Neutral Citation Number: [2008] IEHC 446

THE HIGH COURT
JUDICIAL REVIEW

2006 832 JR

BETWEEN

JOHN REILLY

APPLICANT

AND
JUDGE MICHAEL PATTWELL

RESPONDENT

AND
COBH TOWN COUNCIL AND THE ATTORNEY GENERAL

NOTICE PARTIES

Judgment of Mr. Justice McCarthy delivered the 17th day of October 2008.

1. This action was commenced by originating notice of motion of 28th July, 2006, pursuant to leave granted by O'Neill J. on 17th July, 2006 and to seek *inter alia* thee following relief:-

> 1. An Order of *certiorari* quashing the order of the respondent dated the 23rd day of February 2005 finding the facts proved against the applicant of an offence under S. 6 (4) of the Litter Pollution Act 1997 to which the provisions of s. 1(1)(i) of the Probation of Offenders Act 1907 were applied.
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> 2. If necessary a declaration that s. 6 (4) of the Litter Pollution Act 1997 is invalid having regard to the provisions of the Constitution of Ireland.
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> 3. An order extending the time for the bringing of the application pursuant order 84 Rule 21 (1) of the Rules of the Superior Courts.
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> - as set forth in paragraph D of the applicant's Statement of Grounds dated the 12th day of July 2006.

2. Section 6(4) of the 1997 Act, is as follows:-

> (1) "The occupier of a public place (not being a public road or a building or other structure) shall keep the place free of litter.
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> (3) The occupier of any land (other than land consisting of a building or other structure) that is not a public place shall keep the land free of litter that is to any extent visible from a public place.
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> (4) The owner of any land appurtenant to a residence that is let in two or more dwelling units (not being separate hereditaments) shall, notwithstanding the obligation of an occupier under subsection (2) in relation to land, keep the land free of litter that is to any extent visible from a public place.
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> (5) Every occupier of land adjoining a public road in respect of which a built-up area speed limit or special speed limit has been established in the functional area of a local authority shall keep free from litter-
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> (a) Any footway adjoining the land and forming, or forming part of, a public road, and
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> (b) any area of land forming part of a public road between any such footway and the roadway.
>
> (5) No person shall, in carrying out the obligation under subsection (4), deposit any substance or object so as to create litter on a roadway or in any other place.
>
> (6) A person who contravenes any provision of this section shall be guilty of an offence."

3. The breach of that obligation is an offence pursuant to s. 6(6) of the Act. The penalty is prescribed by s. 24 of the Act which was amended by s. 58 of The Protection of the Environment Act, 2003. As a consequence of the latter, a person guilty of an offence is liable on summary conviction to a fine not exceeding €3,000 and to a continuing daily fine, not exceeding €600, if the breach was continued, each daily breach being a separate offence, punishment on indictment is a maximum fine of €130,000 and €10,000 per day for any continuing breach. It does not appear clear what is in contemplation here is a breach on and subsequent to the date of the first alleged offence or a breach subsequent to the date of conviction of a first offence. There is no question of imprisonment.

4. As to the facts one might turn first to the applicant's affidavit of the 12th July, 2006. The applicant is the joint occupier of "the Voyager Bar" at Casement Square, Cobh, County Cork. He describes the area as a litter "black spot" because of the existence of a "take-away" premises, which gives rise to a congregation of youths for what is said to be anti-social activity resulting in the presence of litter, rubbish and offensive material in the area: it appears however, that it is primarily cigarette ends that are deposited outside the applicant's premises and it would appear that their presence is the primary substantive cause of complaint by the first notice party, ("the council") which ultimately gave rise to the prosecution which resulted in the conviction.

5. The applicant apparently received letters of 7th July, 2004 and 21st July, 2004, from the local authority on behalf of the Council, pointing out to him his duty to keep the area outside his premises clean and he says that in response to these communications he caused the footpath outside his premises (i.e. between his premises and the public roadway) to be swept daily in or about 12 noon and he says that this was his invariable practice, weather permitting, but that periodic attempts were made thereafter to sweep the area – so that since the public house did not open until 4 o'clock, no sweeping took place early on the morning of 10th September, 2004 in or about 9 a.m. or 9.15 a.m. The Council's litter warden exercised the powers conferred upon him by s. 28 of the 1997 Act, to serve what is commonly known as fixed penalty notice affording the applicant an opportunity to pay a fine of €120 within a fixed period in respect of the offence of the 10th of September, 2001. If that amount was so paid a prosecution would not ensue. Oral representations were made to Padraig Lynch, the Council's Town Clerk on the merits and subsequently a purported notice of appeal

against the imposition of the fine was served on 2nd December, 2004. The next step was the implied rejection of such purported appeal by the service of the summons alleging the offence, whereof the applicant was convicted. Such summons was returnable for 23rd February, 2005, when the charge was heard.

6. At the hearing evidence was given on behalf of the Council as prosecutor by Mr. Matthew Watkinson, their litter warden, that he found cigarette ends outside the applicant's licensed premises (of which he had photographs), on the relevant day, he described the place such that it fell into the category in respect of which a duty was imposed under s. 6(4) upon the occupier of the adjacent premises (the applicant) to clean it and he gave evidence concerning the fixed penalty notice. The solicitor for the applicant was inhibited by the learned District Judge from canvassing in cross-examination the proposition that reasonable steps had been taken by the applicant to keep the area in question free from litter and she unsuccessfully applied for a directed acquittal. The applicant was, in fact, afforded an opportunity to give evidence as to the nature of the premises in question, about Casement Square and the difficulties with litter which had arisen there: evidence as to the efforts made to keep the area of footpath in question clean, or the scheme of cleaning was held inadmissible by the learned respondent on the issue of whether the accused was guilty or not guilty. He was quite right to inhibit cross-examination (since cross-examination is permitted only on relevant matters) and to exclude that portion of the evidence of the applicant on that issue. It is plain, of course, that he had regard to such evidence in or about consideration of the penalty since it was admissible on that aspect. He was perfectly entitled to accept as the law what the second notice party ("the Attorney General") herein now contends it is. It seems fair to summarise the District Judges position as being that the sole issue was whether or not, as a fact, the applicant had kept free from litter the footpath and that whether or not he had, say, exercised reasonable care or reasonable diligence in or about attempting to do so (unsuccessfully) was irrelevant. The applicant found the facts proved but dismissed the charge pursuant to The Probation of Offenders Act, 1907, merely ordering the applicant to pay €50 costs which plainly reflects the minor nature of the offence.

7. The applicant has expressed concern in his affidavit lest he is prosecuted for further offences (the respondent having apparently indicated that if there was a subsequent prosecution, he would impose the maximum fine) and asserts in his affidavit that he is "taking reasonable steps to deal with obligations resting upon me to keep the footpath in front of Voyager Bar premises litter free" and no doubt this is true, though not relevant.

