12/99; [1999] VSC 72

SUPREME COURT OF VICTORIA

WILSON v GAHAN

Warren J

7 December 1998; 18 March 1999

STATUTORY INTERPRETATION – CLASSIFICATION OF STATUTORY OFFENCE – WHETHER OFFENCE ONE OF ABSOLUTE OR STRICT LIABILITY – PRINCIPLES TO BE APPLIED IN CLASSIFYING OFFENCE – CRITERIA LAID DOWN BY HIGH COURT IN *HE KAW TEH v R* – DAMAGE BY SPRAY DRIFT TO NEIGHBOUR'S PROPERTY – FINDING BY MAGISTRATE THAT OFFENCE ONE OF ABSOLUTE LIABILITY – WHETHER MAGISTRATE IN ERROR: *AGRICULTURAL AND VETERINARY CHEMICALS (CONTROL OF USE) ACT* 1992, S40(1)(a).

Section 40(1)(a) of the *Agricultural and Veterinary Chemicals (Control of Use) Act* 1992 ('Act') provides so far as relevant:

"(1) A person must not carry out agricultural spraying which injuriously affects —
(a) any plants or stock outside the target area…
(2) It is a defence to a prosecution under sub-section (1)(a) to prove that the plants or stock have no economic value."

W. was charged under s40(1)(a) of the Act in that whilst engaged in aerial spraying he "injuriously affected" the pea crop of a neighbour by way of spray drift. On finding the charge proved the magistrate found that s40(1)(a) of the Act created an offence of absolute liability and that the defence of honest and reasonable mistake was not available. Upon appeal—

HELD: Appeal dismissed.
There is a legal presumption that *mens rea* is an essential ingredient in every offence. However, this presumption can be displaced. In *He Kaw Teh v R* [1985] HCA 43; (1985) 157 CLR 523; (1985) 60 ALR 449; (1985) 59 ALJR 620; (1985) 15 A Crim R 203; [1986] LRC (Crim) 553, the High Court set out the criteria to be applied by a court in determining whether the presumption of *mens rea* has been displaced as follows:
1. The first criterion is consideration of the words of the statute. Having regard to s40 of the Act it was clearly intended to create an offence to which absolute liability attached on the basis that—
(a) words such as "knowingly caused" are not used
(b) the prohibition is on an otherwise lawful activity
(c) the insertion of a specific defence in s40(2) of the Act does not contemplate strict liability.

2. The second criterion is consideration of the subject matter of the statute. The Act is concerned ultimately with the protection of public health and the environment. Whilst this subject matter is important it contrasts markedly with the legislation which was considered by the High Court in *He Kaw Teh*. Whilst a breach of the Act is socially important and serious it could not be regarded as an offence which is truly criminal.

(3) The third criterion is whether subjecting the defendant to absolute liability will assist in the observance of the statute. The measures taken by W. were not sufficient to demonstrate adequate observance of the requirements of s40(1)(a) of the Act. More could have been done by W. such as investigating the nature of the adjoining crop to ensure that damage did not occur.

(4) The fourth criterion is consideration of the purpose of the legislation and the penalties imposed. Section 40(1)(a) of the Act has been enacted to regulate potential risk to public health and the environment from aerial spraying. It is a statute which falls within the category of legislation introduced for the purpose of regulating social conditions and public safety. The relevant penalty is monetary and moderately sized.

(5) Having regard to these criteria, the magistrate was correct in finding that s40(1)(a) of the Act is a provision to which absolute liability applies.

WARREN J:

1. The appellant appeals against the orders of the Horsham Magistrates' Court on a question of law under s92(1) of the *Magistrates' Court Act* 1989.

2. The appeal turns on the construction of an offence under s40(1)(a) of the *Agricultural and Veterinary Chemicals (Control of Use) Act* 1992 and whether the offence is one of absolute liability or strict liability. The section provides:

> "**40. *Damage by spray drift***
> (1) A person must not carry out agricultural spraying which injuriously affects—
> (a) any plants or stock outside the target area; or
> (b) any land outside the target area so that growing plants or keeping stock on that land can be reasonably expected to result in the contamination of the stock or of agricultural produce derived from the plants or stock.
>
> Penalty: In the case of a corporation, 400 penalty units.
> In any other case, 200 penalty units.
>
> (2) It is a defence to a prosecution under sub-section (1)(a) to prove that the plants or stock have no economic value."

