there is evidence which raises a reasonable doubt as to whether he in fact acted with mens rea. The difference between this and the rule in class one seems to be of limited practical significance and the imposition of an evidential burden on the defendant is not thought to be inconsistent with the basic principle that the prosecution has the burden of proving the defendant's guilt.

This class, which does not appear to have a Canadian counterpart, will apparently include any truly criminal offence where the terms of the statute do not positively suggest the need for mens rea. As a general rule, the absence of intention, knowledge or recklessness as to the external elements of the offence should be a defence in such cases, and unless the nature of the offence leads to the exceptional conclusion that negligence suffices a relevant mistake should provide a defence whether or not it was based on reasonable grounds.¹⁴ There may now be doubts as to this where the terms of the statute or common law principles provide that "recklessness" is sufficient, and it is held that this includes a person who gives no thought to an obvious risk of offending as well as one who consciously takes that risk.¹⁵ But a person who acts with a conscious belief in circumstances which would make his conduct lawful intends to act lawfully, and it is submitted that, whether or not a reasonable person would have formed such a belief and innocent intention, that state of mind cannot fairly be described as "heedless" or "careless" of the risk of offending, or equated with "giving no thought to the matter".¹⁶

The effect of the decision in *Police v Creedon*¹⁷ was that this class of offence also included some public welfare offences where the legislation was silent as to mens rea, although in that case the ground of exculpation was absence of negligence rather than absence of intention, knowledge or recklessness. *Mackenzie* confirms that, at least as a general rule, negligence will be sufficient fault when a public welfare offence is charged, but it also removes these offences into a separate category.

3. *Offences of strict liability.* This is the convenient description adopted in Canada for offences where there is a defence of absence of fault, this being the class of offence now recognised in New Zealand by *Mackenzie*.

This category does not include "truly criminal" offences but consists of public welfare regulatory offences where the legislation neither requires nor excludes an element of mens rea or fault. The prosecutor is not required to prove mens rea or fault, but a defendant against whom the prohibited conduct is proved has a defence if he was not guilty of any fault. On this issue, however, the defendant has the persuasive burden and must prove absence of fault on the balance of probabilities. Moreover, the test is an objective one. Mere absence of intention, knowledge and recklessness

¹⁴ Above, notes, 53-62.

¹⁵ *Caldwell* [1982] AC 341; *Lawrence* [1982] AC 510; *Pigg* [1982] 2 All ER 591; *Elliott v C (a minor)* [1983] 2 All ER 1005; *Howe* [1982] 1 NZLR 618.

¹⁶ Contrast *Howe*, *ibid*, 624, but this seems over cautious.

¹⁷ [1976] 1 NZLR 571.

is not sufficient. Rather, the defendant must prove that he took "all reasonable care", that he "did what a reasonable person would have done". In *Mackenzie* the majority held that this principle applied to public welfare offences "such as we are concerned with in this case"¹⁸ but it appears to be intended that the objective standard will apply, and the burden is reversed, whenever the common law defence of absence of fault (or "total absence of fault") is available to an offence which is not "truly criminal".

In many cases ignorance or mistake will be relied upon, in which case it will have to be based on reasonable grounds — an unreasonable failure to know the facts which constitute the offence is sufficient fault or negligence for liability.¹⁹ In other cases the defendant might know the relevant facts but be entitled to acquittal because he proves he did all that was reasonably possible to prevent the offence.²⁰ Conversely, whether or not the defendant was aware of the facts, it seems that unless the nature of the offence is held to justify a different conclusion²¹ the fact that it was ultimately impossible for the defendant to prevent the prohibited event will not excuse him if the event can be attributed to an earlier failure on his part to take reasonable precautions when the possibility of the offence ought to have been foreseen.²² When subjective mens rea is not required, it seems that in principle the same should be true even if the prohibited event finally results from truly "involuntary" or "unconscious" conduct.²³ Similarly, if the prohibited event can be attributed to the defendant, it seems that circumstances of necessity, Act of God, or act of a stranger, will not excuse in this class of offence if the necessity or the event would not have occurred but for prior want of care on the part of the defendant.²⁴ If it is correct that on a public welfare charge absence of fault is essential in all these instances it does not seem plausible to apply different rules as to the burden of proof, which will be on the defendant in each case.²⁵ Moreover, the conclusion that *Woolmington* does not apply to the defence of absence

¹⁸ *Mackenzie*, *supra*, majority p.14.

¹⁹ *R v City of Sault Ste. Marie* (1978) 85 DLR (3d) 161, 174.

²⁰ *Ibid.*

²¹ *Cp Stockdale v Coulson* [1974] 3 All ER 154; [1974] Crim LR 474.

²² *Tifaga v Dept. of Labour* [1980] 2 NZLR 235.