8. There is in existence, apparently, a "Litter Management Plan", though the fact of the existence thereof does not appear to be relevant. There is a replying affidavit of Patrick Gernon on the 1st December, 2006 sworn and filed on behalf of the Attorney General. He is an Assistant Principal Officer in the Department of the Environment with reasonability *inter alia* for litter policy and the implementation of the Government's Anti-Litter Initiatives. In his affidavit he referred to a national anti-litter forum established by the Government and the report thereof, which latter contained recommendations as to law enforcement, promotion of education and awareness, use of economic instruments such as environmental taxes and levies and improved performance by local authorities in cleansing operations to tackle the problem of litter in our society. He refers also to the establishment of an organisation called Irish Business Against Litter (IBAL), the activities of which may be gleaned from its name, and to a "Litter Action Plan". He describes this as a key policy document which sets out the Government's national anti-litter strategy and he states that since the entry into force of the 1997 Act, action has been taken on "many fronts to implement the Litter Action Plan". There is apparently also in existence a national litter pollution monitoring system and publication takes place of what are known as Littering Monitoring Reports. He asserts that the obligations on occupiers of premises under s. 6(4) are "a vital requirement in minimising litter, especially litter arising from the commercial activities of occupiers of business premises" and points out something which is obvious, that the statutory duty in question will be effective commensurate with the power available to local authorities to enforce it. He points out that "realistically" local authorities "cannot monitor the extent to which occupiers of all premises adjoining public roads in their functional area take reasonable steps to discharge the duty imposed upon them and therefore what he calls "strict liability" is a necessary provision for effective enforcement of the duty: he makes the point that if the provision in question were to be struck down "it would leave no effective mechanism available to local authorities to minimise litter levels on footpaths outside premises". It appears that the Litter Action Plan asserts that "litter problems will only be solved through a partnership approach in which all sectors and individuals – businesses, community groups, residence associations and schools – play their part" and it "adopts a multifaceted approach". It is plain, accordingly, that the creation of this obligation by statute and its enforcement with the assistance of a penalty for non-observance is merely one tool in the pursuit of the *desideratum* of litter free streets.

9. Mr. Watkinson has also sworn an affidavit also dated 1st December, 2006 in which *inter alia* he says that "the town of Cobh does not have a good record in the area of litter", that a number of "warning notices" had been sent to a number of proprietors of premises in the centre of Cobh, arising out of the condition of the footpaths outside their premises, prior to 23rd February, 2005 when the applicant was convicted, and that "nearly all of such persons clean the footpath outside their premises as a result of a notice". He refers to the fact that following the introduction of the smoking ban, a particular difficulty arose in relation to public houses – the Council desired that the footpaths outside public houses be swept after the close of business each night, having regard to the propensity of customers to resort to the pavement and throw cigarette butts thereon. He says that the applicant "was prosecuted because he failed to abide by this requirement". He refers to letters (which he describes as notices pursuant to s. 9 of the 1997 Act) exhibited in the applicant's affidavit of 11th July (which were conceived by the applicant to be copies of letters which were circulated to all commercial premises in Cobh). It is clear from perusal of these letters that they are specific to the applicant's premises but that they make no reference to s. 9 of the Act. It is not necessary for me to decide whether or not these constitute notices requiring the removal of litter as contemplated by s. 9: breach of a requirement in any such notice is an offence and in default of compliance with such notice, the local authority, its servants or agents, may *inter alia* give in effect the terms of the notice and may recover any expense thereby incurred as a simple contract debt. This is not a prosecution for the contravention of a requirement of a notice under s. 9. but, s. 6(4).

10. In his replying affidavit of February, 2007, (the date is not clear on my copy), Mr. Reilly addresses issues pertaining to the service of purported notices under s. 9 of the Act, but any issue pertaining to an administrative appeal from such notice (by way of making submissions regarding its terms pursuant to s. 9 (3)) is not relevant either: the only relevance of these letters, whether they are notices or not, within the meaning of s. 9, are that they bring to the attention of the applicant the fact of the existence of litter outside his premises, the statutory obligation imposed upon him (s. 6(4) was apparently on the obverse of each of the letters) and the need, to put it no higher, to sweep the pavement after close of business. An issue is further taken with the manner in which a prosecutorial discretion was exercised by Council and, generally, as to the merits of the applicant's cleaning system.

11. In his affidavit of 14th December, 2006. Mr. Canty who was the prosecuting solicitor for the first named notice party at the trial, *inter alia* states that the applicant gave evidence that he had a cleaning system.

> "He cleaned footpaths in the morning and after close of business where possible. He acknowledged that he probably did receive notices on 7th July, 2004, advising of the intention to prosecute for his failure to clear the footpath. In relation to his cleaning system he stated that if the weather was suitable and male members of staff were on duty, then he would clear the footpath at night. However if female members of staff were on duty or if there were unsuitable weather

conditions, then the footpath would not be cleaned until the next morning."

There is, to a degree, a conflict between that sworn testimony and that in the affidavit of the applicant of 11th July, 2006, where he refers to the sweeping of the pavement at approximately 12 noon as the invariable practice but that "efforts are also made periodically thereafter to sweep outside the premises". It is difficult to reconcile what is referred to as the "invariable practice", however, with the oral testimony but it seems to me proper to proceed on the basis of the evidence in the affidavit of 11th July, which was made after the case had concluded, when apparently, legal advice had been obtained and the issue of whether or not there was strict or absolute liability (depending on one's categorisation of the offence) had crystallised, such that the applicant's mind would have been focused in the most precise manner as to the cleaning system (with ample opportunity to give instructions as to the contents of the affidavit). In any event on the evidence, the basic point is that there were no efforts made on the 10th September, of course.

12. A Statement grounding the application for relief and a Statement of Opposition dated 4th December, 2006, has been filed.

13. That Statement is of considerable length and it might be said that a number of the matters set out therein more properly belong in the affidavit. By way of summary, however, of the grounds set out, the applicant relies on the following matters:

> (1) That the respondent acted *ultra vires* in refusing to consider (or presumably admit) evidence of reasonable steps taken by the applicant to keep the area of pavement outside his premises clean as required by s. 6(4) of the Act.
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> (2) That the offence contrary to s. 6(6) of the Act of failing to keep the footpath in front of the premises and adjoin the public road free of litter is to be interpreted as providing for a defence to the effect that all reasonable care had been taken by the occupier of such premises. (In the course of argument it was conceded that the legal burden to make out such a defence is on the accused and that the standard to be achieved is proof on the balance of probabilities).
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> (3) The offence in question falls to be interpreted in the manner determined by the Supreme Court of Canada in *R. v. City of Sault St. Marie*, [1978] 85 D.L.R. 3rd series 161 as approved by the Supreme Court in *C.C. v. Ireland* [2006] 4 I.R. 1 and in the dissenting judgment of Keane J. in the Supreme Court in *Shannon Regional Fisheries Board. v. Cavan County Council*, [1996] 3 I.R. 267.
>
> (4) That s. 6(4) (by which I have no doubt was meant and understood by all parties to mean s. 6(6) of the Act is repugnant) to the constitution and in particular Articles 38.1, 40.3.1 and 40.3.2 in that it excludes such a defence. (It was raised only if the proposition that the offence was one of strict liability was rejected).

I have not sought to summarise so much of that statement as consists of facts which are deposed to on affidavit or the grounds advanced for an extension of the time within which to make the present application.

14. Apart from certain traverses of the pleas in the statement of grounds, it appears from the Statement of Opposition that the second named notice party relies upon a number of substantive matters, which, I think, might fairly be summarized as follows:-

> 1. The fact that a particular accused may have taken reasonable care is something that a trial judge can take into account at the sentencing stage.
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> 2. It is open to the Oireachtas to provide that a particular problem such as littering requires a strict liability offence and that s. 6(4) is a valid and proportionable response by the legislature to the social problem of littering
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> 3. That the section does not expose an accused person to sentence of imprisonment and that it should be presumed that a trial judge will only impose a lawful monetary fine in accordance with sentencing principles.
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> 4. That the applicant is entitled to "challenge the Act" and presumably seek relief (*certiorari* only) based on his own circumstances as opposed to some anticipated penalty or some future potential prosecution.
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> 5. That the facts as found together with a zero fine and an order for the payment of costs, does not breach the constitutional rights of the applicant and that he may appeal to the Circuit Court (as he did on 7th March, 2005).
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> 6. That the applicant cannot complain of the absence of the defence of reasonable care or due diligence having regard to the notices served in the form of letters (and whether one regards them as notices within the meaning of s. 9 or otherwise) and that, in any event, even on the applicant's own account of the steps taken by him, the relevant defence would not have been open to him.
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> 7. That the offence is a regulatory one, it does not carry a serious criminal stigma but is rather of an administrative nature, that a reasonable care defence would defeat the legislative purpose, that a person who breaches s. 6(4) can avoid a fine by compliance with a notice served under s. 9 of the Act and that prosecution for an offence under s. 6(4) can be avoided by paying a fine.