3. The appellant was the subject of a charge on summons wherein it was alleged that at Birchip on 12 August 1996 whilst engaged in aerial spraying of barley on a property of one O'Connor the appellant "injuriously affected" the pea crop of a neighbour, one Gould, by way of spray drift.

4. The summons came on for hearing at the Horsham Magistrates' Court on 4 June 1998 on which occasion the appellant pleaded not guilty. The parties submitted to the magistrate a statement of agreed facts and no evidence was called. Submissions were made to the magistrate by counsel on behalf of the appellant and the respondent who was the informant. In the submissions the respondent asserted that s40(1)(a) of the Act created an offence of absolute liability and that the defence of honest and reasonable mistake was not available. Submissions on behalf of the appellant asserted that the section created an offence of strict liability and that the defence of honest and reasonable mistake was available. The defence of honest and reasonable mistake was significant because it was the case of the appellant that the spray drift was accidental. Arising from the statement of agreed facts it was said that an error was made by the agent of the owner of the target area in that a map prepared for the purposes of the aerial spraying wrongly identified an adjoining property to the east as containing a cereal crop rather than a pea crop. The appellant took preliminary precautions on the relevant day by circling the property and checking conditions to ensure no drift would carry from the target area. He checked weather conditions and satisfied himself that no drift would be carried to the north-east area where a canola crop was growing and proceeded to spray the target area. In the course of conducting the spraying the agent of the owner of the target area installed markers in an effort to ensure the appellant correctly identified the boundaries of the target area. During the course of the spraying spray drift occurred and injuriously affected approximately 140 acres of land to the east on which a pea crop was grown.

5. The magistrate held that the offence created by s40(1)(a) of the Act was as an offence of absolute liability and found the charge proved. The magistrate ordered that the matter be adjourned for a period of 12 months and the appellant was placed on a good behaviour bond for that period. The appellant was ordered to pay the costs of the informant.

6. Mr J Langmead of counsel appeared for the appellant before me. He submitted that the magistrate was in error for the following reasons: firstly, on the basis of the principles expressed by the High Court in *He Kaw Teh v R* (1985) 157 CLR 523; (1985) 60 ALR 449; (1985) 59 ALJR 620; (1985) 15 A Crim R 203; [1986] LRC (Crim) 553 the offence was one of absolute liability; secondly, the general scheme of the Act and the absence of words such as "knowingly" or "wilfully" does not lead to a conclusion that the offence is intended to be absolute; thirdly, the enforcement of s40(1)(a) of the Act was not assisted by presuming absolute liability in substitution for strict liability; fourthly, a presumption of absolute liability must be expressly stated by the legislature; fifthly, the *Environment Protection Act* 1970 is the primary legislation for protection of the environment in Victoria whereas the *Agricultural and Veterinary Chemicals (Control of Use) Act* plays a different legislative role in that it regulates rights between land owners and users of chemicals.

7. Mr Gipp appeared for the respondent and submitted that the Parliamentary intention upon enactment of the Act was to protect the environment. He submitted that the control of aerial spraying of chemicals and the protection of land owners' rights are inextricably interrelated with the intention of the Parliament to protect the environment.

8. In *He Kaw Teh v R* [1985] HCA 43; (1985) 157 CLR 523; (1985) 60 ALR 449; (1985) 59 ALJR 620; (1985) 15 A Crim R 203; [1986] LRC (Crim) 553, the High Court considered whether a provision in the *Customs Act* 1901 (Cth) making the importation of prohibited products into Australia an offence required *mens rea* before a conviction could be made out. The majority of the High Court (Wilson J dissenting) held that *mens rea* was required. The court referred to the legal presumption that *mens rea* is an essential ingredient in every offence but which presumption can be displaced by the words of the statute creating the offence or the subject matter with which it is concerned (per Gibbs CJ and Mason J CLR 528). The High Court stated that the presumption is weak, particularly with respect to modern statutes (per Gibbs CJ and Mason J CLR 528). The High Court observed, also, that there is difficulty in applying the presumption because of difficulties in ascertaining Parliamentary intention and, further, in ascertaining the mental state necessary to establish "*mens rea*". (See Gibbs, CJ and Mason J at CLR 529; Brennan, J CLR 566-7).