²³ But see Neil Cameron [1981] 5 Crim LJ 299-301; in *Sione v Labour Dept.* [1972] NZLR 278 the defendant was unconscious when he "landed" in New Zealand, but was convicted because he had intended to land; but he was acquitted of the earlier "entering" of New Zealand territory because then he had no choice and had not "intended" to come to New Zealand when he stowed away in Suva; but unless the offence is "truly criminal" it seems the question should now be whether "fault" on his part resulted in his being brought into New Zealand; *cp. Hill v Baxter* [1958] 1 QB 277 (falling asleep at the wheel before reaching a halt sign will not excuse failure to stop); Ashworth, Reason, Logic and Criminal Liability (1975) 91 LQR 102; but a truly criminal offence will be excused unless the defendant was reckless prior to the automatism: *Bailey* [1983] 1 WLR 760, 764-765.

²⁴ *Cp. Mackenzie*, *supra*, majority, p. 5; *Tifaga v Dept. of Labour* [1980] 2 NZLR 235, 241.

²⁵ But see *Walker* (1979) 48 CCC (2d) 126, 144-145 as to necessity.

of fault suggests that the defendant will also carry the burden of proving any statutory defence if the statute is silent as to this.²⁶

Recognition of the defence of absence of fault provides an important and welcome amelioration of absolute liability, but the central notions of “real crime” and “public welfare offences” are so vague as to give the objective standard and the attendant reversal of the burden of proof excessively general and uncertain application. Uncertainty is also inherent in the value judgments which are required when liability depends on assessment of whether the defendant’s conduct was “reasonable”.

4. *Offences of absolute liability.* These are offences where the prosecution does not have to prove mens rea or fault and nor is it a defence to prove absence of fault.

The presumption in favour of mens rea will exclude truly criminal offences from this category, and from *Mackenzie* it appears that when a public welfare offence is created by legislation which is silent as to mens rea or fault the defence of absence of fault is usually available. In *Mackenzie* positive reasons were identified for rejecting the idea that absolute liability was intended for that offence (the severity of the available penalties, the fact that the offence was committed only if unnecessary danger was caused, and the no-fault defence allowed to the owner), and the majority was cautious in describing the potential effect of its judgment on the scope of absolute liability.²⁷ But the judgment in *Sault Ste. Marie* was approved, and this allows absolute liability only if the legislation makes it “clear” that this was intended,²⁸ and the majority itself indicates that the defence of absence of fault will be available in the case of a public welfare offence “unless clearly excluded in terms of the legislation”.²⁹

It remains the case that an intention to impose absolute liability may be found from a consideration of the language of the statute, the subject matter and “over-all regulatory pattern” of the legislation, the penalty, and perhaps the express provision of a defence of due diligence for some but not other offences.³⁰ But an intention to impose absolute liability will seldom be clear, so that the occasions on which absence of fault is no defence to a regulatory offence should be rare. The mere fact that recognition of the defence may make the legislation significantly more difficult to enforce should not justify exclusion of the defence, at least if the penalties are more than minimal.³¹

In *Sault Ste. Marie*³² Dickson J described “absolute liability” as entailing conviction upon proof of the prohibited act, adding that there is “no relevant mental element”, and that it is no defence that the defendant was

²⁶ Cp *Mackenzie*, supra, per McMullin J at p. 29 citing s.67(8) of the Summary Proceedings Act 1957 which has been thought to embody a principle of limited application.

²⁷ *Mackenzie*, supra, majority p. 16.

²⁸ (1978) 85 DLR (3d) 161, 182.

²⁹ *Mackenzie*, supra, majority p. 14.

³⁰ *Grotoli* (1979) 43 CCC (2d) 158 (Ont CA); *Saute Ste. Marie* (1978) 85 DLR (3d) 161, 182.

³¹ *Chapin* (1979) 95 DLR (3d) 13.

³² (1978) 85 DLR 161, 170.

entirely without fault and may have been "morally innocent in every sense". While it is true that the general defence of absence of fault will not be available, and the defendant will not be excused merely because he was reasonably mistaken or had taken reasonable care to avoid offending, there is no reason to suppose that other more particular defences should not be available, even though absence of fault may be a necessary but not sufficient element of some of them. For example, even though an offence be "absolute", it should be a defence that without fault on the defendant's part there were circumstances of clear necessity,³³ or impossibility, or the defendant was in a state of automatism.³⁴ Similarly, some statutory defences such as infancy, insanity and compulsion, are expressed to be available to all offences, which will include "absolute offences". Of course, the occasions when such defences might be raised in the context of absolute offences will be rare indeed, and it seems to follow from *Mackenzie* that the persuasive burden of proof will be on the defendant.

³³ *Walker* (1979) 48 CCC (2d) 126, 134-135; *Kennedy* (1972) 7 CCC (2d) 42; cp *Breau* (1959) 125 CCC 84 (killing a moose in self-defence). These cases are all cited by Stuart, *Canadian Criminal Law* (1982) 168; and see e.g. Howard, *Strict Responsibility* (1963) Ch. 9.

³⁴ Cp *Tifaga v Dept. of Labour* [1980] 2 NZLR 235, 238-239.