15. As well as apparent, accordingly from the pleadings, and especially because of the reference to *R. v. City of Sault St. Marie, C.C. v. Ireland* and *Shannon Regional Fisheries Board v. Cavan County Council* the issue is whether or not offences may be divided into three classes, namely, those requiring *mens rea* in the traditional sense (usually so called "true crimes") offences of strict liability in the sense used in those authorities i.e. offences where, in effect, the offence is made out *prima facie* by proof of the *actus reus* but that a defence is available to an accused of reasonable care or due diligence, and, thirdly, offences which may be described as absolute (i.e. where no defence is available and there is absolute liability once the *actus reus* proofed). Offences of strict liability in this sense would thus fall into the category of a "half-way house", a term used by Professor Glanville William to describe them. I think that it is fair to say that historically in this jurisdiction and in England and Wales the term "strict liability" imported of that class of offence which is now called one of "absolute liability" in the decisions to which I have referred and otherwise. I shall attempt to use these terms in this more modern sense, save where otherwise appears.

16. A number of authorities have been quoted by the Attorney General in relation to the applicant's delay and in this regard I have found the factors elaborated by Denham J. in *de Roiste v. The Minister for Defence*, [2001] 1 I.R. 190 is of particular assistance because they effectively distil the principles elaborated in a variety of decisions. These factors are set out at pages 43 and 44 of the Attorney General's submissions. I accept of course that they are non exhaustive. They are as follows:-

(1) The nature of the order or actions the subject of the application.

(2) The conduct of the applicant.

(3) The conduct of the respondents.

(4) The effect of the order under review on the parties subsequent to the order being made and any steps taken by the parties subsequent to the order to be reviewed.

(5) Any effects on third parties.

(6) Public policy that proceedings relating to the public law domain take place promptly except where good reason is furnished.

It seems clear from *O'Donnell v. Dunlaoghaire Corporation*, [1991] I.L.R.M. 301, *Connolly v. D.P.P.*, [2003] 4 I.R. 121 and *Manning v. D.P.P.,* (Unreported) (High Court) O'Leary J. 29th July, 2004 that it is essential for a party to advance a good reason to explain the delay and afford an excuse as therefore. In the present case I do not think that the conduct of the applicant is open to on undue criticism, the conduct of the respondent is of no relevance one way or the other since he is long *functus officio* and there is no criticism of any kind as to the manner in which he conducted the proceedings, there has been no adverse effect on the parties in terms of, say, taking steps, placing reliance upon the order, nor any effects on third parties. I do not believe that the public policy of requiring prompt commencement of proceedings relating to public law is offended and I do not think that the nature of the orders (*certiorari* and declaratory relief) are such to have adverse consequences on, say third parties or for the respondent. Indeed, in the legal issues, are of considerable signification in the range or gambit or regulatory offences.

17. As to the contention that the applicant is not entitled to the relief claimed because he did not move within the time prescribed by the rules for this relief, being, at most, six months from the 23rd February, 2005, by virtue of O. 84 (21) of the Rules of the Superior Courts, relief, as indicated above, was sought only on the 17th July, 2006, being nearly seventeen months after the order. The relevant paragraphs of the applicant's affidavit of 11th July, 2006, are 17 and 18 and in the former he refers to the Statement of Grounds. Whilst details are not afforded in the affidavit it is asserted in the Statement of Grounds (and I take para. 17 of the affidavit as verifying this portion thereof) that after a prompt appeal of the decision (on 7th March, 2005), (after which and to date the matter has been listed from time to time) it was indicated by the applicant to the Council that it was intended to seek a consultative case stated to the Supreme Court pursuant to s. 47 of the Courts of Justice Act, 1947. It is further pointed out that a number of the adjournments were merely because the case was awaiting its turn in the Circuit Court list. In any event, it is asserted that the decision of the Supreme Court in *C.C. v. Ireland & Ors*. [2006] 4. I.R. 1 (judgment delivered on 23rd May, 2006) introduced "an entirely new aspect that could not have been foreseen, having regard to the interpretation elaborated therein on the interpretation of statutes providing for offences of strict liability" and it is further asserted that that judgment could thus raise the prospect that the consultative case stated might not resolve the concern of the applicant's position as a constitutional challenge to s. 6(4) may not be advanced in such a case stated. This is well established procedural law and, presumably, the case stated contemplated would merely have dealt with the interpretation of the statute without a claim that in some given circumstances it would be invalid, having regard to the provisions of the Constitution. I am prepared to accept that since the judgment in question *inter alia* addressed issues pertaining to strict liability of the kind which arise here there was good reason for the applicant to adopt the present procedure and there cannot be any prejudice to the Council or Attorney General, having regard to the continuance of the case in the Circuit Court, with knowledge (in the case of the Council) that the issues canvassed in the District Court would be again canvassed there and would, indeed, be the subject of an application for a consultative case stated under the 1947 Act. I am accordingly of the view that "good reason" within the meaning of O. 84, r. 21(1) of the Rules for an extension of time exists, and having regard to those authorities also, I will do so up to and including the 17th July, 2006.

18. With respect to the plea that a person who is in breach of s. 6(4) can avoid paying a fine by compliance with a notice pursuant to s. 9 of the Act and can appeal the requirements of such notice, as well as the plea that one can avoid prosecution when one receives a notice pursuant to s. 28 (i.e. by a payment of a fixed penalty in default whereof were a prosecution will take place) it seems to me that this is irrelevant as I am not prepared to hold that a notice pursuant to s. 9 was served (and even if it was, this is not a prosecution for a breach of a requirement therein). If and insofar as it is said that prosecution might have been avoided by payment of the The fixed payment system is not to inhibit persons from appearing before the courts to vindicate their rights but it is, if payment is made, a restriction on the power of prosecution. More importantly, in any event, a prosecution was initiated. If the applicant is right then he was right not to pay and the fact of non-payment cannot, *per se*, accordingly, inhibit him from contending, as he does (I will come to the nomenclature in due course) that this is an offence of strict rather than absolute liability, or that the defence of reasonable care is open to him and that if it is not the provisions of s. 6(4) are invalid having regard to the Constitution.

19. The first issue which has been raised on behalf of the Attorney General is that of the *locus standi* of the applicant. It appears to me that it is not possible to draw a distinction between any issues as to standing which might arise in terms of the application for *certiorari*, based on the question of pure statutory interpretation, at common law, on the one hand, and the issue of constitutionality on the other. It is in respect of the second aspect, of course, that the matter arises in its most acute form. The principle that one may not sue (at least successfully) unless one has standing applies universally to all litigation: what will ordinarily be in issue in a case such as this is, firstly, the criteria which apply as a matter of principle in given classes of litigation and, secondly, whether or not a litigant falls within those criteria thus giving him such standing.