9. In *He Kaw Teh* the High Court referred to the fact that the courts have set down criteria to be applied in determining whether the presumption of *mens rea* has been displaced. The first criterion is consideration of the words of the statute creating the offence (see Gibbs CJ and Mason J 529; Brennan, J 567; Dawson J 594). The second criterion is consideration of the subject matter of the statute (see Gibbs CJ and Mason J 529; Dawson J 594). The third criterion is whether subjecting the defendant to absolute liability will assist in the promotion of observance of the relevant statute (see Gibbs CJ and Mason J 530; Brennan J 567). The fourth criterion is that where a statute creates an offence for the purpose of regulating social conditions and public safety and where the penalty attached to a statutory offence is monetary and moderately sized, the statute is more easily regarded as imposing absolute liability (see Brennan J 567; Dawson J 595).

10. The High Court observed that the expression "*mens rea*" is ambiguous, imprecise, difficult to define but can mean voluntariness, knowledge of all the facts constituting the necessary ingredients of the relevant defence, knowledge of the wrongfulness of the act, intent to cause the wrongfulness and even recklessness in some cases (see Gibbs CJ and Mason J 530-531; Brennan, J 568-70). In *He Kaw Teh* the High Court observed, further, that an honest and reasonable mistake of fact will be a ground of exculpation in cases in which actual knowledge is not a necessary element of an offence (see Gibbs CJ and Mason J 532; Brennan J 574). Ultimately, the High Court in *He Kaw Teh* was concerned with the grave conduct of heroin importation. In applying the principles to be extracted from the case, the High Court held that *mens rea* was required.

11. The present matter is concerned with legislation aimed at controlling agricultural and veterinary chemicals. Before turning to the criteria nominated by the High Court. It is useful to consider an overview of the Act itself and its legislative antecedent. Section 40(1)(a) of the *Agricultural and Veterinary Chemicals (Control of Use) Act* prohibits agricultural spraying outside the target area that injuriously affects plants. The section imposes a penalty of 400 penalty units in the case of a corporation and in any other case 200 penalty units. This penalty is on a par with other offences under part 6 of the Act: s38 (spraying of protected areas); s42 (unlicensed piloting of an aircraft); s43 (carrying out spraying without an approved insurance policy); s46 (using defective spraying equipment); s50 (growing plants or keeping stock on prohibited land). Other offences under the Act attract a lower penalty in the range of 100 and 50 penalty units. Part 6 of the Act is concerned with "controls over spraying of agricultural chemical products". All offences in part 6 carry penalty units of 400 penalty units with respect to a corporation and otherwise 200 penalty units.

12. The main parts of the Act (Parts 2-7) are concerned with unregistered use of chemical products, labelling of chemical products, restrictions and prohibitions on manufacture, sale and use of fertilisers and stock products and controls over spraying of agricultural chemical products and contaminated land, stock and agricultural produce. The purposes of the Act as set out in s1 include the imposition of controls to protect the health of the general public, to protect the environment, to protect the health and welfare of animals, to protect trade in agricultural produce and livestock, to control agricultural spraying and to protect against financial loss caused by agricultural spraying and to impose controls to avoid contamination of food for human consumption. Consideration of the purposes set out in s1 of the Act reveals that the overwhelming purpose of the Act is to protect human health and the environment. [*Her Honour referred to relevant parts of the Minister's second reading speech delivered on 9 May 1991, considered provisions of the* Aerial Spraying Control Act *1966 and continued*] ...

16. Turning to the criteria broadly applied by the High Court, firstly, consideration of the words of the statute. Section 40(1)(a) does not expressly state that *mens rea* is required. There is a total absence of language such as "knowingly caused" in the section to expressly indicate a requirement of knowledge. The sub-section does not prevent aerial spraying. Rather, it stipulates that a person must not carry out an activity that is otherwise lawful where that activity "injuriously affects" plants or stock. The section does not provide a defence of honest and reasonable belief or mistake. By contrast, a defence is provided in s40(2), namely, that it is a defence to a prosecution to prove that the affected plants or stock have no economic value. Applying the first criterion specified by the High Court in *He Kaw Teh*, there is nothing specific in the actual drafting of s40 to indicate that the provision is one to which absolute liability is attached. The authorities do not suggest that in order for absolute liability to apply to an offence it must be expressly stated in the relevant legislation. Rather, there must be clear language and which language must be considered in the context of the purpose of the legislation. It is necessary to consider the specific words of the provision. In this respect I consider that the actual drafting of the provision reveals that it was clearly intended to create an offence to which absolute liability attached on the basis that words such as "knowingly caused" were not used in the drafting of the provision. Further, the prohibition imposed by the provision is on an otherwise lawful activity where that activity "injuriously affects" plants or stock. In addition, and significantly, the Parliament made specific insertion of a defence in s40(2) that does not contemplate strict liability and, furthermore, excluded a defence of honest and reasonable belief or mistake.

17. The second criterion is consideration of the subject matter of the statute. An analysis of the purposes expressed in the Act, the framework of the Act itself and the intentions revealed in the second reading speech make it plain that the Act is concerned ultimately with the protection of public health and the environment. The subject matter of the Act itself is important and is concerned with a matter of social seriousness. However, it contrasts markedly with legislation such as that before the High Court in *He Kaw Teh*. The current Act is not concerned with a grave social matter. The legislative context in *He Kaw Teh* was entirely different as described by Gibbs CJ and Mason J at 529.

18. It could not be said on any view that the activities governed by Part 6 of the *Agricultural and Veterinary Chemicals (Control of Use) Act*, in particular, s40(1), are concerned with subject matter that is a grave social evil and one that the Parliament intended to be rigorously suppressed. Further, s40(1) of the Act is not concerned with a subject matter that is a serious threat to the well-being of the community or has led to an increase in crime, corruption and the ruin of innocent lives. On no view could the provision be construed as dealing with an offence that is truly criminal. Unlike the circumstances and the legislation before the High Court in *He Kaw Teh* it is likely if not highly likely that the Parliament intended that the consequences of committing an offence under s40(1) of the Act should be visited on a person even if that person had no intention of doing anything wrong or had no knowledge that he or she was doing so. Whilst a breach of the offence is socially important and serious it could not be regarded on any view as "being one of the most serious in the criminal calendar". (*He Kaw Teh* per Gibbs CJ and Mason J at 535). Upon consideration of the second criterion in the *He Kaw Teh* I consider that the offence is one of absolute liability.

19. Turning to the third criterion, the matter to be considered is whether subjecting the appellant to absolute liability will assist in observance of the statute. In *He Kaw Teh* the High Court considered that there must be clear language before a statute can be regarded as providing that actions will make a person criminally liable because of circumstances that the person was ignorant about or could not foresee. (See Brennan J at 567). In this respect the courts have considered that it is not enough to infer that absolute liability was intended in a statute because the subject matter of the statute is a grave social evil. It has been held consistently that more is required, namely, an inquiry as to whether the placing of a defendant under absolute liability will assist in the enforcement of the relevant legislation: in other words "... there must be something he 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 regulations". (See *Lim Chin Aik v R* (1963) AC 160, 174; [1963] 1 All ER 223; (1963) 2 WLR 42 per Lord Evershed; also, *He Kaw Teh* per Brennan J at 567). The principle was stated by Brennan J (at 567):

> "The penalties of criminal law cannot provide a deterrent against prohibited conduct to a person who is unable to choose whether to engage in that conduct or not, or who does not know the nature of the

> conduct which he may choose to engage in or who cannot foresee the results which may follow from that conduct (where those results are at least part of the mischief at which the statute is aimed). It requires clear language before it can be said that a statute provides for a person to do or to abstain from doing something at his peril and to make him criminally liable if his conduct turns out to be prohibited because of circumstances that the person did not know or because of results that he could not foresee. However grave the mischief at which a statute is aimed may be, the presumption is that the statute does not impose criminal liability without *mens rea* unless the purpose of the statute is not merely to deter a person from engaging in prohibited conduct but to compel him to take preventive measures to avoid the possibility that, without deliberate conduct on his part, the external elements of the offence might occur. A statute is not so construed unless effective precautions can be taken to avoid the possibility of the occurrence of the external elements of the offence."

20. In the present matter a map was prepared for appellant by the farm manager of the target area following an inspection of that area and in consultation with an agronomist. The map contained an error in that it identified an area of land east of the target property as containing a "cerial" (sic) crop whereas in fact the area contained a pea crop. It was the pea crop grown on the latter area that was damaged by the spraying operation carried out by the appellant. The map prepared by the manager was provided to the appellant. On the day that the aerial spraying was carried out the manager attended at the airport and confirmed the information contained on the map. Further, at the time that the aerial spraying occurred the manager together with an assistant was present at the target area for the purpose of marking out the area for spraying. It was agreed by the parties in the agreed facts submitted to the magistrate that the appellant circled the target area in the aircraft in order to identify the area in accordance with the map, checked all hazards and fence lines. He further checked conditions for the purpose of ensuring that no drift would be carried across to another area to the north-east of the target area on which a canola crop was grown. It was agreed in the agreed facts that the appellant checked the wind direction and speed with a smoke generator fitted to the aircraft and that the weather conditions at the time were cool, partly cloudy with a very mild north-west wind of approximately seven knots. It was agreed between the parties in the agreed facts document that during the course of the spraying carried out by the appellant, the manager and an assistant used markers to assist the appellant in identifying the boundaries of the target area.