20. In the present case the applicant was prosecuted contrary to s. 6(4) of the Act for contravening it, though the offence is contrary to s. 6(6) (although that is of little significance and appears to be an omission of a that kind rendering an amendment of the summons appropriate). The applicant has sought to advance the proposition that he exercised reasonable care or due diligence in and about his efforts to fulfil his statutory duty to keep the footpath adjacent to his premises free from litter. He has sought to advance the proposition that this defence is open to him on the true interpretation of the section. In order to show standing, accordingly, he must show that if such a defence existed he could avail of it. He says that the defence is one which imposes a legal burden upon him to prove such care or diligence on the balance of probabilities as opposed to a mere evidential burden, the emanation of the evidence, of course, on either basis being irrelevant but, presumably, if one is dealing with the imposition of a legal burden on an accused it will ordinarily be necessary for him to go into evidence. This proposition, it is accepted, means, of course, that *prima facie* proof of *actus reas* is enough to convict and it does not matter if there is a reasonable possibility that the accused had, say, exercised reasonable care or due diligence, but that it is only if he probably did that an acquittal should follow.

21. I think that it is appropriate in this connection to refer to *Cahill v. Sutton* [1980] I.R. 269. There the plaintiff sued the defendant gynaecologist for breach of contract in respect of the medical care he had afforded to her in 1968, the consequences of which alleged breach were quickly manifested in that year. Her cause of action was barred pursuant to s. 11(2)(b) of the Statute of

Limitations 1957 and she ultimately asserted in the Supreme Court that the provision was repugnant to Articles 34 and 40. The ultimate argument made by her was that this repugnancy arose because of the absence in the provision of a qualification which excluded a defence under the Statute where a person was not aware of the loss within the period of three years. The plaintiff could not, of course, have availed of a provision of that type in the instant case having regard to the early manifestation of symptoms. Giving the judgment of the Supreme Court Henchy J. (quoted in "*Civil Proceedings and the State*", Collins and O'Reilly, 2nd ed. para. 6 – 12) said:-

> "[In] other jurisdictions the widely accepted practice of courts which are invested with comparable powers of reviewing the legislation in the light of constitutional provisions is to require the person who challenges a particular legislative provision to show either that he has been personally affected injuriously by it or that his is in imminent danger of becoming the victim of it. This general rule means that the challenger must adduce circumstances showing that the impugned provision is operating, or is poised to operate, in such a way as to deprive him personally of the benefit of a particular constitutional right. In that way each challenge is assessed judicially in the light of the application of the impugned provision to the challenger's own circumstances."

22. The matter has been considered, of course, on a number of occasions since but one of the most recent, if not the most recent, decision in that regard (and to which I am explicitly referred by the Attorney General) is *A. v. Governor of Arbour Hill Prison* [2006] 4 I.R. 88. The applicant had been convicted of an offence contrary to s. 1(1) of the Criminal Law Amendment Act 1935, which provision had been found inconsistent with the Constitution in *C. C. v. Ireland*. He sought his release from prison pursuant, to Article 40.3 accordingly. In the latter the successful applicant had wished to defend the matter on the basis that he had acted under a mistake of fact, which was both honest and reasonable, and induced by the female. As to her age he had intercourse, contrary to s. 1(1) of the 1935 Act but was precluded from doing so there under. A, on the other hand, had no basis for seeking to advance such a defence on the facts and he could not, accordingly, have himself sought to impugn the constitutionality of the Section because of the operation of the *jus tertii* rule, which Hardiman J. put as follows:-

> "A person who seeks to invalidate a statutory provision must do so by reference to the effect of the provision on his own rights. He cannot seek to attack the Section on a general or hypothetical basis and specifically may not rely on its effect on the rights of a third party: see *Cahill v. Sutton* [1980] I.R. 269. In other words, he is confined to the actual facts of his case and cannot make up others which would suit him better".

23. Obviously if there is merely an evidential burden on an accused in a given case to afford him a defence there is a lower imposition upon him then to a reverse legal burden to the standard of proof on the balance of probabilities. The question of what is or is not due diligence or reasonable care is, of course, an objective one and the question, accordingly, in the context of *locus standi* in the present case is whether or not on the facts, the defence of due diligence or reasonable care could arise. The applicant swept the pavement daily in or about twelve noon (in circumstances where the Voyager Bar is not opened until four o'clock) weather permitting and, thereafter, "periodically": he accepts that he did not sweep, or have swept, the area in question on the morning of the 10th September, 2004 or the night before. It seems to me that on any basis due diligence or reasonable care would have required him to sweep the area in question on the close of business (when, after all, extensive cleaning of public houses takes place, perhaps even requiring publicans or their employees to work well beyond the statutory closing time). Even if I am wrong and notwithstanding the litter problems in Casement Square there seems to be no basis for failing to sweep the area in the early morning (e.g. at the normal opening times for businesses – even if that is much earlier than the opening time for the public house in question), rather than in or about twelve noon, if one were to show such diligence or care. On the day in question it is accepted that no sweeping occurred the night before. There is simply no explanation as to why this did not occur or, indeed, does not generally occur. It is undoubtedly an imposition though not a large one (there is no suggestion, for example, that there is anything in the nature of a large forecourt area). It may not be pleasant (e.g. due to weather) and it may not be convenient (due to the hour of the night) but it is not an unreasonable requirement.

24. On the basis of the evidence, accordingly, I am satisfied that even if the Section ought to be interpreted as incorporating a defence or is a "half-way house", and one which is, accordingly, strict but not absolute (as those terms are used in the present context) he could not rely upon it. On this basis he has no *locus standi* in this case.

25. Obviously, accordingly, there is no question of addressing the issue of whether or not the provision in question is repugnant to the Constitution, whatever conclusion one might reach as to the nature of the offence. I have been in a quandary as to whether or not I should address the issue of whether or not such offence is one of strict or absolute liability (given that it cannot be contended, and indeed was not contended, that it was an offence which required *mens rea* or was anything other than regulatory, rather than truly criminal). I have to come to the conclusion that it is appropriate to deal with this issue since the charge is still pending against the applicant and in my view he is entitled to know, before the hearing of the appeal (i.e. before his trial) what the legal elements of the offence with which he is faced might be.

26. The first significant Irish authority on the issue of whether or not *mens rea* might not be required for a given offence on the basis that liability would follow proof only of the *actus reus*, whereby, accordingly, such offence was absolute is *Toppin v. Marcus* [1908] 2 I.R. 428. In that case the accused was prosecuted under the General Dealers (Ireland) Act 1903, Section 2, for a failure to keep a written record of the identity of the vendor of certain copper which he had bought and he adduced evidence showing that he had acted in good faith and exercised reasonable care in and about accepting the information of the vendor as to his name and purported address, which was in the latter respect, at least, untrue. Palles C.B. said:-

> "… where an act, not in any real sense criminal, is in the public interest prohibited under a penalty, the innocent nature of the act is at least an element to assist the Court in determining whether or not *mens rea* is an essential ingredient".

and it was held that it was not.

27. In *McAdam v. Dublin United Tramways Company Limited* [1929] I.R. 327, the issue of whether or not *mens rea* was necessary and, if it was not necessary, whether or not, accordingly, the offence was one of absolute liability was considered by a Divisional Court of the former High Court, when it dealt with a Case Stated. It concerned breach of a bye-law made by the Commissioner of Police for Dublin under the Dublin Carriage Act 1853, s. 50, which provided that:-

> "No passenger shall be permitted to travel on the platform, or on any part of such stage carriage, except in, or, or on the place or places set apart and specified in the licence for conveying passengers, and no stage carriage at any one time any greater number of inside or outside passengers than the number of same respectively specified in the licence".