21. The magistrate did not make a specific finding of fact as to whether the preventative measures taken by the appellant were sufficient to demonstrate adequate observance of the requirements of s40(1)(a). The magistrate considered the criteria laid down in *He Kaw Teh*. It may be assumed, therefore, that the magistrate was not satisfied that the steps taken by the appellant were sufficient. The appeal from the order of the magistrate was not challenged on this basis and I need not consider, therefore, whether the magistrate was correct or in error in that respect. However, there remains the issue of satisfying the objective test laid down in *He Kaw Teh* that there must be something a person who is the subject of the prosecution can do to promote the observance of the legislation. Gibbs CJ and Mason J (at 530) considered steps could have been taken by the appellant in that case to ensure observance of the statute and formed the view that the public interest demands care be taken to ensure that baggage brought into the country does not contain drugs. Applying that approach to the present matter, a person carrying out aerial spraying could take steps in addition to those taken by the appellant to ensure that no injurious effects are caused by aerial drift. For example, conducting independent investigations of the nature of crops grown on land adjoining the target area, being satisfied directly or indirectly that the occupiers of adjoining land have confirmed the category of crop growing next to or near the target area that may be at risk from the proposed aerial spraying. It is not for this court to list exhaustively the steps open to the appellant. Rather, it is sufficient that the court be able to be satisfied other steps were available. I am satisfied that for the purposes of applying the third criterion in *He Kaw Teh* that there was more that the appellant could have done. I consider that it is clear from the broad purpose of the statute that the Parliament aimed to protect public health and the environment when aerial spraying of agricultural chemicals occurs and to penalise damage arising from spraying even where it was accidental or no more than careless.

22. Turning to the other matter laid down by the High Court in *He Kaw Teh* and which I have identified as a fourth criterion (but largely is an extension of the third criterion) consideration of the purpose of the legislation and the penalties imposed. It is clear that the *Agricultural and Veterinary Chemicals (Control of Use) Act* created the offence under s40(1)(a) in order to regulate potential risk to public health and the environment arising from aerial spraying. The statute

falls, therefore, within the category of legislation introduced for the purpose of regulating social conditions and public safety (see *He Kaw Teh* per Brennan J at 567 and Dawson J at 595). The relevant penalty under s40(1)(a) is monetary and moderately sized being 200 penalty units ($20,000). Insofar as s7(5) of the 1966 Act is relevant, the Parliament increased the monetary penalty but removed the penal penalty thereby considerably reducing the penalty to be suffered by a person convicted under s40. These factors lead to the conclusion that the intention of the Parliament was to impose absolute liability upon the appellant.

23. The Full Court in *Welsh v Donnelly* [1983] VicRp 79; (1983) 2 VR 173 had before it a review of s35(5) of the *Motor Car Act* 1958 that made it an offence to overload a trailer. The court held that the provision imposed strict liability (to be understood as the law then stood as meaning absolute liability). The Full Court applied the essential principles of considering the common good, public safety and compliance aspects of the legislation that were later developed by the High Court in *He Kaw Teh* (see especially *Welsh v Donnelly* supra, at 178 per Young CJ at 186-7 per McInerney J and at 197 per Southwell J) The same principles apply in the present matter as were considered by the Full Court. *Welsh v Donnelly* has been overtaken by *He Kaw Teh*. Although the High Court did not consider *Welsh v Donnelly* in *He Kaw Teh* there is nothing said by the High Court that would cause me to not follow the Full Court. Furthermore, although *Welsh v Donnelly* was concerned with different legislation to that before me and, therefore, is not binding nevertheless it is highly persuasive authority in support of the view that an offence under s40(1)(a) of the *Agricultural and Veterinary Chemicals (Control of Use) Act* is subject to absolute liability.

24. In *Allen v United Carpet Mills Pty Ltd & Anor* [1989] VicRp 27; (1989) VR 323 Nathan J considered whether a statutory offence was subject to absolute or strict liability. The judgment in *Allen* was the first reported consideration by a judge of this court after *He Kaw Teh* of the nature of the liability to be attached to a statutory offence.

25. In *Allen v United Carpet Mills Pty Ltd & Anor* Nathan J considered the nature of an offence under s39(1) of the *Environment Protection Act* 1970. The salient part of the offence was that it provided: "A person shall not cause or permit any waters to be polluted ... ". As with s40(1)(a) of the *Agricultural and Veterinary Chemicals (Control of Use) Act* the section did not stipulate a requirement of guilty knowledge. Nathan J considered and applied the criteria laid down in *He Kaw Teh* and held that s39(1) of the *Environment Protection Act* creates an offence of absolute liability to which an offence of honest and reasonable mistake is not available. Nathan J stated (at 330):

> "Examining the Act as a whole and the purpose it is designed to serve, I conclude it is directed at penalising all those persons in control of potential pollutants who allow, whether by design, neglect or sheer inadvertence, the escape of those pollutants into the environment which then cause damage. The legislature has deliberately used the word 'cause' and has avoided using language such as 'knowingly cause' or 'negligently cause' (pollution) which would have been expected, if the intention had been to create an offence of merely strict and not absolute liability. This is a strong indication that absolute liability was intended.
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> I am further drawn to this conclusion after considering the subject matter of the Act. It is primarily concerned with pollution of the air or water, both are in the nature of common property, as distinct from property held in private hands. The usual constraints which prevent persons from intruding upon the property rights of others (eg actions in trespass or nuisance) are not effective in creating a regime which protects the general environment. The Act is social regulatory legislation designed to protect the environment. Pollution of the environment usually results in a burden and cost to the community. The Act penalises those who have 'caused' pollution and thereby brought a detriment to the community as a whole."

26. In *Allen* Nathan J was required to consider a second aspect, that of vicarious liability. The judgment in *Allen* was not followed by the New South Wales Land and Environment Court in *State Pollution Control Commission v Blue Mountains City Council (No. 2)* (1991) 73 LGRA 337. However, the issue in the New South Wales authority turned on vicarious liability and it was in that respect that *Allen* was not followed. Hence, the New South Wales authority is not relevant to the present matter.

27. However, there is a line of authority in New South Wales that approached legislation almost identical to that in *Allen* from a contrary perspective. The New South Wales authorities

were concerned with a provision that provided: "A person shall not pollute any waters" (s16(1) of the *Clean Waters Act* 1970 (NSW)). The New South Wales authorities considered the New South Wales provision to create an offence of strict liability thereby enabling a defence of honest and reasonable mistake. (See *Majury v Sunbeam Corporation Ltd* (1974) 1 NSWLR 659, 663; *Tiger Nominees v State Pollution Control Commission* (1992) 25 NSWLR 715, 719; (1992) 58 A Crim R 428; (1992) 75 LGRA; *EPA v N* (1992) 26 NSWLR 352, 357; (1992) 76 LGRA 114; (1992) 59 A Crim R 408; *Australian Iron and Steel Pty Ltd v EPA* (1992) 29 NSWLR 497, 507; (1992) 66 A Crim R 134; (1992) 79 LGERA 158).

28. The kernel of the reasoning in the New South Wales authorities appears to have been *Alphacell Limited v Woodward* [1972] UKHL 4; [1972] AC 824; [1972] 2 All ER 475; [1972] 2 WLR 1320 where the House or Lords considered an environment protection provision that provided: " ... a person commits an offence ... if he causes or knowingly permits to enter a stream any poisonous, noxious or polluting matter ... ". Viscount Dilhorne (at 839) said:

> "Then it is said that, even if that was so, there should not have been a conviction for the offence charged was not an absolute offence. As my noble and learned friend, Lord Diplock, said in *Sweet v Parsley* [1969] UKHL 1; [1970] AC 132 at 162; [1969] 1 All ER 347; 53 Cr App R 221; [1969] 2 WLR 470:
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> > 'The expression 'absolute offence' ... is an imprecise phrase currently used to describe an act for which the doer is subject to criminal sanctions even though when he did it he had no *mens rea*, but *mens rea* itself also lacks precision ... '
>
> In this case it was argued that it was an essential ingredient of the offence that the appellants should – the case being dealt with as if there was no negligence - have intended the entry of the polluting matter into the river, that is to say, that they should have intended the commission of the offence. I cannot think that that was the intention of Parliament for it would mean that a burden of proof would rest on the prosecution that could seldom be discharged. Only if the accused had been seen tipping the polluting material into a stream or turning on a tap allowing a polluting liquid to flow into a stream or doing something of a similar character could the burden be discharged. Parliament cannot have intended the offence to be of so limited a character. Ordinarily all that a river authority can establish is that a discharge has come into a stream from a particular source and that it is of a polluting character. But the Act does not say that proof of that will suffice. If that were so, the Act would indeed create an absolute offence. It has also to be proved that the accused caused or knowingly permitted the pollution."