- the vehicle in question being an omnibus, which fell into the definition of stage carriage.

28. Garda McAdam found, on a given occasion, two persons standing on the rear platform of the bus, being a place which was not set apart and specified in the licence for conveying passengers. Notwithstanding the fact that the conductor, their servant, knew of the presence of these passengers and that the accused was in a position to adduce evidence that on at least two occasions conductors had been warned to obey the bye-law, it was held that such evidence was inadmissible and that the company was liable for breach of the prohibition, irrespective of knowledge on their part. In his judgment Sullivan P. took the view that it was immaterial that the conductor knew of the overloading which perhaps might, with respect, have been considered relevant since knowledge could presumably be imputed to a body corporate only by the knowledge of their servants or agents (i.e. the conductor). The question of vicarious liability for a wrong does not appear to have been canvassed directly but it seems to me that the *gravamen* of the case was that liability arose because of the nature of the offence which was one of absolute liability. The Court quoted with approval from the English decision of Wright J. in *Sherras v. De Rutzen* [1895] 1 Q.B. 918, who had in turn approved the view taken by Lush J. in *Davies v. Harvey* L.R. 9 Q.B. 433 that:-

> "There is a presumption that *mens rea*, an evil intention, or a knowledge of the wrongfulness of the act, is an essential ingredient in every offence; but that presumption is liable to be displaced either by the words of the statute creating the offence, or by the subject matter with which it deals, and both must be considered".

Wright J. went on to say:-

> "Apart from isolated and extreme cases of this kind the principal classes of exceptions may perhaps be reduced to three. One is a class of acts which, in the language of Lush J. are not criminal in any real sense but are acts which in the public interest are prohibited under a penalty".

29. It seems to me that this case can only be regarded as strong authority for the proposition that there is in existence in Irish law a class of offence which is absolute and that, at least at that time, no recognition of an offence of merely strict liability was afforded. Sullivan P. went on to say that in the instant case:-

> "The acts in this case are not in any real sense criminal, but in the public interest they are prohibited under a penalty. Having regard to that fact, and to the terms of the Regulation and to the object it had in view, I am of opinion that *mens rea* is not an essential ingredient in the offences charged against the defendants".

Hanna J. said that *inter alia* on reading the relevant Section of the Act and the terms of the Regulations he considered that there was an absolute duty imposed upon the proprietor (of the bus).

30. The next authority of significance in point of time in the present context is *Maguire v. Shannon Regional Fisheries Board* [1994] 3 I.R. 580. That was a Case Stated and the accused had been prosecuted pursuant to s. 171(1)(b) of the Fisheries (Consolidation) Act 1959 which is to the effect that anyone who:-

> "throws, empties, permits or causes to fall into any waters any deleterious matter is guilty of an offence".

Mr. Maguire was held by the District Court to have taken all reasonable steps to prevent the flow of the deleterious matter in question (whey) into a river for which the Board were responsible – apparently a pipe fractured. The High Court was explicitly asked whether or not, in finding the accused guilty:-

> "Given the seriousness of polluting waters, the offences created by s. 171 of the Fisheries (Consolidation) Act 1959, as amended, are strict liability offences committed in the absence of any *mens rea*".

Lynch J., having considered *inter alia Sherras v. De Rutzen* [1895] 1 Q.B. 918 said that it followed there from:-

> "*Prima facie mens rea* is required for every offence be it a common law or a statutory offence and therefore including s. 171 of the Act of 1959. However, it seems to me that s. 171 is regulatory in essence and does not create an offence which would be regarded as of a truly criminal character. The pollution of waters is an issue of social concern and legislation against the pollution of rivers and streams has a long history and it has always been public policy to prohibit such pollution as far as possible and at least one of the grounds for this policy must be that such pollution creates a public nuisance. Moreover, it seems to me that the creation of strict liability in such pollution cases coupled with heavy penalties is effective to promote the objects of the statute by encouraging greater vigilance to prevent the commission of the prohibited act and therefore fulfils Lord Scarman's fifth condition for strict liability, the other conditions being in my view also fulfilled".

In the latter respect Lynch J. was referring to *Gammon (Hong Kong) Limited v. Attorney General of Hong Kong* [1985] A.C. 1 for the purpose of determining whether or not the offence in question was one of absolute liability and in particular five propositions set out therein.

> "(1) there is a presumption of law that *mens rea* is required before a person can be held guilty of a criminal offence;
>
> (2) the presumption is particularly strong where the offence is "truly criminal" in character;
>
> (3) the presumption applies to statutory offences, and can be displaced only if this is clearly or by necessary implication the effect of the statute;
>
> (4) the only situation in which the presumption can be displaced is where the statute is concerned with an issue of social concern, and public safety is such an issue;
>
> (5) even where a statute is concerned with such an issue, the presumption of *mens rea* stands unless it can also be shown that the creation of strict liability will be effective to promote the objects of the statute by encouraging greater vigilance to prevent the commission of the prohibited act".

31. Whilst they primarily deal with the issue of whether or not given offences fall within the category of public welfare offences not really criminal in character, it is appropriate to say that in *Director of Corporate Enforcement v. Gannon*, [2002] 4 I.R. 439 and *D.P.P. v. Deane*, (Unreported) High Court, 3rd March, 2003, O'Caoimh J., no reference was made nor any recognition afforded to the concept of a division of public welfare offences into those with absolute and strict liability respectively and in each case the offences referred to therein were held to be public welfare offences. They serve, perhaps, as examples of public welfare offences rather than establish

any special principles. I think it is of significance that O'Caoimh J. relied upon *Gammon Limited v. Attorney General of Hong Kong* and thereby approve the principles therein in deciding whether or not the Companies Acts offences before him in *Director of Corporate Enforcement v. Gannon* were public welfare offences or not.

32. Thus, again, there is no reference to the conception of a distinction between offences of absolute and strict liability but merely between offences requiring proof of both *the actus reus* and *mens rea* ("truly criminal" offences) and offences where proof of the *actus reus* only is required for guilt (formerly commonly known in this jurisdiction as offences of strict liability), again, without contemplation of a third or intermediate category and whereby the law, at least until *Shannon Regional Fisheries Board v. Cavan County Council* [1996] 3 I.R. 267 was that there were no others.

33. The first occasion in which, in any of the decisions, the three categories are mentioned is in *Shannon Regional Fisheries Board v. Cavan County Council* [1996] 3 I.R. 267 and in particular in the minority judgment of Keane J. In that case the County Council was prosecuted, also under s. 171(1)(b) of the Act of 1959. Under Section 23 of the Public Health (Ireland) Act 1878, the Council was required to receive into its sewers effluent from owners or occupiers of lands within its functional area, irrespective of the adequacy or otherwise of its existing sewage treatment works. The works had become wholly inadequate due to an increase in population but it was not in a position to remedy the deficiency due to lack of funds. The evidence established that "deleterious matter" - as defined in s. 2 of the Fisheries (Amendment) Act 1962, entered the Pound stream from the treatment works. On the facts, the Council had apparently made every reasonable effort to upgrade the works and, further, took all reasonable care to prevent the entry of the matter into the water. The District Court Judge, in a Case Stated, from the prosecution, expressed the opinion that the offence in question was one of strict liability (in the old sense i.e. absolute ability) not requiring *mens rea*, negligence or knowledge on the part of the Council as an ingredient of the offence but that there was a "basic unfairness" that the Council could be subjected to prosecution since it was obliged to receive sewage and it was not possible to prevent deleterious matter entering waters in consequence of the inadequacy of works, which and in circumstances where it was "doing the best they could with the facilities available to them".