29. On the same basis, the New South Wales courts have construed s16(1) of the *Clean Waters Act* as subject to strict liability and thereby being open to a defence of reasonable and honest mistake. It was in this respect that Nathan J in *Allen* took a divergent view to that prevailing in New South Wales. Nathan J in *Allen* (at 327) considered *Alphacell* and observed:

> "I consider this case to be of limited assistance. ... A further difficulty with the English authorities in this area is that they have not developed, to the same extent and clarity, the tripartite categorisation of criminal offences as was adopted in *Teh's Case* and accordingly, the terms 'strict liability' and 'absolute liability' have tended to be used by the English authorities interchangeably."

30. The House of Lords decision preceded *He Kaw Teh* by some 13 years. However, the New South Wales authorities have considered both *Alphacell* and *He Kaw Teh*. In *R v Wampfler* (1987) 11 NSWLR 541; 34 A Crim R 218 Street CJ observed in delivering the judgment of the Court of Criminal Appeal concerned with a prosecution relating to the publication of an allegedly indecent article:

> "*He Kaw Teh* is authority for the proposition that for the purpose of considering criminal intent, statutory offences fall into three categories:
> (1) Those in which there is an original obligation on the prosecution to prove *mens rea*.
>
> (2) Those in which *mens rea* will be presumed to be present unless and until material is advanced by the defence of the existence of honest and reasonable belief that the conduct in question is not criminal in which case the prosecution must undertake the burden of negativing such belief beyond reasonable doubt.
>
> (3) Those in which *mens rea* plays no part and guilt is established by proof of the objective ingredients of the offence ... There is a discernible trend in modern authorities away from construing statutes

> as creating absolute liability and towards recognising statutory offences as falling within the middle or second category – that is to say the category in which the prosecution must negative the honest and reasonable belief in innocence if there is sufficient basis advanced to be capable of raising a reasonable doubt of such belief. If the matter were at large it would be necessary to examine this trend of authority."

31. Street CJ proceeded to analyse the particular statutory provision (s6(1)) of the *Indecent Articles and Classified Publications Act* 1975 (NSW) and determined that the sale of a pernicious publication from a shop should not, prima facie, preclude a person from showing that with all care on his or her part the item was accidentally sold. The approach in *R v Wampfler* was adopted in *Strathfield Municipal Council v Elvy* (1992) 25 NSWLR 745; (1992) 58 A Crim R 352; (1992) 75 LGRA 390. Gleeson CJ considered that an offence created under s46G of the *Local Government Act* 1919 (NSW) concerned with pecuniary interests of municipal counsellors and cited *He Kaw Teh* and *Wampfler*. Gleeson CJ considered the offence before the court fell within the second category of strict liability. He did so on the following grounds: firstly, the relevant provision contained a defence where a defendant satisfied the court that he or she did not know that the matter before the municipal council was one in which he or she had an interest; secondly, the learned judge (at 750) considered the defence was not inconsistent with leaving it open to a defendant in a proper case to "raise an issue of honest and reasonable, but mistaken, belief of fact"; thirdly, Gleeson CJ in rejecting a construction of absolute liability stated (at 750) that it may not be in the public interest to punish a member of a municipal council for honest and reasonable mistakes of fact; fourthly, the learned judge observed (at 750-751) that whilst the relevant provision carried a fine, that fine was not insignificant and the civil consequences of the provision could be far reaching. The approach in *R v Wampfler* was adopted, also, by the New South Wales Court of Criminal Appeal in *Australian Iron and Steel Pty Ltd v EPA*, *supra* at 507-8.

32. The various New South Wales authorities were largely concerned with legislative provisions that included words such as "pollutes", "causes" or "knowingly causes". Quite different language is used in s40(1)(a) of the Act. Furthermore, as already observed, the sub-section prohibits a person from carrying out an activity that is otherwise lawful save for injurious affects. Furthermore, and as already observed, by the insertion of a defence (in s40(2)) concerned with economic loss together with the non-inclusion of a defence of honest and reasonable mistake, the Parliament has indicated an intention that absolute liability attach to an offence under s40(1)(a).

33. Notwithstanding the direction of the New South Wales authorities, I consider the purpose and specific wording of s40(1)(a), the change represented by the legislation compared with the 1966 Act and the provision of a defence that goes to the issue of economic value rather than honest and reasonable mistake lead to the conclusion that the section is one to which absolute liability is attached.

34. Before moving on from the New South Wales' authorities, I observe that *Allen* was considered also by the New South Wales Court of Criminal Appeal in *Australian Iron and Steel Pty Ltd v The Environment Protection Authority*, supra. The court was concerned essentially with the issue of whether the defence of due diligence was available under environmental legislation concerned with water, the *Clean Waters Act* 1970 (NSW). At 511 the court observed that insofar as Nathan J in *Allen* expressed the view that an offence of strict liability imports a defence of due diligence, such view did not accord with Australian authority (eg see *Proudman v Dayman* [1941] HCA 28; (1941) 67 CLR 536; *Jiminez v R* [1992] HCA 14; (1992) 173 CLR 572; 106 ALR 162; 15 MVR 289; 59 A Crim R 308; 66 ALJR 292; *He Kaw Teh v R*, *supra*). In any event the New South Wales Court of Criminal Appeal observed that the view of Nathan J in *Allen* concerning due diligence was *obiter* since the learned judge found that the relevant offence was one of absolute liability. It is unnecessary for me to embark upon this analysis of *Allen* in *Australian Iron and Steel Pty Ltd v EPA* because in the present case the appellant did not seek to argue a defence of due diligence. Furthermore, the defence of due diligence as such was not ventilated in the court below.

35. Finally, whilst *Allen* was concerned with different legislation to that before me it is an authority of some assistance. Nevertheless, an analysis of the authorities, in particular *He Kaw Teh* reveals that each statute must be construed in accordance with the criteria laid down by the High Court before the nature of the liability to be attached to the relevant statutory offence can be determined.

36. The classic statement of Dixon J in *Proudman v Dayman* [1941] HCA 28; (1941) 67 CLR 536 at 540 is regarded as the genesis of the defence of honest and reasonable mistake:

> "As a general rule an honest and reasonable belief in a state of facts which, if they existed, would make the defendant's act innocent affords an excuse for doing what would otherwise be an offence.
>
> The strength of the presumption that the rule applies to a statutory offence newly created varies with the nature of the offence and the scope of the statute. If the purpose of the statute is to add a new crime to the general criminal law, it is natural to suppose that it is to be read subject to the general principles according to which that law is administered. But other considerations arise where in matters of police, of health, of safety or the like the legislature adopts penal measures in order to cast on the individual the responsibility of so conducting his affairs that the general welfare will not be prejudiced. In such cases there is less ground, either in reason or in actual probability, for presuming an intention that the general rule should apply making honest and reasonable mistake a ground of exoneration, and the presumption is but a weak one.
>
> Indeed, there has been a marked and growing tendency to treat the prima facie rule as excluded or rebutted in the case of summary offences created by modern statutes, particularly those dealing with social and industrial regulation. But, although it has been said that in construing a modern statute a presumption as to *mens rea* does not exist (per *Kennedy* LJ, *Hobbs v Winchester Corporation)*, it is probably still true that, unless from the words, context, subject matter, or general nature of the enactment some reason to the contrary appears, you are to treat honest and reasonable mistake as a ground of exculpation, even from a summary offence."

37. In *He Kaw Teh* Brennan J (at 576) after citing *Proudman v Dayman* observed: "The purpose of the statute is the surest guide of the legislature's intention as to the mental state to be implied".

38. Upon the introduction of the *Agricultural and Veterinary Chemicals (Control of Use) Bill* in the House, certain matters can be observed: firstly, s40(1)(a) added a new offence to the general criminal law; secondly, the legislation related to matters of public health; thirdly, the context of the legislation as reflected in the Minister's Second Reading Speech indicates a legislative intent of absolute liability; fourthly, the same view as to liability is supported by the words of the section itself.

39. Turning to the application of the principles in *He Kaw Teh*, s40(1)(a) of the Act is a section that does not expressly require *mens rea*. The subject matter of the Act is the protection of public health and the environment. There were further steps that the appellant might have taken to ensure that no injurious effects were caused by aerial drift. Accordingly, the magistrate was correct in finding that s40(1)(a) of the *Agricultural and Veterinary Chemicals (Control of Use) Act* was a provision to which absolute liability applied. It follows that the appeal will be dismissed.

APPEARANCES: For the appellant Wilson: Mr HJ Langmead, counsel. Neale J Gribble, solicitors. For the respondent Gahan: Mr RI Gipp, counsel. Victorian Government Solicitor.