34. In this Court it was held that the offence in question was an offence of absolute liability. Blayney J. for the majority in the Supreme Court, accepted the Board's submission to the effect that *mens rea* had been established such that it was of no avail to the defendant if the offence was not one of absolute liability since the discharge of the effluent in question was deliberate: he considered, however, that it was inappropriate to deal with the issue of *mens rea* further since it was not relevant on the facts and he merely agreed with the conclusion of this Court. Counsel for the Council had submitted that it was "in an impossible position and for that reason it is wholly unfair that they should have been prosecuted". Blayney J. took the view that this was not a defence to the charge although he does not explicitly describe it as a purported defence of legal duress which was how the Council's defence was categorised by counsel for the Board (in any event, he was not prepared to accept that no blame attached to it). In the concept of the meaning of causing the effluent to enter the stream he quoted from the speech of Lord Wilberforce in *Alphacell Limited v. Woodward* [1972] A.C. 824. Lord Wilberforce expressly stated, in that speech, that in his opinion "complication of this case by infusion of the concept *of mens rea* and its exceptions, is unnecessary and undesirable". Blayney J. agreed with Lord Wilberforce's reasoning that as in the case before him it was "unnecessary and undesirable" to introduce the context of *mens rea*: I have to confess it is not clear to me whether or not this means that it was "unnecessary and undesirable" to introduce the concept of *mens rea* into the offence before the court or merely to refer to it in the judgment. I am inclined to think that it is the latter having regard to the explicit statement, earlier in the judgment, that he did not propose to consider the issue *of mens rea* apart from agreeing with the conclusion reached by the learned High Court Judge.

35. Keane J., however, dealt with the issue of whether or not *mens rea* was necessary, since a question in that regard was explicitly posed by the District Court. He referred to the fact that the this court had rejected the Council's submission that the entry of the sewage was not the result of the absence of reasonable care but due to the fact that necessary funds had not been provided by central government: he said that the submission was rejected by Murphy J. in this court who considered that he should "follow the decision *in Maguire v. Shannon Regional Board*". It appears that the report of the decision of this court is not available but it seems clear from what Keane J. said that what Murphy J. did was to hold that the offence was one of absolute liability. I think it is noteworthy that notwithstanding the facts of the case (i.e. that *mens rea* had been proved), he raised for the first time the possible recognition in Irish Law of the tripartite distinction now sought to be made and elaborated in *R. v. Sault St. Marie*, [1978] 85 D.L.R. (3rd) 161 (being a decision heavily relied upon by the applicant).

36. Keane J. considered that the question which arose in the case was:-

> "Whether having regard to the traditional insistence of the criminal law that there should not be conviction in the absence of a guilty mind, it would be a defence for the defendant to establish as a matter of probability that it had taken all reasonable steps open to it to prevent the deleterious matter entering the waters. That depends in turn on whether there exists in the law what has been described as 'half way house' between those crimes in which the prosecution must establish *mens rea* and those of 'strict liability' or (as it has sometimes been called) "absolute liability", in respect of which proof of the commission of the prohibited act is sufficient and the state of mind of the accused is irrelevant…"

Keane J. pointed to the traditional rule that *mens rea* will always be required in respect of "true crimes" but that there had developed in all the common law countries what he described as "a vast range" of statutory offences described as "public welfare offences" and that:-

> "For the courts to require proof by the prosecution of *mens rea* in all such cases, would, it was thought, be impractical and convictions, in any event, would not result in the stigma associated with true crime. The result was a development of the doctrine of 'strict liability'" (absolute liability)."

37. He referred also to the decision of Wright J. in the *Sherras v. Rutzen* saying that the effect of that case was that the English courts:-

> "At an early stage, (held that)…, while the presumption is that *mens rea* – an evil intention or a knowledge of the wrongfulness of the act – is an essential ingredient in every offence, that presumption is liable to be displaced either by the words of the statute creating the offence or by the subject matter with which it deals".

and of course he says that this was applied by Lynch J. in Maguire v. Shannon Regional Fisheries Board as well as in McAdam v. Dublin United Tramways Company Limited

38. In the *R. v. City of Saul St. Marie* case the city had entered into an agreement with a private company for the disposal of its garbage but because of the company's default water pollution ensued and a charge of:-

> "Discharging, causing to be discharged, or permitting to be discharged or deposited materials into a body of water are or on the shore or bank thereof, or in such place that might impair the quality of the water was laid".

39. The ultimate conviction of the accused was quashed by the Divisional court on grounds pertaining to the duplicity of the charge but also that the offences required proof of *mens rea*, which was lacking. On the latter point the Court of Appeal agreed with the Divisional Court and an ultimate appeal to the Supreme Court of Canada by the Crown was unsuccessful, the case hinging there on the issue of whether or not a defence was available of due diligence or reasonable care (having regard to the nature of the offence) and on the footing that the offence was one of strict, rather than absolute liability. The court readily accepted that the case fell into the category of "public welfare" or "regulatory" offences which were not criminal in any real sense but were prohibited in the public interest – quoting in that regard *Sherras v. Re Rutzen* Dickson J. (who delivered the judgment of the court) explicitly said that:-

> "Although enforced as penal laws through the utilisation of the machinery of the criminal law, the offences are in substance of a civil nature and might well be regarded as breach of administrative law to which traditional principals of criminal law have but limited application. They relate to such every day matters as traffic infractions, sales of impure food, violation of liquor laws, and the like. In this appeal we are concerned with pollution".

Dickson J. referring to the historical origin of public welfare offences in the 19th Century "as a means of doing away with the requirement of *mens rea* for petty police offences" said that:-

> "The concept was a judicial creation, founded on expediency. That concept is now firmly embedded in the concrete of Anglo American and Canadian *juris prudence*, it's importance heightened by the ever increasing complexities of modern society."

40. Keane J. applied the principles in *R. City of Sault St. Marie* in the instant case and also referred with approval to the leading Australian case (as did Dickson J.) of *Proudman v. Dayman*, [1941] 67 C.L.R. 536 in which Sir Owene Dixon accepted that "an honest and reasonable belief and a state of affairs which, if they existed would make the defendants act innocent afforded the defence to what would otherwise be an offence".

And Keane J. went on to say that:-

> "Dickson J. was of the view that public welfare offences would, *prima facie*, be in the second category and where not subject to the presumption of full *mens rea*. An offence of that type, he said, would fall in the first category only if such words as 'wilfully' are called 'with intent' or 'knowingly' or 'intentionally' were contained in the salutatory provisions creating the offence. Offences of absolute liability would be those in respect of which the legislator had made it clear that guilt would follow proof merely of the prescribed Act.

41. I think that it is of significance from the point of view of the applicant that Dickson J. emphasized as above the origin of the concept i.e. as a judicial creation (although I am not especially happy with the reference to the fact that it was "founded on expediency"). In that regard, Keane J. said that:

> "… Although the authorities speak of the legislature as having creating offences of 'strict liability' or 'absolute liability', it is important to bear in mind that the division of criminal offences into these categories has, in general, been the consequence of judicial decisions. In these circumstances, it seems to me that there is not much force in an argument which might otherwise have some appeal, i.e. that if the law is to develop in this area, it should be by parliamentary intervention rather than court decisions. Since the doctrine of 'strict liability' has been developed by the courts, there seems no reason why it's further elaboration should not also been undertaken by Judges rather than by the legislature. That was the view taken by Dixson J. and is one with which I would respectively agree".

And further, that:-

> "It would seem to me that an attempt by the Oireachtas to make every crime, whether a 'true crime' or a public welfare offence, an offence of absolute liability would involve the removal of a fundamental protection under the criminal law as it existed at the time of the enactment of the constitution."

Dickson J. elaborated his views not only by reference to many authorities, which I cannot hope to address, but also by addressing issues pertaining to the utility of absolute liability or the *desiradum* to be achieved by giving public welfare prohibitions or impositions. I do not propose to deal with his chain of reasoning on this aspect of the matter but rather to rely upon Keane J.'s judgment. The considerations which he elaborated might be summarized as follows:-

> (1) That it (was) "difficult to understand" why the existence of an defence of reasonable care should be excluded where one of the objectives of making the offence one of absolute liability is to encourage greater vigilance: on the contrary it would put the accused in the position of carrying on a particular activity at his peril even where (in the instant case) the counsel was under a duty to receive the sewage which was discharged.
>
> (2) That it would seem to follow from the absence of a rule permitting a defence of reasonable care or due diligence that "some farming activities" could never be carried out, since it would never be open to the farmer to argue that he had taken all reasonable steps in his power to dispose of the slurry of whatever (as was the case) in *McGuire v. Shannon Regional Fisheries Board*.
>
> (3) That apart from a local authority such as the counsel in the instant case, a rule of absolute liability would encourage laxer rather than stricter standards on the part of potential polluters since such persons (e.g. a factory owner or a farmer) would know that any expenditure of time or money or the taking of precautions would avail them nothing – giving rise to a likelihood that they would simply disregard the law or take inadequate precautions.
>
> (4) That the proposition that there is little social stigma involved in conviction being an argument advanced in favour of excluding such a defence is "highly questionable" and there remained the fact, in any event, of substantial penalties, again, including, in the instant case, a fine of imprisonment of up to five years.

He rejected the concept that the fact that a nominal penalty had been imposed was relevant and with this proposition I have to say I agree: I do not think that merely the fact in a given case a nominal or indeed no penalty was actually imposed could give rise to the proposition that an absolute offence should be held to exist, or change its nature from time to time, the penalty actually imposed was

nominal. I do not think that the actual penalty ultimately imposed has a bearing upon the nature of the offence.

42. The authorities to which I have referred, or so it seems to me, deal with three issues. Firstly whether or not there is an animal known to the Irish Law which Glanville Williams has identified as being a "halfway house" offence. Secondly, whether or not given offences fall into the category of public welfare offences as opposed to true crimes, and, thirdly if a distinction is to be drawn between the two categories of such public welfare offences, into which category do such offences fall. In the light of the most recent authorities it is lastly the issue I must address in the present case.

In the light of the Supreme Court's decision in *C.C. v. Ireland*, I consider that Irish law now acknowledges the existence of the separate division of offences. Hardiman J. in giving the judgment of the courts put the matter thus:-

> "On the existing jurisprudence and in particular the judgment of the Canadian Supreme Court in *R. v. City of Sault Sainte Marie* (1978) 2 S.C.R. 1299, and the dissenting judgment of Keane J. in *Shannon Regional Fisheries Board v. Cavan County Council* [1996] 3 I.R. 267, it might appear that a defence of due diligence would suffice to justify a regulatory offence of strict liability as Dickson J. used that term."

I consider that the minority judgment of Keane J. (and that of Dickson J.) was approved by a unanimous Supreme Court of five as opposed to three judges

43. I do not find the authorities to which I have referred of any direct assistance as to whether or not a given offence is strict or absolute. *McAuley* and *McCutcheon*, ("criminal liability"), pp. 253 to 254 say that:-

> "In the ordinary course of events public welfare offences of a regularity nature would fall into the second category (i.e. strict), unless the wording or structure of the provision imported a *mens rea* element. It would appear that the third category is residual and that few offences fall into it".

I mention this because it seems to be intended by the authors to thereby summarise the position in other jurisdictions: I do not agreed that it follows from the recognition of the division in question in our law that this must follow – indeed, on the contrary, few offences, might be strict only. Each offence must be, decided on its own merits.

44. Obviously one's starting point must be the interpretation of the statute on the basis of the natural and ordinary meaning of its words. One looks, of course, at any particular provision in the context of the statute as a whole.

45. Section 3 of the Act imposes a prohibition on the deposit of substances or objects "so as to create litter in a public place or in any place that is visible to any extent from a public place" (subs. (1)). Further offences are established in relation to the deposit of litter for collection by a local authority or the handling of goods or the carrying on of business so as to create litter or lead to litter (subs. (2)) to place certain waste into or near a litter receptacle (subs. (3)) or to move or interfere with a litter receptacle provided by a local authority (subs. (4)). *Prima facie* there is no defence to these. Section 4, however, is different: offences in that section relate to the liabilities of registered owners or persons in charge of motor vehicle's or skips but:-

> "(4) Where a person is charged with an offence under this section it shall be a good defence for the person to show that any litter created as a result of a failure to take measures to prevent the occurrence was removed and properly disposed off as soon as practical after being created".

There is, as we know, *prima facie*, no such statutory defence in s. 6, as in the case of section 3.

46. I have already referred in a different context to s. 9 of the Act. That contemplates the service of notices upon a person who is contravening any provision of s. 6 or precautionary measures are required to prevent the creation of litter, pursuant to subs. 1. Section 9(3) goes on to provide that:-

> "A person on whom a notice under this section is served may, within such time as may be specified in the notice, make submissions in writing to the local authority concerned regarding the terms of the notice and the authority, after consideration of any such submissions may amend the notice."

Breach of the terms of a notice is an offence. By s. 15 obligations are imposed upon the owners/occupiers or persons in charge of a "mobile outlet" which is used "wholly or partly for the sale of produce, food or drink": further, however, a local authority may by notice impose obligations on such a person. The section contains a provision in like terms, as to representations, as to that in s. 9. Section 16 is more extensive: where the local authority considers that "special measures" are "required to be taken by an occupier of any premises to which the section applies in order to prevent or limit the equation of litter at the premises or on the land in the vicinity thereof" which is "caused or likely to be caused by the operation of the business or undertaking of the occupier" it may serve notice requiring such a person to take measures to prevent or limit the equation of litter. However, by s. 16(4):-

> "Before exercising any functions conferred on it by subs. 1(i) the local authority shall advise the occupier of the nature and extent of the measures…and provide the occupier with an opportunity…to make submissions… to the local authority in relation to the proposed measures, and the local authority, having considered such submissions, may amend the proposed measures or confirm or revoke…them)…"

In addition, an appeal on the merits is available to the District Court. Needless to say breach of the requirements of the notice is an offence.

47. Certain analogous powers are conferred on local authorities in relation to what are described as "major events" (by which is contemplated, presumably, say, concerts in the open air). Again, prior notice of a contemplated notice must be given analogous to s. 16(4), but there is no appeal. Section 19 of the Act pertains to advertising offences simplicitor but s. 20 affords the local authority power to serve notices of the kinds referred to above but, in this instance, no prior notice of a contemplated notice need be afforded, but merely the entitlement to make ex post facto representation with a duty on the local authority to consider them and, after such consideration, with an entitlement to amend it. Section 22 is a free standing offence, without qualification, imposing an obligation to remove faeces, if created by a dog in one's charge.

48. Thus, one can see that there is one offence where not only is a party entitled to prior notice of a contemplated notice (s. 16) but also an appeal on the merits to the District Court. There are three offences additional to that which arise in the present case which are "free standing" and which, similarly to the present case, do not provide for a defence. The remaining offences where notices with

prior or subsequent representations are contemplated and, a statutory defence arises in one only.

49. I am prepared to accept that the offences which either require a prior opportunity to make submissions in respect of contemplated notices and those which contemplate ex post facto submissions are in a different category. I accept that in one case there is an appeal to the District Court and all of them, either in respect of prior or *ex post facto* notices, are subject to the judicial review of administrative action vested in this Court. One would have thought, also, that having regard to the nature of such notices or representations it should be reasonably possible for a party to agree with a local authority measures which would exclude the necessity for the existence of a defence of reasonable care or due diligence: it would appear reasonable, on any view of the matter, that in those circumstances absolute liability might be imposed, having regard to the extensive opportunities of the recipient of a notice (or prospective recipient of a notice) to engage with the local authority. I accept that the "free standing" offences which do not afford a defence are in a third category (the first perhaps being that with where a statutory defence is afforded). I think that the legislature must have been taken to approach these classes of offence in a different way, and in particular those provisions where neither a prior or *ex post facto* opportunity to be heard arises. In other words in one only of such offences is a defence afforded. This seems to me to be an indication by the legislature that it is contemplated also that these four are offences of absolute liability.

50. It is true, however, that many regulatory offences are *prima facie* absolute but have been held to be strict where they are regulatory and *mens rea* is not required. The legislature, of course, must be taken to have passed the Act in the light of what is now recognised or explained as the law, namely that there are three categories of offence. It might, accordingly, be inferred that the legislator did not think it necessary, as is the case with many offences requiring *mens rea*, to identify a defence or otherwise make it clear that the present offence was in the "half-way house". It seems to me, accordingly, that one can and should have regard to the criteria which served to justify (or not) offences of absolute liability, before the tripartite distinction was made. The traditional justification for what are now characterised as absolute offences was set out in the speech of Lord Reid in *R. v. Warner*, [1969] 2 A.C. 256 as follows:-

> "… There is a long line of cases in which it has been held with regard to less serious offences that absence of *mens rea* was no defence. Typical examples are offences under public health, licensing and industrial legislation. If a person sets up as, say, as a butcher, a publican, or manufacturer and exposes unsound meat for sale, or sells drink to a drunk man or certain parts of his factory are unsafe, it is no defence that he could not by the exercise of reasonable care have known or discovered that the meat was unsound, or, that the man was drunk or that his premises where unsafe. He must take the risk and when it is found that the statutory prohibition or requirement has been infringed, he must pay the penalty. This may well seem unjust but it is a comparatively minor injustice, and there is good reason for it as affording some protection to his customers, or servants or to the public at large… these are only *quasi* criminal offences and it does not really offend the ordinary man's sense of justice that moral guilt is not of the essence of the offence."

51. In *Sweet v. Parsley* [1970] A.C. 132, Lord Diplock said (at p. 163) that:-

> "…Where the subject matter of a Statue is the regulation of a particular activity involving potential danger to public health, safety or morals in which citizens have a choice as to whether they participate or not, the court may feel driven to infer an intention of Parliament to impose by penal sanctions a higher duty of care on those who chose to participate and to place upon them an obligation to take whatever measures may be necessary to prevent the prohibited act, without regard to those considerations of cost or business practicability which play a part in the determination of what would be required of them in order to fulfil the ordinary common law duty of care. But such an inference is not likely to be drawn, nor is there any room for it unless there is something that the person on whom the obligation is imposed can do directly or indirectly, by supervision or inspection, by improvement of his business methods or by exhorting those whom he may be expected to influence or control, which will promote the observance of the obligation ..."

52. These, to me, are amongst the most helpful observations justifying the existence of such a class of offence as that importing of absolute liabilities. In the presence case, the liability of an occupier extends not merely to persons choosing a particular vocation (e.g. the sale of intoxicating liquor – which might well attract congregations outside the licensed premises to smoke) but also mere user of premises as a private residence. Lord Diplock has made the point (in *Sweet v. Parsley*) that in numerous decisions as to whether or not a particular offence was strict (and in the historical sense not absolute) difficulties of reconciliation arose. However, it should be said that the classification of an offence will depend upon its statutory terms and symmetry may not be possible. However, since the origin of the strict or absolute liability offence is the growth of legislative intervention from the middle of the 19th Century in the regulation of social conduct, it seems to me that in principle that is the aim and the purpose of the a penalty (or application of the criminal law) in respect of regulatory matters is merely to enforce social control in a complex society and even if there is no meaningful sense in which a citizen chooses to be engaged in a given area which attracts such control, there is room for either offences of strict or absolute liability. I think in making the distinction, one can have regard, on the authorities, and in the light of the approach which I have adopted to the following factors (though not exhaustive) are relevant-

1. The moral gravity of the offence.

2. The social stigma attached to the offence.

3. The penalty.

4. The ease (or difficulty) with which a duty is discharged or the law obeyed.

5. Whether or not absolute liability would encourage obedience.

6. The ease or difficulty with which the law might be enforced.

7. The social consequences of non-compliance.

8. The *desideratum* to be achieved when considering the statutes.

53. The moral quality of the act here is in the nature of a failure of civic virtue (people brushed the pavement outside their business premises long before the Act), but I do not think it could be said to offend against any moral law. The question of social stigma is closely associated with the moral quality of the act and hence on any view it seems hard to conceive how any significant stigma whether initial, or lasting, could in any meaningful sense apply to the offence. It is true that the case can be prosecuted on indictment but there is an upper limit on penalty and it can only be monetary. The obligation in question can be discharged with the greatest ease. Unpleasant though it might be, it would be capable of performance even in wet weather and, in most cases,

expeditiously. The obligation is no very high one, accordingly. It seems to me that there would be considerable difficulties in the enforcement of the obligation if it were not absolute: if and insofar as it might be found by, say, a litter warden that rubbish was strewn about on the relevant portion of pavement (e.g. cigarette butts) it would *prima facie* be impossible to know whether or not any reasonable care had been taken or due diligence exercised. If one were to test whether or not that had been the case one would presumably need to watch the premises over a period or make an increased number of visits thereto. The social consequences of widespread non-compliance are significant in as much as this civic obligation on any view seems to be a significant element in application of the policy of achieving a "litter free" country: no one could doubt but that if each business premises kept the pavement in front thereof clean (as not only happened here before the Act but happens widely on the European mainland) it would be a significant step, towards that *desideratum*.

54. This is not one of those cases where the imposition is so great as to discourage a publican or other occupier from discharging it (on the basis that no matter what he might do or what expense he might incur he is at hazard of breach) having regard to the ease of compliance and of course, the discharge of one's civic duty (even if it is enforced under penalty) is something which can legitimately be imposed upon anyone. The objection has been taken to the existence of absolute offences on the basis that evidence tending to show absence of blameworthiness or reasonable care or due diligence can be received on the question of penalty, and that this causes no difficulty in terms of a capacity to enforce the law. I do not think that this is quite correct. It is not uncommon for the prosecution (at least in the case of "true crimes") to be placed in a position where it cannot seriously challenge (and perhaps historically there has been a hesitation about challenging) evidence given in mitigation, firstly, because the prosecution is unlikely to know about it in advance and, secondly, it will not be capable of independent verification. Evidence of this kind, on penalty, tends to benefit the defence because it is unchallenged. If there is a difficulty about enforcement of the kind to which I have referred there will equally be a difficulty in responding to pleas in mitigation based upon such evidence, but it is something with which the prosecution must simply tolerate in most cases. If the present offence was one of strict liability the difficulty would be encountered before conviction. The same difficulty will be encountered afterwards and the fact that it merely occurs in respect of penalty does not eliminate it, but reduces its capacity to undermine enforcement.

55. I am, therefore, of the view that the offence in question here is one of absolute liability.